UNEQUAL BARGAINING POWER: TIME TO RECONSIDER THE EXCEPTIO DOLI GENERALIS?

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By Adv Melt Louw

Student no:

18252975

Under the supervision of Advocate Mayuri Pillay

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To my wife:

You are the foundation of every noteworthy achievement in my life. Thank you for your unwavering support. Without you none of this would be possible, but more importantly, without you this would be immaterial.

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Contents

UNEQUAL BARGAINING POWER: TIME TO RECONSIDER THE *EXCEPTIO DOLI GENERALIS?*

1. Introduction

Consider the following scenario: A sues B for specific performance of contractual obligations 1,2,3,4,5 and 6. B defends the suit and pleads that when the contract was concluded, she would never had agreed to terms 4,5 and 6 had it not been for the unequal bargaining position B found herself in. B furthermore alleges that having regard to the inequality that existed at the time when the contract was concluded, and the specific circumstances under which the suit is brought, enforcing terms 4,5 and 6 would have an unconscionable result.

Neither the Consumer Protection Act (hereinafter referred to as the CPA)[1], nor the National Credit Act (hereinafter referred to as the NCA)[2] is applicable.

The matter proceeds to trial and B is able to prove all of the aforementioned. The critical question is, what is B's remedy, if any? The simple answer would be that B is without recourse.

[1] Act 68 of 2008.
[2] Act 34 of 2005.

2. The position in South African law

2.1. This issue is yet to be addressed head on

The position in South African law relating to unequal bargaining power between contracting parties has been the subject of judicial debate over recent years. Although our courts have referred to this concept in contract law and briefly dealt with it, we are yet to see what type of a remedy, if any, is available to a litigant that proves that certain terms of a contract came into being as a result of unequal bargaining power.

South Africa has progressed substantially on the issue of equality in bargaining power during pre-contractual negotiations, and even afterwards. When one considers our pre-constitutional dispensation with our current position, it is unquestionable that substantial progress has been made in assisting litigants faced with inequality in bargaining power with certain remedies. The issue remains that these remedies are limited to certain instances, certain courts and certain *legal personas*[3].

The Legislature has alleviated this problem and provided remedies where there were previously none, with the enactment of certain legislation such as the NCA, the CPA and the Conventional Penalties Act[4].

It is instructive to note that before 1910 South Africa had 8 Acts. Between 1910 and 1994 South Africa promulgated 101 Acts. Since 1994, South Africa has promulgated 170 pieces of legislation, and counting[5].

Taking the aforementioned into account, it is highly unlikely that there would be any further legislative regulation on contracts in the near future, simply because we run the risk that it will become overregulated, and the legislature might create more difficulties than solving issues. A perfect example of the legislature 'overreaching' is the new

[3] The NCA and CPA are limited in their application and protection. In particular, companies with a certain asset value or turnover are excluded from its ambit.
[4] Act 15 of 1962.
[5] See Department of Justice and Constitutional Development www.justice.go.za/legisltation (October 2019)

National Credit Amendment Act[7], which would allow a court to suspend or even cancel debt below a certain threshold[8].

Notwithstanding legislative reform, there remain instances of inequality of bargaining power which are not covered by the NCA or CPA. By way of example, the NCA and the CPA limit its application to general consumers[9], and juristic entities have little protection. It is naïve to suggest that large corporate conglomerates would never abuse their bargaining position when contracting with small to medium enterprises.

The time has come to develop the common law (or revive an already available remedy) to provide a defence to a litigant who is confronted with relief being sought based on strict reliance of a contractual term that came into existence as a result of unequal bargaining power, which if applied rigidly, would or could result in a unconscionable result.

Notwithstanding the fact that South African law does not recognise, nor accept a doctrine relating to unequal bargaining power, this vacuum and the need for it to be addressed, enjoyed the attention of a Draft Bill on unfair contract and contract terms, which recommended that courts be allowed to strike down a contract that is found to be unreasonable, unconscionable or oppressive[10]. However, despite the Commission's comments that South African law is out of step with foreign law, this piece of legislation did not make the cut[11].

There have been numerous attempts to define or create a general common law principle in terms of which courts can apply a doctrine or principle relating to unequal bargaining power, which would afford a court the power or discretion to award some form of relief, if it could be shown that there had been unequal bargaining power during the conclusion of the agreement[12].

[7] National Credit Amendment Act, 7 of 2019.
[8].Section 15 of National Credit Amendment Act.
[9] Sections 4, 5 and 9 of the NCA.
[10] Law Commission in their 1998 Report on Unreasonable Stipulations of Contracts and the Rectification of Contracts.
[11] The report did not make it past publication.
[12] H Beale 'Inequality of Bargaining Power' 1986 OJLS 123.

The general conundrum with this proposition, and the manner in which it has been approached over recent years, is that legal practitioners, their clients, and to a certain degree judges seek a substantive independent remedy entrusting a judge with the discretion to enforce contractual obligations based on a judicial sense of reasonableness or fairness.

This dissertation does not advocate for such a remedy, which would be inimical to the concept of legal certainty. One can do no better than to quote *Standard Bank of SA Ltd v Wilkinson.*[13] A full bench of the Cape High Court, dealing with an attack on the validity of a suretyship on the grounds of public policy, remarked that:

> *"If once clauses come to be judged . . . against the purpose of the contract, its setting and the relationship between the parties, creditors will come to be faced by a multiplicity of defences by 'recalcitrant debtors' and sureties seeking to have their agreements, freely and voluntarily entered into, declared contra bonos mores. It will, we fear, give rise to a plethora of litigation based upon the 'last resort' defence of public policy. It will also no doubt, in such event, produce the many conflicting decisions on individual clauses that presently exist."*[14]

His Lordship Justice Wallis[15] encapsulated this concern aptly by stating that *"a rule of law that is based solely on judicial discretion and a sense of reasonableness and fairness is no rule at all"*[16].

Equally, the concerns raised by Brand[17] remain prevalent and these views cannot be faulted, nor can they be pushed aside:

> *"If we say that the principles regarding the role of fairness and equity in our contract law, as formulated, for example, in York and Bredenkamp, offend the spirit, purport and objects of the Bill of Rights, why do we say that; and to what*

[13] 1993 (3) SA 822 (C).
[14] At page 832.
[15] Malcolm Wallis "*Commercial Certainty and Constitutionalism: Are they compatible*" 2016 (133) SALJ 545.
[16] At page 25.
[17] Fritz Brand 2016 (27) Stellenbosch Law Review 233 at 258.

extent do they so offend? Where exactly does the deficiency lie? If we are to formulate exceptions to these principles, where will we draw the line? For instance, if a contact provides for payment on a specified future date, would it be a sustainable defence that, payment on that date would be severely prejudicial to the debtor, while the creditor does not really need the money? Furthermore, if we are to recognise exceptions to these established principles, what would happen to equally well-established remedies based on concepts of equity and fairness, such as misrepresentation, rectification, undue influence and so forth? Will they retain their independent existence? Or will they be subsumed by these undefined exceptions? I believe that unless and until questions such as these can be satisfactorily answered, the rule of law requires that the established principles be protected by our highest court."

No, and to the contrary, this dissertation advocates for the conclusion that the role of a court is not to enforce rules and obligations blindly. The role and ultimate goal of a court is to do justice, and to achieve that goal, we must once and for all acknowledge that contracts are premised on the concept of good faith (having due regard for relative bargaining positions of contracting parties and the obligation to not abuse inequality of bargaining power as a substratum of acting in good faith) and acknowledge the need for judicial development in this sphere of contract law. South Africa, with one of the most progressive constitutions in the world, does not currently recognise a robust role for good faith[18], and is potentially lacking behind our international counterparts[19].

[18] AM Louw Yet Another Call for A Greater Role for Good Faith In The South African Law Of Contract: Can We Banish The Law of The Jungle, While Avoiding The Elephant In The Room? [2013] Vol 16 No 5.

[19] Fn 17. The rule was summarised in 1933 by the New York Court of Appeals as imposing an implied covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing" - Kirke La Shelle Company v The Paul Armstrong Company 263 NY 79; 188 NE 163; 1933 NY 167 (as recently confirmed again in ABN AMRO Bank, NV v MBIA Inc 2011 NY Slip Op 5542, 11-12 (2011)). See also, for example, the following as contained in the California Civil Jury Instructions (A 325: Breach of Covenant of Good Faith and Fair Dealing): "In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract." See the discussion of Janse JA of international sources dealing with unconscionable contracts in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) at 613 – 614.

The learned author Christie[20] is equally of the view that the common law has evolved a number of techniques that can be applied in circumstances that may fall within the general ground of inequality of bargain power,[21] but we are yet to tackle the problem head on.

Because the principles relating to equality and bargaining power during pre-contractual negotiations have not been settled in our law, there is no real definition recognised by our courts for "unequal bargaining power".[22] The problem that comes with defining and acknowledging this concept, is the potential far-reaching and undesirable consequences that might come to fruition as a result of the subjective influences that shape and form every judicial referee's inherent biases. But this difficulty is far from insurmountable.

2.2. Where does this concept reside in South African law?

South African law of contract is essentially a modernised version of the Roman-Dutch law of contract, subject to our Constitution,[23] from which all law in South Africa derive its validity[24].

Inequality in bargaining power relates to contractual autonomy as a function of the constitutional value of human dignity. Unequal bargaining power infringes on individuals constitutional right to freedom, equality and human dignity.[25]

2.3. Scope of required remedy

South African jurisprudence requires a remedy that takes into consideration:

[20] Christie, The Law of Contract in South Africa, 5th Edition, Lexis Nexis, on p. 18-19.
[21] Foremost among these techniques are relaxation of the *caveat subscriptor* rule, limitations on the enforcement of exemption clauses, construction *contra proferentem*, duress, undue influence and public policy.
[22] Beale. Note 11 above.
[23] The Constitution of the Republic of South Africa, 1996, as amended. Hereinafter referred to as the Constitution.
[24] Hutchinson et al, The Law of Contract, 3rd ed, page 11.
[25] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 340 par 57.

1. Equality of bargaining power at the time of conclusion of the contract, and the terms and/or conditions that were born from such a position; and
2. The circumstances under which it is or would be strictly enforced to determine whether it would lead to a potential unconscionable result.

The concept of unequal bargaining power is inextricably linked to the question of whether a contract and/or its terms, and the enforcement thereof under certain circumstances, would be against public policy. It is enshrined in the concept of good faith[26].

Consequently, the Court has regard for the facts that existed when the parties contracted, the terms, the consequences if they are strictly enforced, and ultimately prejudice.

In the context of unequal bargaining power, a remedy is required that can be relied upon, once all other contractual remedies have been exhausted or are not available, that would allow a court a discretion to either enforce a contract in a manner that does not offend public policy or alternatively, in sparing and exceptional cases, strike or refuse to enforce the offending term of the agreement.

The notion of judicial intervention in contracts that have been freely and voluntarily entered into is not foreign to our jurisprudence. Therefore, the acknowledgement of the necessity of good faith in contract law, and the development of this remedy, is not an insurmountable difficulty.

There are multiple examples that unequivocally show that judicial discretion in the law of obligations does not necessarily create uncertainty, but is used as a tool to prohibit injustice:

1. Restraint of trade provisions in an employment agreement must pass constitutional muster, failing which they will not be enforced.[27] The court has a

[26] *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) at 617 I – J.
[27] *Magna Alloys and Research (Sa) (Pty) Ltd V Ellis* 1984 (4) SA 874 (A).

discretion, which applies to all contracts, to refuse to allow a contract to be enforced in whole or in part, if the court considers that enforcement would be against the public interest at the time that enforcement is sought;[28]

2. A Court has a general equitable discretion to refuse specific performance.[29] Instructively one of the circumstances under which the court would not award an order of specific performance is if the order would cause undue hardship;[30]

3. Contracts that are inimical to the legal convictions of the community will not be enforced by a court;[31]

4. Lastly, and one of the best examples where South African jurisprudence has developed to prohibit strict enforcement of contractual provisions where it would lead to an injustice, relates to the application of the *exceptio non adempleti contractus*:

    4.1 The Supreme Court of Appeal has reiterated the principle of reciprocity, and also further developed the jurisprudence surrounding the relaxation thereof, in the seminal judgment of *Thompson v Scholtz*[32].

    4.2 The Honourable Nienaber J commenced his analysis of the *exceptio non adimpleti contractus*, by identifying the *"two major premises or propositions in B K Tooling".*[33] The Honourable Judge reiterated that the *exceptio non adimpleti contractus* is available as a defence to a party, from whom performance is demanded by the other contracting party whose own reciprocal performance has not been rendered precisely or in full.[34]

[28] Kerr, *Law of Contract*, page 637.
[29] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).
[30] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A).
[31] *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A).
[32] 1999 (1) SA 232 (SCA).
[33] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 240 J – 241. Hereinafter referred to as *BK Tooling*.
[34] *Thompson v Scholtz* at 244G/HH and 248E.

4.3 The *exceptio non adimpleti contractus* accordingly applies even if the defect in the plaintiff's performance (short of being *de minimis*) is not serious enough to justify its rejection or the cancellation of the contract by the defendant. The learned Judge stated[35], that:

> "*Implicit in the first proposition is the notion that a plaintiff is precluded from recovering any remuneration if his performance falls short of perfection, even when the defendant, notwithstanding its shortcomings, accepts and utilizes it*."

4.4 The learned Judge then proceeded to analyse the second proposition in *B K Tooling*, which aims to ameliorate the first, where the defendant had accepted and utilised the defective performance. The learned Judge held in this regard that:

> *"… the corrective is that where the shortcoming in the plaintiff's performance is capable of being restored (or 'cured')* ***the court has a discretion, if fairness so dictates,*** *of allowing the plaintiff his contractual remuneration – but minus the cost of restoring his defective work to the required contractual standard. … by contrast to the [rejected] approach based on substantial performance the defendant is not required to formulate a claim for damages."*[36] (own emphasis)

[35] *Thompson v Scholtz* at 241 C – D.
[36] *Thompson v Scholtz* at 241 F – G.

3. **Analysis of Case Law**

3.1. Introduction

The concept of unequal bargaining power has been referred to by our courts on many occasions but, for a lack of a better term, the can has been consistently kicked down the road.

3.2. *Brisley v Drotsky*[37]

Insofar as the law of contract is concerned, the decision in *Brisley* will forever be recognised as a seminal landmark judgment.

Harms JA, Brand JA & Streicher JA wrote for the majority. Cameron JA, whilst agreeing with the majority judgment, wrote a separate judgment, and Olivier JA wrote the dissenting judgment.

The facts were briefly as follows:

The appellant in the Supreme Court of Appeal was a lessee who had concluded a lease agreement with the respondent as lessor, in terms of which the appellant leased from the lessor a residential property, with a specific obligation that the rent would be due and payable on or before the first day of each month, and would be payable in advance.[38]

When the appellant, during the later stages of January 2000, had not yet paid her January rent, the respondent cancelled the lease agreement and afforded the appellant a 14-day period to vacate the property.[39]

[37] 2002 (4) SA 1 (SCA). Hereinafter referred to as Brisley.
[38] *Brisley* par 2 at 9F.
[39] *Brisley* par 2 at 9F-G.

The respondent initiated eviction proceedings in the Court *a quo* which was opposed by the appellant. The Court *a quo* found in favour of the lessor and ordered the eviction of the appellant.[40]

When one considers the judgment, one is immediately faced with the unquestionable conclusion that the judges writing for the majority did not see the appellant in a favourable light. Before even considering the facts and the law applicable to the matter, they unequivocally stated that the appellant deployed delaying tactics[41] and raised serious concerns insofar as the appellant's credibility. When perceived as being opportunistic by the Court, one would think that the appellant would have a diminished chance of succeeding.

The lease agreement was a stock standard lease agreement acquired at the well-known stationery chain CNA.[42] The lease agreement determined that the rent would be payable on or before the 1st day of each month, and would be paid in advance. The lease agreement also afforded the lessor the right to cancel the agreement forthwith if rent had not been paid in full.[43] One of the central features of the judgment revolved around the following clause:[44]

> *"No alternation, variation or cancellation of any of the terms or conditions of this lease shall be of any force or effect unless it is recorded in writing and signed by the parties thereto. This has now become well-known as a Shifren clause."*

The appellant's defences in the Court *a quo* were threefold:

1. Firstly, she relied on a verbal agreement that allowed her to pay the rent as and when it suited her;
2. Secondly, she raised estoppel; and

[40] *Brisley* par 2 – 3 at 9G-H.
[41] *Brisley* par 2 at 9G-H.
[42] Brisley par 2 – 3 at 9G-H.
[43] *Brisley* par 4 at 10B -C.
[44] *Brisley* par 4 at 10D.

3. Lastly, that in January she only made a partial payment because she had to incur a certain expense on behalf of the lessor.[45]

After filing a supplementary affidavit, the appellant made a direct challenge on section 26(3) of the Constitution, that she may not be evicted from a residential property without a court order which could only be granted upon consideration of all relevant circumstances. Insofar as this dissertation is concerned, the constitutional challenge premised on Section 26(3) will not receive consideration.

The majority ruled that contracting parties are open to formalise their agreement, and how it will be regulated. In particular, they are free to insert a clause that determines that the terms of the agreement may not be amended unless it is reduced to writing and signed by both parties. The majority was not convinced that the *Shifren* clause was *contra bones mores.*[46]

Insofar as the challenge on the *Shifren* clause, as well as the issue of unequal bargaining power is concerned, the Appeal Court surmised that the appellant admitted in her papers that she had read the agreement before she had signed it, and that she had been given the opportunity to consider same with an advisor, as well as with her mother. There was no evidence by the appellant that she would have concluded the agreement on other terms save for those in the written document, and it was in fact the appellant that had demanded that the agreement be in writing.[47]

Where the decision of *Brisley* is of particular importance in the context of this dissertation, is the appellant's challenge, so to speak, premised on the principle of *bona fides*. The appellant argued that the strict application of the *Shifren* clause should not be allowed as it would amount to an unreasonable and unfair outcome, that flies directly in the face of the principle of *bona fides.*[48]

[45] *Brisley* par 5 at 10E -F.
[46] *Brisley* para 8 at 11E -F.
[47] *Brisley* para 9 at 12C – D.
[48] *Brisley* par 11 at 12F -H.

At this juncture, I interpose to mention that the above type of challenge was governed by the *exceptio doli generalis* - the strict application of contractual terms which amount to *dolus,* leading to an unconscionable result.

The majority decision firstly laid to rest the question of whether a court has a general discretion to enforce a contractual term. The unequivocal answer was no.[49]

As authority for the argument of the appellant, they relied on the decision of Ntsebeza AJ in *Miller and Another NNO v Dannecker*[50] which in turn, relied on the minority judgment of Olivier, JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO.*[51] I will return to the Saayman judgment in due course.

The reliance on the aforesaid decision was based on two arguments:

1. Firstly, that judges should not be bound by the decisions of the Supreme Court of Appeal, if a judge is of the opinion that the application thereof would be against the principles of good faith; and
2. Secondly, that the principles in consideration of good faith amount to an independent ground for the rescission or non-application of certain contractual terms.[52]

The majority obviously found that the first argument cannot be sustained, simply because of the principle of *stare decisis.*[53] Insofar as the second argument is concerned, the majority recognised that Olivier JA advocated that *bona fides* be awarded a more prominent place in the law of contract. Although recognising that the decision of Olivier JA was applied in the decisions of *NBS Boland Bank v One Berg River Drive CC and Others, Deeb and Another v Absa Bank Ltd,*[55] *and Friedman v Standard Bank of SA Ltd,*[56] the majority stated that the reference to the *Saayman* decision did not form part of the *ratio decidendi,* and therefore that these comments

[49] *Brisley* para 12 at 12I.
[50] 2001 (1) SA 298 (K).
[51] 1997 (4) SA 302 HHA 318. Hereinafter referred to as Saayman.
[52] *Brisley* para 14 at 13B – D.
[53] *Brisley* para 15 at 13D – E.
[55] [1999] 4 All SA 183 (A)
[56] 1999 (4) SA 928 HHA at 937G.

remained the comments of a minority judgment, which should not be applied nor followed[57].

Again, of particular importance to this dissertation, is the comments of the majority that *Saayman* attempted in an indirect fashion to revive the *exceptio doli generalis* or alternatively, apply its principles under an alternative umbrella. Instructively, at footnote 10 of the *Brisley* judgment, the majority made the following comment:

> "*Of die exceptio heroorweging verdien, ontstaan tans nie*."

Loosely translated, the Supreme Court of Appeal left the door open that the revival of the *exceptio doli generalis* could be considered and entertained in the future, under appropriate circumstances, or alternatively, instead of reviving the *exceptio doli generalis*, applying its principles perhaps under a newly formed remedy. What circumstances would justify reconsideration was left open, but we can unequivocally accept the proposition that the *exceptio doli generalis* can be reconsidered.

Insofar as the direct application of *bona fides* as an independent ground of non-enforcement is concerned, the majority accepted and applied the comments of *Hutcheson*[58] in that it was not an independent or *"free floating"* basis for the rescission or non-application of certain contractual terms. However, *bona fides* remains the fundamental underlying principle of contractual autonomy. In this regard, he stated the following[59]:

> *"What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function.*

[57] *Brisley* para 16 at 13G – I.
[58] *Brisley* para 22 at 15D – E.
[59] *Brisley* para 22 at 15E – G.

It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one."

The majority made it absolutely clear that *pacta sunt servanda* must enjoy precedent, and was diametrically opposed to the idea of affording a judge a general discretion not to abide by contractual terms or principle if that judge would deem it unfair or unreasonable. If that were to be allowed, the test at that stage would not be the law, but it would be the judge.[60]

Insofar as unequal bargaining power is concerned, the court stated that because the *Shifren* clause afforded contracting parties equal protection, and the term was included freely and voluntarily, the concept of unequal bargaining power and the need to protect individuals in a weaker bargaining position, did find application.[61] What the court left open, is that if it were to be found that a certain clause in an agreement had been inserted as a consequence of unequal bargaining power, or alternatively, only protected one party to the detriment or prejudice of another (thereby re-enforcing the conclusion that there had been unequal bargaining power), what, if any, that person's remedy would be.

In considering the decision of *Sasfin (Pty) Ltd v Beukes,*[62] the court did however recognise the possibility that the *Sasfin* principle could possibly be extended to find application in certain contractual terms (which are not per se in conflict with the *bonos mores*). However, the application of the *Sasfin* principle would be limited to instances that are analogous to *Sasfin,* i.e. certain instances where the enforcement of, for example, a *Shifren* clause would be so unfair that it would be deemed to be "*inimical to the interest of the community*".[63]

However, in the same vein, the majority reiterated the *dicta* of Smalberger JA:[64]

[60] *Brisley* par 26 at 16B – C.
[61] *Brisley* par 26 at 17A – B.
[62] 1989 (1) SA 1 (A). Hereinafter referred to as Sasfin.
[63] *Brisley* para 31 at 18C – D.
[64] *Brisley* para 31 at 18D – G.

"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12:

> *' ... the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'*

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom."

In concluding their remarks insofar as the direct application of the *bona fide* 'defence' on the *Shifren* clause, the majority quite correctly stated that the *Shifren* clause provided both parties with equal protection. The majority dismissed the appeal with costs, on an attorney and client scale.[65]

The minority judgment of Olivier JA, immediately pointed out that *Hutchenson*[66] also stated the following insofar as the application of the *Shifren* clause was concerned[67]:

"The reason is quite simply that, no matter how illogical a theoretical justification, in practice a principle would be productive of injustice if applied without a good deal if discretion and qualification."

[65] *Brisley* para 47 at 22E – F.
[66] 2001 118 SA Law Journal 720 op 721.
[67] *Brisley* para 64 at 26G – I.

Olivier JA acknowledged that the application of *bona fides* in the sphere of contract law would be difficult. However, he aimed at achieving a new framework and thought pattern insofar as law of contract is concerned, especially on this topic.[68]

Olivier JA then turned his attention to the 1988 decision, where the majority through Joubert JA decided to lay the *exceptio doli generalis* to rest. He was of the view that the *exceptio doli generalis* was an important remedy which acknowledged that the astute and firm application of certain contractual terms which leads unconscionable conclusions, in certain instances should be not applied or reduced. In the same vein, he quite correctly referred to the irony of the decision of *Sasfin* a year later, where the court did not waiver to set aside the well-known principle of *pacta sunt servanda,* and to do simple justice between man and man.[69]

He quite correctly stated that since the aforementioned decisions in 1988[70] and 1989,[71] the desire to include *bona fides* in the law of contract had become more and more prevalent.[72] To this day it remains prevalent.

In the context of this dissertation, he acknowledged that modern interest of the communities required that courts should protect individuals in weaker bargaining positions, and should actively act to reduce the impact of harsh contractual terms on them.[73]

Olivier JA disagreed with the majority insofar as the applicability of the principles of restraint of trade provisions (as enunciated by Rabie J in *Magna Alloys and Research SA (Pty) Ltd v Ellis*[74]) was concerned. In restraint of trade provisions, the court refused to strictly apply a contractual provision if it would be inimical to the *bonos mores.*[75] This was exactly what the Appellant sought in *Brisley* - that the strict application of the

[68] *Brisley* para 71 at 29.
[69] *Brisley* para 72 at 29C – E.
[70] Bank of Lisbon.
[71] Sasfin v Beukes.
[72] *Brisley* para 72 at 29.
[73] *Brisley* para 72 at 29G – H.
[74] 1984 (4) 863 (A).
[75] *Brisley* para 74 at 40E – F.

Shifren principle, whilst defending the provision of section 26(3) of the Constitution, would be inimical to the *bonos mores.*

Olivier JA recognised that if a judge were to be afforded a remedy similar to the *exceptio doli generalis*, it would lead to a certain degree of legal and commercial uncertainty. However, this is the price that must be paid in a legal system which underscores the importance of reasonability, just as much as it underscores the desire to have legal certainty.[76] Therefore, a balance must be achieved between the continuity of the legal system whilst having due regard to the modern needs of the community.

Cameron JA stated the following at paragraph 92 of the judgement:

> *"It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights."*

He agreed with the majority judgment, that neither the Constitution, nor the value system it embodies, gave the courts a general discretion to invalidate contracts on the basis of judicially perceived notions of unjustness, or to determine the enforceability on the basis of imprecise notions of good faith.[77] However, and to the contrary, the Constitution's values of dignity, equality and freedom require that the courts approach their task of striking down contracts, or declining to enforce them, with perceptive restraint.[78]

[76] *Brisley* para 40 of the minority judgement.
[77] *Brisley* para 93 at 35.
[78] *Brisley* para 94 at 35.

Short of its obscene excesses, contractual autonomy also informs the constitutional value of dignity. He concluded by stating that the Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual freedom and securing a framework within which the ability to contract enhances, rather than diminishes our self-respect and dignity.[79]

According to Cameron JA, the issues in the *Brisley* did not imperil that balance.[80] Therefore, leaving open the question that if there was an imbalance between freedom of contract and individual self-respect and dignity, the court would not hesitate to afford a person a possible remedy. The question remains what that remedy would be.

3.3. *Afrox Healthcare Bpk v Strydom*[81]

A mere two months after the decision of *Brisley*, Brandt JA, who equally formed part of the majority in *Brisley,* wrote for a unanimous court (consisting of Nienbaber JA, Harms JA, Zelman JA and Mpati JA) and found that a contractual term in a hospital admissions contract, which exempts a hospital from liability, was enforceable.[82]

The appellant in the Supreme Court of Appeal was the owner of a private hospital in Pretoria. The appellant failed in the Court *a quo* and appealed the decision.

The facts are briefly as follows:

The respondent in the Supreme Court of Appeal was admitted to the hospital for an operation and post-operative treatment.[83] When the respondent was admitted into the hospital, an agreement was concluded between the parties. According to the respondent, it was a tacit term of the agreement that the appellant's employees would conduct themselves in a professional manner, without negligence. After the operation,

[79] *Brisley* para 95 at 36.
[80] Fn 72.
[81] 2002 (6) SA 21 (SCA). Hereinafter referred to as Afrox Healthcare.
[82] *Afrox Healthcare* p42, para 37 at 42D.
[83] *Afrox Healthcare* para 2 at 32C – D.

the respondent suffered various complications which, according to the respondent, was caused as a direct result of the employees of the hospital being negligent.[84]

According to the respondent, the negligence of the employees of the hospital constituted a breach of the agreement between the parties, and accordingly the respondent claimed damages from the appellant.[85]

In response to the respondent's claim, the appellant relied on clause 2.2 of the admissions agreement, which absolved the hospital and its employees of any liability, should a patient suffer damages as a result of the employees' negligence.[86] The respondent did not deny the conclusion of the agreement when he was admitted into hospital, or the specific term. However, various grounds were proffered why he would not be bound by the specific term, or why it should not be enforced.

During a pre-trial conference, before the matter proceeded to the Court *a quo*, the parties agreed that should the court determine that clause 2.2 was applicable and enforceable against the respondent, that would be the end of the matter. Accordingly, and in terms of Uniform Rule 33(4), these issues were decided separately and both parties only proceeded to call one witness on this particular point.[87]

The Court *a quo* incorrectly found that the appellant had the onus of proving that clause 2.2 was enforceable against the respondent. In broad strokes, the respondent alleged that clause 2.2 was not enforceable based on three grounds:

1. Firstly, the clause was against the *bonos mores*;
2. Secondly, the clause was in contravention of the principles of good faith; and
3. Finally, the individual who had admitted the respondent at the hospital had a duty to bring clause 2.2 under the attention of the respondent at the time when the agreement was concluded, which this individual had failed to do.[88]

[84] *Afrox Healthcare* para 2 at 32D – E.
[85] *Afrox Healthcare* para 2 at 32D – G.
[86] *Afrox Healthcare* para 3 at 32G – I.
[87] *Afrox Healthcare* para 4 at 32I – J; para 5 at 33A - C.
[88] *Afrox Healthcare* para 6 at 33C-F; para 7 33F – H.

Brandt JA started the discussion of the application of the principle of *bonos mores*. He acknowledged that any contractual term that was against the legal convictions of the community would not be enforceable, but in the same breath warned against such an approach against the backdrop of Smalberger JA's *dicta* in the *Sasfin* decision[89].

The court found that exemption clauses in agreements were *prima facie* not against the legal convictions of their community. However, they had to be interpreted restrictively.[90]

Brandt JA ultimately surmised that the question was whether the enforcement of the exemption clause (irrespective of unreasonable unfair consequences), would offend the legal convictions of the community. To reach this threshold conclusion, the respondent stated that the enforcement of the contractual provision was against the legal convictions community, because:

1. There was unequal bargaining power between the parties;
2. The general importance of the actions of the hospital staff exempted them from the clause; and
3. The appellant was providing medical care to the public,[91]

Insofar as the unequal bargaining position is concerned, instructively Brandt JA stipulated that inequality of bargaining power did not *prima facie* justify the inference that a contractual term that was to the advantage of a contracting party that was perceived to be the stronger, would be against the legal convictions of the community.[92]

The court commented that unequal bargaining power was a factor that, with other factors, would play a role at deciding what the legal convictions of the community would be. Brandt JA stipulated that in that case, there was scant evidence insofar as the inequality of bargaining positions of the parties were concerned.[93]

[89] *Afrox Healthcare* para 8 at 33H – J. Fn 63 *supra.*
[90] *Afrox Healthcare* para 9 at 34D – E.
[91] *Afrox Healthcare* para 10 at 34G – I.
[92] *Afrox Healthcare* para 12 at 35A – C.
[93] *Afrox Healthcare* para 12 at 35B – D.

What Brandt JA did not provide, was that if evidence of an unequal bargaining power had been presented, what the consequence or remedy of the respondent would have been.

Turning to the challenge on the question of *bona fides*, Brandt JA again referred to the minority judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*[94], which was placed in its true perspective in *Brisley* as no more than the thoughts of a minority judge that was not followed in subsequent cases. It was accepted that the principle of good faith does not afford a litigant a self-freestanding and independent remedy insofar as the enforcement of contractual terms were concerned. The challenge insofar as the exemption clause premised upon the principles of good faith, was dismissed.[95]

It is respectfully submitted that this is the closest a litigant has come to a court striking down a specific provision and/or agreement based on the fact that there was unequal bargaining power. The judgment in *Afrox Healthcare* is misunderstood for various reasons. The court did not conclude that a contracting term cannot be deemed to be unenforceable as a result of unequal bargaining power. What the court stated was that there had not been any evidence in the Court a quo that there actually had been any unequal bargaining power at the time of the conclusion of the contract.[96]

What the court would have done had there been sufficient evidence, remains a mystery.

3.4. *Barkhuizen v Napier*[97]

The next instance where the aspect of unequal bargaining power came to the fore was in the decision of *Barkhuizen v Napier*.

[94] 1997 [3] ALL SA 391 (A).
[95] *Afrox Healthcare* para 31 at 40G – J.
[96] *Afrox Healthcare* para 12 at 35B – D.
[97] 2007 (5) SA 323 (CC). Hereinafter referred to as Barkhuizen.

With striking similarities to *Afrox Healthcare*, the Court *a quo* deemed the time bar clause in a short-term insurance contract to be unconstitutional[98]. On appeal the principles echoed in *Brisley* and *Afrox Healthcare* were used to conclude that a court was not entitled to strike down an entire contract based on its opinion of what it considered fair, just or good faith.[99]

Ngcobo JA, was enjoined to determine whether a time bar clause in an insurance contract was contrary to public policy, and as a result unenforceable.[100] The clause required that summons had to be served within 90 days of any repudiation of a claim, failing which the insurer would be released from liability. This would have the effect of limiting a contracting party's constitutionally enshrined right[101] to access to a court.

Ngcobo JA was of the view that time limitation clauses would in general be unenforceable if the limitation was unreasonable or unfair. Public policy takes into account fairness, justice and equity, and reasonableness, which in turn takes into account the necessity to do justice between man and man. He was further of the view that if the limitation clause did not afford the person bound by it adequate and fair opportunity to seek judicial redress, it would not be enforceable.[103]

Turning then to the facts of the case and the issue of fairness, Ngcobo JA stated that two questions had to be considered:[104]

1. Firstly, whether the clause itself was unreasonable;[105] and

2. Secondly, if it were found to be reasonable, whether it should be enforced in the light of the circumstances that prevented compliance with the time limitation clause[106]. If the clause under consideration was determined to be in line with what public policy dictates and non-compliance was established, the claimant

[98] *Barkhuizen* para 9 at 328F – G.
[99] *Barkhuizen* para 91 at 349F – G.
[100] *Barkhuizen* para 2 at 327G – I.
[101] Section 31 of the Constitution.
[103] *Barkhuizen* para 51 at 339C – E.
[104] *Barkhuizen* para 56 at 341A – B.
[105] *Barkhuizen* para 56 at 341A – B.
[106] *Barkhuizen* para 56 at 341A – B.

had the onus to show that in the circumstances prevalent, there had been good reasons for the failure.[107]

At this juncture, I must interject to highlight the fact that this was nothing more than a consideration of circumstances when the contract had been concluded, and the terms born from those circumstances, measured against the circumstances prevalent when enforcement of the contract was sought. This was in essence the boundaries within which the *exceptio doli generalis* operated.

The first question involves the weighing up of two considerations. On the one hand it involves public policy, as informed by the Constitution, that requires in general that a party should comply with contractual obligations that have been freely and voluntarily undertaken, generally expressed in the *maxim pacta sunt servanda*. On the other hand, it involves the consideration that all persons have a right to seek judicial redress.

The second question involves an inquiry into the circumstances that prevented compliance with the clause.[108] Here, the onus would be on the party that had failed to comply with the contractual provision. It is submitted that the onus plays a vital role, as it would play a vital role in the remedy that this dissertation advocates for.

It was firmly held, in the context of the first inquiry that was directed at the object of terms of the contract, that unequal bargaining power was a factor, which together with other factors, in the consideration of whether a contractual term was contrary to public policy.[109]

Ngcobo JA then proceeded to consider the facts of the particular case against the aforementioned principles and, instructively, noted that although the law as it then stood did not recognize good faith as a self-standing rule, but rather an underlying value that is given expression through existing rules of law (*in casu* good faith was given effect to buy the existing common law rule that contractual clauses that were

[107] *Barkhuizen* para 58 at 341E – G.
[108] *Barkhuizen* para 57 & 58 at 341C - G.
[109] *Barkhuizen* para 59 at 341G – I.

impossible to comply with should not be enforced), good faith was recognized as a value or principle that underlies the law of contracts.[110]

Another striking similarity between *Afrox Healthcare* and *Barkhuizen* is the fact that evidence led to support these conclusions were scant at best. In both cases, there were very little evidence before court to make a proper determination. In *Barkhuizen*, the parties had stated cases and were lamented in a minority judgment for the limited amount of evidence before court, which resulted in the court commenting that it could not make a proper determination based on the scantiness of available evidence.[111]

Ultimately Ngcobo JA concluded that the appeal should fail, as the particular facts of the case did not show that the enforcement of the clause would be unjust to the appellant.[112]

The burning question does however remain, if there were enough evidence presented, what remedy would there have been, based on the relative bargaining powers of the contracting parties?

3.5. *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*[113]

In *Saayman,* the respondent's mother signed a deed of suretyship in 1989 in favour of the appellant for the debts of a company controlled by her son. She also signed a cession of certain shares. The company was liquidated, and shortly thereafter, the respondent's mother was declared unfit to handle her own affairs.[114]

Streicher AJA (Hefer JA, Vivier JA and Zulman JA concurring), concluded on the expert and factual evidence that the probability was that the respondent's mother had indeed lacked the capacity to understand the nature or the consequences of her

[110] *Barkhuizen* para 82 at 347G – I.
[111] *Barkhuizen* para 21.
[112] *Barkhuizen* para 86 at 348G – H.
[113] 1997 (4) SA 302 (SCA) Hereinafter referred to as Saayman.
[114] *Saayman* P307 at A-C.

actions when she had entered into the said agreements, and accordingly dismissed the appeal.[115] Olivier JA wrote a concurring minority judgement.

It is the considered view of this dissertation, that Olivier JA recognised the *lacuna* left by the abolishment of the *exceptio doli generalis,* and the need for it to be revived to provide a remedy which gives the principle of good faith (encapsulating the concept of unequal bargaining power) a defined role in our modern legal system.

Olivier JA agreed with the majority, but for different reasons.[116] The issue of *bona fides* was directly raised and relied upon in the pleadings, and he was of the view that it was incumbent upon the court to give consideration to the issue.[117] Whilst having regard to the circumstances when the suretyship was concluded, i.e. the respective bargaining positions of the parties, he concluded that because there was a direct link between the concept of *bona fides* and demands of public policy that require that simple justice between man and man must be done,[118] the suretyship should not be enforced when inequality in bargaining positions were abused.

In this context, Olivier JA recognised the important role that the *exceptio doli generalis* played in ensuring justice was done, as opposed to blindly enforcing contractual terms, especially when the result of strict enforcement of a contract would be against public policy[119].

3.6. Recent judgements

In recent decisions, the aspect of equal bargaining power continued to find judicial attention. The first one was in the decision of *Jordan v Faber,*[120] where a practising attorney had abused his relationship with his clients and had formulated a one-sided agreement under circumstances where his client was under pressure from a financial institution. Under the circumstances the court declared the agreement as void, taking

[115] *Saayman* P315 at A-C.
[116] *Saayman* P331 at G-H.
[117] *Saayman* P318 at G-J.
[118] *Saayman* P322 at B – E.
[119] *Saayman* P319 at A-B.
[120] (1352/09) [2009] ZANCHC 81.

into account the unequal bargaining power, but as an alternative, stated that the agreement was void in any event, as there had been improperly obtained consensus[121].

In the reported judgment of *Uniting Reform Church, De Doorns v President of the Republic of South Africa,*[122] his Lordship Justice Zondo, whilst declaring that the clause in question was contrary to public policy because of the inequality in bargaining positions of the individuals when the agreement was concluded, stated the following:[123]

> *"The question is whether the applicant has established facts which objectively demonstrate that at the time of the conclusion of the lease agreements it was in a weaker bargaining position than the Department and that the effect of inequality in bargaining position was harmful to public interest. I am satisfied from the applicant's papers that the applicant has succeeded in meeting the requisite threshold."*[124]

As recent as November 2017, Davis J, whilst having regard to *inter alia* the inequality in bargaining power between the parties, refused to evict occupants of a building when they had failed to enforce a renewal clause in a lease agreement within the specified 6-month window.[125] In the matter of *BEADICA 231 CC v Oregon Trust*[126] he stated:

> *"Without engaging in an extensive debate about the value of certainty, suffice to say that, prior to the decision in Bank of Lisbon South Africa v De Ornelas 1998 (3) SA 580 (A), South African courts did, albeit on occasion, make use of the exceptio doli generalis as an instrument for ameliorating the strictness of a legal rule by introducing more equitable principles into the law."*[127]

[121] Jordan v Faber at 25.
[122] 2013 5 SA 205 (WCC).
[123] BEADICA 231 CC para 12, p 12.
[124] [2013] JOL 30161 (WCC) par 35.
[125] *BEADICA 231 CC v Oregon Trust* at 2 – 3.
[126] (13689/2016) [2017] ZAWCHC 134.
[127] At paragraph 12.

The decision was overturned in the Supreme Court of Appeal (hereinafter referred to as the SCA),[128] but the matter is still on its way to the Constitutional Court.[129] The SCA reaffirmed the importance of *pacta sunt servanda,*[130] and because it struggled to establish exactly on what basis Davis J came to his conclusion, ultimately overturned the decision on the basis that Davis J was not directly invoking the *exceptio doli generalis* [131] to reach his conclusion, but merely citing its principles. In any event, the SCA found that Oregon Trust's case was not that their counterpart acted dishonestly, but only that it was unfairly relying on the strict application of the contract.[132]

The fact of the matter is that to this day, our courts recognise the valuable role the *exceptio doli generalis* played. If the decision to jettison the *exceptio doli generalis* from our jurisprudence was correct, why are we continuously confronted with the issue, even more than 30 years after the decision laying it to rest?

[128] *Oregon Trust v BEADICA 231 CC* (74/2018) [2019] ZASCA 29 (28 March 2019). Coram: Lewis ADP and Cachalia, Saldulker, Mbha and Schippers JJA.
[129] The date of the hearing is yet to be confirmed.
[130] At paragraph 27.
[131] At paragraph 12.
[132] At paragraph 19.

4. **The *Exceptio Doli Generalis***

4.1. Definition and scope

The principle of good faith finds its origin in Roman law. Roman law differentiated between contracts entered into *negotia stricti iuris* and *negotia bonae fidei.*[133] The latter required that every aspect of the contract had to be in line with *bona fides* to be enforceable. *Negotia stricti iuris* necessitated that parties to the agreement (except if the contract expressed the requirement to adhere to the *bona fides*) strictly adhere to the agreed terms, regardless of what would be considered appropriate by the *bona fides.*[134]

In Roman Law, the *exceptio doli generalis* was a procedural device whereby a substantive defence could be raised, which if successful, would entitle a court to grant relief where the strict law would have an effect *contra naturalem aequitatem.*[135]

The *exceptio doli generalis* was specifically designed to eradicate injustices that may occur due to a strict enforcement of contracts. However, the need for an *exceptio doli generalis* defence ostensibly fell away in Roman-Dutch law, as all contracts were required to be negotiated in good faith.[136]

In *Paddock Motors (Pty) Ltd v Igesund,*[137] the Appellate Division (as it then was) found that the *exceptio doli generalis* could, in the realm of contract law, be deployed to prohibit unjust reliance on a contractual term. It was also found that the *exceptio doli*

[133] AJ Barnard-Naude "Oh what a tangled web we weave…" Hegemony, freedom of contract, good faith and transformation – Towards a politics of friendship in the politics of contract' 2008 (1) Constitutional Review 155, 176.
[134] Viljoen F "The *exceptio doli*: its origin and application in South African law" (1981) *De Rebus* 173.
[135] *Bank of Lisbon & South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A).
[136] FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 SALJ 71, 73.
[137] 1976 (3) SA 16 (A). *MacDuff and Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573, *Weinerlein v Goch Buildings Ltd* 1925 AD 252; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A).

generalis did not operate to change substantive law, or alter unfair terms of an otherwise valid contract.[138]

Dolus in this context means a certain act, or a series of acts, by a contracting party that induces the other party into concluding the agreement, or agreeing to certain terms, which do not amount to misrepresentations.

In the case of the *exceptio doli generalis,* the edict of the praetor promised relief "*si in ea re nihil dolo malo Ai Ai factum sit neque fiat"*.[139] The *exceptio doli generalis* had two clear applications:

1. Firstly, in respect of conduct in the past; and
2. Secondly, in respect of conduct which amounted to *dolus malus* in the present.[140]

Von Savigny[141] used the word '*dolus*' as indicating anything which the law does not allow, anything inequitable, or anything done with consciousness that one is acting contrary to the law and good faith[142].

De Groot substituted '*dolus'* with the term '*arglist',* which he described as "*quaed bedrog, aengeleit om iemand te verkoten".*[143]

Agreements *negotia bonae fidei* required that parties should perform contractual obligations that were reasonably and fairly expected of them.[144] Agreements *negotia bonae fidei* imposed a duty of good faith upon the parties, irrespective of whether the parties had consciously undertaken to adhere to this duty or not.[145]

[138] *Paddock Motors* 28E-F.
[139] Lenel *Edictum Perpentuum* 512.
[140] D 45.1.36.
[141] *Systems des heutigen römischen Rechts* 3 11b as rendered by Kotze JA in *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573, 610.
[142] Adopted in *Preller v Jordaan* 1956 (1) SA 438 (A) 491.
[143] *Inleidinge* 3.48.7.
[144] Aronstam PJ " Unconscionable Contracts: The South African Solution" (1979) THRHR 29.
[145] Aronstam 30.

In the adjudication of disputes of *negotia bonae fidei* agreements, conduct which was found wanting when measured against the standard of *bona fides,* was considered in the adjudication of the dispute.[146] The defence available to the defendant, was the *exceptio doli generalis,* if the conduct fell short of this standard.[147] The defendant was then entitled to rely upon the defence of the *mala fides* of the plaintiff, if the plaintiff either at the commencement of the action itself, or during pre-contractual negotiations, lacked the requisite degree of *bona fides.*[148]

Viljoen was of the view that Gaius' definition of the *exceptio doli generalis* had particular advantages: "*it could be used as an exceptio to dolus which had already occurred, in this case the exceptio doli specialis applied*".[149]

Roman Law, in the application of the *exceptio doli generalis*, did not necessarily differentiate between the *exceptio doli generalis* and the *exceptio doli specialis.* The general umbrella term '*exceptio doli'* was used to cater for both instances[150]. Because of this phenomenon, certain authors accept that it is more acceptable to define the *exceptio doli generalis* as an equitable defence which found particular application to ensure that justice is done, as opposed to rigidly enforcing contractual terms.[151]

4.2. *Bank of Lisbon & South Africa Ltd v De Ornelas and Another*[152]

In *Bank of Lisbon*, the respondents sought an order for the cancellation of certain security instruments. The bank opposed the application, and contended that the security instruments also served to secure a claim for damages, which it intended to launch against the respondents. The respondents replied that the attempt by the appellant to rely on the wide ambit of the security instruments to include a claim for damages, was not contemplated by the parties when the agreements were concluded and therefore the reliance on such a construction amounted to *dolus generalis*[153].

[146] Aronstam 30.
[147] Aronstam 30.
[148] Aronstam 31.
[149] Viljoen 173.
[150] Viljoen 173 and Aronstam 28.
[151] Viljoen 173 and Aronstam 28.
[152] 1988 (3) SA 580 (A). Hereinafter referred to as Bank of Lisbon.
[153] *Bank of Lisbon* P593 B-D.

The court *a quo* found in favour of the respondents. The bank appealed and so began the *exceptio doli generalis'* demise.

Joubert JA wrote the *exceptio doli generalis'* obituary on behalf of the majority. Two major motivating factors stand out in his approach:

1. A historical analysis as a premise for the conclusion that the *exceptio doli generalis* as a defence, was not accepted into Roman-Dutch law, and consequently did not form part of South African law; and

2. The rejection of earlier decisions by our courts that applied the *exceptio doli generalis*.

Insofar as Joubert JA's historical investigation is concerned, he ultimately concluded that because the *exceptio doli generalis* did not form part of Roman-Dutch law, its application in South African law was without foundation. This conclusion, according to Joubert JA, was confirmed by the significant silence of the authoritative Dutch jurists and by the total absence of judicial recognition of the *exceptio doli generalis* by the 'Hof van Holland en West-Friesland' and the 'Hooge Raad'.[154]

Instructively, Joubert JA did recognise that Roman-Dutch law is an inherently equitable legal system.[155]

Joubert JA then addressed previous decisions where the *exceptio doli generalis* was applied, and found that these decisions were not binding precedent for the argument that the *exceptio doli generalis* was in fact adopted into South African law.[156]

The decision of Wessels JA in *Weinerlein*[157] was criticised by Joubert JA on the basis that Wessels JA relied upon '*Vinnius Inst 4.13.1'* and two 'mutilated' sentences from

[154] *Bank of Lisbon* at 605H – I.
[155] *Bank of Lisbon* at 606A - B.
[156] *Bank of Lisbon* at 591 B -D.
[157] *Weinerlein v Goch Buildings Ltd* 1925 AD 252.

the French jurists. According to Joubert JA, in his positivist-historical approach, these jurists could not be authority for the argument that the *exceptio doli generalis* formed part of Roman- Dutch law, because the quoted authors were discussing Roman law.[158]

Concerning the decision of *Zuurbekom,*[159] Joubert JA was of the view that Tindall JA's views were largely based on Sohm. Joubert JA considered the position, and according to him Sohm considered the role of the *exceptio doli generalis* in the context of the formulary procedure of classical Roman law, not Roman-Dutch law. Therefore, this reasoning suffered the same fatal flaw as Wessels JA in *Weinerlein.*[160]

Turning to Jansen JA's decision in *Paddock Motors*[161], Joubert JA criticised the decision because there was no investigation into Roman Dutch authorities.[162]

Poetically, Joubert JA declared the *exceptio doli generalis* a superfluous defunct anachronism: "*Requiescat in pace".*[163]

In the dissenting judgment of Jansen JA, it was correctly pointed out that the Appellate Division readily accepted that a defence based on the *exceptio doli generalis* existed.[164] Instructively, Jansen JA stated that our courts had in previous occasions found that the *exceptio doli generalis* had its foundations in equity.[165]

Jansen JA did however acknowledge the fact that the extent of the *exceptio doli generalis'* application in South African jurisprudence has found itself the topic of contested judicial debate.[166] Proponents of the conclusion that the *exceptio doli generalis* is not a recognised defence in South African law, view reliance on the defence as a being indicative of the fact that the plaintiff has in fact no defence at all.[167]

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[158] *Bank of Lisbon* at 606G – H.
[159] *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A).
[160] *Bank of Lisbon* at 606 G – I.
[161] Fn 122.
[162] *Bank of Lisbon* at 606J and 606A – B.
[163] *Bank of Lisbon* at 607B-C. 'Rest in Peace.
[164] *Bank of Lisbon* at 612A-F.
[165] *Ibid.*
[166] *Bank of Lisbon* at 611G.
[167] *Bank of Lisbon* at 612B.

To the contrary, there are many who have unreservedly found[168] that the *exceptio doli generalis* has been part of our law, and consequently applied it in multiple decisions.[169]

In reaching his conclusions, Jansen JA quite correctly referred to the plethora of examples in South African law where judges worked with the prevailing *mores* and the sense of justice of the community as a norm[170] and therefore, in principle, there could be no real objection in the case of the *excceptio doli generalis,* to determine an objective standard of *aequitas* along similar lines.[171] He continued and stated that:

> *"In our law the requisite of good faith has not as yet absorbed the principles of the exceptio doli nor has the concept of contra bones mores has yet been specifically applied in this field. To deny the exceptio right of place would leave a vacuum."*[172]

Contrary to Joubert JA's historical analysis, Jansen JA stated that in the absence of contrary statutes or usage, it must be accepted that the principles of the *exceptio doli generalis* were in fact part Roman law that was subsequently received in the Netherlands.[173]

In his concluding remarks, Jansen JA stated that the *exceptio doli generalis* was a substantive defence premised in public policy or *boni mores* and consequently, if the appropriate circumstances did arise, it would be against public policy to enforce an unreasonable contract.[174] With an astounding degree of foresight, he warned that the banishment of the *exceptio doli generalis* from our legal system would leave a vacuum because in our law, "the requisite degree of good faith has not yet absorbed the underlying principles of the *exceptio doli*, nor has the concept of *contra bonos mores* been specifically applied in this field".[175]

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[168] *Bank of Lisbon* at 612D -F.
[169] *Bank of Lisbon* at 612D -F.
[170] *Bank of Lisbon* at 6155. Fn para 2.3.1 – 2.3.4 *supra.*
[171] *Bank of Lisbon* at 615D – E.
[172] *Bank of Lisbon* at 616C – D.
[173] *Bank of Lisbon* at 617E.
[174] *Bank of Lisbon* at 617G – H.
[175] *Bank of Lisbon* at 616C.

In reaching his decision that he would have dismissed the appeal, he remarked that the facts in *Bank of Lisbon* "would offend the sense of justice of the community"[176] based on, *inter alia,* the inequality of bargaining power that existed when the agreement was concluded.[177]

One must be reminded who Jansen JA was. Carole Lewis wrote that "equity is the pre-eminent theme which runs through the judgements of Jansen JA".[178] Undoubtedly one of the most influential and important decisions of Jansen JA's career was *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[179], a judgement that dealt with the *exceptio non adempleti contractus* and the relaxation of the principle of reciprocity and took over a year to write.[180]

Although Lewis agrees with the majority decision insofar as *Bank of Lisbon* is concerned, she stated:

> *"However, the seed sown by him [Jansen JA] has not flourished. One can only hope that this is temporary. It is chilling thought indeed that it may perish altogether. For there can be no doubt that the need for an equitable jurisdiction in South African law is keenly felt. The occasional reference to bona fides, and the claim that the system is an equitable one, are not good enough".*[181]

This is as true today as it was in 1991.

4.3. Why Joubert JA erred

Ironically enough, a couple of months after the decision of *Bank of Lisbon*, the court was faced in *Sasfin* with a deed of cession to the bank of a bank customer's earnings. The court found that Beukes was at the mercy of the bank and found that due to the extreme unreasonableness of the cession, and inadvertently the unequal bargaining

[176] *Bank of Lisbon* at 617H – I.
[177] *Bank of Lisbon* at 617J – I.
[178] Carole Lewis, 108 *SALJ* 1991: 262.
[179] 1979 (1) SA 391 (A).
[180] The Appellate Division heard the matter in September 1977 and the judgement was delivered in September 1978.
[181] Carole Lewis, 108 *SALJ* 1991; 262 at 264.

power at the time of the conclusion of the agreement, the whole contract was unenforceable as it was rendered contrary to public policy.[182]

Evidently the need for the *exceptio doli generalis* was still prevalent.

Shortly after the decision in *Bank of Lisbon*, the learned Professors of Law Van der Merwe, Lubbe and Van Huyssteen [183] carefully scrutinised the *ratio* of Joubert JA's majority judgment and criticised it on multiple levels. The learned professors accepted that Joubert JA correctly emphasised that the *ratio decidendi* of the *iudex* was based on the facts proved by the defendant, and that the *iudex* as such was not concerned with the equities of a particular case. However, the role of the *praetor* was different. Joubert JA seemed to suggest that the *praetor* exercised a purely factual discretion, which the learned professors believed not to be the case, as the *praetor* had to decide on normative grounds whether the facts alleged in support of the exception constituted *dolus malus.*[184]

Van der Merwe, Lubbe and Van Huyssteen criticised the judgement because the exclusive emphasis on the role on the *iudex* as finder of facts, obscured the role which equity and policy most probably played in the stage of the process before the *praetor* had to decide on the legal merits raised by the defendant. The learned professors stated that the role of a modern judge could never be equated to the role of the *iudex* alone, because a court applying legal rules in a purely mechanical fashion would be untenable, as it seems to have been in Roman Law.[185]

Instructively they stated that the demise of the *exceptio doli generalis* as a technical defence was no more than formal significance. It did not affect the need for substantive justice, by whatever means it was effected.[186]

The majority decision followed a positivist-historical approach; both the formal and substantive application thereof by the majority was called into question. By restricting

[182] *Sasfin* at 347.
[183] Van der Merwe, Lubbe and Van Huyssteen, 106 *SALJ* 1989: 235.
[184] Van der Merwe, Lubbe and Van Huyssteen at 237.
[185] Van der Merwe, Lubbe and Van Huyssteen at 237 – 238.
[186] Van der Merwe, Lubbe and Van Huyssteen at 238.

the sources considered in establishing a rule in Roman-Dutch law by characterising the law of the province of Holland as the common law of South Africa, the existence of the European *ius commune* which was part of the conceptual Dutch authorities was ignored.[187]

Joubert JA himself in the past has taken a much broader view than in the *Bank of Lisbon* decision. In *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality,*[188] Joubert JA referred to Voet, who in turn referred to two Italian Jurists. Instructively, he relied heavily on these two writers (as well as a Spanish one) in his judgement, and referred to this as "Roman-Dutch Authorities".

European common law and common legal science which resulted from the reception of the Roman law, has become part and parcel of South African law[189]. Van den Heever JA opined that "Roman-Dutch" law was really a misnomer, because that system had been the common law of Western Europe for centuries.[190] *Zimmerman[191]* has stressed that the Roman-Dutch law, which was transplanted to the Cape of Good Hope, stemmed from a unified European intellectual tradition, and what we usually refer to as *usus modernus pandectarum* existed not only in Germany, but in the whole of Central and Western Europe.[192]

Chief Justice Wessels once stated that Roman-Dutch law "sweeps into its system all the legal learning accumulated by the great Italian, French and German Jurists".[193] South African law owes its unique traits of broad equitable spirit, its common sense and reasonableness, and its abhorrence of unnecessary formalities and technicalities to this fact.[194]

[187] Van der Merwe, Lubbe and Van Huyssteen at 239.
[188] 1985 (1) SA 419 (A).
[189] HJ Erasmus, *Roman Law in South Africa Today* 106 SALJ 1989; 666 at 668.
[190] F P van den Heever *The Partiarian Agricultural Lease in South African Law* (Cape Town 1943) 7.
[191] Cite source
[192] Reinhard Zimmerman 'Synthesis in South African Private Law; Civil Law, Common Law and Usus Hodiernus Pandectarum' (1986) 103 SALJ 259 at 269.
[193] The Future of Roman Dutch Law in South Africa (1920) 37 S.A.L.J. 265 at 267-8.
[194] Erasmus at 676.

In any event, Roman-Dutch law is a legal system built upon principles of equity and equality,[195] but as Kentridge points out correctly, it is not always realised that this is one of the fundamental precepts of Roman-Dutch law.[196]

The decision was further questioned on the supposition that where uncertainty exists, a definitive answer cannot be solely sought in historical analysis. The learned professors were of the view that because of such a formalistic and clinical approach, the court became insensitive to the problems of the present.[197]

Erasmus[198] equally criticized Joubert JA's historical analysis approach as being antiquarianism, which is by its very nature sterile and uncreative.

One of the major criticisms was that Joubert JA incorrectly inferred that the reason for the application of the *exceptio doli generalis* had disappeared and had thus become redundant. This conclusion negated the fundamental notion underlying the *exceptio doli generalis* that, however necessary and acceptable a general rule may be, the need to qualify it for the sake of meeting the requirements of justice in a particular matter, will always exist.[199]

Van der Merwe, Lubbe and Van Huyssteen [200] correctly stated that the majority judgement seemed to distance itself from the fundamental responsibility of a court to ensure justice. No reference was made to the operation and/or application of equity in our legal system, despite the conclusion that Roman-Dutch law was inherently an equitable system.[201]

Lastly, with regard to Joubert JA's comment that equity cannot override a clear rule of law, the learned professors reminded us that the concept of *bona fides* had in recent years been recognised as a relevant factor in contexts of contracts. However, a

[195] C G Weeramantry 'The Constitutional Reconstruction of South Africa: Some Essential Safeguards (1987) 3 *Lesotho* LJ 1 at 34.
[196] Sydney Kentridge 'Civil Rights in Southern Africa – The Prospects for the Future (1987) 3 *Lesotho* LJ 93 at 97.
[197] Van der Merwe, Lubbe and Van Huyssteen at 240.
[198] HJ Erasmus, *Roman Law in South Africa Today* 106 SALJ 1989.
[199] Erasmus at 677.
[200] Van der Merwe, Lubbe and Van Huyssteen, 106 *SALJ* 1989: 235.
[201] Van der Merwe, Lubbe and Van Huyssteen, 106 *SALJ* 1989: 235 at 241.

specific content has not been given to this concept. The *Bank of Lisbon* decision concluded that *bona fides* has not yet absorbed the principles underlying the *exceptio doli generalis* to the extent that it would make the defence redundant as a specific mechanism of equity. Ironically, whilst the majority of the court found that the contracts were *bonae fidei*, they rejected the *exceptio doli generalis* and at the same time denied that *bona fides* had developed to fulfil the function of the *exceptio doli generalis.*[202]

AJ Barnard-Naude,[203] with reference to Aronstam,[204] argued that because all contracts were required to be in line with *bona fides*, and *bona fides* would require contracts to be made in good faith, then the bad faith defence of the *exceptio doli generalis* would still be needed, and therefore it had survived the transition from Roman law to Roman-Dutch law. Barnard-Naude also disagreed with the conclusions of Joubert JA in *Bank of Lisbon.*

Kerr[205] stated that the majority had misconstrued D.44.4.2.4 at 594I-598D. Joubert JA stated that the true basis of the defence was not the plaintiff's *dolus generalis,* but rather the existence of the *pactum de non petendo,* which gave rise to either the *exceptio doli generalis* or the *exceptio pacti conventi*. Kerr analysed what Ulpian stated, and concluded that the true basis of the *exceptio doli generalis* was *dolus* - "one who claims contrary to what was agreed, is acting with fraud". To show that this kind of fraud existed in these circumstances, the defendant would have to show that there was a *pactum de non petendo*; and, indirectly, refer to the *exceptio doli generalis*. Consequently, Ulpian stated that the defendant may make use of either exception.

Kerr stated that the judgement should be reconsidered[206], and agreed with Jansen JA where he said: "it would seem that in the absence of contrary statutes or usage it must be accepted that the principles of the *exeptio doli* were in fact part of the Roman Law that was received in the Netherlands".[207]

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[202] Van der Merwe, Lubbe and Van Huyssteen, 106 *SALJ* 1989: 235 at 241.
[203] AJ Barnard-Naude "Oh what a tangled web we weaved…" Hegemony, Freedom of Contract, Good Faith and Transformation – towards politics of friendship in the politics of contract (2008) (1) 2 Constitutional Court Review 155-176.
[204] Aronstam PJ " Unconscionable Contracts: The South African Solution" (1979) THRHR 29.
[205] Kerr, *The Principles of the Law of Contract*, 4th ed:478.
[206] *Ibid.*
[207] At 671 D – E.

Kerr,[208] quite astutely noted that the problem was more fundamental than the use of the title *'exceptio'*. It was:

"Are our courts in a position to administer justice as effectively as Roman and Roman-Dutch courts were? Does dolus generalis on the part of the plaintiff give rise to a defence in our law?"

[208] At 488.

5. Conclusion

Coming full circle to the conundrum postulated in the introduction of this dissertation, it is respectfully submitted that the exc*eptio doli generalis* as a defence, had it not been incorrectly and prematurely laid to rest in the *Bank of Lisbon* (especially in the context of inequality of bargaining power), could provide a suitable remedy to not enforce a specific term of an agreement that had been concluded under unequal bargaining positions, when its enforcement would be unreasonable or unjust.

The task is not to disguise equity or principle, but to develop contractual principles in the image of the Constitution, having due regard for the fact that *Bank of Lisbon* predates our new Constitutional dispensation.

The proposition is not that the *exceptio doli generalis*, whatever its ambit may be, be used as a general principle that equity should override the substantive law. A court of law will accordingly not be permitted, by means of the *exceptio doli generalis*, to alter the terms of a contract merely because they are harsh or unfair. As an overriding requirement, it requires subsequent conduct on the part of the enforcing in bad faith. Alternatively, there should be supervening circumstances which render it unconscionable for such a party to rely on the strict application of the contract. This difficult onus will play a vital role in weeding out *mala fide* reliance on this defence.

Because the power struggle rages on with *pactu sunt servanda* in the one corner, and the necessity of our jurisprudence to develop with our modern socio-economic position (with an end goal of a court not being solely enjoined to strictly enforce a contract but to, as a basic principle, rather do justice between man and man) in the other corner, this dissertation advocates for the revival of the *exceptio doli generalis* as a possible solution.

The *exceptio doli generalis* is an acceptable and widely recognised legal principle, that has been applied in numerous cases. It has defined boundaries and requirements, which will finally afford the ever-allusive concept of *bona fides* a fixed position in our law.

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Melt Louw

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