

**DOES THE CONSUMER PROTECTION ACT 68 OF 2008 HAVE THE EFFECT OF
REVIVING THE ABOLISHED *EXCEPTIO DOLI GENERALIS*?**

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Summary

The historical legal exception, the *exceptio doli generalis* was widely applied and accepted in the South African law of contract as a justifiable defence by a defendant to rescind unfair contracts or contractual terms during the twentieth century. Our courts implemented open-ended or abstract values of equity and fairness in the substantive law in order to allow a defendant to counter claim for the enforcement of an unfair contract.

In spite of the wide application of this defence by our courts, it was put to an end in *Bank of Lisbon and South Africa Ltd v De Ornelas* in 1988. The outcome of this judgment created a lacuna in our law for court to consider criteria of fairness and equity in their deliberations when delivering judgments.

The universal doctrine of unconscionability which advocates considerations of fairness and equity appeared to have influenced a move towards consumer legislation on a global scale and ultimately to the enactments of the Consumer Protection Act (CPA), introduced in 2008 and operational since 31 March 2011.

The CPA contains several provisions which appear to revive the application of defences akin to the abolished *exceptio doli generalis* such as the codification of the consumer's right to "fair and honest dealing" and the right to "fair, just and reasonable terms and conditions" to name but a few.

The question that arises and which is explored herein is whether the rights afforded by the CPA constitute the revival of the principles that used to apply in terms of the *exceptio doli generalis*.

TABLE OF CONTENTS

CHAPTER 1	INTRODUCTION	1
	1.1 Background	1
	1.2 Research question	1
	1.3 Methodology	2
	1.4 Delimitations	3
CHAPTER 2	DESCRIPTION AND ORIGIN OF THE DEFENCE	4
	2.1 Position in early Roman law.....	4
	2.2 Post-classical Roman law.....	6
	2.3 Position in Roman-Dutch law	7
	2.4 Position in South African law	9
	2.4.1 <i>Weinerlein v Goch Buildings</i>	9
	2.4.2 <i>Zuurbekom v Union Corporation</i>	10
	2.4.3 <i>Paddock Motors v Igesund</i>	11
	2.4.4 <i>Aris Enterprises v Waterberg Koelkamers</i>	12
	2.4.5 <i>Novick v Comair Holdings</i>	13
	2.4.6 <i>Rand Bank v Rubenstein</i>	14
CHAPTER 3	THE ABOLISHMENT OF THE DEFENCE	16
	3.1 General.....	16
	3.2 <i>Bank of Lisbon and South Africa v De Ornelas</i>	16
	3.2.1 Facts	16
	3.2.2 Court a quo	17
	3.2.3 Appeal court	17
	3.3 Criticism of the <i>Bank of Lisbon</i> judgment	18
	3.4 Support of the <i>Bank of Lisbon</i> judgment	19
CHAPTER 4	THE CONTINUED DEVELOPMENT OF THE PRINCIPLES OF GOOD FAITH AND PUBLIC POLICY	21
	4.1 The principle of good faith as developed through case law	21
	4.1.1 <i>Eerste Nasionale Bank v Saayman</i>	21

4.1.2	<i>Brisley v Drotsky</i>	22
4.1.3	<i>Afrox Healthcare v Strydom</i>	25
4.2	The principle of public policy as developed through case law	26
4.2.1	<i>Sasfin v Beukes</i>	26
4.2.2	<i>Barkhuizen v Napier</i>	27
4.2.3	<i>Breedenkamp v Standard Bank</i>	29
4.2.4	<i>Malan v City of Cape Town</i>	31
CHAPTER 5 A BRIEF EXPOSITION OF THE UNIVERSAL DOCTRINE OF UNCONSCIONABILITY		34
5.1	Origin	34
5.2	Expansion and global adoption	35
5.2.1	United States	35
5.2.2	Canada	36
5.2.3	Australia and New South Wales	37
5.2.4	New Zealand	39
CHAPTER 6 RELEVANT SECTIONS OF THE CONSUMER PROTECTION ACT		41
6.1	The call for legislative intervention	41
6.2	Traditional defences	43
6.3	Introduction of the CPA	44
6.4	The right to fair and honest dealing	45
6.5	The right to fair, just and reasonable terms and conditions	46
6.6	The influence of constitutional and common law values on the CPA	47
6.7	Concerns regarding enforcement.....	48
CHAPTER 7 CONCLUSION		50
BIBLIOGRAPHY		51

CHAPTER 1

INTRODUCTION

1.1 Background

Throughout the twentieth century, the legal exception, the *exceptio doli generalis*¹ was generally accepted and implemented in the South African law of contract as a justifiable defence by a defendant to counter a claim for the enforcement of an unfair contract or the enforcement of a contract in unfair circumstances.²

This defence was widely applied by courts to implement open-ended or abstract values of equity and fairness in the substantive law of South Africa enjoyed a long history of application by the South African courts. It was however unexpectedly abolished in no uncertain terms in 1988 by Joubert JA in his judgment delivered in *Bank of Lisbon and South Africa Ltd v De Ornelas*³ (hereafter the “*Bank of Lisbon case*”). The court determined that the defence, which in its view was never received into Roman Dutch law in the first place, created legal uncertainty and undermined the sanctity of freedom to enter into a contract.⁴ This left a lacuna in our law for court to consider criteria of fairness and equity in their deliberations when delivering judgments.

1.2 Research question

The Consumer Protection Act⁵ (hereafter the “CPA”) was signed into law by the President on 24 April 2009 and was published in the Government Gazette on 29 April 2009. The CPA came into operation incrementally between April 2010 and 31 March 2011⁶ and contains

¹ In brief, it can be described as the Roman law defence of bad faith in the general form.

² Christie RH, Bradfield GB *The Law of Contract in South Africa* 6th ed (2011) 12.

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

⁴ As explained in *Bank of Lisbon* 582H.

⁵ Act 68 of 2008.

⁶ Chap 1; 5 of the CPA, and s120 as well as Sched 2 came into operation on the “early effective date”, on the 24th of April 2010. The remainder of the provisions of the CPA came into operation on the “general effective date”, 31 March 2011 and the main set of regulations that were issued in terms of the CPA were published on 1 April 2011.

several provisions⁷ which appear to revive the application of defences akin to the abolished *exceptio doli generalis*.

This study will aim to determine whether the CPA does in fact constitute the return of the *exceptio* or whether the CPA simply codified the existing common law principles of public policy and good faith.

1.3 Methodology

This research question will be explored in the following manner. Chapter 2 will explain the origin and effect of the *exceptio doli generalis* and consists primarily of a historical account of the defence as well as its earlier application in the South African law through means of a case law analysis.

Chapter 3 describes the reasons for the departure of the defence as enunciated in the well-known *Bank of Lisbon* case.

Chapter 4 examines the informing common law concepts of good faith and public policy as it continues to develop factors which influence the obligations created by, and the binding nature of agreements. This is achieved primarily through an analysis of relevant case law.

Chapter 5 follows, in which the universal doctrine of unconscionability is briefly explored in its historic context. Although our courts have used the term "unconscionable" in their earlier judgments,⁸ it has only started to enjoy recognition as a freestanding criterion through its implementation by way of section 40 of the CPA. A brief comparative study of this doctrine is undertaken by means of reviewing the statutory development in other countries.

In Chapter 6, specific sections of the CPA are examined. A brief discussion of traditional defences is incorporated in this chapter as well as the impact of constitutional and common law values. Also included is the correlation between the aforementioned doctrines and their respective impact on and application to the South African law of contract.

⁷ See in particular s40, s48, s51 and s52.

⁸ See the discussion in Chap 2 of the judgments in *Weinerlein*, *Zurbekom*, *Novick* and *Rand Bank*.

Finally, Chapter 7 contains the conclusion which will attempt to answer the question whether the CPA does have the effect of reviving a defence similar to the abolished *exceptio doli generalis*.

1.4 Delimitations

This study will not address any criteria based on fairness and good faith that can be found in South African legislation other than in the CPA.

An in-depth discussion of the development and application of the *exceptio* or a similar defence in the countries that are included in par 5.2 cannot for reasons of extent and length, be included in this dissertation. Another inherent obstacle is inaccessible literature or literature which is too extensive. Only a cursory overview can be provided to illustrate the universal nature of the doctrine of unconscionability and its application elsewhere.

CHAPTER 2

DESCRIPTION AND ORIGIN OF THE DEFENCE

2.1 Position in early Roman law

The Roman common law was known as the *ius civile*.⁹ It was characterised by a strict adherence to formalities which in turn had the benefit of ensuring a high level of legal certainty. A disadvantage of this formalistic system however was that very little room was left to meaningfully interpret an individual case, and regrettably an equitable solution was not always attained.¹⁰

To address this concern and because liability for fraud was unknown under the *ius civile*, the *exceptio doli generalis* originated under the guidance of the praetorship¹¹ in terms of the praetorian law (*ius honorarium*).¹² According to Viljoen, it was one of the most significant legal phenomena of its time,¹³ and it essentially brought the requirement of good faith into the *stipulatio*.¹⁴ Gallus Aquilius, a member of the praetorship, made provision for two praetorian remedies in his *edictum praetoris* in 66 BC. These were named the *actio doli mali* and the *exceptio doli mali* (the “*actio doli*” and “*exceptio doli*” respectively).¹⁵

⁹ See in general Thomas JAC *Textbook of Roman Law* 3rd ed (1981) 28.

¹⁰ As conceded by Hawthorne L, Thomas PHJ *The exceptio doli – Bank of Lisbon and South Africa Ltd v De Ornelas* 1989 (22) *De Jure* 143.

¹¹ The Praetorship consisted of a number of Praetors, which were judicial officers in ancient Rome - Thomas 36.

¹² See also the comprehensive discussion of the historical position in *Bank of Lisbon* 592G *et seq.*

¹³ Viljoen F *The exceptio doli: its origin and application in South African law* (1981) *De Rebus* 173.

¹⁴ *Stipulatio* is a form of verbal contract in Roman law which is based on a single question and answer. *Stipulatio* developed, at first, with very strict rules. Both parties had to be present during the entire proceedings, which had to be one continuous act. The contract was oral and had to be made in Latin. The stipulator asked, “*Spondes?*” (“Do you promise?”) and the promisor answered, “*Spondeo*” (“I promise”) – See in general Thomas 259.

¹⁵ Thomas 374.

With the introduction of these defences, the unyielding and formalistic Romans began to develop into a legal system representing more open-ended values such as good faith, equity and informality.¹⁶

The *exceptio doli* became available to a defendant in the law of contracts to defend a claim based on a *negotium stricti iuris*¹⁷ for example, loan or *stipulatio*.¹⁸ Since the *stipulatio*¹⁹ was the main form of contract in Roman law, the application of the *exceptio doli* was significant in reducing the rigidity of the *ius civile*.²⁰

The effect of the *exceptio doli* was that a claim could be defeated if the plaintiff acted contrary to the requirements of good faith or unconscionably at the moment the contract was entered into, or if he did so at the moment of attempting to enforce the action.²¹

The goal of the defence was commendable, as it aimed to mitigate the severity of the plaintiff's claim based on a *negotium stricti iuris* such as a *stipulatio*.²² In accordance with the formulary procedure of Roman law, the *exceptio doli generalis* was not established on equity but rather on *mala fides*²³ which, on an objective construction, is contrary to good faith.²⁴ According to some authors, the *exceptio doli* was a defence of general application used by the Romans to ensure that simple justice was achieved between contracting parties.²⁵

¹⁶For a detailed discussion on the historical aspects see Hawthorne, Thomas 1989 (22) *De Jure* 143.

¹⁷ The rule of *stricti iuris* requires the strict, narrow and close interpretation of the rights under law - Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* 3rd ed (1992) 293.

¹⁸ As extensively explained in *Bank of Lisbon* 592J.

¹⁹ See fn14.

²⁰ *Bank of Lisbon* 593.

²¹ Hawthorne, Thomas 1989 (22) *De Jure* 145.

²² As recognised in *Bank of Lisbon* 595.

²³ Bad faith – Hiemstra 226.

²⁴ As confirmed in *Bank of Lisbon* 595.

²⁵ See in general the application as discussed by Viljoen 173, and also Aronstam PJ *Unconscionable contracts: the South African solution* (1979) 42 *THRHR* 21.

The *iudex*²⁶ was permitted to take into account the real intention of the parties, terms that were implied, informal and secondary pacts between the parties, general legal provisions applicable to similar transactions and so forth, and were therefore not strictly bound by the wording of the particular *negotium bonae fidei*. Because the formula did not identify the facts on which the defendant could rely for purposes of pleading the *exceptio doli generalis*, the defence was flexible enough to be used in conjunction with a number of other special exceptions.²⁷

2.2 Post-classical Roman law

At the end of the third century AD, the formula and the formulary procedure were replaced by the extraordinary procedure and the defences of classical Roman law were replaced by post-classical objections.²⁸ However, the authors of the *Corpus Juris Civilis*²⁹ decided to preserve the *exceptio*.³⁰

Since the introduction of the extraordinary procedure, a defendant wishing to raise the *exceptio doli generalis* would plea by way of confession and avoidance, admitting to the existence of the plaintiff's cause of action, but he would also allege the facts establishing his defence that the plaintiffs' conduct is *mala fide*. The judgement was not based on equity but on whether the defendant demonstrated the facts of his case.³¹

In post-classical Roman law a development which required all contracts to be regulated by *bona fides* appeared to emerge.³²

The replacement of the formulary procedure by the extraordinary procedure also prompted the end of the *exceptio doli* as a technical term of pleading and a defendant who wished to

²⁶ A judge in Roman law; see in general Hiemstra 213.

²⁷ *Supra*.

²⁸ *Supra*.

²⁹ The body of Roman or civil law consolidated by Justinian in the 6th century AD, that consists of four parts namely the Institutes, Digest, Code, and Novels; see in general Hiemstra 56.

³⁰ As explained in *Bank of Lisbon* 597.

³¹ *Supra*.

³² *Supra*.

rely on what equated to an *exceptio doli generalis* as a defence had to set out the factual basis of his defence in his plea.³³

During the middle ages, medieval Commentators and Canonists introduced the following significant modifications to the Roman law of contract:³⁴

- (i) The distinction between nude pacts and the privileged contracts was eradicated by the introduction of a general rule that nude pacts create a cause of action, in that all agreements which are entered into lawfully and with the *animus contrahendi* or serious intent create an obligation capable of being enforced through legal process.³⁵
- (ii) The technical formalities of the *stipulatio* were eliminated; however, the essential requirement of consent was preserved for its validity.³⁶
- (iii) It was pronounced that all contracts were regulated by *bona fides*.³⁷

The above listed modifications called into question the continued relevance of the *exceptio doli generalis*, as it was no longer required to compensate for the severity and rigidity of the *ius civile* as a *ius strictum* in the law of contract.³⁸ This led to a reduced application of the defence as it served little purpose.

2.3 Position in Roman-Dutch law

The Roman law was received in the Netherlands during the 15th century as codified in the *Corpus Juris Civilis*.³⁹ It was developed by the Glossators and Commentators in the Middle Ages, but it was never understood whether all of the legal principles of Roman law were wholly adopted.⁴⁰

³³ See *Bank of Lisbon* 598A for a detailed explanation.

³⁴ *Bank of Lisbon* 598.

³⁵ *Supra*.

³⁶ *Supra*.

³⁷ *Bank of Lisbon* 599.

³⁸ As perceived by Joubert JA in *Bank of Lisbon* 599.

³⁹ See fn29.

⁴⁰ *Bank of Lisbon* 601.

According to Viljoen it remains a mystery whether or not, and to what extent the *exceptio doli* was actually incorporated into Roman-Dutch law.⁴¹

It was however clear that the key principle that all agreements which were lawful and consensual were binding was adopted in the Netherlands.⁴²

Hutchison explains that towards the later part of the 18th century it was proclaimed by the writers of that time that all contracts were based on consent and accordingly *bonae fidei*. This meant that the parties to a contract were legally bound by anything reasonably and equitably required by good faith and as a result there was no longer a need for a technical defence such as the *exceptio doli generalis*.⁴³ It was believed by the Dutch jurists that the distinction between *contractus stricti iuris* and *contractus bonae fidei* had died out, except in the case of the date of liability for interest which was not promised as well as the principles relating to the interpretation of contracts.⁴⁴ Aronstam submits that the only factor to be considered by the Roman-Dutch courts was whether the requirements of good faith were observed by a party to an agreement through his conduct, and that for this reason it was no longer necessary for a contracting party to specifically plead the *exceptio doli*.⁴⁵

Upon researching the works of the prominent Dutch jurists, Joubert JA reached the conclusion that the *exceptio doli* never formed part of Roman-Dutch law.⁴⁶ This, he determined by the lack of reference to the *exceptio*, and the lack of evidence of an “implied reception” in the Province of Holland.⁴⁷ Furthermore, Joubert JA could not find any evidence of the existence of a general substantive defence based on equity, and in his noteworthy judgement on the topic, outright rejected the contrary views of Botha that the general

⁴¹ Viljoen 173.

⁴² *Bank of Lisbon* 601.

⁴³ Hutchison D, Pretorius CJ, et al *The Law of Contract in South Africa* (2009) 28. See also *Bank of Lisbon* 601G.

⁴⁴ As put by Aronstam 29. See also *Bank of Lisbon* 601.

⁴⁵ See the comprehensive explanation by Aronstam 32. The defendant merely had to allege that the plaintiff’s conduct did not meet the requirements of good faith in the circumstances. The conduct of a party was relevant both at the negotiation phase as well as thereafter in reliance on the terms thereof.

⁴⁶ *Bank of Lisbon* 605.

⁴⁷ *Supra*.

defence had in fact been adopted.⁴⁸ Yet its application continued to endure as it surfaced in the courts from time to time.

2.4 Position in South African law

In spite of the later findings by Joubert JA that the *exceptio doli* never formed part of the Roman-Dutch law, which is effectively the common law of South Africa, it was applied in numerous cases in our courts. Upon investigation it appears to have made its first appearance in our law reports in the late 19th century. It was initially and somewhat controversially used by the courts to import certain equitable doctrines from English law, such as rectification, estoppel and the rescission of a contract brought about through innocent misrepresentation.⁴⁹ Only the main Appellate Division cases, which essentially laid the foundation for the application of the *exceptio doli* in South African law, are briefly outlined in date sequence below.

2.4.1 *Weinerlein v Goch Buildings Ltd*⁵⁰ (hereafter the “*Weinerlein case*”)

In this 1925 case, the Appellate Division reflected on the nature and scope of the *exceptio doli*.⁵¹

The question arose whether a contract of sale of land could be rectified to accurately portray the prior verbal agreement of sale between the parties, even though it was required by statute to be in writing.⁵²

Both De Villiers and Kotze JJA determined that a written contract could be rectified as a result of a mutual mistake by the contracting parties, and confirmed the *a quo* decision of the Witwatersrand local division.

Wessels JA concurred with the above determination, but he proceeded to also invoke the *exceptio doli generalis* to justify the rectification.⁵³ The judge declared that the Roman courts would not, under the civil law, allow a person to make an “unconscionable claim” regardless of whether the claim is based on a “strict reading of the law”. He further pointed out that it was a form of the “inherent equitable jurisdiction” of our courts as well as the

⁴⁸ *Bank of Lisbon* 604.

⁴⁹ As confirmed by Hutchison 28.

⁵⁰ 1925 AD 282.

⁵¹ See in general the discussion in *Weinerlein* 292.

⁵² *Weinerlein* 287.

⁵³ *Weinerlein* 292.

Roman courts to deny a plaintiff the enforcement of an unconscionable claim which under the special circumstances would be inequitable.⁵⁴

According to Wessels JA the defendants could plead the *exceptio doli* and rely on the mutual error to oppose the plaintiff's claim.⁵⁵ He continued to explain that the object of the law of registration of transfers is that an individual may bear his title in accordance with what is written in the register. He confirmed that it would for that reason be contrary to legal policy if a person could invoke the *exceptio doli* because he has a right to property, and yet be unable to have such right reflected in the register.⁵⁶

The *exceptio* was thus applied by name in this case, yet specifically also by reference to the universal doctrine of unconscionability.

2.4.2 *Zuurbekom Ltd v Union Corporation Ltd*⁵⁷ (hereafter the “Zuurbekom case”)

In 1947 the *Zuurbekom* case appeared before the Appellate Division.

The respondent transferred a portion of his farm to the appellant, but reserved the associated mineral rights. Under the mineral rights, the respondent was afforded the sole and exclusive right to prospect and mine all mineral substances. When the appellant attempted to subdivide the land a few years later, the respondent did not object because he was unaware of these and subsequent activities by the appellant.⁵⁸

When the respondent learnt of the appellants' actions, he obtained a restraining interdict against the appellant for a period of eight years on the grounds that gold-bearing reefs where beneath the land in question and he faced serious and irreparable damage if the appellants' application to subdivide were to be approved.⁵⁹

The appellant raised the *exceptio doli* in his appeal against the interdict by contending that prevailing circumstances rendered the granting of an interdict inequitable.⁶⁰

Both Tindall JA and Schreiner JA referred to the *exceptio doli generalis* in their judgments⁶¹ and seemed to emphatically accept that it formed part of South African law.⁶² It was declared that before a mineral holder's delay can be a true hindrance to a request for an

⁵⁴ *Weinerlein* 293.

⁵⁵ *Supra*.

⁵⁶ *Supra*.

⁵⁷ 1947 (1) SA 514 (A).

⁵⁸ See the comprehensive discussion in *Zuurbekom* 519.

⁵⁹ *Zuurbekom* 523.

⁶⁰ *Zuurbekom* 525.

⁶¹ *Zuurbekom* 537.

⁶² *Bank of Lisbon* 606.

interdict, it must be demonstrated that the enforcement of such a remedy would result in “great inequity” and amount to “unconscionable conduct” in the particular circumstances.⁶³ However, upon its consideration, it was found that the conduct of the respondent in the present circumstances was not “unconscionable”⁶⁴ and the appeal was accordingly dismissed.⁶⁵

Here as well, it is clear that the doctrine of unconscionability was recognised and applied in the judgment.

2.4.3 *Paddock Motors (Pty) Ltd v Igesund*⁶⁶ (hereafter the “*Paddock Motors case*”)

In 1976, the Appellate Division again accepted and relied upon the *exceptio doli generalis* for purposes of its judgment.

The appellant and the respondent concluded a deed of settlement in terms of which immovable property would be transferred to the appellant after payment of the final monthly instalment. The deed of settlement contained a clause stating that if the appellant failed to make any of the payments on the stipulated due date, the full balance immediately became due and the respondent was entitled to apply for judgment for the balance and ejection from the property.⁶⁷

When the appellant defaulted in respect of two of the monthly payments, the respondent relied on the terms of the deed of settlement and successfully obtained a consent judgment for the payment of the full balance before the due date of the final instalment as well as ejection from the property.⁶⁸

The appellant unsuccessfully instituted action in the Durban local division for the transfer of the property and relied on the *exceptio doli* by suggesting that the conduct of the respondent in retaining full payment as well as refusing to transfer the property was inconsistent with good faith.⁶⁹

On appeal, Jansen JA surmised that the *exceptio doli generalis* was frequently used in practice despite “academic scepticism in respect of its viability in modern law” and despite the confusion regarding its scope of application.⁷⁰

⁶³ *Zuurbekom* 537.

⁶⁴ *Supra*.

⁶⁵ *Zuurbekom* 542.

⁶⁶ 1976 (3) SA 16 (A).

⁶⁷ See the comprehensive discussion in *Paddock Motors* 18.

⁶⁸ *Paddock Motors* 19.

⁶⁹ *Paddock Motors* 22.

⁷⁰ *Paddock Motors* 27.

The learned judge however recognised that the scope of the *exceptio doli generalis* is “unavoidably more limited due to the fact that all contracts have become *bona fide*”⁷¹ and that in the present case, no authority had been cited to indicate that the *exceptio* may be used to amend the conditions of a valid contract, thereby altering the substantive law. He conceded that the *exceptio* may possibly prevent a party from relying on certain conditions of contract as a result of the ensuing circumstances or behaviour of the other contracting party.⁷² This was not argued by the appellant and therefore sadly no ruling was made on this point, however the reflections of the judge indicate that in this case, the court already had some reservations about the continued application of the defence.

In the cases mentioned above, the position was generally enunciated that the *exceptio doli* can be raised as a recognised legal defence, however it does not *ipso facto* constitute a general principle that equity can override substantive law to alter the terms of an agreement validly entered into.

2.4.4 *Aris Enterprises v Waterberg Koelkamers*⁷³ (hereafter the “*Aris Enterprises case*”)

In 1977, the Transvaal Provincial Division of the High court was faced with the question whether the defendant was entitled to invoke the *exceptio doli generalis* to overthrow the plaintiff’s claim on the proven facts.⁷⁴

The plaintiff and defendant concluded agreements of lease in terms of which cooling equipment was leased to the defendant. When these agreements terminated through the effluxion of time, the plaintiff relied on the terms of agreement for the return of his property. The defendant refused to return the equipment to the plaintiff and invoked the *exceptio doli generalis* and alleged that the plaintiffs’ strict reliance on an onerous clause of the agreement was unconscionable and in bad faith.⁷⁵

Coetzee J expressed his apprehension that although, as a single judge, he was bound by the judgment of the full bench of the same court, who assumed the existence in the South African law of the *exceptio doli generalis* in *Otto en ‘n Ander v Heymans*,⁷⁶ he was not in agreement.⁷⁷ He noted that although his personal views were irrelevant, he believed that by the time of Justinian it had already served its purpose and consequently was never part of Roman-Dutch law.⁷⁸ The application of the *exceptio* was thus for the first time truly

⁷¹ *Paddock Motors* 28.

⁷² *Supra*.

⁷³ 1977 (2) SA 436 (T).

⁷⁴ *Aris Enterprises* 438.

⁷⁵ *Aris Enterprises* 437.

⁷⁶ 1971 (4) SA 148 (T).

⁷⁷ *Aris Enterprises* 438.

⁷⁸ *Supra*. In this respect, Coetzee J echoed the later views of Joubert JA in *Bank of Lisbon*.

questioned. He explained his viewpoint in that the *exceptio doli* was a major contributor to the reformation of the Roman law system from a strictly formal one to a system which became the foundation for the entire European continent with an emphasis on the principle that “every lawful agreement begets an action” and that as such, a fully developed system of law had no meaningful reason to rely on the *exceptio doli generalis* which had become “a superfluous anachronism”.

His personal views aside, the judge accepted that the onus rested on the defendant to prove facts which rendered the *exceptio doli* applicable and that the defendant merely had to prove that the plaintiff was *mala fides* by bringing the action, and that he did not have judicial discretion.⁷⁹

I am of the view that the judge's unreserved *obiter* comments in respect of the continued relevance of the *exceptio doli generalis* were a major catalyst for the subsequent and eventual abolishment thereof in the *Bank of Lisbon* judgment almost eleven years later.⁸⁰

2.4.5 *Novick v Comair Holdings Ltd*⁸¹ (hereafter the “*Novick case*”)

In this case, Colman J was requested by the second defendant to dismiss the relief sought by the applicants. The defendant raised the *exceptio doli generalis* as a defence to the applicants' prayer for a declaratory order, confirming the validity and binding nature of a written agreement, which the defendant sought to rescind.⁸²

In following the doubts expressed above by Jansen JA in the *Paddock-Motors* case and Coetzee J in the *Aris Enterprises* case, this judgment clearly confirmed the growing scepticism of our courts in recognising this defence, when the judge voiced his uncertainty about the existence of the defence in the South African law as an “independent remedy”.⁸³

According to Colman:

“The view has been expressed that all situations which were originally covered by the *exceptio* have now been recognised and covered by specific remedies with their own names and with well-defined limits. The *exceptio*, so the theory goes, has become an empty shell in which a litigant can find no ground for relief if he is unable to formulate a case within the ambit of one of the more specific remedies.”

The judge conveyed his expectation that the Appellate Division would make a definitive ruling on the matter but recognised that he, as a single judge, was not at liberty to do so,

⁷⁹ *Aris Enterprises* 439.

⁸⁰ See discussion in par 3.2 below.

⁸¹ 1979 (2) SA 116 (W).

⁸² See the comprehensive discussion in *Novick* 158.

⁸³ *Novick* 156.

and that it had to be assumed that the defence forms part of the South African law as evidenced by its application in numerous cases listed by him.⁸⁴ He continued to say that he would adopt, as a minimum requirement for the application of the defence the suggestion of Tindall JA in the *Zuurbekom* case, that the conduct of a litigant must be “unconscionable” and cause “great inequity” in order for the *exceptio doli generalis* to be successfully invoked.⁸⁵

2.4.6 *Rand Bank Ltd v Rubenstein*⁸⁶ (hereafter the “*Rand Bank case*”)

In 1981, the court once more upheld a defence based on the *exceptio doli generalis*, and Botha J described the conduct of the plaintiff (the creditor) in the circumstances to be “unconscionable”.⁸⁷

The defendant and his father signed a deed of suretyship in favour of the plaintiff and bound themselves as sureties to the plaintiff for the performance by the debtor of his obligations to the plaintiff and for the payment of all debts which the debtor owed or might thereafter owe to the plaintiff, however such future indebtedness may arise. This suretyship was provided as security for guarantee facilities given by the plaintiff to the debtor in order to procure the proclamation of townships developed by the debt. A few years later, the plaintiff and the debtor entered into another unrelated loan transaction. When the debtors company was placed into liquidation, the plaintiff instituted action against the defendants and relied on the suretyship to cover the debt arising out of the unrelated transaction.⁸⁸

The court recognised that the plaintiffs’ exploitation of the wide wording of the deed of suretyship was an abuse of the benefit he received for one purpose (that it serve as security for guarantee facilities) by aiming to use that benefit as a remedy for a subsequent and unintended purpose. The court confirmed that the successful reliance on this unintended purpose by the plaintiff would “result in a gross injustice or great inequity towards the defendant.”⁸⁹

Botha J considered the *exceptio doli* in its general form and correctly conceded that it was the subject of great controversy, but of “particular relevance” on the facts of the case and opted not to analyse or evaluate the authorities in respect of the defence in his judgment,

⁸⁴ *Novick* 157.

⁸⁵ *Supra*.

⁸⁶ 1981 (2) SA 207 (W).

⁸⁷ See the comprehensive discussion in *Rand Bank* 215.

⁸⁸ *Rand Bank* 209.

⁸⁹ *Rand Bank* 215.

but accepted the existence of the defence without further investigation, thereby letting a golden opportunity to provide some legal certainty on the issue pass.⁹⁰

The *obiter dicta* of the courts in the judgments discussed in this chapter clearly indicated the desire of the courts to obtain clarity in respect of the continued relevance of the *exceptio doli generalis*. The general sentiment of the courts seemed to be that the defence was not part of our law and if the opportunity arose sooner the inevitable abolishment may have occurred long before the judgment in the *Bank of Lisbon* case, which is analysed in more detail in the following chapter.

⁹⁰ *Rand Bank* 214.

CHAPTER 3

THE ABOLISHMENT OF THE DEFENCE

3.1 General

In 1988, the application of the erratically applied *exceptio doli generalis* was finally put to an end in the prominent *Bank of Lisbon* case by a majority judgment of four to one.⁹¹ The judgement concerned itself with the contractual rights of the parties as afforded by the documents rather than the conduct of the parties.

Joubert JA conducted a thorough investigation into the origin, history and development of the defence, which he incorporated into his judgment. Based on his conclusions as a result of his thorough investigations, he pronounced prior judgments of the Appeal court⁹² which relied on the *exceptio* as not binding on the court. His main reason was that the adoption of the defence into Roman Dutch law and subsequently into South African law was never fully and comprehensively investigated. Over time it was merely assumed that it was.⁹³ His ground-breaking judgment is examined in detail below.

3.2 *Bank of Lisbon v De Ornelas*

3.2.1 Facts

In this case the respondents were the joint managing directors of a fishing company, who approached the appellant for overdraft facilities. The overdraft was secured by deeds of suretyship, three mortgage bonds and a negotiable certificate of deposit.

In 1985 the company discharged its entire debt under the overdraft and closed its account with the appellant. The company requested the return of the negotiable certificate of deposit as well as the cancellation of the deeds of suretyship and mortgage bonds. The appellant refused the request pending the outcome of an action for damages that it intended to bring against the company. The appellant claimed that it concluded a contract with the company for the forward purchase of dollars, which the company had unlawfully

⁹¹ See dissenting judgment of Jansen JA 617.

⁹² See specifically the *Weinerlein-*, *Zuurbekom* and *Paddock Motors* cases.

⁹³ *Bank of Lisbon* 607A.

repudiated; resulting in the cancellation of the contract and the subsequent suffering of damages by the appellant.⁹⁴

3.2.2 Court *a quo*

The respondents brought an application in the Cape Provincial Division of the High court for an order against the appellant for the return and/or cancellation of the securities. The respondent argued that the company had discharged its principle indebtedness to the appellant and that the appellants conduct in retaining the securities amounted to *dolus generalis*. The court *a quo* upheld the application.

3.2.3 Appeal court

On appeal, Joubert JA examined the history and application of the *exceptio doli generalis* and in short declared it to be officially abolished, referring thereto as a “superfluous, defunct anachronism”.⁹⁵ This much-quoted statement provided the final answer to the question pondered by many a judge as discussed above.

The court stated that the question was simply whether or not the appellant had a contractual right derived from the deeds of suretyship and the mortgage bonds to retain the securities and that the solution was to inspect the provisions of the documents themselves.

Upon examining the wording of the documents, the court established that they were clearly intended to cover any transaction which might arise out of the customer/banker relationship between the parties⁹⁶ and the appeal was upheld.

In investigating the history of the *exceptio* as explained in the preceding chapter in pars 2.1 to 2.4, the court found that the *exceptio* was never adopted into Roman-Dutch law. As such, it could also not have been adopted into South African law, and it could not be recognised and applied as part of our law. The judgment was however not met with praise. Criticism was levelled at it mainly because it deprived our law from a handy defence against

⁹⁴ *Bank of Lisbon* 581.

⁹⁵ See *Bank of Lisbon* 607B, where the earlier views of Coetzee J as expressed in the *Aris Enterprises* case are reflected.

⁹⁶ *Bank of Lisbon* 609.

unconscionable conduct. The views of the main critics of the judgment are dealt with below. In reaction to this development, a new drive commenced for the introduction or reintroduction of such a defence by ways of statute, which culminated in the eventual enactment of the CPA. This statutory development is discussed in detail in chapter 6.

Before the cheers in response to this judgment subsided, the court in the case of *Van der Merwe v Meades*⁹⁷ (hereafter the “Van der Merwe case”) appeared to reverse its position when Joubert ACJ reaffirmed the application of the *replicatio doli*.⁹⁸

3.3 Criticism of the *Bank of Lisbon*-judgment

The decision of the court in *Bank of Lisbon* was criticised by most of the prominent academics of that time.

Kerr was of the view that the court erred by abolishing the *exceptio doli generalis* in *Bank of Lisbon*. He believed that the statement by Joubert JA that the *exceptio doli* was absent in both post-classical Roman law and Roman-Dutch law was incorrect.⁹⁹ According to Kerr, the *exceptio doli* and the *replicatio doli* are intrinsically linked and since the *replicatio doli* was reaffirmed in the *Van der Merwe* case, it is necessarily implied that the *exceptio doli* and the *replicatio doli* are both available in South African law.¹⁰⁰

Due to the fact that the Appellate Division in *Bank of Lisbon* regarded the *exceptio doli* and the *replicatio doli* as similar defences, Kerr correctly argues that there are “inconsistent expositions of the law in two Appellate Division decisions.”¹⁰¹ The *Van der Merwe* case demonstrated that the *replicatio doli* still exists and it is therefore unclear why a similar and related defence was purposefully abolished. Cockrell expressed his regrets over the conclusion of the court that the *exceptio doli* is not part of South African law and lamented that the *exceptio doli* provided a very good demonstration of the operation of a principle of

⁹⁷ 1991 (2) SA 1 (A).

⁹⁸ *Van der Merwe* 2. See further explanation in par 3.3 below.

⁹⁹ See the comprehensive discussion of Kerr AJ, *The replicatio doli* reaffirmed 1991 (108) SALJ 583 at 585.

¹⁰⁰ As expressed by Kerr 586.

¹⁰¹ *Supra*.

good faith in the law of contract.¹⁰² He moreover criticises the majority judgment for being “characterized by its total failure to address any of the relevant matters of policy”.¹⁰³

According to the learned author Christie, the decision of the Appellate Division has been criticised for being “positivist” and for employing an “over-scholarly method of historical reasoning” without thorough debate of general policy considerations or the duty of the courts to guarantee justice.¹⁰⁴ Christie expresses the view that these criticisms are fair, but nevertheless believes that it is unlikely that the supreme court of appeal will in future again revive the *exceptio doli generalis* because the general confusion regarding its partial existence from 1925 to 1988 made it an inappropriate instrument for use in modern courts.¹⁰⁵

A similar viewpoint is reiterated by Lambiris,¹⁰⁶ who also views the *exceptio doli* unsuitable for use in modern law due to the technical difficulties which would be posed by the process of pleading.¹⁰⁷ He advocates the importance of pleading the facts which one relies on directly as opposed to the reliance on a technical exception.¹⁰⁸

The majority clearly and correctly opined that our law was in need of an instrument to provide defences against general unconscionability.

3.4 Support of the *Bank of Lisbon*-judgment

The judgment was not marred only with criticism and opinions were noticeably divided. Shortly after the judgment, Lewis reflected on whether the need still existed for a defence such as the *exceptio doli*.¹⁰⁹ She determined that many remedies and defences exist in modern law to ensure that justice is done such as the defence of estoppel, actions for

¹⁰² Cockrell A *Substance and Form in the South African Law of Contract* 1992 (109) SALJ 40 at 59.

¹⁰³ See explanation by Cockrell 59.

¹⁰⁴ See Christie 13 in general on these points.

¹⁰⁵ *Supra*.

¹⁰⁶ Lambiris MA *The exceptio doli generalis: an obituary* 1988 (105) SALJ 644.

¹⁰⁷ Lambiris 645.

¹⁰⁸ *Supra*.

¹⁰⁹ Lewis C *The demise of the exceptio doli: is there another route to contractual equity?* 1990 (107) SALJ 26 at 33.

misrepresentation, rectification and mistake, however she identified the scenario where a contract is used for a purpose not intended by the parties as the sole circumstances in which the *exceptio doli* had to be invoked.¹¹⁰ Lewis suggested that this need arose because the South African rules of contractual interpretation developed in a way which does not concern itself with the real intention of the parties. She expresses her views thus: “The *exceptio* is no longer available as a defence, and possibly never should have been”, and proposed that the approach to the interpretation of contracts should be changed in order to achieve equity in such circumstances.¹¹¹

Glover, on the other hand, focussed his attentions on an alternative to the *exceptio doli generalis* and commended the Constitutional court for its continued development of public policy considerations which he believes will have equitable benefits akin to the *exceptio doli*.¹¹² He furthermore believes that the likelihood of the return of the *exceptio doli generalis* is improbable because it “carries too much baggage”.¹¹³

In view of the above, it is clear that, having been deprived of the *exceptio* as a formal defence, South African law needed to develop along other avenues in order to bring about change that could reintroduce values and mechanisms opposing unconscionability. The duty of good faith and the general requirement of public policy were, barring radical statutory interference, the only vehicles available for this progress. These are examined in the next chapter.

¹¹⁰ *Supra*.

¹¹¹ Lewis 34.

¹¹² Glover G *Lazarus in the Constitutional Court: An exhumation of the exceptio doli generalis?* 2007 (124) *SALJ* 449.

¹¹³ As put by Glover (2007) 458.

CHAPTER 4

THE CONTINUED DEVELOPMENT OF THE PRINCIPLES OF GOOD FAITH AND PUBLIC POLICY

4.1 The principle of good faith as developed through case law

It can be argued that the principle of good faith was introduced into Roman law through the introduction of the *exceptio doli*,¹¹⁴ and that good faith continued to develop as a separate concept in Roman-Dutch law. Today, good faith remains an important concept that underlies our substantive law of contract.¹¹⁵

In discussing the role of the concept of good faith in the law of contract, AJ Barnard writes:

“Good faith cannot be contained in a neat and tidy legal definition. It promotes the idea that we as a community of contracting persons, each responsible for the other's wellbeing, should ultimately be concerned with the constitutive values of the supreme law under which the subordinated but indispensable law of contract must continue to operate.”¹¹⁶

The concept of good faith, as perceived by our courts, is explored below.

4.1.1 *Eerste Nasionale Bank v Saayman*¹¹⁷ (hereafter the “*Saayman case*”)

The *Saayman* case was reported in 1997. In this post-Constitution case, Olivier, JA reviewed the role of good faith in the modern law of contract. In his minority judgment, he declared that “the purpose of the principle of good faith in the law of contract is simply to accomplish the community's perceptions of what is proper, reasonable and fair”.¹¹⁸ He continued to state that there is an intimate relationship between good faith and the principle of public policy and public interest, and that the principle of good faith is applied because it is required by public policy.¹¹⁹ He confirmed that the principle of good faith has increasingly

¹¹⁴ See fn13.

¹¹⁵ See fn45.

¹¹⁶ Barnard AJ *A different way of saying: on stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa* 2005 (21) SAJHR 278.

¹¹⁷ 1997 (4) SA 302 (SCA).

¹¹⁸ *Saayman* 319.

¹¹⁹ See explanation in *Saayman* 322.

been recognised and used by the court to create new rules and fair solutions to problems where a strict application of the existing law would lead to great inequity.¹²⁰

In the present case, the respondent, in her capacity as *curatrix bonis*, obtained a court order from the Provincial Division directing the appellant (FNB) to deliver to her share certificates that her mother ceded to FNB in 1989 to secure her son's debts. In the circumstances of the case, the judge of appeal felt that the principle of good faith did not require the strict application of the general rule that a contractual party was bound by the contents of the agreement, as the respondent's mother probably lacked contractual capacity when she signed the documentation, owing to the fact that she was 85 years old, hard of hearing and virtually blind when she was asked to sign the documentation.

The judge affirmed that good faith required the creditor to ensure that the surety understood the full implication of the agreement and of any consequent cessions thereof. The court explained that the otherwise legal and valid surety agreement and cession cannot be enforced against the surety on the grounds that the level of good faith required was not met by the appellant.¹²¹ The doctrine of good faith was applied not to rescind a contractual term for being unfair, but because the court believed the Bank's failure to act in good faith during the execution thereof resulted in it being unenforceable.¹²²

Glover correctly points out that this judgement is of great significance as it was the first time that the court overturned a contract based only on the principle of good faith and where the acknowledged grounds of misrepresentation, duress and undue influence were not applicable.¹²³

4.1.2 *Brisley v Drotsky*¹²⁴ (hereafter the "*Brisley case*")

In this 2002 case, the full bench of the Supreme Court of Appeal¹²⁵ criticised the minority judgment of Olivier JA in the *Saayman* case. According to them, Olivier JA attempted to

¹²⁰ *Saayman* 320.

¹²¹ *Saayman* 331.

¹²² Glover G *Good faith and procedural unfairness in contract: Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) (1998) THRHR 328 at 332-333

¹²³ Glover (1998) 330.

¹²⁴ 2002 (4) SA 1 (SCA).

revive the *exceptio doli* indirectly through the application of essentially the same principles.¹²⁶ The court emphatically disagreed with the minority decision in the *Saayman* case and expressed concern over the sanctity of the principle of *pacta sunt servanda* should it become accepted that judges may exercise a discretion in enforcing a contractual term which in their view is unfair and unreasonable.¹²⁷ The full bench is of the view that good faith is merely a general founding principle in the law of contract and not an independent ground for the rescinding of a contract or a contractual term.¹²⁸

In this case, the appellant entered into an agreement of lease with the respondent in his capacity as lessee for the lease of a townhouse at an amount of R3 500.00 monthly in advance. When the lessee still had not paid the January rental by the 31st of January 2000, the lessor cancelled the agreement of lease and afforded the lessee 14 days to vacate the premises. The lessee failed to vacate and the lessor commenced with eviction proceedings.¹²⁹

The lessee opposed the application stating that subsequent to the conclusion of the lease agreement, she entered into an oral agreement with the lessor which allowed her for the first six months of the lease to make payment as it suited her throughout the course of the particular month. She further alleged that she only made a partial payment during the month of January due to an expense incurred to repair the sewer. Her defences and versions of events were not consistent and the court *a quo*¹³⁰ eventually granted an eviction order, against which the lessee brought an appeal.

The presiding judges identified three key questions to be investigated prior to delivering their judgment. In the first instance, they intended to determine the scope and confines of the *Shifren*-principle. This principle recognises that parties can use their freedom of contract to enter into a contract that restricts their future freedom of contract by agreeing that any future amending agreement will be invalid unless it is in writing and signed, often referred

¹²⁵ Comprised of Harms AR, Streicher AR and Brand AR.

¹²⁶ *Brisley* 14.

¹²⁷ *Brisley* 16.

¹²⁸ *Brisley* 15.

¹²⁹ *Brisley* 9.

¹³⁰ Vorster WnR at the Transvaal Provincial Division.

to as a “non-variation” clause.¹³¹ Thereafter they planned to examine the scope of the *bona fides* principle in relation to the *Shifren*- principle and finally they would aim to determine the scope and confines of section 26(3) of the Constitution.

The court explained that it is trite law that the *Shifren*-principle is intended to protect both contracting parties and that it is accordingly not *contra bonos mores* as alleged by the lessee.¹³²

With regards to *bona fides*, the lessee argued that the lessor’s reliance on the non-variation clause should not be enforced due to the fact that it would not be reasonable fair or in line with the principles of *bona fides* in the circumstances. The court declared that in its view, it has no discretion whether to enforce a valid clause contained in a contract and that it is simply obliged to do so.¹³³ The court is of the view that although *bona fides* is a legitimate principle of the Law of Contract, it is not necessarily the most important one and when it is in conflict with the principles of *pacta sunt servanda*,¹³⁴ it can lead to legal uncertainty and inconsistent application.¹³⁵ The court rejected the lessees’ reliance on the principle of *bona fides*.

According to the court the lessor has a legal entitlement to own her property free from any illegal occupation and is entitled to an eviction order in this instance where her property is being illegally occupied.¹³⁶ Therefore all and any circumstances pertaining to the lessee cannot be relevant and only legally relevant circumstances should be taken into account.¹³⁷

The appeal was dismissed.¹³⁸

¹³¹ *Shifren and Others v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 (2) SA 343 (O).

¹³² *Brisley* 12.

¹³³ *Brisley* 13.

¹³⁴ Latin for “agreements must be kept”. The principle is that all Agreements lawfully entered into must be kept - Hiemstra 251.

¹³⁵ *Brisley* 16.

¹³⁶ *Brisley* 21.

¹³⁷ *Supra*.

¹³⁸ *Brisley* 22.

If the *exceptio* was still available, I am of the opinion that an equitable outcome would have been reached in this case. Unfortunately the court did not see it fit to develop the existing underlying principle of good faith in a meaningful or significant manner for general application as a rule in the law of contract.

4.1.3 *Afrox Healthcare Bpk v Strydom*¹³⁹ (hereafter the “*Afrox case*”)

Not long after the *Brisley* case, the court was again implored to rescind a contractual clause on the basis of good faith in the *Afrox* case.¹⁴⁰

The appellant was the owner of a hospital and concluded a contract with a patient, the respondent, in terms of which the hospital is indemnified from any liability in respect of the negligent actions of its nursing staff.¹⁴¹ The respondent claimed that the specific indemnification clause is not enforceable against him because it is contrary to the principle of good faith and requested that the specific indemnification clause be set aside.¹⁴²

The court refused to do so and instead pointed out that the *Brisley* case placed the judgement of Olivier JA in the *Saayman* case in perspective by referring to it as the interpretation of a single judge.¹⁴³ Brand JA further confirmed his approval of the *Brisley* judgment by re-affirming that whilst the concept of good faith is a founding principle and justification for legal rules as well as the development thereof, it is an abstract concept which does not constitute a legal rule and the court may accordingly not act on the strength thereof as an independent ground for the rescission of a contract or a contractual term.¹⁴⁴

It is clear from the discussion above that the courts recognised that the presence or absence of good faith is not a separate criterion and can therefore never be applied directly in the form of a rule.

¹³⁹ 2002 (6) SA 21 (HHA).

¹⁴⁰ *Afrox* 33.

¹⁴¹ *Afrox* 32.

¹⁴² *Afrox* 33.

¹⁴³ *Afrox* 40.

¹⁴⁴ *Supra*.

4.2 The principle of public policy as developed through case law

As with good faith, the principle of public policy is also a significant and accepted concept that underlies the substantive law of contract in South Africa. It is an open-ended value,¹⁴⁵ which can be described as the community's general sense of justice and which is reflected through the public opinion of the prevailing *boni mores*.

Ngcobo J in the judgment of *Barkhuizen* (discussed at 4.2.1.2 below) states the following:

"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights."

The concept of fairness of contracts in view of the criterion of public policy as applied by our courts is explored below.

4.2.1 *Sasfin v Beukes*¹⁴⁶ (hereafter the "*Sasfin case*")

In this case, reported in 1989, the court of Appeal was called upon to determine whether certain provisions of a deed of cession concluded by a medical practitioner in favour of a financial institution were contrary to public policy.

Smalberger JA pronounced that although public policy generally demands freedom of contract and the entitlement to freely bind oneself in respect of any legitimate subject matter, it should also take into consideration "the doing of simple justice between man and man".¹⁴⁷

In his majority judgment, Smalberger JA affirmed that the courts should not deny their responsibility to declare a contract contrary to public policy when it is called for in a specific case, however he emphasised that the power to do so should be used cautiously and only in undeniable cases in order to guard against legal uncertainty as a result of haphazard and selective application of its' judiciary power.¹⁴⁸

¹⁴⁵ Now also firmly entrenched as a constitutional value. See the discussion at 4.2.2 below.

¹⁴⁶ 1989 (1) SA 1 (A).

¹⁴⁷ *Sasfin* 9.

¹⁴⁸ *Supra*.

He further noted that the courts should be cautious not to conclude that a contract is contrary to public policy merely because it offends one's individual sense of propriety and fairness. The judge stressed that the interests of the entire community are of paramount importance *vis-à-vis* the concept of public policy, and agreements which are obviously detrimental to the interests of the community as a whole cannot be imposed, whether such agreements are contrary to law, morality or social or economic expedience.¹⁴⁹ He stipulated clearly that it is important to evaluate the likely effect of the contractual term complained of and not the personal and therefore subjective characteristics of the contractual party desiring to escape the oppressive stipulation.¹⁵⁰

The court found that the consequences of the agreement concluded between the appellant and the respondent was clearly unconscionable and not in line with the public interest and that the agreement could for this reason not be enforced.¹⁵¹

The court ruled that the deed of cession was not enforceable because it was contrary to public policy.¹⁵²

4.2.2 *Barkhuizen v Napier*¹⁵³ (hereafter the “*Barkhuizen case*”)

The *Barkhuizen* case was reported in 2007. The applicant (the insured) instituted action in a High court against the respondent (the insurer) on a short-term insurance contract. The insurer raised a special plea that it had been released from liability under the contract because the applicant failed to institute the action within the 90 day period from repudiation of the claim, specified as a requirement in the contract. The applicant countered that the time-limitation clause was unconstitutional and unenforceable because it violated his rights under section 34 of the Constitution.¹⁵⁴

¹⁴⁹ *Sasfin* 8 B-D.

¹⁵⁰ *Sasfin* 9.

¹⁵¹ *Sasfin* 13I.

¹⁵² *Sasfin* 19.

¹⁵³ 2007 (5) SA 323 (CC).

¹⁵⁴ See comprehensive discussion in *Barkhuizen* 328.

The High court upheld the applicant's argument and declared the time-limitation clause to be inconsistent with section 34 of the Constitution, which states that everyone has the right to have a dispute capable of being resolved by the application of law determined in a fair public hearing and before a court or another independent and impartial tribunal where appropriate.

The judgement was appealed to the supreme court of Appeal, and finally also to the Constitutional court. The Constitutional court conceded that the correct approach to the constitutional challenges posed by contractual terms is to determine whether the contentious term is contrary to public policy in view of the values contained in the Bill of Rights.¹⁵⁵ The Constitutional court is in favour of this approach because it feels that it makes allowance for the doctrine of *pacta sunt servanda* to function and also permits the courts to decline to enforce contractual terms that are in conflict with the constitutional values regardless of whether the parties agreed thereto.¹⁵⁶

Ngcobo J reiterated that public policy embodies the legal convictions of the community at any given time and that it depicts the values that are most significant to the community. He continues to state that prior to the enactment of the Constitution, it was at times challenging for the courts to determine what constituted public policy, however it has been simplified through the collation thereof in the form of the values contained in the Bill of Rights.¹⁵⁷ According to Ngcobo J, a contractual term which threatens or opposes a value contained in the Bill of Rights is automatically contrary to public policy and as such unenforceable.¹⁵⁸

Further in the majority opinion, the Constitutional court concluded that ideas of fairness, justice, equity and reasonableness cannot be separated from public policy¹⁵⁹ and went as far as laying down a test¹⁶⁰ for determining whether a specific contractual clause passes

¹⁵⁵ *Barkhuizen* 329.

¹⁵⁶ *Barkhuizen* 333G - 334A.

¹⁵⁷ *Supra*.

¹⁵⁸ *Supra*.

¹⁵⁹ *Barkhuizen* 338.

¹⁶⁰ This test would prove to be widely applied in subsequent cases of the Constitutional court as well as the superior courts. See discussion in Chap 5 below.

constitutional muster. It was determined that two questions have to be asked in order to determine fairness, in the first instance, whether the clause is unreasonable and finally, if it is found to be reasonable, whether it should in fact be enforced in view of the specific circumstances which prevented compliance with the clause.¹⁶¹

To answer the second question a review of the circumstances that prevented compliance with the clause is required. On the facts of the present case, it was unreasonable of the insurer to hold the insured to the time limitation clause and also impossible for the insured to comply therewith. The final stage of the test requires that if a clause in itself is not against public policy but has not been complied with, the person seeking to avoid compliance bears the onus of showing that the circumstances warrant the failure to comply.¹⁶²

The judgment also commented on the importance of the doctrine of *pacta sunt servanda*, which it recognised as a significant legal principle with universal application, upon which society must be able to rely, but the court remarked that even the principle of *pacta sunt servanda* must be transformed in the image of the Constitution by the courts and can accordingly not be applied to immoral agreements that violate public policy.¹⁶³ I

The Constitutional court, having had regard to the circumstances of the case, found that it would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress and also dismissed the appeal.¹⁶⁴

4.2.3 *Breedenkamp v Standard Bank*¹⁶⁵ (hereafter the “*Breedenkamp case*”)

Representing the South Gauteng High court, Jajbhay J delivered a noteworthy judgment in *Breedenkamp*. In this case, the bank relied on its general terms and conditions to unilaterally cancel its contract with the applicants by giving them written notice that their

¹⁶¹ In this instance a time limitation clause.

¹⁶² *Barkhuizen* par 56-59.

¹⁶³ *Barkhuizen* par 87. It is thus clear that contracts that are unconscionable are serious enough to violate the greater concept of public policy.

¹⁶⁴ *Barkhuizen* 339E.

¹⁶⁵ *Breedenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (5) SA 304 (GSJ).

bank accounts would be closed. The bank did so upon hearing that the applicants were registered as “specially designated nationals” by the US Department of Treasury's Office of Foreign Assets Control (hereafter the “OFAC”).¹⁶⁶ The applicants requested an interim interdict restraining the bank from cancelling the contract.

The bank provided three superficial reasons for its decision to close the bank accounts of the applicants, namely the OFAC designation in itself, potential reputational risk for the bank and potential business risks associated with the continued relationship with the applicants.¹⁶⁷ The applicants relied on *Barkhuizen* in stating that the term which gave the bank the right to close the accounts was unfair to the extent that it was “unfettered by considerations of reasonableness” and had to be adjusted to allow cancellation only if good cause is shown.¹⁶⁸

Jajbhay J relied on the authority of *Barkhuizen* when he stated that the bank has a duty to act fairly, which implies that it cannot impose a term if its application is unfair and it may also not enforce a term in an unfair way.¹⁶⁹ He explained that the act of terminating a bank account would have the severe effect of making it extremely difficult for the account holder to obtain an account elsewhere, especially since the bank cited “reputational risk” as the reason for closing the account.¹⁷⁰ The termination of the applicants' bank accounts was oppressive, in these circumstances, because other banking facilities could not be obtained by the applicants.¹⁷¹

The court submitted that a clause which provides an influential bank the right to arbitrarily terminate an account, and thereby preventing the party from participating in the “modern commercial world” without first demonstrating good cause or providing the party

¹⁶⁶ The OFAC suspected the first applicant of “being involved in illicit business activities including tobacco trading, arms trafficking, oil distribution and diamond extraction and of being a confidant and financial backer of Zimbabwe's President Robert Mugabe”.

¹⁶⁷ *Breedenkamp* par 33.

¹⁶⁸ *Breedenkamp* paras 4-7.

¹⁶⁹ *Breedenkamp* par 48.

¹⁷⁰ *Breedenkamp* par 65.

¹⁷¹ *Breedenkamp* par 67.

concerned a hearing is against public policy because it is unfair, unjust and oppressive.¹⁷² For the aforementioned reason, the court believed that the common law had to be developed, as required by the Constitution, in order to discourage big commercial undertakings such as the bank from conducting itself in this manner.¹⁷³

It was accordingly held that the decision to terminate the accounts was unreasonable as it was unfair to the applicants and that in light of *Barkhuizen*, the reliance on this right is not permissible.¹⁷⁴

As a result of the emphasis placed on the requirement for reasonableness and fairness in this case, a defence based on the *exceptio doli*, had it still been available, or on the doctrine of unconscionability would, in my opinion, have resulted in a similar outcome.

4.2.4 *Malan v City of Cape Town*¹⁷⁵ (hereafter the “*Malan case*”)

By the time Majiedt AJ, handed down the majority judgment in the recent case of *Malan*, it seems that it had become common place for the courts to apply the two pronged test for determining fairness as a ground for contractual validity as laid down in the *Barkhuizen* case.¹⁷⁶

Ms Malan was an elderly lady on state pension residing in a house which she leased at a subsidised rental from the City of Cape Town. When she breached the terms of the agreement, the city cancelled on the strength of the clause that either party may terminate on a month’s notice and obtained an eviction order. The city accurately acknowledged that to terminate a lease agreement in public rental housing on one month's notice alone, and without further justification, would be regarded as oppressive and unconstitutional¹⁷⁷ in terms of the second leg of the test for contractual validity enunciated in the *Barkhuizen*

¹⁷² *Breedenkamp* par 68.

¹⁷³ *Supra*.

¹⁷⁴ *Breedenkamp* par 71.

¹⁷⁵ 2014 (6) SA 315 (CC).

¹⁷⁶ See discussion of the test for determining fairness in par 4.2.2 above.

¹⁷⁷ According to the court, this is so because it would amount to an abuse of contractual power. In addition to infringing the tenant's security of tenure, it would furthermore create potential abuse.

case.¹⁷⁸ Such conduct on the part of the City would in fact be unconscionable and demonstrate a lack of good faith.

The city however relied on further circumstances to justify its act of cancellation and application for eviction by explaining to the court that when Ms Malan fell into arrears she was afforded the opportunity to remedy the default by means of small monthly payments, but she soon stopped doing so. In addition to the default of payment obligations, the city cancelled the lease due to a breach by Ms Malan of a clause prohibiting anybody from being convicted of possession of drugs on the premises when her son and daughter as well as a third party was convicted of this offence. A further justification for the cancellation was the failure of the lessee, and the persons for whose conduct she was responsible, to conduct themselves in accordance with the requirements of the lease agreement. Various forms of criminal activity had transpired or been allowed to transpire on the property.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,¹⁷⁹ read together with s 26(3) of the Constitution, calls for the courts to balance the conflicting interests of tenants and landlords by determine what is just and equitable to both parties and to deliberate elements such as fairness, social values and the implications of the eviction.¹⁸⁰

The court was expected to take into account the personal circumstances of Ms Malan who was at the time of the eviction an elderly, widowed pensioner as well as the severe challenges faced by the city to meet its obligation to provide public housing as required by the Constitution.¹⁸¹ The court however acknowledged the fact that the city made Ms Malan a very reasonable offer to provide her with accommodation at a home for the elderly under its control within a radius of 10km of the property from which she was evicted. This arrangement of adequate alternative accommodation viewed together with Ms Malan's general disregard for the conduct expected of her at the property prompted the court, in

¹⁷⁸ As explained in *Malan* 333.

¹⁷⁹ 19 of 1998.

¹⁸⁰ *Malan* 339.

¹⁸¹ *Supra*.

considering the principle of public policy, to conclude that it should be offered to another eligible and destitute family.¹⁸²

The criteria of fairness, justice, equity and reasonableness which have been developed through case law appear to have been done so in an attempt to explore an alternative to the abolished *exceptio* and are closely related to and intended to oppose the notion of "unconscionability" which is further explored in chapter 5 and 6 below.

¹⁸² *Supra.*

CHAPTER 5

A BRIEF EXPOSITION OF THE UNIVERSAL DOCTRINE OF UNCONSCIONABILITY

5.1 Origin

Our courts have, as reported above, often referred to the lack of good faith as "unconscionability" and have recognised it as reprehensible in a contractual sense;¹⁸³ therefore the doctrine deserves a brief exposition.¹⁸⁴

According to historian, Allen Kamp, the doctrine of unconscionability appears to be of English heritage, invoked for the first time by Lord Jeffreys in the Court of Chancery in the case of *Berney v Pitt*,¹⁸⁵ stemming from the court's concern over family property.¹⁸⁶ In this case, the plaintiff borrowed £2000 from the defendant, subject to the condition that he would repay the defendant £5000 should he get married or inherit from his father. The plaintiff sought relief from this condition which he claimed to be an exploitation of his dire circumstances. In his judgment Lord Jeffreys declared:

"these bargains were corrupt and fraudulent, and tended to the destruction of heirs sent to town for their education, and to the utter ruin of families; and that the relief of the court ought to be extended to meet with such corrupt and unconscionable practices."

At its inception in England in 1686, the notion of unconscionability¹⁸⁷ operated to preserve estates, protect person in vulnerable circumstances, and rescind blatantly unwise bargains as well as to prevent fraud.¹⁸⁸

¹⁸³ See the discussion of the judgments in *Weinerlein, Zuurbekom, Novick, Rand Bank and Sasfin*.

¹⁸⁴ This is not a comprehensive discussion and serves to explain the basic doctrine and its universal recognition that has been formally introduced into our law by our CPA.

¹⁸⁵ *Berney v Pitt* 23 Eng. Rep. 620 (1686).

¹⁸⁶ Kamp AR *Uptown Act: A History of the Uniform Commercial Code 1940-49* 1998 (51) *SMU L. Rev.* 275 at 310.

¹⁸⁷ Also commonly referred to as the equity-or equality doctrine.

5.2 Expansion and global adoption

Even though the doctrine of unconscionability was not initially intended to invalidate commercial agreements which fell short of accepted trade norms, the concept was soon taken advantage of to ameliorate the harsh and inequitable effects of bad bargains on a global scale in the area of contract law as well as in consumer legislation.¹⁸⁹

5.2.1 United States

In 1965, Judge Skelly Wright optimistically introduced the term “unconscionability” in the United States, in the prominent case of *Williams v Walker-Thomas-Furniture*¹⁹⁰ (hereafter the “*Williams* case”). In his majority opinion, Judge Wright declared that courts in the District of Columbia were at liberty to decline to enforce a contract of sale if the bargain was “unconscionable” to the extent that there was “an absence of meaningful choice” by one of the parties, together with “terms which are unreasonably favourable to the other party”.¹⁹¹ It is submitted that the courts’ finding in this respect appears to suggest that the absence of a meaningful choice has to be combined with the presence of terms which are unreasonably favourable to one party in order to make a finding of unconscionability.¹⁹²

According to author Anne Fleming, the ground-breaking judgment in *Williams* served to heighten public awareness of the challenges experience in the low-income marketplace and as such became a catalyst for legislative intervention.¹⁹³ Judge Wright managed to avoid an unfair outcome in the case whilst simultaneously notifying lawmakers of a concern that required a more concrete solution. Fortunately the D.C lawmakers took the bait and

¹⁸⁸ As explained by Kamp 309. The doctrine of unconscionability was later developed further by the judiciary to address inequality in bargaining power, see for instance *Lloyds Bank Ltd v Bundy* (1975) Q.B. 326 and *National Westminster Bank Plc v Morgan* (1985) AC 686.

¹⁸⁹ As confirmed in Fleming A *The Rise and Fall of Unconscionability as the “Law of the Poor”* Georgetown Law Journal, volume 102, issue 5, 1383 (2014) at 1385 .

¹⁹⁰ 350 F.2d 445 (D.C. Cir. 1965).

¹⁹¹ *Williams* 449. See also discussion of Fleming at 1385.

¹⁹² Stuntebeck CA, “The Doctrine of Unconscionability” 1967 (19) *Me. L. Rev.* 81 at 84.

¹⁹³ As explained by Fleming 1388.

commenced drafting consumer credit reform legislation which, amongst other things, granted the courts the power to rescind unconscionable terms.¹⁹⁴

More far-reaching was the enactment¹⁹⁵ of the Uniform Commercial Code (hereafter “the UCC”) in 1965, which was adopted by the majority of the states. With this statute, the doctrine of unconscionability is believed to have been firmly entrenched in the law of the United States.¹⁹⁶ Section 2-302 of the UCC provides that:

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

5.2.2 Canada

The doctrine of unconscionability, which developed from the earlier doctrine of undue influence, has also been firmly entrenched in Canada.¹⁹⁷ This is important because the South African Consumer Protection Act was based on the Canadian Act.

Through the evolution of its common law and based on the principle of equity, the Canadian courts have developed a test to establish if a contract is “unconscionable”. The courts will determine the existence of the following four elements, firstly that the transaction is grossly unfair and improvident, secondly, that the disadvantaged party lacked independent legal advice, thirdly that there existed an overwhelming imbalance in bargaining power as a result of the disadvantaged party’s ignorance of business, illiteracy, ignorance of the language of the

¹⁹⁴ See Fleming 1389, in general on these points. The District of Columbia Consumer Credit Protection Act of 1971 was enacted to govern instalment sale contracts.

¹⁹⁵ The UCC became effective at midnight on June 30, 1967.

¹⁹⁶ See the opinion of Stuntebeck 81 in this regard.

¹⁹⁷ Black, *AJ Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada* 2011 (XVII) *New England Journal of International and Comp. Law* 47.

bargain, or physical disability and finally that the advantaged party knowingly took advantage of this vulnerability.¹⁹⁸

Canada has also passed legislation in all provinces, except British Columbia that regulates unconscionable contracts.¹⁹⁹ The Consumer Protection Act of Quebec deals with unconscionable contracts in consumer transactions and the phrasing of section 8 strongly resemble the equitable principle of inequality of bargaining power.²⁰⁰ All of the other provinces regrettably limited the application of the regulation of unconscionable contracts to transactions made on credit.²⁰¹

It is submitted that in view of this limited statutory application relating to unconscionable contracts, it is necessary that the equitable principle of inequality of bargaining power continue to be applied and developed by the courts in order to ensure that injustice and unfair results are avoided in the law of contract and it therefore seems that the rules of equity continue to be an important principle in Canadian law.²⁰²

5.2.3 Australia and New South Wales

In 1983 the case of *Commercial Bank of Australia v Amadio*²⁰³ came before the Australian court. The Amadios were an elderly couple who had migrated from Italy and they were not well versed in written English. The couple had a son who was in the building industry and they

¹⁹⁸ Manderscheid, DJ *The Right to a Fair Bargain* 2008: <http://www.lawnow.org/the-right-to-a-fair-bargain>. See also *Harry v Kreutziger* 1978 393 (BC CA), where the emphasis was on the imbalance in bargaining power. In *Pike v Pike* 1996 CanLII 6623 (NL SCTD), the transaction was found to be grossly unfair and improvident. In *Shoppers Drug Mart Company v Nigro* the circumstances called for independent legal advice as a consideration of equity and in *Blackmore v Cablenet Ltd* 1994 CanLII 9078 (AB QB), the emphasis was on the act of knowingly taking advantage of a party to an agreement.

¹⁹⁹ As confirmed by Manderscheid.

²⁰⁰ S8 reads: "The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable."

²⁰¹ See explanation by Manderscheid.

²⁰² As put by Manderscheid.

²⁰³ (1983) 151 CLR 447.

were persuaded by him to enter into a mortgage agreement with the bank which would guarantee his business debts to the bank.²⁰⁴

When the son's business eventually went into liquidation, the Amadios were called upon to perform under the contentious mortgage agreement. The contract was eventually rescinded by the full court due to the unconscionable conduct of the bank. The full court was of the view that relief through the doctrine of equity²⁰⁵ was required in the circumstances, as it was found that the bank manager was fully aware of the Amadios' "special disability"²⁰⁶ in conjunction with their reliance on the inaccurate disclosure by their son of his financial position.

The court believed that the bank as the stronger party should not have exploited the weaker party based on this "disability", which on its own was sufficient to indicate that the transaction was clearly unfair in the circumstances and the failure to ensure that the Amadios' completely understood the transaction amounted to its' "taking advantage" of the situation and was therefore "unconscientious".²⁰⁷

It is submitted that it is the outcome of this case which inspired the passing of legislation in Australia to deal with the new concept of "unconscionability" in the law of contract in general, such as the Contracts Review Act 1980 and the Competition and Consumer Act 2010.²⁰⁸

Since 1980, contracts concluded in New South Wales are regulated by the Contract Review Act. The long title describes this Act as follows:

"An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts."

²⁰⁴ *Amadio* 451.

²⁰⁵ The equitable principles relates to relief against unconscionable dealing.

²⁰⁶ The couple was elderly, not well versed in written English and did not possess any meaningful business acumen.

²⁰⁷ *Amadio* 474.

²⁰⁸ South African Law Commission Report Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 1998.

In terms of this Act,²⁰⁹ the court may in circumstances where it considers a contract or a provision of a contract to be unjust in the circumstances relating to the contract at the time it was made, and if it finds it just to do so and in order to prevent an unjust consequence or result, make a number of prescribed orders.²¹⁰ The Contracts Review Act also equips the court with various guidelines to consider when determining if a contract or a provision of a contract is unjust, whilst generally having regard to the public interest as well as to all the circumstances of the case.²¹¹

5.2.4 New Zealand

According to the New Zealand Law Commission,²¹² their judiciary adequately developed the common law doctrine of unconscionability in ground-breaking cases such as *Hart v O'Connor*²¹³ and *Nichols v Jessup*.²¹⁴

The New Zealand Law Commission prefers that any proposed legislation in respect of the doctrine of unconscionability draws from the common law as developed in their case law²¹⁵ and associated doctrines like undue influence and duress and declares that its aim is to extend the focus of the doctrine beyond the physical making of the contract, by

²⁰⁹ S7(1).

²¹⁰ See the discussion of the South African Law Commission Report Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* 1998 at 110. Prescribed orders which a court is allowed to make in terms of section 7.1 of the New South Wales Contract Review Act of 1980 include: “(a) it may decide to refuse to enforce any or all of the provisions of the contract; (b) it may make an order declaring the contract void, in whole or in part; (c) it may make an order varying, in whole or in part, any provision of the contract; (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that: (i) varies, or has the effect of varying, the provisions of the land instrument; or (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.”

²¹¹ S9(1). See also Report Project 47 (1998) 144.

²¹² Report Project 47 (1998) 128. According to the New Zealand Law Commission the law has always been willing to intervene when a transaction, in the courts view, can be considered unconscionable.

²¹³ 1985 (2) All ER 880 (AC) 1000. (1985) UKPC 1.

²¹⁴ 1986 (1) NZLR 226.

²¹⁵ Report Project 47 (1998) 128. See also fn225 and 226.

acknowledging that certain contractual terms may not be unfair in themselves but can be applied in a manner that is either harsh or unfair.²¹⁶

²¹⁶ Report Project 47 (1998) 128.

CHAPTER 6

RELEVANT SECTIONS OF THE CONSUMER PROTECTION ACT

6.1 The call for legislative intervention

In 1996 The South African Law Commission (hereafter “the Commission”) published a discussion paper, recommending the introduction of legislation that would allow the courts to review unfair contract terms.²¹⁷ Due to the abolishment of the *exceptio* for example, it seems as though the Commission recognised that the diverse South African society²¹⁸ was in need of protection against contractual unconscionability. It considered it appropriate to follow the movement for legislative intervention which had become conventional amongst first world countries.²¹⁹

In 1998, the Commission published its report based on the feedback received from respondents and made a number of well thought-through recommendations in respect of the legislation it invited. A brief over-view of the recommendations follows below.

According to the Commission, legislation should be enacted to prohibit “unfairness, unreasonableness, unconscionability or oppressiveness” in contracts at the stage of its formation as well as at the stage of enforcing the agreement.²²⁰ The Commission therefore recommended that the prevailing circumstances at the time of the conclusion of the contract should be taken into account, as well as any “reasonably unforeseeable change of circumstances” making performance unduly burdensome. In the latter instance, the parties should be compelled to enter into negotiations to adjust or to cancel the contract.²²¹

²¹⁷ South African Law Commission Discussion Paper 65 Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1996).

²¹⁸ Which consist of a very large percentage of illiterate and disproportionately poor people.

²¹⁹ Discussion Paper 65 Project 47 (1996) 4.

²²⁰ See par 2.2.3.1 to 2.2.4.1 of Report Project 47 (1998).

²²¹ See par 2.8.4.1 and 2.8.5.1 of Report Project 47 (1998).

It was recommended that an office of an Ombudsperson be with authority to decide only on matters relating to standard form contracts²²² and the authority of the Ombudsperson should focus on avoiding unreasonable, unconscionable or oppressive contractual terms.²²³

The Commission suggested that the courts should be given “wide powers” in order to effectively ensure justice for contracting parties, but that these wide powers are to be confined by limiting the benchmark to “fairness, unreasonableness, unconscionability and oppressiveness.” Although the principle of good faith or the absence thereof was not expressly mentioned by the Commission, it can certainly be inferred from the aforementioned broader requirements proposed by them. It is also noteworthy that the Commission, for purposes of its recommendations did not refer to or deliver an opinion on the historic *exceptio doli* and merely reported on its burial in the *Bank of Lisbon* case. The Commission further suggested that any court sitting on appeal in respect of an allegedly unfair term or contract should be able to confront the issue as a court of first instance would.²²⁴

It was submitted by the Commission that the High court should be given injunctive powers to prevent or restrict the formation of any intended unfair, unreasonable, unconscionable or oppressive terms which is likely to occur upon the evidence presented by an interested applicant. Likewise, the Ombudsperson should be given the authority to bring such application for injunctive relief before the High court in respect of all standard form contracts to restrict or omit any unfair, unreasonable, unconscionable or oppressive terms.²²⁵

The Commission conceded that it is necessary to provide an open-ended list of guidelines in the proposed legislation by giving some definition to the notions of “unreasonableness, unconscionability or oppressiveness”, which would have the benefit of reducing legal uncertainty to a more acceptable level without limiting the discretion of the judiciary

²²² See par 2.3.6.1 of Report Project 47 (1998).

²²³ See par 2.3.6.1 and 2.3.7.1 of Report Project 47 (1998) for a list of recommended powers and duties of the Ombudsperson.

²²⁴ See par 2.4.4.1 of Report Project 47 (1998).

²²⁵ See par 2.4.4.2, 2.4.5.1 and 2.4.5.2 of Report Project 47 (1998).

unduly. Another benefit of guidelines in the proposed legislation is the increased level of predictability which it would provide in terms of what will be considered acceptable in contracts in order to encourage prevention thereof as opposed to the emphasis on obtaining relief from the courts after the fact and thereby avoiding cost and inconvenience to contracting parties.²²⁶

It was recommended by the Commission that the proposed legislation should enjoy wide application and that agreements or settlements under the Divorce Act, the Matrimonial Affairs Act, or the Matrimonial Property Act should also be included and enjoy protection under the proposed legislation because it is believed that the provisions of these acts do not sufficiently protect the parties from unfair, unreasonable, unconscionable or oppressive terms.²²⁷ Furthermore, it was submitted that no categories of persons should be exempted from the proposed legislation because the distinction between consumers and other contracting parties are generally "arbitrary and difficult to maintain", and the courts would in any event tend to use more flexible standards depending on the level of business acumen of the contracting parties concerned.²²⁸

6.2 Traditional defences

Our common law provides a number of grounds, albeit a closed list, upon which a party to a contract can avoid liability in circumstances where consensus was obtained by improper means. These grounds have come to be recognised in the law of contract as a justifiable defence for rescission or voidability because consensus is generally regarded as the corner stone of contracts and as such the requirement that an actual meeting of the minds of the contracting parties occur is of the utmost importance.²²⁹

Prior to the enactment of the CPA, the common law provided that contractual liability can only be avoided on grounds of misrepresentation, mistake, fraud, duress and undue

²²⁶ See par 2.6.4.1 and 2.6.5.1 of Report Project 47 (1998) for a list of recommended guidelines.

²²⁷ See par 2.7.4.3 of Report Project 47 (1998).

²²⁸ See par 2.7.4.4 of Report Project 47 (1998).

²²⁹ Van der Merwe S & others *Contract: General Principles* 4th ed (2012) 102.

influence (including commercial bribery), all of which indicate the actual absence of *bona fides* towards the other contracting party.²³⁰

Professor H R Hahlo explained the methodology of our common law as follows:²³¹

“Provided 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 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. The courts will not release him from the contract or make a better bargain for him.”

In his synopsis above, Professor Hahlo clearly intends to point out that aside from the fixed number of recognisable defences to rescind a contract or a contractual term, our law of contract reverently honours the doctrine of *pacta sunt servanda*. The continued relevance of this opinion will be reviewed below in view of possible further and less confined grounds for rescission introduced by the CPA.

6.3 Introduction of the CPA

The main purpose of the CPA is to protect illiterate, poor and historically disadvantaged persons from an unfair marketplace for consumer products and services and unfair business practices.²³² It is the first statute in South Africa which deals with unfair contract terms in general and the first act to attempt to codify open-ended principles²³³ in the law of contract and as such, the CPA contains several provisions which, at face value, appear to revive elements of the abolished *exceptio doli*.

²³⁰ For a detailed discussion of these grounds and the elements required to prove them, see Van der Merwe & others 102 -130.

²³¹ Hahlo HR *Unfair Contract Terms in Civil-Law Systems* 1981 (98) SALJ 70.

²³² As stated in the Preamble to the CPA.

²³³ Principles that can be interpreted in various ways, and which can be described as ambiguous are known as open-ended principles, such as public policy, good faith the responsibility of the parties, distributive justice, materiality, reasonableness, paternalism and public harm.

This result is achieved most notably through the wide and general stand-alone criteria of “fairness” and “reasonableness” as well as the re-introduction²³⁴ of the term “unconscionable” into the South African law of contract, which it attempts to define in section 1.²³⁵

Unfortunately, and in direct conflict with the recommendations of the South African Law Commission, the CPA has limited application and does not apply to all contracts.²³⁶

If the early inferences of Stuntebeck in 1967 are correct, it stands to reason when read together with the CPA that the doctrine of unconscionability, understood as the absence of good faith, is now firmly, although with limited application, entrenched in our law of contract. It now remains the task of the court to either stifle or further develop the application of the doctrine, depending on the extent which the judiciary is prepared to accept and expand it.²³⁷

6.4 The right to fair and honest dealing

Section 40 of the CPA deals with “Unconscionable conduct” and essentially prohibits a supplier or an agent of the supplier from using unfair tactics, physical force, coercion, undue influence, duress or similar unconscionable conduct against a consumer in connection with the supply, negotiation, conclusion, execution or enforcement of an agreement for goods or services. It further advocates that it is unconscionable for a supplier to take advantage of a consumer who is unable to protect its own interests due to physical or mental disability, illiteracy, ignorance or a similar reason. In doing so, a supplier or service provider would be acting *mala fide* or contrary to good faith. Thus, section 40 enables a prejudiced party to set the contract aside due to the age-old values mirrored in the *exceptio doli generalis*.

²³⁴ See for example *Weinerlein and Zuurbekom*. See also Van der Merwe 317.

²³⁵ “Unconscionable”, when used with reference to any conduct, means- (a) having a character contemplated in s40; or (b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person”.

²³⁶ See s5 read together with s6 for a large number of excluded categories of contracts.

²³⁷ See Stuntebeck 91.

It is the first time in the South African law of contract that these matters have been codified. The CPA however supplements the existing common law criteria²³⁸ (restricted by the scope of the CPA) by adding many new and additional grounds for avoiding contractual liability such as the wide criteria “unfair tactics” and “pressure”. In stark contrast to the common law, the CPA also looks at the subjective circumstances of the individual party to an agreement and such individual is afforded protection as a result of such subjective circumstances and personal characteristics, which is strikingly reminiscent of the supposedly abolished *exceptio doli*.

Van der Merwe recognises that a finding by the court that a contract is greatly inequitable or oppressive or unconscionable, as introduced in broad and unrestricted definition by the CPA, could now also be regarded as new factors which justify rescission of a contract.²³⁹

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

Section 48 of the CPA prohibits unfair, unreasonable and unjust contract terms. In terms of this section, a supplier or his agent may not supply goods or services at an unfair, unreasonable, or unjust price or on terms that are generally unfair, unreasonable or unjust. Contractual terms that are excessively one-sided in favour of anyone other than the consumer are defined as unfair, unreasonable and unjust.

Section 52 of the CPA, which bestows wide powers on the courts to ensure fair and just conduct, terms and conditions has been widely criticised for causing unwarranted legal uncertainty due to the varying discretion of judges and magistrates.

Naude explains that whilst section 52 of the CPA makes provision for the factors which a court must consider when determining whether a contract or a term is unfair, section 51 reinforces the overall prohibition of unfair terms by listing a number of terms which are expressly prohibited, such as exemption clauses in respect of gross negligence and false

²³⁸ See par 6.2.

²³⁹ Van der Merwe & others 132.

acknowledgments by a consumer that no representations were made by or on behalf of the supplier.²⁴⁰

Naude confirms that the CPA has merely followed the example of the global market place as many legal systems across the world have enacted “unfair terms legislation”. She however emphasises the need for the CPA to be supplemented by a model for preventative control, such as the 1993 EC Directive on Unfair Terms in Consumer Contracts introduced by the UK in 1995, because the control of individual consumer contracts through the courts alone is problematic and poses severe limitations as a result of factors like cost, risk and access.²⁴¹

Naude further suggested that the CPA should have attempted to provide more detailed guidance in respect of what constitutes an “unfair term” as opposed to the vague reference thereto. She believes that businesses or suppliers would be more likely to voluntarily exclude unfair terms if they had a better understanding of what the legislature had in mind.²⁴² These suggestions are in my opinion correct. What is clear, however, is that the conduct of one person that indicates sufficient bad faith to be classified under the broader concept as “unconscionable” as discussed below will afford a defence against contractual liability.

6.6 The influence of constitutional and common law values on the CPA

Both the CPA and the Constitution have been written in the context of a post-apartheid South Africa with the obvious need to redress past discrimination and to protect vulnerable, illiterate and poor citizens.

As a result of the political and historical background of this country, the principles of public policy and *bona fides* have become essential to South African society and these key values have been firmly entrenched in the Bill of Rights to the Constitution. Section 39 of the Constitution imposes a positive duty on all courts, tribunals and forums to promote the

²⁴⁰ Naude T *Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective* 2010 (127) *SALJ* 515.

²⁴¹ As explained by Naude 516.

²⁴² See the viewpoints expressed by Naude 536 in this regard.

spirit, purport and object of the Bill of Rights when interpreting any legislation, and when developing the common law and customary law.²⁴³

As we have learnt from the majority judgement of the *Barkhuizen* case, the Constitution advocates values such as equity, justice, reasonableness and fairness which cannot be separated from public policy. It is evident from the volume of cases that have subsequently applied the principles of the *Barkhuizen* case that the superior courts have responded to the call to develop the law of contract in accordance with the spirit, purport and objectives of the Bill of Rights.²⁴⁴ The emphasis of the CPA is also largely on notions of fairness and reasonableness and by implication also on considerations of public policy, and therefore echoes both the values of the Constitution as well as the common law.

6.7 Concerns regarding enforcement

While consumers are afforded commendable and equitable rights under the CPA, it does not seem likely that the enforcement thereof will be effective, as there are no guidelines to support consumer tribunals to enforce the provisions of the CPA fairly or in an organised way. It appears that it will inevitably become the task of the courts to give meaning to terms such as “pressure”, “unfair tactics”, “physical force” and “any similar conduct”, placing the burden of inconvenience and cost on the shoulders of the consumers which the CPA intends to benefit. It is interesting to note that under the *exceptio doli*, the burden was similarly on the defendant to prove the *dolus*. This supports the conclusion that the CPA does in fact reintroduce or at least mirror the *exceptio* as a defence.

I agree with the observations of Stuntebeck that the “policing function” created in legislation, which allows a court to rescind a contractual term, is not inconsistent with

²⁴³ S39 (2) of the Constitution.

²⁴⁴ See *inter alia* the following cases: *Potgieter and Another v Potgieter No and Others* 2012 (1) SA 637 (SCA); *Breidenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (5) SA 304 (GSJ); *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA); *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM); *ADVTECH Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C); *Mozart Ice Cream Fanchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C); *Botha and Another v Rich No and Others* 2014 (4) SA 124 (CC); *Malan v City of Cape Town* 2014 (6) SA 315 (CC); and *Country Cloud Trading CC v Mec, Department of Infrastructure Development* 2015 (1) SA 1 (CC).

freedom of contract, because it is the abuse of this principle rather than the principle itself which the courts are at liberty to deal with.²⁴⁵ As a result of fierce economic competition, skilled drafters have abandoned their basic sense of equity through the practise of enforcing harsh standard form contracts, and it is therefore clear that a certain degree of intervention or policing is necessary to ensure that contracting parties can conclude a meaningful and fair bargain concluded without unconscionability.²⁴⁶ It is however unfortunate that the legislature also failed to heed the sensible suggestions of countless academics to provide adequate guidelines for the application of the widely articulated definitions contained in the CPA, which as the Law Commission pointed out would have had the dual benefit of curbing legal uncertainty to a more acceptable level as well as to serve the function of providing preventative guidelines.²⁴⁷

It is disappointing that thus far very few cases have been heard by the courts in respect of the provisions of the CPA since its inception, as authority of this nature would be welcome in order to clarify some of the short-comings of the CPA as identified above. Ultimately the main goal should be to achieve an equitable balance between the existing and newly introduced substantive rules of contract and a reasonable degree of trust should be placed in the legislature to achieve this balance.

²⁴⁵ As stated by Stuntebeck 85.

²⁴⁶ Stuntebeck 91.

²⁴⁷ See par 6.1 for a summary of the Commissions' views as well as par 6.5 for Naude's suggestions in this regard.

CHAPTER 7

CONCLUSION

Since its development in early Roman law, it was evident that the *exceptio doli generalis* was a much needed and useful defence. The failure of its successful incorporation into Roman-Dutch law appears to be the primary cause of its ultimate and unfortunate demise in the *Bank of Lisbon* judgment. The ensuing developments, as discussed in detail in the preceding chapters of this study, demonstrate the extent of the lacuna which the abolishment of the defence left within the South African law and it is with some relief that the CPA has attempted to fill this lacuna.

Although the CPA appears to merely codify many of the existing common law principles in the form of consumer legislation, it also provides an infinitely wider application and interpretation thereof and as such it does appear to embrace the spirit of the *exceptio doli generalis*.

The relevant sections of the CPA, discussed in chapter 5, clearly constitute the statutory creation of peremptory rules in the law of contract and impose on parties the duty to act reasonably, fairly and to avoid unconscionable conduct. To this end the objectives and purpose of the *exceptio doli generalis* has been reintroduced (as limited by its application).

In my view, these supplemented open-ended grounds for rescission of contractual terms, as explored in paras 6.4 and 6.5 of chapter 6, is a positive addition to the South African law of contract; however it is unfortunate that the legislature did not in fact heed the suggestion of the Law Commission to give it wider application.²⁴⁸ It is further regrettable that the enforcement of the CPA may be curtailed by the constraints described in par 6.7.

All things considered it will be interesting to see what the future holds for the principles of equity, fairness, good faith and unconcionability in the South African law of contract and whether the CPA will contribute to these principles in a meaningful way.

²⁴⁸ See par 6.1.

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Word count: 16 197