

April fool's day

Does the CPA reintroduce the *exceptio doligeneralis*?

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April fool's day: Does the CPA reintroduce the *exceptio doligeneralis*?

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Summary

Modern law of contract in South-Africa can be seen as a dynamic field of law. It encompasses key principles such as freedom of contract, autonomy, good faith and public policy. These principles are seen as important concepts that underlie the substantive law of contract.

The Consumer Protection Act, introduced in 2008 and operational since 31 March 2011, has contributed to this dynamic field of law. Unfortunately the uncertainties regarding the application of widely articulated definitions associated with the act remain a concern.

Many legal academics have tried to alleviate the possible difficulties posed by the application of the CPA by means of constructive criticism, in-depth analysis of practical aspects and submissions to the legislator during the past three years.

The *exceptio doligeneralis* has offered similar protection for consumers in circumstances where it seemed as if no remedy would provide a similar equitable outcome. This defence was available when a plaintiff wanted to enforce legal action in circumstances that are unconscionable. The defendant could raise these circumstances as a defence to the action of enforcement.

The potential difficulties associated with the CPA are not entirely similar to the uncertainties created by the application of the *exceptio doli* in the past. The widely articulated definitions present a bigger problem of uncertainty. This may in certain circumstances be to the detriment of the consumer. Consumers are afforded rights in terms of the CPA but it does not necessarily mean that the enforcement of these afforded rights is in place.

There are technical difficulties regarding the interpretation of terms such as “agreement”, “unfair tactics” or “pressure” to name but a few. There are still no guidelines provided to assist consumer tribunals to adhere to the purpose of the act in a fair and organised manner. The question that arises is whether these afforded rights seem better than what it actually is; leaving us to believe that the common law regarding consumer protection can be codified.

This study is an attempt to demonstrate that the CPA might not have the desired outcome as initially anticipated. The CPA unfortunately, in my opinion, represents an April fool's day.

Sections 40, 48 and 51 of the CPA will perhaps have a similar effect than the *exceptio doligeneralis*. These sections offer protection to a consumer if there are unfair, unreasonable or unjust circumstances. The widely articulated sections create an inclusive protecting mechanism rather than excluding. Any contract, term or clause thereof will be interpreted in such a way to benefit a consumer.

It is submitted that it will not be possible to attach precise meanings to concepts such as good faith, public interest or fairness. There will always be a different understanding in a particular language and within a variation of context.

The main goal to be achieved, the rules of the law of contract should reflect attempts to achieve a balance between fundamental principles such as fairness and good faith, and economic policies such as economic efficiency and the facilitation of honest market participation.

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CHAPTER 1

INTRODUCTION

Rules of the law of contract “reflect the attempts within the legal system to achieve a balance between relevant principles such as freedom of contract and individual autonomy, and policies such as economic efficiency and the promotion of fair business practices.”¹ A balance must be struck between these principles and policies to satisfy prevailing perceptions of justice and fairness, as well as to increase economic, commercial and social expediency in a heterogeneous society.

The nature and basis of a contract in South-Africa are based on the following key principles: freedom of contract, specifically with reference to individual autonomy, economic equality and the responsibility of contracting parties to adhere to the terms and conditions of the contract. Important concepts that underlie the substantive law of contract include good faith, public policy and equality.

The role of good faith specifically, and the principles based on *bona fides* which are based on the legal convictions of the community, play an important role in the law of contract. However, the principle of good faith is not a direct requirement that the parties have to abide by when concluding a contract. Good faith governs the performance of contracts. Courts give expression to this principle of good faith by indirect means, by interpreting the contract as a whole or specific clause thereof, and by including tacit terms that are assumed by the court to give effect to the contract and its purpose. This statement was confirmed in the judgment of *Sasfin v Beukes*.² It is stated that the principle of good faith plays an important role in law of contract but cannot be considered as a requirement for the existence or enforceability of contracts.

¹ Van der Merwe S & others *Contract: General Principles* 3rd ed. 2007 Juta

² 1989 (1) SA 1 (A) 9-10.

The Constitution of South Africa 1996 also plays an indirect role to determine whether a contract is enforceable or not within an open democratic society.³ The indirect application of the Constitution is achieved through the interpretation of open norms such as good faith and public interest.⁴ In *Brisley v Drotosky*⁵ it is stated that the legal cause of a contract, in other words the purpose, conclusion and performance must be legal within our constitutional framework, and therefore not contrary to public policy.

These principles will be discussed more extensively in Chapter two of this dissertation, where the focus will be on freedom of contract, the principle of *pacta sunt servanda*, good faith and public policy.

Rules-based principles that facilitate certainty and encourage less interference by courts are the type of principles that are, strictly from a positivistic point of view, favoured in law of contract. According to this formal approach the courts when applying the law of contract can enforce only the principles that are codified, determined and non-ambiguous.

On the other hand, principles that are ambiguous and vague, and concepts that can usually be interpreted in many ways, are known as open-ended principles and also apply to contract law. The interpretation of these principles necessitates increased intervention by courts, which ultimately causes legal uncertainty within the law of contract. The following contractual principles are considered as open-ended: public policy, the responsibility of the parties, good faith, distributive justice, public harm, materiality, reasonableness and paternalism.

Agreements that are against the interests of the community, therefore against public policy, will not be enforced on the grounds of public interest.⁶ As we live in a society with multiple interests, the court has the difficult task to determine the public interest in a heterogeneous society. It was held in *Sasfin v Beukes* that these open-ended principles should merely constitute policy considerations and if necessary, the possibility of adapting the existing

³ See the Constitution of South Africa 1996 s7(2); s33(2) and s39(2); Freedom of contract, autonomy, is indirectly incorporated in the Constitution in s9, s10, s12 and s22.

⁴ Hawthorne L “The principle of equality in the law of contract” 1995 (58) *THRHR* 157 at 160.

⁵ 2002 (4) SA 1 (HHA) 15.

⁶ 1989 (1) SA 1 (A) 39.

common law contract doctrine by applying these principles.⁷ This statement will be considered more thoroughly in Chapter two below.

One of the open-ended principles that has featured in the law of contract for many years is that of good faith, or its direct opposite bad faith, which underlies the raising a defence against a claim called the *exceptio doli generalis*.

During the twentieth century, the *exceptio doli generalis* was utilised as an equitable defence that allowed a defendant to resist a claim for performance under a contract, when there was something unconscionable about the plaintiff seeking to enforce the contract (or a clause thereof) in the specific circumstances of that case.⁸ Judges referred to the *exceptio doli* in the context of law of contract to determine whether a contract between two parties thereto was enforceable or not.⁹

However, many authorities have in the past questioned the relevance and utility of the *exceptio doli* in South African law.¹⁰ According to the majority in *Bank of Lisbon and South Africa v De Ornelas*¹¹ the circumstances required for a successful reliance upon the *exceptio doli* was a legal standard that could not be reduced to the form of a determine or codified rule. The recognition of the *exceptio doli* in the form of a determined rule would lead to legal uncertainty.

According to Glover, one of the reasons why the *exceptio* was buried by the court in the *Bank of Lisbon* case was the fact that the *exceptio* was criticized for being a “wide” articulated defence.¹² This wide defence was in contrast with the classical individualist approach, also known as the formal approach. The formal approach in contract law is that courts ought not to interfere in the interpretation process of contracts to settle disputes concerning the fairness and equity of contractual terms agreed to by the parties.

⁷ *Ibid.*

⁸ Glover G “Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?” 2007 (124) *SALJ* 449.

⁹ In cases such as *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) and *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A).

¹⁰ See Glover 2007 (124) *SALJ* 449; Van der Merwe SWJ “The *exceptio doli generalis*” 1989 (106) *SALJ* 235; Hawthorne L “The *exceptio doli*” 1989 (22) *De Jure* 143, Lambiris MA “The *exceptio doli generalis*” 1988 (105) 664; Van der Walt JC “Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontrakbedinge” 1986 *SALJ* 646; Van Warmelo P “*Exceptio doli*” 1981 *De Jure* 202.

¹¹ 1988 (3) SA 580 (A) 586.

¹² Glover 2007 (124) *SALJ* 450.

The *exceptio doli* was known to be based on the principle of good faith, and despite being abolished in the case of *Bank of Lisbon and South Africa v De Ornelas*, the concept of good faith remained an important fundamental contractual value in South African law as mentioned above.

A principle such as good faith is not a requirement for the valid conclusion of a contract or the enforceability of a contract. The courts, however, use doctrines such as good faith and now even “unconscionability”¹³ to rescind contracts tainted by procedural unfairness.¹⁴

Clearly these principles must play a role when judges decide whether contracts are valid and enforceable within a South African society.

The following questions arise. One would enquire whether it is the task of the courts to attach precise meanings to these principles, and if the courts have the discretion to strike down contracts on the basis of unfairness, unconscionability or unreasonableness.

These questions form the focal point of this dissertation.

These abovementioned questions of possible legal and commercial uncertainty are complicated even further with the enactment of the new piece of legislation, namely the Consumer Protection Act 68 of 2008.¹⁵

The Department of Trade and Industry (hereafter the “DTI”) has developed consumer protection legislation, in the form of the CPA that strives to protect the rights of consumers and attempts to promote an economic environment where consumers are equal. With this Act, the DTI aims to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities.

¹³ Mentioned in the Consumer Protection Act, s 1 and Chap 2, part F, s 40.

¹⁴ For example in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A); in this case Olivier used the doctrine of *bona fides* as the foundation for articulating a specific rule that should be applied by banks in the process of negotiating contracts of suretyship and cession otherwise the contract should be declared voidable.

¹⁵ Referred to as the “CPA”; enacted on 31 March 2011.

The CPA is based on specific policy principles including market integrity and transparency, consumer safety and empowerment of the consumer and civil society. These policy principles that underlie the CPA, aim to remove unscrupulous conduct from the marketplace, to promote better and simple disclosure of information within the marketplace to ultimately facilitate well-informed market participants.

The CPA is the first statute in South Africa to deal with unfair contract terms in general and thus the first act to attempt to codify open-ended principles in the law of contract.

The question begs whether this means that the CPA will promote legal certainty with regards to the interpretation of these open-ended principles.

The South African Law Reform Commission stated in Discussion Paper 65 Project 47 “Unreasonable Stipulations in Contracts and the Rectification of Contracts” 1996 that open-ended principles, also referred to as doctrines, place a heavy burden on the courts to determine the meanings of these doctrines within a specific context.¹⁶ The Commission further suggested that legislation, such as the current CPA, must provide guidelines for the courts to enable them to interpret concepts such as unconscionability to ultimately promote legal certainty within our heterogeneous society. The Commission’s suggestions are in my opinion correct.

These questions will be addressed in the following manner. Firstly, in Chapter 2 specific principles that underlie the substantive law of contract, namely freedom of contract, the principle of *pacta sunt servanda*, good faith and public policy will be explained.

Chapter 3 will explain the origin and effect of the *exceptio doli generalis*. The reasons why it has been abolished are explained briefly and the recurring appearance of the *exceptio* in many cases after the abolishment thereof will be pointed out.

Chapter 4 follows, in which specific sections of the new Consumer Protection Act, namely Chapter Two part F s 40, part G s 48, s 51 and s 52 of the Act will be examined. The effect of these sections is analysed in Chapter 4, and compared to the effect of the *exceptio doli*, as

¹⁶ Discussion Paper 65 Project 47 (2006) 8.

explained in Chapter 3, in conjunction with the underlying fundamental principles mentioned in Chapter 2.

Finally and in conclusion, Chapter 5 will attempt to provide answers to the question of whether the statute has possibly reinstated a defense similar to the common law *exceptio doli*.

CHAPTER 2

THE UNDERLYING PRINCIPLES OF THE LAW OF CONTRACT

2.1 General introduction

Specific principles that underlie the substantive law of contract include but are not limited to the following principles: freedom of contract, *pacta sunt servanda*, good faith, public policy and fairness. These principles are also considered as part of the cornerstones of the law of contract in South Africa, and play an important role in the application of law.¹⁷ Many authorities stress the fact that the principles should be considered as policy considerations only to be utilised if necessary to adapt the existing common-law rules.¹⁸

The point of departure in this chapter is to provide a brief overview of the different theories of law of contract, and the factors that influence the application of these theories in modern society. Subsequently, the following will be addressed: Firstly the principle of good faith, secondly freedom of contract and *pacta sunt servanda* and thirdly competing values, namely public policy, good faith and freedom of contract. These are addressed with reference to scope and application of the Constitution. The nature and effect of each principle will be discussed with references to case law dating from 1969 to 2007. Finally, the Constitution is applied horizontally yet indirectly to the private affairs of contracting parties. Constitutional values such as public interest play a prominent part in the law of contract to determine whether a contract complies with the requirement of legality.

¹⁷ Van der Merwe (2007) 12-15,131-140.

¹⁸ Smalberger AR in *Sasfin v Beukes* 1989 (1) SA 1 (A) at 9, *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) at 32, *Cf Du Plessis v De Klerk and another* 1996 (5) BCLR 658 (CC), *Cf Barkhuizen v Napier* 2007 (2) SA 323 (CC), *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at 19, 31-33, *Cf Davids v ABSA Bank* 2005 (3) SA 361 (C), *Cf Van Aswegen A* “The Implications of the Bill of Rights for the Law of Contract and Delict” 1995 (11) *SAJHR* 50; *Cf Hawthorne L* “The principle of equality in the law of contract” 1995 (58) *THRHR* 157; *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en andere* 1964 (4) SA 760 (A) at 767.

2.2 Theories of Law of Contract

According to Van Aswegen the current law doctrine is based on the paradigm of a free market.¹⁹ The free market, as viewed by many neoclassical economists and also referred to as *laissez faire*, encourages participation by individuals to bargain on equal footing with minimal state intervention.²⁰ Van Aswegen mentions that idealistically this type of participation would, according to the free market doctrine, result in the greatest public good.²¹

Adam Smith first used the metaphor of the invisible hand to describe the unpredictable effects of an economy where self-interest and self-organisation played dominant roles within a so-called free market.²² Smith claimed that rational self-interest and competition could lead to economic prosperity.²³ The theory of the invisible hand was seen as a metaphor for *laissez-faire* even though Smith never used the term himself.²⁴ This theory later developed into an ideology based on freely bargained, self-interested transactions with minimal legislative interference.²⁵

Hawthorne refers to two different theories that contradict one another, namely the classical theory of contract and the modern law theory.²⁶ She identifies the cornerstones of the classical theory of contract as freedom of contract, equality between parties, insurance against calculated economic risks and freedom of movement.²⁷ This theory is founded on principles such as liberty of an individual, self-reliance and autonomy.²⁸ The classical model of contract promotes negotiations of future deals amongst businessmen and choices that are made voluntarily and freely in an equal environment. It facilitates the creation of legal obligations on specific terms chosen specifically and freely by those individuals.

¹⁹ Van Aswegen A “The Implications of the Bill of Rights for the Law of Contract and Delict” 1995 (11) *SAJHR* 55.

²⁰ Fisher I “Why has the Doctrine of Laissez Faire been abandoned?” 1907 *Science* 25 (627) 18 at 27.

²¹ Van Aswegen 1995 (11) *SAJHR* 55.

²² Marroquin A *Invisible Hand: The Wealth of Adam Smith* 2002: The Minerva Group Inc_Marroquin 123.

²³ *Ibid.*

²⁴ As used by Marroquin (2002) 124.

²⁵ Hawthorne L “The principle of equality in the law of contract” 1995 (58) *THRHR* 157 at 163.

²⁶ *Ibid* 160.

²⁷ *Ibid.*

²⁸ *Ibid.* The principle of autonomy is also enshrined in s 22 of the Constitution of South Africa, namely in the fundamental right of freedom of trade, occupation and profession. Every citizen has the right to choose his trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

Van Aswegen and Hawthorne explain that a theory of contract based solely on the freedom of the individual without taking various factors into consideration such as interference of the state, unequal footing and ignorance are no longer viable and are subsequently rejected in a modern, heterogeneous society.²⁹

Van Aswegen argues that changing circumstances such as unequal bargaining, ignorance, inexperience of individuals and standard form of contracts distorts the current law doctrine based on real freedom of the individual.³⁰ These abovementioned circumstances need to be taken into consideration to create an environment where people enter into contracts on fair, equal and justifiable grounds.

The classic model is not concerned with social and economic equality.³¹ Hawthorne argues that the application of the classic model is limited because the model does not take the discrepancies in resources, such as ownership, wealth and knowledge into account.³² The application of the classic model leads to domination of the well-informed person and exploitation of the ignorant, uneducated person.

Hawthorne argues that the doctrine of freedom of contract produces social inequalities, domination, and exploitation of one contracting party by the other.³³ She concludes that the modern law theory rejects the classical theory based on the fact that the classical theory ignores the basic needs of human beings.³⁴ Few members of society live an average life where they can achieve economic conditions, which enable them to enjoy freedom of contract.³⁵

In a modern, heterogeneous society the circumstances of the contracting parties must be taken into consideration.³⁶ In other words it is not only about the individual and his/her self-

²⁹ Van Aswegen 1995 *SAJHR* 50; Hawthorne 1995 *THRHR* 165.

³⁰ Van Aswegen 1995 *SAJHR* 55.

³¹ Hawthorne 1995 (58) *THRHR* 161.

³² *Ibid* 166.

³³ *Ibid* 168.

³⁴ *Ibid*.

³⁵ *Cf* Hawthorne 1995 (58) *THRHR* 157.

³⁶ *Ibid*; see *Coetzee v Comitis* 2001 (1) SA 1254 (C) 1264-1265; Traverso J held that a certain compensation regime constituted a restraint of trade. Accordingly this restraint of trade was said to be “unreasonable and public policy required it to be declared unlawful and inconsistent with provisions of Constitution.” The restraint of trade was declared invalid. Traverso J referred to the circumstances of the parties and how this may influence the conclusion of a fair contract.

reliance, but rather an increased notion of collectivism and the effects of distribution of wealth amongst the contracting parties.³⁷

Currently, the DTI by enacting the CPA is striving to protect the rights of consumers and promote an economic environment where consumers are equal.³⁸ There is a possibility that contract law may indirectly prevent unjust domination and exploitation of the possible ignorant or uneducated person.³⁹ In my opinion a common law defence such as the *exceptio doli generalis* had a similar preventative effect in contract law in the past.⁴⁰

2.3 Standards

One must question how open-ended principles have played a role in our heterogeneous society during the past ten years.

According to Cockrell one has to examine the following two concepts, namely substance and form of the law to discover the role of underlying principles also known as standards.⁴¹ He refers to substance of the law as the “political morality that underlies the law and form of the law as the manner in which substance, specifically legal doctrines, are to be expressed.”⁴²

Cockrell explains that substance of the law refers to the individual needs of each person within a realm of economic participation. The substance of law is divided into the individual freedom and the concept of collectivism. Every person has a choice to enter into a contract or to not enter into a contract. However there is a connection between the individual choice and his or her direct surroundings. If and when a contract is concluded between two contracting parties, multiple obligations arise and these obligations may affect the parties without their voluntary consent. For example if one party (A) benefits more from a deal than the other (B), B will not be as satisfied as A with the outcome of the said deal.

³⁷ Cf Hawthorne 1995 (58) *THRHR* 157; Cf Cockrell A “Substance and Form in the South African Law of Contract” 1992 (109) *SALJ* 40.

³⁸ This aspect will be addressed in detail in chap 4 of this dissertation

³⁹ See chap 4.

⁴⁰ See chap 3.

⁴¹ Kennedy first explained form and substances through the illustration of two axes; see Kennedy D “Form and Substance in Private Law Adjudication” (1976) 89 *Harvard LR* 1685; Cockrell 1992 (109) *SALJ* 40.

⁴² *Ibid* 41.

Legal doctrines are given affect to through the form of law, and form of law is expressed in rules and standards.⁴³ Cockrell explains that a formalistic viewpoint favours specific rules within a legal context that facilitates legal certainty.⁴⁴ There is no space for the discretionary interpretation by any judge and the judiciary only applies written rules. Rules are thus applied in a mechanical way based on previous case law.⁴⁵ Cockrell claims that a rule is associated with individualism, in that each case is considered only through applying existing rules without taking any other factors into consideration.⁴⁶

On the other hand a standard, which forms falls within the category of “form” of law, is concerned with the reasonableness of the law. Judges have applied standards, such as freedom of contract, good faith and public policy repeatedly when dealing with contracts.⁴⁷ There is space for the discretionary interpretation of rules, and different policies are applied on a case-by-case basis by taking the circumstances of the contracting parties into account. This is also known as purposive adjudication.⁴⁸

A standard is thus concerned with collectivism, where not only individual needs are taken into consideration, but also the circumstances of the parties and their surroundings.⁴⁹ Thus, according to Cockrell, the link that exists between form and substance of the law is these so-called standards.⁵⁰

⁴³ *Ibid* 42.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 45.

⁴⁷ Courts have referred to these principles in the following cases, to name but a few, to deal with complex issues; *Cf Innes CJ in Neugebauer & Co Ltd v Hermann* 1923 AD 564 at 573; *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573, *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) 802; *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W); *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652; *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A); *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) 433; *Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) 198; *Sasfin v Beukes* 1989 (1) SA 1 (A) 19; *Olivier AJ in Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 318, 321; *Miller and Another NNO v Dannecker* 2002 (1) SA 928 (C); *Brisley v Drotsky* 2002 (4) SA 1 (HHA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (HHA) 39; *Barkhuizen v Napier* 2007 (5) SA 323 (CC). Courts have warned against the application of standards, for example *Cf Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A).

⁴⁸ See Brand D “Freedom, constraint and (the) judging (of) Albie Sachs” 2010 *SA Public Law* (25) 25; Botha H “Albie Sachs and the politics of interpretation” 2010 *SA Public Law* (25) 39, Roux T “Transformative Constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?” 2009 *StellLR* (20) - Issue 2 - 258 on purposive adjudication.

⁴⁹ Cockrell 1992 (109) *SALJ* 46.

⁵⁰ *Ibid*.

2.3.1 Freedom of Contract

The principle of freedom of contract is based on the assumption that the contracting parties have equal resources.⁵¹ Nowadays parties seldom have equal and similar resources available when concluding a contract. This is mainly due to inequality of wealth distribution, illiteracy and other factors as mentioned previously by Van Aswegen and Hawthorne.⁵²

A contract is an agreement entered into by two or more persons who have the capacity to do so, with the serious intention to be legally bound thereto, which is legal, possible, certain and complies with formalities.⁵³ Consensus must exist between the parties regarding the real cause of the contract.⁵⁴

When considering freedom of contract two important factors come into play, namely public interest that demands that contracting parties should comply with their contractual undertakings, and the constitutional right of every individual to freedom of trade.⁵⁵

Closely related to freedom of contract is the principle of *pacta sunt servanda*.⁵⁶ This means that parties who enter into a contract do so for a reason. The existence of the contract creates a reason for the enforceability thereof.⁵⁷ *Pacta sunt servanda* implies that the parties have a responsibility to adhere to the terms and conditions of the contract, which they agreed upon. *Pacta sunt servanda* is seen according to Sachs J as a moral principle on which the coherence of any society relies.⁵⁸

The responsibility accepted by the parties to adhere to the terms of the contract is stressed in *Conradie v Rossouw* and *Brisley v Drotsky*.⁵⁹ According to the common law, the intention of

⁵¹ Van der Merwe (2007) 12; Christie (2006) 16-18.

⁵² See footnote 15 and 18.

⁵³ Van der Merwe (2007) 8, 54.

⁵⁴ Cf Van der Merwe (2007); and stated in *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 978-980.

⁵⁵ According to Hattingh J in *Polygraph Center – Central Provinces CC v Venter and another* (2006) 4 All SA 612 (SCA) at par 22 – 24, and confirmed in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵⁶ *Barkhuizen v Napier* 100. *Pacta sunt servanda* is also a universally recognised legal principle, Van der Merwe (2007) 11.

⁵⁷ Van der Merwe (2007) 11.

⁵⁸ *Barkhuizen v Napier* 87.

⁵⁹ Cf *Brisley v Drotsky*; *Conradie v Rossouw* 1919 AD 279 at 288.

creating an obligation might give rise to a civil obligation.⁶⁰ Therefore if a promise was made seriously and deliberately with the intention that a lawful obligation should be established the parties have a responsibility to upkeep this promise.⁶¹

The constitutional value of public policy (discussed at 2.3.3) requires that parties should comply with contractual obligations that have been undertaken freely and voluntarily.⁶² *Pacta sunt servanda* gives effect to the central constitutional values of freedom and dignity.⁶³

Self-autonomy, the ability to regulate one's own affairs even to one's own detriment, is the very essence of freedom and a vital part of dignity.⁶⁴ However, this general rule that agreements must be honoured does not apply to immoral agreements, which violate public policy.⁶⁵ Immoral agreements lack one of the requirements of the conclusion of a valid contract, namely legality.⁶⁶

In *Knox D'Arcy Ltd and another v Shaw and another* it is stated that "the freedom of contract comprehends freedom of the individual to pursue a choice to enter into a contract that may be to his/her benefit or disadvantage."⁶⁷ The court further held that they will not easily interfere in private affairs but will protect individuals against rash decisions.⁶⁸ As stated in this dissertation the legislator with the enactment of the CPA attempts to prevent choices made by individuals that will be to his or her own detriment mainly because of their unprivileged circumstances.⁶⁹

⁶⁰ Van der Merwe (2007) 4.

⁶¹ Cf *Conradie v Rossouw* 279.

⁶² Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en andere* 1964 (4) SA 760 (A) at 767.

⁶³ *Ibid.* *Barkhuizen v Napier* 87; Cf Van der Merwe (2007).

⁶⁴ *Knox d'Arcy Ltd and another v Shaw and another* 1996 (2) SA 651 (W) 660-661.

⁶⁵ In *Barkhuizen v Napier* 158 Sachs J states: "The interests of the community or the public are of paramount importance in relation to the concept of public policy."

⁶⁶ Cf *Barkhuizen v Napier* 158: "Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced."

⁶⁷ *Knox d'Arcy Ltd and another v Shaw and another* 660.

⁶⁸ *Ibid* 660.

⁶⁹ Chap 4 of this dissertation. CPA Chap 2 part C, E, F, G and H.

2.3.2 Good Faith

(a) The academic point of view

A valuable standard underlying the law of contract is good faith. The application and role of good faith differ among legal academics. Important views that will be referred to below include those of Hutchison, Van der Merwe, Van der Walt and Christie.

Hutchison explains 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.”⁷⁰

Hutchison submits that good faith finds expression in rules and doctrines.⁷¹ He stresses the fact that good faith is not the only value or principle that underlies the law of contract. Hutchison argues that good faith cannot be seen as an independent, “free-floating” requirement that any contractual term must adhere to. Good faith cannot be a decisive factor when determining whether a contract should be enforceable or not.⁷²

Van der Merwe submits that if the result of a contract is “greatly inequitable, or oppressive or unconscionable” the contractants may be able to rescind the contract based on this inequitable result.⁷³ However, South African courts have tried to avoid the application of the considerations such as unconscionability and inequity.⁷⁴

There is some measure of fairness and reasonableness incorporated in the principles on which contractual liability is based.⁷⁵ The agreement must be obtained properly and comply with

⁷⁰ *Brisley v Drotzky* 2002 (4) SA 1 (HHA) par 22; *Cf Hutchinson D “Non-variation clauses in contract: any escape from the Shifren straitjacket?”* 2001 (118) *SALJ* 720 at 743-744.

⁷¹ *Cf Cockrell A “Substance and Form in the South African Law of Contract”* 1992 (109) *SALJ* 46; *Cf Hutchison* 2001 (118) *SALJ* 720.

⁷² *Brisley v Drotzky* 22-23; *Hutchison* 2001 (118) *SALJ* 2001 720 at 743; Hutchison claims that in certain cases courts apply good faith indirectly to strike down contracts; he argues “the influence of good faith in the law of contract is merely of an indirect nature, in that the concept is usually if not always mediated by some other, more technical doctrinal device. Thus, for example, while good faith does not empower a court directly to supplement the terms of a contract, or to limit their operation, it might in appropriate cases enable the court to achieve these same results indirectly, through the use of devices such as implied terms and the public policy rule.”

⁷³ Van der Merwe (2007) 132-133, *cf Extel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA).

⁷⁴ *Magna Alloys & Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) 875; *Sasfin v Beukes* 1989 (1) SA (A) 1-18; see chap 4 of this study.

⁷⁵ Van der Merwe (2007) 316.

the requirement of legality.⁷⁶ It is however not always possible to ensure that justice is done every time where a contract is put into operation. Van der Merwe further questions how the law can provide for the fair operation of a particular contract in most cases.⁷⁷ He answers this by referring to two different approaches.

Firstly the approach to analyse general concepts that underlie the rules, doctrines and remedies that are intended to facilitate fair operation of contracts and promote “conscionability”.⁷⁸

Secondly, Van der Merwe suggests an approach to focus on specific remedies available to the parties and the development of these remedies to accommodate the “changing convictions (of society) of what is just and fair”.⁷⁹

As can be seen below, South African courts seemed prepared to develop existing remedies to adapt to the “changing convictions” of society of what is deemed to be fair operation of contracts.⁸⁰

In *Weinerlein v Goch Buildings Ltd*⁸¹ and *Zuurbekom Ltd v Union Corporation Ltd*⁸² the courts considered the application of an instrument that might promote equity in the law of contract, namely the *exceptio doli generalis*.⁸³

However in *Bank of Lisbon & South Africa Ltd v De Ornelas*⁸⁴ the Appellate division (as referred to then) held that the *exceptio doli generalis* was not part of our law.⁸⁵ The court further rejected previous decisions by the Appellate division and other divisions that might have implicated that the *exceptio doli* was part of South African modern law.⁸⁶

⁷⁶ *Ibid* 317.

⁷⁷ *Ibid*.

⁷⁸ Van der Merwe (2007) 317.

⁷⁹ *Ibid*.

⁸⁰ Van der Merwe (2007) 318; *cf Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).

⁸¹ 1925 AD 282-290.

⁸² 1974 (1) SA 514 (A) 520.

⁸³ The origin and effect of the application of this remedy will be discussed in chap 3.

⁸⁴ 1988 (3) SA 580 (A) 601.

⁸⁵ See Chap 3.

⁸⁶ *Cf Bank of Lisbon & South Africa Ltd v De Ornelas*.

The second approach as mentioned by Van der Merwe to develop existing remedies to facilitate fair operation of contracts have therefore failed in the past. This approach will not easily be upheld in modern society.⁸⁷ The court in the *Bank of Lisbon & South Africa Ltd* was not willing to develop existing remedies to enable the application of a defense such as the *exceptio doli* to facilitate equity amongst contracting parties.⁸⁸ The court also did not consider any other remedies that might fulfil the same function as the *exceptio doli*.⁸⁹

The focus should rather be on the “general concepts that underlie and inform the rules governing the operation of a contract” according to Van der Merwe. For South African law, good faith, as one such general concept and not as the principal guideline, would seem to be particularly appropriate.⁹⁰ Van der Merwe suggests that the acceptance of a duty to act in accordance with the dictates of good faith may develop from specific, existing duties in law.⁹¹ He states that this development may take place within the “framework of existing legal concepts”.⁹² For example courts have developed the concept of public policy and public interest to include good faith.⁹³

Van der Merwe’s suggestion can be of value within a South African context in my opinion. The development of existing remedies may lead to the facilitation of certainty within contract law.

(b) Case law

(i) *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*

Olivier AJ confirms the close connection that exists between the doctrine of *bona fides*, public policy and public interest.⁹⁴ However, in his minority judgment in the *Saayman NO*

⁸⁷ Van der Merwe (2007) 321: “The appeal court has been expressly unwilling to recognise good faith as a free-floating basis for judicial intervention and control in respect of consensual contractual terms”; *Brisley v Drotsky* 12-19; confirmed in *Afrox v Healthcare Bpk v Strydom* 40 and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) 6-8.

⁸⁸ *Ibid.* See also chap 3 below.

⁸⁹ Van der Merwe (2007) 318.

⁹⁰ Van der Merwe (2007) 318, *Brisley v Drotsky* 15; *Afrox v Healthcare Bpk v Strydom* 40.

⁹¹ Van der Merwe (2007) 321.

⁹² *Ibid.*

⁹³ *Cf Sasfin v Beukes* 1989 (1) SA 1 (A); *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 322; *Cf Napier v Barkhuizen, Cf Barkhuizen v Napier* 2007 (5) SA 323 (CC); see Van der Walt CFC “Beheer oor onbillike kontrakbedinge – *quo vadis* vanaf 15 Mei 1999?” 2000 (1) *TSAR* 33-35.

⁹⁴ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 331.

case, he suggests that good faith should be considered as an independent requirement as well as a separate ground to determine whether the contract in question is enforceable or not.⁹⁵

He argues that “the doctrine of *bona fides* was invoked to entitle a respondent to rescind a contract in circumstances where actions based upon misrepresentation, duress and undue influence could not be used.”⁹⁶ Olivier’s opinion links up with those of legal writers who are in favour of the application of the *exceptio doli*.

According to Olivier the doctrine of *bona fides* should be utilised to give effect to the “community’s desire for fairness, reasonableness and justice.”⁹⁷ His argument is strengthened by examples of the application of good faith in case law, namely in *Meskin v Anglo-American Corporation of SA* and *Savage and Lovemore Mining v International Shipping*.⁹⁸

In the *Meskin* case Jansen J is of the opinion that during the pre-stages of contracting while negotiation takes place, good faith should play a fundamental role. A party must be able to rescind a contract based on lack of good faith during the pre-stages of contracting.

Stegmann J in the *Savage* case agrees with this point of view and submits that “*bona fides* do not only arise after consensus, but rather applies to the process of reaching consensus.”⁹⁹

Olivier argues that good faith should be applied directly by courts.¹⁰⁰ He advocates that even if a party has contractual capacity a contract cannot come into existence if the conclusion

⁹⁵ *Ibid* 318.

⁹⁶ Glover G “Good faith and procedural unfairness in contract - *Eerste Nasionale Bank v Saayman NO*” 1998 (61) *THRHR* 330 at 333.

⁹⁷ *Cf Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 302; see also *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C) and *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C).

⁹⁸ *Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) 198A; *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) 802; see also Ntsebeza J in *Miller and Another NNO v Dannecker* 2002 (1) SA 928 (C) in *Brisley v Drotsky* 11; in Van der Merwe (2007) 87-88 during the pre-stages of contracting the notion of *bona fides* may help to define the limits of the price, which the grantor may demand, thus preventing a possible manipulation of the price to the detriment of the other party. Van der Merwe refers to *Soteriou v Recto Poynton’s (Pty) Ltd* 1985 (2) SA 922 (A) 932.

⁹⁹ Van der Merwe (2007) 317; *Cf Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) 198A concerning *bona fides* in the process of reaching consensus. Olivier AJ refers to other jurisdictions *Brisley v Drotsky* 19, specifically the so called “special equity theory” as mentioned by Scott J in *Barclays Bank plc v O’Brien and Another* (1992) 4 All ER 983 (CA) however the special equity theory is rejected by the House of Lords in *Barclays Bank plc v O’Brien and Another* (1993) 4 All ER 417 (HL).

¹⁰⁰ *Brisley v Drotsky* 21.

thereof is against the principles of *bona fides*.¹⁰¹ Olivier submits that the doctrine of *bona fides* serves as a substitute for the *exceptio doli generalis* remedy that has fallen away.¹⁰² He states, “Since all contracts in our law are negotiated *bona fide*, it must therefore automatically comply with the dictates of good faith.”¹⁰³

(ii) *Brisley v Drotsky*

In *Brisley v Drotsky* the tenant (Brisley) argued that a clause in the lease agreement may not be enforced, as the result would be unfair, not reasonable in an open, democratic society and against the dictates of good faith.¹⁰⁴ The tenant’s argument was founded on the basis that considerations of good faith are relevant in assessing whether an agreement or clause meets the criterion of public policy.¹⁰⁵

The majority in the *Brisley case*, namely Harms, Streicher and Brand AJJ, put the application of good faith into perspective.¹⁰⁶ They held that there can be no “general equitable discretion on the strength of which a court could decide not to enforce a clause merely because it was unconscionable or against good faith.”¹⁰⁷ It is unnecessary, according to their judgment, to apply good faith as an independent ground to cancel contracts based only on a judge’s point of view and his or her opinion of public interest.¹⁰⁸

According to them the suggested application of good faith according to Olivier, as a substitute for the previously known remedy the *exceptio doli generalis*, cannot stand. The *exceptio doli* was applied in circumstances where there was unfair conduct on the part of the plaintiff and no other remedy could provide an equitable result for the defendant. The remedy was abolished in 1988 because it opened the door to a field of legal uncertainty.¹⁰⁹ Good faith, fairness, reasonableness and justice remain abstract ideas in the law of

¹⁰¹ Glover 1998 (61) *THRHR* 330; *Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 319.

¹⁰² The *exceptio* was abolished in *Bank of Lisbon and South Africa v De Ornelas* 605-606.

¹⁰³ *Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 322.

¹⁰⁴ *Brisley v Drotsky* 12-15.

¹⁰⁵ Van der Merwe (2007) 155. The tenant’s argument is derived from *Miller v Dannecker* 2001(1) SA 928 (C) 933-935.

¹⁰⁶ *Brisley v Drotsky* 17-25.

¹⁰⁷ Van der Merwe (2007) 155, *Brisley v Drotsky* 13-19.

¹⁰⁸ *Brisley v Drotsky* 15.

¹⁰⁹ See fn 46.

contract.¹¹⁰ These ideas are underlying principles of the law and do not form independent criteria for the court to determine whether contracts can be enforced or not.¹¹¹ I agree that these abstract ideas may be of assistance to develop the common law if there is no stipulated rule available to provide a solution in a specific case.

The majority further held that the court does not have the discretion to base decisions on abstract ideas as they prefer.¹¹² It should be noted that judges often differ in their conception of good faith in respective case law.¹¹³ The court is obliged to apply clear rules when dealing with a clause in question.

The *exceptio doli* can also be seen as one of these abstract ideas that has helped with the development of the law. In conclusion good faith can only be seen as an underlying value expressed in rules and does not qualify as a self-standing rule.

(iii) *Barkhuizen v Napier*

The contract in the *Barkhuizen* case contained the following clause: “If we reject liability for any claim made under this policy we will be released from liability unless summons is served . . . within 90 days of repudiation.”¹¹⁴

The counsel for *Barkhuizen* (the applicant in this case) argued that this clause is contrary to public policy and therefore, unenforceable.¹¹⁵ Counsel for the applicant submitted that public policy represents the legal convictions of the community.¹¹⁶ They stated that legal convictions have now been codified in a set of constitutional values namely the Bill of Rights.¹¹⁷ Thus, this clause constituted an unreasonable and unjustified limitation of the constitutional right of access to court, which is guaranteed in section 34 in the Bill of Rights.

¹¹⁰ *Brisley v Drotosky* 2002 (4) SA (SCA) 22, confirmed in *Barkhuizen v Napier* 82.

¹¹¹ *Brisley v Drotosky* 22-23, *Barkhuizen v Napier* 80: “The requirement of good faith is not unknown in our common law of contract. It underlies contractual relations in our law.”

¹¹² *Ibid.*

¹¹³ According to Harms J, Streicher en Brand AJJ in *Brisley v Drotosky* 12 good faith may help to set the standard to the extent that conduct which runs contrary to good faith may justify rescission of the contract. This statement is also confirmed in Van der Merwe (2007) 131.

¹¹⁴ *Ibid* 3 and 111.

¹¹⁵ *Ibid* 19.

¹¹⁶ *Ibid*; Davis J expresses his concern for possible legal uncertainty in cases where courts need to define the legal convictions of the community; see *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 475-476.

¹¹⁷ *Ibid.* Chapter 2, Bill of rights as part of the Constitution 1996.

The counsel submitted that the limitation of access to court was not reasonable and justifiable under section 36 (1) of the Constitution. This violated public policy and the clause should be declared invalid.¹¹⁸

The Appellate Division held that constitutional values of public policy and equality may prove to be the decisive factor when the parties' relative bargaining positions is an issue.¹¹⁹

It must be borne in mind that the applicant's personal attributes should not play the decisive role when determining if a clause is enforceable in the light of public policy.¹²⁰ Moseneke DCJ explains that one may consider surrounding factors regarding a contracting party such as illiteracy, ignorance and inability to get access to professional advice.¹²¹ One must also consider whether these factors prevented a party to comply with the terms of the contract.¹²²

Therefore according to Moseneke public policy remains an objective criterion and should not be "held ransom by the infinite variations to be found in any set of contracting parties."¹²³

2.3.3 Synopsis of Public policy

Public policy is the general sense of justice of the community, the *boni mores*, as manifested in public opinion.¹²⁴ Closely associated with public policy are the notions of fairness, justice

¹¹⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 111, Moseneke DCJ: "The clause is unreasonably short and it is manifestly inflexible. It is couched in certain and explicit terms. The claimant must serve summons within 90 days of repudiation. If this is not done, the insurer is released from liability. The clause irreversibly takes away, in an unreasonably short time, the right of action of the insured and, in that way, denies the insured a reasonable opportunity to have the dispute decided by an independent tribunal." The limitation of the right to enjoy access to courts is therefore not reasonable and justifiable in an open and democratic society in terms of s 36.

S 36 of the constitution: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹¹⁹ *Barkhuizen v Napier* 159 and in *Afrox Healthcare Bpk v Strydom* 11 and 12 the SCA recognised that unequal bargaining power is indeed a factor which together with other factors, plays a role in the consideration of public policy. The *Afrox* case gives recognition to the potential injustice that may be caused by inequality of bargaining power. Van der Merwe (2007) 132 states: "inequality of bargaining power between potential contractants may affect the recognition of a right to rescind a contract." Also see Christie (2006) 18-19.

¹²⁰ *Barkhuizen v Napier* 95.

¹²¹ *Ibid.*

¹²² *Ibid* par 95-96.

¹²³ *Ibid* par 98.

and reasonableness.¹²⁵ It would be contrary to public policy to allow the enforcement of a clause or contract that would result in an injustice for one of the parties.¹²⁶

Public policy, as part of the Constitution, requires of the courts to “employ its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives.”¹²⁷ With this borne in mind, he states that “intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”¹²⁸

The question remains whether it is the task of the court to develop the common law of contract to enable the court to invalidate a term in question.¹²⁹ An important statement in the judgment concerns the fact that all law, including the common law of contract, is subject to

¹²⁴ *Ibid.* Christie (2006) 18-21 and 73; Kerr 2008 (125) *SALJ* 241 at 244; in the *Afrox case* the court held: “What public policy seeks to achieve is the reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition.” However, Davis J states that it is a difficult task to define public interest. Davis J submits in *Mort NO v Henry Shields-Chiat*; “Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community — a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated.” Olivier JA cited this in *Brisley v Drotsky* 69.

¹²⁵ *Ibid* par 73.

¹²⁶ *Ibid.* Also held in *Wells v South African Alumenite Company* 1927 AD 69-72; *Cf Brisley v Drotsky*; *Cf Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); see *Barkhuizen v Napier* 159; the Court cited as authority what Innes CJ held in *Eastwood v Shepstone* 1902 TS 294 at 302: “Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals.”

¹²⁷ *Barkhuizen v Napier* 70; Smalberger AJ in *Sasfin v Beukes* 2006 (4) SA 581 (SCA) 9 warns the courts to exercise the duty to declare contracts against public policy, unenforceable, sparingly; “The power to declare contracts contrary to public policy should 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.”

¹²⁸ *Barkhuizen v Napier* 80-89; Van der Merwe (2007) 322-323; *Cf Hutchison* (2001) 118 *SALJ* 720: “The principle (good faith) may be employed directly, on the grounds that it affords a judge an equitable, discretionary power, based on public policy, to refuse to enforce a provision in a contract whenever a party’s attempt to rely on the provision is unconscionable or in bad faith. The more widely accepted view is that good faith operates indirectly, in that it is always mediated by other, more concrete rules or doctrines.” See Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12.

¹²⁹ *Ibid.* The Constitution has bestowed an important task on the courts, namely when developing the common law of contract or any legislation, to promote the spirit, purport and objects of the Bill of Rights. This is confirmed in *Brisley v Drotsky* 24-26 and referred to in *Barkhuizen v Napier* 35.

constitutional control.¹³⁰ In the words of the court “The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.”¹³¹

The court has the difficult task to strike a balance between the concepts that underlie the law of contract such as good faith, constitutionally introduced values such as public policy and the promotion of legal certainty in general through the strict application of existing rules and remedies.

It remains unclear how the court manages to achieve this balance when considering the private affairs of individuals - the right to freedom of contract - on the one hand and the responsibility to promote bargaining grounds between individuals that are equal and not against public policy on the other hand.¹³²

2.3.4 Concluding remarks

The task of the courts to apply underlying values of the law of contract has become increasingly complicated. The constitutional dispensation requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual freedom of an individual, and securing a framework within which the ability to contract

¹³⁰ All law now enforced in South Africa and applied by the courts derives its force from the Constitution; see s 2, s 8(1) and s 39(2) of the Constitution. In terms of s 173 of the Constitution, the Constitutional Court has the power to develop the common law in constitutional matters within its jurisdiction. The power of this Court to develop the common law is also implicit in terms of s 8(3) of the Constitution, which deals with the application of the bill of rights to both natural and juristic persons. Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. S 167(3)(c) of the Constitution provides that the Constitutional Court makes the final decision whether a matter is a constitutional matter.

¹³¹ *Barkhuizen v Napier* 80-87; Ngcobo J confirms that the *pacta* principle is also subject to constitutional control; Van der Merwe (2007) 17.

¹³² *Cf* Van der Merwe (2007); the courts have favoured immediate certainty in law as seen in *Afrox Healthcare Bpk v Strydom* 38-39 where the court mention that the constitution has not abolished the doctrine of *stare decisis*. This doctrine obliges courts of the same jurisdiction or of lower jurisdiction courts to follow judgments of higher jurisdictions courts to ultimately facilitate legal certainty. An example of balancing competing values can be the limitation of freedom to contract by means of a restraint of trade; see *Cf Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *cf Knox d'Arcy Ltd and another v Shaw and another*; *cf Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767 and 786.

enhances, rather than diminishes, anyone's self-respect and dignity within a heterogeneous society.¹³³

This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to these terms.¹³⁴

The courts are required to develop the common law in line with the normative framework of the Constitution.¹³⁵ The normative framework encompasses a democracy founded on human dignity, the achievement of equality, the advancement of human rights and freedoms and the rule of law.¹³⁶

I agree with Van der Merwe in that courts will still have to deal with the difficulty inherent in the interpretation and extension (or limitation) of existing rules, which is necessary, when the common law is developed, to give effect to the objective normative value system embodied in the Constitution.¹³⁷

The South Africa Law Reform Commission (SALRC) states, with regards to the courts interactive role when developing the common law that it is not only about achieving legal certainty but also adapting to ever-changing and new circumstances in society.¹³⁸ The SALRC stated that public policy within a South African context is more sensitive to justice, fairness and equity than ever before.¹³⁹

¹³³ Van der Merwe (2007) 322. It is stated in *Knox D'Arcy v Shaw* 1996 (2) SA 651 (W) 660 D at 658 "there should be no principle that can trump a person's choice and interfere with the private affairs of the contracting parties. However, the Constitution indirectly protects persons against rash decisions that lead to the violation of a person's constitutional rights."

¹³⁴ Cf *Carmichele v Minister of Safety and Security and another (Center for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 38.

¹³⁵ See s 39(2) of the Constitution: When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Van der Merwe (2007) 18, 134-135. Case law where the court was obliged to develop the common law includes *K v Minister of Safety & Security* 2005 (6) SA 419 (CC) 429, *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) 376.

¹³⁶ Cf the Constitution 1996.

¹³⁷ *Ibid.*

¹³⁸ South African Law Commission Discussion Paper 65 Project 47 "Unreasonable Stipulations in Contracts and the Rectification of Contracts" (1996) 22-23 and 30; an example of the development of common law was seen in *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) 720-723; the court recognised an independent ground for rescission of a contract namely, commercial bribery. Also see Van der Merwe (2007) 103 and 130.

¹³⁹ *Ibid.*

The court decides what public policy, freedom of contract, equality and reasonableness require in particular circumstances. Sachs J describes the nature of the law of contract perfectly:

“The very foundation of contract law was to create certainty, to protect the expectations of the parties, to secure to each the bargain made. That was why the idea of contract, based on autonomy of the will of freedom of contract, was the very basis of all commercial and financial dealings and practices.... If a court was given a review power, it meant in practical terms that the court could re-make the contract, relieve one party of his or her obligations, wholly or partly, and to that extent frustrate the legitimate expectations of the other party. One would not know, when concluding a contract, whether or not that contract was going to be re-written by a court, using as its yardstick vague terms such as “good faith”, “fairness” and “unconscionability”.¹⁴⁰

Kerr has mentioned in his in-depth discussion of the *Barkhuizen* case that the majority in this case did not refer to the known common law principles nor developed any existing principles, the majority rather only concentrated on underlying constitutional values and the facilitation of a wider field of operation of these values.¹⁴¹ One of these known common law principles was the *exceptio doli generalis*.

Sachs J suggests a principled approach for the courts’ interactive role while applying the underlying principles in the law of contract. The principled approach is based on the utilisation of “objective criteria with reference to both deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society.”¹⁴²

The CPA has been operational since 31 March 2011. The question arises whether the courts are equipped to interpret concepts as mentioned in the Act such as “unconscionability, unethical, improper, shock the conscience of a reasonable person” to administer justice effectively within a normative framework whilst protecting autonomy and the freedom of

¹⁴⁰ *Barkhuizen v Napier* 171; the term “unconscionability” is used in the Consumer Protection Act as addressed in Chapter 4 of this dissertation.

¹⁴¹ Kerr 2008 (125) *SALJ* 241 at 246.

¹⁴² *Ibid* 146 and 183.

contract.¹⁴³ Or one may enquire whether the courts will re-define the common law where deem fit under the pretext of the CPA.

Chapter 3 digs into the past to discuss a particular defence to the plaintiff's claim, the *exceptio doli generalis* and whether the defence can still be of use in the light of the relevant provisions of the CPA. The importance of particular circumstances after a contract was entered into brings new dimensions to the question of enforceability of the agreement.

¹⁴³ Chap 1, s 1 of the CPA 68 of 2008.

CHAPTER 3

THE *EXCEPTIO DOLI GENERALIS*

The *exceptio doli generalis* was known to be a controversial Roman principle utilised by many South African courts during 1900 – 1980's.¹⁴⁴ At one point during the development of South African law it seemed as if the courts were prepared to accept the application of the *exceptio doli* within a defined framework in the law of contract.¹⁴⁵ However that idea was crushed after the majority judgment in the *Bank of Lisbon and South Africa Ltd v De Ornelas* put the concept to rest.¹⁴⁶

A brief overview of the origin and development of the *exceptio doli generalis* puts the different opinions of the judiciary and writers with regards to the application or non-application thereof in law into perspective. Once the diverse opinions have been summarised, the effects of the *exceptio doli* will be addressed within a framework of modern law in South Africa. Reference will be made to leading case law and authors on this topic.

3.1 Origin and development of the *exceptio doli generalis*

The legal system in Rome in about 380 BC was known as the *ius civile*. This system was characterised by strict adherence to formalities. A high degree of certainty was obtained during the application of the *ius civile*.¹⁴⁷ The system consisted of stringent rules and there was little space for interpretation of an individual case. It therefore often led to inequitable solutions.¹⁴⁸ After the creation of position of the chief of law, the so called *praetor*, the rigid

¹⁴⁴ Cf in the cases of *United South African Association Ltd v Cohn* 1904 TS 733; *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717; *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Estate Schickerling v Schickerling* 1936 CPD 269; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Allers v Rautenbach* 1949 (4) SA 226 (O); *Venter v Liebenberg* 1954 (3) SA 333 (K); *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T); *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T); *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (K); *Otto en 'n Ander v Heymans* 1971 (4) SA 148 (T); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977(2) SA 436 (T); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); and *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).

¹⁴⁵ Cf *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W).

¹⁴⁶ Cf 1988 (3) SA 580 (A).

¹⁴⁷ Hawthorne L, Thomas PHJ “The *exceptio doli* – *Bank of Lisbon and South Africa Ltd v De Ornelas*” 1989 (22) *De Jure* 143 referring to the judgment of Joubert J in *Bank of Lisbon* 1988 (3) SA 580 (A) 582–584.

¹⁴⁸ Hawthorne, Thomas 1989 (22) *De Jure* 143.

and formalistic Roman law soon developed into a legal system characterised by good faith, equity and informality.¹⁴⁹ A new method of litigation, the procedure *per formulam*, was introduced in 200 BC.¹⁵⁰ The *ius civile* was the only source of the Roman law until the function of the *praetor* was introduced in 367 BC.¹⁵¹ The *praetor* had the power to publish legal remedies in the form of actions and exceptions that could assist and protect the people against inequity and formalism.¹⁵² The *praetor* became the main source of law during litigation. Even though the *praetor* had the ability to introduce the principle of good faith during the negotiation phases of contracts, the *praetor* did not have the discretion to insert the principle of good faith in any *stipulatio*.¹⁵³ The *stipulatio* was known as the most important contract in Roman law.¹⁵⁴ An exception had to be expressly inserted in the contract to protect the parties against the strict formalities that could result in inequities.¹⁵⁵ This gave rise to the introduction of the *exceptio doli generalis* (hereafter *exceptio doli*) in 66BC.¹⁵⁶ The *exceptio doli* could be raised against a contractual claim, and this ultimately led to the incorporation of the requirements of good faith in the *stipulatio*.¹⁵⁷ Although the *exceptio doli* was created by the praetor Aquilius Gallus, it was formulated by Gaius.¹⁵⁸

The *exceptio doli* was utilised as an equitable defence that allowed a defendant to resist a claim for performance under a contract when there was something unconscionable about the plaintiff's seeking to enforce the contract (or a clause thereof) in the specific circumstances of that case.¹⁵⁹ The *exceptio doli* had the effect that a claim could be defeated if the plaintiff had

¹⁴⁹ *Ibid.* The population of Rome grew and people became more sophisticated. Roman law developed during these phases; See Schermaier MJ "Bona fides in Roman contract law" in Zimmermann R & S Whittaker S (eds) *Good faith in European contract law* (2000) 65. The introduction of the office of the praetor reflected the increasingly transforming Roman thought concerning law. Through the office of the praetor equity based approach started to develop and this was gradually incorporated into the law.

¹⁵⁰ *Ibid.* 144.

¹⁵¹ *Ibid.* 145.

¹⁵² *Ibid.*

¹⁵³ *Ibid.* Also see Van Warmelo P "Exceptio Doli" 1981 (1) *De Jure* 203 at 211.

¹⁵⁴ Hawthorne, Thomas 1989 *De Jure* 143.

¹⁵⁵ Van Warmelo 1981 (1) *De Jure* 213.

¹⁵⁶ Van der Merwe (2007) 317.

¹⁵⁷ *Ibid.*; also see Zimmermann (1996) 218; Barnard AJ "A critical legal argument for contractual justice in the South African Law of Contract" (2006) <http://upetd.up.ac.za/thesis/available/etd-06192006-083839/unrestricted/00front.pdf>; Barnard explains the concept of equity was received in Roman law of contract as the law developed into a sophisticated legal system. He states that this was achieved through the incorporation of, the *exceptio doli generalis* applicable to contracts from the strict law.

¹⁵⁸ Viljoen F "The Exceptio doli – Its origin and application in South African law" 1981 *De Rebus* 173, Viljoen refers to the *Institutes* 4.119 and Van Oven *Leerboek van Romeinsch Privaatrecht* 3 ed (1948) 93.

¹⁵⁹ *Zuurbekom Ltd v Union Corporation Ltd* 535; Glover G "Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?" 2007 (124) *SALJ* 449-450. In Van der Merwe (2007) 317; Zimmermann (1996) 218; the *exceptio doli* would be available to the defendant if the plaintiff acted *mala fide* or in other words acted

acted contrary to the requirements of good faith at the moment the contract was entered into, or at the moment of enforcing the action.¹⁶⁰

3.2 The *exceptio doli generalis* as a substantive defence

According to Gaius the advantages of the effect of *exceptio doli* were twofold.¹⁶¹ The *exceptio doli* could be raised as an exception to *dolus* at two different stages, namely as an exception to *dolus* which had already occurred and to *dolus* occurring at the moment of *litis contestatio*.¹⁶²

In *Weinerlein v Goch Buildings Ltd*¹⁶³ Wessels JA described the role of the *exceptio doli* as follows:

“It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances, it would be inequitable, dates back to remote antiquity.”¹⁶⁴

According to Van der Merwe, Lubbe and Van Huyssteen the *exceptio doli* eventually became an instrument to ameliorate the strictness of the civil law by introducing more equitable principles through praetorian law.¹⁶⁵ They further submit that these equitable principles had been borne into our law by way of Roman law.¹⁶⁶ It seemed as if the South African courts

against the requirements of good faith during the contracting phase. In terms of the *exceptio* a contractant who was faced with an action on the contract was allowed to raise in defence any facts, which could not be entertained in terms of the strict civil law.

¹⁶⁰ Hawthorne, Thomas 1989 (22) *De Jure* 145.

¹⁶¹ Viljoen 1981 *De Rebus* 173. Viljoen refers to *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 438 per Coetzee J.

¹⁶² Viljoen 1981 *De Rebus* 173.

¹⁶³ 1925 AD 282.

¹⁶⁴ *Ibid* 285, 290-292. Wessels JA states the *exceptio* can be applied in cases where the enforcement of a remedy would amount to unconscionable conduct. See Viljoen 1981 *De Rebus* 173, Viljoen describes the *exceptio doli* as a general equitable defence and refers to *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 438 per Coetzee J: The *exceptio doli* operated as a “kind of general reserve clause which, without specifying the defence”, and thus enabling the defendant to state relevant facts that “will secure his acquittal.”

¹⁶⁵ Van der Merwe SWJ, Lubbe GF and Van Huyssteen LF “The *exceptio doli generalis*: Requiescat in Pace – vivat aequitas” 1989 (106) *SALJ* 235 at 237; stated in *Bank of Lisbon and South Africa v De Ornelas* at 599; Hawthorne, Thomas 1989 (22) *De Jure* 148.

¹⁶⁶ A similar viewpoint is reiterated by Hawthorne, Thomas 1989 (22) *De Jure* 150.

were prepared to accept that the *exceptio doli* could be beneficial if applied as an instrument of equity.¹⁶⁷

Tindall JA was prepared to apply the *exceptio doli* if needed in particular circumstances as an instrument of equity.¹⁶⁸ In *Zuurbekom Ltd v Union Corporation Ltd* Tindall argued that the *exceptio doli* may only be applied if the enforcement of a right would result in great inequity and the plaintiff's conduct would amount to unconscionable conduct.¹⁶⁹

Some authors such as Viljoen, Van der Merwe and Lubbe agree that the application of the *exceptio doli* might provide an equitable result if no other remedies are suitable in particular circumstances, yet that the exact limits and nature of the *exceptio doli* remain difficult to determine.¹⁷⁰

Jansen J tried to determine whether the *exceptio doli* could be applied as a substantive defence distinct from other remedies or legal principles. He held in *North Vaal Mineral Co Ltd v Lovasz*¹⁷¹ that it was necessary to define the limits and operational criteria in order to be able to raise the *exceptio doli* as an independent, substantive defence. Sohm's Institutes concedes that the *exceptio doli* was inserted to empower a judge to consider any fact within the circumstances that would amount to a substantial inequitable result for the defendant if the applicant's action would succeed.¹⁷²

A similar viewpoint was reiterated by the majority in *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd*.¹⁷³ The *exceptio doli* can function within well-known and defined limits however in their opinion it can not be operational as a distinct defence, this is the

¹⁶⁷ *Ibid* 237. See *Weinerlein v Goch Buildings Ltd* 282; *Zuurbekom Ltd v Union Corporation Ltd* 514; *Paddock Motors (Pty) Ltd v Igesund* 16, *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A). It is not certain whether the *exceptio doli* formed part of Roman-Dutch law. There are different views, see for example Aronstam PJ "Unconscionable contracts" 1979 (2) *THRHR* 21-31 where he states that no reference to the *exceptio doli* can be found by Roman-Dutch writers such as Van Leeuwen, Van der Linden and Van der Keessel. However, he submits that the defence was implied by good faith and "that the *exceptio* was an element or part of the requirements of good faith" and thus became part of Roman-Dutch law impliedly. See Coetzee J in *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 437-438. Coetzee argues that the *exceptio* did not form part of Roman-Dutch law. He states that by the time of Justinian the *exceptio* had served its purpose and the use of it became redundant.

¹⁶⁸ *Cf* *Zuurbekom Ltd v Union Corporation Ltd*.

¹⁶⁹ *Ibid* 535,537; also see Van Warmelo 1981 (1) *De Jure* 208.

¹⁷⁰ Viljoen 1981 *De Rebus* 173. Also see Tindall AJ in *Zuurbekom Ltd v Union Corporation Ltd* 535 who states that he is not certain what the exact limits of the defence are.

¹⁷¹ 1961 (3) SA 604 (T) 607. *Zuurbekom Ltd v Union Corporation Ltd* 537.

¹⁷² Quoted in the *North Vaal Mineral* case 607-608.

¹⁷³ 1962(3) SA 399 (T).

correct point of view in my opinion. They declare that the *exceptio doli* should be applied within known barriers namely within the limitations of fraud, misrepresentation or mistake justifying rescission or rectification.¹⁷⁴

In *Hauptfleisch v Caledon Divisional Council*¹⁷⁵ Corbett AJ argued that the *exceptio doli* could be applied at a stage where conduct of a party would amount to unconscionable conduct or result in great inequity.¹⁷⁶

The court in *Otto v Heymans* again tried to define the grounds of application but went a little further and stated that judges must be able to exercise their discretion in determining whether the *exceptio doli* may be applied or not.¹⁷⁷ The court must be able to apply the *exceptio doli* as a remedy if the court can prevent an inequitable result in particular circumstances where fraud is not a requisite or element of the conduct.¹⁷⁸ Even if the *exceptio doli* is not a clear defined legal concept it must be available to the defendant in these peculiar circumstances where no other remedy is suitable to prevent an inequitable result.¹⁷⁹

Subsequently in *Paddock Motors (Pty) Ltd v Igesund*¹⁸⁰ Jansen JA explained that uncertainty and skepticism exists in respect of seeing the *exceptio doli* as a separate substantive legal concept in modern law. The precise limits of the application thereof have remained ambiguous.¹⁸¹ Whilst judges do not agree on the scope of application or even the existence of the *exceptio doli* in South African law the *exceptio doli* had often been raised in case law and assumed to be available to a litigant.¹⁸²

¹⁷⁴ *Ibid* 409.

¹⁷⁵ 1963 (4) SA 53 (C).

¹⁷⁶ *Ibid* 60-61. See Viljoen 1981 *De Rebus* 174 where he refers to the *Hauptfleisch* case and states that the scope of application of the *exceptio doli* still remains wide if seen in this context.

¹⁷⁷ *Cf Otto v Heymans* 1971 (4) SA 148 (T). Also see Fannin J in *Rashid v Durban City Council* 1975(3) SA 920 (D) who confirms that the precise limits of the *exceptio* have never been authoritatively stated.

¹⁷⁸ *Otto v Heymans* 155.

¹⁷⁹ *Ibid*. Tindall AJ confirms this in *Zuurbekom Ltd v Union Corporation Ltd* 536 where he states that the *exceptio doli* empowers a judge to take account of circumstances that may lead to an unjust outcome and enables the judge to prevent this from happening.

¹⁸⁰ 1976 (3) SA 16 (A).

¹⁸¹ *Ibid* 27. See *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) where Colman J accepted a remedy, such as a defence named the *exceptio doli*, however one has to define the grounds of application thereof; Colman J stated that the remedy can be available if the enforcement of one of the litigants' rights might lead to an inequitable result. Also see Viljoen 1981 *De Rebus* 173.

¹⁸² *Ibid*. See *Zuurbekom Ltd v Union Corporation Ltd* 535-537, *Senekal v Home sites (Pty) Ltd* 1950 (1) SA 139 (W), *Barkhuizen v Jackson* 1957 (3) SA 57 (T), *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T), *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C), *Kruger v Pizzicanella* 1966 (1) SA 450 (C), *Da Mata v Otto* 1971 (1) SA 763 (T), *Otto v Heymans* 1971 (4) SA 148 (T) 155E, *Chesterfield*

Botha J once again confirmed the possibility of raising the *exceptio doli* as an acceptable defense in *Rand Bank Ltd v Rubinstein*.¹⁸³ Botha conceded that the judicial function of judges often includes areas of relative uncertainty, which necessarily requires judges to form moral judgments without being assisted by precise guidelines.¹⁸⁴ The application of broad considerations of fairness and justice is almost an everyday occurrence in a court of law.¹⁸⁵

3.3 The *exceptio doli generalis* must be put to rest

Many authors question the relevance and utility of the *exceptio doli* in South African law.¹⁸⁶ Others mention that the *exceptio doli* was never borne into South African law.¹⁸⁷

According to Glover the relevance of the *exceptio* was questioned mainly because of two reasons.¹⁸⁸ Firstly, the defence was applicable to claims brought in terms of the Roman *ius civile*. The strict and formal procedure in terms of the civil law was ultimately abandoned, and all contracts were recognized to be contracts of good faith.¹⁸⁹ According to many authors

Investments (Pty) Ltd v Venter 1972 (3) SA 777 (T), *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 28D-F, *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) 214. However Coetzee J in *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977(2) SA 436 (T) states that he was bound to the decision of the full bench in *Otto v Heymans* although he does not believe that the *exceptio doli* forms part of South African law.

¹⁸³ 1981 (2) SA 207 (W) 214G-218A.

¹⁸⁴ *Ibid* 214; Viljoen 1981 *De Rebus* 174-175, where he submits that the *exceptio* forms part of our law, that it is an established defence and it is only the exact and precise limits of the *exceptio* that must be determined. He argues that the scope and field of operation of the *exceptio doli* will remain “uncertain, vague and obscure” if the court fails to attach precise limits to the operation of the *exceptio doli*. In Hawthorne, Thomas 1989 (22) *De Jure* 150 the authors held that the *exceptio doli* formed part of Roman-Dutch law and was borne into South African law; also confirmed by Aronstam PJ “Unconscionable Contracts: The South African Solution?” 1979 *THRHR* 39 and Kerr AJ “Raising the *Exceptio Doli* when a Formal Contract Has Been Varied Informally” 1971 *SALJ* 408.

¹⁸⁵ *Ibid*.

¹⁸⁶ Glover G “Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*? 2007 (124) *SALJ* 449; JC de Wet in “Estoppel by representation in die Suid-Afrikaanse reg” (1939) 89 doubts the existence of the *exceptio doli* as a substantive and distinct defence in our law; Coetzee J in *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 437 did not agree with the judgment in *Otto v Heymans* 1971 (4) SA 148 (T) where the application of the *exceptio doli* was allowed, but was bound as a single judge to the full bench decision in the *Otto v Heymans* case and had to allow the possibility of the *exceptio doli* utilised as a substantive defense in South African contract law; and North *Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T).

¹⁸⁷ Joubert JA in *Bank of Lisbon and South Africa v De Ornelas* 605; Joubert JA states that there is no evidence of the existence in Roman-Dutch law of a general substantive defence such as the *exceptio doli* based on equity.

¹⁸⁸ Glover 2007 (124) *SALJ* 450.

¹⁸⁹ *Ibid*; see fn 5.

the defence fell away.¹⁹⁰ Some writers conclude that the *exceptio doli* was never received into Roman-Dutch law, and therefore could not form part of South African law.¹⁹¹

Secondly, Glover states that the *exceptio* was criticized for being a “wide” articulated defence.¹⁹² This wide articulated defence was in contrast with the “classical individualist approach” regarding the law of contract, namely the approach where courts ought not to interfere in the interpretation process of contracts to settle disputes concerning the fairness and equity of contractual terms agreed to by the parties.¹⁹³

Another opinion associated with the second reason why the relevance of the *exceptio doli* was questioned by authorities, is the fact that well-defined (“crystallized”) remedies could provide the same equitable result.¹⁹⁴ There are numerous remedies available to protect parties from unconscionable conduct such as duress, undue influence, fraud, rectification or estoppel.¹⁹⁵ As put by Zimmermann the *exceptio doli* can only be a distinctive principle if it is possible to apply it without reference to associated principles such as estoppel, error, fraud and duress.¹⁹⁶

Therefore according to certain authorities the *exceptio doli* is an “empty shell” and serve no purpose in modern law.¹⁹⁷

¹⁹⁰ *Ibid*; Joubert JA in *Bank of Lisbon and South Africa v De Ornelas* 605; Joubert JA states that the Dutch courts administered the law without the need for a separate system of equity. He held that the Dutch law system is inherently an equitable legal system. Also confirmed by Zimmermann (1996) 218. In the *Bank of Lisbon and South Africa* case at 606-610 Joubert JA states that equity remains subject to the principles of law and cannot override the clear rule of law in Dutch courts. Therefore it is clear according to Joubert JA that the concept of bona fides did not provide the Dutch courts with basis for an equitable defence such as the *exceptio doli*.

¹⁹¹ Glover 2007 (124) SALJ 450; Van Warmelo P “*Exceptio doli*” 1981 (1) *De Jure* 203 at 206 refers to Coetzee J in *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 437 Coetzee J believes that the *exceptio doli* was not part of Roman-Dutch law and states “in a fully developed system of law such an instrument (*exceptio doli*)...is a superfluous anachronism.”

¹⁹² Glover 2007 (124) SALJ 450. Dowling J in *Senekal v Home Sites (Pty) Ltd and Another* 153 states that the “principle underlying the *exceptio doli* is very wide” and therefore it can be applied to different sets of facts in various circumstances.

¹⁹³ *Ibid*.

¹⁹⁴ Van Warmelo 1981 (1) *De Jure* 206-207.

¹⁹⁵ *Ibid*. Colman J in *Novick and Another v Comair Holdings Ltd and Others* advocates at 156 “all situations which were originally covered by the *exceptio doli* have not been recognised and covered by specific remedies with their own names and well defined limits.” See in general on these points Olivier PJJ “Aanspreeklikheid weens onskuldige wanvoorstelling by kontraksluiting” 1964 (1) *THRHR* 20 at 26-28; also associated with this topic Van der Merwe, Lubbe and Van Huyssteen 1989 (106) SALJ 235.

¹⁹⁶ Zimmermann (1996) 233; Zimmermann advocates “estoppel, the defence of rectification and misrepresentation cover much of the ground claimed by the *exceptio doli*.” There are new sub-doctrines to which the exception gives birth, and subsequently the range of application of the exception then is being reduced.

¹⁹⁷ *Cf Novick and Another v Comair Holdings Ltd and Others* 1979 (2) SA 116 (W).

The decision of the Appellate Division in *Bank of Lisbon and South Africa v De Ornelas* added to the controversy among legal academics. The majority held that it was time to put the *exceptio doli* to rest.¹⁹⁸ The *Bank of Lisbon* case is an encounter of two conflicting principles, namely equity and certainty.¹⁹⁹

The facts, briefly, that gave rise to much anticipated academic debate, were as follows. The De Ornelas brothers (respondents) obtained overdraft facilities from the Bank of Lisbon (appellant). The appellant was in possession of a negotiable certificate of deposit, mortgage bonds and deeds of suretyship of the respondents as security for money lent to them for the overdraft facilities.²⁰⁰ The respondents closed the account at the bank after they discharged their debt. They further cancelled the securities and requested return of the negotiable certificates.²⁰¹

The appellant held that the respondents' company were obligated to "forward purchase of dollars" as stipulated in the contract. The appellant refused to return any securities based on the fact that the respondents unlawfully repudiated the contract and as a result the Bank suffered damages.²⁰²

The court a quo upheld the application for return of securities and the cancellation of the mortgage bonds in favour of the respondents. The Bank appealed. The respondents declared that the appellant's appeal should be dismissed because the appellant's conduct amounted to *dolus generalis*.

The question addressed by the Appellate Division in the case was whether the *exceptio doli generalis* was applicable in South African law to written contracts. Rabie ACJ, Joubert JA, Hefer JA and Grosskopf JA decided that the *exceptio doli generalis* technical remedy was not part of our law.²⁰³ The court held that the scope and application of the *exceptio doli* has remained uncertain. It was held by Joubert JA that the *exceptio doli* had never been received

¹⁹⁸ 1988 (3) SA 580 at 607 Joubert JA held "all things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis*"

¹⁹⁹ Hawthorne, Thomas 1989 (22) *De Jure* 143.

²⁰⁰ *Bank of Lisbon and South Africa Ltd v De Ornelas* 581.

²⁰¹ *Ibid.*

²⁰² *Ibid* 582.

²⁰³ *Ibid* 603-604; Van der Merwe (2007) 318; however in Hawthorne, Thomas 1989 (22) *De Jure* 154 the authors declare that the "only doubt that exist regarding the *exceptio doli*.... pertains to the scope and application and not to its very existence."

in Roman-Dutch law.²⁰⁴ Joubert concluded that the recognition and application of the *exceptio doli* in South African law would be without historical foundation.²⁰⁵

The court rejected previous decisions by the appellate and other divisions that might have implied that the *exceptio doli* was part of modern law.²⁰⁶ The court preferred a strict reading of the law and continued to examine the wording of the contract without challenging the plain meaning of the words.²⁰⁷ Eventually the court concluded that the suretyship established a continuing liability on the part of the respondents to purchase forward dollars. The appeal was upheld. The majority was in favour of the promotion of certainty in the law of contract.

Jansen JA in his minority judgment, however, was in favour of equity. He held that the *exceptio doli* should form part of our law.²⁰⁸ Jansen argued that the *exceptio doli* had been recognised as a defence by many courts, based on equity.²⁰⁹ The *Bank of Lisbon* case depicted a sense of injustice. According to Jansen the company of the Ornelas brothers did not have equal bargaining power with the Bank, which then led to an unreasonable outcome.²¹⁰

3.4 Modern Law

Kerr has agreed with the opinion in favour of equity as stipulated by Jansen JA in the *Bank of Lisbon* case.²¹¹ Kerr has attempted to prove, and according to this study, proved that the *exceptio doli* or a defence similar to the *exceptio doli* can be relevant in modern law. He

²⁰⁴ *Bank of Lisbon and South Africa v De Ornelas* 592-601, 605, 609. See also fn 46.

²⁰⁵ *Ibid*; Van der Merwe SWJ, Lubbe GF, Van Huyssteen LF “The *exceptio doli generalis*: Requiescat in Pace – vivat aequitas” 1989 (106) SALJ 236.

²⁰⁶ *Ibid* 586-588 Joubert JA refers to the following case law *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Senekal v Home sites (Pty) Ltd* 1950 (1) SA 139 (W); *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T); *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C); *Kruger v Pizzicanella* 1966 (1) SA 450 (C); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) as failed attempts when utilizing the *exceptio doli* as a defence. Joubert JA advocates that in some of the cases it has been assumed (never established) that conduct which is insufficient to establish estoppel might be sufficient for the *exceptio doli*. However, the cases were not successful in proving this.

²⁰⁷ *Bank of Lisbon and South Africa v De Ornelas* 583.

²⁰⁸ *Ibid* 616 that to deny the *exceptio* right of place would leave a vacuum in our law.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid* 618.

²¹¹ Kerr AJ “The *replicatio doli* reaffirmed. The *exceptio doli* available in our law” 1991 (108) SALJ 583; *Cf* Kerr AJ “The defence of unfair conduct on the part of the plaintiff at the time action is brought: the *exceptio doli generalis* in modern law” 2008 (125) SALJ 241; also see Olivier in his minority judgment in *Eerste Nasionale Bank van Suidelike Afrika v Saayman No* 1997(4) SA 302 (SCA) 323-324 in favour of equity.

concedes that the *exceptio doli* or a similar defence should be available in the law of contract.²¹²

Kerr refers to the facts in *Van der Merwe v Meades*²¹³ and indicates that the *replicatio doli* and the *exceptio doli* are applied in similar circumstances. In *Van der Merwe v Meades* Joubert ACJ held if a contract contains a voetstoots clause and a seller deliberately withhold information regarding defects of the particular *merx* in question, the buyer will be able to apply the *replicatio doli* in his/her reply to a seller's claim and prove that the seller acted *dolo malo*.²¹⁴ If the buyer is successful in proving that the seller was aware of the defect the seller will not be able to rely on the voetstoots clause.²¹⁵

The Appellate Division in the *Bank of Lisbon* case regarded the *exceptio doli* and the *replicatio doli* as similar defences.²¹⁶ The *exceptio doli* as a substantive defence however failed in this case. Subsequently, a few years later, the Appellate Division in *Van der Merwe v Meades* held that the *replicatio doli* was available in post-classical Roman law and in Roman-Dutch law, even though a similar defence was buried over time.²¹⁷

Kerr argues that there are “inconsistent expositions of the law in two Appellate Division decisions, the later not referring to the earlier.”²¹⁸ The *Van der Merwe* case is proof that the *replicatio doli* still exists and that it survived the formulary procedure. He concludes that the majority judgment in the *Van der Merwe* case submitted that if one of the parties acted with *dolus* it would enable the innocent party to raise a defence namely the *replicatio doli* or the *exceptio doli*. According to Kerr the approach in *Van der Merwe* is correct.

The fact that South African law of contract does not recognise a general equitable jurisdiction is not disputed.²¹⁹ As mentioned in chapter 2 of this study, the presence of *bona fides* is not a separate criterion and can therefore never be applied directly in the form of a rule.²²⁰ Many authors argue that the *exceptio doli* is based on a general equitable basis. Thus through the

²¹² *Ibid.*

²¹³ 1991 (2) SA 1 (A) 4, 7-8.

²¹⁴ *Ibid* 4-5.

²¹⁵ *Ibid* 10.

²¹⁶ Kerr 1991 (108) SALJ 583; *Bank of Lisbon and South Africa Ltd v De Ornelas* 594.

²¹⁷ 1991 (2) SA 1 (A) 4, 7-8.

²¹⁸ Kerr 1991 (108) SALJ 586.

²¹⁹ Hawthorne, Thomas 1989 (22) *De Jure* 154; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 318.

²²⁰ *Ibid* 153. *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651.

direct application of the *exceptio doli* equity will suffice where needed. Hawthorne endorses the need for the *exceptio doli* to facilitate in reaching concrete equitable decisions.²²¹

If one considers the *exceptio doli* in the light of good faith it can be argued that it underlies the operation of all consensual contracts.²²² The *exceptio doli* was a convenient way for a defendant to allege improper behaviour on the side of the plaintiff. As a result of the plaintiff's improper behaviour a contract came into being and this constituted an infringement of good faith.²²³ The *exceptio doli* could have been an alternative basis for an equitable jurisdiction.²²⁴ Unfortunately the majority in the *Bank of Lisbon* case rejected the proposition that the *exceptio doli* can serve as an independent legal principle based solemnly on good faith with the ability to be applied directly in a case where a form of *dolus* exists.

The following must be borne in mind. Our contracts are said to be in accordance with the underlying principle of good faith. However good faith as criterion cannot be based on a single judge's opinion in a particular case.²²⁵ This might lead to uncertainty as illustrated by Kerr's comparison of two Appellate Division decisions. In view of this difficulty it is submitted that there might still be a need for the *exceptio doli* in the law of contract to promote justifiable outcomes in concrete equitable decisions to ultimately facilitate certainty to an acceptable extent.

Now that the *exceptio doli* was put to rest Zimmermann asks the important question whether the abolishment of this defence "entail[s] a substantive shift of approach" when implementing equitable elements in the law of contract.²²⁶ He argues that the *exceptio doli* might have been a critical device for introducing equitable elements and facilitating flexibility when judgments are formulated.²²⁷ In the evaluation of contractual rights and duties judges were able to adapt law of contract to the demands of a developing society.

²²¹ Hawthorne, Thomas 1989 (22) *De Jure* 154.

²²² Zimmermann (1996) 240.

²²³ *Ibid.* Hawthorne, Thomas 1989 (22) *De Jure* 143, 146-147 submit that the *exceptio* was founded on *bona fides* also confirmed in the adagium "exceptio doli iudiciis bonae fidei inest"; *Cf D 30 84 5; D 24 3 21, D 10 3 14 1*; substantiated by Gaius 3 137 and 155; this resulted in drastic changes in the Roman law of contract; Hawthorne and Thomas differ from the judgment of Joubert JA in the *Bank of Lisbon* case where Joubert fails to mention the foundation of the *exceptio doli* being good faith at 594-597, 598.

²²⁴ *Ibid* 254. *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 652; Van der Merwe (2007) 317-318.

²²⁵ Hawthorne, Thomas 1989 (22) *De Jure* 153.

²²⁶ Zimmermann (1996) 236.

²²⁷ *Ibid.*

Zimmermann concedes even though the *exceptio doli* has been abolished the application of *dolus* may have the same effect as the *exceptio doli* when utilised in the form of the doctrine of notice and undue influence.²²⁸

Even though Zimmermann refers to aspects similar to the *exceptio doli* when referring to *dolus*, it is submitted that the application of *dolus* does not constitute the substantive shift needed to facilitate equitable outcomes within a defined framework. The concept *dolus* is a broadly articulated term and can encompass different facets, which will not be dealt with here. Zimmermann argues that *dolus* has proved to be the best port of entry for an equitable doctrine.²²⁹ This might present its own difficulties when pursuing legal certainty among legal academics as well as the judiciary.

Zimmermann argues that the law of contract has “lost its flexibility to react to new challenges and to accommodate new problems, its potential for growth and for organic change and its openness to considerations of policy” when the *exceptio doli* was abolished.²³⁰

In the quest to promote an equitable system in the law of contract one does not necessarily have to entrust wide powers onto the courts to change the terms of a contract between private parties and ultimately give them the ability to restructure the contract in accordance with the general open-ended requirements of justice, reasonableness and fairness.

Aronstam correctly projected that legislative intervention will be necessary to enable South African courts to curb unfair contractual terms openly through direct orders.²³¹ The CPA is presumed to be this intervention that many critics have been waiting for. The CPA has introduced new dimensions to the applicability of good faith and *dolus* in the law of contract within a broad defined framework.

²²⁸ *Ibid* 237. Zimmermann refers to the doctrine of notice where a person who acquires an asset may be bound to give effect to a right which his predecessor in title had granted if he knew about his predecessor’s undertaking; he explains that parties thus strive to act *bona fide*; see case law explaining the application of the doctrine of notice; *African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd* 1982 (3) SA 893 (A) 910. On 238 Zimmermann refers to the Appellate Division of the Supreme Court in *Preller v Jordaan* 1956 (1) SA 483 (A) at 492; undue influence is a term that includes any situation where a person is influenced in an unscrupulous manner which weakens the person’s resistance and this results in the conclusion of a prejudicial transaction which he would not have entered into in normal circumstances.

²²⁹ Zimmermann (1996) 239.

²³⁰ *Ibid* 255.

²³¹ Aronstam PJ “Unconscionable contracts: The South African solution?” 1979 (42) *THRHR* 21; Van der Walt CFC argues in “Kontrakte en beheer oor kontrakteervryheid in ‘n nuwe Suid-Afrika” 1991 (54) *THRHR* 367; if the proposal of statutory provisions to which the courts may either declare invalid or modify any contract or any clause within a contract, in the light of all the circumstances, if it does not conform to the standard of good faith, is to be adopted the judgment in the *Bank of Lisbon* case will be overruled; a similar viewpoint is reiterated by Barnard AJ “A different way of saying: On stories, Text, a Critical Legal Argument for Contractual Justice and the Ethical element of Contract in South Africa” (2005) 21 *SAJHR* 278 at 281.

With that borne in mind, it is submitted that there are other points of departure when evaluating modern law after the *exceptio doli* has been put to rest, namely the concept public interest.²³² Public interest requires the courts to refuse the enforcement of a contract that would have resulted in an unreasonable promotion of one person's interest at the expense of another.²³³

It is possible to allow the principle of public interest to evolve over time. Public interest is considered to be a dynamic concept, which reflects a developing and changing society.²³⁴ The concept can therefore adapt to these changing times where needed.²³⁵

Now when considering these broad defined concepts that have most certainly played an underlying role in the law of contract in the past and still do today, it seems that legal certainty has not been the only goal to pursue in modern law.

Hawthorne and Thomas mention that there is a difference between the law as it is and the law how it should be.²³⁶ Finding what the law should be in particular circumstances remains a part of the judiciary's task. A judge should strive to find an equitable decision guided by principles such as equity, good faith and public interest.²³⁷ However, Hawthorne claims that these guiding principles often conflict with another principle of the law of contract, namely certainty.²³⁸

In the 1940's Aquilius identified the tendency for equitable jurisdiction to suffice in legal rules in early development stages in law.²³⁹ However, the duty of the court to make value judgments based on their personal convictions of public interest and their prejudices in society has contributed to the legal uncertainty.²⁴⁰ Judges have never been allowed to ignore the rule of law. As recognised above, in numerous circumstances there will not always be a

²³² Zimmermann (1996) 258; in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) Rabie CJ concedes agreements in restraint of trade cannot be regarded as *prima facie* void; the restraint will be declared void if the enforcement thereof will be against public interest.

²³³ *Ibid* 259-260; in *Magna Alloys* the following is summarized at 897; public interest is an essential factor in determining the legality of contracts and therefore contracts are declared illegal if it is against public interest.

²³⁴ *Magna Alloys and Research (SA) (Pty) Ltd* 891.

²³⁵ Confirmed by *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

²³⁶ Hawthorne, Thomas 1989 (22) *De Jure* 143.

²³⁷ Zimmermann (1996) 219.

²³⁸ See fn 199.

²³⁹ Aquilius "Immorality and Illegality in Contract" 1941 *SALJ* 337 at 339; Zimmermann (1996) 234 held that the policy behind stringent formulation is obviously an attempt of the courts to preserve legal certainty.

However Zimmermann mentions that lenient formulations have come about in modern law.

²⁴⁰ *Ibid* 337-339.

rule to follow.²⁴¹ Logically this will result in a need for judicial discretion to address potential injustices in the law of contract.²⁴²

After evaluating different case law it seems that courts do not want to attach specific meanings to concepts such as “unjust, inequitable or unconscionable.” This might also be the reason why the *exceptio doli* was put to rest rather than to explore the possibilities of application.

It is submitted that authorities often make more of the *exceptio doli* than what it in fact was.²⁴³ Some authors argue that the *exceptio doli* can be the answer to cases where no other remedy can provide an equitable outcome and thus it can be successfully raised where a judge’s opinion allows it.

The *exceptio doli* was an appropriate defense if actual fraud could not be proved but where unfair conduct on the part of the plaintiff was present. The general defence was based on the plaintiff’s *mala fides*.²⁴⁴

The *exceptio doli*, in accordance with the view of this study, could have been a suitable defence if defined within a proper framework. However as confirmed by the opinions of legal academics no exact framework has even been identified. A similar phenomenon has been introduced by the provisions of the CPA.

²⁴¹ Barnard AJ “A critical legal argument for contractual justice in the South African Law of Contract” (2006) chapter 118 <http://upetd.up.ac.za/thesis/available/etd-06192006-083839/unrestricted/00front.pdf>; Barnard explains that during the nineteenth century claims of certainty found in a subjectivist theory of contract appeared to be false “because aspiration to an objective will theory of contract made each and every contract unique. Law of contract could be made unique between the parties involved therefore it was pervasively uncertain rules.” Certainty in law of contract has been an idealistic thought rather than reality.

²⁴² Aquilius 1941 *SALJ* 343.

²⁴³ Lambiris MA “The *exceptio doli generalis*: an obituary” 1988 (105) *SALJ* 646; Lambiris concedes that “there is no authority in Roman or Roman Dutch law for the proposition that an *exceptio doli generalis* was available whenever it appeared that to enforce the performance of a legal obligation was “unconscionable” or contrary to generalized notions of good faith and fair dealing.”

²⁴⁴ *Ibid* 646; Lambiris explains that the *exceptio doli* was utilised in specified circumstances; namely “where the general *exceptio* included those where an owner had sold and delivered property to the buyer from whom he later sought to vindicate or when a person suing to recover property had failed to compensate the possessor for improvements made, or when litigation was initiated in contravention of an agreement not to sue.”

South African law of contract seemed to have acquired a new dimension in which policy and other external criteria determine the decisions of the courts. Chapter 4 subsequently deals with the particular sections of the CPA that can be compared to the effect of the *exceptio doli*.

CHAPTER 4

THE CONSUMER PROTECTION ACT

The *exceptio doli generalis*, when raised as a defense, offered protection for consumers in circumstances where it appeared that no remedy would provide a similar equitable outcome. This type of defence was available at a specific time, namely when a plaintiff seeks to enforce legal action in circumstances that are unconscionable the defendant may raise these circumstances as a defence to the action of enforcement.²⁴⁵ However many legal academics have suggested that notions such as good faith and equity should rather be enforceable as a defence to ensure that contracting parties' obligations are met.

Even though defence mechanisms had been identified in different forms there was no exact application framework and the courts continued to avoid the application thereof as it might have resulted in uncertainty among divisions of the court. Unfortunately factors such as unequal bargaining power and the use of standard-form contracts have resulted in unfair terms being imposed on a contracting party. Courts continued to serve justice in a manner that seemed to be fair and equitable in a developing society. However conflicting judgments frequently appeared among divisions of the courts.²⁴⁶

This chapter briefly explains what the law had been before legislative measures were implemented focussing specifically on consumer protection and the application of the *exceptio doli generalis* within a pre-Constitution and post-Constitution framework respectively.

Subsequently an overview of particular sections of the CPA will be given to illustrate similarities between these sections and the *exceptio doli generalis*. The CPA extends common law principles' original functions in order to allow utmost protection to consumers in any given circumstance. The discretionary power of the court was limited during the pre-

²⁴⁵ Lambiris MA "The *exceptio doli generalis*: an obituary" 1988 (105) *SALJ* 644.

²⁴⁶ Barnard AJ (2006) online doctoral thesis page 14; Barnard explains that courts insist on justice, fairness and good faith. Courts fear the naturalistic side of the law because it is associated with "uncertainty, fear of how it will ultimately show the falsity of positivistic certainty, fear of commitment to justice, fear that it will transpire that contract doctrine can never live up to its promise to bridge the source of our deepest anxiety, the chasm between self and other."

legislation period. Now after legislative measures have been implemented the courts have unlimited power to protect the interest of the consumer against all odds.

4.1 Pre-legislation period

Lambiris has held, purely considered from a practical perspective, that the *exceptio doli* cannot be utilised in modern law.²⁴⁷ If the *exceptio doli* were to be raised in modern law there would be technical difficulties regarding the process of pleadings in the law of contract. Lambiris explains that one does not rely on the existence of particular technical exceptions but parties rather plead facts relied on directly.²⁴⁸ If one considers the development of Roman law, formal technicalities have been transformed into a generalised legal basis of equity.²⁴⁹ However, as will be illustrated below, South African modern law is not constrained by the limits of the development of Roman and Roman-Dutch law. Lambiris expressed our liberty to extend the availability of the *exceptio doli* if there is a need to do so.²⁵⁰

In particular circumstances the court must have a discretionary power to refuse the plaintiff's action against a defendant if the result would seem unconscionable.²⁵¹ This power afforded to the court is not the same thing as allowing a general defence to any defendant "who can allege and prove that the enforcement of valid legal obligations operates harshly or unconscionable on him" according to Lambiris.²⁵² It is important to differentiate between the availability of a defence such as the *exceptio doli* and the power of the court to ensure that justice is served in a particular circumstance.

²⁴⁷ Lambiris 1988 (105) *SALJ* 645; also see Lewis C "The demise of the *exceptio doli*: is there another route to contractual equity?" 1990 (107) *SALJ* 26, 41; Lewis argues that there is no place for the *exceptio doli* in modern law; she highlights the following important points: "we must focus on the inadequacies of the law rather than counting heads to determine whether there is ancient authority for a particular principle that has actually been invoke in recent times." Lewis admits that even though the *exceptio doli* formed part of our law, South African law has developed since then. It is time to focus on the "inadequacies" of modern law.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* 647.

²⁵¹ *Ibid* 649.

²⁵² *Ibid.* According to Lambiris the majority decision in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) appears to be correct.

There has never been a defence in our law that can be raised on the general grounds of unconscionability or inequity.²⁵³ It is submitted that the effect of the good faith has been overstated for a long time. The concept of good faith regulates contractual relationships.²⁵⁴ However rules, derived from the concept of good faith, govern contractual obligations. If obligations are not met, rules can be applied to ensure that these obligations are enforced. Specific defences such as fraud, misrepresentation and error are available and specifically recognised in the common law.

Accordingly Lambiris concedes that the *exceptio doli* was originally available not on the “basis of a generalised notion of equity overriding valid legal obligations, but on the existence of *mala fides* on the plaintiff’s part” in attempting to enforce legal rights in specific situations.²⁵⁵

This statement is important to establish whether the *exceptio doli* has been codified as a general defence in the Consumer Protection Act in its original form. According to many legal academics the *exceptio doli* was not the only defence available to address *mala fides* on the plaintiff’s part.²⁵⁶

Lewis questions whether there exists another route to an equitable decision where the *exceptio doli* had previously been applied.²⁵⁷ She explains that the basic principles of law of contract have been forgotten. Lewis suggests that the true intentions of the parties must be determined.²⁵⁸ According to Lewis the “actual intention” of the contracting parties is often disregarded.²⁵⁹ Clearly, Lewis supports a purposive reading of a contract. She claims that

²⁵³ *Ibid* 649; cf *Bank of Lisbon and South Africa Ltd v De Ornelas*; Lewis 1990 (107) *SALJ* 32, 34.

²⁵⁴ *Ibid* 650; Lambiris argues that “it is not the same thing to suggest that the notion of good faith underlies contractual relationships to the extent that, whatever the parties may actually agree, the resultant obligations are enforceable only if they do not contravene general notions of good faith.”

²⁵⁵ Lambiris 1988 (105) *SALJ* 649; Lewis 1990 (107) *SALJ* 32-33; Fannin J in *Rashid v Durban City Council* 1975 (3) SA 920 (D) 927 held that “there was no proof by counsel – where it is has been held that the *exceptio doli* can successfully be pleaded merely because one party to a contract has exercised, as against the other party, a right conferred upon him by that contract. To do that would be to exercise a jurisdiction to regulate contractual relationships merely on the ground that the court considered that one party had driven a hard, harsh bargain.” This was confirmed in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 27-28 by Jansen JA where he argues that “the *exceptio doli* can be a defence however it does not entail a general principle that equity can override substantive law. There is no authority that the *exceptio doli* to be employed to alter the terms of the true agreement validly entered into between parties.”

²⁵⁶ See for example Zimmermann (1996) 233; Lambiris 1988 (105) *SALJ* 649; Van Warmelo P “*Exceptio doli*” 1981 *De Jure* 203.

²⁵⁷ Lewis 1990 (107) *SALJ* 30.

²⁵⁸ *Ibid* 33.

²⁵⁹ *Ibid*.

language must be understood within the four corners of the contract.²⁶⁰ However facts that may be helpful for the courts' interpretation of the contract can be supported by evidence not necessarily found within the contract in question.²⁶¹ The courts often rely on other concepts, such as general notions of good faith or public interest, to ensure that equitable judgments are made. Lewis suggests that equity can be achieved through a change in the way contracts are interpreted by the courts.²⁶²

It is submitted that the *exceptio doli* has served a particular purpose in ancient times. Courts were empowered to decide whether the enforceability of a contract would be apposite within particular circumstances or to the detriment of the defendant. Words such as “unconscionable”, “unfair” and “unjust” were often used to describe these types of circumstances. However definite meanings have not been attached to these words.²⁶³

When proposed changes and developments in law are implemented, the basic principles that characterise our law must not be ignored. The freedom of contracting parties to negotiate their own terms will not survive if they are made subject to general overriding considerations of what is equitable or fair.²⁶⁴ Therefore legal developments must always be consistent with basic principles if a legal system is to remain “coherent and logical.”²⁶⁵

To deliver a judgment where no precedent can provide guidance remains a difficult task that the judiciary must bear.²⁶⁶ This must be borne in mind when one criticizes the various opinions of the bench. The judiciary must also be praised for developing the law of contract into a dynamic field of law, which is adaptable to the constant changes in society. Courts are

²⁶⁰ *Ibid* 36.

²⁶¹ *Ibid* 36-37.

²⁶² *Ibid*. Lewis also refers to other jurisdictions such as England and America to substantiate her point of view. Lewis argues that “we must recognize that the literal approach to interpretation (of language in contracts) needs to be modified, at least to allow evidence of surrounding circumstances where the words in issue are apparently clear and unambiguous. This change would not only avoid the inequity that has arisen in cases like *Bank of Lisbon* but would be following trends in England and America.”

²⁶³ Sharrock RD “Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act” 2010 (22) *SA Merc LJ* 295 at 298; Courts have been unwilling to intervene with the private affairs of contracting parties; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) was an important decision in which the courts have struck down contract terms on the ground of substantive unfairness.

²⁶⁴ *Lambiris* 1988 (105) *SALJ* 645; the freedom of parties to negotiate their own terms is also known as *pacta servanda sunt*.

²⁶⁵ *Ibid*. Also see Joubert JA in *Bank of Lisbon and South Africa v De Ornelas* 606 where he explains that the “Dutch courts paid due regard to considerations of equity but only where equity was not inconsistent with the principles of law. Equity could not override a clear rule of law.”

²⁶⁶ *Cf* Van Warmelo 1981 *De Jure* 203.

obliged to take policy considerations and values into account when dealing with unfair contract terms.²⁶⁷ There have been concerns regarding the role of the court as well as the role of legislative intervention when determining unfair contract terms.²⁶⁸ Van der Walt suggested that legislation could be implemented to offer guidance to courts, when judgments must be made on the so-called grey areas of the law. Contractual justice will only be accomplished if there is harmony amongst the interests of the contracting parties.²⁶⁹ Certain rights had to be secured for consumers in South Africa with a large population of disadvantaged and semi-literate, illiterate consumers. McQuoid-Mason held the opinion that consumers in South Africa were being “short-changed concerning their rights to safety, honesty, fair agreements, knowledge, choice, privacy and a hearing.”²⁷⁰

Clearly, there had to be a radical reassessment of consumer protection law. The Constitution was adopted in 1995 and basic human rights were afforded to everyone, but unfortunately did not introduce specific consumer protection law provisions.²⁷¹ Thus consumer protection still has a long way to go. Consumer protection measures that existed before 2008 were out-dated and fragmented.²⁷²

The role of the Constitution introduced new beginnings for a transformative approach whilst interpreting law in South Africa. It became a necessity to consider the social context within which rules had to be applied.²⁷³ The court has a duty in terms of the Constitution to

²⁶⁷ Van der Walt CFC “Beheer oor onbillike kontrakbedinge – *quo vadis* vanaf 15 Mei 1999?” 2000 (1) *TSAR* 33.

²⁶⁸ Van der Walt 2000 (1) *TSAR* 34.

²⁶⁹ *Ibid.* Also see Selznick P “The ideal of a communitarian morality” (1987) 75 *California LR* 445 at 451; “Man as a social being depends on others for psychological sustenance, including the formation of personality. The morality of the implicated self builds on the understanding that our obligations (including our obligations of a contractual nature) flow from our identity (influenced from our experiences in society) and our relatedness with that society, rather than from consent or more importantly for current purposes from consensus.”

²⁷⁰ McQuoid-Mason DJ “Consumer law: the need for reform (continued)” 1989 (52) *THRHR* 243.

²⁷¹ Sutherland PJ “Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) – Part 2” 2009 (1) *Stell LR* 72; Sutherland submits the following: “given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not loomed as large in this country as it has in other parts of the industrialised world. Yet just as the best should not be the enemy of the good, so the worst should not be the friend of the bad. As our society normalises itself, issues that were once relatively submerged now surface to claim full attention. In this way achievement of the larger constitutional freedoms enables us to attend to and develop the smaller freedoms so necessary for enabling ordinary people to live dignified lives in an open and democratic society.”

²⁷² McQuoid-Mason 1989 (52) *THRHR* 228; Sharrock 2010 (22) *SA Merc LJ* 296; Legislative control of unfair contract terms in SA was limited to statutory provisions invalidating or requiring specific terms in certain kinds of contract.

²⁷³ Barnard AJ “A critical legal argument for contractual justice in the South African Law of Contract” (2006) chapter 118 <http://upetd.up.ac.za/thesis/available/etd-06192006-083839/unrestricted/00front.pdf>; Barnard Guidelines for the Development of Industry Codes of Conduct for Accreditation under the Consumer Protection

transform the law into what is needed to address discrepancies in society.²⁷⁴ This requires the court to make difficult political decisions and to move away from their traditional commitment to common law principles.²⁷⁵

South Africa needed a comprehensive outline to provide a framework of legislation, policies and government authorities to regulate consumer-supplier interaction.

4.2 Legislative intervention

The Department of trade and industry (DTI) aims to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities.

The DTI published a Consumer Protection Bill for public comment in 2006, and subsequently published a third draft for comment in May 2008. All nine provinces supported the Bill in principle. The Bill was provisionally considered with minor amendments in August 2008, and the Act was scheduled for promulgation in 2009. It was finally assented to on 24 April 2009, yet, as certain provisions appeared to be inadequate, only specific Parts and sections of the act came into force at that stage. The commencement date for the full Act was the 31 March 2011.

The CPA now provides an extensive framework for consumer protection and aims to develop, enhance and protect the rights of the consumer and to eliminate unethical suppliers and improper business practices.²⁷⁶ The Act has, however, a limited application and does not

Act 68 of 2008 GG No.34087 2011/03/08 at 16-18; Barnard advocates that “reform is inevitable in the sense that the continued application of a rigid system of rules, devoid of any reference to social context or a true value sensitivity, brings the law of contract in conflict with its broad legal context where the emphasis is increasingly being placed, due to the birth of the constitutional rule of law, on a system of equally competing values as opposed to a value neutral system favouring freedom of contract.”

²⁷⁴ S 39(2) of the Constitution; this is in line with the preamble of the CPA; discussed by Du Preez ML, The legislation acknowledges the reality of many SA consumers namely high levels of poverty, illiteracy and other forms of social and economic inequality; living in remote or low-density population areas; being minors, seniors or other similarly vulnerable consumers; having a limited ability to read and comprehend advertisements, agreements, instructions and warnings as a result of low literacy levels, vision impairment or language impediments.

²⁷⁵ *Ibid.* See Van Marle en Brand “Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horizontaliteit in *Jooste v Botha*” (2001) 12(3) *Stellenbosch LR* 408, 412; Sharrock 2010 (22) SA Merc LJ 297; Sharrock submits that common law principles are not enough to provide the degree of control that is needed.

²⁷⁶ Chap 1, Part B, s 3 of the CPA contains the purpose of the Act; the purpose is mainly to advance the social and economic welfare of consumers in South Africa by providing them with an accessible effective and efficient system of redress; Sharrock 2010 (22) SA Merc LJ 297 submits that “redress in this context clearly includes judicial redress in relation to unfair contract terms.” He continues to highlight the purposes of the act and how the act must be interpreted in a manner that gives effect to these purposes as stated in s 2(1) and s 3.

apply to all contracts.²⁷⁷ For example, immovable property falls under definition of goods²⁷⁸ as stated in the CPA. The CPA will thus govern the sale of immovable property. However, the CPA only applies to transactions by parties in their ordinary course of business and thus does not apply to once-off private transactions between parties.²⁷⁹

The question that needs to be addressed is whether common law principles, specifically the *exceptio doli*, have been restated and confirmed as statutory rules in the CPA.

The CPA is based on specific policy principles including, market integrity and transparency, consumer safety and empowerment of consumer and civil society.²⁸⁰ These policy principles that underlie the Act, aim to remove unethical or unscrupulous conduct from the marketplace, to promote better and simple disclosure of information within the marketplace to ultimately facilitate well-informed market participants.

In addition to the extensive framework of protection, the CPA is the first act in South Africa dealing with unfair contract terms in general.²⁸¹ Unfortunately certain definitions seem vague and it might be difficult to interpret these concepts in court.²⁸² Sharrock attempts to determine to what extent the CPA deals with unfairness regarding the content of consumer contracts.²⁸³ Chapter 2, part F of the Act, attempts to protect any purchaser who entered into

²⁷⁷ S 5, read with s6.

²⁷⁸ In the CPA s1 the definition of “goods” includes –anything marketed for human consumption: any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded: any literature, music, photograph, motion picture, game information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product: a legal interest in land or any other immovable property, other than an interest that falls within the definition of “service” in this section; and gas, water and electricity.

²⁷⁹ In the CPA s 1 the definition of a consumer – includes the words in the “ordinary course of business.” Private home owners will therefore be excluded from the application of the Act when selling their homes as a once-off transaction.

²⁸⁰ As seen in the Preamble of the CPA; also reiterated by Du Preez ML ‘The Consumer Protection Bill: A few preliminary comments’ 2009 (1) *TSAR* 58 at 59.

²⁸¹ See s 51; Naude T “Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective” 2010 (127) *SALJ* 515 at 516,535-536. Sharrock 2010 (22) *SA Merc LJ* 306 explains that “the prohibition relates to unfairness in terms generally, not in standard-form contracts or non-negotiated terms, even terms specifically agreed to after hard bargaining are in principle subject to the unfairness standard.”

²⁸² Sharrock 2010 (22) *SA Merc LJ* 307 concludes correctly that the terms “unfair”, “unreasonable” and “unjust” are not defined individually.

²⁸³ Ss 48, 51 and 52; Sharrock 2010 (22) *SA Merc LJ* 306; Sharrock compares the CPA with other countries where legislative measures have been adopted to regulate unfairness in contract terms. He refers to the United Kingdom Germany, Netherlands Spain and Portugal to mention but a few. Similar comparisons are made by Du Preez in Du Preez 2009 (1) *TSAR* 62; one can implement international directives that can be helpful when dealing with a general prohibition of unfair terms. The United Nations provide such guidelines such as the Unfair Commercial Practice Directives that were also incorporated into the law of the United Kingdom.

a agreement in the ordinary course of business whilst relying upon a misleading or deceptive representation or any opinion provided by the seller that is to the detriment of that purchaser.²⁸⁴ This type of contract will be considered as unfair, unreasonable or unjust if the purchaser has entered into the contract under such reliance.

Unconscionable conduct under Part F, section 40, includes known common law concepts such as undue influence and duress. However section 40 further allows a consumer to argue that a contract has been concluded based on unconscionable conduct which may be any of the following factors; physical force against a consumer, coercion, pressure or unfair tactics or any other similar conduct.²⁸⁵ The *exceptio doli* served a similar purpose. To protect a consumer (or defendant) against a claim enforced by a plaintiff if there had been something unfair about the contract in general and no other remedy could provide an equitable outcome.

In part G of Chapter 2 of the CPA a consumer's rights to fair, reasonable and just terms and conditions are protected.²⁸⁶ Section 48 deals with unfair terms in general, and allows a defendant to raise a defence where there is something unconscionable, unjust or unfair on the part of the plaintiff's conduct, including his claim. This section will not only be utilised as a defence but can be enforced in various circumstances. It can also be enforced as a remedy. The court will have to ensure that fair, reasonable and just terms and conditions are enforced. The court will have the ability to consider any factors that might be helpful while determining whether terms and conditions in question are regarded as fair.²⁸⁷

It remains uncertain to which extent the CPA deals with unfairness of the contract content. The courts now have to determine whether an agreement was, in whole or in part,

²⁸⁴ The word "contract" does not appear in the CPA. The Act rather refers to "agreement" or "transaction".

²⁸⁵ S 40 Unconscionable conduct: (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any – (a) marketing of any goods or services; (b) supply of goods or service to a consumer; (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or service to a consumer; (d) demand for, or collection of, payment for goods or service by a consumer; or (e) recovery of goods from a consumer. (2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the act that a consumer was substantially unable to protect the consumer's own interest because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement or any other similar factor. (3) Section 51 applies to any court proceedings concerning this section.

²⁸⁶ Ss 48-52 contained in Part G of Chapter 2 of the CPA.

²⁸⁷ See s 52 powers of the court.

unconscionable, unjust, unreasonable or unfair.²⁸⁸ The court has a discretion to make any order that it considers just and reasonable in the circumstances.²⁸⁹ There are no guidelines provided to guide the courts in their judgments with regards to these unjust agreements. The courts have the difficult task to effectively adhere to the principles of the CPA on the one hand and to keep up the fundamental contractual principle of autonomy on the other hand.

Section 2(1) of the CPA stipulates the way in which the act must be interpreted. It seems that the Act must be interpreted in a manner to adhere to its purpose, namely to advance social and economic welfare of the consumers in South Africa.

None of the sections contained in the CPA may be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.²⁹⁰ CPA does not prevent the consumer from challenging unfair contract provisions on the basis of common law principles. Courts are also required to develop the common law as may be necessary to improve the social and economic welfare of consumers generally.²⁹¹

The *exceptio doli* will not necessarily be reintroduced exactly as it existed in the past by section 2(10) or section 4(2)(a) of the CPA. Legal academics have debated the role of the *exceptio doli* in common law for many years. Therefore in the opinion of this study the *exceptio doli* cannot be seen as part of the common law rights referred to in the CPA that may not be precluded because the *exceptio doli* does not form part of South Africa's common law.²⁹²

However when one reads Chapter 2 Part F and G, sections 48, 51 and 52 seems to have a similar broad scope of application in comparison to the scope of application of the *exceptio*

²⁸⁸ S 48 see fn 53; Minister is empowered in terms of s 120 Minister is also empowered to make regulations relating to unfair contract terms (s 120(1)(d))

²⁸⁹ The court deals with provisions that are found to be unfair section in terms of s 52(3); Naude 2010 (127) SALJ 519, 531; Naude explains that the court are granted powers in respect of a transaction between a consumer and a supplier in terms of s 52; "powers of the court to ensure fair and just conduct, terms and conditions." The "court may (also) make any further order the court considers just and reasonable in the circumstances, including but not limited to an order requiring supplier to cease any practice." Naude concludes that the court has the power to prevent unfair contractual terms of future contracts as well.

²⁹⁰ S 2(10); see Du Preez 2009 (1) TSAR 63; vulnerable and/or illiterate consumers should not only be protected by also empowered; "SA consumers are diverse and an increasing number of consumers are entering our growing market."

²⁹¹ S 4(2)(a).

²⁹² *Bank of Lisbon and South Africa Ltd v De Ornelas*; see s 2(10).

doli. Section 48(1) of the CPA creates a general standard of fairness for consumer agreements.

The following example will firstly illustrate the effect of the *exceptio doli*, and subsequently the effect of sections 40, 48(2), read together with sections 51 and 52.²⁹³ It will be assumed that all the requirements for the conclusion of a valid contract have been met and the agreement is not excluded in terms of the CPA.²⁹⁴

Party B (the plaintiff) supplies loans to up and coming small entities in the ordinary course of business. Party A (the defendant) concludes an agreement with the plaintiff whereby the defendant obtains the first loan to facilitate the opening of the entity. In return the defendant provides the plaintiff with security, namely a mortgage bond registered over the entity's property. The agreement also consists of an obligation bestowed upon the defendant to support the plaintiff's business through the conclusion of a second loan agreement to enable the defendant to purchase future equipment as stipulated in the terms and conditions of the agreement. However the plaintiff fails to mention an increase within the next month in future rent expenses charged to obtain the second loan.

Once the defendant has discharged his debt regarding the first loan he denies the obligation to obtain another loan because of the increased expenses and concludes an agreement with a third party to obtain a similar loan for the purchase of equipment. The plaintiff alleges possible breach of contract in the form of repudiation and withholds the property secured with the mortgage bond.

The defendant submits that he had no idea what the policies of the plaintiff's financial loan business were. The plaintiff failed to mention these policies and practices and assumed that the defendant had knowledge of all the provisions of the loan agreement. The plaintiff wants to claim damages suffered due to breach of contract.

If the *exceptio doli* was available to the defendant, the defendant would be able to raise this defence to resist the plaintiff's claim. The defendant must, in this case, prove that the conduct of the plaintiff should be considered as unfair. The strict application of the *exceptio*

²⁹³ Note that the National Credit Act is not applicable for purposes of the example.

²⁹⁴ S 5(1) – (8) of the CPA contains the application scope of the Act, and includes a list of agreements that are included or excluded from the Act.

doli would enable a court to view all the relevant facts and to ultimately ensure that an equitable outcome is reached between the contracting parties.

The court may make the following orders: The court may declare the clause, containing the obligation to obtain a second loan, as void *ab initio*. This might be the case where the defendant can prove that if the contract obligation was to be enforced it would result in an inequitable outcome.

Now in our current dispensation, where the same example is analysed, the plaintiff will qualify as a supplier of loans in the ordinary course of business. The defendant is a consumer, and in this particular example a small entity obtaining a loan. The following sections of the CPA may be applied: section 40(1) (c), the supplier used unfair tactics in connection with any negotiation, conclusion, execution or enforcement of an agreement to supply any goods or service to a consumer. Section 40(2) allows the consumer to allege in addition to any conduct contemplated in subsection (1), unconscionable conduct where a supplier knowingly takes advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of ignorance or any other similar factor. The consumer may therefore argue that he was unaware of the obligation to apply for a second loan.

In terms of section 48(1)(c)(ii) the consumer is protected against the conduct of a supplier who requires of a consumer, to whom any goods or services are supplied at the direction of the consumer to assume any obligation on terms that are generally unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.²⁹⁵

²⁹⁵ S 48 Unfair, unreasonable or unjust contract terms (1) A supplier must not – (a) offer to supply, supply, or enter into an agreement to supply, any goods or services – (i) at a price that is unfair, unreasonable or unjust; or (ii) on terms that are unfair, unreasonable or unjust; (b) market any goods or service, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or (c) require a consumer, or other person to whom any goods or service are supplied at the direction of the consumer – (i) to waive any rights; (ii) assume any obligation; or (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction. (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if – (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in s 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or (d) the transaction or agreement was subject to a terms or condition, or a notice to a consumer contemplated in s 49(1), and – (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of s 49.

Section 48 (2)(a)-(d) provides a reader with guidelines to identify unfair, unreasonable or unjust terms.²⁹⁶ Unfortunately these guidelines remain too broad. Section 51 contains a list of prohibited transactions, agreements, terms or conditions. These prohibitions are defined very broadly.

The court has to promote fair and just conduct, terms and conditions. The court may make an order contained in section 52(3) after all relevant facts have been considered according to 52(1) and (2).²⁹⁷ In terms of section 52(3) if the court determines that an agreement was in whole or part, unconscionable, unjust, unreasonable or unfair, the court may declare the contract in whole, or part, void. The court further has the discretion in terms of section 52(3), to make any order including those stipulated in (i)-(iii), that is considered reasonable in the circumstances.

Many legal academics have argued that the *exceptio doli* could have been utilised to prevent unconscionable conduct during the negotiation phase.²⁹⁸ However the stages of the application have always been vague. The CPA implicitly prohibits unfair conduct during the “negotiation” or “entering into a contract” stages.

The application of the CPA might present the following problems in society, namely that flexible and well-known common law practices are replaced by a rigid system of rules. Also, due to the technicality of the legislation, it may result in a reduced protection of consumers. According to the submissions made by the Parliament Research Unit on the Consumer Protection Bill:

“The Bill appears to codify large areas of the common law and generally acceptable practices which are common place and prevalent in the South African market place. Common law evolves over a protracted period of time through common practice and court mechanics and application, enforcement and resultant

²⁹⁶ See fn 53; in Sharrock 2010 (22) *SA Merc LJ* 308 the author concedes that the guidelines for determining what is “unfair” are excessively one-sided in favour of the consumer in particular circumstances. These guidelines are too broad and imprecise to be of any assistance in the interpretation of the term.

²⁹⁷ The court has to consider in terms of s 52(1) specific matters not only in relation to alleged contraventions of s 48(1) but also in relation to alleged contraventions of s 40; factors stipulated in s 52(2) must also be viewed before deciding whether an agreement or provision is unfair and what order the court should make; see Naude 2010 (127) *SALJ* 518; Du Preez 2009 (1) *TSAR* 80.

²⁹⁸ Naude 2010 (127) *SALJ* 519 explains that the possible court order for which unfair terms legislation should ideally prove to facilitate preventative control also at 535-536 – prohibited terms and presumptively unfair terms – important mechanisms for effective preventative control. In Naude’s opinion s 51 contains a relatively short list of prohibited terms.

practices. Allowing this practice to be overlooked and replaced by a more rigid system will give rise to grave and serious consequences.”²⁹⁹

The Research Unit submitted that the real danger lies in the fact that proposed principles stipulated in the act will not include every possible scenario that a particular business might experience. The exact defined prohibitions would not achieve the required result of facilitating certainty in law. Unfortunately the exact opposite might occur. The removal of “established common law principles” would lead to an increase in uncertainty.³⁰⁰ This could result in a wide range of litigation and lack of confidence in South Africa’s economy.³⁰¹

Du Preez argues that the market targeted by the CPA, such as illiterate, low income and vulnerable consumers likely to be the victims of unfair terms and conditions will have to be educated on specific sections of the CPA to ensure awareness among vulnerable groups of their rights afforded in terms of the CPA.

In my opinion, these potential problems are not entirely similar to the uncertainty created by the application of the *exceptio doli*.

However if one considers the effects of sections 40, 48 and 51, nostalgic after thoughts of the *exceptio doli* comes to mind. A defense similar to the abolished *exceptio doli* appears to be reintroduced by these sections.

²⁹⁹ Database Policy Documents “Consumer Protection Bill (B19-2008): Synopsis of Submissions” DH060853 Cluster Economic Date: 20080625 Portfolio Trade & Industry, Publication Type Policy Document Notes Issued by the Parliamentary Research Unit to the Select Committee on Economic and Foreign Affairs p 3.

³⁰⁰ *Ibid* 2-3.

³⁰¹ *Ibid* 3.

CHAPTER 5

CONCLUSION

Modern law of contract in South Africa can be seen as a dynamic field of law. It encompasses key principles such as freedom of contract, autonomy, good faith and public policy. These principles are seen as important concepts that underlie the substantive law of contract.

The Consumer Protection Act, introduced in 2008 and operational since 31 of March 2011, has contributed to this dynamic field of law. Unfortunately the uncertainties regarding the application of widely articulated definitions associated with the Act remain a great concern.

Many legal academics have tried to alleviate the possible difficulties posed by the operation of the CPA by means of constructive criticism, in-depth analysis of practical aspects and submissions to the legislator during the past three years.

The CPA has included many common law rights and in certain sections extended these rights to protect a disadvantaged consumer against the powers of suppliers.³⁰² The Act consists of sections that attempt to prevent unfair terms and conditions in general.³⁰³ The legislator aims to protect the consumer against unfair bargaining grounds arising because of unfortunate factors such as ignorance, illiteracy, poverty or discrimination.

The *exceptio doli generalis* has in the past offered similar protection for consumers in such circumstances where it seemed as if no remedy would provide a similar equitable outcome. This defence was available when a plaintiff wanted to enforce legal action in circumstances that are unconscionable. The defendant could raise these circumstances as a defence to the action of enforcement.³⁰⁴

The common law freedom to enter a contract was one of the fundamental principals in the law of contract. If parties signed a contract the rule of *caveat subscriptor* prevailed. In other words parties were bound by their signatures to adhere to the terms and conditions of the

³⁰² See Chap 2 of the CPA, s 18, 19, 20, 29, 30, 40, 41, 44, 46 and 48.

³⁰³ See Chap 2 s 48-51.

³⁰⁴ Lambiris MA “The *exceptio doli generalis*: an obituary” 1988 (105) SALJ 644.

contract. A signature meant that a contracting party understood and accepted his or her responsibilities in terms of the contract. Courts were empowered to take underlying values such as good faith into consideration when applying specified, strict rules. However the powers of the courts were limited and the courts did not easily accept the direct application of uncertain concepts such as the *exceptio doli*.³⁰⁵

The CPA restricts freedom of contract on the part of consumers as well as suppliers. Many forms of agreements are prohibited. A party may approach the consumer tribunal if he believes that a contract or clause in question should be declared void. Therefore, the Act does not only contain specific prohibitions in terms of the Act, but if a party alleges that there are no other remedy available in circumstance that seems to be unfair, a court has the power to set the contract or clause aside.

The potential difficulties associated with the CPA are not entirely similar to the uncertainties created by the application of the *exceptio doli* in the past.³⁰⁶ The opinion can be held that the widely articulated definitions present a bigger problem of uncertainty as it could potentially limit the discretion of the court. This may in certain circumstances be to the detriment of the consumer. Consumers are afforded rights in terms of the CPA but it does not necessarily mean that the enforcement of these afforded rights will be effective.

There are technical difficulties regarding the interpretation of terms such as “agreement”, “unfair tactics” or “pressure” to name but a few. There are still no guidelines provided to assist consumer tribunals to adhere to the purpose of the Act in a fair and organised manner.

Courts are given unlimited power to review contracts based on their personal conception of fairness in terms of the CPA. They are able to amend, declare contracts void or order anything that would seem fair in the particular “unfair” circumstances. In cases where there is doubt, courts will have to interpret a clause or contract to the benefit of the consumer.

It will be the task of the courts to attach precise meanings to the principles contained in the CPA. Courts may even have to re-define the common law where deem fit under the pretext of the CPA. It is necessary to provide the courts with guidelines. Courts will have to be

³⁰⁵ Cf *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

³⁰⁶ For example there is no authority in Roman or Roman Dutch law for the proposition that an *exceptio doli generalis* was available whenever it appeared that to enforce the performance of a legal obligation was “unconscionable” or contrary to generalized notions of good faith and fair dealing purely in accordance with the court’s opinion.

equipped to interpret words such as “physical force” or the broadly defined “any similar conduct” if there is to be some form of assistance from the side of the legislator.³⁰⁷

Sachs J suggests a “principled” approach for the courts’ interactive role while applying the underlying principles in the law of contract. The principled approach is based on the utilisation of “objective criteria with reference to both deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society.”³⁰⁸

One would enquire whether it is the task of the courts to attach precise meanings to these principles, and if the courts have the discretion to strike down contracts on the basis of unfairness, unconscionability or unreasonableness.

These questions form the focal point of this dissertation.

It is submitted that it will not be possible to attach precise meanings to concepts such as good faith, public interest or fairness. There will always be a different understanding in a particular language and within a variation of context. Courts will have to fall back on international law, in which diverse interpretations exist in countless jurisdictions.³⁰⁹

The main goal that is to be achieved is that the rules of the law of contract should attempt to achieve a balance between fundamental principles such as fairness and good faith, and economic policies such as economic efficiency and the facilitation of honest market participation.

Sections 40, 48 and 51 of the CPA will perhaps have a similar effect that the *exceptio doli generalis* had in the past.

³⁰⁷ See s 40 of the CPA.

³⁰⁸ *Ibid* 146 and 183.

³⁰⁹ S 2(2)(a) and s 4 of the CPA

CHAPTER 6

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