

**AN ANALYSIS OF THE EVOLUTION OF THE SOUTH  
AFRICAN LAW ON THE WARRANTY  
AGAINST LATENT DEFECTS**

By

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## DECLARATION

I declare that the dissertation, which I hereby submit for the degree LLM (Private Law) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

An abridged version of chapter four of this dissertation has been sent for peer review for possible publication as:

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## SUMMARY

In this dissertation I analyse the transformation of the South African law on the warranty against latent defects. I trace the development from pre-classical Roman law through to the enactment of the Consumer Protection Act 68 of 2008 (“the CPA”). Society’s ever-changing economic requirements and moral ideals serve as the driving forces behind these continuous legal developments.

Under Roman law the rules on latent defects initially applied to the sale of slaves. In contrast, modern South African law, as per the CPA and the values of the Constitution of the Republic of South Africa, 1996, specifically aims to protect the most vulnerable members of South Africa’s unequal society. The conservative approach adopted by the judiciary when adjudicating contractual matters hinders the transformation of the law of sale. Legal rules and legal thinking which reinforce traditional distributive patterns require reconsideration if societal-wide change, as demanded by the Constitution, can be imagined and accomplished. If the economic role of the contract and its power to divide and (re)distribute wealth is viewed as important, the link between poverty and the contract, and by association the consumer agreement, cannot be ignored.

Contracts, and specifically basic consumer and credit agreements, are often concluded in order to facilitate survival in our current social reality. The law as it relates to consumer protection and the sale of defective goods is directly related to the contract’s role in wealth distribution. Where sales agreements are in question, the unequal bargaining power of the parties can impede the purchaser/consumer even further. The consumer’s right to good quality and safe goods creates uncertainty regarding whether or not the seller’s liability under the common law warranty against latent defects may be excluded in instances where the CPA and the common law apply simultaneously. This uncertainty, if addressed as being part of the national project of transformative constitutionalism, the only conclusion that can be drawn is that the exclusion of the seller’s liability is, paradoxically, detrimental to the very subject that the CPA and Constitution aim to protect, namely the purchaser.

**Key terms:** warranty against latent defects, *voetstoots* sales, contracts of purchase and sale, consumer sales agreements, vulnerable consumers, unequal bargaining power, law and poverty, ethical contract, transformative constitutionalism, common law development.

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## CHAPTER 1 INTRODUCTION

### 1.1 Background

Roman legal principles relating to defects in things sold can be traced back as far as the XII Tables, the *ius honorarium* and the *ius civile*.<sup>1</sup> Through the reception of Roman law principles into the European *ius commune* in the 12<sup>th</sup> century AD,<sup>2</sup> the aspects of Roman law relating to the issue of latent defects present in things sold found their way into various legal systems across Europe. Accordingly these rules manifested in the Roman-Dutch legal system applicable in the Netherlands and later its global trade outposts. The initial principles relevant to latent defects have not changed much in substance since they were accepted in the South African common law.<sup>3</sup> The modern South African situation has understandably required some developments.

Resultantly, the South African law will hold a seller automatically liable for latent defects present in the *merx*,<sup>4</sup> if both the seller and purchaser were unaware of the defect at the time of the conclusion of the contract, unless such liability was expressly excluded from the agreement.<sup>5</sup> This right to exclude liability stems from the seller's right to freedom of contract, which effectively means that almost any stipulation<sup>6</sup> can be included or excluded from an agreement, as long as the parties have reached consensus on all the essential elements of the agreement.<sup>7</sup> A clause expressly excluding such liability of the seller is commonly known as a *voetstoots* clause and has the effect that the purchaser accepts the *merx* as is, irrespective of any possible flaws present therein at the time of the conclusion of the agreement. More significantly, the purchaser thereby agrees not to hold the seller liable for further losses suffered due to any defects in the *merx*.<sup>8</sup>

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<sup>1</sup> Van Warmelo 6-7.

<sup>2</sup> Du Plessis P 362.

<sup>3</sup> Otto (2011) *THRHR* 527.

<sup>4</sup> The term '*merx*' is used to describe the object of sale, or the item(s) sold in terms of a common law contract of purchase and sale. This term should also be understood as being synonymous with 'merchandise' 'wares' or *res vendita*. Where reference is made to 'goods' the term should be understood as referring to items sold in terms of a consumer sale or consumer transaction as regulated by the Consumer Protection Act 68 of 2008.

<sup>5</sup> Otto (2011) *THRHR* 528.

<sup>6</sup> If not *contra bonos mores*.

<sup>7</sup> Christie & Bradfield 24.

<sup>8</sup> *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) 202E-F.

The South African common law<sup>9</sup> is based on several modified Roman-Dutch legal rules. These fundamental rules on latent defects currently applicable under the South African common law have remained virtually identical to their Roman-Dutch predecessors, though the scope of their application and that which constitutes a valid claim has expanded greatly. The period of application of the aedilician actions and the *actio empti* has been extended to a uniform period of three years, thus extending the protection initially granted to purchasers under the early common law.<sup>10</sup> Under the current South African common law courts distinguish between guarantees, misrepresentations and sales talk,<sup>11</sup> and here English law has shaped the South African position.<sup>12</sup>

Two divergent views on the superiority of Roman-Dutch legal principles in the South African common law exist. The survival of pre-classical Roman and the subsequent Roman-Dutch legal principles, on which the current South African common law is based, has been described as miraculous.<sup>13</sup> This has been attributed to the fact that South African courts have been able to effectively and successfully adapt these rules to that necessitated by modern requirements.<sup>14</sup> Directly opposed to this view are those of transformative constitutionalists. These scholars believe that the common law, as rooted in Roman-Dutch and English legal principles has, to date, not yet transformed sufficiently to truly embrace the constitutional values of dignity, equality and freedom.<sup>15</sup>

The dawn of South Africa's democratic dispensation and the adoption of the Interim Constitution<sup>16</sup> and the Constitution<sup>17</sup> have altered the South African community's collective social values, and the cardinal importance of addressing the unequal wealth distribution in South Africa has come to the fore. It should, however, be noted that classical contract theory, encompassing the principle of autonomy, still informs

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<sup>9</sup> Unless stated otherwise all references to the 'common law' refer to the South African common law. Where the English common law system is at issue, this will be specifically stated.

<sup>10</sup> Lötzt in Zimmermann & Visser 382-383.

<sup>11</sup> Lötzt in Nagel 224.

<sup>12</sup> Lötzt in Zimmermann & Visser 378.

<sup>13</sup> Van Niekerk (2011) *Stud Iuris* 20.

<sup>14</sup> Otto (2011) *THRHR* 527.

<sup>15</sup> Serving as some examples in this regard see Klare (1998) *SAJHR* 146; Hawthorne (2006) *THRHR* 48; Van der Walt (2006) *Fundamina* 1; Van Marle (2009) *Stell LR* 286.

<sup>16</sup> The Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as "the Interim Constitution").

<sup>17</sup> The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

the common law of contract. The hope is that the principles of good faith, ubuntu and public policy could ultimately swing this conservative position. It is undeniable that the implementation of this ideal will be an uphill battle since the courts do not readily adopt a progressive approach when interpreting or enforcing contracts.<sup>18</sup>

The general principles of the law of contract regulate specific subsections of the law, such as the law on purchase and sale, and where these general principles embody unyielding and unfair rules sales agreements will reflect these same deficiencies. When the judiciary fails to transform the common law in a manner that aligns it with the Constitution, the legislature should remedy the situation.

The National Credit Act<sup>19</sup> and the Consumer Protection Act<sup>20</sup> affected a substantial amendment to the common law of contract.<sup>21</sup> This is most certainly true for the law of sale, and more specifically the law on latent defects. The Consumer Protection Act addresses the validity (or not) of warranties against latently defective goods sold.<sup>22</sup> Currently uncertainty regarding the enforceability of *voetstoots* clauses exists, since the aim of the legislation in question is to protect the consumer and not the supplier. Excluding such warranty is unquestionably detrimental to the consumer.

What adds to the confusion is the fact that the statutory warranty related to the consumer's right to safe, good quality goods will not be applicable in all situations, as the Consumer Protection Act does not apply to all commercial transactions<sup>23</sup> or sales concluded under the common law. The CPA does, however, explicitly state that a consumer who concludes a consumer agreement in terms of the Act also has common law remedies at her<sup>24</sup> disposal. There will thus be instances where the common law or the common law *and* the Consumer Protection Act will regulate a transaction. Furthermore, unlike its common law predecessor, this statutory warranty

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<sup>18</sup> For a detailed discussion in this regard see 4.4 *infra*.

<sup>19</sup> 34 of 2005 (hereinafter referred to as "the National Credit Act").

<sup>20</sup> 68 of 2008 (hereinafter referred to as "the Consumer Protection Act" or "the CPA").

<sup>21</sup> Consumer agreements in terms of the Consumer Protection Act may simultaneously qualify as credit agreements under the National Credit Act, where the goods or services in question are purchased on credit. Even though the NCA could thus potentially apply in instances where defective goods are purchased, this study will not address the NCA or its application.

<sup>22</sup> Otto (2011) *THRHR* 525, 526.

<sup>23</sup> Contracts of purchase and sale concluded under the common law, but which exclude once-off transactions between individuals who act in their private capacity.

<sup>24</sup> For the sake of brevity, the feminine pronoun is used throughout as the generic pronoun and should be read as including male individuals. No gender discrimination is intended.

cannot be contracted out of by means of a *voetstoots* clause.<sup>25</sup> The viability of the *voetstoots* clause in both consumer and commercial transactions will be viewed from a constitutional perspective. This seemingly inconsequential legal conundrum provides an opportunity to question whether it is possible to imbue this area of the law of sale with the values of the Constitution. Any further research on the matter should be squarely grounded in an analysis of the application and effect of the Constitution. Therefore another, possibly more pressing, investigation on this topic relates to whether or not the common law rules of contract, untouched by the influence of the Constitution, should still apply.

The Consumer Protection Act has undoubtedly brought about several changes to the common law of purchase and sale and these changes are undeniably beneficial to the consumer. The question that remains unanswered is whether the transformation brought about is sufficient. If the Constitution and the Consumer Protection Act has (not yet) had a great enough influence on the law of purchase and sale, then the law is neither providing adequate protection to the poor and vulnerable members of South Africa's society nor addressing the socio-economic situation of disenfranchised South Africans. This question will be addressed in this dissertation.

## **1.2 Research question and methodology**

When taking the preceding discussion into consideration it becomes apparent that the South African law of contract has reached a crossroad. In order to remain valid, research on the law of contract should advocate a change in the current legal culture.

### **1.2.1 Research methodology and theoretical framework**

The study aims to contribute to this endeavour by addressing a set of research questions related hereto. These questions can be divided into a main research question and a set of sub-questions. The primary research question asks:

To what extent can the South African law on the warranty against latent defects be described as a sufficiently-developed branch of the law, which fully reflects the values of the Constitution and efficiently protects the consumer?

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<sup>25</sup> S 48(1)(c). See further Otto (2011) *THRHR* 537.

This complex main research question is divided into three sub-questions in order to effectively address it. Firstly it should be determined how the rules pertaining to the warranty against latent defects, and the lawful exclusion thereof, have changed from pre-classical Roman law to its inception in the South African common law. The enquiry then shifts in order to determine the extent to which the law of contract, as critically analysed from a transformative constitutional perspective, has embraced the spirit and purport of the Constitutional project. Thirdly, the question on the manner in which the Consumer Protection Act has altered the common law on latent defects and warranties against defective goods, is addressed.

The purpose of the dissertation is to analyse the evolution of the South African law on the warranty against latent defects. This is achieved by evaluating the findings of the research questions side by side to determine whether the legislation truly protects the consumer by encapsulating the values of the Constitution.

### 1.2.2 Research methodology

This study will critically analyse the current legal position on the law relating to latently defective goods sold. This analysis will be undertaken from the theoretical perspective of transformative constitutionalism.

Klare's radical concept of 'transformative constitutionalism' is defined as

“a long term project of constitutional enactment, interpretation and enforcement committed...to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction”.<sup>26</sup>

Put differently, it as an attempt to induce “large-scale social change through nonviolent political processes *grounded in law*.”<sup>27</sup>

Klare explains that in a legal system where transformative constitutionalism is the prerogative, a duty rests on legal scholars to re-think and evaluate the role of the Constitution and its inherent power to bring about transformation on a socio-economic front in the impoverished South African society.<sup>28</sup> He finds justification for

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<sup>26</sup> Klare (1998) *SAJHR* 146 150.

<sup>27</sup> Klare (1998) *SAJHR* 150 (own emphasis).

<sup>28</sup> Klare (1998) *SAJHR* 150.

his views in the fact that he understands the nature of the Constitution as “*social, redistributive, caring... horizontal, participatory, multicultural, and self-conscious*”<sup>29</sup>

A positive duty to actively combat poverty rests on the government and should resultantly tint any interpretation of the law.<sup>30</sup> Where a developmental state is burdened with the grave duty of eradicating poverty, exceptional measures should be implemented in order to address the matter. Due to the horizontal application of the Constitution and the Bill of Rights<sup>31</sup> between private individuals,<sup>32</sup> examining the effect of the Constitution on the law of contract is of paramount importance.

Hawthorne mirrors Klare’s views<sup>33</sup> and she make the link to the law of contract tangible. She states that the effect of the framework of the political economy on the construct of the law of contract should be evaluated, by explaining that the contract is a tool for the division of wealth in a society.<sup>34</sup>

An investigation into the protection of consumers, the distribution of wealth and the importance of the contract of sale, can be guided by the transformative constitutionalist approach. The theory will be applied to the law on latent defects. The understanding obtained from this investigation will subsequently be applied to consumer law as it relates to defective goods sold to consumers.

Van Marle has taken Klare’s concept further by developing the notion of ‘transformative constitutionalism as critique’, explaining it as an approach to the South African Constitution but also law in general, “that aims to transform political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.”<sup>35</sup> This is thus a method combining the approach of a critique (questioning and analysing) with that of the transformative constitutional enterprise (measuring and comparing law

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<sup>29</sup> Klare (1998) *SAJHR* 153 (author’s emphasis).

<sup>30</sup> Klare in Liebenberg & Quinot 423.

<sup>31</sup> Ch 2 of the Constitution.

<sup>32</sup> S 8(2) of the Constitution.

<sup>33</sup> None of Hawthorne’s writings directly reference transformative constitutionalism, but the themes explored touch on the same drive towards a transformed legal system which endeavours to bring about socio-economic change. Hawthorne conducts transformative constitutional research in the field of contract law, without labelling her own work as such.

<sup>34</sup> Hawthorne (2006) *THRHR* 48-49.

<sup>35</sup> Van Marle (2009) *Stell LR* 288.

against and to constitutional principles).<sup>36</sup> This approach could be implemented effectively to evaluate the changes to the common law brought about by the Consumer Protection Act. A critical analysis of this nature will allow for an assessment of the constitutional values imported into the law on the sale of latently defective goods in South Africa.

Van der Walt argues that where any development of the common law is proposed the investigation should start with a detailed account of the historical development of the common law in question. This should be followed by a clear exposition of *why* the existing common law is incongruent with the Constitution.<sup>37</sup> I will attempt to adhere to this approach by initiating my investigation with historical developments, outlining how these have led to the development of the present South African common law. Thereafter I will point out the unconstitutionality of certain aspects of the common law of contract and then only will the importance of further transformation be explicated. My research will thus be guided by a combination of Van der Walt, Klare and Van Marle's theoretical approaches.

### 1.3 Chapter overview

In this dissertation I provide an exposition of the development and transformation of the law on the warranty against latent defects. The dissertation consists of six chapters, this being the first.

Chapter 2 provides a brief historical overview of the development of the Roman legal principles regulating defects in goods, as well as the resultant developments in the Roman-Dutch legal system. I illustrate the evolution of the scope and application of the warranty against latent defects, as well as its ultimate lawful exclusion by means of a *voetstoots* clause. The development of the *actio empti* and the aedilician actions are scrutinised. The influence of French as well as English law on the topic is assessed to ensure that a sound basis for further discussion is created.

In the third chapter I expand on the knowledge acquired in chapter 2 by evaluating further development and transformation of the law on latent defects. I assess the development and reception of this warranty into the South African common law of purchase and sale. The pre-constitutional position is set out and pivotal case law of

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<sup>36</sup> Van Marle (2009) *Stell LR* 288.

<sup>37</sup> Van der Walt (2013) *SALJ* 738.



this period on the warranty against latent defects and the *voetstoots* clause will be assessed. The research question as it relates to the development from the pre-classical to current South African common law is thus addressed in chapters 2 and 3.

In chapter 4 I address the influence of the Constitution on the current common law of contract. I also evaluate the contract as an indispensable tool in the process of wealth distribution in South Africa's impoverished society. The reproduction of social inequalities and the tradition of one contracting party exploiting another becomes the underlying focus of the chapter.<sup>38</sup> Elements of the developmental state, paternalistic legislation, the validity of the freedom of contract as well as the ethical element of contract are discussed. These interrelated aspects are evaluated alongside the transformative values of the Constitution. Hawthorne points out that our courts blindly follow the traditional notions of the freedom and sanctity of contract, regardless of whether or not the Constitution might be applied to the facts in question.<sup>39</sup> The extent of the effect of the Constitution on the general law of contract is thus examined. Here I take cognisance of the right to freedom of contract, the role of *bona fides* and amendments to the common law of contract.

As constitutionally mandated legislation the Consumer Protection Act is evaluated as a vehicle for aligning the law of purchase and sale with the Constitution and the Bill of Rights. In chapter 5 I relate the Constitution to the CPA and the CPA to the common law. To enhance the value of analysing the consumer's right to safe, good quality goods<sup>40</sup> and the related warranty of quality, the existing common law and its relation to the Constitution, as analysed in the preceding chapter, is compared to the position under the CPA. I emphasise the cardinal importance of measuring the common law against the guiding principles of the Constitution and in this chapter the investigation is focussed on measuring the CPA in a similar manner. In the first part of the fifth chapter the legal rules implemented by the Act are set out and in the second part these legislative rules are compared to the common law on the matter. The greatly varying legal remedies applicable under each system are discussed in detail to determine the scope of the protection granted under both the common law and the CPA.

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<sup>38</sup> Hawthorne (2006) *THRHR* 54.

<sup>39</sup> Hawthorne (2006) *THRHR* 58.

<sup>40</sup> S 55.



In the final chapter of this dissertation I reflect on what has been discussed in the preceding chapters. I investigate whether the changes brought about in the common law of latent defects by the Constitution and Consumer Protection Act have instilled this aspect of the law of purchase and sale with sufficiently protective measures and whether sufficient transformation of the law in this regard has indeed been observed. I evaluate all the information expounded into a unified argument which reflects the purpose of the study. Brief summaries are provided before a cohesive conclusion is supplied. Closing remarks regarding the efficiency of the Consumer Protection Act as these relate to the common law warranty against latent defects and the *voetstoots* clause will be supplied and the main research question will be revisited.

## CHAPTER 2 A HISTORICAL OVERVIEW OF THE WARRANTY AGAINST LATENT DEFECTS

### 2.1 Introduction

When a study of a particular aspect of the South African law of contract is conducted, it is imperative that cognisance be taken of the historical foundations and development of the area of the law in question, as a modern model can only be truly understood by studying the evolution thereof. A brief overview of the historical development of the South African legal system, as an example of a mixed legal system, will be provided. Due to the uncodified nature of the South African common law, its direct link to the historical Roman and Roman-Dutch sources has not been severed and resultantly these sources are still “living law” today.<sup>41</sup> The law regarding latent defects in items sold as well as the *voetstoets* clause will be investigated by briefly tracing its development from pre-classical<sup>42</sup> Roman to Roman-Dutch law. Cognisance will also be taken of the European and English developments that influenced the South African law on the topic. These historical developments will be outlined briefly in order to provide the background against which an analysis of the South African development of the law on the sale of latently defective goods will be undertaken.

### 2.2 The historical context of the South African private law

The two major Western legal families are the continental European, or civil law tradition, and the English common law system.<sup>43</sup> The mixed legal system can be defined as a system constructed of two or more different components, which has manifest traits from at least two systems, which are autonomous and distinct from each other.<sup>44</sup> Palmer describes the three fundamental qualities of the mixed system as follows: the system is built on “dual foundations of common-law and civil-law materials”; the presence of these dual elements may be described as “quantitative

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<sup>41</sup> Hosten 6, 7.

<sup>42</sup> The law as contained in the XII Tables will be the earliest law assessed. The XII Tables were compiled during 451 and 450 BCE (Du Plessis xiii).

<sup>43</sup> Church *et al* 27.

<sup>44</sup> Church *et al* 49.

and psychological”; and lastly, the structural composition of the system illustrates a clear distinction between private civil law and public common law spheres.<sup>45</sup>

All of these features are clearly visible in the South African legal system. The influences of Roman-Dutch and English law are still visible today; numerous elements of both these systems are identifiable. Finally, the largest part of South African private law is based on the European civil law model, while the public and procedural law closely resemble that of the English common law tradition.<sup>46</sup> Any study of South African law must acknowledge the system’s mixed nature. The law on latently defective goods clearly illustrates the principles of the mixed legal system, as English law had a slight, yet lasting, influence on the development of this subsection of the South African law of contract, which remains mainly governed by principles inherited from Roman-Dutch law.

With the arrival of the Dutch at the Cape in 1652 and the English in 1795 and again in 1806, their individual legal systems inevitably altered the law applied. The Dutch working for the *Vereenigde Oost-Indische Compagnie* (VOC) had no initial intention to colonise the Cape, but only to start a refreshment post to service ships sailing around Africa.<sup>47</sup> One can therefore understand why the Dutch had very little interest in “societal regulation or improvement”, as they represented a commercial company and not a sovereign government.<sup>48</sup> A letter sent to the Council of India by the directors of the VOC communicated that the law of the Province of Holland was to be applied by the Council in the territories it occupied.<sup>49</sup> It is argued that the letter simply conveyed the views of the directorate and that it did not constitute a legislative document, or even a binding mandate.<sup>50</sup> Yet the effect of this letter is still easily observed in the current South African system as it resulted in the introduction of Roman-Dutch law to the region.

The English colonisation of the Cape resulted in a marked influence on the legal system in place in the early 1800s. Roman-Dutch law remained the official law of the

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<sup>45</sup> Palmer 7-11.

<sup>46</sup> South Africa’s constitutional dispensation is, however, beginning to blur the initially well-defined lines between the public and private law spheres.

<sup>47</sup> Fagan in Zimmermann & Visser 35.

<sup>48</sup> Fagan in Zimmermann & Visser 47.

<sup>49</sup> Fagan in Zimmermann & Visser 38-39. For a detailed discussion see Van den Bergh (2012) *Fundamina* 72 fn 4.

<sup>50</sup> Fagan in Zimmermann & Visser 37.

region, but in an attempt to bring order to the Cape, the English gradually altered the pure civil law model.<sup>51</sup> The result of these influences can be described as a complex, yet effortless relationship between Roman-Dutch and English law in the South African sphere, which is complimentary rather than opposing,<sup>52</sup> thus resulting in the birth of the South African mixed legal system.

Due to the influence of Roman, continental European and English law on the South African law of purchase and sale, and more specifically on the warranty against latent defects, the relevant rules of these systems will be discussed succinctly.

## 2.3 Roman law<sup>53</sup>

Honoré argues that judicial and procedural inconsistencies were rife in Rome after the formulary system<sup>54</sup> fell into disuse,<sup>55</sup> and consequently it is difficult to trace the historical development of the law on latent defects in the original sources with exacting accuracy.<sup>56</sup> It is contended that an investigation of the relevant secondary sources will shed sufficient light on the matter.

### 2.3.1 The Roman contract of sale in general

According to Justinianic law only ten categories of Roman contracts existed,<sup>57</sup> the one under scrutiny in this study being *emptio venditio*.<sup>58</sup> Under Roman law all bilateral contracts were ruled by *bona fidei*<sup>59</sup> and in the case of purchase and sale

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<sup>51</sup> Fagan in Zimmermann & Visser 51.

<sup>52</sup> Fagan in Zimmermann & Visser 62.

<sup>53</sup> For detailed analyses of the original Roman law sources on the topic see Van Warmelo 6-57; Van den Bergh (2012) *TSAR* 53-75; Lötze (1992) *De Jure* 148-155; Du Plessis P 269-272; Zimmermann 305-321.

<sup>54</sup> A system for instituting civil claims introduced by the *praetor peregrinus*, which initially applied exclusively to foreigners. The *formulae* were “standardized written pleadings which contained both the action on which the claim was based and the defence(s) raised against it” (Du Plessis P 72). For a detailed discussion of Roman litigation and civil procedure see Du Plessis P 72-79.

<sup>55</sup> This is linked to the abolition of the office of the *aediles curules* (Honoré in Daube 133).

<sup>56</sup> Honoré in Daube 132-133.

<sup>57</sup> The four real contracts, *mutuum*, *commodatum*, *depositum* and *pignus*; the four consensual contracts, *emptio venditio*, *locatio conductio*, *societas* and *mandatum*; *contractus litteris*; and *contractus verbis* (Thomas *et al* 224, 243, 265, 283, 309).

<sup>58</sup> The contract of purchase and sale (Du Plessis P 260).

<sup>59</sup> In general most bilateral contracts were ruled by the good faith and not strict law. In terms of these rules the parties were required to act in good faith and as a result claims based on mistake, fraud or duress were more easily heard and accepted than those ruled by the strict

consent between the parties was sufficient to create a binding agreement. Neither delivery of the *merx* nor payment of the *pretium*<sup>60</sup> was required for a binding sale agreement to come into existence.<sup>61</sup> The most important requirement for the contract to be classified as one of sale, is agreement on “the exchange of a *merx* for a *pretium*”.<sup>62</sup> The presence of a defect in the *merx*, which both the seller and purchaser are unaware of at the time of the conclusion of the contract, is the central focus of this study and will now be evaluated in more detail.

### 2.3.2 Outlining a ‘latent defect’

Van Warmelo identifies the key element of the doctrine of the warranty against latent defects as the fact that, at the time of the conclusion of the contract of purchase and sale, the *merx* has some form of defect that neither the seller nor the purchaser is aware of.<sup>63</sup> The defect leads to loss and the resultant legal question considers which party bears the related risk.<sup>64</sup>

If the seller is in fact aware of the defect and fails to point it out to the purchaser, she is regarded as having acted fraudulently.<sup>65</sup> Where a patent defect<sup>66</sup> was present on the facts, the rule applicable was *caveat emptor*,<sup>67</sup> whereas *respondeat venditor*<sup>68</sup> applied in cases of latent defects.<sup>69</sup>

Three questions emerge from this description of a latent defect: firstly, to which types of property or *merx* the rules apply; secondly, which defects will be classified as latent defects; and thirdly, what the result is if such a defect is in fact present on the

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law (Du Plessis P 250). “The parties are bound, not only by what they said, but to all the obligations that follow as a matter of good faith” (Gordley (2010) *Tulane LR* 1438).

<sup>60</sup> The purchase price paid to the seller in terms of the contract, which had to be wholly or partially in money for the contract not to be one of barter (Du Plessis P 265).

<sup>61</sup> Gordley (2010) *Tulane LR* 1438.

<sup>62</sup> Christie & Bradfield 5.

<sup>63</sup> Van Warmelo 1. Also see Thomas 123.

<sup>64</sup> Van Warmelo 1.

<sup>65</sup> Van Warmelo 3; Du Plessis P 257.

<sup>66</sup> A defect of which the purchaser was aware at the time of purchase, or which was so blatantly obvious that the purchaser ought to have been aware thereof.

<sup>67</sup> “[L]et the buyer beware” (Du Plessis P 269).

<sup>68</sup> “The seller is liable” (Van Warmelo 127).

<sup>69</sup> Van Warmelo 127; Du Plessis P 269.

facts.<sup>70</sup> These questions will subsequently be answered in the discussion of the development of the law in question.

### 2.3.3 Early Roman development on latent defects

For physical defects in items sold, early Roman law in terms of the XII Tables only had a rule and remedy where a piece of land was transferred by means of *mancipatio*<sup>71</sup> and the seller declared that the land was larger than it was in reality.<sup>72</sup> In such a case the purchaser could claim back a part of the purchase price paid with the *actio de modo agri*,<sup>73</sup> provided that the purchase price had originally been determined based on the size of the piece of land purchased.<sup>74</sup> The wronged purchaser was entitled to double the value of the land that did not form part of the property as initially stipulated by the seller.<sup>75</sup> Where such a defect was found in a piece of land sold, the purchaser's remedy did not rest on the sale, but the *mancipatio*, or formal juristic act which accompanied the sale.<sup>76</sup> This action stemmed from the *ius honorarium*,<sup>77</sup> classified as edictal law,<sup>78</sup> and fell away with Justinian's abolition of *mancipatio*.<sup>79</sup>

From the late Republican era the *actio empti*<sup>80</sup> could be instituted against the seller for damages if the seller did not act in good faith during the conclusion of the agreement, or when performing in terms thereof.<sup>81</sup> Importantly it must be noted that the *actio empti* could be instituted regardless of the type of *merx* that was defective (and was thus not solely applicable where immovable property was sold), as long as

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<sup>70</sup> Van Warmelo 3, 4.

<sup>71</sup> In terms of the *ius civile* this mode of transferring ownership of a *res Mancipi* was regarded as the most important, as it granted the purchaser additional protection. This formal juristic act was distinguishable from the contract of sale and it is important to note that it is a derivative mode of transferring ownership and not a contract in itself (Du Plessis P 178-180).

<sup>72</sup> Kaser 217; LötZ (1992) *De Jure* 149.

<sup>73</sup> An action used to claim double the amount by which the *pretium* was excessive in the case where the size of land sold and transferred via *mancipatio* was overstated (Du Plessis P 180).

<sup>74</sup> Kaser 217.

<sup>75</sup> Lee 314; LötZ (1992) *De Jure* 149.

<sup>76</sup> Van Warmelo 6.

<sup>77</sup> "[T]he law laid down by magistrates", or stated differently, the law consisting of the edicts handed down by the *praetors* (Du Plessis P 33).

<sup>78</sup> Van Warmelo 6.

<sup>79</sup> Kaser 217; LötZ (1992) *De Jure* 149 fn 151; Du Plessis P 180.

<sup>80</sup> "[T]he action on the purchase" (Du Plessis P 269).

<sup>81</sup> Kaser 217; LötZ (1992) *De Jure* 149 fn 156; Thomas 123; Van Warmelo 56; Zimmermann 280.

*dolus* on the part of the seller was present on the facts.<sup>82</sup> An example would be where the seller was aware of the defect in the *merx* and failed to point it out to the purchaser.<sup>83</sup> Lötz discusses two additional instances where this action could be applied: firstly, when the purchaser during the conclusion of the contract explicitly states that the *merx* has a specific quality, and this turns out to be untrue; and secondly, when the purchaser, during the conclusion of the contract, insists that the seller declare that the *merx* is free of some specific, or all defects or alternatively that it displays a specific quality, and this declaration is false. Statements of this nature constitute *dicta et prommissa*.<sup>84</sup> Importantly, in the classical period a purchaser had no remedy where the seller acted truly in good faith and was unaware of any defect in the *merx*.<sup>85</sup>

### 2.3.4 The aedilitian actions

During the Republican period<sup>86</sup> the *aediles curules*<sup>87</sup> implemented two edicts related to the sale of defective slaves and beasts of burden in the market place. Their application was later extended to include slaves and all livestock sold inside and outside the market.<sup>88</sup> The edicts resulted from the fact that worthless warranties were so freely given that the *aediles curules* felt it necessary to institute stricter measures to protect purchasers.<sup>89</sup>

The aedilitian actions, estimated to have come into legal operation in 199 BC,<sup>90</sup> are the *actio redhibitoria* and the *actio quanti minoris*.<sup>91</sup> It is important to note that these

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<sup>82</sup> Zimmermann 319.

<sup>83</sup> Thomas 123.

<sup>84</sup> Lötz (1992) *De Jure* 149-150. For a detailed exposition of *dicta et prommissa* as a method to enhance the liability of the seller see Van Warmelo 25-30; Lee 314-315; Lötz (1992) *De Jure* 152-153 fn 179; Thomas 124; Zimmermann 315-316.

<sup>85</sup> Van Warmelo 56.

<sup>86</sup> 510 BCE – 27 BCE (Du Plessis P 3).

<sup>87</sup> These officials were *magistratus minoris*, tasked with policing disputes between parties in the marketplace and on the waterways in the city. They had the authority to pass edicts which initially formed part of the *ius honorarium* and later the *ius civile*. The two specific aedilitian edicts in question in this study were taken up in the *Edictum Perpetuum* and ultimately in Justinian's *Corpus Iuris Civilis* – see Van Warmelo 9-11; Lötz (1992) *De Jure* 151 fn 165; Du Plessis P 270.

<sup>88</sup> Thomas 123-124.

<sup>89</sup> Zimmermann 311.

<sup>90</sup> Lötz (1992) *De Jure* 151.

<sup>91</sup> Thomas 124. Interestingly Lee states that the *actio quanti minoris* was also known as the *actio aestimatoria*, while Hallebeek states that the *actio redhibitoria* was also identified as such (see Lee 315 and Hallebeek in Cairns & Du Plessis 117).



actions were based on tacit terms understood to be part of the contract of purchase and sale.<sup>92</sup> The effect of these edicts was a different approach to the thinking related to the contract of purchase and sale; the notion of *respondeat venditor* was introduced.<sup>93</sup> The *actio redhibitoria*<sup>94</sup> was aimed at full restitution and this remedy prescribed after six months.<sup>95</sup> The *actio quanti minoris*<sup>96</sup> allowed the purchaser to insist on a reduction in the purchase price (by determining the actual current value of the *merx* and comparing this to the purchase price paid), if the purchaser chose to retain the *merx*, and this remedy prescribed after one year.<sup>97</sup> The *actio quanti minoris* thus resulted in the inclusion of an implied warranty of quality into the contract of sale.<sup>98</sup> Kaser explains the situation as follows:

“In this limited field the liability was strengthened, it rested on an express or tacit guarantee and was, therefore, independent of the vendor’s fault. Moreover, with ‘reversal’ of the sale and ‘reduction’ of the price it affected special legal consequences which were adapted to the needs of the situation”.<sup>99</sup>

Originally the edicts required the seller to make the purchaser aware of defects in the property in question, and if the seller did not do so the purchaser could institute one of the aedilician actions against the seller.<sup>100</sup> Therefore these edicts did not initially apply solely in cases of latent defects,<sup>101</sup> and it can be surmised that the rising need to protect the innocent purchaser led to this legal development. The legal principles contained in the aedilician edict were gradually taken up into the *ius civile*:

“[W]arranty for latent defects was taken to be implicit in the contract of sale, even in cases where the seller had not known about the defects himself. This warranty, implied by law, was based on a generalisation of

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<sup>92</sup> Lötz (1992) *De Jure* 148 fn 149.

<sup>93</sup> Van Warmelo 1. He later explains that this was done by Justinian and that this doctrine did not apply during the classical period (Van Warmelo 57).

<sup>94</sup> “The action for rescission” (Du Plessis P 270).

<sup>95</sup> Kaser 218; Thomas 124.

<sup>96</sup> “[T]he action for diminution” (Du Plessis P 270).

<sup>97</sup> Kaser 218; Lötz (1992) *De Jure* 152; Thomas 124.

<sup>98</sup> Du Plessis P 270.

<sup>99</sup> Kaser 218. Lötz ((1992) *De Jure* 154 fn 186) states that the purchaser’s choice to institute one of the aedilician actions was not necessarily influenced by the severity of the defect.

<sup>100</sup> Thomas 124.

<sup>101</sup> Thomas 124.



the aedilician remedies and was affected by means of a more refined interpretation of what was owed, in good faith, under the *actio empti*".<sup>102</sup>

### 2.3.5 The *Corpus Iuris Civilis*

With the promulgation of Justinian's *Corpus Iuris Civilis* the aedilician rules were extended to apply to the sale of "all things everywhere",<sup>103</sup> but these rules were enforced with the *actio empti*. Kaser states that "the *actiones redhibitoria* and *quantum minoris* became superfluous; they were retained only for reasons of tradition".<sup>104</sup> It seems as if this distinction fell away along with the office of the *aediles curules*.<sup>105</sup> Interestingly, it has been pointed out that the extension to include all things was achieved by means of *interpretatio*<sup>106</sup> by the compilers of the *Corpus Iuris Civilis*.<sup>107</sup> Similarly, the extended liability (of a seller who acted in good faith) based on the mere presence of a latent defect in the *merx*, was also created by means of interpolations.<sup>108</sup> This was the case because of the tacit "warranty" against latent defects provided by the contract due to the fact that full restitution could have been claimed.<sup>109</sup> It was, however, possible to contract out of such liability by express agreement on the matter.<sup>110</sup> In instances where the seller expressly excluded all liability related to latent defects, the contract was referred to as a *venditio simplaria*.<sup>111</sup>

The last word on the Roman development of the law on latent defects was therefore that which was included in the *Corpus Iuris Civilis* on the topic. This can be summarised as follows: Where a *bona fidei* seller sold a *merx* to a purchaser and such *merx* contained a hidden defect, which existed at the time of the conclusion of

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<sup>102</sup> Zimmermann 321.

<sup>103</sup> Thomas 124; Kaser 218-219; Lötzer (1992) *De Jure* 150.

<sup>104</sup> Kaser 219.

<sup>105</sup> Hallebeek in Cairns & Du Plessis 178; Lötzer (1992) *De Jure* 148 fn 149.

<sup>106</sup> Also referred to as interpolations. In an attempt to aid the interpretation of the original texts *interpretationes* (in the form of individual glosses) were added to the original legal texts. Often these additions resulted in distortions and extensions to the original legal rules (Du Plessis P 35-39).

<sup>107</sup> Van Warmelo 56-57; Lee 315; Hallebeek in Cairns & Du Plessis 178. For alternative and thought-provoking theories on the disputed presence of interpolations in the texts referring to latent defects see Du Plessis P 271; Honoré in Daube 139-140.

<sup>108</sup> Van Warmelo 57; Lötzer (1992) *De Jure* 153 fn 184.

<sup>109</sup> Lötzer (1992) *De Jure* 153-154 fn 185. The warranty, as it is understood today, is derived from the English law and will be discussed hereafter (see para 2.6 *infra*).

<sup>110</sup> Lötzer (1992) *De Jure* 150, 153-154.

<sup>111</sup> Lötzer (1992) *De Jure* 154 fn 190. This development is therefore the historical root of the Roman-Dutch *voetstoots* clause (for a detailed discussion see 2.4.4 *infra*).

the agreement, of which neither party was aware, the seller would be held liable. The purchaser could institute the *actio empti* against the seller to either claim a reduced purchase price or rescission of the contract. The seller's liability was created by the mere presence of the defect in the *merx*.<sup>112</sup> These rules applied to all sale transactions concluded within the empire.

The question about what actually constituted a defect was not clarified by the compilers of the *Corpus Iuris Civilis*.<sup>113</sup> Another question which remains to be answered satisfactorily is why Justinian chose not to abolish the aedilician actions, since they were effectively made redundant. Zimmermann attributes this to a strong sense of traditionalism.<sup>114</sup> To my mind this step defeats the purpose with which the *Corpus Iuris Civilis* was compiled, namely the creation of legal certainty and the eradication of the duplication of legal rules.

## 2.4 Roman-Dutch law

Investigating the reception of Justinian's Roman law into continental European law is warranted. Since this reception led to the birth of Roman-Dutch law, gaining an understanding thereof is crucial for the purpose of this dissertation. Roman-Dutch law on the topic of latent defects will be discussed briefly in order to acquire foundational knowledge on the roots of the South African common law.

### 2.4.1 The reception of Roman law

The 'second life' of Roman law refers to the reception thereof into the law of the European continent after the fall of both the western and eastern Roman empires. It is the law of the *Corpus Iuris Civilis* as developed by scholars of Roman law of the Middle Ages and Renaissance which was ultimately modified and taken up in Codes throughout Europe.<sup>115</sup> Cognisance will not be taken of the individual developments affected by the Glossators, *Ultramontani* and Commentators,<sup>116</sup> but it is necessary to

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<sup>112</sup> Such liability could however be excluded by agreement.

<sup>113</sup> Van Warmelo 57.

<sup>114</sup> Zimmermann 322.

<sup>115</sup> Van Warmelo 58, 70; Du Plessis P 360.

<sup>116</sup> For more detailed accounts on the role of the Glossators, Canon law, *Ultramontani* and Commentators see Van Warmelo 58-71; Hallebeek in Cairns & Du Plessis 184-214; Zimmermann 322-330; Van Zyl 83-109, 160-184.

mention the significant role of Canon law<sup>117</sup> in the shaping of the European *ius commune*.

The Canon law was indisputably rooted in the domestic rules of persecuted, fleeing and geographically divided groups of early Christians. Constantine officially adopted Christianity as the religion of the Roman Empire in AD 313. Due to social acceptance Christians became active members of society, resulting in their legal rules affecting the greater society and ultimately Canon law.<sup>118</sup> At Bologna, Irnerius' work related to the, then recently rediscovered, *Corpus Iuris Civilis* resulted in the reception of Roman law on the continent.<sup>119</sup> As the power and influence of the Roman Catholic church spread across Europe, so did Roman law, since the church applied Canon law in all disputes.

Not much development of the law on latent defects took place during the medieval period, but notable advancements will be summarised. By the time of the reception of Roman legal principles in the Dutch provinces, the *actio empti* was used in instances where the seller acted fraudulently and in instances where a latent defect was present in the *merx*, even if the seller was unaware of the defect. The *actio empti* could be instituted regardless of the type or form of defect present or the type of *merx* in question.<sup>120</sup> The aedilician actions, the *actiones redhibitoria* and *quantum minoris*, could be instituted only for specific defects in a limited number of items.<sup>121</sup> Even though the same time limits applied as under Roman law, these actions still provided greater recourse than the *actio empti*.<sup>122</sup> The *actio empti* was thus the remedy of general application in instances of latently defective goods. Legal texts were no longer the only aspect that provided guidance in finding and reading the law – human reason and the demands of practice started to greatly influence the law and

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<sup>117</sup> “Canon law consisted of the canons of the [Roman Catholic] Church – ecclesiastical decrees concerned mainly with the administration of the Church, doctrinal issues, and jurisdiction over matters such as marriage and wills. In some respects, it had close affinity with Roman law, was influenced by it, and in turn influenced its revival” (Du Plessis P 364).

<sup>118</sup> Christie & Bradfield 6.

<sup>119</sup> Christie & Bradfield 7.

<sup>120</sup> Van Warmelo 70.

<sup>121</sup> In this regard see Van Warmelo 67-69.

<sup>122</sup> Van Warmelo 70.

the manner in which it was applied.<sup>123</sup> These paradigm shifts resulted in a more equitable application of the law.

#### 2.4.2 The development of Roman-Dutch law as a legal system

After liberation from (Catholic) Spanish rule the jurists of the United Provinces of the Netherlands acknowledged the crucial influence of medieval Canon law on the law of the area.<sup>124</sup> Simon van Leeuwen was the first Dutch jurist to introduce the term 'Roman-Dutch law'.<sup>125</sup> Roman-Dutch law has a cosmopolitan nature and, as its name indicates, is the resulting product of the reception of Roman law into Dutch law. The sources impacting on this reception were the writings of the post-glossators, more so than the original Roman sources.<sup>126</sup> During the initial period of the study of Roman law in north-western Europe Dutch jurists also analysed the writings of their counterparts from Italy, Spain, Germany and France, and naturally these writings also affected their national law to some extent. This vast cosmopolitan influence on the Roman-Dutch legal system has been described as one of its most redeeming features.<sup>127</sup> Against the background of these historical aspects the development of Roman-Dutch law on latent defects will now be discussed.

#### 2.4.3 Roman-Dutch law on latent defects

The Roman law that was received into the law of the Netherlands was that contained in the *Corpus Iuris Civilis*.<sup>128</sup> Classical Roman law and the local Dutch laws, which applied in the area before the reception of Roman law, regulating latent defects were relatively similar.<sup>129</sup> However, the rules pertaining to horses and livestock differed and the rules as contained in the local laws remained in force even after the reception of Roman legal principles.<sup>130</sup> This provides direct evidence of the amalgamation of Roman principles with Dutch customary law in the field of latent defects. Initially the maxim *caveat emptor* applied to the Roman-Dutch law regarding

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<sup>123</sup> Hallebeek in Cairns & Du Plessis 217.

<sup>124</sup> Christie & Bradfield 7.

<sup>125</sup> Thomas *et al* 70.

<sup>126</sup> Hosten 12.

<sup>127</sup> Hosten 12.

<sup>128</sup> Van Warmelo 72; Lötze & Van der Nest (2001) *De Jure* 231.

<sup>129</sup> Van Warmelo 72.

<sup>130</sup> Van Warmelo 72-73, 85-91; Lötze & Van der Nest (2001) *De Jure* 232.

purchase and sale, but with the reception of Roman law the position eventually changed to conform to the Roman model of *respondeat venditor*.<sup>131</sup>

Importantly, the rules of the seller's liability for latent defects applied to all types of *merces*.<sup>132</sup> Examples include infertile soil, a house encumbered by a servitude, incomplete books in a library and coal of a sub-par quality.<sup>133</sup> For the first time generic things also fell within the scope of the law on latent defects and this resulted in an interesting conundrum: what is the difference between positive malperformance and delivering a *merx* with a latent defect? This question was left unanswered by Roman-Dutch jurists.<sup>134</sup> Gordley proposes that the confusion is caused by the fact that Roman legal principles were extended beyond the scope they were intended for when originally devised.<sup>135</sup> His argument in this regard is compelling.

The Roman-Dutch jurists were the first to contemplate the nature of the defect itself.<sup>136</sup> Three requirements had to be met for a defect to be regarded as a latent defect: the defect had to be of a serious nature; the defect in question should constitute a physical defect; and the defect had to be latent in nature.<sup>137</sup> The description '*koopmanswaar*' was used as a measure, referring to the fact that the *merx* had to be fit for the purpose for which it was intended in the ordinary course,<sup>138</sup> and that its usefulness was uncompromised.<sup>139</sup>

Reference to an action based on a latent defect in a *merx* can be found in Roman-Dutch case law of 1797.<sup>140</sup> The technical distinction between the two aedilician actions was not strictly adhered to, possibly because the actions were relatively unknown to the Dutch.<sup>141</sup> De Groot states that the *actio redhibitoria* was only available to the purchaser if the defect was so great that it would most likely have dissuaded the purchaser from concluding the contract had it been common

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<sup>131</sup> Lötz (1992) *De Jure* 148-149 fn 149.

<sup>132</sup> Van Warmelo 73.

<sup>133</sup> As provided by the old authors and discussed by Van Warmelo 73-74.

<sup>134</sup> Van Warmelo 74.

<sup>135</sup> Gordley (2010) *Tulane LR* 1470.

<sup>136</sup> Van Warmelo 75.

<sup>137</sup> Lötz & Van der Nest (2001) *De Jure* 232.

<sup>138</sup> "Vir die alledaagse handelsverkeer", thus no cognisance was taken of each individual transaction, but the focus was placed on the ordinary purpose of the *merx* (Van Warmelo 76).

<sup>139</sup> Van Warmelo 75-76.

<sup>140</sup> In this regard see Van der Keesel *Thesis Selectae Juris Hollandici et Zelandici* (1840) as cited by Honoré in Daube 144.

<sup>141</sup> Lötz (1992) *De Jure* 149 fn 150.

knowledge.<sup>142</sup> Put differently, the remedy could be instituted if the defect hampered the effective or successful use of the *merx*.<sup>143</sup> If the purchaser would still have concluded the contract the only remedy available would have been the *actio quanti minoris*, and if the *merx* was not fit for the specific purpose for which it had been acquired a claim for damages could have been instituted against the seller.<sup>144</sup> A judge had to rule on whether or not the purchaser would still have concluded the transaction if the defect was common knowledge; here the nature and extent of the defect as well as facts specific to the case and the parties were taken into account.<sup>145</sup> This development allowed for a more just application of the law regulating latent defects.

As in Roman law, the distinction between the *actio empti* and the aedilician actions was not upheld.<sup>146</sup> Identical to the post-classical Roman position, the *actio empti* could be instituted to claim restitution from the seller in the case of the fraudulent failure to point out a defect in the *merx* known to the seller at the time of the conclusion of the contract, as well as all other instances related to claims based on latent defects.<sup>147</sup> Another comparison with the Roman system may be made between the Roman *venditio simplaria*<sup>148</sup> and the *voetstoots clause*.

#### 2.4.4 The *voetstoots* clause

As in Roman law, where the seller was unaware of a defect in the *merx* at the time of the conclusion of the contract, it was possible to successfully contract out of the liability a potential defect could cause.<sup>149</sup> This was achieved by including a *voetstoots* clause in the contract. Otto has provided a thorough exposition of where the term ‘*voetstoots*’ originated. He quotes Van Leeuwen, who made one of the first references to the term:

“Om in geen vergoeding van eenig gebrek gehouden te zyn, verkoopt men het goed dikwels so goed en quaat als het is, het welk men noemt

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<sup>142</sup> De Groot 3 1 4. See also Van Warmelo 80; Lötz (1992) *De Jure* 148 fn 149, 154 fn 186.

<sup>143</sup> Lötz (1992) *De Jure* 154 fn 189; Lötz & Van der Nest (2001) *De Jure* 231.

<sup>144</sup> Lötz (1992) *De Jure* 148 fn 149; Van Warmelo 80.

<sup>145</sup> Van Warmelo 81.

<sup>146</sup> Lötz (1992) *De Jure* 149 fn 156.

<sup>147</sup> Lötz (1992) *De Jure* 150 fn 159.

<sup>148</sup> See fn 111 *supra*.

<sup>149</sup> Lötz (1992) *De Jure* 154 fn 190.

*met die voet te stoten*: in welk geval men nergens anders in gehouden is, als't verkogte so goed en quaad als't is te leveren".<sup>150</sup>

A Dutch legal dictionary defines the term as “met uitsluiting van elke garantie van de kant van die verkoper bij verkoop betreffende de hoeveelheid, verborgen gebreken enz”.<sup>151</sup> It is also described as meaning “zonder uitzoeken; zonder dat men later met klachten kan komen”.<sup>152</sup>

From Otto's research it may be surmised that the *voetstoots* clause is an optional clause which may (at the parties' discretion) be inserted into a contract of sale, and that this clause has the effect of excluding all liability on the part of the seller for latent defects identified in the *merx* at a later stage.

#### 2.4.5 The position of the manufacturing and merchant seller in Roman-Dutch law

In terms of *Digesta* 19 1 6 4 the merchant seller or manufacturer of a *merx* was “*ipso facto* and *ex professio*” liable if the *merx* was not fit for the specific purpose for which it was purchased, regardless of whether the merchant seller or manufacturer was aware of the defect.<sup>153</sup> In Roman-Dutch law the position remained the same, but the rules relating to such an instance became definitive and the seller's liability was extended.<sup>154</sup> Allowing a claim for consequential damages thus goes beyond what was possible under the Roman aedilician actions.<sup>155</sup>

The ‘*artifex*’<sup>156</sup> was held liable for a latent defect in the *merx* much more stringently than was the average seller.<sup>157</sup> Van Warmelo argues that such liability does not

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<sup>150</sup> Van Leeuwen 4 18 7. Free translation: The seller is not obliged to refund payments where a defect is found in the goods, since the goods are sold as is, be it good or bad. This principle is otherwise known as *to push with the foot*, implying that the seller cannot be held accountable for providing that which was sold. Lötz & Van der Nest ((2001) *De Jure* 231) also refer to Van Leeuwen's description, summarising it as purchasing the *merx* “so goed of so sleg as wat dit is” (free translation: as good or as bad as it is). See also Otto (2011) *THRHR* 525.

<sup>151</sup> Van Caspel *et al Fockema Andreae's juridisch woordenboeken* (2008) 513, as quoted by Otto (2011) *THRHR* 530. Free translation: excluding all guarantees provided by the seller during the sale, regarding the quantity, latent defects, etc.

<sup>152</sup> Ter Laan *Nederlandse spreekwoorden, spreuken en zegszijzen* (2009) 362, as quoted by Otto (2011) *THRHR* 530. Free translation: Without selecting, and not being able to complain afterwards.

<sup>153</sup> As cited by Lötz (1992) *De Jure* 151 fn 164.

<sup>154</sup> Lötz (1992) *De Jure* 151.

<sup>155</sup> Honoré in Daube 146; Lötz & Van der Nest (2001) *De Jure* 233.

<sup>156</sup> Craftsman (translation from Honoré 148).

<sup>157</sup> Van Warmelo 91; Lötz & Van der Nest (2001) *De Jure* 233.



emanate from the mere presence of the defect in the *merx*, but from the fact that the merchant seller or manufacturer “stands in” or vouches for the product sold. This is equated to breaching a duty and ultimately malperformance in terms of the contract.<sup>158</sup> Here the fine line between a latent defect in a product and positive malperformance is observed again. Van Warmelo explains that here both causes of action are present on the same facts; the malperformance based on the breach of duty by the seller and the claim based on the latent defect, rests on the mere fact that the *merx* is defective. This question never arose in Roman law, as malperformance as a cause of action was unknown to the Romans.<sup>159</sup>

## 2.5 French jurisprudence and the Pothier rule

The consequence of considering the application of the law on latent defects to generic goods for sale had an interesting consequence in French law: the liability for damages suffered as a result of the defect was extended.<sup>160</sup> Robert Joseph Pothier was influenced by French jurist Dumoulin and *Digesta* 19 1 6 4, which stated that when wine was lost from a leaky vessel the seller of the vessel was liable for the wine.<sup>161</sup> Therefore, the original rule can be worded as follows:

“The seller is not liable in consequential damages for latent defects of which he does not know, except in the case where he is a workman or a merchant who is selling works that he has made or goods in which he deals”.<sup>162</sup>

The liability here is based on the foreseeability of future loss if the product sold were to be defective.<sup>163</sup> A specialised merchant, selling a specialised type of *merx*, was thus liable for resultant damages, regardless of whether said merchant was also the manufacturer of the goods, because the tacit assertion is that the product is suitable for use as advertised or sold.<sup>164</sup> Where the seller is not a merchant seller or

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<sup>158</sup> Van Warmelo 91.

<sup>159</sup> Van Warmelo 91-92.

<sup>160</sup> Gordley (2010) *Tulane LR* 1468.

<sup>161</sup> As cited by Gordley (2010) *Tulane LR* 1468.

<sup>162</sup> Honoré in Daube 147. Also see Zimmermann 335 in this regard.

<sup>163</sup> Honoré in Daube 147.

<sup>164</sup> Honoré in Daube 147-148, 149; Zimmermann 334-335.



manufacturer the only liability incurred is for a reduction in price,<sup>165</sup> as would normally be the case.

Gordley states that this contradicts the general rule in Roman law in terms of which the seller is only liable for damages in the case of *dolus*.<sup>166</sup> It is unclear whether the rule is based on a tacit guarantee, an implied term, or a wide interpretation of the *bona fides*-principle as applied to purchase and sale.<sup>167</sup> Dumoulin argued that this rule could only be applied if the faulty vessel was “produced or professionally sold” by the seller in question, because a tacit affirmation of an absence of defects was assumed to form part of the agreement.<sup>168</sup> Where the *merx* is sold by the individual who also manufactured it, the ensuing liability is based in the fact that insufficient professional skill in the field in question was regarded as a form of negligence.<sup>169</sup>

The ‘Pothier rule’, as it is known, is not applicable to generic sales, as Dumoulin interpreted the section of the Digest in question in a restrictive manner.<sup>170</sup> As mentioned earlier, the Romans were also not familiar with generic sales.

Pothier’s rule on the manufacturer and merchant seller was not directly taken up in the French Civil Code, but was eventually introduced into French law by the judiciary.<sup>171</sup> The Pothier rule was also incorporated into Roman-Dutch law. It did, however, become part of the South African common law of latent defects, where the rule was not applied uniformly.<sup>172</sup>

## 2.6 English law developments

Initially the English common law rule pertaining to latently defective items sold was based on the maxim Romanists understand as *caveat emptor*. However, the law on latent defects is one of several areas where the English law borrowed from Roman principles.<sup>173</sup> As early as 1844, Story observes that the Roman law on the subject “implies a warranty that the goods sold are merchantable, and fit for the purpose for

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<sup>165</sup> Honoré in Daube 148.

<sup>166</sup> Gordley (2010) *Tulane LR* 1468.

<sup>167</sup> Zimmermann 334.

<sup>168</sup> Gordley (2010) *Tulane LR* 1468.

<sup>169</sup> Zimmermann 335. See 3.5 *infra*.

<sup>170</sup> Honoré in Daube 149.

<sup>171</sup> Gordley (2010) *Tulane LR* 1468.

<sup>172</sup> Zimmermann 335; Lötze & Van der Nest (2001) *De Jure* 233, 243. See 3.5.1 *infra*.

<sup>173</sup> Gordley (2010) *Tulane LR* 1463-1464; Van Warmelo 1; 94.

which they are known to be bought”.<sup>174</sup> Just over three decades later the Court of Common Pleas officially incorporated the Roman principle into English law, again referring to “an implied warranty”.<sup>175</sup>

The concepts ‘implied warranty’ and ‘implied condition’ greatly contributed to the limitation of the *caveat emptor* rule in English law. Both the Roman and English systems attempted to protect the innocent purchaser, but in the former the seller’s liability was based in the mere presence of the defect itself, and in the latter the warranty in favour of the purchaser was the root thereof.<sup>176</sup> A warranty is characterised as an additional agreement reached by the parties during their conclusion of the sale, but it is an inferior, or secondary, agreement to the principal purchase and sale contract.<sup>177</sup> The practical reality of this is that a contract of sale can be concluded without including a warranty, but a warranty cannot be supplied if not done in conjunction with a specific purchase and sale agreement. Breach of warranty only allows for the seller to claim damages, not repudiation (as the principal contract of sale had not been breached) and such breach is equated to malperformance on the part of the seller.<sup>178</sup> This warranty was implied and thus tacitly incorporated into the contract.<sup>179</sup> Where generic goods are sold the test that goods must be fit for their ordinary use, is obviously insufficient and reference should be made to the specified or desired quality in the generic product sold.<sup>180</sup> In English law the justification for the strict liability of the manufacturer is based on the fact that a defect in an item made to the manufacturer’s own strict specifications should be easier to foresee.<sup>181</sup> It can thus be concluded that several similarities between the English and Roman(-Dutch) law on the subject existed, even though these were named and applied differently.

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<sup>174</sup> Story *A treatise on the law of contracts not under seal* (1844) 333, as quoted by Gordley (2010) *Tulane LR* 1464.

<sup>175</sup> *Beer v Walker*, [1877] 46 L.J.Q.B. 677 as cited by Gordley (2010) *Tulane LR* 1464.

<sup>176</sup> Van Warmelo 95.

<sup>177</sup> Van Warmelo 100-101.

<sup>178</sup> Van Warmelo 103, 115, 126-127.

<sup>179</sup> Van Warmelo 101.

<sup>180</sup> Gordley (2010) *Tulane LR* 1464.

<sup>181</sup> Gordley (2010) *Tulane LR* 1468.

## 2.7 Conclusion

During the Roman classical period a purchaser only had a remedy under the *actio empti* in the case of *dolus* – no general remedy for latent defects existed. The remedy originally applied only in instances where defective slaves were sold in the marketplace. By *circa* 199BCE the aedilician actions were instituted, which resulted in a shift to the more equitable position of *respondeat venditor*.<sup>182</sup> By the time of the compilation of the *Corpus Iuris Civilis* the rules regulating latent defects applied to the sale of all things everywhere, but the remedy applied was the *actio empti*.<sup>183</sup> The aedilician actions fell into disuse. The fact that the claim was based on the mere presence of the defect implies a tacit warranty, even though this was not the terminology used by Roman jurists when addressing the matter.<sup>184</sup>

Under the developed Roman-Dutch law the defect in question had to adversely affect the ordinary usefulness of the *merx* before a claim could be instituted. The *actiones redhibitoria* and *quanti minoris* were once more available to the purchaser. The *voetstoots* clause developed, as a concretisation of the Roman concept of the *venditio simplaria*, to allow sellers to contract out of potential liability.<sup>185</sup>

Under Roman-Dutch law sales by merchant seller-manufacturers were more stringently interpreted and the seller's liability was due to the fact that merchant and manufacturing seller vouched for the product and its quality.<sup>186</sup> In terms of the French Pothier rule the liability was based on the foreseeability of the loss if the product were to be faulty, as the insufficient skill displayed by such a merchant seller or manufacturer was viewed as negligence. This differed from the Roman position where damages could only be claimed in cases of *dolus* on the part of the seller.<sup>187</sup> The notion of the English law implied warranty of quality was not one contemporarily known to Roman jurists, though the rules in Roman and English law functioned in a similar fashion.<sup>188</sup>

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<sup>182</sup> See 2.3.2 *supra*.

<sup>183</sup> See 2.3.5 *supra*.

<sup>184</sup> See 2.3.5 *supra*.

<sup>185</sup> See 2.4.3 *supra*.

<sup>186</sup> See 2.4.3 *supra*.

<sup>187</sup> See 2.5 *supra*.

<sup>188</sup> See 2.6 *supra*.

It may be concluded that a latent defect in Dutch law may be described as a defect in the item sold, which affects its functionality and is hidden from both parties at the time of the conclusion of the contract of sale. The injured purchaser could institute either the *actio empti* or the aedilician actions, depending on the severity of the claim or the conduct of the seller. These actions could be instituted regardless of the type of *merx* or where the transaction took place.

The various unexpected influences and the cumulative effect of the Roman, Roman-Dutch, French and English developments in the law on latent defects, as exerted on the South African common law, will be discussed in detail in the next chapter.

## CHAPTER 3 THE DEVELOPMENT OF THE SOUTH AFRICAN COMMON LAW ON LATENT DEFECTS

### 3.1 Introduction

The previous chapter culminates in an exposition of the Roman-Dutch law on latent defects as it had been prior to its acceptance into the South African law. This chapter contains a brief exposition of the development of the South African common law on latent defects as developed by the courts. The slight influence of the Constitution will also be scrutinised. The creation and development of the warranty against latent defects and the *voetstoots* clause prior to the enactment of the Consumer Protection Act will thus be described. The South African legal system as a prime example of the mixed legal system,<sup>189</sup> will also be illustrated in the discussions that follow.

A vast and detailed body of academic work has already been prepared on the warranty against latent defects and *voetstoots* sales in South African law.<sup>190</sup> The purpose of this chapter is not to provide a complete historical exposition on the matter, but rather to highlight key developments in the South African law.

### 3.2 Early development of the common law<sup>191</sup>

In South Africa the aedilician law was initially applied to the sale of determined divisible and indivisible things. This means that the Roman-Dutch requirements were usually applied to the sale of all specified things and applied in all instances, regardless of the nature of the latent defect in the *merx*.<sup>192</sup> It is however interesting to note that one of the very first cases relating to a latent defect decided at the Cape, *De Wet v Manuel*,<sup>193</sup> was based on the sale of a mentally defective slave girl and

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<sup>189</sup> See 2.2 *supra*.

<sup>190</sup> As examples see Barnard (2012) *De Jure* 455-484; Barnard J 357-380; Cornelius (2013) *De Jure* 868-875; Glover (2001) *THRHR* 156-166; Kerr 106-136, 205-219, Lötzt (1992) *De Jure* 148-155; Lötzt in Nagel 223-224; Lötzt & Van der Nest (2001) *De Jure* 219-246; Maleka (2009) *SA Merc LJ* 576-590; Okharedia (2002) *J Jur Sc* 129-144; Otto (2011) *THRHR* 525-545; Van den Bergh (2012) *TSAR* 58-60; Van Warmelo; Zimmermann 305-337; Zimmermann & Visser 77-383.

<sup>191</sup> The following discussion will mainly cite Van Warmelo's extensive exposition of the law in question (*Vrywaring teen gebreke by koop in Suid-Afrika* (LLD dissertation 1941 Leiden)), as his thorough investigation into the South African law on latent defects as developed by our courts between 1830 and the late 1930s remains unmatched.

<sup>192</sup> Van Warmelo 129-131.

<sup>193</sup> 1 M 501 (1830).

here the court applied pure Roman law as found in the *Corpus Iuris Civilis*, instead of its more evolved Roman-Dutch counterpart.<sup>194</sup>

It is further interesting to note that when adjudicating matters related to the sale of horses, the early South African courts relied on the law as had originally been applied in the Dutch provinces, before the Roman influence was observed.<sup>195</sup> The result thereof was that pure Roman-Dutch law on the subject was not always applied. It can therefore be deduced that these early courts applied no logical or uniform procedure to determine which legal rules to apply in cases of latent defects.

Van Warmelo described a general defect as a quality that is not normally present in a specific item, and it is clear that an exposition of what constitutes a *legal* defect is necessary. Roman-Dutch law used the notion of usefulness as a measure to determine whether the quality of a *merx* had been compromised: a defect was said to be present if the ordinary use of the *merx* had been impaired.<sup>196</sup> This principle was adopted as South African law in *Reed Bros. v Bosch*<sup>197</sup> where it was held that a contract should be rescinded if the defect renders the *merx* unfit for the specific purpose it was intended, or if the purchaser would not have concluded the contract had the defect been common knowledge at the time of the negotiation. In an attempt to answer such an enquiry the court should take all evidence into account.<sup>198</sup> Needless to say this test for the presence of a defect is insufficient where a specific item may be used for more than one purpose.<sup>199</sup>

The early South African common law relating to the purpose for which the *merx* was sold, was also influenced by the English principle of the implied condition: where a purchaser proclaims the purpose for which a *merx* is being bought during or before the negotiation phase of the sale and the sale is concluded, the seller will be liable if the *merx* was later found to be unfit for the proclaimed purpose.<sup>200</sup> This condition implied that the *merx* was of a “merchantable” quality, and the Dutch equivalent

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<sup>194</sup> Van Warmelo 131.

<sup>195</sup> See 2.4 *supra*. See 2.4 *supra*.

<sup>196</sup> For a detailed discussion in this regard see Van Warmelo 132.

<sup>197</sup> Van Warmelo 143.

<sup>198</sup> 1914 TPD 578.

<sup>199</sup> *Reed Bros. v Bosch* 1914 TPD 578.

<sup>200</sup> Van Warmelo 144.

<sup>200</sup> Van Warmelo 145.

thereof, “*handelswaar*”,<sup>201</sup> yet again highlights the intricate nature of the South African legal mix.

Van Warmelo argues that too much emphasis was placed on the fact that the defect had to be latent, as this requirement was not applied as stringently in the initial instances where the aedilician actions were applied under Roman law. Here the seller was liable for any defect not expressly declared, whether patent or latent. Only much later did the law evolve to the point where it was not necessary to point out obvious defects during the conclusion of a sale.<sup>202</sup> He continues by describing the South African system as being based on the rule of *caveat emptor*, tempered by the English “implied warranties by law” against latent defects.<sup>203</sup> Where the purchaser is an expert greater care needs to be displayed when the *merx* is inspected and here “ordinary caution” would be insufficient.<sup>204</sup>

Regarding the remedies that could be applied for, it is interesting to note that the Roman prescription periods of six months and one year respectively, were transplanted into the South African application of the *actiones redhibitoria* and *quantum minoris*.<sup>205</sup> Legislation<sup>206</sup> determined that a prescription period of one year should be applied to both actions in the Transvaal.<sup>207</sup> The Roman-Dutch custom of assessing the nature of the defect in order to determine which remedy applied was extended under South African law, resulting in evidence on what the purchaser would have paid had the defect been known, being of far less importance.<sup>208</sup>

Van Warmelo argues that the *actio empti* did not “absorb” the aedilician actions, rather the South African law effectively created a new action which encapsulated the protection granted by these.<sup>209</sup> As in Roman law the South African embodiment of

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<sup>201</sup> Van Warmelo 145 (free translation: suitable for sale).

<sup>202</sup> Van Warmelo 133.

<sup>203</sup> Van Warmelo 133. For a detailed discussion on the nature and origin of the implied warranty see Van Warmelo 147-148 and regarding the general contractual principles on implied terms see Maxwell *Obligations* in Hutchinson & Pretorius 242-244.

<sup>204</sup> Van Warmelo 136.

<sup>205</sup> Van Warmelo 150. For a discussion on the purchaser becoming aware of the defect and the effect of such knowledge on the prescription running, see Van Warmelo 152-153, specifically fn 49.

<sup>206</sup> S 3 of An Act to Amend the Law relating to Prescription 26 of 1908.

<sup>207</sup> Van Warmelo 153-154.

<sup>208</sup> Van Warmelo 150-151.

<sup>209</sup> Van Warmelo 155. For a further exposition of the application of these remedies see 3.3.4 & 3.3.5 *infra*.

the *actio empti* was based on good faith and it would therefore succeed in the presence of fraud on the part of the seller.<sup>210</sup> The concept of fraud was widely interpreted,<sup>211</sup> but it did not include a *bona fide* omission or innocent misrepresentation.<sup>212</sup> The crystallised rule seemed to be that the *actio empti* applied where express warranties or representations related to the *merx* were made and the aedilician actions applied in cases of implied warranties.<sup>213</sup>

After an evaluation of the early South African common law, as it was applied between 1830 and 1940, it may be concluded that the South African law of purchase and sale of that period contained a duty to guarantee or indemnify against latent defects in items sold. The defect in question must be latent in nature and the test for such latency is whether the defect would not normally have been discovered upon inspection.<sup>214</sup> Determining the presence of a defect could be achieved by asking questions related to the merchantability of the *merx*, whether it was suited for its ordinary purpose and whether it was suited to the specific purpose for which it was purchased. After carefully assessing all the evidence the court then decided which remedy was available to the purchaser in each instance.<sup>215</sup>

The discussion subsequently reverts to more recent developments in the law on defective goods sold. Due to the significant developments in this area of the law from the 1940s onwards, the discussion will investigate and set out individual facets of the law rather than taking on a chronological format.

### **3.3 An exposition of the common law on latent defects prior to the enactment of the Consumer Protection Act**

This section will set out the common law as currently applicable in instances where the CPA does not apply.<sup>216</sup> The law discussed will be set out in various sub-sections before being analysed collectively.

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<sup>210</sup> Van Warmelo 156.

<sup>211</sup> Van Warmelo 158.

<sup>212</sup> Van Warmelo 161.

<sup>213</sup> Van Warmelo 159, 161; see 3.3.2 & 3.3.5 *infra*.

<sup>214</sup> Van Warmelo 161.

<sup>215</sup> Van Warmelo 161-162.

<sup>216</sup> See 3.3.5.3 *infra* where the relationship between the CPA and the common law is expounded.



### 3.3.1 Defining a 'latent defect'

The *locus classicus* in the South African law on the definition of a latent defect is the case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co (Pty) Ltd*.<sup>217</sup> In this case the plaintiff supplied bricks to the defendant that were excessively efflorescent and crumbed due to the fact that the bricks contained harmful quantities of magnesium sulphate. The Appellate Division<sup>218</sup> held that the bricks were defective. The court defined a defect as “an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used.”<sup>219</sup> Lötz states that this is the most commonly accepted definition of a latent defect.<sup>220</sup> Unfortunately, this relatively concise definition causes the concept of a latent defect to seem deceptively elementary. Kerr provides a broader description:

“In my view a taint in the article purchased can only be described as a defect giving rise to a legal action by the purchaser if it is shown that such taint is of a type or nature which a reasonable man would not expect to exist in other articles of substantial identity with the article purchased...All that a purchaser of an article is entitled to expect is that the article shall be free from such latent defects as are not to be expected in an article of that quality, price and type, unless he obtains a warranty in expressly wider terms.”<sup>221</sup>

Here Kerr provides a description which more effectively highlights the complexities related to defining a latent defect. These complexities are apparent when the latency of the defect and the notion of a defect itself, is magnified.

Kerr states that any imperfection may be labelled a defect, but not all defects fall within the ambit of the aedilician actions.<sup>222</sup> In *Dibley v Furter*<sup>223</sup> the court makes reference to “redhibitory defects”.<sup>224</sup> When determining whether or not an

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<sup>217</sup> 1977 (3) SA 670 (A).

<sup>218</sup> The Appellate Division was renamed in 1996 and is currently referred to as “the Supreme Court of Appeal” (ss 166(b) & 168 of the Constitution).

<sup>219</sup> 683H.

<sup>220</sup> Lötz in Zimmermann & Visser 377 fn 116. This is certainly true, as virtually all cases on the matter quote this definition authoritatively.

<sup>221</sup> Kerr 118.

<sup>222</sup> Kerr 116.

<sup>223</sup> 1951 (4) SA 73 (C).

<sup>224</sup> 82D.

inadequacy is an aedilician (or redhibitory) defect,<sup>225</sup> cognisance must be taken of the class of goods into which the *merx* falls, as well as the purpose for which the *merx* was sold, of which both parties are deemed to be aware.<sup>226</sup> The purpose of the sale could be expressly communicated by the purchaser before the sale is concluded, but the context in which the sale takes place could often be sufficient indication thereof.<sup>227</sup> The “ordinary” or “common” use of a type or class of item can also be taken into consideration.<sup>228</sup>

The defect should be distinguishable as affecting the utility of the *merx*. Only substantial defects would qualify as latent defects and the nature and affected utility of the *merx* should be determined objectively. The defect should be present at the time of conclusion of the contract and the purchaser is burdened with this duty of proof.<sup>229</sup> It is of paramount importance that the purchaser should not have any knowledge of the defect at that time.<sup>230</sup>

The difference between latent and patent defects is that latent defects, unlike patent defects, cannot be readily observed or discovered by a diligent person. The latency of the defect is determined by the nature thereof.<sup>231</sup> Lötz and Van der Nest make reference to the fact that “it is just as likely [for the defect] not to be discovered as it is to be discovered, where in half the cases it will be discovered.”<sup>232</sup> The test for latency could be formulated as follows: would the reasonable person, who is not an expert but rather someone with an average intellect,<sup>233</sup> have detected the defect upon examining the *merx* without being exceptionally thorough?<sup>234</sup> This is an objective test which evaluates the usefulness of the *merx* and requires no expert knowledge on the part of the purchaser.<sup>235</sup>

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<sup>225</sup> For a discussion of the instances where the aedilician actions do not apply see 3.3.5 *infra*.

<sup>226</sup> Kerr 117 fn 107.

<sup>227</sup> Kerr 119-120; see *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) SA 344 (A) regarding the purpose of the sale.

<sup>228</sup> Kerr 120.

<sup>229</sup> Lötz in Nagel 223; Barnard (2012) *De Jure* 456-457.

<sup>230</sup> Lötz in Nagel 223; *Waller v Pienaar* 2004 (6) SA 303 (C) 307E.

<sup>231</sup> Lötz in Nagel 223.

<sup>232</sup> Lötz & Van der Nest (2001) *De Jure* 226, quoting from *Zieve v Verster* 1918 CPD 296.

<sup>233</sup> Lötz & Van der Nest (2001) *De Jure* 226.

<sup>234</sup> Lötz in Nagel 223.

<sup>235</sup> Barnard (2012) *De Jure* 457.

Several definitions of latent defects exist, none of which are incorrect. I however believe Lötz's definition to be the most complete, without being overly complicated. He defines a latent defect as

“a defect in the thing sold which is of such a nature that it renders it unfit for the purpose for which it was bought or for which it is normally used, and which defect was not known to the buyer at the time of conclusion of the contract, and could not be discovered by him upon a reasonable examination of the thing sold”.<sup>236</sup>

### 3.3.2 The warranty by operation of law and the contractual warranty

For the purposes of this dissertation, a warranty, in the strict sense, is understood as a contractual undertaking that a state of affairs exists, or that a state of affairs will exist in the future.<sup>237</sup> One of the duties of the seller, as party to the contract of purchase and sale,<sup>238</sup> is to provide a warranty against latent defects in the *merx* either by *naturalia* or *incidentalia*.<sup>239</sup> When the warranty is included contractually (thus as *incidentalia*) it can be done expressly or tacitly.<sup>240</sup> The purchaser's claim and remedy is influenced by the type of warranty provided.<sup>241</sup> An implied warranty against latent defects, which applies automatically by operation of law, forms part of every contract of sale, unless specifically excluded by a *voetstoots* clause.<sup>242</sup> Where such an implied warranty has been provided by the seller, as a result of it not being expressly excluded from the agreement, the two aedilician actions may be instituted, but the purchaser is not entitled to claim damages<sup>243</sup> with these.<sup>244</sup>

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<sup>236</sup> Lötz in Nagel 223.

<sup>237</sup> Sharrock in Visser 571. The complexity of defining a warranty has been illustrated in great depth by Okharedia ((2002) *J Jur Sc* 130). For the purposes of this discussion on the South African common law a warranty will be understood as depicted by Sharrock.

<sup>238</sup> The other duties of the seller are taking care of the *merx* prior to delivery thereof; delivery of ownership to the purchaser and warranting the purchaser against eviction (Lötz in Nagel 210).

<sup>239</sup> Lötz in Nagel 222; Barnard (2012) *De Jure* 456. For a detailed discussion of the *naturalia*, *essentialia* and *incidentalia* of the South African contract in general see Maxwell *Obligations* in Hutchinson & Pretorius 235-236.

<sup>240</sup> Lötz in Nagel 222; Otto (2011) *THRHR* 528; Barnard (2012) *De Jure* 457.

<sup>241</sup> Lötz in Nagel 222; Barnard (2012) *De Jure* 456.

<sup>242</sup> *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) 202E-F; Lötz in Nagel 223; Hawthorne & Kuschke in Hutchinson & Pretorius 402; Otto (2011) *THRHR* 528.

<sup>243</sup> For a discussion of what the aggrieved party may claim when instituting the aedilician actions see 3.3.5.1 and 3.3.5.2 *infra*.

<sup>244</sup> Lötz in Nagel 223.

To determine whether an additional tacit warranty was given by the seller, the court will evaluate the facts and circumstances of the case and evidence brought by both parties.<sup>245</sup> Once the existence of a tacit warranty has been deduced on a balance of probabilities it will be acknowledged and enforced, as in the case of *Minister van Landbou-Tegniese Dienste v Scholtz*.<sup>246</sup> Here the appellant claimed cancellation of the contract of sale in terms of which a Simmentaler bull was purchased from the respondent.<sup>247</sup> The seller was aware of the fact that the bull was purchased exclusively for breeding purposes.<sup>248</sup> It transpired that the bull was infertile and consequently the appellant instituted the *actio redhibitoria* based on breach of the implied warranty that the bull was in fact fertile.<sup>249</sup> The Appellate Division found in favour of the appellant, declaring that the seller had provided such a tacit warranty (the court also refers to an implied consensual warranty),<sup>250</sup> as both parties were aware that the purchaser wanted to acquire a “normal, healthy and fertile bull”.<sup>251</sup> Courts will take all relevant information and circumstances into account when making a determination on the presence of an implied or tacit term.

The seller can also warrant specific qualities in the *merx* by means of a *dictum et promissum*, which guarantees the presence of good qualities or the absence of bad qualities in the *merx*.<sup>252</sup> Where the specifically guaranteed qualities are not present in the *merx* the remedy available to the purchaser is the *actio empti*, with which cancellation of the contract as well as consequential damages may be claimed due to breach of contract.<sup>253</sup>

### 3.3.3 Guarantees distinguished from misrepresentations and sales talk

It is important to distinguish contractual guarantees from misrepresentations and sales talk. A fraudulent, negligent or innocent misrepresentation may be defined as a false declaration “which is made within or out of contractual context”.<sup>254</sup> If the

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<sup>245</sup> Lötz in Nagel 224.

<sup>246</sup> 1971 (3) SA 188 (A).

<sup>247</sup> *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) 200B.

<sup>248</sup> 200C-D.

<sup>249</sup> 197E-G.

<sup>250</sup> 202G.

<sup>251</sup> 194C, 202F-G.

<sup>252</sup> Lötz in Nagel 224.

<sup>253</sup> Lötz in Nagel 224; Barnard (2012) *De Jure* 457. Here the seller's liability is based in the breach of warranty (Otto (2011) *THRHR* 529).

<sup>254</sup> Lötz in Nagel 224.

misrepresentation is included in the contract in the form of a contractual clause, the injured party is entitled to the standard contractual remedies for breach of contract.<sup>255</sup> If an intentional or negligent misrepresentation is made out of contractual context, and all the other requirements for delictual liability are present, the injured party may institute an action for damages based on delictual liability.<sup>256</sup> In the case of an innocent misrepresentation the injured party is entitled to the aedilician actions.<sup>257</sup> The right of rescission based on innocent misrepresentation seems to originate from the English law, rather than the Roman-Dutch law.<sup>258</sup>

Sales talk therefore amounts to praising declarations, aimed at marketing the *merx*, and these declarations represent the seller's opinion, which is "neither a guarantee nor a misrepresentation."<sup>259</sup> Lötz states that if the declarations turn out to be false the purchaser is not entitled to take action against the seller.<sup>260</sup> However, this is not the case where the seller is a merchant seller or a manufacturing seller.<sup>261</sup>

### 3.3.4 The *actio empti*

Compliant with the general principles of South African contract law, the *actio empti* may be instituted in instances of breach of contract or misrepresentation.<sup>262</sup> The judicial developments in the law applicable to instances of latent defects are not in conflict with the fundamental principles of the South African law on claims for damages due to breach of contract.<sup>263</sup>

As under Roman law, this remedy can be instituted where the defect in the *merx* is of such a severe nature that the purchaser cannot logically be expected to keep the faulty item.<sup>264</sup> Under these circumstances the purchaser may claim cancellation of the contract, as well as consequential damages incurred due to the breach of

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<sup>255</sup> Lötz in Nagel 224.

<sup>256</sup> *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) 567I-J; Lötz in Nagel 224.

<sup>257</sup> Lötz in Nagel 224.

<sup>258</sup> Lötz in Zimmermann & Visser 378.

<sup>259</sup> Lötz in Nagel 224.

<sup>260</sup> Lötz in Nagel 224.

<sup>261</sup> For a detailed discussion see 3.5 *infra*.

<sup>262</sup> Lötz in Zimmermann & Visser 378.

<sup>263</sup> Lötz in Zimmermann & Visser 377.

<sup>264</sup> See 2.3.3 *supra*.

contract.<sup>265</sup> Lötz identifies four grounds for the institution of the *actio empti* under the developed South African common law:

“Where the seller provides the purchaser with an express or tacit contractual warranty against latent defects and these defects are in fact present; where the seller provides the purchaser with an express or a tacit warranty that certain virtuous characteristics are present in the *merx* or that certain negative characteristics are absent, and such claims are untrue; where the seller conceals a latent defect; and where the seller is a dealer or manufacturer”.<sup>266</sup>

Under the first two warranties the *merx* in question is bought for a specific purpose, of which the purchaser has notified the seller. If the seller then sells the *merx* to the purchaser she is deemed to have provided a tacit warranty to the purchaser that the item in question is in fact suited for the specifically disclosed purpose.<sup>267</sup>

Instances where the seller conceals a latent defect should be evaluated in more detail. The seller is obliged to disclose the existence of any latent defects she is aware of to the purchaser.<sup>268</sup> A fraudulent misrepresentation is thus made if the seller deliberately conceals such a defect. Again, cancellation of the contract, along with consequential damages, may be claimed from the seller.<sup>269</sup> No general duty to disclose rests on the seller, but this situation changes when the relevant information falls within the exclusive knowledge of the seller and “knowledge and honesty in the circumstances requires disclosure.”<sup>270</sup>

In *Waller v Pienaar*<sup>271</sup> the court provided the test for a seller’s duty to disclose the existence of a defect.<sup>272</sup> The test consists of the following three questions:

- (1) “Were the defects as pleaded, latent defects?”

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<sup>265</sup> Lötz in Nagel 226. This was confirmed in several Appellate Division cases: *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha* 1964 (3) SA 561 (A); *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

<sup>266</sup> Lötz in Nagel 224-226. See also Lötz in Zimmermann & Visser 378.

<sup>267</sup> Lötz in Nagel 225.

<sup>268</sup> Lötz in Nagel 225.

<sup>269</sup> Lötz in Nagel 225; Christie & Bradfield 307; Otto (2011) *THRHR* 528-529.

<sup>270</sup> Lötz in Nagel 225.

<sup>271</sup> 2004 6 SA 303(C).

<sup>272</sup> The extent of this duty has also been evaluated by the Appellate Division in *Van der Merwe v Meades* 1991 2 SA 1 (A).

- (2) Were [the] defendants aware of the alleged defects at the time of sale and, if so, were they under a duty to disclose these to plaintiffs?
- (3) If the answer to 2 above is in the affirmative, did [the] defendants fraudulently conceal the defects and/or falsely misrepresent to plaintiffs that there were no defects, with the intention of inducing them to buy the property and under circumstances where they had a duty to disclose the alleged defects?<sup>273</sup>

Public policy dictates whether a legal duty to disclose exists. Several factors may be considered, such as whether or not the seller is the only person that knows about the defect; whether any extraordinary circumstances or facts apply to the matter or the *merx*; or where the seller's own prior representations were ambiguous or incomplete and the furnishing of further information is required.<sup>274</sup> In contracts of sale there is thus a duty on the seller to disclose latent defects of which she is aware, but what little authority is available on the matter indicates that a *purchaser* is entitled to remain silent when she, but not the seller, is aware of facts that substantially increase the value of the *merx*.<sup>275</sup>

The presence of a *voetstoots* clause in the contract in question will not protect the seller against liability where she knew of said defect when concluding the contract.<sup>276</sup>

### 3.3.5 The aedilician actions

The aedilician actions<sup>277</sup> are available to the purchaser where a latent defect is present in the thing sold and no express or tacit contractual warranty was provided by the seller during the contractual negotiations.<sup>278</sup> In 1949 the Appellate Division declared that the *actiones redhibitoria* and *empti* had “merged”,<sup>279</sup> but subsequent decisions by the same court disregarded this statement.<sup>280</sup> In *Phame (Pty) Ltd v*

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<sup>273</sup> 309G-310A.

<sup>274</sup> Lötzt *et al* 63.

<sup>275</sup> See Christie & Bradfield 288 for a detailed exposition in this regard.

<sup>276</sup> Lötzt in Nagel 225. For a detailed discussion of the *voetstoots* clause and its application see 3.4 *infra*.

<sup>277</sup> The *actiones redhibitoria* and *quantum minoris*.

<sup>278</sup> *Truman v Leonard* 1994 (4) SA 371 (SE) 373G-H; Otto (2011) *THRHR* 529; Barnard (2012) *De Jure* 458. See 3.3.2 *supra*.

<sup>279</sup> *Hackett v G & G Radio & Refrigeration Corporation* 1949 3 SA 664 (A) 685. Also see Kerr 108 fn 22.

<sup>280</sup> Kerr 108.



*Paizes*<sup>281</sup> it was held that the aedilician actions are both available in modern law and that the distinct application of these Roman-Dutch remedies can be preserved and simultaneously be adapted to the modern South African situation.<sup>282</sup>

The aedilician edict specifically refers to the *time* of the sale, which means that the actions are not allowed if the *merx* was defective prior to the sale, but sound at the time thereof.<sup>283</sup> The same applies if the *merx* only became defective after the sale. Whether or not a disease or defect is present in the *merx* is a question of fact and the related onus of proof lies with the purchaser.<sup>284</sup> It may be inferred<sup>285</sup> that the defect existed at the time of the sale if it is discovered or it manifests shortly after delivery, though the purchaser need not prove that the defect was ostensible at the time of sale.<sup>286</sup> Proving that the beginning of a defect or disease was present at the time of sale is adequate.<sup>287</sup>

Lötz provides for four instances in which the actions may be instituted: Most obviously, where a latent defect is present in the *merx*; where the seller fraudulently concealed a latent defect;<sup>288</sup> where the seller expressly or tacitly guaranteed the presence of desirable and/or the absence of undesirable characteristics in the *merx*;<sup>289</sup> and where the seller made a false *dictum et promissum* to the purchaser.<sup>290</sup>

In *Phame (Pty) Ltd v Paizes* it was held that the *actiones redhibitoria* and *quantii minoris* are available to the purchaser “if the seller made a *dictum et promissum* to the buyer on the faith of which the buyer entered into the contract or agreed to the price in question; and it turned out to be unfounded”.<sup>291</sup> Here a *dictum et promissum* is outlined as “a material statement made by the seller to the buyer during the

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<sup>281</sup> 1973 3 SA 397 (A).

<sup>282</sup> 419H-420A.

<sup>283</sup> Kerr 114-115 (own emphasis).

<sup>284</sup> Kerr 115.

<sup>285</sup> Circumstances depending.

<sup>286</sup> Kerr 115; Barnard (2012) *De Jure* 458.

<sup>287</sup> Kerr 115.

<sup>288</sup> In this instance instituting the *actio empti* would be more beneficial, as consequential damages could also be claimed.

<sup>289</sup> Here the *actio empti* would again provide more comprehensive recourse.

<sup>290</sup> LötZ in Nagel 226-227. A discussion of the *dictum et promissum* in the case of *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C) is provided at 3.3.5.5 *infra*.

<sup>291</sup> 417.



negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation”.<sup>292</sup>

The two aedilician actions will now be evaluated in detail and aspects of the application of these actions will be provided.

### 3.3.5.1 *The actio redhibitoria*

The purpose of the *actio redhibitoria* is to return both parties to the position they were in before the contract was concluded and therefore restitution has to take place. The purchaser may reclaim the purchase price paid and the seller may reclaim the *merx*; this action can obviously only be instituted once.<sup>293</sup> The action may only be instituted if the defect in question is of such a nature that restitution is justified,<sup>294</sup> the test being whether the *merx* can be used for the purpose for which it was bought.<sup>295</sup> This action allows the purchaser to claim “the return of the purchase price, plus interest and compensation for the reasonable expenses incurred in connection with the delivery, preservation, and maintenance”<sup>296</sup> of the *merx* and the purchaser has to restore the *merx*, the fruits thereof and all accessory things to the seller.<sup>297</sup> As a general rule the purchaser cannot institute this action if it is impossible to return the *merx*, although the *actio quanti minoris* would still be at her disposal.<sup>298</sup> There are however exceptions to this rule, circumstances depending.<sup>299</sup>

The ownership in the *merx* passes to the purchaser as a result of the conclusion of the contract of sale, resulting in the purchaser’s right to deal with the *merx*.<sup>300</sup> If the *merx* depreciates or weakens in the hands of the purchaser while she is using it in a reasonable manner or testing it, the resultant reduction in value must be endured by the seller, as this does not disqualify restitution.<sup>301</sup> If restitution is ordered and the

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<sup>292</sup> 418; Lötz in Zimmermann & Visser 381. For a detailed discussion, and severe criticism, of this judgment see Lötz in Zimmermann & Visser 381 fn 148.

<sup>293</sup> Lötz in Nagel 227.

<sup>294</sup> Otto (2011) *THRHR* 529.

<sup>295</sup> *De Vries v Wholesale Cars* 1986 (2) SA 22 (O) 25G-I.

<sup>296</sup> Lötz in Zimmermann & Visser 380.

<sup>297</sup> Lötz & Van der Nest (2001) *De Jure* 230.

<sup>298</sup> See also Lötz in Zimmermann & Visser 380.

<sup>299</sup> See Lötz in Zimmermann & Visser 380-381; Christie & Bradfield 302.

<sup>300</sup> Kerr 6.

<sup>301</sup> Kerr 121.

purchaser has caused deterioration in a manner unrelated to the defect in question, the purchaser must compensate the seller for such deterioration.<sup>302</sup>

The *actio redhibitoria* may also be instituted by the purchaser if the *merx* is sold *adversus quod dictum promissumve*,<sup>303</sup> regardless of whether the *merx* is defective.<sup>304</sup> In *Phame (Pty) Ltd v Paizes*,<sup>305</sup> Holmes JA explained this by stating that the seller made a “material statement”<sup>306</sup> to the purchaser “upon the faith of which the [purchaser] entered into the contract or agreed to the price in question and [the statement in question] turned out to be unfounded.”<sup>307</sup>

When instituting the action in question for defects present in goods that still need to be separated<sup>308</sup> different requirements for the institution of the action apply.<sup>309</sup> Barnard states that the purchaser “may reclaim the purchase price, interest and compensation for the reasonable expenses incurred in connection with the delivery, preservation and maintenance of the thing sold.”<sup>310</sup>

The *exceptio redhibitoria* is the seller’s remedy in the case where the purchaser claims restitution.<sup>311</sup> The seller may claim payment of the purchase price and reimbursement equal to the value of the *merx* that was used to the purchaser’s benefit before the discovery of the defect.<sup>312</sup>

### 3.3.5.2 *The actio quanti minoris*

In practice instituting the *actio quanti minoris* is not as cut and dry an issue as is that of the *actio redhibitoria*. A general description of the purpose and application of the action will be followed by an exposition of the more problematic aspects thereof.

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<sup>302</sup> Kerr 122.

<sup>303</sup> “[I]n contravention of what was stated and promised” (Kerr 124 fn 170). This means that a false *dictum et promissum* was supplied by the seller.

<sup>304</sup> Kerr 124.

<sup>305</sup> 1973 3 SA 397 (A).

<sup>306</sup> 418A.

<sup>307</sup> 417H-418A.

<sup>308</sup> Barnard provides examples of these: potatoes or corn that still have to be weighed and bagged (Barnard J 366).

<sup>309</sup> Barnard J 366.

<sup>310</sup> For a detailed discussion see Barnard J 366.

<sup>311</sup> Kerr 126.

<sup>312</sup> Kerr 126. For an instance of the use of this term see *Schwarzer v John Roderick’s Motors (Pty) Ltd* 1940 OPD 170 186.

The purchaser may claim a *pro rata* reduction of the purchase price, while retaining the *merx*, by instituting the *actio quanti minoris*.<sup>313</sup> It is possible for the same circumstances to give rise to both an *actio redhibitoria* as well as an *actio quanti minoris* and in such instances the purchaser may choose which action is more beneficial to her under the circumstances, either full restitution or keeping the *merx* and reclaiming a portion of the purchase price tendered.<sup>314</sup> It is important to note that once one of these actions is instituted “the matter becomes *res judicata* and the other cannot subsequently be brought”, unless another defect is discovered.<sup>315</sup> In *Truman v Leonard*<sup>316</sup> it was also held that if more latent defects appear after the first claim, the *actio quanti minoris* may be instituted again.

The purchaser is also entitled to institute the *actio empti*, in the alternative the *actio redhibitoria*, and in the further alternative the *actio quanti minoris*. It is possible that on the facts of a specific case the defect, disease or what has been promised with regards to the *merx*, is not significant or severe enough to justify instituting the *actio redhibitoria*, but that the defect is not trivial enough to ignore, and here the *actio quanti minoris* applies:<sup>317</sup>

“By our law a person is not compelled to take something substantially and materially different from that which he purchased, but if the difference is infinitesimal he must take what he buys and be content with a reduction in price.”<sup>318</sup>

Cornelius states that for a claim based on this action to succeed it must be proved that the defect was present in the *merx* at the time of the conclusion of the contract, as well as the precise amount by which the purchase price paid should be reduced.<sup>319</sup> It is trite law that the purpose of the action in question is to allow the purchaser to reclaim a portion of the purchase price, but determining the *portion* of the price in question is not as straightforward.

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<sup>313</sup> Lötz in Nagel 227; Lötz in Zimmermann & Visser 380; Otto (2011) *THRHR* 529; *McDaid v De Villiers* 1942 CPD 220, 225. Also see *Van der Merwe v Meades* 1991 2 SA 1 (A) 3D-E; Barnard (2012) *De Jure* 458; Kerr 129; & 2.3.4 *supra*.

<sup>314</sup> Kerr 127; Otto (2011) *THRHR* 529.

<sup>315</sup> Kerr 127.

<sup>316</sup> 1994 (4) SA 37 (SE).

<sup>317</sup> Kerr 127; Barnard 368.

<sup>318</sup> *Douglass v Dersley* 1917 EDL 221, 229 as cited in Kerr 127.

<sup>319</sup> Cornelius (2013) *De Jure* 868.

Since the early 20<sup>th</sup> century South African courts deemed the amount recoverable with the *actio quanti minoris* as the difference between the price paid to the seller and the “actual value” of the *merx*.<sup>320</sup> This “actual value” refers to the value of the *merx* at the time of the sale<sup>321</sup> and not at the time of instituting the action or hearing the matter. Kerr states that the date applicable to such a calculation “has been a contentious matter, but that the majority of judicial opinions in this regard use the date of the *sale* as the relevant date when determining this elusive value.”<sup>322</sup> This statement seems correct and has not been contested in recent years.

The debate regarding the determination of the “true value” of the defective *merx* has however been ongoing since the publication of De Groot’s *Inleydinge tot de Hollandsche rechtsgeleertheit*<sup>323</sup> and remains a topical dilemma to this day.<sup>324</sup> In this regard South African courts have suggested several methods over the years.

In instances where a market price for items of the same quality of that which was delivered by the seller exists, such evidence may be lead to assist the court in its determination of the quantum of the claim.<sup>325</sup> When this method of calculation is applied, evidence must be lead on the time, the place and the specific *merx* being sold.<sup>326</sup> The market value in question must be understood as the “[market value of the] *merx* in its deficient state”.<sup>327</sup> In instances where a group of items sold for a collective price made up the *merx*,<sup>328</sup> the combined or collective market value of the group of items (as one *merx*) must be established, regardless of the number of items that are defective.<sup>329</sup>

In reference to various judgments<sup>330</sup> Cornelius further highlights that the notion of the market is also complex and misleading. Where it is not possible to determine the value of the defective *merx* on the theoretical public market, or the applicant cannot

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<sup>320</sup> *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 413.

<sup>321</sup> Kerr 129.

<sup>322</sup> Kerr 133; Barnard 368 (own emphasis). For a more detailed discussion in this regard please see Kerr 131-133.

<sup>323</sup> Otto (2011) *THRHR* 529; Cornelius (2013) *De Jure* 871.

<sup>324</sup> Kerr 130.

<sup>325</sup> Kerr 129; Cornelius (2013) *De Jure* 872.

<sup>326</sup> Cornelius (2013) *De Jure* 872.

<sup>327</sup> *Ranger v Wykerd* 1977 2 SA 976 (A) 999A, as quoted by Cornelius (2013) *De Jure* 872.

<sup>328</sup> Examples include a flock of sheep or a case of wine.

<sup>329</sup> Cornelius (2013) *De Jure* 872-873.

<sup>330</sup> *Katzenellenbogen Ltd v Mullin* [1977] 4 All SA 818 (A) 878E; *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) SA 344 (A) 352B.

provide any evidence to support or calculate such a value, the duty to determine this value falls on the judge as valuator.<sup>331</sup> The court should thus employ a reasonable method to arrive at this value fairly. Another problematic aspect is the fact that the market value of a certain item could constantly be influenced by supply and demand in a specific market, as well as the impact of successful marketing campaigns. Here an attempt should be made to determine the true value to which these fluctuating values seem to always return.<sup>332</sup> The term “current value” as opposed to “market value” is also preferential as this does not conjure up the notion of a public market, but rather implies any establishment or individual the purchaser might have approached to replace the defective *merx* originally purchased.<sup>333</sup>

In light of these stumbling blocks and related suggestions Cornelius defines the market value as

“the price which the defective product would reasonably have attained at the time and place when the actual sale was concluded, where a willing seller and willing buyer who was aware of the defects, entered into a putative contract of purchase and sale in respect of the defective thing.”<sup>334</sup>

The Appellate Division has also enquired as to the “appropriate yardstick” which must be supplied to the court in order to make such a fair valuation.<sup>335</sup> Various options exist in this regard and the nature and facts of the matter will dictate the courts’ approach. Cornelius lists expert valuations; industry standards; appraisals provided by dealers who are experienced traders of the item in question; the actual value the seller acquired when disposing of the item in question, or similar items; sales records on similar items; as well as the value of the deficit.<sup>336</sup>

In *Phame (Pty) Ltd v Paizes*<sup>337</sup> it was ruled that the precise price reduction claimable is calculated by determining the difference between the purchase price and the *true value* of the *merx*, as it is with the latent defect,<sup>338</sup> at the time of the sale.<sup>339</sup> Otto

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<sup>331</sup> Cornelius (2013) *De Jure* 873.

<sup>332</sup> Cornelius (2013) *De Jure* 873-874.

<sup>333</sup> Cornelius (2013) *De Jure* 873.

<sup>334</sup> Cornelius (2013) *De Jure* 874.

<sup>335</sup> *Katzenellenbogen Ltd v Mullin* [1977] 4 All SA 818 (A) 825.

<sup>336</sup> Cornelius (2013) *De Jure* 875.

<sup>337</sup> 1973 (3) SA 397 (A) 420F-G.

<sup>338</sup> *Ranger v Wykerd* 1977 2 SA 976 (A) 999A as quoted by Cornelius (2013) *De Jure* 872.

favours this method of quantifying the amount payable to the purchaser.<sup>340</sup> In the recent case of *Banda v Van der Spuy*<sup>341</sup> the Supreme Court of Appeal again quantified a claim in terms of the *actio quanti minoris*, but Swain AJA made no reference to the then Appellate Division's decision in the *Phame* case.

In the *Banda* case the appellants purchased a house from the defendants and subsequently claimed a reduction in the purchase price, due to a leaking thatch roof caused by two separate structural errors present in the building.<sup>342</sup> Furthermore, proof of fraud on the part of the respondents was also provided, as the contract of sale contained a *voetstoots* clause.<sup>343</sup> The fraudulent act proved in *casu* was the respondents' failure to disclose the existence of a defect in the *merx* of which they were aware at the time of concluding the transaction.<sup>344</sup>

In *Banda* the method to determine the actual value of the *merx* use by the court was to deduct the amount payable at the time of the conclusion of the contract, for repairs to the roof, from the purchase price paid. Only the reasonable costs of repair will be considered in this regard.<sup>345</sup> Issues arising out of this method of quantification relates to rectifying any related deterioration therein as a measure to assist the court.<sup>346</sup>

Cornelius questions the notion of using the price of the repairs made to determine what the purchase price would have been if the purchaser was aware of the defect. The purpose of the *actio quanti minoris* is not to place the purchaser in the theoretical possession she would have been if there were no defect present in the *merx*: the only relief that may be sought is a reduction in the purchase price.<sup>347</sup> If contractual damages are claimed due to positive malperformance, the purchaser may be placed in the patrimonial position she would have been if the *merx* contained

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<sup>339</sup> Own emphasis. See also Lötz in Zimmermann & Visser 380.

<sup>340</sup> Otto (2011) *THRHR* 529-530.

<sup>341</sup> 2013 4 SA 77(SCA).

<sup>342</sup> *Banda v Van der Spuy* 2013 4 SA 77(SCA) 79F-I.

<sup>343</sup> Cornelius (2013) *De Jure* 868.

<sup>344</sup> *Banda v Van der Spuy* 2013 4 SA 77(SCA) 83A-G.

<sup>345</sup> Kerr 130.

<sup>346</sup> *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) SA 344 (A) 352E. See also Lötz in Zimmermann & Visser 380 fn 139; Barnard (2012) *De Jure* 458.

<sup>347</sup> Cornelius (2013) *De Jure* 870.

no defect. By reducing the purchase price by the amount the actual repairs cost the purchaser is effectively granted an amount equal to the value of the damage.<sup>348</sup>

The cost of actual repairs is not a yardstick often employed by our courts when quantifying a claim in terms of the *actio quanti minoris*.<sup>349</sup> It is, however, not a practice that is unjust and if no other method of determining the true value of the defective *merx* exists, this method is justified.<sup>350</sup> It can thus be deduced that the law on the matter of quantum and the *actio quanti minoris* is highly flexible and adapts to the circumstances of each case with great ease.

It is interesting to note that the *exceptio quanti minoris* is also available to the purchaser if she is entitled to institute the relating *actio*.<sup>351</sup> Instituting either the *actio quanti minoris* or the *exceptio quanti minoris* would afford the purchaser the same rights to performance and the outcome of the two remedies are thus identical.<sup>352</sup> It may be assumed that these two remedies originally had slightly varying applications and purposes, but that this distinction fell away over time.

### 3.3.5.3 *Exceptions to the actions*

Lötz provides six instances in which the aedilician actions may not be instituted: If the defect in the *merx* arose after the conclusion of the contract;<sup>353</sup> if the defect in question was not latent in nature; in the case of a *voetstoots* sale; if the latent defect was repaired by the seller before the contract was concluded; if the purchaser waives the right to institute the *actio empti* or the aedilician actions;<sup>354</sup> and prescription of the claim.<sup>355</sup> Kerr provides additional reasons for the aedilician actions not applying: the nature of the transaction;<sup>356</sup> where assisting the purchaser

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<sup>348</sup> Cornelius (2013) *De Jure* 870.

<sup>349</sup> Cornelius (2013) *De Jure* 875.

<sup>350</sup> Cornelius (2013) *De Jure* 875.

<sup>351</sup> Kerr 133.

<sup>352</sup> Kerr 134.

<sup>353</sup> The purchaser bears the onus of proving that the defect was indeed present at the time the contract was concluded (Lötz in Nagel 228).

<sup>354</sup> A waiver constitutes “the deliberate abandonment of an existing legal right by the right holder acting with full knowledge of the right” and such waivers are not accepted easily by our courts, as the seller should prove the waiver on a balance of probabilities (Lötz in Nagel 228).

<sup>355</sup> LötZ in Nagel 228.

<sup>356</sup> Here three examples are provided: where the sale is due to an order of the court; where the sale is subject to a suspensive condition; and where the transaction is a gift or a sale for a nominal price (Kerr 135-136).



is not (considered to be) a necessity;<sup>357</sup> and where the purchaser is satisfied with the contract (and its implications) after learning of the defect or disease.<sup>358</sup>

Most of these instances where the application of the aedilician actions is disallowed are self-explanatory, but further details regarding prescription are necessary.

#### 3.3.5.4 Prescription and the aedilician actions

The aedilician actions were specifically mentioned in the Prescription Act 18 of 1943, but not the Prescription Act 68 of 1969.<sup>359</sup> Kerr states that these actions must be regarded as actions on “debts” (which encompasses more than debts flowing from contractual obligations), as referred to in the 1969 Act.<sup>360</sup> If sections 12(1) and 12(3)(a) of the Prescription Act 68 of 1969 are read in the context of aedilician obligations, prescription starts running once the debt is due, and the debt will be deemed due once the creditor has knowledge of the reason for the debt arising, “[p]rovided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”<sup>361</sup> The Prescription Act 11 of 1984 repealed section 12(3) of the preceding Act and since the implementation of the 1984 Act<sup>362</sup> the period of prescription of the aedilician actions, usually three years,<sup>363</sup> begins to run once the purchaser is aware, or by the exercise of reasonable care should have become aware of the disease, defect or the erroneousness of statements made in relation to the qualities of the *merx*.<sup>364</sup> Prior to 1 December 1970 claims based on the *actiones redhibitoria* and *quanti minoris* prescribed significantly quicker (after one year) than those based on the *actio empti*. At present all three these actions are subject to the three year prescription period applicable to most civil claims.<sup>365</sup>

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<sup>357</sup> These circumstances include instances where the purchaser is aware of the defect; the defect is obvious; and where the purchaser chooses to rely on her own opinion or the opinion of another (Kerr 136-144).

<sup>358</sup> Kerr 144-146.

<sup>359</sup> Kerr 134 fn 266.

<sup>360</sup> Kerr 134.

<sup>361</sup> S12(3)(a) of the Prescription Act 68 of 1969. For a more detailed discussion of prescription and the aedilician edicts before the promulgation of the act see *Hackett v G & G Radio and Refrigerator Corporation Ltd* 1948 (3) SA 940 (C).

<sup>362</sup> 7 March 1984.

<sup>363</sup> In terms of s 11(d) of the Prescription Act 11 of 1984.

<sup>364</sup> Kerr 134.

<sup>365</sup> Lötzer in Zimmermann & Visser 382-383.



### 3.3.5.5 Trade-in agreements and the aedilician actions

The Supreme Court of Appeal has not yet decided on whether the aedilician actions are available to the *seller* where a thing is traded as partial payment of the purchase price, but different high courts<sup>366</sup> have handed down dissenting verdicts in this regard.<sup>367</sup> Kerr argues that in instances of a “trade-in” the purchaser provides the seller with “*a similar warranty that [the thing traded as part of the purchase price] is free of latent defects.*”<sup>368</sup>

It is of the utmost importance to mention the case of *Janse van Rensburg v Grieve Trust CC*<sup>369</sup> in this regard. Here the purchaser made an innocent misrepresentation regarding the vehicle traded in as part of the purchase price, declaring that it was a 1993 model when in actual fact it was a 1989 model.<sup>370</sup> Here the purchaser is not claiming a reduction in the purchase price in terms of the *actio quanti minoris*, the *seller* is claiming a reduction in the value of a vehicle which constitutes a portion of the purchase price – a very novel situation indeed.<sup>371</sup> The court aligned itself with the judgment in *Wastie v Security Motors (Pty) Ltd*<sup>372</sup> and stated emphatically that, in the interest of fairness, the aedilician actions should apply in instances of trade-in agreements.<sup>373</sup> The court reiterated its duty to balance the rights, duties and interests of the purchaser and seller in order to bring the common law in line with the spirit and purport of the Bill of Rights and the Constitution.<sup>374</sup>

The importance of the case of *Janse van Rensburg* is that it expanded the application of the *actiones redhibitoria* and *quanti minoris* to the sale of corporeal and incorporeal things; to *merces* that are latently defective or which have been misrepresented as being something which it is not; to objects of sale and barter; and to objects forming part of the purchase price.<sup>375</sup>

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<sup>366</sup> *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) and *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D).

<sup>367</sup> Kerr 109 (own emphasis).

<sup>368</sup> Kerr 109 (author’s emphasis).

<sup>369</sup> 2000 (1) SA 315 (C).

<sup>370</sup> 317A.

<sup>371</sup> Glover (2001) *THRHR* 157.

<sup>372</sup> 1972 (2) SA 129 (C).

<sup>373</sup> 2000 (1) SA 315 (C) 324 H-I, 325H; Kerr 111; Lötzt in Nagel 227.

<sup>374</sup> 326E-I.

<sup>375</sup> Lötzt in Nagel 227; Glover (2001) *THRHR* 162-165; Lubbe (2004) *SAJL* 405-408; Kerr 112. Kerr (113) supports the decision and states that if this legal question were ever to be heard by

Van Zyl J however ventured further than merely addressing the legal question at hand. This case is the first on a matter regarding a latent defect that addresses the applicability of the Constitution on this area of the law and this novel step should be commended. Glover argues that

“[t]he decision is to be welcomed for adopting a refreshingly frank, common-sense approach to what has become a contentious issue in our law of sale. The decision also provides a blueprint for a principled yet liberal approach to the development of our common law of contract – an approach which is both constitutionally sound, and in addition seeks to emphasise that, where appropriate, well-known legal actions may be adapted to suit the needs of modern commercial reality, while at the same time remaining true to their innate historical character”.<sup>376</sup>

### 3.3.5.6 Conclusion

Kerr argues that the fact that the aedilician actions were extended to apply to cases in which the disease or defect were totally unknown to the sellers is of cardinal importance because it is the primary reason the actions survived to modern times.<sup>377</sup> This can be attributed to the fact that these actions are the only common law remedies available to the purchaser in instances where the seller is not a merchant or manufacturer,<sup>378</sup> and these actions thus contribute to the creation of equal bargaining power between the parties. The aedilician actions therefore instil a degree of fairness into the law of purchase and sale.

Due to the powerful remedies provided by the aedilician actions to the aggrieved seller, care must be taken before it can be found that the protection provided by these actions has been excluded. The *voetstoots* sale thus needs to be evaluated with care.

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the Supreme Court of Appeal, that the decisions in *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) and *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C) be followed. I respectfully agree with this suggestion.

<sup>376</sup> Glover (2001) *THRHR* 162.

<sup>377</sup> Kerr 124.

<sup>378</sup> Kerr 124. See 3.5 *infra*.

### 3.4 Voetstoets sales

As was the case under Roman-Dutch law, including a *voetstoets* clause in a contract of purchase and sale constitutes an agreement that the seller shall not bear the risk of the presence of specified, or of any, diseases or defects potentially present in the *merx*.<sup>379</sup> In *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd*<sup>380</sup> the court ruled that the *voetstoets* clause excludes the seller's liability which flows naturally from an implied warranty of quality as well as the *ex lege* warranty against latent defects.<sup>381</sup> Therefore the purchaser relinquishes her right to claim restitution or damages due to the presence of latent defects in the *merx*.<sup>382</sup> Subject to any particular rule to the contrary,<sup>383</sup> such agreements may be included in contracts of sale.<sup>384</sup>

There is no set or accepted wording or manner of phrasing a *voetstoets* agreement or clause.<sup>385</sup> It is also not required that the term 'voetstoets' be included in the term or contract in question.<sup>386</sup> It is further of importance to note that a *voetstoets* clause may also be referred to as an 'exemption clause', as the effect thereof is to exempt the seller from liability related to latent defects.

#### 3.4.1 Presumption against *voetstoets* sales

The inclusion of a *voetstoets* clause in a contract of sale is not presumed and specific agreement, by both parties to the contract, on the inclusion of such a clause must be proved.<sup>387</sup> The onus of proving the existence of such an agreement rests on the party alleging the existence thereof (which is usually the seller).<sup>388</sup> The seller may not claim that the mere fact that the purchaser examined the *merx* before concluding the agreement automatically means that the sale was *voetstoets*.<sup>389</sup> In instances where the purchaser examines or inspects the *merx* prior to the delivery thereof, the warranty provided by the seller only applies if latent defects are

<sup>379</sup> Lötz in Zimmermann & Visser 381; Kerr 150; Barnard (2012) *De Jure* 456, 460; Barnard 371.

<sup>380</sup> 2002 6 SA 256 (C).

<sup>381</sup> 2002 6 SA 256 (C) 276.

<sup>382</sup> Lötz in Nagel 228.

<sup>383</sup> See 5.5.5 *infra* on legislative provisions disallowing *voetstoets* clauses.

<sup>384</sup> Kerr 146; Otto (2011) *THRHR* 530.

<sup>385</sup> Otto (2011) *THRHR* 530; Lötz in Zimmermann & Visser 381.

<sup>386</sup> Barnard 371.

<sup>387</sup> Lötz in Nagel 228.

<sup>388</sup> Kerr 146.

<sup>389</sup> Kerr 146; Barnard 370.

discovered after delivery.<sup>390</sup> The *voetstoots* clause may be included in an express or implied manner, but cognisance should be taken of the fact that our courts are less likely to acknowledge an implied *voetstoots* agreement, as there is an assumption against *voetstoots* sales in the South African common law of contract.<sup>391</sup>

### 3.4.2 The seller's duty to disclose

The seller is obligated to disclose her knowledge of circumstances which could constitute reasonable grounds to suspect the presence of a disease or defect in the *merx*.<sup>392</sup> Where the seller is conscious of any latent defect in the *merx* at the time of conclusion of the agreement, and deliberately conceals these, the protection provided by the *voetstoots* clause is defunct.<sup>393</sup> The same applies where two defects in the *merx* contribute to its objectionable quality, but the seller failed to disclose the existence of the one defect she had been aware of.<sup>394</sup> Lötz explains the law in the instances of misrepresentation:

“According to the general principles of South African contract law, a buyer should be able, under these circumstances, to have the exemption clause set aside; and unless the seller's liability for a negligent, or innocent misrepresentation has also been excluded, it should make no difference whether the misrepresentation was fraudulent, negligent or innocent and whether it was made *per commissionem* or *per omissionem* (that is, by non-disclosure of a defect of which the seller was aware).”<sup>395</sup>

The test for the presence of the seller's duty to disclose information about the *merx*, or defects therein was evaluated and applied in several noteworthy judgments.

The case of *Orban v Stead*<sup>396</sup> reiterated the fact that no general duty to disclose rests on a seller; a rule which originated in the common law. It was however ruled

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<sup>390</sup> Barnard 370. For a detailed discussion see par 2.6 of Barnard 370.

<sup>391</sup> Kerr 152; *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170 176.

<sup>392</sup> Kerr 146.

<sup>393</sup> Kerr 146-147; Otto (2011) *THRHR* 530-531; Lötz in Nagel 228; Lötz in Zimmermann & Visser 381-382; *Knight V Trollip* 1948 (3) SA 1009 (D) 1013; *Van der Merwe v Meades* 1991 (2) SA 1 (A) 8C-F; *Truman v Leonard* 1994 (4) SA 371 (SE) 373E-H. Regarding “constructive knowledge” of the defect see *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A).

<sup>394</sup> *Banda v Van der Skyf* 2013 4 SA 77 (SCA) 83G-I.

<sup>395</sup> Lötz in Zimmermann & Visser 382. Here a more detailed discussion on conflicting case law in this regard is also provided.

<sup>396</sup> 1978 2 SA 713 (W).

that this rule does not apply uniformly. The court provided three instances in which the seller should disclose the relevant information: concealment, “designed concealment” and non-disclosure.<sup>397</sup> When the duty to disclose was evaluated in *Waller v Pienaar*<sup>398</sup> the court referred to *ABSA Bank Ltd v Fouche*<sup>399</sup> where the notion of the “honesty requirement” was initially provided. This standard was applied to the facts in *Waller*, where the court relied on the requirements of public policy. It was held that if either intent or negligence was present where no disclosure was made, the duty to disclose was not satisfied, and delictual liability based on fraud must follow.<sup>400</sup> In *Truman v Leonard*<sup>401</sup> it was emphatically stated that where any fraudulent or intentional deceit resulted in the conclusion of a contract, such fraud was against public policy. Delictual and contractual damages may thus be claimed.

It can be surmised that a seller’s duty to disclose information related to a defect exists where the information concerned is not known to the purchaser, and no reasonable possibility exists that the purchaser would acquire such information by herself; and where the purchaser’s lack of such information results in an unfair bargaining position in favour of the seller.<sup>402</sup> In conclusion it may thus be stated that “[a] seller may only rely on a *voetstoots* clause where [s]he is honest.”<sup>403</sup>

### 3.4.3 Misrepresentations

It is important to take cognisance of the fact that a *voetstoots* clause excludes the seller’s liability for latent defects present in the *merx*, but not for any misrepresentations made by the seller with regard to the *merx*.<sup>404</sup> Agreements related to the risk of a potentially diseased or defective *merx* are often combined, or associate with an agreement excluding the seller’s liability for (negligent) misrepresentations.<sup>405</sup> Various possibilities exist and because contracts of sale are individualised the contract in its entirety, as well as the clause in question, should be

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<sup>397</sup> 717-718. For a detailed discussion in this regard see *Orban v Stead* 1978 2 SA 713 (W) 718-719.

<sup>398</sup> 2004 6 SA 303 (C) 305-306.

<sup>399</sup> 2003 1 SA 176 (SCA) 180-181.

<sup>400</sup> 2004 6 SA 303 (C) 309.

<sup>401</sup> 1994 4 SA 371 (SE).

<sup>402</sup> Lötze in Nagel 225.

<sup>403</sup> Barnard 372.

<sup>404</sup> Barnard 371.

<sup>405</sup> Kerr 149.

evaluated prudently in an attempt to identify the parties' true intention.<sup>406</sup> Kerr provides for four possibilities of such agreements being linked:

- i. The parties can include a provision in the contract, stating that they agree that the purchaser will not hold the seller liable for any misrepresentation concerning the *merx*, and that the seller will not bear the risk of the manifestation of any diseases or defects;<sup>407</sup>
- ii. The parties may agree that the seller will not be held liable for misrepresentations related to the condition or quality of the *merx* and that the seller will not bear the risk related to the presence of potential diseases or defects (here the seller will still be liable for any other misrepresentations);<sup>408</sup>
- iii. The parties agree that the seller will not be liable for any misrepresentations regarding the quality of the *merx* or the possible presence of any disease or defects;<sup>409</sup> or
- iv. The parties' contract is silent on any misrepresentations (and the seller is thus liable in all instances thereof), but it contains a *voetstoots* clause.<sup>410</sup>

Thus, a *voetstoots* clause may exclude liability based on a misrepresentation, depending on the circumstances or specific contract in question, but the protection the *voetstoots* clause provides the seller will never apply where the misrepresentation (or omission) was made fraudulently. The *voetstoots* clause excludes the applicability of the aedilician actions as well as the *actio empti*,<sup>411</sup> but the *actio empti* will always be available to the purchaser where the seller is guilty of fraud, as in the case of a fraudulent misrepresentation.

Both the seller's duty to disclose, as well as the presence of a misrepresentation on the facts, relate directly to fraudulent behaviour on the part of the seller. The intent to defraud is thus of crucial importance as it relates to the law on latent defects. In *Odendaal v Ferraris*<sup>412</sup> the matter of avoiding liability due to a *voetstoots* agreement was one of those evaluated by the court. Where a purchaser wishes to nullify the operation of a *voetstoots* agreement, she has to prove that the seller knowingly

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<sup>406</sup> Kerr 149; *Cockroft v Baxter* 1955 (4) SA 93 (C) 97D.

<sup>407</sup> Kerr 149.

<sup>408</sup> Kerr 149.

<sup>409</sup> Kerr 150.

<sup>410</sup> Kerr 150.

<sup>411</sup> Barnard 371.

<sup>412</sup> 2008 4 All SA 529 (SCA).

concealed the existence of the latent, defect at the time the sale was concluded. It should further be averred and proved that the intention behind the concealment of the defect was to defraud the purchaser.<sup>413</sup> This was confirmed in *Van der Merwe v Meades*.<sup>414</sup>

### 3.5 An analysis of the position of the merchant and manufacturing seller<sup>415</sup>

In terms of the law of purchase and sale one of the residual obligations of the seller is to warrant the merchantability of the *merx*. This obligation is enforced and applied in various ways, depending on the parties to the agreement. Pothier describes the seller's obligation as follows:

“Accept in these cases of an artificer or a dealer, the seller, who has no knowledge or any just suspicion of the existence of a redhibitory defect, is liable to nothing more than to restore the price to the buyer, who is bound on his part to return the thing sold; and the seller is in no manner liable for any damage, which this defect causes the buyer in his other goods. And, therefore, if, instead of purchasing my casks of a cooper or of a dealer, I purchase them of an individual, who sells me those which he has more than he is in need of, and some one of them proves defective, the seller will only be liable to a restitution of the price, but he will not be liable for the loss of the wine occasioned by the defect in the cask.”<sup>416</sup>

Before discussing the Pothier rule and its impact on the liability of the merchant and manufacturing seller, it is important to reiterate the position where the seller is not a merchant or manufacturing seller and the sale in question is not completed as part of the seller's ordinary course of business. In the rule quoted above the position regarding a seller's liability for consequential damages is set out. The purchaser has a claim for restitution due to the defective *merx*, but no consequential damages may be claimed.<sup>417</sup> Even though the law in question is taken directly from a French

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<sup>413</sup> 549.

<sup>414</sup> 1991 2 SA 1(A) 8C-F.

<sup>415</sup> Where reference is made to the ‘merchant and manufacturing seller’ it should be understood as referring to both the merchant seller and the manufacturing seller. The ‘manufacturing seller’ is also known as the ‘manufacturer seller’, and both terms should be understood as referring to the individual who both manufactures and sells the *merx* in question.

<sup>416</sup> Pothier par 216-217.

<sup>417</sup> Löt & Van der Nest (2001) *De Jure* 223.



source it is identical to the modern South African common law position. This again highlights the strong ties between the private law rules of civil law systems.<sup>418</sup>

The seller's residual obligation to warrant the merchantability of the *merx* thus applies to all sales, regardless of who the seller is. The law applicable to the position of the merchant and manufacturing seller, as expressed in the Pothier rule, will now be analysed. The original, as well as subsequent (conflicting) versions of this rule will be scrutinised.

### 3.5.1 The meaning and scope of the Pothier rule

Pothier described the law applicable to latent defects and merchant and manufacturing sellers as follows:

“There is one case, in which the seller, even if he is absolutely ignorant of the defect in the thing sold, is nevertheless liable to a reparation of the wrong which the defect caused the buyer in his other goods; this is the case where the seller is an artificer, or a merchant who sells articles of his own make, or articles of commerce which it is his business to supply. The artificer or tradesman is liable to a reparation of all the damage which the buyer suffers by a defect in the thing sold in making a use of the thing for which it was destined, even if such artificer or tradesman were ignorant of the defect. For example, if a cooper or a dealer in casks sells me some casks, and in consequence of defects in any of the casks the wine which I put in them is lost, he will be liable to me for the price of the wine which I have lost.”<sup>419</sup>

In *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*<sup>420</sup> it was ruled that the Pothier rule applies to the merchant seller under South African law.<sup>421</sup> In this case the respondent, a sorghum producer battling a plant louse infestation, purchased a pesticide from the respondent. The sales agreement between the parties expressly stipulated that the pesticide was fit for the purpose it was purchased, as well as being free from latent defects. The sorghum was subsequently damaged by the pesticide and resultantly the appellant was guilty of breach of

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<sup>418</sup> See 2.2 *supra*.

<sup>419</sup> Pothier par 214.

<sup>420</sup> 1964 3 SA 561 (A).

<sup>421</sup> 571E.



warranty.<sup>422</sup> The court interpreted the rule as requiring the merchant seller to “publicly profess to have attributes of skill and expert knowledge in relation to the kind of goods sold”.<sup>423</sup> Here the court altered the original Pothier rule by including the requirement that the seller’s knowledge or skill related to the *merx* should have been publicly professed. The result is that it becomes harder for the purchaser to succeed with a claim based on a latent defect in the *merx*.<sup>424</sup> Zimmermann<sup>425</sup> and Lötz and Van der Nest<sup>426</sup> argue that the rule was incorrectly translated and applied in this case.

The rule as set out in the *Kroonstad* case was followed in *Holmdene Brickworks*,<sup>427</sup> but applied differently in *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk*.<sup>428</sup> In this case the appellant traded as a producer of canned and bottled fruits and vegetables. The appellant purchased latently defective seeds from the respondent, which resulted in a poor crop and subsequent consequential damages. The court ruled that the fact *that* the respondent sold seeds implied that it publicly professed to have the required knowledge and skill to qualify as an expert in the sale of seeds.<sup>429</sup> The court dismissed the appeal and stated that appellant's manner lead the respondent to believe that it was an expert in the sale of seeds.<sup>430</sup> It is thus clear that the Appellate Division and the Supreme Court of Appeal applied the same rule in opposing manners. Determining whether or not a merchant seller has in fact publicly professed to have skill and expert knowledge related to the *merx* in question is an arduous task.<sup>431</sup>

Lötz and Van der Nest prophetically argued that the uncertainties regarding the application of the Pothier rule under the South African common law would only be remedied by legislative intervention.<sup>432</sup> This rule has been applied in various contexts during its application in the South African common law of sale. These applications and the surrounding debates will now be evaluated.

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422 565D-H.

423 571G.

424 Lötz & Van der Nest (2001) *De Jure* 242.

425 Zimmermann 335.

426 Lötz & Van der Nest (2001) *De Jure* 233.

427 Lötz & Van der Nest (2001) *De Jure* 233.

428 1996 2 SA 565 (A).

429 570C-H.

430 569J-570B.

431 For a detailed discussion see Lötz in Zimmermann & Visser 379.

432 Lötz & Van der Nest (2001) *De Jure* 243.

### 3.5.2 Basis for the merchant and manufacturing seller's liability

Various grounds for the incurrance of liability on the part of the merchant seller have been hypothesised and this caused confusion regarding the basis of such liability.<sup>433</sup> Barnard lists three bases for liability: the merchant and manufacturing seller are deemed to have been conscious of the defect present in the *merx*, and are thus liable due to fraud; the *ex lege* tacit warranty against latent defects, which allows the aggrieved purchaser to institute the *actio empti* in order to claim damages; and the fact that the *merx* delivered is not what was contractually agreed upon, resulting in breach of contract and the purchaser's right to institute general contractual remedies.<sup>434</sup> Strict (product) liability may also be added to this list. In *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd*<sup>435</sup> Cloete JA further maintained that if a legal rule (in this case that of Pothier) is clear and accepted as law there is no need to argue "the considerations which motivated the rule" in every instance where the application of the rule is sought.<sup>436</sup> It is worth mentioning that the Supreme Court of Appeal had the opportunity to provide insight in this regard, but failed to do so.

Maleka eloquently summarises this aspect's effect on the litigation of these matters: "It was incorrect...to raise the reasons for the rule ... into forming part of the rule".<sup>437</sup> He further argues that before the ruling in the *D & H Piping* case it had not been required of manufacturing sellers to publicly profess their expert knowledge or skill associated with the *merx* in question.<sup>438</sup> The court therefore only had to determine whether the seller also manufactured the *merx*, or whether it is a seller of products it has publicly declared to have skills or expert knowledge on. Maleka critically evaluates several phrasings of these two requirements in both judgments and academic literature and concludes that liability for consequential damages *automatically* ensues for both the merchant seller and the manufacturing seller.<sup>439</sup>

In 2002 the Supreme Court of Appeal yet again ruled that the Pothier rule applies to the merchant seller in the case of *Ciba-Geigy v Lushof Farms*.<sup>440</sup> The purchaser

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<sup>433</sup> Barnard J 376.

<sup>434</sup> Barnard J 376.

<sup>435</sup> 2006 (3) SA 593 (SCA).

<sup>436</sup> *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd & Another* 2006 (3) SA 593 (SCA) par 27.

<sup>437</sup> Maleka (2009) SA Merc LJ 580.

<sup>438</sup> Maleka (2009) SA Merc LJ 584-585, 587.

<sup>439</sup> Maleka (2009) SA Merc LJ 585-586 (own emphasis).

<sup>440</sup> 2002 2 SA 447 (SCA).

was entitled to a delictual claim for consequential damages due to the seller's breach of a contractual warranty.<sup>441</sup> It was further ruled that no *nexus* between the manufacturer of the *merx* and the purchaser thereof was required, as the liability in question was viewed as product liability.<sup>442</sup> A clear distinction was also made between the grounds for the merchant seller and manufacturer's liability with regards to latently defective goods sold: the merchant seller's liability stemmed from the breach of a contractual warranty (that the *merx* is fit for the purpose it was intended and that it is of merchantable quality), while the manufacturer's related liability was grounded in the law of delict.<sup>443</sup>

The judicial relevancy of the Pothier rule is questioned and the majority argument is in favour of an approach based on product liability.<sup>444</sup> The delictual foreseeability test for consequential damages is provided as another alternative for liability under the Pothier rule. The practical application of the rule is aptly described as "transform[ing] a general question of fact into an absolute legal principle."<sup>445</sup> Being aware of, and avoiding such a manner of applying the rule will assist in placing focus on the basis of the liability flowing from the rule.

The above decision to apply the law of product liability in instances of latent defects was followed in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*.<sup>446</sup> *In casu* the manufacturer's liability was however based on delictual wrongfulness due to negligence, as the goods in question were not fit for human consumption, which constituted non-performance in terms of the contract of sale.<sup>447</sup>

Due to the specific manner in which the Pothier rule has been developed and applied in South African courts the case of the merchant seller and that of the manufacturing seller will now be analysed separately.

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<sup>441</sup> 473, 476.

<sup>442</sup> Barnard 377.

<sup>443</sup> 2002 2 SA 447 (SCA) 475.

<sup>444</sup> Barnard J 377.

<sup>445</sup> Lötz DJ & Nagel CJ "Fabrikant en handelaar se aanspreeklikheid weens verborge gebreke" 2005 *THRHR* 337-344, 56-57 (sic) as cited in Barnard J 377.

<sup>446</sup> 2010 1 SA 8 (GSJ).

<sup>447</sup> 293A-297H.

### 3.5.3 Merchant sellers

In terms of the Pothier rule, instances where the seller acts as a merchant seller (or dealer), liability for all the purchasers' consequential damages due to the latent defect automatically ensues.<sup>448</sup> The two requirements for holding a merchant seller liable in such instances are that (i) the seller must act as a dealer, and (ii) the seller must have publicly proclaimed her expert knowledge of the *merx*.<sup>449</sup> Apart from the duty to warrant against latent defects, the seller should also warrant the fitness for purpose and reasonable merchantable quality of the *merx*.<sup>450</sup>

An express or implied warranty relating to the *merx*'s fitness for the purpose for which it was sold, is often included in a contract of sale.<sup>451</sup> This residual warranty is only read into contracts if the purchaser *specifically* stated during the negotiation phase that an item is to be used for a specific purpose which has been disclosed to the seller.<sup>452</sup> If the *merx* in question is subsequently sold without any further discussion and it turns out that the *merx* cannot perform the required function or task, the seller will be held liable even if the *merx* is sound and free of any other defects. If the purchaser requests a specified *merx*, because she is under the erroneous impression that this item will serve the intended purpose, and this turns out to be an incorrect assumption, the residual warranty is not included in the contract, because of the specificity of the purchaser's demand.<sup>453</sup> Where, however, the *merx* in question is unfit for the purpose intended as a result of a latent defect therein, the purchaser may institute the aedilician remedies.<sup>454</sup>

Okharedia opines that "the concept of the retailer or 'merchant seller' who possesses 'skill and expert knowledge' has created a number of problems in determining whether sellers will be liable for damages caused by defective products sold by them."<sup>455</sup> He continues by stating that the *Kroonstad* case<sup>456</sup> did not provide much

<sup>448</sup> *Kroonstad Westelike Boere-Kooperatiewe Vereniging Bpk v Botha* 1964 (3) SA 561 (A); *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 (2) SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 (2) SA 1 (A).

<sup>449</sup> Lötz in Nagel 225; Barnard (2012) *De Jure* 458.

<sup>450</sup> Kerr 205-218.

<sup>451</sup> Kerr 205; Otto (2011) *THRHR* 529.

<sup>452</sup> Kerr 206; 208 (own emphasis).

<sup>453</sup> Kerr 207.

<sup>454</sup> Kerr 211-212. For the purchaser's remedies where the unfitness was not due to a latent defect see Kerr 214-215.

<sup>455</sup> Okharedia (2002) *J Jur Sc* 137.

<sup>456</sup> *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A).

clarity regarding who in fact possessed such skill and knowledge, since it was ruled that the matter will be addressed by considering the facts of the case.<sup>457</sup>

The merchant seller is entitled to include a *voetstoots* clause in the sales agreement, but this clause will not provide the merchant seller with immunity from liability if said seller was aware of, and intentionally hid, a latent defect in the *merx*.<sup>458</sup> Though the rules applicable to manufacturing sellers are very similar to those applicable to merchant sellers, a few distinctions should however be highlighted.

### 3.5.4 Manufacturing sellers

Manufacturing sellers should warrant the skill of their art.<sup>459</sup> It has been argued that the manufacturing seller need not be skilled at the manufacturing in question, but merely that some process of manufacture should take place.<sup>460</sup> It is of importance that the seller herself should take part in the manufacturing process in order to be deemed a manufacturing seller. Determining what exactly qualifies as *manufacturing* is a complex matter. A literal and linguistic approach should be avoided: “the essence of what the person concerned is doing rather than the way it would be described in popular parlance”<sup>461</sup> is of importance. Maleka postulates that even though each case will require a detailed evaluation of the facts at hand to determine whether the seller is also a manufacturer, guidance may be taken from tax law<sup>462</sup> in this regard.<sup>463</sup>

If a manufacturer sells latently defective items, liability for the purchaser’s consequential damages follow by law.<sup>464</sup> No declaration regarding expert knowledge of the *merx* is required, and neither negligence nor ignorance of the defect will succeed as a defence.<sup>465</sup> In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*<sup>466</sup> the

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<sup>457</sup> Okharedia (2002) *J Jur Sc* 137.

<sup>458</sup> Maleka (2009) *SA Merc LJ* 576.

<sup>459</sup> Kerr 218.

<sup>460</sup> Maleka (2009) *SA Merc LJ* 587.

<sup>461</sup> *Formscaff Investments (Pty) Ltd v Commissioner for Inland Revenue* 1993 (4) SA 76 (T) 82 as quoted by Maleka (2009) *SA Merc LJ* 589.

<sup>462</sup> See Practice Note 42 of 27 November 1995 (GN 244 in GG 17017 of 8 March 1996).

<sup>463</sup> Maleka (2009) *SA Merc LJ* 589-590.

<sup>464</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A); *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 (2) SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 (2) SA 1 (A).

<sup>465</sup> Lötz in Nagel 226; Otto (2011) *THRHR* 529; Maleka (2009) *SA Merc LJ* 576.

<sup>466</sup> 2002 (2) SA 447 (SCA).

Supreme Court of Appeal found that the Pothier rule was outdated and unsuitable for modern circumstances, but refrained from providing a possible solution in this regard.

In *AB Ventures Ltd v Siemens Ltd*<sup>467</sup> the Supreme Court of Appeal confirmed that manufacturers' liability is based on product liability. It was held that a legal duty to make sure that any *merx* manufactured and supplied by the manufacturing seller should comply with South African and international legislation aimed at protecting the purchaser or consumer.<sup>468</sup> Therefore a *voetstoots* clause protecting a manufacturing seller will be of no effect where the seller supplied a *merx* other than that contracted for.<sup>469</sup>

### 3.5.5 Consequential damages

Maleka opines that the manufacturing seller or merchant seller's liability for consequential damages caused by the defective *merx* sold is deemed to be based on contractual, and not delictual, liability.<sup>470</sup> This exact question was however expressly left open in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*.<sup>471</sup>

Claims for consequential damages based on the sale of a latently defective *merx* ultimately results in a continuous struggle to find a balance between the interests of the purchaser and those of the seller.<sup>472</sup> Lötz and Van der Nest argue that when adjudicating a claim for damages based on a latently defective *merx*, the court should endeavour to balance the liability in order to allow both parties to the contract to bear their related responsibility.<sup>473</sup>

A detailed analysis of the consequential damages related to cases of latently defective *merces* has been outlined by Lötz and Van der Nest.<sup>474</sup> They address matters such as the categories of consequential damage and quantifying consequential damages. They surmise that where consequential damages are the

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<sup>467</sup> 2011 (4) SA 614 (SCA).

<sup>468</sup> Par 14.

<sup>469</sup> Barnard (2012) *De Jure* 463-464.

<sup>470</sup> Maleka (2009) *SA Merc LJ* 588.

<sup>471</sup> Lötz in Zimmermann & Visser 379.

<sup>472</sup> Lötz & Van der Nest (2001) *De Jure* 219.

<sup>473</sup> Lötz & Van der Nest (2001) *De Jure* 245-246; Okharedia (2002) *J Jur Sc* 138-139.

<sup>474</sup> Lötz & Van der Nest (2001) *De Jure* 219-226.

result of a breach of contract (such as delivering a *merx* that differs in quality from that which has been promised), the accepted method of determining such damage is to make use of positive interest.<sup>475</sup> This effectively results in the purchaser being placed in the patrimonial position she would have been in, had there been no defect in the *merx*. In order to mitigate the damages the seller will be held liable for, the normative requirements of factual and legal causality should be evaluated.<sup>476</sup>

### 3.5.6 Conclusion

From the discussion above it is clear that the facts of each case will greatly impact the rules applicable to the situation in question. The Pothier rule, exactly as originally formulated, has long since not been applied by South African courts. The rule has been viewed as too rigid and as a result the courts have utilised more equitable methods to determine the liability of manufacturers, manufacturing sellers and merchant sellers in instances of latent defects. Barnard summarises the principles aptly:

“the warranty of skill and art will be included *ex lege* where both parties know the particular purpose of the contract and the seller has skills which he applies for the purpose of the contract to be accomplished. The warranty will apply regardless of whether or not persons in the particular class to which the seller belongs have those skills or not. The only exception would be where the buyer uses the *merx* for some other purposes or in a way that the particular goods would not ordinarily be used for and the seller is unaware of this fact.”<sup>477</sup>

Where consequential damages are claimed from merchant or manufacturing sellers as a result of product liability, appreciating the intricate relationship between the law of contract and delict is thus of extreme importance.

## 3.6 Conclusion

Today the aedilician rules are not applied to the transactions they were originally intended for, namely the purchase and sale of slaves.<sup>478</sup> Zimmermann lists “the

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<sup>475</sup> Löt & Van der Nest (2001) *De Jure* 226.

<sup>476</sup> Löt & Van der Nest (2001) *De Jure* 226.

<sup>477</sup> Barnard J 379.

<sup>478</sup> Van Warmelo 131.



growing complexities of Roman economic life” as one of the reasons why the protection provided under the Roman law on latent defects was extended.<sup>479</sup> The same can be said for the South African developments in this regard. De Wet and Van Wyk explain that South African courts have developed the law on a seller’s liability for latent defects in a manner that is “logical, refined, and practical, even if [the law] no longer reflect[s] pure Roman-Dutch law”.<sup>480</sup>

Judicial precedent dating from 1830 to 2013 has transformed the common law on latent defects. Throughout this period, legal principles guiding the law on the warranty against latent defects have been applied inconsistently: the very first cases utilised no logical procedure to determine which rules should be applied and much more recent Appellate Division and Supreme Court of Appeal judgments contradicted and ignored one another in this regard.<sup>481</sup>

The general rule of the law of purchase and sale remains *caveat emptor* – careful inspection of the *merx* before the sale is concluded is important, but this rule has been tempered. If the seller is aware of a defect present in the *merx* a duty to disclose the existence of such a defect to the purchaser, exists. In *Janse van Rensburg v Grieve Trust CC*<sup>482</sup> the instances where the *actio quanti minoris* may be instituted was greatly expanded and Van Zyl J names the Constitution as grounds for its expansion of the common law in question.<sup>483</sup>

Where a *merx* is purchased from a manufacturer, manufacturing seller or merchant seller, the law automatically provides the purchaser with additional protection where latent defects are found in the *merx*. The legal convictions of the community deem it unlawful where a manufacturer’s goods are used in the manner they are intended, and a latent defect therein causes the purchaser to suffer damage.<sup>484</sup> In recent years South African courts have based a merchant or manufacturing seller’s liability for a latent defect in the *merx* on product liability, breach of contract, fraud, *ex lege* warranties of quality and delictual liability. It is thus quite clear that the position under the common law reflects confusion and inconsistency. The previous prominence of

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<sup>479</sup> Zimmermann 321.

<sup>480</sup> De Wet JC & Van Wyk AH *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol 1, 5<sup>th</sup> Ed (1992) 313, as cited in Lötze in Zimmermann & Visser 378.

<sup>481</sup> See 3.5.1 *supra*.

<sup>482</sup> 2000 (1) SA 315 (C).

<sup>483</sup> See 3.3.5.2 and 3.3.5.5 *supra*.

<sup>484</sup> See 3.5 *supra*.



the Pothier rule has thus faded and the application thereof in South African common law has ceased.

The promulgation of the Consumer Protection Act has disseminated doubt as to the continued application of the common law rules in cases of latent defects. The relationship between, and the application of both the common law and the Consumer Protection Act requires detailed analysis. The role of the Constitution in transforming the common law will be evaluated, where after the impact of the enactment of the Consumer Protection Act will be analysed in Chapter 5.

## CHAPTER 4 TRANSFORMATIVE CONSTITUTIONALISM, DISTRIBUTIVE JUSTICE AND THE LAW OF CONTRACT

### 4.1 Introduction

Since South African law comprises a single legal system,<sup>485</sup> guided by the Constitution,<sup>486</sup> constitutional values and the rights enshrined in the Bill of Rights *must* inform the law of contract. Barnard identifies the rights to equality, human dignity and freedom as those which have the most direct and obvious influence on contract law.<sup>487</sup>

The question that arises is to what extent the law of contract has, if critically analysed from a transformative constitutional perspective, embraced the spirit and purport of the Constitutional project. The point of departure for such an investigation can be found in the following:

“All market transactions that contribute to the system of production create power relations. From the most basic consumer purchase and sale agreement opportunities for the exercise of power present themselves, for instance where a retailer has contracted out of repairing or replacing defective goods, leaving the consumer in a weaker position.”<sup>488</sup>

This clearly illustrates the relationship between rights, distributive justice, the law of contract and more specifically warranties against latent defects. The desired and required societal change demanded by the fall of apartheid can only be achieved by a “shift in the existing patterns of wealth distribution”.<sup>489</sup> Only once this shift is achieved can an attempt be made to rectify the socio-economic injustices caused by such a systemically and fundamentally unjust system, since “political change would

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<sup>485</sup> “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control” (*Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) par 44).

<sup>486</sup> “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled (S2 of the Constitution).

<sup>487</sup> Barnard AJ 229.

<sup>488</sup> Hawthorne (2006) *THRHR* 57. See also Barnard AJ 224 on the interrelationship between the contract and power.

<sup>489</sup> Van der Walt (2006) 2.

scarcely enjoy legitimacy unless it could provide real, visible benefits for poor and marginalised members and sectors of society.”<sup>490</sup>

This should naturally have consequences for the law of contract. Davis states that the highest courts of South Africa have not yet addressed “the distributive importance of the ground rules of contract”, and the way that these presently stand benefit and protect some legal subjects while subordinating others.<sup>491</sup> For a revolution of the socio-economic *status quo* perpetuated by the current common law position to take place, the background rules<sup>492</sup> informing the law of contract need to be scrutinised and transformed.<sup>493</sup>

In order to investigate the effect of the Constitution on the warranty against latent defects, the impact of the Constitution on the law of contract should first be analysed briefly. The right to freedom of contract, the role of *bona fides* and the development of the common law of contract will be discussed. The main aim of this chapter is to evaluate the effect of the Constitution on the interpretation of contract law. Recent research proposing a methodology to be implemented when a private law aspect of the common law is developed, provides great insight in this regard.<sup>494</sup> The aspects of the common law discussed here directly and indirectly influence contracts of sale which contain warranties against latent defects. The lack of constitutional development in the field of contract law will be evaluated due to its relation to the courts’ adherence to strictly liberalist interpretations and applications of the law which ultimately favour autonomy above paternalism. Transformative constitutionalism will be expounded and critique against the approach will be discussed. The notion of justice and contract law will be analysed before an

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<sup>490</sup> Van der Walt (2006) 2.

<sup>491</sup> Davis (2011) *Stell RL* 846. Matters relating to housing and land have seen the social and historic realities of the litigants play the largest role in the eyes of the courts (Davis & Klare (2010) *SAJHR* 494). To date the socio-economic realities of parties to contracts have not been regarded by the higher courts. See Michelman (2011) *Stell LR* 710-720 in this regard.

<sup>492</sup> See 4.2.3 *infra* for an exposition of the background rules of contract.

<sup>493</sup> Davis (2011) *Stell RL* 847.

<sup>494</sup> Van der Walt (2013) *SALJ* 722-756. Van der Walt’s research relates to the development of the common law of property and servitudes in particular, but it could easily be adapted to research on the development of the common law of contract or any other area of private law. He contends that any attempt to propose developments of the common law should start with a detailed account of the historical development of the common law in question and then a clear exposition on *why* the existing common law is incongruent with the Constitution (738). See Davis (2014) *Stell LR* 4-13 where it is argued that the next step requires an investigation into the fundamental values of the Constitution, before an attempt can be made to align the common law in question with the Constitution (12).

evaluation of the law of purchase and sale, and ultimately the legitimacy of the warranty against latent defects, is addressed.

## 4.2 The common law and the Constitution

The scope of the application of the CPA will be discussed in detail in the next chapter. It is however important to take note of the impact of the Constitution on the common law of latent defects, as the CPA does not apply to all transactions.<sup>495</sup> Evaluating the fairness or not of the common law in this regard is thus a merited endeavour.

### 4.2.1 Introduction

The much celebrated<sup>496</sup> survival of Roman and Roman-Dutch legal principles is directly attributed to the fact that South African courts have continuously, and with great success been adapting the ancient rules in order to keep these applicable to the present demands of the South African economic and industrial sphere.<sup>497</sup>

Homes J stated the following in *Ex parte De Winnaar*:<sup>498</sup>

“Our country has reached a stage in its national development when its existing law can better be described as South African rather than Roman-Dutch ... No doubt its roots are Roman-Dutch, and splendid roots they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law.”<sup>499</sup>

Understanding this statement in context brings one to the conclusion that in 1959 it was believed that the South African legal system was very close to reaching the point of stabilising. This may be understood as implying that the South African common law had effectively reached the point where after very little legal development would be necessary. Today it is common knowledge that this was not the case. The adoption of the Interim and final Constitutions hailed the dawning of a

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<sup>495</sup> For a more complete discussion see 5.3.3 *infra*.

<sup>496</sup> Van Niekerk (2011) *Stud Iuris* 20; Van den Bergh (2012) *Fundamina* 71-90.

<sup>497</sup> Otto (2011) *THRHR* 527.

<sup>498</sup> 1959 (1) SA 837 (N).

<sup>499</sup> At 839.

truly democratic and constitutional dispensation in South Africa. This naturally resulted in an ongoing process of legal development and transformation. As the supreme law of the Republic, the Constitution recognises the common law and the crucial role the courts have to play in developing the common law in line with the Constitution.<sup>500</sup> The Constitution also creates the imperative to further integrate customary and indigenous law into the South African legal system while developing it in line with the values of the Constitution.<sup>501</sup>

Homes J was therefore correct by articulating that over time, a distinct and identifiable South African legal tradition would develop, different from the civil law and common law traditions<sup>502</sup> from which it originated. Democracy, politically-motivated transformation and the Constitution all had an unrivalled impact on the nature, purpose and scope of legal transformation in South Africa.

Van der Walt criticises the belief that law should be completely politically neutral in order to achieve the transformation thereof and argues that “reform politics” must play a role in the reading of the law.<sup>503</sup> He also criticises the idea that the existing “flexible” common law will evolve enough over time to bring about a sufficiently transformed legal system:

“[T]he notion that development of the law has to be accomplished through incremental, interstitial developments of the common law doctrine – supplemented where necessary, by way of larger, legislative interventions – is problematic in view of the necessity of meaningful and significant transformation... the incremental judicial process of interstitial development may well be too slow and protracted because it is driven by the logic of doctrinal development and not by *the need for change*.”<sup>504</sup>

Evaluating the constitutionality of the existing common law in question is thus necessary in order to determine whether large scale transformation is essential.

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<sup>500</sup> S39(2) of the Constitution.

<sup>501</sup> Church *et al* 57. This aspect of constitutional law and the transformative constitutional project falls outside the scope of this dissertation.

<sup>502</sup> The common law tradition in reference here should be understood as referring to the English common law tradition.

<sup>503</sup> Van der Walt (2006) *Fundamina* 7.

<sup>504</sup> Van der Walt (2006) *Fundamina* 9 (own emphasis).

#### 4.2.2 South Africa as developmental state and the role of the Constitution

The notion of referring to the developmental state has become a fashionable manner to address the exploration of developmental challenges experienced by nation states.<sup>505</sup> The developmental state is identified as one where the governing forces initiate a spirited drive towards economic growth and implements national resources towards a developmental goal.<sup>506</sup> In South Africa this goal has been identified as “*broad-based economic development*”.<sup>507</sup>

South Africa’s democratic project initiated in 1994 provided the newly elected government with the opportunity to “use its administrative apparatuses to transform the lives of the poor and economically marginalised.”<sup>508</sup> Human rights, and more specifically socio-economic rights, are constitutionally enshrined and government must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”.<sup>509</sup>

“In South Africa the developmental state is characterised by its democratic content and the role of the state in socio-economic transformation. It prioritises both social and economic development and draws on participatory and integrated planning processes to undertake pro-poor, redistributive and proactive interventions. The emerging South African developmental state is non-racial, people-centred and participatory.”<sup>510</sup>

It is practically impossible to eradicate poverty in developing nations without implementing elements of the developmental state.<sup>511</sup> “The developmental state project in South Africa is based on the recognition that the inequalities in our society will not be addressed through the operation of the market.”<sup>512</sup> Along the same veins Turok states that “[w]e cannot depend on ‘trickle down’ or ‘ladders up’ to create a more just and equal society”,<sup>513</sup> because “[w]ealth doesn’t trickle down”.<sup>514</sup>

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<sup>505</sup> Machete in Turok 121.

<sup>506</sup> Levin in Turok 50.

<sup>507</sup> Turok 160 (author’s emphasis).

<sup>508</sup> Levin in Turok 50.

<sup>509</sup> S 27(2) of the Constitution.

<sup>510</sup> Levin in Turok 52.

<sup>511</sup> Levin in Turok 51.

<sup>512</sup> Levin in Turok 54.

<sup>513</sup> Turok 159.

Jahed and Kimathi argue that development cannot be achieved without intervention by the state and that legislation provides a legitimate apparatus with which to achieve such intervention.<sup>515</sup> Decisions related to the management of the economy should be made with the collective society in mind, since the economy is essence socially owned and new mechanisms for sustaining politico-economic democracy is thus necessitated.<sup>516</sup>

Hawthorne considers South Africa as belonging to the developing world and continuous intervention is required to perpetuate and bolster the development and transformation of South Africa's society. In order to achieve this traditional, conservative interpretation and application of the law of contract needs to be ceased.<sup>517</sup>

Van der Walt poses various questions relating to the debate centred on the creation of a new direction for the future:

“Does transformation require the abolition of traditional sources of law...? Does it imply that we should abandon traditional interpretive and analytical tools, or that we should develop new ones? Perhaps most perplexing of all: How do we step outside of the restrictions that necessitate transformation in the first place when devising a new approach to the sources and methodology we traditionally relied on? Can we lift ourselves up by our own bootstraps?”<sup>518</sup>

Van der Walt answers his own questions by concluding that it is neither the historical sources nor their traditional interpretation that is to blame for the traditional legal culture's tension with transformation, but rather the deep-rooted and conservative thinking about the purpose and function of “The Law” in a society.<sup>519</sup> South Africa's conservative legal culture, perpetuated by its courts, is perpetuating poverty and this results in a skewed vision of the distribution of wealth, power and resources in our society.

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<sup>514</sup> Turok B (ed) “Wealth doesn't trickle down – The case for the developmental state in South Africa” (2008) New Agenda: Cape Town.

<sup>515</sup> Jahed & Kimathi in Turok 97.

<sup>516</sup> Szentes 91.

<sup>517</sup> Hawthorne (2006) *THRHR* 48.

<sup>518</sup> Van der Walt (2006) *Fundamina* 5.

<sup>519</sup> Van der Walt (2006) *Fundamina* 5-6. See also the discussion of the work of Klare at 4.3.1 *infra*.



#### 4.2.3 Transforming the law of contract in line with the Constitution

Directly opposed to the position defending the efficacy and superiority of the Roman-Dutch legal principles present in our common law are the arguments put forward by transformative constitutionalists. These scholars inspired by the transformative project believe that the common law, with its Roman-Dutch and English foundations, has not been transformed sufficiently to be regarded as being aligned with the spirit of the Constitution or its values of dignity, equality and freedom.<sup>520</sup>

Since the theoretical paradigm of transformative constitutionalism is employed to analyse the topic of this dissertation, considering the influence of the Constitution on the law of contract, and more specifically the warranty against latent defects, is paramount. The notion that the Constitution should serve as the inspiration for reconfiguring the common law rules which govern all economic activity, provides exciting possibilities and challenges. In 1996, LötZ asserted that the then newly promulgated Constitution and its potential to alter the relationship between private autonomy<sup>521</sup> and social justice, would change the nature of the law of contract.<sup>522</sup> However, to date the courts have only referred to Constitutional values in passing and thereafter the focus of their judgments shifts to “the ‘real’ law of contract”.<sup>523</sup> That which is described as the ‘real’ law of contract therefore deserves closer scrutiny.

The cornerstone of the South African common law of contract has been unanimously identified as freedom of contract, or “the idol that is *pacta servanda sunt*.”<sup>524</sup> Probably the harshest description of the liberal notion of the sanctity of contract and its effects, as observed by South African courts since 1903,<sup>525</sup> can be found in this statement by Hahlo:

“[P]rovided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If through inexperience, carelessness or weakness

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<sup>520</sup> In this regard see Klare (1998) *SAJHR* 146; Davis (2011) *Stell LR* 845-864; Hawthorne (2006) *THRHR* 48-49; Van der Walt (2006) *Fundamina* 1; Van Marle (2009) *Stell LR* 286. For a more detailed discussion see 4.3 *infra*.

<sup>521</sup> An exposition of autonomy and paternalism follows *infra*.

<sup>522</sup> LötZ in Zimmermann & Visser 387.

<sup>523</sup> Davis (2011) *Stell LR* 847; Davis & Klare (2010) *SAJHR* 415.

<sup>524</sup> Barnard AJ 241; Davis (2011) *Stell LR* 847; Hawthorne (2006) *THRHR* 53. CHECK verder

<sup>525</sup> *Burger v Central South African Railways* 1903 TS 571 576 (Hawthorne (2006) *THRHR* 50).

of character, he has allowed himself to be overreached, *it is just too bad for him*, and it can only be hoped that he will learn from his experience....Darwinian *survival of the fittest*, the law of nature is also the law of the marketplace”<sup>526</sup>.

Interestingly, this quote is utilised on the cover page of a 2013 policy document of the National Research Foundation which addresses agreements between research laboratories and equipment suppliers.<sup>527</sup> The purpose of the document is to educate laboratory staff on the nature and consequences of the conclusion of a contract of sale. The fact that a government institution utilises this relatively outdated and unnecessarily emotive quotation is alarming. This does, however, illustrate the community’s present view of the nature of the contractual agreement and the fact that this view is being perpetuated. In light thereof, I believe that it is of value to discuss freedom of contract briefly.

Freedom of contract has been described as having four distinct implications: legislation should not interfere with parties’ freedom to negotiate the terms of their agreement;<sup>528</sup> agreements should be enforced according to the meaning of a contract as intended by the parties; parties should be allowed to choose with whom to contract; and parties should not be forced to contract, but should be allowed to opt not to conclude agreements.<sup>529</sup>

Freedom of contract is based on the presumption that the parties to a contract occupy an equal bargaining position.<sup>530</sup> This presumption also serves as the justification for the enforcement of contracts. More often than not, the vastly disparate socio-economic realities of the parties in question have a direct influence on their bargaining power:

“Equality between the parties is a prerequisite to the attainment of the ideal of freedom of contract ... [t]he doctrine of freedom of contract,

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<sup>526</sup> Hahlo “Unfair contract terms in civil-law systems” 1981 *SALJ* 70 as quoted by Hawthorne (2006) *THRHR* 49 (own emphasis).

<sup>527</sup> NRF [http://eqdb.nrf.ac.za/sites/default/files/resources/Final\\_Best%20Practices%20when%20entering%20into%20agreements%20](http://eqdb.nrf.ac.za/sites/default/files/resources/Final_Best%20Practices%20when%20entering%20into%20agreements%20).

<sup>528</sup> The Consumer Protection Act prescribes a number of specified terms that should be included in certain consumer contracts, fundamentally shaking the scope of the freedom of contract in such agreements. For a detailed discussion of the effect and role of the Consumer Protection Act see Chapter 5 *infra*.

<sup>529</sup> Hawthorne (1995) *THRHR* 163.

<sup>530</sup> Barnard AJ 213; Hawthorne (2006) *THRHR* 53.

coupled with formal equality,<sup>531</sup> reproduces social inequalities and allows the domination and exploitation<sup>532</sup> of one contracting party by another. Equal bargaining power cannot exist if a party to the contract concludes an agreement out of necessity, without a true understanding of what the contract entails.<sup>533</sup> Formal equality before the law is an engine of oppression.<sup>534</sup>

Pieterse argues that equality must be understood as being in touch with the societal context of parties. Attaining substantive (true) equality requires engagement with persistent domination and the disregard for the reality of the vulnerable.<sup>535</sup> Hawthorne states that the traditional view of the freedom of contract relates it to liberty and equality, an evaluation which might not be totally accurate in our current social reality, as contracts (and especially basic consumer contracts and credit agreements) are often concluded out of absolute necessity: “The social reality is, however, that true equality [between contracting parties] seldom exists and that many contracts are concluded out of necessity.”<sup>536</sup> The harsh reality is that the most disadvantaged individuals in our society never attain the economic status which empowers them to take part in market transactions as true equals with equal bargaining power.<sup>537</sup> The contract stripped bare has been described as “a system of give and take”<sup>538</sup> and from this vantage point it is easy to see how one party can subordinate another, since many parties take disproportionately to what they give.

Freedom to contract may be limited by public policy or the *boni mores*.<sup>539</sup> The Constitution has been described as a “repository of the *boni mores*”.<sup>540</sup> It has also been argued that public policy is closely related to good faith in the law of contract.<sup>541</sup>

<sup>531</sup> Here formal equality is understood as absolute equality before the law (Hawthorne (1995) *THRHR* 159).

<sup>532</sup> Also see the discussion of Hale’s theories *infra* at 4.4.

<sup>533</sup> In this regard see Davis (2011) *Stell LR* 854; Kok (2010) *SALJ* 68.

<sup>534</sup> Hawthorne (1995) *THRHR* 163 (footnotes omitted; own emphasis); Hawthorne (2006) *THRHR* 53; Barnard *AJ* 248; Lucy (1989) *Oxford J Legal Stud* 146.

<sup>535</sup> Pieterse (2006) *SAPR/PL* 160.

<sup>536</sup> Hawthorne (2006) *THRHR* 53-54; 61.

<sup>537</sup> Hawthorne (2006) *THRHR* 61-62.

<sup>538</sup> Barnard (2006) *Stell LR* 406.

<sup>539</sup> Hutchinson D & Du Bois F “Contracts in general” in Du Bois F (ed) *Wille’s Principles of South African Law* 9<sup>th</sup> Ed (2007) 733 737, as referred to by Davis (2011) *Stell LR* 847; *Barkhuizen v Napier* 2007 7 BCLR (CC) par 14.

<sup>540</sup> Davis (2014) *Stell LR* 14.

<sup>541</sup> Davis (2011) *Stell LR* 847 discussing Hutchinson & Du Bois *supra* (fn 539).

But interestingly an inferred contradiction exists between the sanctity of contract and good faith,<sup>542</sup> to the point that these concepts seem irreconcilable:

“[C]ontractual autonomy reflects not one, but two, *conflicting* values. Freedom-of-contract informed equally by the values autonomy and private ordering *and* by the need for government to restrict autonomy in order to secure legitimate business expectations. *Every* contract judgment strikes a balance between the conflicting contractual values of autonomy and constraint.”<sup>543</sup>

This has not been the case in the development of the modern Dutch and English law of contract, as freedom of contract is not seen as an unconditional principle.<sup>544</sup> The current South African common law is haunted by the continuous struggle between autonomous and paternalistic approaches in an attempt to achieve a measure of justice for all legal subjects. Barnard argues that the law in its present form does more to hinder the accomplishment of a sense of balance between autonomy and paternalism, than to achieve it.<sup>545</sup>

Paternalism refers to a system or reigning measure of control which influences individuals’ ability to act autonomously, protecting them from acting or deciding in a manner which will attenuate their general well-being.<sup>546</sup> Autonomy, on the other hand, has been described as synonymous with the liberal ideal of “the ‘good life’”.<sup>547</sup> Paternalism further sanctions the notion that the government’s judgment (often superimposed through the work of the legislature) supersedes and replaces the individual’s predilections.<sup>548</sup> Consumer legislation is an example of paternalistic legislation which limits freedom of contract with the intention of protecting the interests of the consumer.<sup>549</sup>

In an attempt to attain the truly egalitarian (and utopian) society where equality amongst all is the order of the day, legal rules should control or regulate “the

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<sup>542</sup> Barnard AJ 229.

<sup>543</sup> Davis & Klare (2010) *SAJHR* 471 (authors’ emphasis).

<sup>544</sup> Hawthorne (1995) *THRHR* 167.

<sup>545</sup> Barnard AJ 220.

<sup>546</sup> Hawthorne (1995) *THRHR* 168.

<sup>547</sup> Davis (2011) *Stell LR* 848. See also Davis & Klare (2010) *SAJHR* 411.

<sup>548</sup> Hawthorne (2007) *SAPR/PL* 479.

<sup>549</sup> For a detailed exposition of the Consumer Protection Act see Chapter 5 *infra*.

contractual allocation of power” between individuals,<sup>550</sup> since one of the principal functions of the contract law is dividing a society’s wealth.<sup>551</sup> The law of contract thus has a direct influence on the distribution of wealth, power and resources in a society and therefore the right to equality<sup>552</sup> demands that distributive consequences be considered.<sup>553</sup> Hawthorne argues that the reality of the inequality of resources demands that the actual resources of the parties involved be evaluated and considered,<sup>554</sup> since equality is central to the legal transformative endeavour.<sup>555</sup> The Constitution thus demands that the doctrine of *inequality* in the law of contract be acknowledged and accommodated.<sup>556</sup> If a principal goal of the Constitution is to mediate unequal power relations and unfair resource distributions,<sup>557</sup> surely this must have a drastic impact on the law of contract.

The notion of the redistribution of wealth implies that there two unequal groups make up South Africa’s society: the ‘haves’ and the ‘have nots’. The redistribution of wealth and resources is of importance if a vast fissure exists between those more affluent and those living in poverty. This is of course the reality in South Africa. The unequal bargaining power between these unequal parties therefore becomes of extreme importance. Cognisance should be taken of how the liberal conceptualisation of the freedom of contract (and the individualism it reveres) is actively hindering the (re)distribution of wealth, resources and power in our unequal society.<sup>558</sup>

The cases commonly referred to as ‘the freedom of contract cases’,<sup>559</sup> exemplify the courts’ unrelenting adherence to the tradition and legal analysis associated with the common law and the resultant lack of transformation of this area of the law. Davis and Klare argue that, although not blatantly clear, these cases illustrate an

<sup>550</sup> Hawthorne (1995) *THRHR* 176; Hawthorne (2006) *THRHR* 49.

<sup>551</sup> Hawthorne (2006) *THRHR* 49.

<sup>552</sup> As contained in s 9 of the Constitution.

<sup>553</sup> Hawthorne (1995) *THRHR* 176. See also Hawthorne (2011) *Stud Iuris* 1.

<sup>554</sup> Hawthorne (1995) *THRHR* 176.

<sup>555</sup> Moseneke (2000) *SAJHR* 316.

<sup>556</sup> Hawthorne (1995) *THRHR* 176 (own emphasis).

<sup>557</sup> Moseneke (2000) *SAJHR* 318.

<sup>558</sup> Davis (2011) *Stell LR* 849-850. See also Hawthorne (2006) *THRHR*: Those with wealth and power “[abuse] freedom of contract by creating monopolistic organisations imposing standard contracts within a legal system where substantive individualism is privileged over co-operative fairness... [and thus] allows the continued empowerment of the stronger contracting party, over the weaker, because the courts are justified by the particular regime of contract law adhered to not come to the aid of the weaker party” (57-58).

<sup>559</sup> *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

adherence to apartheid-era morality, racial discrimination and thinking about the law.<sup>560</sup> They highlight the courts' blatant disregard for the social contexts applicable in the cases, and list this as one of the central difficulties with these judgments. Directly related is the disregard for the disparate bargaining power of parties to the contracts in question.<sup>561</sup>

Another aspect of the law of contract that deserves scrutiny due to its relation to contractual justice is the Appellate Division's abolition of the *exceptio doli generalis*, as well as the restriction placed on the interpretation of good faith, in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas*.<sup>562</sup> Hawthorne argues that this abolition banished the last tatter of equity from the South African law of contract.<sup>563</sup> This notion was strengthened by the judgments in *Brisley v Drotsky*<sup>564</sup> and *Afrox Healthcare Bpk v Strydom*.<sup>565</sup> Traditionally the *exceptio doli generalis* was raised as a defence based on equity and it permitted a defendant to assert that the unconscionable conduct of the plaintiff resulted in the defendant's right to refuse tendering performance as agreed upon in terms of the contract. The main aim of the remedy was thus to ensure that a measure of good faith is imposed when contracts are enforced.<sup>566</sup> Barnard argues that the most unsettling aspect of the Court's decision is what it symbolises: a disregard for the principles represented by the remedy and the law of contract's disconnection with 'the ethical'.<sup>567</sup> In *Afrox Healthcare Bpk v Strydom*,<sup>568</sup> decided only a few months later, The Supreme Court aimed another blow at contractual justice, vilifying the doctrine of good faith, reasonableness, justice and fairness as "abstract considerations subjacent to our law of contract which...are not independent or 'free-flowing' bases for the non-enforcement of contracts."<sup>569</sup> Alarminglly it has been pointed out that our courts blindly follow the traditional notions of the freedom and sanctity of contract, regardless of whether or not the Constitution might be applied to the facts, thereby

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<sup>560</sup> Davis & Klare (2010) *SAJHR* 468.  
<sup>561</sup> Davis & Klare (2010) *SAJHR* 480.  
<sup>562</sup> 1988 3 SA 580 (A).  
<sup>563</sup> Hawthorne (2006) *THRHR* 51.  
<sup>564</sup> 2002 4 SA 1 (SCA).  
<sup>565</sup> 2002 6 SA 21 (SCA).  
<sup>566</sup> Veldsman & Kuschke (2012) *Without Prejudice* 47.  
<sup>567</sup> Barnard (2006) *Stell LR* 378-379.  
<sup>568</sup> 2002 6 SA 21 (SCA).  
<sup>569</sup> Barnard (2006) *Stell LR* 394.



entrenching the autonomous legal principles in our law.<sup>570</sup> The paramount importance of the transformative constitutional endeavour to the law of contract and consumer protection is found in the sentiment that our courts are ignoring opportunities to inject equity<sup>571</sup> into the common law of contract.<sup>572</sup>

Hawthorne attributes the strict, liberal stance adhered to in these cases to the autonomous tradition the South African law on contract adhered to both before and after the enactment of the Constitution.<sup>573</sup> Fischer's conception of just law, which should be "morally defensible as tested against the common conviction of the community at large",<sup>574</sup> does not accommodate a system of contract law which does not insist that contracting parties act in good faith.

Liberalism upholds individual autonomy, while transformative constitutionalism strives for "the collective good, through redistributive fairness in an open and accountable society".<sup>575</sup> Freedom of contract and paternalism are irreconcilable principles.<sup>576</sup> Moseneke argues that the fact that the Bill of Rights does not refer to 'social justice' by name, does not mean that it is not a constitutionally mandated imperative to strive for such justice.<sup>577</sup>

Several (former) Constitutional Court justices and chief justices have contemplated the link between social justice and the Bill of Rights, but only two instances will be mentioned here. Moseneke argues that mere equality does not automatically constitute social justice, more is required:

"[A] creative jurisprudence of equality coupled with substantive interpretation of the content of 'socio-economic' rights should restore social justice as a premier foundational value of our constitutional

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<sup>570</sup> Hawthorne (2006) *THRHR* 58.

<sup>571</sup> Hawthorne observes that in *Haviland Estates (Pty) Ltd v McMaster* 1969 2 SA 312 (A) 336D-G; *Lanfeer v Du Toit* 1943 AD 59; *Van der Merwe v Viljoen* 1953 1 SA 60 (A); and *Oswanick v African Consolidated Theatres (Pty) Ltd* 1967 3 SA 310 (A) 317E the courts liken equity to sympathy and therefore spurn the possibility of applying it completely. In my opinion *Wells v South African Alumenite Co* 1927 AD 69 could also be added to this list.

<sup>572</sup> Hawthorne (2006) *THRHR* 62.

<sup>573</sup> Hawthorne (2006) *THRHR* 52.

<sup>574</sup> Moseneke (2002) *SAJHR* 311.

<sup>575</sup> Moseneke (2000) *SAJHR* 316.

<sup>576</sup> Hawthorne (1995) *THRHR* 168.

<sup>577</sup> Moseneke (2002) *SAJHR* 314.



democracy side by side, if not interactively with, human dignity, equality, freedom, accountability, responsiveness and openness.”<sup>578</sup>

Along the same veins Sachs states that

“[t]he restoration of dignity for all South Africans accordingly requires the simultaneous creation of material conditions for a dignified life and development of increased respect for the personality and rights of each one of us. Both freedom and bread are necessary for the all-round human being. Instead of undermining each other, they are interrelated and interdependent.”<sup>579</sup>

He goes on to state that the fundamental right of having one’s human dignity respected becomes the link between freedom and bread.<sup>580</sup> Bread, an essential consumer product, becomes the symbol of dignity and freedom. It is clear that the contract of purchase and sale, more specifically the consumer contract, has an exceedingly important role to play in attempting to attain social justice in South Africa.

With the enactment of the Bill of Rights as contained in the Interim Constitution, freedom of contract was originally understood as being a fundamental human right.<sup>581</sup> This interpretation does however not hold Constitutional muster today. Freedom of contract is derived from political freedom<sup>582</sup> whereas good faith has its foundation in human dignity. Barnard argues that freedom, equality and human dignity should be understood and considered concurrently in the context of the constitutional notion of contract.<sup>583</sup> This conceptualises his idea of the ethical element of contract law.<sup>584</sup> He continues by explaining the link between human dignity as a form of empowerment<sup>585</sup> and human dignity embodied in the practice of constraint.<sup>586</sup> Human dignity relates directly to both the traditional notion of freedom

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<sup>578</sup> Moseneke (2002) *SAJHR* 314.

<sup>579</sup> Sachs in Jones & Stokke 141.

<sup>580</sup> Sachs in Jones & Stokke 142.

<sup>581</sup> Hawthorne (1995) *THRHR* 166.

<sup>582</sup> The traditional link between the right to liberty and freedom of contract stems from the French and American revolutions, as well as the British Industrial Revolution (Hawthorne (2006) *THRHR* 52-53).

<sup>583</sup> Barnard AJ 229.

<sup>584</sup> Barnard AJ 229-230.

<sup>585</sup> Barnard AJ 231-232.

<sup>586</sup> Barnard AJ 232-234.

of contract, as an expression of empowerment, as well as good faith in contractual dealings, which is achieved by a measure of constraint.<sup>587</sup> When looking through the lens of “the ethical element of contract in a constitutional South Africa” Barnard comes to the powerful conclusion that in order to respect the right to human dignity when contracting, the common law right to freedom of contract must *be exercised in good faith*: “[The] collective achievement of freedom cannot be attained where a claim to freedom violates another’s claim to dignity.”<sup>588</sup> He argues that freedom of contract has a duty or responsibility linked to it and is therefore an ethical freedom.<sup>589</sup>

Davis argues that the ‘the background rules of the law of contract’ need to be transformed in order to achieve true contractual fairness in South Africa’s unequal society. Liebenberg defines ‘background rules’ as rules applicable in a market economy that structure the access to and distribution of resources in a society.<sup>590</sup> Davis does not define this concept but various meanings thereof can be extrapolated from his work: the basis and norms propelling the notion of freedom of contract; the prevailing normative values of contract law; the pre-constitutional law of contract; and the law of contract as based on “all the values immanent in prevailing legal concepts”.<sup>591</sup> I believe that these background rules can only truly be changed if the courts evaluate them critically against the normative framework established by the Constitution.

#### 4.2.4 Conclusion

The importance of aligning the law with the values of the Constitution can not be discounted. More importantly, the role the law of contract has to play in the distribution of wealth and resources in our society demands that the contract as a distributor of power be evaluated. This must be done at the hands of the normative values of the Constitution.

### 4.3 Transformative constitutionalism

In this section transformative constitutionalism will be placed in context as a research agenda or theoretical paradigm. The concept will be defined, expounded and

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<sup>587</sup> Barnard AJ 231-232.

<sup>588</sup> Barnard AJ 237; 249.

<sup>589</sup> Barnard AJ 237.

<sup>590</sup> Liebenberg (2011) *Stell LR* 35.

<sup>591</sup> Davis (2011) *Stell LR* 850.

criticised before the importance thereof for the law of contract is illustrated. The Constitution encapsulates the greater South African community's yearning for transformation, while at the same time providing the device with which to achieve it.<sup>592</sup> In his "celebrated"<sup>593</sup> "seminal"<sup>594</sup> article Klare explains that in a legal system where transformative constitutionalism is the prerogative, a duty rests on legal scholars to re-think and evaluate the role of the Constitution and its inherent power to bring about transformation on a socio-economic front in an impoverished South African society. He argues that law-making is achieved by means of both legislation and adjudication.<sup>595</sup>

#### 4.3.1 Describing transformative constitutionalism

Klare defines transformative constitutionalism as

"a long-term process of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of *inducing large-scale social change* through nonviolent political *processes grounded in law*."<sup>596</sup>

Klare's exposition of transformative constitutionalism advocates eradicating South Africa's conservative legal culture. He warns that a conservative legal culture<sup>597</sup> will inevitably hinder the transformative endeavours attempted in the name and spirit of the Constitution. Fischer describes a "new attitude of mind" as one of the most difficult human traits to achieve.<sup>598</sup> Such a "new attitude of mind" is desperately necessary if a break is to be made with the conservative tradition.

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<sup>592</sup> Moseneke (2000) *SAJHR* 319.

<sup>593</sup> Davis (2014) *Stell LR* 4.

<sup>594</sup> Sibanda (2011) *Stell LR* 487.

<sup>595</sup> Klare (1998) *SAJHR* 146; 163-165.

<sup>596</sup> Klare (1998) *SAJHR* 150 (own emphasis).

<sup>597</sup> See Klare (1998) *SAJHR* 151; 156; 159; 161; 166-171; Moseneke (2000) *SAJHR* 316.

<sup>598</sup> As quoted by Moseneke (2002) *SAJHR* 311) from Clingman S (1998) *Bram Fischer: Afrikaner Revolutionary*. On the importance of the personal transformation of individuals in the pursuit of social change see Smith & Bauling (2013) *Stell LR* 603-604.

Constitutional adjudication is inherently political and shying away from, or attempting to disregard this is counterproductive; transparency is desirable.<sup>599</sup> As Klare originally set out, the law cannot be understood and interpreted as being free from any political influence<sup>600</sup> and for Van der Walt this means that the political nature of law must be embraced.

One of Klare's principle arguments is thus that our legal materials, such as the common law, legislation and the Constitution, are inherently pliable, our interpretation and application of these legal tools should, however, leave room to allow for such pliability to shine through and effect legal decision-making.<sup>601</sup> Davis does however describe the common law as "inherently preservative" by nature.<sup>602</sup> It is virtually impossible to endeavour for a more egalitarian legal culture "with the tools, training and habits of mind of earlier times".<sup>603</sup>

Van der Walt explains Klare's 'legal culture' as "legal tradition": deep-seated intellectual habits and unchallenged ways of doing things in the same manner they have been done for a long time.<sup>604</sup> An "exaggerated devotion" to, and reverence of, the common law has a lasting influence on the logic and arguments of legal practitioners and researchers.<sup>605</sup> He explains that this reverence will inevitably affect the approach selected when considering crucial legal problems. Even more troubling, sound, albeit alternative solutions to these problems may be overlooked as a result.<sup>606</sup> This clearly illustrates the notion that "[l]iberal legalism balks at the idea of transformative adjudication".<sup>607</sup>

The debate regarding the (direct and/or indirect) horizontal application of the principles of the Bill of Rights has been raging since the promulgation of the Interim

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<sup>599</sup> Klare (1998) *SAJHR* 151, 158, 161; Barnard (2006) *Stell LR* 395; Davis & Klare (2010) *SAJHR* 403; Van der Walt (2006) *Fundamina* 7.

<sup>600</sup> Klare (1998) *SAJHR* 152.

<sup>601</sup> Klare (1998) *SAJHR* 171. In this regard see Akintayo (2012) *SAPR/PL* 639-651.

<sup>602</sup> Davis (2014) *Stell LR* 5.

<sup>603</sup> Klare (1998) *SAJHR* 171. An interesting debate regarding the suitability of the common law's "pliability" and its inherently flexible character versus that of the Constitution's "development clauses", ss 8(3) & 39(2) (Davis & Klare (2010) *SAJHR* 403), is ongoing. In this regard see Van der Walt (2013) *SALJ* 722; Davis (2014) *Stell LR* 14; Bhana (2013) *SAJHR* 359; Davis & Klare (2013) *SAJHR* 449-509; Friedman (2014) *SAJHR* 63-88; Roederer (2013) *SAJHR* 219-250; Barnard *AJ* 239.

<sup>604</sup> Van der Walt (2006) *Fundamina* 18.

<sup>605</sup> Davis & Klare (2010) *SAJHR* 450.

<sup>606</sup> Van der Walt (2006) *Fundamina* 18.

<sup>607</sup> Moseneke (2000) *SAJHR* 315.

Constitution,<sup>608</sup> and has yet to be resolved.<sup>609</sup> Consensus has however been reached on the fact *that* the Constitution and the Bill of Rights apply horizontally between private individuals and therefore examining the law of contract in this light is of paramount importance.

Van der Walt discusses the two opposing views to transformation: the conservative approach, attempting to “restrict the transaction cost” that change would inevitably bring; and the radical approach, attempting to bring about the greatest change as quickly as possible.<sup>610</sup> Linked to this juxtaposition he discusses the apparent contradiction related to transformation (change) in a constitutional (stability) democracy.<sup>611</sup> The change and stability in reference relate to paternalism and autonomy, respectively.<sup>612</sup> The inevitable link between resistance to change, the desire for stability and a conservative legal culture is undeniable.<sup>613</sup>

Van Marle has developed the notion of transformative constitutionalism as being an approach to critiquing the law, a theoretical model which can be effectively applied to this study. She defines ‘transformative constitutionalism as critique’ as an approach “that aims to transform political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.”<sup>614</sup> To her, *transformative constitutionalism as critique* creates a continuous stream of possibility and opportunities, as it advocates doing more than simply tracing what has already been done.<sup>615</sup> She thus inspires the legal scholar to do more than just evaluate the transformations in law that have already occurred by proposing, aiding and implementing new ones. She calls for a disassociation from the traditional view on the law, an attempt which is at the centre of this study. Van der Walt’s exposition of law, as a cultural phenomenon which can only be observed from a specific cultural context (because it is impossible to analyse the law from a

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<sup>608</sup> See Hawthorne (1995) *THRHR* 160-162.

<sup>609</sup> A series of recently published articles illustrate this point: Bhana (2013) *SAJHR* 351-375; Roederer (2013) *SAJHR* 219-250; Friedman (2014) *SAJHR* 63-88. See also Davis & Klare (2010) *SAJHR* 415-419.

<sup>610</sup> Van der Walt (2006) *Fundamina* 3-4.

<sup>611</sup> Van der Walt (2006) *Fundamina* 4-5.

<sup>612</sup> See 4.2.3 *supra*.

<sup>613</sup> Van der Walt (2006) *Fundamina* 5.

<sup>614</sup> Van Marle (2009) *Stell LR* 288.

<sup>615</sup> Van Marle (2009) *Stell LR* 298.

socially and politically neutral position),<sup>616</sup> links to Van Marle's view on the importance of embracing the political character of the law.

#### 4.3.2 Criticism of the transformative constitutionalist research agenda

Klare asks whether transformative constitutionalism is a feasible endeavour for bringing about social and economic change in a democratic South Africa. He concludes that this is one of the best ways to do so from within the confines of the law, because he views transformation as a "political process grounded in law".<sup>617</sup> Some, however, question whether change by means of the law is the appropriate approach to adopt, as well as whether law has the ability to effectively and significantly transform our society to a more equal community. The fact that the gross human rights violations and the resultant inequality associated with apartheid was achieved by laws and legal means might be the reason that so many believe that law is the best tool to remedy these injustices.<sup>618</sup>

Sibanda argues that, in spite of all the good attempted in the name of transformative constitutionalism, the liberalistic character and interpretation of the Constitution resulting from the conservative approach to law ingrained in South African jurists, cannot be avoided.<sup>619</sup> Hence the attempt to achieve poverty eradication in the name of the Constitution is hindered by fact that *that* which could be achieved through the application of Constitutional principles has been defined and imagined in a fashion that is not broad and powerful enough and therefore hinders the transformative power of the Constitution. Transformative constitutionalism is accordingly "ill-suited for achieving the social, economic and political vision it proclaims",<sup>620</sup> since "it promises more than it can actually deliver."<sup>621</sup>

Michelman agrees with Sibanda that the South African Constitution is steeped in a classical-liberal legal culture from which it cannot escape.<sup>622</sup> He views the prevailing political and cultural reality, which adheres to an unwaveringly liberal reading of the law, and the fact that this reality will remain unchanged for the foreseeable future, as

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<sup>616</sup> Van der Walt (2006) *Fundamina* 21.

<sup>617</sup> Klare (1998) *SAJHR* 150.

<sup>618</sup> Klare (1998) *SAJHR* 169.

<sup>619</sup> Sibanda (2011) *Stell LR* 485-486.

<sup>620</sup> Sibanda (2011) *Stell LR* 486.

<sup>621</sup> Sibanda (2011) *Stell LR* 490; 493.

<sup>622</sup> Michelman (2011) *Stell LR* 707; 708.

the reason that transformative constitutionalism can be seen as “a contradiction in terms”.<sup>623</sup> He thus believes that the Constitution is an inherently flawed transformative tool due to the fact that it was written, and is interpreted, in an inherently conservative manner.

Kok’s central argument is compatible with that of Sibanda. Law has the ability to transform society, but this potential to transform is overestimated.<sup>624</sup> The passing of time also becomes relevant since “the more far-reaching the intended change, the longer it will take”.<sup>625</sup> He postulates that law can be viewed as a mirror reflecting a society’s collective values, but this does not mean that the law can automatically induce transformation in line with these values.<sup>626</sup>

Cognisance should be taken of the fact that it is impossible to definitively prove the existence of a sufficiently causal link between changes to the law and the transformation of a society.<sup>627</sup> Since a legal change is implemented after the fact, as an attempt to address an already existing problem, it “plays no role in influencing human behaviour.”<sup>628</sup> Kok continues by proposing that legal rules are grounded in the incorrect assumption that human beings are rational and that they will therefore conduct themselves in congruence with these rules when dealing with other members of the community – “but at best humans are a-rational”.<sup>629</sup>

Litigation based on legislative rules may potentially result in a court order which could in a specific situation ultimately lead to change, but additional resources are required. In Kok’s opinion these include “enormous organisational ability, energy, effort and money”, none of which are automatically available.<sup>630</sup> It would however be unfounded to deny that judicial law-making can “hasten social changes that are already under way”.<sup>631</sup>

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<sup>623</sup> Michelman (2011) *Stell LR* 707.

<sup>624</sup> Kok (2010) *SALJ* 59-61.

<sup>625</sup> Kok (2010) *SALJ* 61 in reference to Chemerinsky E “Can courts make a difference?” in Devins N & Douglas DM (eds) *Redefining Equality* (1998) Oxford University Press 192-193.

<sup>626</sup> Kok (2010) *SALJ* 66.

<sup>627</sup> Kok (2010) *SALJ* 70.

<sup>628</sup> Kok (2010) *SALJ* 75.

<sup>629</sup> Kok (2010) *SALJ* 80.

<sup>630</sup> Kok (2010) *SALJ* 83.

<sup>631</sup> Sackville (2005) *Fed LR* 390 (own emphasis).



In *Fourie v Minister of Home Affairs*<sup>632</sup> Cameron JA, as he was then, explained a paradox he believes lies at the heart of South Africa's national project of transformation: "we came from oppression by law, but resolve to seek our future, free from oppression, in regulation by law."<sup>633</sup> Governments view the law as a speedy and cost-effective way to address problems that arise in society, in an attempt to change that society and eradicate the problem.<sup>634</sup> It must be accepted that law may not be the only instrument employed by the state to induce social change. One example of this can be found in Lucy's argument that the contract, in essence a voluntary exchange, is not the ideal way to achieve distributive justice.<sup>635</sup> He considers taxation a more appropriate approach to attain such justice.<sup>636</sup>

The main critique against transformative constitutionalism is thus that law's power to bring about socio-economic transformation is greatly exaggerated. The lived experience of the greater South African society is not one of transformation at the hands of the law. I do, however, not accept these pessimistic views of the role of the law and constitutional interpretation on face value. The mere fact that law has already assisted in bringing about some change in the South African society, no matter how insufficient such change may seem, means that the law can be used to transform the lives of those in our society that rightfully demand it.

Barnard argues for utopian thinking about the law, championing for the value it could potentially hold. In the context of contract law he maintains that "[u]topian thinking provides the space for contract's reconnection with the ethical in that it openly commits to the ideals of fairness, equity and justice".<sup>637</sup> He equates true contractual justice to a contractual Utopia.<sup>638</sup> A societal commitment to contracting in good faith will result in the introduction of the ethical element of contract, which could ultimately result in a measure of contractual justice.<sup>639</sup>

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<sup>632</sup> 2005 (3) SA 429 (SCA).

<sup>633</sup> Par 7 as quoted by Davis & Klare (2010) *SAJHR* 503. See also Klare (1998) *SAJHR* 169.

<sup>634</sup> Kok (2010) *SALJ* 83.

<sup>635</sup> Lucy (1989) *Oxford J Legal Stud* 132,147.

<sup>636</sup> Lucy (1989) *Oxford J Legal Stud* 147.

<sup>637</sup> Barnard (2006) *Stell LR* 398.

<sup>638</sup> Barnard AJ 241.

<sup>639</sup> Barnard AJ 241.

Barnard emphatically and convincingly argues that the fact that irresolvable fundamental contradictions<sup>640</sup> exist in the law of contract is the exact reason why the utopian ideal of contractual justice should never be abandoned.<sup>641</sup> Utopian thinking has the potential to lead to real transformation,<sup>642</sup> but thinking alone is not enough – immediate action is required:<sup>643</sup>

“It is not ‘the law’ which is responsible for this transformation – it is us who create the law with our human will in the face of our humanity who is inexcusably responsible for transforming it.”<sup>644</sup>

Although the law is not the only available transformative apparatus, it can most certainly not be disregarded as such; “law and legal practices *can* be a foundation of democratic and responsive social transformation”<sup>645</sup>

#### 4.3.3 Transformative constitutionalism and the law of contract

Approaching the law of contract from a transformative constitutional framework means re-reading the law and applying the egalitarian values contained in the Constitution. Klare describes the Constitution as “*social, redistributive, caring, positive...horizontal, participatory, multicultural, and self-conscious*”<sup>646</sup> and with this in mind no interpretation of the law can be neutral to the Constitutional agenda any longer.

When transformative constitutionalism and the law of contract are discussed in unison, I believe two crucial truths should be acknowledged. Firstly, cognisance should be taken of the fact that the principle of ubuntu should impact the law of contract; and secondly, contract law and consumer protection should impact the fight against poverty.

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<sup>640</sup> In this regard see 4.2.3 *supra* on the relationship between freedom of contract and good faith.

<sup>641</sup> Barnard AJ 242.

<sup>642</sup> Barnard AJ 245.

<sup>643</sup> Barnard AJ 247. “While not sufficient, I do believe that a progressive legal culture is a necessary condition for a long-term success of transformative constitutionalism” (Klare (1998) *SAJHR* 170).

<sup>644</sup> Barnard AJ 252.

<sup>645</sup> Klare (1998) *SAJHR* 188 (own emphasis).

<sup>646</sup> Klare (1998) *SAJHR* 153 (author’s emphasis).

The South African Constitution is informed by a sense of communality and ubuntu.<sup>647</sup> The spirit of ubuntu is encapsulated in the Constitution, and mirrored by its preamble, as the idea of the collective community jointly striving towards freedom. The Constitution as the supreme law is adopted by the South African people to “[i]mprove the quality of life of all citizens and free the potential of each person”.<sup>648</sup> The goal of achieving social, political and economic freedom and equality is clearly expressed in the vision embodied here. The *corpus* of case law on the relationship between the South African law and ubuntu is too expansive to assess in this dissertation, but cognisance must be taken of the case most directly related to contractual matters. The minority judgment of the recent decision of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>649</sup> contains a wealth of information on the importance of the relationship between ubuntu’s focus on the worth of the community and the principle of good faith in contractual dealings.

The crux of the minority judgment as handed down by Yacoob J centres around the fact that the time has arrived for the background (common law) rules of the law of contract to be infused with the principles of good faith and ubuntu in order to make way for “a new constitutional contractual order”.<sup>650</sup>

In this case the applicant argued that the *pactum de contrahendo*<sup>651</sup> was against public policy and that the common law applicable in this regard should be developed in accordance to section 39(2) of the Constitution. The argument was in favour of the application of a measure of good faith on the agreement in question. The Court stated that

“[g]ood faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith

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<sup>647</sup> Davis & Klare (2010) *SAJHR* 403.

<sup>648</sup> Klare (1998) *SAJHR* 153; Moseneke (2002) *SAJHR* 313.

<sup>649</sup> 2012 (1) SA 256 (CC).

<sup>650</sup> Par 36.

<sup>651</sup> In this regard also see *Southern Port Developments (Pty) Ltd v Transnet Limited* 2005 (2) SA 202 (SCA) par 17 & Hutchinson (2011) *SALJ* 273-296.

requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country”.<sup>652</sup>

The importance of the role of the contract in the daily lives of South Africans is thus recognised. Another essential point raised by the Court is that it would most likely benefit the community as a whole to incorporate the principle of good faith into the law of contract. This notion is strengthened when reference is made to the importance of the principles of ubuntu:

“The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman-Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce”.<sup>653</sup>

Yacoob J continues by stating that the majority of the community living under the common law rules would most likely prefer good faith being a requirement in contractual dealings.<sup>654</sup> It is of integral importance to understand the link the Court makes between good faith, the spirit of the Constitution and the principles of ubuntu. The question raised by the Court is whether the ideals imbedded in the Constitution, and subsequently public policy,<sup>655</sup> demand that “the important moral denominator of good faith”<sup>656</sup> be reintroduced into the law of contract. It is then argued that the principles encompassed in the notion of ubuntu should guide the process of determining what the spirit and objects of the Constitution are. The Court later confirms that the principles of ubuntu should inform any decision made on the importance of contracting in good faith.<sup>657</sup> The importance of the unequal bargaining power between poor individuals and financially strong companies is again raised and

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<sup>652</sup> 2012 (1) SA 256 (CC) para 22.

<sup>653</sup> 2012 (1) SA 256 (CC) para 23.

<sup>654</sup> Par 23.

<sup>655</sup> Davis (2014) *Stell LR* 14.

<sup>656</sup> Par 36.

<sup>657</sup> Par 24.

the values ubuntu might bring to the table here are highlighted.<sup>658</sup> The Court thus confirms Barnard's theory that the introduction of the ethical element of contract is paramount.<sup>659</sup>

What becomes clear is the urgent need to address the reality of poverty in our unequal society by means of the law (of contract). The Constitution imposes a positive duty on the state to "combat poverty and promote social welfare",<sup>660</sup> as well as providing subjects of the state the ability to live out their constitutional rights by means of self-realisation.<sup>661</sup> The state thus has to endeavour to achieve this goal in any and every manner possible, examples being the enforcement of the Bill of Rights in dealings between citizens themselves,<sup>662</sup> as well as the promulgation, interpretation and enforcement of legal rules done with this kept in mind. Section 8(2) of the Constitution specifically mandates such action by the state.

In a later article Klare commented that those academics and judges researching in the field of transformative constitutionalism are generally of the opinion that the abolition of poverty is in fact a "constitutional imperative", a notion which is novel in the international legal community.<sup>663</sup> This is a powerful statement which makes the burden on those working in the legal sphere even heavier; the greatness of the task should not serve as deterrent, but rather as motivation. I agree with Barnard that the law of contract (and more specifically the law of purchase and sale) has an important and significant role to play in the fight against poverty.

#### 4.3.4 Conclusion

The Constitutional Court, albeit in a minority judgment, has contended that the constrictive common law rules applicable to the law of contract should be revised in order to shape them in line with the spirit of the Constitution.<sup>664</sup> Judicial consideration for the plight of the poor who enter into consumer contracts is thus critical.<sup>665</sup> For the transformative constitutional endeavour to succeed the common law should be re-

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<sup>658</sup> Par 24.

<sup>659</sup> In this regard see the discussion of Barnard's argument at 4.2.3 *supra*.

<sup>660</sup> Klare (1998) *SAJHR* 154.

<sup>661</sup> Klare (1998) *SAJHR* 153.

<sup>662</sup> See Klare (1998) *SAJHR* 155; 179-180.

<sup>663</sup> Klare in Liebenberg & Quinot 423.

<sup>664</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)* case par 23.

<sup>665</sup> Par 25.

imagined.<sup>666</sup> The transformation envisaged for the law of contract is firstly pleading for an interpretation and application of the law which allows for the stretching of the limits that legal scholars believe the existing law to inherently have; and secondly, but more importantly, the transformation of the legal thinking of those engaged with its interpretation and application, as called for by Klare. The obligation imposed can be directly transplanted to consumer law and the law of warranties against defective goods.

#### 4.4 The law of contract and achieving justice

Davis contends that when the immense disparity between the wealthy and the impoverished is evaluated, it becomes clear why the South African society is viewed as one of the most unequal societies in the world. He attributes this disproportion to “more than three hundred years of colonial and racist rule.”<sup>667</sup> This blatantly obvious inequality may be regarded as one of the main causes of the social injustice experienced by South Africa’s impoverished community. Maintaining the *status quo* of the background rules of contract will have a direct and destructive impact on the fight against poverty.<sup>668</sup> To dismiss the implications of such a statement would be ignorant. Davis argues that if the reconfiguration of these common law background rules is not achieved the role contract law has to play in the eradication of poverty will never be realised,<sup>669</sup> since “the law *reproduces* patterns of power and distribution that *reproduce* poverty”.<sup>670</sup> He equates poverty to inequality and powerlessness<sup>671</sup> and directly links it to an infringement of the constitutional rights to dignity and freedom.<sup>672</sup>

When considering the contract and equality, it is crucial to appreciate that “the median person in the developing world, the *peripheral* contracting party, is rarely skilled, knowledgeable, well-educated or wealthy”.<sup>673</sup> The colonial and apartheid-era abuse and deprivation of those on the periphery of South African society is sustained “by the denial of an equitable jurisdiction” and the eradication of common law

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<sup>666</sup> Davis & Klare (2010) *SAJHR* 410.

<sup>667</sup> Davis (2011) *Stell LR* 845.

<sup>668</sup> Davis (2011) *Stell LR* 857.

<sup>669</sup> Davis (2011) *Stell LR* 857.

<sup>670</sup> Davis (2011) *Stell LR* 860 (own emphasis).

<sup>671</sup> Davis (2011) *Stell LR* 862.

<sup>672</sup> Davis (2011) *Stell LR* 863. In this regard also see Barnard *AJ* 231-232.

<sup>673</sup> Hawthorne (2006) *THRHR* 61-62 (own emphasis).

means<sup>674</sup> to reinstate it.<sup>675</sup> Along the same veins Barnard contends that our legal system would have differed vastly had “its basic doctrines... been written by poor people, women and black people.”<sup>676</sup> These basic doctrines refer to the same fundamental legal concepts as Davis’ background rules of the law.<sup>677</sup> Barnard further explains these doctrines and rules as “seemingly ‘value-neutral’”,<sup>678</sup> which is a dangerous assumption in light of South Africa’s transformative project. Since the potential economic role of the contract and its power to (re)distribute wealth is viewed as paramount,<sup>679</sup> possible avenues by which to explore this potential should be investigated.

Judicial decisions illustrate their inherent power to lobby for and achieve justice.<sup>680</sup> But social justice is incompatible with a strictly liberal manner of interpreting and enforcing contracts, as this approach rejects “the general fairness criterion” and the result is the denial of equity and human dignity as entrenched in the Bill of Rights.<sup>681</sup>

Barnard argues that the normative values of the Constitution and the *interdependent* nature of a community creates the obligation to contract in an ethical manner.<sup>682</sup> For Barnard contractual justice entails each individual taking responsibility for the advancement of her own needs and welfare *as well as* those of the other members of the community, who are all in turn potential contracting parties.<sup>683</sup> I understand this as strengthening the notion that contractual justice can only be achieved by means of a lived experience of ubuntu.

To date socio-economic rights have not yet had any significant effect on the law of contract.<sup>684</sup> Contractual disputes almost always involve the court being tasked with balancing conflicting rights, and human rights are often involved. Liebenberg further

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<sup>674</sup> As examples *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA); *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); and *Brisley v Drotzky* 2002 4 SA 1 (SCA) may be mentioned. The denial of and disregard for the principles of good faith and fairness, as well as the *exceptio doli generalis* illustrate the fact that the courts are out of touch with the needs and struggles of ordinary contracting parties.

<sup>675</sup> Hawthorne (2006) *THRHR* 62.

<sup>676</sup> Barnard AJ 212.

<sup>677</sup> For a detailed discussion see 4.2.3 *supra*.

<sup>678</sup> Barnard AJ 220.

<sup>679</sup> See 4.2.3 *supra*.

<sup>680</sup> Klare (1998) *SAJHR* 147.

<sup>681</sup> Barnard AJ 221-222.

<sup>682</sup> Barnard AJ 212.

<sup>683</sup> Barnard AJ 243.

<sup>684</sup> Liebenberg 358, 487.



argues that the transformative endeavour embarked on in the name of the Constitution will be hindered if socio-economic rights are marginalised when contractual disputes are adjudicated.<sup>685</sup> Transformative adjudication, as related to socio-economic rights, involves critically engaging with the “real life impact of [the] social and economic deprivation of disadvantaged groups” and considering the implications thereof in light of what these rights actually entail.<sup>686</sup>

Economic marginalisation is as serious and unjust as discrimination based on race, gender or disability and these forms of social injustice reinforce each other to create “a vicious cycle of cultural and economic subordination”.<sup>687</sup> This yet again illustrates the importance of the right to human dignity, which has been linked to the manner in which individuals contract with one another.<sup>688</sup>

Some legal rules create a skewed distribution of resources, wealth and bargaining power, while others enforce and maintain it.<sup>689</sup> The latter include the rights and duties imposed on parties by the former.<sup>690</sup> The title of Hale’s 1923 work aptly describes the current South African situation: “Coercion and Distribution in a Supposedly Non Coercive State”.<sup>691</sup> A clear explanation of this is found in Hale’s story of a hypothetical hungry [wo]man: If she owns no property, she has no legal right to work any piece of land in order to produce food without paying for the use of the land. She also needs to pay for any food which is sold by others. To feed herself and take part in the economic system governing the society in which she lives, she needs to spend money. In order to obtain money she is forced, “under penalty of starvation”, to enter into an employment agreement where she is automatically in a weaker bargaining position and is thus forced to accept the terms as laid down by the employer, whatever these may be. Spending the wages she receives is the only

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<sup>685</sup> Liebenberg 358.

<sup>686</sup> Liebenberg 79. This relates directly to the importance of taking cognisance of the true realities and bargaining positions of the contracting parties in order to achieve a measure of substantive equality (see 4.2.3 *supra*).

<sup>687</sup> Fraser N “From redistribution to recognition? Dilemmas of justice in a ‘postsocialist age’” in Olson K (ed) *Adding Insult to Injury: Nancy Fraser Debates her Critics* (2008) 9-41 Verso: London 16 as quoted by Liebenberg 481.

<sup>688</sup> See 4.2.3 *supra*.

<sup>689</sup> Davis (2011) *Stell LR* 848; 862 referring to Hale R “Bargaining, Duress and Economic Liberty” (1943) 42 *Columbia LR* 603 625.

<sup>690</sup> Davis (2011) *Stell LR* 848 referring to Kennedy D (1991) *Legal Studies Forum* 330.

<sup>691</sup> In *Political Science Quarterly* 38 (1923) 470.

manner in which she may legally take part in society's economic arena.<sup>692</sup> It can therefore be surmised that if she does not accept the contractual terms imposed by another party, she will starve.

Hawthorne supports and strengthens this theory: "Distributive agreements reallocate...wealth by means of trading in commodities, securities and property. Thus the law of contract facilitates the distribution of wealth."<sup>693</sup> The fact that the contracts that distribute wealth are often concluded and enforced in a *mala fide* fashion creates severe injustices in our society and in a socio-political climate where mass service delivery protests are the order of the day, it would be unwise to continue ignoring these injustices.

Today's idea of liberty and equality is not that envisaged 100s of years ago.<sup>694</sup> The traditional notion that nothing (neither judicial decision-making nor legislation) should interfere with the almost religiously defended notion of the freedom of contract results in the reproduction of social inequalities and the domination and exploitation of one contracting party over another. This view that contracts play no role in the socio-economic and political sphere of society leaves no room for the acknowledgement of the importance of the distribution of wealth. All facets of human welfare are connected.<sup>695</sup> Resultantly protecting the most vulnerable members of society (who are automatically the weakest role-players in the economic market) from the effects of poverty is of no importance and this view cannot be supported in light of South Africa's constitutional dispensation. The consumer contract and its potential impact on poverty in South Africa illustrates the reason that legislative intervention was required in this area of the law.

#### **4.5 The warranty against latent defects, consumer protection and the Constitution**

Davis welcomes the changes to the law of contract that the Consumer Protection Act appears to implement, but he warns that

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<sup>692</sup> Adapted from Hale R "Coercion and Distribution in a Supposedly Non Coercive State" (1923) 38 *Political Science Quarterly* 470 472-473 as quoted by Davis (2011) *Stell LR* 848-849.

<sup>693</sup> Hawthorne (2006) *THRHR* 56.

<sup>694</sup> In this regard see fn 582 *supra*.

<sup>695</sup> Liebenberg 481.

“[f]or the jurisprudence that emerges from the Consumer Protection Act to be coherent, the courts will no longer be able to eschew an interrogation of the ground rules upon which the contractual arrangement has been ultimately fashioned...Inequality of bargaining power and the consequences thereof lie at the heart of the considerations of which the court is required to take into account in terms of [the Act].”<sup>696</sup>

For the purpose of this study the link between the ethical contract<sup>697</sup> and consumer transactions must be investigated. Consumer legislation has introduced various measures to infuse fairness and conscionability into the law of purchase and sale.<sup>698</sup> But, as Davis argues, the fairness envisaged will only be achieved if the general law of contract is applied in an ethical manner. Striving towards such an ethical utopia also requires that the actual realities of the contracting parties be considered in order to bridge the chasm caused by unequal bargaining power. Potential developments of the common law on the warranty against latent defects, and the reigning background rules in this the area of the law, can only be considered once the scope of the changes brought about by the CPA are fully understood.

The role of consumer legislation, as it attempts to protect the consumer from the economic effects of the purchase of defective goods, should thus be analysed in conjunction with the constitutionally imposed duty<sup>699</sup> to continually evaluate the fairness and legitimacy of the law of contract. The Constitutional Court has started to take the relevant social and historical contexts into account “as *sources* of legal knowledge”.<sup>700</sup> This has, however, not yet been the case in matters of a contractual nature and more should be done in this regard.

#### 4.6 Conclusion

In the not so distant past judges illustrated that they are unsure as to whether the common law or the Constitution should guide their interpretation of legislation<sup>701</sup> and I predict that this confusion will most probably apply to future interpretations of

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<sup>696</sup> Davis (2011) *Stell LR* 846.

<sup>697</sup> As championed by Barnard (see 4.2.3 *supra*).

<sup>698</sup> For a detailed discussion see Chapter 5 *infra*.

<sup>699</sup> As expounded by Klare (2008) *SAJHR* 146-188.

<sup>700</sup> Davis & Klare (2010) *SAJHR* 495 (own emphasis). See further 495-496.

<sup>701</sup> Van der Walt (2006) *Fundamina* 11-12.

consumer legislation in South Africa. However, in light of the importance and prominence of the Constitution's transformative project the hope is that this uncertainty will soon be a thing of the past, the optimistic expectation being that the normative values of the Constitution will enjoy favour.

The complex issues related to the law's true power to change society as raised in this chapter,<sup>702</sup> provoke the question of whether developments of the common law of defects can effectively impact poverty in South Africa. Though the ultimate developmental goal is much wider than pure economic transformation and upliftment, the law's role in transforming South Africa's society cannot be relegated.

For true transformation to take place in South Africa, it must be accepted as a national project as well as a necessity by all in the community.<sup>703</sup> How else will we reach the point in history where we all contract in good faith, taking the needs and human dignity of the other contracting party into consideration? Due to its prevalence the consumer contract of purchase and sale might be a means to introduce members of the community to a more ethical manner to deal with each other in the marketplace.

The fact that those who benefit(ed) from the apartheid regime are those who lead the way in terms of conservative legal thinking, could explain the resistance to change so clearly visible in the South African contract law. This is however not the only factor of relevance, but the importance of the law's potential to transform a society should not be ignored.<sup>704</sup> It is blatantly clear that the background legal rules of the law of contract enforce and enshrine the unequal bargaining position<sup>705</sup> which originally created the immeasurable inequality in South Africa's, now democratic, society. South African courts need to take responsibility for the fact that their lack of action in this regard is perpetuating the injustices running rampant in South Africa's society.

Davis states that the task prescribed by the Constitution is to question and evaluate whether all legal rules "are congruent with the normative commitments of the

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<sup>702</sup> See 4.3.2 *supra*.

<sup>703</sup> In this regard see Smith & Bauling (2013) *Stell LR* 603-604.

<sup>704</sup> See 4.3.2 *supra*.

<sup>705</sup> Davis (2011) *Stell LR* 849.

Constitution.”<sup>706</sup> In a country as economically divided as South Africa, the incremental changes applied to the common law of contract to date, has not been sufficient to bring about adequate transformation; one-on-one contractual bouts between parties will not facilitate society-wide transformation:

“A legal system based exclusively on individual common law action by ‘consumer’ against ‘trader’ bears no relation to an efficient and fair market characterised by globalisation. Consequently private contract law has been supplemented and supplanted by statutes, regulations and the introduction of consumer organisations.”<sup>707</sup>

The importance of the enactment of the CPA cannot be denied. It has, and will continue to play an important role in effecting fair consumer dealings. It is thus paramount to extend the analysis to the effect of the Constitution on the CPA and the South African law applicable to the warranty against latent defects. Contracts warranting or excluding liability for defective goods ultimately remain contracts, and therefore an examination must be launched into whether the urgency to transform the general law of contract extends to the law on latent defects. What is true for contract law in its totality is not necessarily, or automatically, true for the law applicable to contracts of purchase and sale that enforce or exclude a seller’s duty to indemnify the purchaser against latent defects. In order to conduct such an analysis the impact of the CPA on the existing common law should first be evaluated.

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<sup>706</sup> Davis (2011) *Stell LR* 850.

<sup>707</sup> Hawthorne (2007) *SAPR/PL* 477.

## CHAPTER 5 THE EFFECT OF THE CONSUMER PROTECTION ACT ON THE LAW RELATING TO LATENTLY DEFECTIVE GOODS SOLD

### 5.1 Introduction

The previous chapters explored the development of the rules regarding latent defects as these developed from Roman to Roman-Dutch, and eventually South African common law principles. The extreme importance of the Constitution and the transformation of the common law of contract it necessitates, have been highlighted. Thus the development to this point, as well as much-needed further development has been discussed. My investigation now shifts to the influence of the Constitution on consumer legislation and the resultant effect of the Consumer Protection Act on the common law warranty against latent defects.

Legislation is often drafted to give light to public policy and the *boni mores*.<sup>708</sup> The CPA is an excellent example of legislation playing such a role, as it aims to address the almost inevitably unequal bargaining positions in consumer contracts.<sup>709</sup> This chapter investigates the effect of, and interplay between, the Consumer Protection Act, the relevant common law and the Constitution, as these apply to warranties against defective products, the viability of the *voetstoots* clause and strict liability under the current South African law of purchase and sale.

A brief overview of the CPA will be provided, where after a detailed discussion of the consumer's right to fair value, good quality and safety will follow. The transformative effect of this consumer right on the common law on latent defects will be analysed in order to determine the success thereof and whether or not it contributes to the transformative project attempted under the Constitution.

### 5.2 The Constitution as background to the Consumer Protection Act

Prior to the enactment of the CPA the unfair contract terms consumers could simply not avoid was criticised by legal scholars.<sup>710</sup> They acknowledged the urgency of providing consumers redress against these unfair terms.<sup>711</sup> The law of contract had stagnated in this regard and the courts provided injured parties no real redress

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<sup>708</sup> Du Plessis HM 91.

<sup>709</sup> Woker (2010) *Obiter* 230.

<sup>710</sup> Du Preez (2009) *TSAR* 64; Naudé (2006) *Stell LR* 361; Sharrock (2010) *SA Merc LJ* 295.

<sup>711</sup> Du Plessis HM 92.

based on equity and fairness.<sup>712</sup> Traditional contract theory is built on the assumption that the parties to the contract negotiated the terms of the contract, reached consensus on each term and occupied equal bargaining positions during the negotiations.<sup>713</sup> This is unfortunately not observed in practice; traders and enterprises make use of standard form contracts that are slanted in their favour and not open to negotiation by the consumer.<sup>714</sup> Furthermore, many consumer contracts are concluded out of necessity, as life sustaining products are also purchased by means of consumer contracts.<sup>715</sup> In light of this the common law remedies to address unfair contracts and contractual terms were considered insufficient.<sup>716</sup>

Previous attempts to provide the consumer with recourse by means of legislation resulted in a piecemeal body of incoherent and ineffectual rules.<sup>717</sup> Before the enactment of the CPA the limited scope of consumer legislation in place was unknown to consumers, applied in an uncoordinated manner and did not provide sufficient protection to consumers.<sup>718</sup> The resultant system was inadequate and fragmented.<sup>719</sup> Furthermore the courts were diffident to develop the related common law casuistically: “the courts have repeatedly stressed that they are simply not equipped for the task of legislation”.<sup>720</sup> The long-awaited legislative solution finally came in 2008 with the promulgation of the CPA.<sup>721</sup>

The CPA, as social justice legislation, has as aim the transformative constitutional aspiration to kindle and drive socio-economic change in the impoverished South African community. Law’s political element implies a process of implementing law to achieve political aims. Inducing drastic socio-economic transformation in the community as a whole is also one of the most prominent aims of the South African developmental state.<sup>722</sup> Legislation could and should thus be employed in this regard.

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<sup>712</sup> See 4.2.3 *supra*.

<sup>713</sup> Du Plessis HM 91; Woker (2010) *Obiter* 227.

<sup>714</sup> Sharrock (2010) *SA Merc LJ* 296; Van Eeden 13.

<sup>715</sup> See 4.2.3 *supra*.

<sup>716</sup> Sharrock (2010) *SA Merc LJ* 296; Naudé (2006) *Stell LR* 362.

<sup>717</sup> Du Preez (2009) *TSAR* 64; Sharrock (2010) *SA Merc LJ* 296; Woker (2010) *Obiter* 218.

<sup>718</sup> Woker (2010) *Obiter* 219; Du Plessis HM 92.

<sup>719</sup> Naudé (2006) *Stell LR* 361 fn 4; Woker (2010) *Obiter* 218–219.

<sup>720</sup> Van Eeden 2.

<sup>721</sup> Woker (2010) *Obiter* 228.

<sup>722</sup> See 4.2.2 *supra*.



Since bargaining positions and the parties themselves are not equal, the *pacta servanda sunt* principle only serves to enforce pre-existing inequalities. The Constitution, which embodies the *boni mores* and the principles of ubuntu, requires that the welfare of the community as a whole be considered when the law is interpreted and applied. As stressed above, this means that the unfair background rules of the common law of purchase and sale should be evaluated and transformed.<sup>723</sup> The legislature employed the CPA as an instrument with which to drive such transformation forward.

Respecting the human dignity of the other contracting party means that the common law right to freedom of contract must be exercised with a measure of good faith.<sup>724</sup> The redistribution of wealth, resources and power in the South African society requires that the contract as a distributive tool be recognised. In this regard the normative framework set by the Constitution cannot be disregarded. Paternalistic legislation such as the CPA strives to introduce elements of the ethical contract into South African consumer law. An evaluation of how these constitutional aspirations have found a voice in the law on the sale of defective goods is essential.

### 5.3 An evaluation of the key elements of the Consumer Protection Act

“The Consumer Protection Act protects natural persons as well as small juristic persons in their capacity as consumers in respect of the promotion and supply of goods and services<sup>725</sup> by a supplier in the ordinary course of the supplier’s business.”<sup>726</sup>

The CPA, promulgated in 2008, only became effective on 31 March 2011<sup>727</sup> and encapsulates previous consumer acts and accommodates consumer legislation still in force.<sup>728</sup> The Act generally addresses unfair contractual terms in order to provide consumers with better protection.<sup>729</sup> The CPA follows a rights-based approach,

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<sup>723</sup> See 4.2.3 *supra*.

<sup>724</sup> Barnard AJ 237.

<sup>725</sup> As discussed at 1.x *supra*, the effect of the consumer law in question on the supply of services falls beyond the scope of this dissertation.

<sup>726</sup> Van Heerden in Nagel 707-708.

<sup>727</sup> The Minister deferred the operation date of the CPA to 31 March 2011 (item 2(3)(a) of Schedule 2; GN 917 in GG 33581 of 23 September 2010).

<sup>728</sup> Melville & Palmer (2010) *SA Merc LJ* 272.

<sup>729</sup> Du Preez (2009) *TSAR* 58; Sharrock (2010) *SA Merc LJ* 297.

structuring the protection granted in terms of specific rights granted to consumers.<sup>730</sup> This rights-based system has as one of its aims the development of the common law of sale to bring it in line with the transformative constitutional project.

### 5.3.1 Purpose of the Consumer Protection Act

The CPA provides a broad spectrum of justifications for its enactment.<sup>731</sup> These are found in the long title, preamble and Part B of Chapter 1 of the Act, which provides the purpose of the legislation. The golden thread running through these justifications is the aim of promoting and advancing “the social and economic welfare of consumers in South Africa”.<sup>732</sup> This broader aim of the CPA relates to the transformative goals of the Constitution and the desire to bring about social and economic transformation across the greater South African society.<sup>733</sup> Of the utmost importance in this regard is the aim to protect the rights of the South African society’s most vulnerable persons (consumers).<sup>734</sup> They are specifically identified as persons from low-income and remote communities, minors, seniors, the visually impaired, those with poor or no literacy skills, and individuals with limited language skills in the language in which the advertisement, agreement or other visual representation is presented.<sup>735</sup> The striking conclusion to be drawn in this regard is that “[t]he more vulnerable the consumer is, the more protection is required”.<sup>736</sup>

Of particular importance to this study is the focus the Act places on the vulnerable party in a sales agreement and how this vulnerability is directly related to the socio-economic position this vulnerable person fills in the community. In line with the purpose of the CPA, it implicitly addresses the notion of the poor as vulnerable, and as a result, the protection it attempts to provide the vulnerable in an attempt to address poverty. As highlighted, this must be evaluated and approached from within the Constitutional framework. The role of the common law of contract should also be kept in mind, as the link between the Constitution, consumer legislation and the development of the common law cannot be denied or ignored.

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<sup>730</sup> Meiring (2010) *Without Prejudice* 28.

<sup>731</sup> See ss 3 & 4 of the CPA in this regard.

<sup>732</sup> S 3(1).

<sup>733</sup> Klare (1998) *SAJHR* 150.

<sup>734</sup> S 3(1)(b).

<sup>735</sup> S 3(1)(b).

<sup>736</sup> Du Preez (2009) *TSAR* 63.

In order to achieve this transformative goal the Act provides additional objectives: creating and supporting a fair, accessible, efficient and sustainable consumer market;<sup>737</sup> promoting fair business practices;<sup>738</sup> and shielding consumers from suppliers' unfair trade practices and conduct.<sup>739</sup>

### 5.3.2 Interpreting the Consumer Protection Act

The interpretation of the CPA is dictated by section 2. It is of cardinal importance to remember that the Act should always be interpreted in such a way as to give effect to the purpose thereof.<sup>740</sup> Here several aspects should be taken into consideration. When a matter regulated by the Act is heard by a court or consumer tribunal it should firstly, develop the common law so as to aid the realisation of consumer rights and to improve the standing of the vulnerable consumer;<sup>741</sup> and secondly, the interpretation must promote the spirit and purposes of the Act.<sup>742</sup> Where a provision of the Act, or any document in question, may be construed as having more than one meaning, the meaning that best promotes the spirit and purposes of the Act (and by extension the Constitution) and the realisation of the consumer rights of vulnerable persons should always be preferred.<sup>743</sup>

In terms of section 2(10), the Act may not be interpreted in a manner which denies the consumer any of her common law rights. This provides the greatest protection to the consumer, as she is granted a larger scope of remedies. This last interpretive measure is of extreme importance in relation to the law on defective goods, as it implies that the consumer has both common law and legislative remedies at her disposal. Lastly it should be remembered that foreign law; as well as international law, conventions, declarations and protocols relating to consumer protection, may also be considered.<sup>744</sup>

These interpretation rules are all closely related and point to a duty to interpret the CPA in the manner which grants the vulnerable consumer the greatest protection possible. This may be viewed as the golden rule when interpreting the CPA.

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<sup>737</sup> S 3(1)(a).  
<sup>738</sup> S 3(1)(c).  
<sup>739</sup> S 3(1)(d).  
<sup>740</sup> S 2(1).  
<sup>741</sup> S 4(2)(a).  
<sup>742</sup> S 4(2)(b)(i).  
<sup>743</sup> Ss 4(3) & 4(4)(a).  
<sup>744</sup> S 2(2).

### 5.3.3 Application of the Consumer Protection Act

Section 5 sets out the rules for the application of the Act. Every transaction concluded in South Africa, which is not specifically exempted from the operation of the Act, is regulated in terms thereof.<sup>745</sup> A transaction is concluded between a natural/juristic person who is acting in her/its ordinary course of business (the supplier); and another person (the consumer), where an agreement is reached regarding the “supply or potential supply of any goods or services in exchange for consideration.”<sup>746</sup> The definition further includes the actual supply of the goods or services agreed to.<sup>747</sup> A transaction thus includes the act of reaching consensus regarding the supply of goods, as well as the actual supply of goods. This can be equated to the common law definition of a contract of sale.<sup>748</sup> Du Plessis states that “supply” as described by the Act, includes the purchase and sale of goods and that the Act could potentially apply to these agreements, depending on whether or not the sale was concluded within the borders of the Republic; as part of the supplier’s ordinary course of business; or if any of the exemptions supplied by the Act, apply to the agreement.<sup>749</sup> The Act defines a ‘consumer’ as a person who concludes a transaction with a supplier in the ordinary course of the supplier’s business.<sup>750</sup> A ‘supplier’ is defined as a person who markets (promotes or supplies)<sup>751</sup> any goods or services.<sup>752</sup> A supplier in terms of the Act may thus be equated to the common law seller, and the consumer to the purchaser.<sup>753</sup> To further qualify when the Act applies, it is also key to understand that “goods” in terms of the Act refers to items promoted or supplied as being for human consumption; a tangible, physical object which could bear writing or encoding; “any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written on or encoded on any medium, or a licence to use any such intangible product”;<sup>754</sup> a legal interest in any immovable property; as well as gas, water and electricity.<sup>755</sup>

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<sup>745</sup> S 5(1)(a).

<sup>746</sup> S 1 sv “transaction” (a)(i).

<sup>747</sup> S 1 sv “transaction” (a)(ii).

<sup>748</sup> See 2.3.1 *supra*.

<sup>749</sup> Du Plessis HM 95.

<sup>750</sup> S 1 sv “consumer”.

<sup>751</sup> S 1 sv “market”.

<sup>752</sup> S 1 sv “supplier”.

<sup>753</sup> Du Plessis HM 97.

<sup>754</sup> S 1 sv “goods” (c).

<sup>755</sup> S 1 sv “goods”.

In terms of section 5(1)(a) the transaction must occur within the borders of South Africa. The use of “occur” creates confusion regarding whether the Act applies to the conclusion or execution of the agreement.<sup>756</sup> Du Plessis argues that it would include contracts of sale concluded in South Africa.<sup>757</sup> If this section is interpreted with the protection of the vulnerable in mind, the only conclusion that can be drawn is that “occur” refers to both the conclusion and execution of the agreement. This principle is mirrored by the definition of ‘supply’: both the act of reaching an agreement on the supply and the act of actually supplying the goods, are included.

Van Heerden points out that the CPA does not define “the ordinary course of business” and that this will have to be determined on the facts of each case.<sup>758</sup> Cognisance should also be taken of the fact that once-off sale agreements are not regulated in terms of the Act.<sup>759</sup> This rule includes a measure of fairness for the seller, because she will only be liable in terms of the Act if she ordinarily supplies the goods in question.

Section 5(2)(b) specifically excludes agreements from the application of the Act where goods are sold to purchasers who are juristic persons<sup>760</sup> whose total asset value or annual turnover<sup>761</sup> equates or exceeds the threshold amount indicated by the Minister.<sup>762</sup> The current threshold is R2 million.<sup>763</sup> The Act thus only regulates agreements where the consumer is an individual or a small juristic person. Barnard argues that this is because the Act is aimed at protecting *vulnerable* consumers.<sup>764</sup> Larger juristic persons who are not protected by the Act may still rely on the remedies available under the common law.

In line with the principle that legislation may not be applied retrospectively, transactions and agreements concluded before the general effective date<sup>765</sup> of the CPA are not protected in terms of the Act. Several additional exemptions of specific

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<sup>756</sup> Du Preez 2009 *TSAR* 68.

<sup>757</sup> Du Plessis HM 96.

<sup>758</sup> Van Heerden in Nagel 709; Otto (2011) *THRHR* 536.

<sup>759</sup> Otto (2011) *THRHR* 538.

<sup>760</sup> These include body corporates, partnerships, associations or trusts (s 1 *sv* “juristic person”).

<sup>761</sup> This amount refers to the turnover of the entity at the time of the conclusion of the agreement.

<sup>762</sup> Here “Minister” (s1 *sv* “Minister”) refers to the member of the Executive tasked with administering consumer related matters. At present this is the Minister of Trade and Industry, Dr Rob Davies (DTI [http://www.dti.gov.za/about\\_dti.jsp](http://www.dti.gov.za/about_dti.jsp)).

<sup>763</sup> GN 294 in GG 34181 of 1 April 2011.

<sup>764</sup> Barnard J 471 (own emphasis).

<sup>765</sup> Item 3(1) of Schedule 2 to the CPA; see fn 727 *infra*.

agreements and transactions, in terms of which goods are supplied, are provided by the Act. These include agreements in terms of which goods are supplied to the State,<sup>766</sup> or where the Minister excludes specific transactions from the ambit of the Act.<sup>767</sup> Goods sold by means of a credit sale agreement are covered by the CPA, but the credit sales<sup>768</sup> themselves are excluded from the protection granted by the Act.<sup>769</sup>

Just as the CPA excludes the above mentioned transactions and agreements outright, some agreements will always provide the consumer with recourse. Section 5(6)(e) determines that agreements in terms of which goods are supplied to a franchisee under a franchise agreement will always be regarded as a transaction in terms of the Act.<sup>770</sup> Furthermore, sections 60 and 61 of the Act impose a form of strict (product) liability on all sales agreements, regardless of whether the transaction qualifies as a consumer agreement or not.<sup>771</sup>

The rules regarding the application of the Act may thus be summarised as follows:

“The CPA is applicable to certain contracts of sale only. Therefore, the CPA divides contracts of sale into sales governed by the CPA (‘consumer sales’) and sales not governed by the CPA (‘commercial sales’).<sup>772</sup> Therefore, where a seller concludes a contract of sale with a buyer who is an individual or a juristic person (whose annual turnover is below the determined threshold) in the course of the seller’s business and in South Africa, that contract of sale is governed by the CPA.”<sup>773</sup>

#### **5.4 Fundamental consumer rights enshrined in the Consumer Protection Act**

In order to protect the consumer from unfair and unjust action by the supplier, fundamental consumer rights are provided by the CPA. These rights stipulate the conduct expected from suppliers, or alternatively, the grounds on which consumers

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<sup>766</sup> S 5(2)(a).

<sup>767</sup> S 5(2)(c).

<sup>768</sup> As regulated by the NCA.

<sup>769</sup> S 5(2)(d). Otto (2011) *THRHR* 535, 543; Melville & Palmer (2010) *SA Merc LJ* 272. The exemptions provided in ss 5(2)(e)–(g) are not listed or discussed here, as they pertain to services and thus fall beyond the scope of this dissertation.

<sup>770</sup> S 5(6)(e).

<sup>771</sup> For a detailed discussion of product liability in terms of the CPA see 5.5.6 *infra*.

<sup>772</sup> Van Eeden 2.

<sup>773</sup> Du Plessis HM 98.

may institute action against suppliers. These rights are provided in Parts A to H of Chapter 2 of the Act. They are the following: the right to equality in the consumer market,<sup>774</sup> the right to privacy,<sup>775</sup> the right to choose,<sup>776</sup> the right to disclosure and information,<sup>777</sup> the right to fair and responsible marketing,<sup>778</sup> the right to fair and honest dealing,<sup>779</sup> the right to fair, just and reasonable terms and conditions,<sup>780</sup> and lastly, the right to fair value, good quality and safety.<sup>781</sup> These rights apply to consumer agreements simultaneously and reinforce one another in an attempt to provide the consumer with the best possible protection.<sup>782</sup>

Part C of Chapter 2 of the CPA provides for the consumer's right to choose. Here section 15 states that the consumer should be granted the opportunity to pre-authorise any repairs or maintenance exercised on the goods in question. The implied warranty of quality as found in section 56(1) also provides for the repair of goods. When consumer goods do not comply with the standard of quality set by the Act,<sup>783</sup> the consumer may choose to repair the goods. Furthermore, section 18 dictates that the consumer may choose or examine the goods. Section 18(3) specifically provides that "[i]f the consumer has agreed to purchase goods solely on the basis of a description or sample, or both, provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be." In terms of the consumer's right to quality goods, a consumer may elect to return, replace or demand a refund if any material defect is found in the goods.<sup>784</sup> Therefore, if a consumer is not satisfied with goods based on any of the circumstances set out in section 18, the rights supplied by section 55 could provide the consumer with another measure of protection. The section 20(1)(a) right to return goods also specifically refers to the right to return unsafe goods in terms of section

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<sup>774</sup> Ss 8-10.

<sup>775</sup> Ss 11-12.

<sup>776</sup> Ss 13-21.

<sup>777</sup> Ss 22-28.

<sup>778</sup> Ss 29-39.

<sup>779</sup> Ss 40-47.

<sup>780</sup> Ss 48-52.

<sup>781</sup> Ss 53-61.

<sup>782</sup> A discussion of all eight these consumer rights falls beyond the scope of this dissertation.

<sup>783</sup> See 5.5.3 *infra*.

<sup>784</sup> S 55(2). For a detailed discussion see 5.5.2 *infra*.



56, and it is expressly stated that these rights do not substitute each other. This illustrates that both Parts C and H of Chapter 2 of the Act protect the consumer's right to choose.

Section 50 of the Act regulates written consumer agreements and provides the minimum standards, in terms of information included, to which the document must conscribe. The rules contained here do, however, apply to all written agreements, regardless of whether these are tax invoices, notices of delivery or consumer sales agreements. Therefore, if a supplier wishes to capture any part of the agreement concluded with the consumer, such as the consumer's acceptance of goods in a specifically stated condition, such document must comply with the requirements for plain language as set out in section 22. Section 22 contains the consumer's right to information in plain and understandable language, as part of the greater right to disclosure and information which is encapsulated in Part D of Chapter 2 of the Act.

Part F of Chapter 2 enshrines the consumer's right to fair and honest dealing, which includes protection against unconscionable conduct<sup>785</sup> as well as false, misleading or deceptive representations<sup>786</sup> on the part of the supplier. Although this right applies to all consumer agreements, it certainly also applies to the supply of defective goods as contemplated in Part H of Chapter 2. Unconscionable conduct includes any misrepresentation, fraud or duress on the part of the supplier. Similar protection is, however, provided under the common law in terms of the *actio empti* and it is therefore unclear whether, and if so, what additional protection this provides the consumer.

The fact that section 40(2) specifically asks of the supplier to take the circumstances of a specific consumer into account is of great importance. Here the supplier is required to take into account the consumer's "physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor." Section 55(4) also requires that circumstances beyond the agreement be taken into account, namely the consumer's bargaining position.<sup>787</sup> Therefore the right to fair and honest dealing, as well as right to fair value, good quality and safety relate directly to common law protection, as well as to the court, tribunal or mediator's duty

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<sup>785</sup> S 40.

<sup>786</sup> S 41.

<sup>787</sup> For a detailed discussion see 5.5.2 *infra*.

to consider the circumstances beyond the actual agreement concluded by the parties. Under the common law courts are allowed to take details beyond the agreement into account, but only in an attempt to determine the true intention of the parties when they concluded the actual agreement.<sup>788</sup> The CPA allows the actual circumstances of the parties to be taken into consideration to ameliorate the disparate bargaining positions of the parties.

The consumer right that relates most directly to all the other rights is that found in Part G of Chapter 2 of the Act: the right to fair, just and reasonable terms and conditions. This right immediately reminds of the protection against unconscionable conduct discussed above. Terms included in any consumer agreement which waive or limit the (legislative or common law) rights of consumers are unfair.<sup>789</sup>

The specific rights referred to here only represent a portion of those related to the consumer's right to fair value, good quality and safety. The interrelatedness of the individual consumer rights found in the Act itself, the rights granted in terms of the common law and those enshrined in the Bill of Rights will now be analysed in conjunction with the consumer right at the heart of this study, namely the right to fair value, good quality and safety.

## **5.5 The consumer's right to fair value, good quality and safety<sup>790</sup>**

Section 2 Part H of the Act<sup>791</sup> addresses the consumer's right to fair value, good quality and safety.<sup>792</sup> The consumer right encapsulated in this section has a drastic

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<sup>788</sup> Traditionally courts were allowed to consider the surrounding circumstances when an ambiguous common law contract was interpreted. The purpose of providing the court with information on the surrounding circumstances applicable to the conclusion of the agreement is to determine the true intention of the parties. The precise extent of the oral evidence that parties may supply in court in order to illustrate the true meaning of the contract has not yet been established (Maxwell *Interpretation* in Hutchinson & Pretorius 258, 260, 262). This illustrates that evidence and information beyond the contract itself may only be considered under limited circumstances (In this regard see a detailed discussion of the parole evidence rule in Maxwell *Interpretation* in Hutchinson & Pretorius at 255-263).

<sup>789</sup> S 51(1)(b)(i).

<sup>790</sup> In terms of Part H of Chapter 2 of the Act, specific types of goods are mentioned as being included under the consumer's right to safe, good quality goods. Due to the limited scope of this dissertation the sale of immovable property by estate agents, the sale of second-hand goods, sales by auction and hire-purchase agreements will not be investigated. The application of Chapter 2 Part H on the supply of services also falls beyond the ambit of the study.

<sup>791</sup> Ss 53 to 61.

impact on the common law of latent defects.<sup>793</sup> When evaluating this section of the Act it is paramount to consider the scope and application of the Act.<sup>794</sup> It is crucial to keep in mind that certain transactions fall outside the ambit of the Act, namely once-off transactions between parties to the agreement; agreements where the purchaser is a juristic person as defined by the Act; and agreements in terms of which goods are not supplied in the ordinary course of business of the seller. This means that the common law on latent defects will still apply to some purchase and sale agreements.<sup>795</sup> In some instances where the Act does apply, the common law might apply simultaneously, depending on which rules provide the consumer with the most equitable redress.<sup>796</sup> The manner in which the CPA results in a deviation from the existing common law rules will be discussed alongside the provisions of the Act, in order to facilitate an effortless evaluation of the relation between these rules.

### 5.5.1 Definitions

Part H of Chapter 2 is subject to the general definitions in terms of the Act, as well as specific definitions which only apply to this Part of the Act.<sup>797</sup> The four definitions provided here deserve further consideration in light of the discussion that follows.

Section 53(1) of the CPA provides definitions applicable to any goods, component of any goods, or service as referred to in Part H. A defect is regarded as “any material imperfection” associated with the manufacture of the goods, or the components thereof, which causes the goods to be less acceptable than one would expect in the circumstances.<sup>798</sup> A defect is also present in the goods where a characteristic of the goods or components results in the goods being less useful, practicable or safe than one would reasonably be entitled to expect in the circumstances.<sup>799</sup> ‘Failure’ refers to the inability of the goods to perform in the manner, or to the effect, intended.<sup>800</sup> Goods are regarded as being hazardous if a characteristic therein is identified or

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<sup>792</sup> This right will only be discussed as it applies to goods. A discussion on services (s 54) falls beyond the ambit of this dissertation.

<sup>793</sup> Barnard J 387-388.

<sup>794</sup> Barnard J 381. See also 5.3.3 *supra*.

<sup>795</sup> Otto (2011) *THRHR* 537; Barnard J 388.

<sup>796</sup> In this regard see the detailed discussion 5.3.3 *infra*.

<sup>797</sup> As provided in s 53.

<sup>798</sup> S 53(1)(a)(i).

<sup>799</sup> S 53(1)(a)(ii).

<sup>800</sup> S 53(1)(b).

declared as such by law,<sup>801</sup> or if the use of the goods poses a significant risk of personal injury to any person, or damage to property.<sup>802</sup> Goods are regarded as being unsafe if a characteristic, failure, defect or hazard particular to the goods present an extreme risk of personal injury to the consumer or other persons, or damage to property.<sup>803</sup>

### 5.5.2 The consumer's right to safe goods of quality

Section 55 sets out the rules related to the consumer's right to safe, good quality goods which results in the implied warranty of quality provided in the subsequent section. Section 55 is applicable to goods as defined by the Act,<sup>804</sup> but does not apply to any goods acquired by a purchaser at auction.<sup>805</sup> Section 55(2) provides an explanation as to the quality of goods the consumer may demand: all goods supplied in terms of consumer agreements as contemplated by the Act should be reasonably suitable for the purposes for which they are generally intended; of good quality, in good working order and free of *any* defects; useable and durable for a reasonable period of time, if the use to which they would normally be put and the surrounding circumstances of the supply thereof are taken into account; and comply with standards of Standards Act 29 of 1993, or any other public regulation, if applicable.<sup>806</sup>

When reading section 55(5)(a) together with section 53, it becomes evident that the nature of the defect present in the goods is irrelevant; "*any*"<sup>807</sup> defect is taken into consideration, be it latent or patent. Barnard argues that section 53 of the Act confirms the common law definition<sup>808</sup> of a latent defect, but that the Act also extends the scope thereof.<sup>809</sup> She further argues that an amendment to the CPA is required in order to emphatically state this and avoid confusion.<sup>810</sup> Lötz points out that "*any*"

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<sup>801</sup> S 53(1)(c)(i).

<sup>802</sup> S 53(1)(c)(i).

<sup>803</sup> S 53(1)(d).

<sup>804</sup> See 'goods' s 1 v.

<sup>805</sup> S 55(1). See s 45 for a discussion of auctions for the purposes of the Act.

<sup>806</sup> Ss 55(2)(a)-(d).

<sup>807</sup> Ss 53(1)(a)(i)&(ii) (own emphasis).

<sup>808</sup> As provided in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A).

<sup>809</sup> Barnard J 383; 455.

<sup>810</sup> Barnard J 388; 455. She also discusses the fact whether an implied "consumer expectation test" is created by the definition of a defect as provided in the Act. She shoots down the merits

implies that the defect need not be material. The South African courts' struggle to determine whether or not a defect is material, substantial or sufficiently debilitating the use of the *merx* also falls away, because the CPA grants the adjudicating body the right to take a wide range of extra-legal information into consideration,<sup>811</sup> which will aid this determination greatly. The fact that the defect could be patent means that it is of no importance that a defect could potentially have been identified by the consumer before the sale.<sup>812</sup> Interestingly, the CPA addresses Van Warmelo's concern regarding the emphasis on the *latent* nature of the defect.<sup>813</sup> Here the CPA implements the scope of protection granted under Roman law, but which ultimately fell by the wayside as a result of the development of Roman-Dutch law and the South African common law.

In terms of section 55(3) a consumer may assume that goods are fit for the purpose she has expressly indicated they are to be used for, if the supplier indicates, implicitly or otherwise, that she can supply suitable goods.<sup>814</sup> This reminds of the position of the common law merchant seller.<sup>815</sup>

In the previous chapter the importance of the courts' responsibility to take cognisance of extra-legal information, such as the difference in bargaining power between contractual parties, was discussed.<sup>816</sup> If section 55(4)<sup>817</sup> of the CPA is taken into consideration it seems as if consumer law might be moving in a similar direction. These sections do not refer to the socio-economic situations of the parties, but rather the circumstances surrounding the supply of the goods in question. These circumstances include how and for which purported purpose the goods were marketed, packaged and displayed; whether any trademark, description, instructions or warnings related to the goods were provided; or the reasonable scope of use for which the goods might possibly be employed, at the time when the goods were

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of such a test, supporting the notion that the presence, or not, of a defect should be determined by the court based on the facts of each case (388-389).

<sup>811</sup> S 55(4).

<sup>812</sup> Lötz in Nagel 229.

<sup>813</sup> Van Warmelo 133.

<sup>814</sup> Barnard J 383; Van Eeden 350.

<sup>815</sup> See 5.5.7 *infra*.

<sup>816</sup> In this regard see 4.4 *supra*.

<sup>817</sup> Subsections (a)-(d).

produced and supplied.<sup>818</sup> This section clearly broadens the common law idea of information which may be brought before the courts when determining the nature and extent of the defect in the goods.

Trade-in transactions will fall within the ambit of Chapter 2 Part H of the Act, if such an agreement is concluded as part of the ordinary course of the supplier's business. Therefore the supplier has the legislative remedies available to her if the goods supplied in terms of the trade-in agreement do not measure up to the standard for fair, good quality and safe goods as required by the Act.<sup>819</sup> Barnard does however contend that the supplier, who receives goods as part of the price paid for the goods sold, may not rely on the same legislative remedies as the consumer; the supplier will however be protected in terms of the common law aedilitian remedies.<sup>820</sup> The fact that the supplier does in fact deserve protection is derived from the duty imposed by section 39(2) of the Constitution to develop the common law in order to create a more just body of common law rules.<sup>821</sup> This difference in protection at the disposal of disgruntled suppliers and consumers, results in justifiable discrimination between consumer and supplier. This discrimination may be justified in terms of the purpose of the Act, namely granting protection to the most vulnerable of consumers.<sup>822</sup>

### 5.5.3 The consumer's related warranty

In its bare essence section 56(1) read together with section 55(2) of the CPA creates the following warranty: In instances contemplated<sup>823</sup> by the CPA where goods are supplied to a consumer, there is an implied provision that the producer, importer, distributor and retailer each warrant that the goods comply with requirements and standards connoting good quality. This standard of quality includes a guarantee that the goods are reasonably suitable for the purposes for which they are generally intended; in good working order and free of any defects; that they will be useable

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<sup>818</sup> Barnard J (383-384) provides a detailed discussion of the effect of regulations 44(3)(i)–(j) of the CPA and how these forbid a supplier from unilaterally altering the nature or characteristics of the goods agreed upon.

<sup>819</sup> Barnard J 402.

<sup>820</sup> Barnard J 402.

<sup>821</sup> *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) 326E-I. For a detailed discussion see 3.3.5.5 *supra*.

<sup>822</sup> See 5.3.1 *supra* for a detailed discussion on the protection of vulnerable members of the South African community.

<sup>823</sup> See ss 5 & 6 regarding the scope and application of the CPA.

and durable for a reasonable period of time, having regard to the average use they would have to endure; and comply with any applicable standards set under the Standards Act<sup>824</sup> or any other public regulation.

Barnard explains that the right to safe goods of quality “has been safeguarded by an implied *legislative warranty*”,<sup>825</sup> highlighting the direct link between the legislative right and the ensuing warranty. She later argues that this warranty is an “implied *contractual warranty*”.<sup>826</sup> I support the position that the implied warranty is legislative in nature. Where the Act does not apply, the common law dictates that this implied warranty is contractual.<sup>827</sup> If the legislative standards for the goods<sup>828</sup> are not met, the goods are defective and the implied warranty of quality as expressed in section 56(1) provides the consumer with a claim in this regard. The warranty in question applies to both “transactions” and “agreements” as defined in terms of the Act.<sup>829</sup>

In terms of this warranty, the consumer has the right to return the goods to the supplier<sup>830</sup> within six months of the supply thereof, and no penalty may be enforced by the supplier as a result of the return.<sup>831</sup> The consumer then has the choice between either a refund, replacement or the repair of the goods,<sup>832</sup> and if the repair thereof was selected and eventually turns out to be unsuccessful or unsatisfactory, the suppliers have three months in which to replace the goods or refund the customer.<sup>833</sup> These time periods create interesting arguments and questions

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<sup>824</sup> Act 29 of 1993. Under ss 3 & 4 the South African Bureau of Standards is tasked with setting specific product standards in specific industries, assessing the quality of products and endeavouring for the standardization of products and services. These are merely provided as examples as the Act empowers the South African Bureau of Standards to act in order to achieve a plethora of quality and safety related standards.

<sup>825</sup> Barnard J 384.

<sup>826</sup> Barnard J 390.

<sup>827</sup> See 3.3.2 *supra*.

<sup>828</sup> As set by s 55(2).

<sup>829</sup> Barnard J 390; Löt in Nagel 230.

<sup>830</sup> The Act refers to “the producer or importer, the distributor and the retailer” (s 56(1), but Barnard (390) argues the application of the warranty should be extended in order to be applied to “suppliers” (s 1v) as well. The fact that the Act refers to the “the producer or importer” means that the warranty cannot be provided by both these parties (Barnard J 392).

<sup>831</sup> Barnard J 383; 390.

<sup>832</sup> S 56(2).

<sup>833</sup> Löt in Nagel 230. If the repair thereof was selected and eventually turns out to be unsuccessful the suppliers has three months in which to replace the goods or refund the customer (s 56(3); Barnard J 384). In this instance the supplier may select whether to refund or replace the goods (Barnard J 390). S 57(1) & (2) determines the rules applicable to the warranty implicitly supplied on repaired goods.



regarding the lifespan of the remedies available to the consumer. Barnard argues that the *voetstoots* clause will not become operational after the six month period has lapsed, since this would not be in line with the spirit and purpose of the Act.<sup>834</sup> The preferred position is that once the consumer remedies available to the consumer are no longer available, the consumer remains protected by the implied warranty of quality.<sup>835</sup> Here it can be argued that a *contractually* implied warranty would support this claim. This would mean that a *voetstoots* clause would never be lawful in a consumer agreement and that the common law remedies would be at the consumer's disposal for a significantly longer period.

#### 5.5.4 The remedies available to the consumer in the case of breach of warranty

As illustrated above, the question of whether common law remedies are available to the consumer, even in instances where the CPA applies, becomes important. Barnard makes a highly compelling argument for the application of the common law remedies in conjunction with the consumer remedies as supplied by the CPA. Section 56(4) dictates that this legislative warranty of quality applies “*in addition* to any other implied (not tacit) warranty or condition imposed by the common law, the Act itself, any public regulation or express contractual warranty or condition.”<sup>836</sup> Section 2(10) of the Act holds that the consumer may not be denied the exercise of any right she has under the common law and Barnard argues that, by extension, this includes the common law remedies associated with those rights. I agree with Barnard since it would be impossible to enforce rights granted to the consumer under the common law if she had no remedies with which to enforce these rights.<sup>837</sup> Surely an interpretation which excludes the application of the *actio empti* and the aedilician actions would be *contra* the spirit and goals of the CPA. She further argues that the protection granted under the aedilician actions is not as comprehensive, since no damages may be claimed, so it is preferential to select to institute the legislative remedies granted by the CPA if these are available.<sup>838</sup>

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<sup>834</sup> Barnard J 390-391.

<sup>835</sup> As encapsulated by s 56. LötZ (in Nagel 230) argues that it is unclear from the Act whether the six month limitation also applies to the warranty, in which case the *voetstoots* clause could potentially become operational once the six months have expired. Barnard however differs from this position.

<sup>836</sup> Barnard J 384 (own emphasis); 392; LötZ in Nagel 230.

<sup>837</sup> Barnard J 467.

<sup>838</sup> Barnard J 392; 467.

“Practically speaking there would be no sense in instituting the *actio redhibitoria* because the defect would have to be of a material nature and relying on the implied warranty would be much less cumbersome. Nothing prevents a consumer from instituting the *actio quanti minoris* but it would be much simpler to rely on the implied warranty of quality in terms of section 56.”<sup>839</sup>

In instances where the CPA does apply to a consumer sale and the implied warranty of quality is breached, the consumer is protected by a legislative remedy<sup>840</sup> In instances where the goods in question are of an unsatisfactory quality and are defective in terms of section 53(1)(a) read with section 55, and the consumer notifies the supplier of this fact within six months after the delivery of the goods, the following protection is granted: within six months of delivery of the defective goods the consumer may insist that the supplier either repair, replace or refund the goods.<sup>841</sup> The legislation also allows the consumer to choose a remedy, which is not the case under the common law. Here the development introduced by the CPA provides the consumer with a more equitable form of redress by allowing her to decide what would suit her needs best.

The legislative and common law remedies should, however, always be considered in tandem. The legislative remedies only apply for six months after delivery, but since the consumer agreement creates an implied warranty of quality (which applies indefinitely and cannot be excluded by including a *voetstoots* clause in the agreement),<sup>842</sup> the consumer’s remedies, which ensue naturally from the contract in terms of the common law, will apply after the expiration of the legislative remedies. An undertaking by the consumer to forego any rights or remedies in this regard will be invalid and therefore the consumer may not contract out of rights granted by legislation, the common law or any (other) contractual agreement.<sup>843</sup> Barnard argues that this interpretation provides the consumer with the widest scope of protection. Because the legislative remedies allow for a claim for damages, it provides more comprehensive protection, but the six month window for application of these

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<sup>839</sup> Barnard J 392.

<sup>840</sup> These remedies arise from the provision of s 56(2) of the CPA.

<sup>841</sup> Barnard J 470.

<sup>842</sup> Barnard J 391; 470.

<sup>843</sup> Barnard J 470

remedies is regarded as unfair.<sup>844</sup> Certain consumer goods are intended for use over an expanded period of time (such as water geysers or motor vehicles) and here a remedy which is only available for six months is deemed completely insufficient. Often products come with additional extended contractual warranties as provided by the supplier.<sup>845</sup> When any remedy provided contractually or by law expires, the consumer may still rely on her common law remedies. These may however be tedious to implement in that the litigation process is lengthy and expensive<sup>846</sup> when compared to the legislative remedies and processes. It does however remain to be seen how promptly and satisfactorily the consumer tribunal alleviates the position of the wronged consumer.

Barnard proposes a division of the remedy under the CPA. In instances where the consumer wishes to be compensated by means of a refund, she must bring such a claim within six months of the delivery of the defective goods; and if she requires repair or replacement of the goods she should be granted a two-year window where new goods are involved, and one year for second-hand goods.<sup>847</sup> This is a very reasonable suggestion which would greatly expand the protection granted to the consumer.

It is interesting to note that Barnard's suggestion reminds of the original varying time periods applicable to the *actiones redhibitoria* and *quanti minoris*. Although both these remedies provided the purchaser with the opportunity to claim a monetary 'penalty' from the seller (full restitution in the case of the *actio redhibitoria*), relying on the *actio quanti minoris* allowed the injured purchaser to retain the *merx*. Under Roman, Roman-Dutch and the early South African common law the purchaser had six months within which full restitution could be claimed and one year if a price reduction accompanied by the retention of the *merx* was desired.<sup>848</sup> Prescription legislation<sup>849</sup> altered and codified the South African position and under existing law all actions based on the *actiones empti, redhibitoria* and *quanti minoris* prescribe

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<sup>844</sup> Barnard J 470.

<sup>845</sup> Barnard J 471.

<sup>846</sup> Barnard J 471.

<sup>847</sup> Barnard J 470. For a complete discussion of the position in the case of the supply of second-hand goods see Barnard J 400-402; 472-473. A close inspection of this aspect of the Act falls beyond the scope of this dissertation.

<sup>848</sup> See 2.3.4, 2.4.3 & 3.3.5.4 *supra* for an exposition of the development of these rules.

<sup>849</sup> The Prescription Act 18 of 1943, Act 68 of 1969 and Act 11 of 1984.

three years after the debt arises.<sup>850</sup> No legislative remedy allows the consumer to retain ownership of the defective *merx*, unless it is repaired and returned to the consumer.

Implementing Barnard's suggested split remedy would however not change the fact that the common law remedies would still be applicable. She reiterates that current prescription legislation should be applicable in order to prevent the possibility of instituting claims in perpetuity.<sup>851</sup> The fact that the consumer agreement creates an implied warranty of quality which applies indefinitely, does not mean that the consumer should have an unlimited period in which to institute her claim.

The analysis and arguments provided above illustrate the scope of transformation of the South African law of latent defects that the CPA has implemented. As a result great strides towards a more equitable contract of sale have been achieved. Section H of Chapter 2 of the Act provides a much greater scope of protection to the consumer who purchases defective goods than the common law does. It is however utterly disappointing that the remedies in terms of the Act are only available to the injured consumer for six months after the date of the delivery of the defective goods. Often defects in goods are only discovered after six months due to the nature of the item or the manner in which it is used. In instances like these the more circumspective legislative remedies have expired and the consumer may only rely on her common law remedies. The types of redress available to the consumer who has been supplied with defective goods has been extended greatly, but the period in which to implement these remedies is much shorter than the three year period provided in terms of the common law. I therefore believe that the legislature could have gone further in its attempt to protect the injured consumer, which is ultimately the objective of the Act.

#### 5.5.5 The *voetstoots* clause under the CPA

The position regarding the legality of the *voetstoots* clause in consumer agreements deserves closer inspection. Barnard discusses both the argument for, and against the legality of the *voetstoots* clause in consumer agreements as regulated by the Act. Section 55(6) seems to create a potential defence to a consumer's claim, similar to that of the *voetstoots* clause and the waiving of a warranty. A supplier may limit

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<sup>850</sup> For a detailed discussion in this regard see 3.3.5.4 *supra*.

<sup>851</sup> Barnard J 471-472.

his liability in terms of the implied warranty of quality if the goods sold are expressly described to the consumer as being in a certain condition and the consumer then accepts the condition of the goods, either expressly or tacitly.

It therefore *seems* as if a *voetstoots* clause is viable if the consumer has been notified of the exact condition the goods are currently in<sup>852</sup> and if the consumer accepts the goods in such condition. It has also been argued that the terms according to which the consumer waives her rights may not be unfair, unreasonable or unjust and that a waiver of rights is allowed if the seller structures the waiver according to that which the reasonable person would expect.<sup>853</sup> Lötz argues that section 55(6) abolishes the *caveat emptor* rule and severely limits the use and scope of the *voetstoots* clause.<sup>854</sup> He, however, still argues in favour of retaining the rule. On the face of it, this position and the arguments supporting it cannot be accepted. Following such reasoning calls for a very technical interpretation and application of the facts and the law in question.

The arguments against the inclusion of such a clause are more palatable. Since the CPA prohibits a supplier from denying a consumer any of her common law rights,<sup>855</sup> such as the right created by the implied warranty against latent defects, a *voetstoots* clause cannot be enforced.<sup>856</sup> Barnard also highlights that no action on the part of the supplier may cause the consumer to waive any right she might have in terms of the Act,<sup>857</sup> and this obviously includes the right to fair value, good quality and safety.<sup>858</sup>

“Selling goods in terms of a general “umbrella” *voetstoots* clause is a clear waiver and deprivation of a consumer’s rights. Whether a *voetstoots* clause is worded as a condition or term or if it boils down to a waiver or deprivation, it will still be invalid”.<sup>859</sup>

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<sup>852</sup> Lötz in Nagel 229. Barnard discusses these and other arguments in favour of the retention of the *voetstoots* clause as put forth by several scholars in detail (see 394-395).

<sup>853</sup> Barnard J 395.

<sup>854</sup> Lötz in Nagel 229.

<sup>855</sup> See the discussion at 5.5.4 *supra*.

<sup>856</sup> Barnard J 395.

<sup>857</sup> S 51(1)(b)(i).

<sup>858</sup> As regulated by Chapter 2, Part H of the CPA.

<sup>859</sup> Barnard J 396. Here Barnard discusses several other compelling arguments against the legality of the *voetstoots* clause in consumer agreements.

Probably the most compelling evidence against the inclusion of this waiver is found in sections 4(3) and 4(4) of the CPA. Here it is expressly stated that the Act must be interpreted so as to promote the purpose of the legislation, which may be scaled down to the protection of the most vulnerable of consumers in our socio-economic community.<sup>860</sup> Furthermore, an equivalent to the common law *contra proferentem* rule is included, since the consumer should always benefit in instances where gaps and ambiguities are present in the law.<sup>861</sup> This directly relates to the desire and duty to apply extra-legal knowledge regarding the bargaining positions of the parties to the facts of a dispute.<sup>862</sup>

Barnard's position that the *voetstoots* clause may in fact not be applied to consumer agreements,<sup>863</sup> is supported wholeheartedly. The *caveat emptor* rule is abolished since suppliers have a general duty to inform the consumer of all the qualities present (or not) in the goods.<sup>864</sup> The effect of this single amendment to the law has far-reaching consequences. By abolishing the *caveat emptor* rule<sup>865</sup> the consumer is again provided with a wider scope of protection in the instance where she purchases defective goods. It has also been argued that the fact that the common law remedies in question provide protection for two and a half years longer than that granted by the Act, does not mean that the right to enforce a *voetstoots* clause is revived.<sup>866</sup>

It should be noted that a supplier may sell goods in any condition, as long as the exact condition of the goods has been explained to the consumer and the consumer subsequently makes it clear that she is aware of the condition of the goods and that she accepts the goods in the described condition.<sup>867</sup> A supplier would, however, still be able to argue that the consumer tacitly agreed to accept the goods in the condition in which it was supplied.<sup>868</sup> It will be interesting to see how courts and tribunals decide on matters in this regard, as instances of this nature will surely arise eventually. Suppliers would be able to exclude their liability if exact written records of consumer agreements are kept as required by section 26 of the Act and if such

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<sup>860</sup> For a detailed discussion see 5.3.1 *supra*.

<sup>861</sup> Barnard J 396.

<sup>862</sup> In this regard see the discussion at 4.4 *supra*.

<sup>863</sup> For a detailed exposition of the position see Barnard J 395-397.

<sup>864</sup> Barnard J 396.

<sup>865</sup> This rule and its application are discussed at 3.3.2 *supra*.

<sup>866</sup> See 5.5.3 *supra*.

<sup>867</sup> Barnard J 397; s 55(6).

<sup>868</sup> Barnard J 397.

agreements unequivocally prove that the consumer accepted the goods knowing the condition they were in at the time.

#### 5.5.6 Strict (product) liability

The common law position on product liability has been amended by the CPA. Of crucial importance is the fact that it is no longer required to prove negligence on the part of the producer or manufacturer in order to succeed with a claim in this regard.<sup>869</sup> This lessens the common law burden of proof severely and rightfully so. Section 61(1) of the Act provides that:

“the producer or importer, distributor or retailer of any goods is liable for any harm...caused wholly or partly as a consequence of

- (a) supplying any unsafe goods;
- (b) a product failure, defect or hazard in any goods; or
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.”

The harm in question includes a natural person’s death, disease or injury; any physical damage to, or loss of, any property; or any form of economic loss suffered as a result of the described harm.<sup>870</sup> Barnard argues that the harm, as contemplated by section 61(5) of the Act, should not be equated to damages.<sup>871</sup> The common law *actio empti* may be instituted for a claim for damages, if this has been suffered over and above the “harm” as intended by the CPA. The harm defined by the Act is limited, whereas common law damages allows for the inclusion of any array of other bases for a claim on damages. The fact that all the parties in the supply chain are jointly and severally liable for the harm suffered by the consumer provides a greater scope of protection.<sup>872</sup> One does however question why reference to the “supplier” was omitted by the legislature. Regulations and guidelines published by the Minister of Trade and Industry regarding whether, and if so, when suppliers could be held

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<sup>869</sup> Barnard J 403; 473. Wrongfulness is however still a requirement (Lötz in Nagel 231).

<sup>870</sup> S 61(5).

<sup>871</sup> Barnard J 410.

<sup>872</sup> See ss 61(6) & 117; Barnard J 387; 406; 473; Lötz in Nagel 230; 231; Van Eeden 378.



strictly liable by the consumer, have been suggested.<sup>873</sup> Section 61(4)(d) determines the prescription periods for claims for damages in terms of section 61 and these periods differ depending on the type of harm suffered.<sup>874</sup> It is also interesting to note that the harm may be suffered by “a person”, which goes beyond the scope of the consumer who purchased the goods in question.<sup>875</sup> It will be a complex matter to apply and enforce this section of the Act in practice.<sup>876</sup>

It is however important to know that suppliers do not avoid liability altogether since an injured consumer could still institute a claim for damages based on delictual liability or breach of contract.<sup>877</sup> A defence against the strict liability imposed by the CPA might be found in section 61(4)(c) where it is stated that “it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to the person’s role in marketing goods to consumers”. Suppliers will rely on this defence heavily and try to prove that they could not reasonably possibly have discovered the defect in question, but succeeding with this defence would result in a failure to protect the consumer in question which would subsequently defeat the purpose of the Act.<sup>878</sup> A just and equitable approach to this potential quandary is put forth by Barnard:

“[A]ny defence raised by retailers or distributors in terms of section 61(4) of the CPA should be interpreted strictly against the distributor or retailer and the marketing of the goods should always be taken into account”.<sup>879</sup>

The CPA does not introduce a system of unqualified strict liability, “but rather a model that attempts to strike a balance between fault and no-fault liability or strict liability system”,<sup>880</sup> which is further described as “form of ‘modified strict liability’”.<sup>881</sup> Strict liability regimes could potentially have a great influence on production costs as producers attempt to create safer goods which ultimately raises the prices, out-ricing the poorest of consumers, which in turn has other unforeseen influences on

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<sup>873</sup> Barnard J 475.

<sup>874</sup> See s 61(4)(d) for a detailed exposition in this regard.

<sup>875</sup> S 61(4).

<sup>876</sup> Lötze in Nagel 230.

<sup>877</sup> Barnard J 475-476.

<sup>878</sup> For a detailed discussion in this regard see Barnard J 476.

<sup>879</sup> Barnard J 477 (own emphasis).

<sup>880</sup> Barnard J 405.

<sup>881</sup> Van Eeden 373; Barnard J 405.

the socio-economic structure of society.<sup>882</sup> It is therefore of the utmost importance to strike a balance between keeping consumer goods affordable and protecting consumers as much as possible.<sup>883</sup>

The supplier may not include any contractual indemnity, nor is the consumer allowed to waive any rights created in terms of section 61(1). Some limited defences are however granted to the supplier in terms of the Act.<sup>884</sup> This effectively results in strict, or product, liability being introduced into the South African law.

An interesting anomaly in the Act is found in section 61(5) of the Act. Here the normal rules regarding the application of the Act is altered:

“If goods are supplied within South Africa in terms of a transaction that is exempted from the application of the Consumer Protection Act, such goods, including the importer, producer, distributor and retailer of those goods, are still subject to the provisions of sections 60 and 61. In terms of item 3(d) of Schedule 2 to the Act, section 61 also applies to any goods that were first supplied to a consumer on or after the ‘early effective date’ which is 24 April 2010.”<sup>885</sup>

Therefore all consumer and commercial transactions in terms of which goods are supplied, are regulated by sections 60 and 61 of the CPA.<sup>886</sup> This is supposedly done to provide the consumer with a wider scope of protection. It is clear that the interpretation of section 61 of the Act will remain complicated until such time as a court decides on the matter and/or regulations are passed in this regard.

#### 5.5.7 The merchant seller and the Pothier rule

By definition sales concluded with merchant sellers fall within the ambit of their “ordinary course of business”,<sup>887</sup> as they are suppliers of goods by trade.<sup>888</sup> Part of their trade also includes the marketing of the goods they supply to consumers.<sup>889</sup>

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<sup>882</sup> Barnard J 405-406.

<sup>883</sup> Barnard J 406.

<sup>884</sup> See s 61(4)(a)-(c) in this regard.

<sup>885</sup> Barnard J 387.

<sup>886</sup> S 4(5) of the CPA; Lötze in Nagel 231; Van Heerden in Nagel 705.

<sup>887</sup> See s 1 v ‘supply’.

<sup>888</sup> Barnard J 388.

<sup>889</sup> In s 61(4)(c) it is specifically mentioned that the marketing of goods should be considered in this regard.

Therefore, where all the requirements of the Act are met, the Act applies and it will regulate the supply of goods to consumers.<sup>890</sup>

Section 55(3) of the CPA should by no means be interpreted as a confirmation of the Pothier rule.<sup>891</sup> Lötz does however argue that this section seems to be a confirmation of the Pothier rule.<sup>892</sup> The wording of the rule and the section may appear similar, but varying requirements apply. Section 55(3) applies only in a very specific set of circumstances. The consumer should have expressly made the supplier aware of the precise purpose of the goods after the purchase thereof, and the supplier should then have supplied goods that are (by implication) fit for the declared purpose, *or* the supplier should illustrate sufficient relevant knowledge of the use of the goods.<sup>893</sup> Only if both these requirements are met will the supplier be liable based purely on the fact that she is the supplier.

The Pothier rule, as set out and applied in terms of the South African common law,<sup>894</sup> also sets two requirements for its application. Firstly, the seller must classify as a merchant seller and she should also have declared her relevant expert knowledge and skill regarding the *merx*.<sup>895</sup> Because section 55(3) does not require that both of these requirements be met before the supplier can be held liable, it must be concluded that the liabilities in terms of the Act and the Pothier rule differ.<sup>896</sup> The Act only requires that the supplier ordinarily supplies and offers to supply the goods in question; *or* the conduct of the supplier must illustrate that she has the required knowledge regarding the use of the goods.<sup>897</sup> Under the common law Pothier rule, the manufacturing seller or merchant seller will be held liable in terms of the warranty against latent defects, but under the CPA this implied legislative warranty of quality binds a producer, importer, distributor and retailer,<sup>898</sup> therefore extending the protection granted under the common law.

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<sup>890</sup> Barnard J 388; 404.

<sup>891</sup> Barnard J 393.

<sup>892</sup> Lötz in Nagel 229.

<sup>893</sup> Ss 55(3)(a) & (b); Barnard J 393.

<sup>894</sup> Barnard J 404. For a more detailed discussion see 3.5 *supra*.

<sup>895</sup> Barnard J 393.

<sup>896</sup> Barnard J 393.

<sup>897</sup> Barnard J 393-394.

<sup>898</sup> S 56(1).

## 5.6 Conclusion

The CPA embodies the *boni mores* and aims to protect the consumer by means of individually defined consumer rights.<sup>899</sup> The goal of the CPA, the protection of the most vulnerable and economically marginalised members of the South African society, is in line with the transformative goal of the Constitution. Section 4(2)(b)(i) of the CPA expressly states that the Act must be interpreted so as to protect the most vulnerable of consumers in our socio-economic community.

The CPA's development of the common law on the purchase of defective goods may be viewed as an example of the transformation and development introduced by the Act.<sup>900</sup> It is contended that protecting the consumer against the potentially unscrupulous action suppliers could take when selling (defective) goods, may be viewed as a prime example of the type of protection granted to the consumer under the CPA.

The Constitutional Court has started to take relevant social and historical contexts into account "as *sources* of legal knowledge".<sup>901</sup> The "abstract considerations subjacent to our law of contract" should be considered as crucial.<sup>902</sup> The courts thus have the responsibility to take cognisance of extra-legal information. This has however not yet been the case in the adjudication of matters of a contractual nature.<sup>903</sup> If section 55(4) of the CPA is scrutinised it seems as if consumer law might be moving in this direction. Here the Act does not refer to the socio-economic situations of the parties, but rather the circumstances surrounding the supply of the goods in question.<sup>904</sup> This section clearly broadens the common law idea of the information that may be brought before the courts when deciding matters on defective goods.

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<sup>899</sup> See discussion at 5 *supra*.

<sup>900</sup> An in-depth evaluation of the law on defective goods falls beyond the scope of this article. Some key examples will however be provided in an attempt to highlight the transformation referred to. The developed position discussed here only provides a small glimpse into the transformative power contained in the CPA.

<sup>901</sup> Davis & Klare 2010 *SAJHR* 403 495 (own emphasis). See 495-496.

<sup>902</sup> Barnard 2006 *Stell LR* 386 394.

<sup>903</sup> See 4.2.3 *supra*.

<sup>904</sup> Barnard J (at 383-384) provides a detailed discussion of the effect of regulations 44(3)(i)–(j) of the CPA and how these forbid a supplier from unilaterally altering the nature or characteristics of the goods agreed upon. See also ss 4(4)(b).

The CPA also highlights the cardinal importance of addressing and transforming the areas of the common law that ought to provide a measure of fairness in order to protect the consumer.<sup>905</sup> In this regard the argument regarding the survival of the *voetstoots* clause serves as an example. The position that the *voetstoots* clause should not be of application in consumer agreements and transactions is supported.<sup>906</sup> This interpretation provides the vulnerable consumer with the best protection in instances where defective goods are supplied. This would mean a development of the common law which brings it in line with the constitutionally transformative program. This argument could however be taken a step further. If the common law, which applies alongside the CPA in consumer agreements, is developed to deny the application of this waiver of consumer rights, surely this development should be transplanted to the common law which applies to commercial transactions<sup>907</sup> where the CPA is not applicable. This would result in the protection granted to the consumer in terms of a consumer agreement, extending to sales regulated by the common law, ultimately providing the common law purchaser with a more equitable remedy. This would satisfy the duty imposed by section 39(2) of the Constitution and section 4(2)(a) of the CPA.

Section 56(4) dictates that the legislative warranty of quality<sup>908</sup> applies “*in addition to any other implied warranty or condition imposed by the common law, the Act itself, any public regulation or express contractual warranty or condition.*” Section 2(10) of the Act holds that the consumer may not be denied the exercise of any right she has under the common law and Barnard correctly argues that, by extension, this includes the common law remedies associated with those rights.<sup>909</sup> By allowing the common law and consumer legislation to apply at the same time, the legislature has granted the consumer the widest scope of protection available.

No doubt exists as to the CPA’s capacity to induce large-scale change in the South African economic sphere, but only if the legislation is interpreted and applied in a fair and ethical manner.<sup>910</sup> Section 7 of the Constitution compels the state to actively

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<sup>905</sup> S 4(2)(a). This reminds of the similar responsibility imposed by s 39(2) of the Constitution.

<sup>906</sup> Barnard J 395; 470.

<sup>907</sup> See fn 23 *supra*.

<sup>908</sup> This warranty is specifically created in the Act as a remedy related to the consumer’s right to safe, good quality goods as encompassed in s 55 of the Act.

<sup>909</sup> Barnard J 467.

<sup>910</sup> See 4.5 *supra*.

protect and promote the rights enshrined in the Bill of Rights. By enacting the CPA the state has provided legal practitioners, the judiciary and academics the tools with which to promote and advance constitutionally guided transformation of the South African common law of contract.

I am of the opinion that one of the most crucial changes to the law on the sale of defective goods brought about by the CPA, relates to the remedies available to the consumer as well as the common law purchaser. The legislative remedy includes a claim for damages and thus provides greater protection than the aedilician actions, since fraud need not be proved in order to claim damages.<sup>911</sup> But Barnard correctly argues that the fact that the remedy related to the legislative warranty may only be instituted for a period of six months after the delivery of the goods contains an element of unfairness.<sup>912</sup> If the purpose of the Act is to provide the vulnerable consumer with as much protection against suppliers as possible, why only protect the consumer for six months? The consumer still has the common law remedies at her disposal, but as already pointed out, these are not as comprehensive. Here the CPA has not transformed the law sufficiently and the legislature could do more.

The vast scope of protection the Act provides to the consumer who has purchased defective goods has another positive impact on this area of the law – it makes one wonder about the true efficacy of the common law protection available to the purchaser in commercial contracts.<sup>913</sup> This certainly steers the common law in the direction of constitutionally sound law.

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<sup>911</sup> See 5.5.4 *supra*.

<sup>912</sup> Barnard J 470.

<sup>913</sup> Here 'commercial contracts' should be understood as excluding once-off transactions or agreements between individuals who are not acting in the ordinary course of business.

## CHAPTER 6 CONCLUSION

With this study I have attempted to formulate an answer to the question of whether the law on the warranty against latent defects has developed enough to reflect the values of the Constitution, or whether further transformation of the law required for this aspect of the law to be regarded as truly fair, equitable and just.

This study attempts to contribute to the ongoing transformative project by questioning the role of the contract of sale in the socio-economic landscape of South Africa. The impact of both the common law and the Consumer Protection Act on the distribution of wealth has been evaluated. It has been argued that if the common law remains blind to the requirements of the South African developmental state, and if no attempt is made to aim for a more ethical approach to applying the law of contract, poverty will never be addressed and the distribution of wealth by means of contracts will remain skewed towards the privileged. The CPA has gone a long way to bring certain areas of sale in accordance with a more ethical approach to dealing with one another as legal subjects. But where defective goods are at issue the legislature could have gone much further in an attempt to protect the South African community's most disenfranchised and poor consumers. Further analysis of each consumer right is warranted in order to establish how these rights could be developed in order to provide even stronger protection to consumers.

The relationship between politics and law is of cardinal importance and is directly related to the imperative to transform and uplift South Africa's society in an attempt to achieve socio-economic equality. The law of contract can and should play an important role in this regard. The background rules of the common law of contract should be transformed and developed as a matter of urgency if South Africans' unequal bargaining positions are to be addressed.<sup>914</sup> The transformation of these rules can only be guided by the Constitution by questioning whether all legal rules measure up to the norms encapsulated by the Constitution.<sup>915</sup> True transformation of the legal and economic landscape of South Africa can only be attained if this project is valued by all role players in the market as being of cardinal importance in the nation's drive towards true equality. This is certainly not an easily attainable goal, but this does not mean that it should not be attempted. Even those who strongly

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<sup>914</sup> Davis (2011) *Stell LR* 849.

<sup>915</sup> Davis (2011) *Stell LR* 850.



advocated for the implementation of consumer legislation doubt whether it will achieve its very “lofty” goals.<sup>916</sup> Striving for development does, however, remain a constitutional duty.

Participation in the economic market requires the conclusion of consumer contracts, a daily activity for most members of the community. Due to their prevalence, contracts of sale and consumer agreements provide the vehicle with which to introduce members of the greater community to the ideal of the ethical contract.<sup>917</sup> An awareness of the possibility of contracting in good faith could lead to an understanding of the importance of acknowledging the human dignity of other contracting parties.

Davis argues that this requires the development of the common law background rules of contract. If this development is not realised the contract’s propensity to perpetuate poverty cannot be rectified,<sup>918</sup> nor can the realisation of the constitutional rights to human dignity and freedom be addressed. Barnard argues that the normative values of the Constitution and the interdependent nature of a community create the obligation to contract ethically.<sup>919</sup> The contract has, and will continue to play an important role in effecting fair consumer dealings. Here the importance of the enactment of the CPA cannot be denied.

The CPA aims to address socio-economic injustice as a matter of constitutional and social urgency. When interpreting the CPA, the golden rule is to interpret it in the manner which will give effect to the purpose of the Act, namely shielding the poor and vulnerable South African consumers from unconscionable conduct by suppliers.<sup>920</sup> Section 2(10) also dictates that the Act should not be interpreted in a manner which denies the consumer her common law rights, therefore creating a larger pool of potential remedies available to the consumer.<sup>921</sup> Since the CPA only has at goal the protection of the vulnerable, the Act only applies if the consumer is

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<sup>916</sup> Woker (2010) *Obiter* 219 231.

<sup>917</sup> See 4.4 *supra*.

<sup>918</sup> Davis (2011) *Stell LR* 857, 860.

<sup>919</sup> Barnard AJ 212.

<sup>920</sup> S 2(1) of the CPA.

<sup>921</sup> See 5.3.2 *supra*.

an individual or a small juristic person, but all purchasers have common law remedies at their disposal when matters related to sales arise.<sup>922</sup>

Several consumer rights impact consumer agreements, where defective goods have been supplied to consumers, concurrently. These consumer rights should re-enforce one another when the position of an injured consumer is considered. In cases where a consumer has purchased defective goods these rights are the consumer's right to fair value, good quality and safety; the right to choose; the right to disclosure and information; the right to fair and honest dealing; and the right to fair, just and reasonable terms and conditions.<sup>923</sup> Chapter 2 Part H of the CPA captures the consumer's right to fair value, good quality and safety and has implemented several crucial amendments and extensions of the common law on latent defects.<sup>924</sup>

The amendments to the remedies available to the consumer provides one of the best examples of the manner in which the CPA has changed the common law, but more importantly, whether or not these developments may be viewed as fair.

The legislative remedies are available to the consumer if the implied warranty of quality is breached, but these are only at the consumer's disposal for six months after the delivery of the defective goods.<sup>925</sup> In contrast, the common law remedies are of application for three years and this discrepancy is viewed as unfair. Barnard's proposed subdivision of the legislative remedy provides a much more equitable solution. A claim for the restitution of the purchase price should be instituted as per the current rule (within six months of delivery), and the repair or replacement of the defective goods should be claimed within two years for new and one year for second-hand goods.<sup>926</sup> The consumer's right to safe, good quality goods will resultantly be better enforced if the Act extends the application of the already exceptional remedies instituted by Part H of Chapter 2 of the Act. Here the legislature has failed the consumer and the development of section 56(2) of the CPA is suggested.

The extension of both the type of defects, and the remedies available in answer to these, is key. The CPA has amended the traditional common law perception of what

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<sup>922</sup> See 5.3.2 *supra*.

<sup>923</sup> See 5.4 *supra*.

<sup>924</sup> Barnard J 387-388.

<sup>925</sup> See 5.5.4 *supra*.

<sup>926</sup> See 5.5.4 *supra*.

constitutes a fair and just remedy against the purchase of a defective item. The legislative remedies provide a much greater scope of protection, but for a much shorter period.<sup>927</sup> The fact that the common law remedies still apply after the expiration of their legislative counterparts provides a measure comfort to the poor and vulnerable consumer, but the costly and laborious process of instituting these means that no redress will be achieved in practice.<sup>928</sup> This cannot be viewed as being aligned with the true purpose of the CPA.

No aspect of the law in question better illustrates the complicated and entangled nature of the common law and consumer law, than the matter of waiving the purchaser/consumer's implied warranty of quality. This area of the law on defects can also be analysed in order to gauge the efficacy of the development brought about by the Act. Within the first six months of the delivery of the defective goods the warranty of quality created by the CPA may be enforced by either the common law or the Act. Thereafter the common law will apply, even though the supply was initially regulated by the Act. This does however not mean that the common law *voetstoots* clause may be utilised to waive the consumer's right to quality, as this is not in alignment with the purpose of the CPA.<sup>929</sup> The statutory warranty cannot be excluded by way of a *voetstoots* clause.<sup>930</sup>

The CPA falsely seems to reintroduce the Pothier rule, but the liability under the Act and the original common law rule differs.<sup>931</sup> The common law idea of strict (product) liability has also been transformed: the supplier's negligence need not be proved to institute a claim in this regard.<sup>932</sup> Some confusion regarding 'harm' in terms of the Act, and damages under the common law of purchase and sale seems to exist. The amount claimable when instituting a claim for damages is much greater, since 'harm'<sup>933</sup> applies to a finite number of losses suffered. Again, the legislature ignored the opportunity to infuse a greater measure of protection into this area of the law and here the common law protection is far greater. Since sections 60 and 61 apply even

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<sup>927</sup> See 5.6 *supra*; Barnard J 470

<sup>928</sup> See 5.6 *supra*.

<sup>929</sup> See Barnard J 391; 470 and 5.5.3 and 5.5.5 *supra*.

<sup>930</sup> S 48(1)(c). See further Otto (2011) *THRHR* 537. See 3.4 *supra* for an exposition of the common law position on the *voetstoots* clause.

<sup>931</sup> See 5.5.7 *supra*; Barnard J 393.

<sup>932</sup> See 5.6 *supra*.

<sup>933</sup> As set out in s 61(1) of the Act.

to transactions and agreements beyond the scope of the CPA's application, strict (product) liability is officially introduced in South African law.<sup>934</sup>

The cardinal influence of the Constitution on the CPA is undeniable.<sup>935</sup> The influence of the CPA, and more specifically, the right to fair value, good quality and safety, on the common law is vast. It is logical to deduce that the Constitution has indirectly changed the common law. The common law of purchase and sale has therefore been developed as required by section 39(2) of the Constitution.

As expected, the approach taken by the judiciary when developing the law on latent defects, is grounded in a profoundly conservative approach. Glover might be putting misplaced emphasis on the fact that the *Janse van Rensburg* judgment<sup>936</sup> addresses the *actio quanti minoris* "while at the same time remaining true to [its] innate historical character".<sup>937</sup> The socio-political demands of the South African community can only be met by striving to bring the law in alignment with the values of the Constitution. If this necessitates the transformation of legal rules predating the Christian Era by five centuries,<sup>938</sup> such transformation should take place. If such Constitutional development results in an approach essentially similar to that of its historical counterpart, this should be incidental, and not the principle aim of the court's endeavour. The court states that, had the office of the *aediles curules* existed today, the action would have been developed in this extended manner, exactly as was done by the court in the case in question.<sup>939</sup> This theory cannot be tested, but alarmingly reveals Van Zyl J's continued conservative approach to the law. South African courts should not strive to act like Roman officials. The courts' sole aim should be absolute adherence to the values of the Constitution, and the Constitution itself should be the impetus for such change. The innate flexibility of the common law should not be put forward as the reason for the development of the law. The constitutional imperative imposed by section 39(2) of the Constitution should serve as the only drive to develop and transform the law.

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<sup>934</sup> S 4(5) of the Act. See 5.5.6 *supra*.

<sup>935</sup> See Chapter 4 *supra*.

<sup>936</sup> *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C).

<sup>937</sup> Glover (2001) *THRHR* 162.

<sup>938</sup> The earliest rules on defective goods sold can be traced by to the XII Tables.

<sup>939</sup> *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C) 324G.

In the *Janse van Rensburg* case the application of the Constitution is not authentic and apart from stating that the aedilitian law should be developed in terms of the spirit of the Constitution, nothing more is done on this front. The disheartening conclusion is that even where courts refer to the Constitution when adjudicating contractual matters governed by the common law, the true values of the Constitution are not embraced in actuality. The problem lies in the fact that some still ponder “[w]ho, after all, could ever imagine the aedilitian actions of all things having constitutional implications?”<sup>940</sup>

Winkel challenges the notion that consumer protection is a relatively recent phenomenon in legal history which has only started to appeal since the nineteenth century.<sup>941</sup> Various notions of present day consumer protection may be considered as extensions of the Roman principle of *bona fides*.<sup>942</sup> Although good faith did not survive into Roman-Dutch law and thus never officially constituted South African law, the South African society’s demand for good faith in legal dealings is evident. The Constitutional Court’s insistence on the importance of contracting in good faith and applying and interpreting contracts in accordance with the principles of ubuntu, reiterates this importance.<sup>943</sup> By determining what may and may not be included as terms in a consumer contract, the CPA flies in the face of entrenched common law principles such as the freedom of contract. This results in transforming the background rules of contract. This also illustrates an attempt to break with the traditional legal culture, which still idolises *pacta servanda sunt*. Paternalistic legislation thus introduces an ethical element into the consumer contract.

In light of the criticism of traditional and conservative legal thinking, one might question Otto’s critique of the CPA as “irritating”.<sup>944</sup> Barnard correctly argues that the CPA is not the “Armageddon” it was originally envisaged as.<sup>945</sup> It cannot be denied that the CPA has helped shine a transformatively conscious light on the law of contract. The result of the enactment thereof is a set of legal norms which may be described as more ethical.

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<sup>940</sup> Glover (2001) *THRHR* 165.

<sup>941</sup> Winkel (2010) *Fundamina* 587.

<sup>942</sup> Winkel (2010) *Fundamina* 587.

<sup>943</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)* par 36.

<sup>944</sup> Otto (2012) *THRHR* 535.

<sup>945</sup> Barnard J 477.

If the utopia of substantive equality under the law of contract is to be achieved, it should be aimed for.<sup>946</sup> As illustrated above, the CPA's influence on the common law of latent defects has certainly brought it closer to the constitutionally mandated ideal. I am however left wanting. Were the legislative remedies to be amended as suggested in this study, the protection granted to the consumer who finds herself in possession of defective goods would be more comprehensive. Such extended protection could be described as truly aligned with the constitutional drive to protect the poor and vulnerable. The hope is that seemingly small influences, like that focussed on in this dissertation, will eventually have a collective impact on South African law.

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<sup>946</sup> See 4.5 *supra*.

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