MAY ESSENTIAL PROVISIONS OF A CONTRACT BE DETERMINED BY ONE OF THE PARTIES ALONE?

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1 Introduction

When the Supreme Court of Appeal raises a question but does not answer it, what it says can be interpreted as an invitation to all those interested in the topic to discuss it. This note is a response to such an invitation in NBS Boland Bank v One Berg River Drive CC, Deeb v ABSA Bank Ltd, Friedman v Standard Bank of South Africa Ltd 1999 (4) SA 928 (SCA); [1999] 4 All SA 183, hereinafter referred to as the NBS Boland Bank case. The case concerned the validity of mortgage bonds which confer on the mortgagee 'the right to unilaterally increase the original rate of interest payable by the mortgagor' (per Van Heerden DCJ at 932D, 185e/f-f). The court held that (1) a provision in a loan relating to the payment of interest is not an essential term of the contract (at 935E, 188c-d); and (2) contracts with the clause in question are valid but 'an exercise of the power conferred upon the mortgagor may be objectionable' (at 9371, 9361-J; 190e-f, 18 9 g). During the course of its opinion, the court in addition expressed reservations about a long-standing contractual rule-that it is unacceptable for one of the parties alone to fix the price in a contract of sale or the rent in a contract of lease. It was, however, made clear that what was said about sales and leases '... was not in issue in this Court, and the question whether the rule should be jettisoned was not argued before us. Hence it is unnecessary, and indeed undesirable, to decide that question.' (at 938C-D, 190i) The finding that in this context a provision relating to a non-essential element is to be distinguished from one dealing with an essential element settles a controversy referred to in Boland Bank Bpk v Steele 1994 (1) SA 259 (T) at 276C-E (on which see A J Kerr The Principles of the Law of Contract 5 ed (1998) 124 (Contract)). This note, however, is directed towards examining what was said by the court on the question whether essential provisions of a contract may be determined by one of the parties alone; in particular, whether the price in sale or the rent in lease can be so determined. By essential provisions is meant provisions without which the contract cannot exist. It seems advisable to discuss the following questions. What reason, if any, has been given for the rule? If the rule is to be changed, should it be stated that there is a contract if, in respect of an essential provision or essential provisions, the terms of the agreement give one of the parties alone either an unfettered discretion, or one restricted to the discretion that a bonus vir would exercise? What practical consequences would follow from a change in the rule? If a clause in a purported contract clearly and explicitly empowers one of

the parties alone to determine an essential provision, is the 'contract' ever 'void for vagueness'? Each of these questions will be discussed in turn.

2 What has been the rule up to the present?

In the NBS Boland Bank case the court questioned whether 'the rule should be jettisoned' (quoted in section 1 above) without stating what 'the rule' is. Hence Roman, Roman-Dutch and modem law sources need to be considered.

2.1 Roman law

In his Institutes, compiled by Tribonian and Professors Theophilus and Dorotheus for 'the young desirous of legal knowledge', Justinian said that 'the price must be settled for, without a price, there can be no sale' (I 3.23.1, J A C Thomas' translation-the original is: 'nam nulla emptio sine pretio esse potest'; see also Ulpian in D 18.1.2.1: 'sine pretio nulla venditio est'), and went on to explain that he had brought an end to the controversy concerning the validity of a contract in which the parties agreed that a named third person should fix the price (ibid; and see C 4.38.15). As Roman law solved the problem of third persons fixing the price only in Justinian's time, it is clear that we can infer that the more far-reaching step of allowing one of the parties to fix the price unilaterally was not taken in early or classical or post-classical Roman law. The same holds for rent in lease: I 3.23.1 in fine and I 3.24.1. Further, Gaius is quoted in the Digest (D 18.1.35.1) as saying (Watson's edition): 'It is settled that no contract is concluded when the vendor says to the purchaser: "You shall buy for what you choose to give, or what you think fair or at your own estimate of its value."' This refers to the purchaser determining his own prestation but the same rule applied if one party determined the other party's prestation. Thus C 4.38.13 says that a purported contract of sale 'drawn up under the condition that it will be dependent upon the will of the vendor or purchaser, is void' (Scott's translation).

2.2 Roman-Dutch law and Pothier

The following Roman-Dutch authorities state, without giving any reasons apart from the citation of Roman-law texts, that if a purported sale or lease leaves it to either party to fix the price or rent, there is no contract: Grotius 3.14.23 in fine and 3.19.7; Voet 18.1.23 in fine and 19.2.7; Van der Keessel Praelectiones ad Grotius 3.14.23 (vol 4 at 381) and ad Grotius 3.19.7 (vol 5 at 23); Van der Linden 1.15.8 on sale, but he says in 1.15.11 that lease is similar. Huber 3.4.5 does not mention both parties but says that it cannot be left to the purchaser to fix the price. When we turn to Pothier we find that he also says that the determination of the price cannot 'be left in the power of one of the parties': Sale (Cushing's translation) para 23, see also para 29; Obligations para 205; and, for lease, Letting and Hiring para 37.

2.3 South African law

The South African courts have, as a general rule, been steadfastly of the opinion that there is no contract if either party alone is left to fix the price or rent. In Dawidowitz v Van Drimmelen 1913 TPD 672 at 675-6, Wessels J said: 'By our law a contract is not valid if it depends on the will of one of the parties.... Take, for instance, the case of a contract of sale. Our law requires, as one of the elements of a contract of sale, that there shall be a certain price. It may very well be that, from the circumstances of the case, the Court will imply that the purchaser was to pay a reasonable sum for the goods which he received. But if you cannot gather this from the

surrounding circumstances, if there is no price, there is no contract. If I say, for instance: "I will buy your horse for what I think it is worth," or: "for what I choose to pay for it," there is no sale. This principle applies to every form of contract. If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract .... ' The rule has been referred to many times since: see, for example, Deary v Deputy Commissioner for Inland Revenue 1920 CPD 541 at 548; Maigate Estates Ltd v Moore 1943 TPD 54 at 59; Theron NO vjoynt 1951 (1) SA 498 (A) at 506; Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA700 (A) at 707C; Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd 1964 (1) SA669 (W) at 670C-F; Patel v Adam 1977 (2) SA653 (A) at 666; Steyn NO v Lomlin (Edms) Bpk 1980 (1) SA 167 (0) at 170E; Shell SA (Pty) Ltd v Corbitt 1986 (4) SA 523 (C) at 525-6; Kriel v Hochstetter House (Edms) Bpk 1988 (1) SA220 (T) at 226G; Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA508 (A) at 514F-J. In the NBS Boland Bank case, Theron NO v Joynt (supra) and Patel v Adam (supra) were distinguished on the ground that they dealt with a condictio si voluero. In regard to the discussion of the meaning of the word 'willekeur' in Theron NO v Joynt (referred to in the NBS Boland Bank case at 936D-E, 188-9), it is of interest to note that the translators of Van der Keessel Praelectiones ad Grotius 3.14.23 (H L Gonin & D Pont) use the word to refer to the discretion of either the buyer or the seller to fix the price. The most commonly encountered articulation of the rule is to be found in Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 574B/C-C/D (per Corbett JA): 'It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them.' This passage has been cited with approval by the Appellate Division and the Supreme Court of Appeal in a number of cases: see Genac Properties JHB (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd) 1992 (1) SA 566 (A) at 576-7; H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd 1996 (2) SA 225 (A) at 233H-I/J; Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk 1997 (4) SA 141 (SCA) at 158F. None of these cases, including the Westinghouse Brake & Equipment case (supra), is referred to in the opinion in the NBS Boland Bank case. The first (and, as far as we can ascertain, only) criticism of the rule in our courts prior to the NBS Boland Bank case came in Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 (A), in which Van Heerden JA (as he then was), with whom the other members of the court concurred, said, obiter, that he had 'considerable difficulty' (at 185F/G) in understanding why the fixing of the rent or price by one of the contracting parties should be considered less certain than a prestation which is to be determined by a third party, which is quite acceptable in our law. (As to the fact that this statement is obiter, see at 182H-I, 186C-C/D.) His lordship also pointed out that in other jurisdictions (he gave the examples of Germany, Holland, Switzerland, Scotland and the United States) it is acceptable for one of the parties to the contract to fix the price or rent alone (at 185-6). Despite these comments, the judge of Appeal ended his obiter dictum in the Benlou Properties case by saying: 'Be all that as it may, I shall assume that we are bound by the views of our old authorities; viz, that a sale (or lease) is invalid if the price (or rent) is to be determined by one of the parties to the agreement.' (at 186C) It is noteworthy that in the NBS Boland Bank case, Van Heerden DCJ (with whom the other members of the court concurred) was prepared

to go further in his obiter dictum. After citing criticisms similar to those in the Benlou Properties case (at 933H-J, 186g-i), and examining at length the position in foreign jurisdictions (at 934-5, 187a-i/j), the Deputy Chief Justice described the views of our Roman-Dutch writers as 'not only illogical but also sadly out of step with modem legal systems. It is problematical whether we should still follow those rules... . ' (at 935B, 187-8). In the light of these comments, the reason for the existence of the rule in our legal system and its antecedents ought to be investigated.

3 What reason, if any, has been given for the rule?

Roman authorities do not give any reason for the rule; they state it as self-evident, presumably on the ground that as contracts are based on consensus there needs to be agreement by the parties on the essentials of whichever class of contracts is in issue: see the texts quoted in section 2 of this note above. R Zimmermann The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 254 discusses the rule under the heading of 'Certainty of Price'. He suggests two possible reasons for such a rule. First, the Romans were eager to ensure that a firm contract was concluded. '[T]hey tried to avoid recognizing a contract of sale where a breakdown of the transaction was still possible due to the fact that in the end a price might either be lacking or be unascertainable.' Secondly, he suggests that the Romans feared that the absence of true negotiation about the price could lead to one of the parties abusing his power, and imposing gross and unreasonable demands upon the other. Roman-Dutch writers do not discuss the reason for the rule either: they content themselves with the citation of Roman authorities. Pothier's approach is similar; but in his discussion (Sale para 27) of the analogous case of a purported sale of a certain thing 'for such a price as shall be offered him [the seller] for it', he says that there is no contract because '[i]t would give rise to too many frauds. The buyer, in order to obtain the thing for a small sum, might bring forward a person, to offer a mean price; and the seller, with a view to obtain a large sum, might interpose an offer of a high price, in the same manner.' The South African courts too provide no firm reasons for the existence of the rule. They have been satisfied to cite the relevant Roman and Roman-Dutch texts (in particular Voet 18.1.23), and, as the years have passed, the decisions of previous courts, as their authority. Some courts have, however, suggested that the rule exists because allowing one party to the contract to fix the price or rent would render the contract 'void for vagueness': see Dawidowitz v Van Drimmelen at 676 quoted above; Dharumpal's Transport (Pty) Ltd v Dharumpal (supra) at 706-7; Murray & Roberts Construction v Finat Properties (supra) at 514G-H; and cf the Westinghouse Brake & Equipment case (supra) at 574D-E. This assertion will be discussed in section 6 below.

4 If the rule is changed should it be stated that there is a contract if, in respect of an essential provision or essential provisions, the terms of the agreement give one of the parties alone either an unfettered discretion or one restricted to the discretion that a bonus vir would exercise?

The question above is phrased as it is because in the NBS Boland Bank case Van Heerden DCJ said at 936-7, 189g-i: '... I am of the view that, save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable.... It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be unfettered, an exercise of such a discretion must be made arbitrio bono [sc: boni] viri.'

(emphasis added) And at 937-8, 190f-g: '... It is conceivable, albeit unlikely, that a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the parties. Here again it is unnecessary to express a view as to whether such a stipulation will be invalid, as being in conflict with public policy, or whether the fixing of the prestation may only be assailed when it is done in bad faith.' (emphasis added) However, the court referred on a number of occasions to a requirement that a party empowered to determine a provision in a contract should act as would a bonus vir, ie reasonably and equitably (at 933E-F, 186e/f, 937C/D-E, 189-90), but did not say whether the court itself would settle the problem in such a way if a challenge to what had been done were brought before it. This is a question which has caused much discussion in relation to challenges to prices fixed by nominated third persons which are claimed to be 'unjust' or 'unfair' or 'manifestly unjust' or 'altogether too high or too low' (AJ Kerr The Law of Sale and Lease 2 ed (1996) 38-54 (Sale and Lease)). It is suggested that enquiry should be made as to whether the parties intended to leave the determination to the person indicated in the contract alone. If so, and if the determination by that party is unjust, there is no contract; but if the empowerment of the party in question was not based on his personal skill or qualities but was in order to settle the matter after, say, a needful enquiry, then the contract continues and the court is the appropriate bonus vir and makes the determination unless special circumstances exist: Sale and Lease 48-54 and A J Kerr 'The legal position when the figure given by a third person nominated by the parties to fix the price of rent is manifestly unjust' (1999) 116 SALJ 15. In parenthesis the court in the NBS Boland Bank case said that when a contractual discretion is assailed, '[i]t may be voidable at the instance of the other party' (at 937A/B, 189h), but gave no examples in which this would be so. Here again the discussion in Sale and Lease 38-54 can be of assistance. Also the court did no more than mention that there is sometimes said to be a distinction between provisions which are 'unjust' and those which are 'manifestly unjust' (at 937G/H, 190d/e). Other such phrases can also be found (see Sale and Lease 38-9). Apart from the fact that some minor departures from a strict standard are so small as to be not far off a figure that might have been expected and should thus be accepted by the other party (Sale and Lease 38), it is suggested that it is not helpful to try to distinguish between those which are 'unjust' and others which are 'manifestly unjust'.

5 What practical consequences would follow from a change in the rule?

It must not be forgotten that if it were to be the law that one of the parties could be given an unfettered discretion on an essential provision (provided that the words of the contract were to be clear), the courts would be called upon to enforce contractual provisions which are far from what the one party contemplated or could foresee when he contracted and which the court itself considers go too far (unless they go so far as to be against public policy). Further, there is an important difference concerning the onus of proof between saying, on the one hand, that the party aggrieved by an apparent borderline case can only have it declared that the purported contract is not a contract if he proves that the other party was in bad faith, and, on the other hand, saying that the party claiming performance of a purported contract, which has an essential provision determined by him alone, has to prove that in making his determination he acted in good faith. It also needs to be borne in mind that even if the law were to be changed to allow one of the parties a discretion which would have to be exercised as a bonus vir would exercise it, some of those in a dominant contractual position would soon incorporate in their standard-form contracts provisions that explicitly give them the power to determine essential provisions unilaterally. If the other contracting party were then to wish to challenge the essential provision

so set, he would have to accept the prospect of a long delay before getting to court and, in nearly every case, he would incur expenses far in excess of the amount of the price or rent or the benefit of the other essential provision in question. The net result would be that the person entitled to determine unilaterally an essential provision could set a value slightly, perhaps even considerably, above the appropriate value secure in the knowledge that few, if any, opposing contracting parties would be in a financial position to challenge the determination. Contrast this with the present position which requires the parties themselves, or a third person jointly chosen, to agree on the essentials of a contract. There may be a proliferation of take-it-or-leave-it contracts as a result of the law as it stands, but the parties at least have the opportunity to judge for themselves, before they become bound in law, whether they wish to enter into the contract. It has been indicated above that the adoption of a change in the law to allow one of the contracting parties to fix the content of an essential provision leads on occasion to the position where the court fixes the content of the provision, for example, the price or rent (Voet 18.1.23). The court being in possession of the evidence which has been led by the parties, a change in the law would mean that the court would be expected in appropriate circumstances to make the determination for the parties. To this extent there would be a departure from the rule that courts will not make a contract for the parties. (On this rule, see the cases in Contract 381n194 and in addition H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd (supra) at 234D-E.) In sum, it is suggested that due to the adverse consequences (as outlined above) of changing the rule, neither an unfettered nor a restricted discretion should be given in respect of an essential provision of a contract, and that the better view is that the Roman and Roman-Dutchlaw position should be maintained. In our law, as contracts are based on agreement, actual or apparent (Contract 3-17), the parties need to agree on the essentials of any contract themselves, or they need to 'agree upon some external standard by the application whereof it will be possible to determine [the essential provision in question] without further reference to them' (Westinghouse Brake & Equipment (supra) at 574C).

6 If a clause in a purported contract clearly and explicitly empowers one of the parties alone to determine an essential provision, is the 'contract' ever 'void for vagueness'?

This question arises from the fact that Van Heerden DCJ said at 933-4, 186g-i/j: 'A recurring theme in those cases in which it was held that the clause in question is invalid is that a contract which empowers one of the parties to fix a prestation is void for vagueness. With one exception that was undoubtedly the view of Roman-Dutch law writers in regard to the determination of the price in a sale and the rental in a lease. However, in Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 (A) at 185-6 two observations were made thereanent. The first was that the reason given by our writers for their views, viz that the price or rental is uncertain, is difficult to reconcile with their recognition that it may validly be left to the determination of a third party. In such a case the price or rental is after all as "uncertain" as when such a prestation is to be determined by one of the parties. I may add that if A sells to B any one of his hundred horses the merx remains uncertain until it is determined by either the seller or the buyer, as the case may be. Yet it is undoubtedly a valid contract.' We have been unable to find any Roman-Dutch writer who gives vagueness' as the reason why there is no contract if an agreement purports to empower one of the parties alone to determine an essential element. Grotius, like Justinian before him (I 3.23.1) and Pothier after him (Sale para 23; although he was not a Roman-Dutch writer), requires certainty ('zeeckerheid') of price (3.14.23). This, however, is not a reference to an absence of vague language, because he

(Grotius) goes on to say (ibid) that if a third person nominated to fix the price fails to do what was expected of him, 'the sale will be void for want of certainty in the price' (R W Lee's translation of 'zoo zoude de koop nietig zijn, by ghebreck van koopschats zeeckerheid'). In such circumstances the agreement is not at all 'vague' (Sale and Lease 55-9). The nomination is perfectly clear; but no price has been fixed and that is why there is no contract (Sale and Lease 37). (The discussion in Sale and Lease 55-9 is now to be amplified with reference to Standard Bank of South Africa Ltd v Friedman 1999 (2) SA 456 (C) at 467F; [1999] 1 All SA 142 at 153b-c; Investec Bank (Pty) Ltd v GVN Properties CC 1999 (3) SA 490 (W) at 492-3,499H; [1999] 1 All SA631 at 634b-g, 641c, where the decision in Boland Bank v Steele (supra) at 276 is referred to with approval; and the NBS Boland Bank case at 186b-c, where the court referred to the decision in Boland Bank v Steele without express approval or disapproval.) Neither the Roman authorities nor the Roman-Dutch writers refer to 'vagueness' in their discussion of the requirement of 'certainty' of price. There is moreover strong authority that there is a special meaning of the word 'certain' (certum) in this context. In David Daube's extended discussion of 'Certainty of Price' in Daube (ed) Studies in the Roman Law of Sale Dedicated to the Memory of Francis de Zulueta (1959) 9-45, the author says (at 15 lines 23-4) that '[t]he question of certum in connection with price is a very specialized one', and: 'The sale ["at whatever by way of price the buyer has in his safe"] is valid (in the Digest) because the price is certum in the sense of resembling "such and such a sum of money, pecunia numerata"' (at 17 lines 4-6). In his study the author reviews numerous cases in Roman law, in none of which there was any vagueness in the language used nor any doubt about the intention of the parties. The phrase 'void for vagueness' is frequently used in the context of fixing the price-as early, for example, as in Dawidowitz v Van Drimmelen (supra) at 676, and often thereafter (Sale and Lease 55-9). The primary meaning of the phrase is that because the language of a proposed contract is so obscure that no meaning can be discovered, there is no contract: see Namibian Minerals Corporation Ltd v Benguela Concessions Ltd 1997 (2) SA 548 (A) at 557E; [1997] 1 All SA 191 at 206e and the other cases referred to in Contract 393-5. This is certainly not a meaning that can have any relevance in the context of the question whether or not one of the contracting parties alone can determine the price or rent. When justinian settled the controversy that previously existed by deciding that a sale is valid if it is left to a nominated third person to fix the price (I 3.23.1; C 4.38.15), he confirmed that this was an additional method of arriving at a pretium certum (additional, that is, to the parties settling the price themselves). In this context, he was not in any way concerned with the clarity or obscurity of the language used. To describe language which is quite clear as 'vague' is bound to give rise to confusion.