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HISTORICAL INTRODUCTION

The law of contract is of fundamental importance in the modern world, because it is woven into and inseparable from every form of economic activity.¹ But although economic theories abound, there are few theories of contract. Three theoretical bases for the enforcement of contracts have been suggested. The subjective consensual theory (wils-teorie) postulates that enforceability depends on *consensus ad idem* or the concurrence of the subjective wills of the contracting parties. The objective declaration theory (verklarings-teorie) postulates that enforceability depends on the concurrence of the declared intentions of the parties. The reliance theory (vertrouwensteorie) postulates that enforceability depends on the reasonable expectations conveyed to the mind of each party by the words or conduct of the other. These three theories have been discussed by academic writers,² but until 1979 do not appear to have found their way into any reported judgments.

The reason for this lack of judicial theorising is no doubt a reluctance to adopt a theory that might not prove satisfactory in practice. This is a healthy reluctance, which accords with our courts' long tradition of developing the common law from case to case.³ Nevertheless, in *Sambou-Nasionale Bouwenrigting v Friedman* 1979 3 SA 978 (A) 993F Jansen JA, with whom the other four judges concurred, expressed the view that:

"In die algemeene woorde geleer dat die grondslag van 'n ooreenkoms *consensus ad idem*, wilsoreenstemming tussen die partye, is. Ons broonne, literatuur en regspraak is deurspek met 'n terminologie en stellings wat daarop dui dat met *consensus*

¹ The extensive literature on this topic is reviewed by Harter "The role of contract and the object of remedies for breach of contract in contemporary Western society" (1984) 101 *SALJ* 121.

² Hofmann "The basis of the effect of mistake on contractual obligations" (1935) 52 *SALJ* 432; De Wet *Drauing en Bedring by die Kontraksketling* De Wet en Van Wyk 9-31; Hahlo and Kahn *South Africa* 441-442; Kerr 17-19; Hosen *et al* 706; Farlam and Hathaway 106-109; Jonbert 79-80; Van der Merwe *et al* 13-41; Krizinger "Approach to contract: a reconciliation" (1983) 100 *SALJ* 47; Reineke and Van der Merwe (1979) 42 *THRHR* 432; Sharrock (1984) 101 *SALJ* 1; Van Rensburg (1986) 49 *THRHR* 448; Cockrell "Reliance and private law" 1993 *Stell LR* 41 shows some of the problems inherent in adopting the reliance theory as a foundation for contractual obligations.

³ It also accords with the words of Isalah 28:10: "For precept must be upon precept, precept upon precept; line upon line, line upon line; here a fittle, and there a fittle."

bedoel word die saamval van wat elke party werklik (psigologies) wil. As dit inderdaad die grondslag van ooreenkoms en kontrakkele aanspreeklikheid is (die "wils-teorie") dan volg die antwoord op die onderhawige geval byna vanselfsprekend."

Having thus given the Appellate Division's seal of approval to the consensual theory, Jansen JA then expressed disapproval of the declaration theory, but accepted that when there is no true subjective *consensus* an enforceable contract may be found by applying the reliance theory in the form of the doctrine of quasi-mutual assent, a doctrine which will be investigated at pages 12 ff and 26 ff below. In a dissenting judgment in *Mondlop Eendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 78 Jansen JA repeated the same view.⁴ That the Appellate Division has adopted this view seems clear from *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A) 984.⁵

The Appellate Division's view on the three theories must not be misunderstood. The view expressed was *obiter*, and our courts should not regard themselves as bound by any rigid theory. What the Appellate Division has done is to define the basis on which contracts are treated as enforceable in our law. It remains as ever that the object of the courts is to apply and, where necessary, to develop the law in order to achieve justice. But justice is a broad concept, and it is helpful to have a more sharply defined goal at which to aim. It will be found that in many (but of course not all) problem areas of the law of contract the most satisfactory result can be achieved by enforcing contracts that stem from true agreement or quasi-mutual assent, and by not enforcing contracts that do not conform to that pattern.

To keep this goal in mind it is helpful to adopt a working definition of a contract. A contract, in the modern Roman-Dutch law of South Africa, may be defined as: an agreement (arising from either true or quasi-mutual assent) which is, or is intended to be, enforceable at law.⁶ The basic principle on which this modern concept of contract rests was well expressed by Pollock:⁷

4 See also *Van Deventer v Louw* 1980 4 SA 105 (O) 110; *Spes Bona Bank Ltd v Portals Water Treatment* 1981 1 SA 618 (W) 631; *Standard Credit Corp'n Ltd v Nancher* 1987 2 SA 49 (N) 52.

5 See the note on this case by Sharrock "More on the *Spes Bona* case and theories of contract" (1984) 101 *SALJ* 1, see also Lewis "The demise of *exceptio dolii* is there another route to contractual equity?" (1980) 107 *SALJ* 26-42. Sharrock justly observes that Krüzinger "Contractual formation and the Blackburn dictum: adding to the confusion" (1983) 100 *SALJ* 569 sees confusion where in truth there is none.

6 I prefer this definition to Pollock's "a promise or set of promises which the law will enforce" (Pollock 1), which seems to be the basis of the definitions put forward by most of the modern writers in English, eg Furnison para 1.16; Chitty para 1-001; Smith and Thomas 3; Williston 1, Restatement 1. In *Wilken v Kohler* 1913 AD 135 140 Innes J referred to the use of the word "in its strict sense as meaning a concluded agreement legally enforceable". My only criticism of these definitions is that they appear to exclude agreements which, although intended to be enforceable at law, are not. It is both good law and good English to describe such agreements as contracts.

7 *Loc cit*.

"The law of Contract may be described as the endeavour of public authority, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average rightmindedness."

Although Pollock was writing of the English law of contract, his words are equally apt in describing the modern Roman-Dutch law.⁸ But the historical process by which each system arrived at an understanding of the moral basis of contract differs.

The English process, although starting with Glanvill's and subsequently Bracton's reliance on Roman law to fill the gaps in an infant jurisprudence, soon became a characteristically English process of adapting writs to new purposes.⁹ Writs originally designed for the protection of property were adapted to give broader delictual remedies, and in course of time the delictual writs were adapted to give purely contractual remedies, that is, to enforce performance of contractual promises. The details of this process are of little interest to us because although the influence of English law on our law of contract has been considerable, this influence has fortunately not extended so far as to make a knowledge of English legal history necessary for a proper understanding of our law.

To understand how our law reached its present position of enforcing contractual promises because it is morally right and commercially sound to do so it is necessary to go back to Roman law. In outline, the story that will emerge is that Roman law worked from a number of different types of contracts for different purposes towards a generalised concept of contract, but never quite reached that level of abstraction, which was later reached by Roman-Dutch law. In South Africa the working out of this general concept was hampered for a time by an unfortunate flirtation with the English doctrine of consideration, but was greatly assisted by the acceptance of the English doctrine of quasi-mutual assent.

The Roman concept of contract

Starting probably with Quintus Mucius Scaevola in republican times,¹⁰ a number of Roman jurists wrote systematic expositions of the law. The exact method of classification varied from writer to writer, but the classification which became the most influential and is best known to us is that of Gaius' *Institutes*. Whether this scheme of classification was original or copied from previous writers,¹¹ it formed the basis for the teaching of Roman law up to the time of Justinian, when it was replaced by Justinian's *Institutes*, which adopted and so perpetuated the same scheme of classification. The whole of the private law – the law which concerns the interests

8 And, in fact, the modern law of most countries, whether based on Roman or common law. Schlesinger *passim*; Zimmermann 559 ff. In recent years much thought has been given to the moral and political values underlying the law of contract. A challenging introduction to this thinking is Cockrell "Substance and form in the South African law of contract" (1992) 109 *SALJ* 40.

9 Fitouf part 2; Holdsworth esp vol III 412 ff and vol VIII 1 ff; Potter 446 ff.

10 Schulz 94; Jolowicz 93.

11 Honoré 65 ff argues strongly for originality.

of individuals as opposed to that which concerns the government of the state – is set out under three headings: the law of persons, the law of things and the law of actions.¹² The Latin *res* is properly translated as “thing”, but perhaps a better idea of the wide scope of the term would be obtained by employing the Afrikaans “dinges”, because the law of things was something of a rag bag and sufficiently elastic to contain a treatment not only of tangible property but of intangible rights such as servitudes and also of obligations (*obligationes*).

Justinian defined an obligation as a legal bond by virtue of which we are compelled to perform some act for the benefit of another according to the laws of our state.¹³ This legal sense of the word must of course be distinguished from the wider sense in which it can include a moral duty or even a course of conduct forced on one by the pressure of circumstances. The word “obligation” is derived from *ligare*, to bind, and the Romans called the legal bond established by the *obligatio* a *vinculum iuris*. The state, or as it is usually expressed, the law, determines in what cases the *vinculum iuris* shall be established and in what cases there shall be no legal bond. If the state decides that a legal bond exists it provides machinery, through its law courts, by which the person in whose favour the bond operates (the creditor) can enlist the state’s aid in enforcing the bond and exacting from the other party (the debtor) whatever the law regards as owing. As Modestinus puts it, “By ‘debtor’ is understood that person from whom money can be exacted against his will.”¹⁴ This is only one example, because the obligation may not be to pay money. It may be to give something (*dare*), or to do something (*facere*), or in some other way to perform (*praestare*).

The Roman lawyers used the words *dare, facere, praestare* as a kind of formula to include everything which might form the substance of an obligation. The verb *praestare* and its noun *praestatio* are not easy to translate. Murhead, in his translation of Gaius, relied on the venerable but little-used English word “prestation” for the noun, and was driven to invent the new word “prestate” for the verb.¹⁵ The Afrikaans equivalents “prestate” and “presteer” have gained far greater currency and, as De Wet and Yeats¹⁶ correctly observed, these words should be understood not only as referring to performance that does not consist of giving or doing, but to performance generally, that is, including these two methods.

In using this formula both Gaius and Paul draw attention to one of the most important aspects of the concept of *obligatio* – that the creditor’s right of action lies against the debtor only, and not against all the world. In other words it is an action *in personam* and not *in rem*. In drawing the distinction between these two kinds of action Gaius gives as examples of actions *in rem* actions based on a claim of ownership, or of *usus*, or

usufruct, or a servitude. All these concepts would be classified by a modern writer as falling under the law of property, which is concerned with property rights, rights good against all the world, rights *in rem*, but to the practical-minded Gaius the distinction lay not in the nature of the rights (a philosophical concept alien to most classical Roman lawyers) but in the nature of the action. He describes the action appropriate to *obligatio* in this way:

“An action is *in personam* when we proceed against someone who is under an obligation to us by reason either of contract or delict, that is, when we contend that he ought to give, do, or in some other way perform (*dare, facere, praestare*).”¹⁷

Paul puts it this way:

“The substance of obligations does not consist in making any corporeal property or servitude ours, but in binding another to us to give something or to do or in some other way to perform (*ad dandum aliquid vel faciendum vel praestandum*).”¹⁸

The obligation thus described, enforceable by the creditor against the debtor by action, was sometimes described by the Romans as *obligatio civilis* (because it was enforceable by the *ius civile*) to distinguish it from *obligatio naturalis* which, although not directly enforceable, was recognised by the law as binding to the extent that the existence of a natural obligation provided a defence to an action for the recovery of money paid in accordance with such an imperfect obligation. Thus Ulpian, in defining the circumstances in which the existence of a debt justifies calling people creditors, continues “but if the debt is owed naturally, they are not classed as creditors.”¹⁹ Paul takes this further:

“Natural obligations are adjudged such not merely by whether an action lies on them, but rather by the impossibility of recovering money paid under them.”²⁰

Gaius, in the passage quoted above,²¹ refers to an obligation arising by reason either of contract or delict. He begins his treatment of delictual obligations by saying, rather cryptically, that they are all of one kind. Justinian explains this by adding that “they all arise *re*, that is from a wrongdoing itself, such as from theft or robbery or damage or injury.”²² The point is that when the *res* (act or event) of wrongdoing has occurred a delictual obligation arises automatically, and an action lies to enforce it.

To our modern eyes a contractual obligation looks very different, because it does not arise automatically from an act or event but from an agreement between two or more people, involving an exercise of their wills. But to a classical Roman lawyer the distinction was not so sharp. So, in classifying contractual obligations, Gaius says that they arise from an act (*re*), from words (*verbis*), from writing (*litteris*) or from consent (*consensus*).²³ As

¹² “All the law which we use relates either to persons or to things or to actions.” *Inst* I 2 12.

¹³ *Inst* 3 13 pr. Zimmerman I.

¹⁴ *D* 50 16 108.

¹⁵ *OED* s.v. “prestate”.

¹⁶ 4 ed I.

¹⁷ Gaius 4 2.

¹⁸ *D* 44 7 3 pr.

¹⁹ *D* 50 16 10.

²⁰ *D* 1 16 4.

²¹ See also Gaius 3 88.

²² Gaius 3 182.

²³ *Inst* 4 1 pr.

²⁴ Gaius 3 89. For the development of the concept of contract from this fourfold classification see Zimmerman 546-559.

an example of a contract *re* Gaius gives *mutuum*, a loan for consumption. On his analysis it was not the agreement inherent in such a transaction which created the obligation, but the *res* or act of handing over the money, wine, oil or whatever it might be, with the intention that it should become the property of the borrower, who was to replace it with articles of the same sort in due course.²⁵ The comparative unimportance of agreement in itself is shown equally clearly in the other classes of contract: for instance in *stipulatio* (a contract *verbis*) no obligation arose if the words used did not conform exactly to the required pattern set by the law, no matter how clear it might be from the words used that the parties were in agreement.²⁶

By Justinian's time a curiously inconsistent approach to the concept of contract was apparent.²⁷ For elementary teaching purposes the *Institutes* limited contracts to ten in number: *mutuum, commodatum, depositum, pignus* (all contracts *re*); *stipulatio* (the contract *verbis*); the contract *litteris*; and *emptio venditio, locatio conductio, societas, mandatum* (the contracts *consensu*). These limits were slightly extended by the addition of *obligationes quasi ex contractu*, such as *negotiorum gestio*, but the advanced student or practitioner had to turn to the *Digest* to discover how far the concept of contract had in fact progressed and become generalised.

Here he would find that the praetor had very considerably extended the concept of contract by giving an *actio in factum* or *praescriptis verbis*²⁸ in a number of circumstances falling outside the ten classes set out in the *Institutes*. Modern writers have coined the term "innominate contracts" to describe these circumstances, which form the subject matter of *D* 19 5. The best-known text in this title is *D* 19 5 5 pr in which Paul classifies the following circumstances as giving rise to *obligatio: do tibi ut des* (I give to you in order that you should give), *do ut facias* (I give in order that you should do), *facio ut des* (I do in order that you should give), *facio ut facias* (I do in order that you should do). This classification is not complete, since it omits the actionable negative promise, for instance *facio ut non facias*, but it is sufficient to give a general picture of the circumstances in which a party to an informal agreement, who had performed his promise, could sue the other party for performance. Note that the defendant's promise was enforceable not because it formed part of a seriously-made agreement, but because the plaintiff had performed his part of the agreement.

Further, an action lay in a number of cases to enforce a *pactum* or agreement. From very early law a *pactum* had been recognised as a defence to an action, and the next step was to enforce by action a *pactum adiectum* or agreement tacked on to a recognised contract and forming, in our modern terminology, a term of that contract. The reason for the Roman terminology

is simply that a Roman lawyer was accustomed to regarding a known contract, such as purchase and sale, as being confined to the bare essentials of an agreement for the exchange of a *merx* for a *pretium*, so he thought of any additional terms as *pacta adiecta*.²⁹ In the course of time the obvious injustice caused by allowing informal agreements to remain unenforceable persuaded successive praetors and emperors to give actions on particular types of informal agreements that could not be classified otherwise than as *pacta*. They therefore became known as *pacta vestita*³⁰ since they were clothed with the action provided by the state.³¹ Nevertheless, as pointed out by De Villiers *AJA in Conradie v Rossouw* 1919 AD 279 306:

"The fact is there was no valid reason in the nature of things for stopping here. But such was the conservatism of the Romans that they never advanced far beyond it. They never took the final step of declaring that all lawful agreements, involving as they do the consensus of the parties, give rise to a civil obligation and are consequently actionable."

Hence we find that, although the *Digest* perpetuates Pedius' perceptive observation that there is no contract, no obligation, that does not contain in itself an agreement,³² the Romans never reached the conclusion that every serious agreement creates a contractual obligation. Indeed, the same title of the *Digest* (title 14 *De Pactis*) contains Ulpian's oft-quoted maxim *nuda pactio obligationem non parit, sed parit exceptionem*³³ and his repeated stressing of the necessity to maintain this rule, also expressed by the maxim *ex nudo pacto non oritur actio*.

A third route by which the Roman law of the *Digest* came tantalisingly close to enforcing all seriously-made agreements was by way of the *stipulatio*. As pointed out at page 6 footnote 26 above, the post-classical law greatly relaxed the earlier insistence on formalism in *stipulatio*. *C* 8 38 1, a rescript of Severus and Antoninus, permits a *stipulatio* to be presumed from the fact that the parties were present together, and *C* 8 38 10, a constitution of Leo (specifically mentioned in *Fest* 3 15 1), lays down that any form of words will suffice, provided it is apparent that the parties were in true agreement. Taken to its logical conclusion this placing of agreement above form leads to the equation *stipulatio* = *pactum* = contract, but if this had been the Roman law Justinian would not have perpetuated the distinction, noted above, between *pacta vestita* and *nuda pacta*.³⁴

The Roman-Dutch concept of contract

Roman-Dutch law was not afraid to take the final step which Roman law never quite took, and treat every agreement made seriously and deliberately as a contract. In taking this step it was influenced by the canon law,

²⁵ Gaius 3 90.

²⁶ Gaius 3 93. The rigidity of this rule was greatly relaxed in the post-classical law: *Fest* 3 15 1.

²⁷ Buckland 412.

²⁸ See Buckland 521 and Van Warmelo 159-160 for the evolution and various descriptions of these actions.

²⁹ Eg Ulpian in *D* 2 14 7 5.

³⁰ Subdivided by modern writers into *pacta praetoria* and *pacta legitima* according to the praetorian or imperial origin of the action. See Zimmermann 511.

³¹ For the names and natures of these *pacta*, see Buckland 529-533.

³² *D* 2 14 1 3.

³³ *D* 2 14 7 4.

³⁴ See also *C* 38 5. A good introduction to the discussion of this question is Thomas 209.

by the *ius gentium* and by a notion that the honouring of promises was inherent in peoples of Germanic origin.

Canon law no doubt had its origins in the domestic rules of the scattered, persecuted groups of early Christians.³⁶ The adoption by Constantine of Christianity as the official religion of the Empire in 313 brought these groups and their rules to the forefront of national life, and it was natural that the first general council of the whole Church at Nicaea in 325 should adopt rules or canons of general application. Before the end of the 4th century successive popes began to issue decretals (comparable to the rescripts of the emperors), and canons and decretals began to grow into a comprehensive body of canon law, initially concerned with the government of the Church, but progressively concerning itself with wider questions of faith and conscience.³⁷ The honouring of contractual promises thus inevitably attracted the attention of canon lawyers, so when Imerius at Bologna led the study of the rediscovered *Corpus Iuris* and triggered off the reception of Roman law throughout Europe, and in the happy phrase of Pollock and Maitland³⁸ "The challenged church answered with Gratian's Decretum (c. 1139) and the Decretals of Gregory IX (1234)", the mediaeval canon law was active in the field of contract. To our modern eyes such activity might seem to be trespassing, but the plain fact is that from about the middle of the 12th to the end of the 13th century the popes were, almost without exception, outstanding lawyers, and litigants resorted to the courts of such men as Alexander III and Innocent III because there the best law in Europe was available.

It is therefore hardly surprising that, even after the predominantly Protestant United Provinces had freed themselves from Catholic Spain, we should find Roman-Dutch writers of the 17th and 18th centuries acknowledging the influence of mediaeval canon law in replacing the old Roman distinction between contract and pact by the new rule *ex nudo pacto oritur actio*. In *Conradie v Rossouw* 1919 AD 279 308 De Villiers AJA refers to a number of these writers, and in (1909) 26 SAJ 511 JG Kotze quotes extensively from Bockelman, who very specifically attributes to the canon law the introduction of this rule into Roman-Dutch law.

But not all writers took the same view. Voet 2 14 9 maintains that the canon law said no more than that agreements ought to be kept, and that it is a serious thing for faith to be broken, and he concluded that the

³⁵ Pollock and Maitland 2-3.

³⁶ For a concise account of the growth of canon law, see *The Canon Law of the Church of England* (the report of the archbishops' commission on canon law) chs II and III; also *General Survey of Continental Legal History* vol I *passim*; Wessels *History* 130-143; Roussier *Le Fondement de l'obligation contractuelle dans le Droit classique de l'Eglise* traces the development of the canon law's interest in the honouring of promises and shows that, surprisingly, although *pacta sunt servanda* and *ex nudo pacto oritur actio* were always maintained as moral principles, later canonists admitted the distinction between *nuda pacta* and *pacta vestita*. Fortunately the principles rather than the later practice had the greater influence on the Roman-Dutch writers. See also Eiselen "Kontraktheorieën, kontraktheoretie geregtigheid en die ekonomiese liberalisme" (1989) 52 THRHR 516.

³⁷ *Op cit* 24.

abdoucement of the Roman distinction between *pacta* and *stipulationes* is rather to be attributed to the influence of the *ius gentium*.

Other writers stressed the traditional Germanic respect for the sanctity of promises. This respect is well attested, starting with Tacitus who, in his *Germania* 24, describes how the Germanic tribes considered it a point of honour to pay a gambling debt, and in his *Annals* 13 54 expands on this by attributing to the same tribes a respect for promises generally and an estimation of themselves as having no superiors in arms or in keeping faith. Wessels *History* 568 quotes from Heinemann to show that, whether or not Tacitus was exaggerating in order to bring home to his fellow Romans the necessity of matching the Germans in moral virtue as well as in arms, the maxims and proverbs of the Germanic people undoubtedly stressed the sanctity of promises. It was against this background, says Wessels, that Zypaeus, Gudelinus, Grotius, Groenewegen, Vinnius and Marthaeus all expressed the opinion that the ancient Germans attached great importance to their promises. For example Grotius *Inleiding* 3 1 52, after referring to the distinctions drawn by Roman law, wrote (tr Lee):

"But since the Germans from of old have esteemed no virtue above good faith such subtilty has not been accepted by them, but it has been understood and used that all contracts which proceed from any reasonable causes, whatever be the form of words employed, whether the parties were together in one place or not, gave a right of action and of defence to an action."

In the latter part of this passage Grotius expresses the Roman-Dutch law of the 17th century, in which *stipulatio* - *pactum* = contract and the Roman distinctions no longer existed. Whether this result was reached by way of canon law, or *ius gentium*, or Germanic custom, or by a combination of all three is no longer important.³⁹ What is important is that the result was reached, and has endured.

The modern South African concept of contract

The Bigge and Colebrooke report of 1826 recommended, *inter alia*, that the Roman-Dutch law should gradually be replaced by English law in the Cape Colony, and the Supreme Court that was set up, in accordance with

³⁸ Lee *Commentary* 291 comments on the above passage of Grotius: "This is historically incorrect. The Germans, no more than the Romans, attached a right of action to a bare pact. The principle *ex nudo pacto nascitur actio* originated in the Canon Law." Wessels *History* 569 issues a similar warning against concluding that the German respect for promises led to their enforceability in court, and concludes at 577: "Though some authorities think that the origin of the maxim *Ex nudo pacto oritur actio* is to be sought in the Canon law, it seems to be more probable that the Canonists found the custom prevalent amongst the German nations of western Europe, and incorporated it into the Canon law as part of the *ius gentium* of the middle ages." To this might be added that the researches of Grotius and others in the newly independent Netherlands might, consciously or unconsciously, have been directed away from the law of the Catholic Church towards something more autochthonous.

³⁹ Klein "The reality of real contracts" (1995) 58 THRHR 16 draws attention to the survival in Old Roman-Dutch and modern law of the Roman contracts *re* (pp 5-6 above) which are not founded on agreement.

the report's recommendations, by the First Charter of Justice in 1826, soon had an opportunity to decide whether to adopt a basically English or basically Roman-Dutch concept of contract. The case in which this opportunity arose was *Louisa and Protector of States v Van den Berg* (1830) 1 M 471, (1833) 4 B and Ad 433. English law might have been prepared to enforce a stipulatio alieni,⁴⁰ it would certainly not have been prepared to enforce an oral gratuitous promise. Neither counsel nor the court made any reference to English law (except on the question of illegality which arose in the case), but Voet, Grotius and Groenewegen were relied on, and the court held that a gratuitous promise could be proved by parol evidence and that a stipulatio alieni was enforceable.

The course thus set, of applying the Roman-Dutch rather than the English concept of contract, was not unswervingly maintained. The forces which gave rise to the influence of English law on the law of the Cape and, later, the law of South Africa generally⁴¹ were active in the sphere of contract, as in other spheres. In *Jacobson v Norton* (1841) 2 M 218 counsel for the plaintiff attempted to persuade the court that no action could be brought on a *nudum pactum*, but the court, preferring to express its conclusion in English legal terminology, held that "no consideration was necessary to support the promise alleged in the declaration as a ground of doctrine of valuable consideration in the sense of a *quid pro quo*, in the absence of which a contract is unenforceable in English law unless made by deed under seal. English law, in fact, unlike Roman-Dutch law, enforces bargains but not promises."⁴² The argument that was rejected in *Jacobson v Norton* subsequently prevailed, and Meziaris J, who decided in that case, was said later to have accepted the doctrine of consideration, although no reported case confirms this belief.⁴³ Be that as it may, it is clear that before another quarter of a century had elapsed the doctrine of consideration had taken firm root in the Cape⁴⁴ and had been adopted by the new Supreme Court of Natal.⁴⁵

De Villiers CJ made it his business to ensure that the alien doctrine that had thus taken root was well watered by references to the old Roman-Dutch writers, some of whom, as he was able to show in a series of judgments, supported the argument that *iusta causa, realitjke oorzak* and consideration were one and the same thing, and were necessary

ingredients of any enforceable contract in Roman-Dutch law. In the first of these cases, *Alexander v Perry* (1874) 4 Buch 59, counsel made common cause that consideration in the English sense was necessary for the enforceability of a contract. Nevertheless Denysen J considered that the question was not settled, and that the case ought to be referred back to the magistrate so the pleadings could be put in order and the question properly raised. De Villiers CJ, and Fitzpatrick J who concurred with him, regarded the necessity for consideration as settled law on the authority of Van der Linden, Van der Keessel and Van Leeuwen, despite Voet's contrary view. Unsatisfactory as this decision may appear, it was followed by the Eastern Districts Court in *Hansen and Schrader v Quirk* (1885) 5 EDC 35 and *Midgley v Tarrant* (1885) 5 EDC 57. In *Malan and Van der Merwe v Secretan, Boom & Co* 1880 F 94⁴⁶ De Villiers CJ took the opportunity of considerably expanding the reasons and references he had given in *Alexander v Perry*.

The view of De Villiers CJ was challenged by Kotze CJ of the Transvaal in a note at pages 28 ff of vol II of his translation of Van Leeuwen's *Commentaries*, published in 1886, to which De Villiers CJ replied in *Tradesman's Benefit Society v Du Preez* (1887) 5 SC 269 with a further examination of the Roman-Dutch writers. There the matter rested until the new Transvaal Supreme Court came into being. In *Sandground v Elaff* 1903 TS 787 the question was argued but the case was decided on other grounds. *Rood v Wallich* 1904 TS 187 gave the Transvaal Supreme Court an opportunity to consider the question which Innes CJ described at 195 as

"important, not only in respect of the right settlement of the present dispute, but because it goes to the very root of the principles upon which, under the Roman-Dutch law, contracts are held to be binding and are enforced by courts of justice."

His conclusion, after reviewing the Roman-Dutch writers, was expressed at 201 in these words:

"From the authorities I have quoted, and there are many others, the rule of the Roman-Dutch law seems clear - every agreement, not manifestly impossible, made deliberately and seriously, by persons capable of contracting, and having a ground or reason which is not immoral or forbidden by law, may be enforced by action, subject of course to any special legal defences which may arise in particular cases."

Solomon and Mason JJ came to similar conclusions. Within three months De Villiers CJ elaborated and restated his previous view in *Mtshu v Webster* (1904) 21 SC 323. By coincidence, the Supreme Court of Ceylon in the same year came to the same conclusion as the Transvaal court, basing its reasoning largely upon Kotze CJ's note on Van Leeuwen.⁴⁷ In 1907 Maasdopp CJ of the Orange River Colony strongly attacked *Mtshu v Webster* and supported *Rood v Wallich*⁴⁸ and in the following year Wessels J took the same line.⁴⁹ The Cape court continued to follow *Mtshu v Webster*⁵⁰

40 See eg Chesbire Filoot and Furnston 462; Furnston para 6.3.

41 These forces are well described and assessed in Hahlo and Kahn *South Africa: the Development of its Laws and Constitution* 17 ff; Hahlo and Kahn *The South African Legal System and its Background* 575 ff; Hosien *et al* 351 ff; Wessels *History* ch XXXV; Schreiner *The Contribution of English Law to South African Law*.

42 For modern expositions of the doctrine of consideration, see eg Chesbire Filoot and Furnston 73 ff; Furnston paras 2.15 ff. An excellent short history and explanation of the doctrine is to be found in the *Sixth Interim Report of the Law Revision Committee* (Cmd 5449).

43 See per De Villiers CJ in *Mtshu v Webster* (1904) 21 SC 323, 344.

44 *Canwood v Lane* (1867) 5 S 264, and De Villiers CJ's comment on this case in *Mtshu v Webster* above 344-5. See also per De Villiers AJA in *Conradie v Ransouw* 1919 AD 279, 300.

45 *Boshoff v Lotter* 1858 Phipson 7.

46 Foord's reports were not published until 1887, which no doubt explains why this case was not mentioned in the 1885 cases in the EDC, nor in Kotze CJ's note published in 1886.

47 *Laphon v Buchanan* (1904) 8 NLR (Ceylon) 49.

48 *The Institutes of Cape Law* vol III 34-55.

49 Wessels *History* 571-578.

50 *Cilliers v Ladsenborg* (1909) 26 SC 511; *Fitzgerald v Green & Seydler* 1913 CPD 403.

The dispute was obviously ripe for decision by the Appellate Division after its creation in 1910. In one of the first cases to come before the new court the question very nearly arose,⁵¹ but the accidents of litigation did not bring it up for decision until *Comrade v Rossouw* 1919 AD 279, five years after the death of De Villiers CJ and, fortuitously, during the absence on leave⁵² of Innes CJ. The Appellate Division unanimously rejected the Cape view that the English doctrine of consideration formed part of our law, and De Villiers AJA, who gave the main judgment, concluded at 320:

"According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into *sermo ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is *consensus*, naturally within proper limits – it should be *in* or *de re facta ac honesta*."

Solomon ACJ preferred to state the general rule without including all the qualifications at 288:

"An agreement between two or more persons entered into seriously and deliberately is enforceable by action."

Wessels AJA, at 324, said:

"I agree with the conclusion arrived at that a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established."

Since 1919, therefore, it has been settled law that the English doctrine of consideration forms no part of our law of contract.⁵³

An English importation that has been attended with far less controversy, and has been entirely beneficial, is the doctrine of quasi-mutual assent. In the old authorities on which our law is founded one can find numerous statements to the effect that agreement, as a necessary ingredient of a contract, must be true agreement in the sense of a meeting of the minds or coincidence of the wills of the contracting parties, or *consensus ad idem*.⁵⁴ Taking these statements to their logical conclusion, it would follow that if, through a mistake or misunderstanding in the mind of one or both parties, there was no true subjective agreement there would be no contract, however unjust that result might seem when viewed objectively from the point of view of how each party, as a reasonable person, might interpret the words and actions of the other. Indeed, this subjective approach is inherent in many of the statements referred to in the previous note.

In some of the earlier South African cases similar statements are to be found,⁵⁵ but when the question was first raised in the Appellate Division it was unanimously held, without reference to authority, that an offer to pay the amount owing by a debtor, reasonably understood by the offeror as meaning the full amount of £490 odd actually owing, bound the offerors to pay that amount, and not the lesser amount of £345 odd that the offerors thought was the amount owing. The case was *Peters & Co v Solomon* 1911 AD 121, and at 130 De Villiers CJ said:

"... if their course of dealing with the defendant was such as reasonably to lead him to believe that they intended to pay him the full amount of his claim, the plaintiffs' unexpressed intention to pay the lesser sum cannot avail them."

At 137 Innes J expressed the same conclusion in words that have frequently been quoted since:

"When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware."

This objective approach, as has been pointed out above, was adopted without reference to authority. If authority had been sought in Roman-Dutch law it would have been difficult, if not impossible, to find.⁵⁶ On the other hand English law could provide clear authority in the well-known rule in *Freeman v Cooke* (1848) 2 Ex 654 663, as stated by Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 607:

"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

By 1911 (the date of *Peters & Co v Solomon*) this rule could properly have been described as *trite law* in England, and was so regarded in the leading English textbooks which were current in South Africa at the time.⁵⁷ It is difficult to resist the conclusion that in *Peters & Co v Solomon* the Appellate Division was, consciously or unconsciously, importing the English rule in *Smith v Hughes* into South African law.⁵⁸

56 Eg *Rose-Innes Diamond Mining Co Ltd v Central Diamond Mining Co Ltd* (1883) 2 HOG 272 308; *Poigetter v New York Mutual Life Insurance Society* (1900) 17 SC 67 70; *Joubert v Enslin* 1910 AD 6 23; *Greenberg v Wascheh* 1911 WLD 1 7.

57 Grotius *De Jure Belli et Pacis* 2 11 6 3 would be authority for arguing that in circumstances such as those in *Peters & Co v Solomon* there should be held to be no contract, but possibly liability in delict. Glück *Pandekten* 2 14 290 can hardly be ranked as a Roman-Dutch authority.

58 See eg *Halsbury's Laws of England* 1 ed vol 7 (1909) 349-350; *Anson Law of Contract* 11 ed (1906) 154 and 12 ed (1910) 156; *Kerr on Fraud and Mistake* 3 ed (1902) 449.

59 There may be some significance in the fact that *Smith v Hughes* was quoted to the Appellate Division by counsel for the appellants, although on another point. See 1911 AD 127.

51 *Joubert v Enslin* 1910 AD 6.

52 James Rose-Innes *Autobiography* 210.

53 That does not mean it can be entirely forgotten in this country. In *Maklong v My Honda Pear* 1986 2 SA 714 (A), an Admiralty case, the doctrine had to be considered in some detail.

54 See Christie "The doctrine of quasi-mutual assent" 1976 *Acta Juridica* 149.

55 Eg *D 2 14 1 2* and 3; Grotius 3 3 45; Voet 45 1 2; Van Leeuwen 4 2 2; Van der Linden 1 14 2; Pothier *Obligations* para 17; Pufendorf 3 6 6. De Wet "Estoppel by Representation" in *de Suid-Afrikaanse Reg* 72 gives other examples.

Even if the rule in *Freeman v Cooke*, as stated by Blackburn J in *Smith v Hughes*, cannot be regarded as the foundation of *Peters & Co v Salomon*, it has been expressly adopted as part of South African law in a number of subsequent cases and must now be regarded as firmly entrenched.⁶⁰ Without it our law would be in a sorry state, as it would be obliged to hold that whenever there was no true subjective agreement there was no contract, even if the one party had given the other reasonably to understand that they were in agreement. The conduct of business, if this were the law, would be so hazardous that the law would be brought into disrepute.

Current problems

It should not be thought that the law has achieved perfection. Far from it. The later chapters of this book will reveal a number of areas in which the present law is open to criticism either because it is uncertain or because it denies apparently just claims or allows apparently unjust claims. Further development in these areas can be anticipated. Two of these areas – unfair contracts and the effect of the Constitution – are so broad that they need to be considered here at the outset.

Unfair contracts

The principle that the courts will enforce contracts, expressed in Latin as *pacta sunt servanda*, is obviously necessary as a general principle. But it is by no means obvious that the courts should enforce unfair contracts, and it is a regrettable fact that, on any objective view, the making of a contract, the terms of a contract or the enforcement of a contract are often unfair.

The South African Law Commission's project 47 was set up to investigate this problem, which had become urgent as a result of the unexpected decision in *Bank of Lisbon and South Africa Ltd v De Onidas* 1988 3 SA 580 (A). Before that decision it had been generally assumed that the *exceptio*

doli generatis provided a remedy against the enforcement of an unfair contract or the enforcement of a contract in unfair circumstances, but the Appellate Division (Jansen JA dissenting) fully reviewed the old and modern authorities on the *exceptio doli generatis* and concluded that it is not part of our law. In the course of its review the court held that it was not bound by *dicta* in the three Appellate Division decisions⁶¹ on which reliance had frequently been placed in the past, and at 607B Joubert JA, giving the judgment of the majority, concluded:

"All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generatis* as a superfluous, defunct anachronism. *Requiescat in pace.*"

The decision has been justly criticised for its positivist and over-scholarly method of historical reasoning and absence of an in-depth discussion of general policy considerations or the responsibility of a court to ensure justice,⁶² but it would be unrealistic to expect the Supreme Court of Appeal to have second thoughts and bring the *exceptio* back to life again.⁶³ Indeed it would not be desirable to do so, because the half-life of the *exceptio* from 1925 to 1988 showed it to be so entangled in its history that it was not a satisfactory instrument for modern courts to use.

The Law Commission's proposal, contained in its report of April 1998, is to cover unfair making, unfair terms and unfair enforcement of contracts in a comprehensive statute to be called the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act. As this rather lengthy short title indicates, the Act would establish a criterion of unreasonableness, unconscionableness or oppressiveness to be applied by the court to all contracts (with certain exceptions already covered by other legislation). The court would be supplied with 25 guidelines and "any other factor which in the opinion of the court should be taken into account" in order to determine whether the criterion had been met, and an ombudsperson would be established with power to regulate standard form contracts.

Before examining the relationship between the proposed Act and the existing common law in relation to unfair making, unfair terms and unfair enforcement of contracts, two comments need to be made. The first is that the proposed 25 guidelines would open almost every contract to attack. Assuming that the attack would only succeed in a proper case, nevertheless any party wishing to escape from a contract, however unjustifiably, would have little difficulty in choosing one or more of the guidelines to support an attack on the contract in the hope of at least gaining time or forcing a compromise. Few attorneys would be able to

60 *Turner, Visser & Co v Minister of Defence* 1916 CPD 84 92; *Van Ryn, Wine and Spirit Co v Chamidos Bier* 1928 TPD 417 422-423 (where the description of the rule as the "doctrine of quasi-mutual assent" was adopted by Greenberg J); *Hodgson Bros v SAR* 1928 CPD 257 261; *Abrahams v Willison* 1939 1 PH A14; *Jerin and Johnson (SA) Ltd v Keshan* 1940 CPD 647 650; *Padel v Le Cais (Pty) Ltd* 1946 TPD 30 34; *Pettu v Abrahamson (II)* 1946 NPD 673 682; *Diamond v Kernick* 1947 3 SA 69 (A) 83; *Collin v Ridgeman Engineering Works* 1948 1 SA 413 (A) 430; *Lady v Banket Holdings (Pty) Ltd* 1956 3 SA 558 (FC) 561-562; *George v Rainnood (Pty) Ltd* 1958 2 SA 465 (A) 471; *Perr-Ultan Areas Health Board v Breed* 1958 3 SA 783 (T) 789-790; *Mahne v Harml* 1961 1 SA 799 (D) 808; *Ocean Camp Lane Ltd v FR Warring (Pty) Ltd* 1963 4 SA 641 (A) 653 (per O'Flaherty Thompson JA *dis*); *Springdale Ltd v Edwards* 1969 1 SA 464 (RA) 469-470; *Benjamin v Gurewitz* 1973 1 SA 418 (A) 425; *Moko Henry Handlager (Pty) Ltd v Sikes* 1975 2 RLR 132 137; *Maugrove & Watson (Rhodesia) (Pvt) Ltd v Kolan* 1978 2 SA 918 (R) 922; *Stambou-Vassonaki Bouver-enting v Friedmann* 1979 3 SA 978 (A) 995; *Mondory Egenomaganutakup (Eims) Bpk v Kamp on De Beer* 1979 4 SA 74 (A) 78; *Spes Bona Bank Ltd v Portus Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A) 984; *Sonop Perotekum (SA) (Pty) Ltd v Popphodaganus* 1992 3 SA 334 (A) 239; *Soren v LSA Motors Ltd* 1994 1 SA 49 (A) 61; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 2 SA 795 (A) 800; *Ganzel (Pty) Ltd v Scharrghuizen Construction (Pty) Ltd* 1996 2 SA 682 (N) 682 (N) 686; *Consuntio Grasswarte BK v Snyman* 1996 4 SA 117 (W) 124.

61 *Wierntem v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corp'n Ltd* 1947 1 SA 514 (A); *Paddok Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A).

62 Van der Merwe, Lubbe, Van Huysselen "The *exceptio doli generatis*: *requiescat in pace* – *vivat aequitas*" (1989) 106 SALJ 235; Zimmermann "The law of obligations – character and influence of the civilian tradition" 1992 *Stell LR* 5 6-9; and see Lambers "The *exceptio doli generatis*: an obituary" (1988) 105 SALJ 644.

63 Although Kerr (1991) 108 SALJ 583 argues that the Appellate Division has done so in *Van der Merwe v Metcalles* 1991 2 SA 1 (A).

advise that a contract was unassailable, and the hazards of commercial dealings would be increased to an unacceptable extent.

The second comment concerns the proposed ombudsperson. In the previous edition of this book the view was expressed that in order to protect the consumer – the ordinary man or woman in the street – from oppressive contracts it is the machinery rather than the law that needs attention. The courts are effectively out of the financial reach of most people, and the ombudsman concept may very well provide the machinery to bring the desired remedies within reach. But before establishing any such office it should be borne in mind that the courts are out of reach of most people whether the contract of which they complain is in standard form or individually negotiated, and the proposed limitation of the ombudsperson's powers to standard form contracts would solve only part of the problem. It should also be borne in mind that the appointment of an ombudsperson need not be dependent on statutory amendment of the common law. We already have a number of ombudsmen functioning very effectively by applying the common law to problems in particular areas, and there is no reason why the proposed ombudsperson should not do the same.

In Gauleg the consumer protector and consumer affairs court set up by the Consumer Affairs (Unfair Business Practices) Act 7 of 1996⁶⁴ have been in operation for less than a year, but they are showing how protection can be extended to consumers against unfair business practices (which may take the form of unfair contracts) without involving the courts. At the time of writing aspects of the legislation are likely to be challenged on constitutional grounds, so any attempt to evaluate the scheme would be premature, but it will have to be evaluated before a decision is taken on the Law Commission's proposal for an ombudsperson.

Unfairness in the making of a contract

The common law has developed many principles and rules to curb unfairness in the making of a contract, treated in this book under the headings: quasi-mutual assent (pages 12-14, 26-31); written terms (pages 199-217); misrepresentation and fraud (pages 313-347); duress (pages 349-359); undue influence (pages 359-362); mistake (pages 363-389); illegality and unenforceability (pages 391-465). The question raised by the Law Commission report is whether these principles and rules cover the ground sufficiently or whether there are gaps that need to be filled by a more general power to curb unfairness.

Inequality of bargaining power is the most noticeable gap, partly but by no means completely filled by the rules relating to duress and undue influence. As will be seen at pages 349-359, the rules relating to duress are not cast in concrete but have been progressively extended by the courts to include the concept of duress of goods, and may well be further extended

to include economic duress and link up with the rules relating to undue influence. Section 9 of the Bill of Rights in the 1996 Constitution, read with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, gives the opportunity of tackling the problem of inequality of bargaining power by developing the common law further without legislation such as that proposed by the Law Commission. This line of thinking will be developed at pages 21-22 below.

Unfair contracts and contract terms

The Law Commission proposes that a contract or a term of a contract should be open to attack if it is unreasonable, unconscionable or oppressive. These three criteria are already well known to the courts, and the starting point of the common law is that the courts will not interfere with a contract or term on the ground that it is unreasonable. In *Burger v Central South African Railways* 1903 TS 571 576 Innes CJ said that

"our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable."⁶⁵

And even before the demise of the *exceptio dolus generalis*⁶⁶ it was settled that the *exceptio* could not be used to give relief against unfair terms or the fact that the other party had driven a hard, harsh bargain.⁶⁷ The reason for this hands-off attitude is clear. The parties have agreed, and the whole basis of the law of contract is that the law will enforce their agreement. Intervention by the courts because that agreement appears to be unreasonable would be a form of paternalism inconsistent with the parties' freedom of contract. But this general principle has been whittled away by the common law, which will not enforce a contract that is in unreasonable restraint of trade,⁶⁸ or an unreasonable term in a contract that is signed without being read⁶⁹ or in an unsigned document such as a ticket.⁷⁰ To accept the Law Commission's proposal would lead, not to a mere continuation of this process of whittling away the general principle, but to its complete abandonment. This would be a disastrous mistake, because every contract, no matter how carefully negotiated, would be open to

⁶⁵ And see *Van Rensburg v Stroucken* 1914 AD 317 328; *Scottish Union & National Insurance Co Ltd v Native Recruiting Corp'n Ltd* 1934 AD 468 465; *Segethohle Farms (Pty) Ltd v National Farmers Union Mutual Insurance Society Ltd* 1967 1 SA 13 (R) 18C; *John H Pruthard & Associates (Pty) Ltd v Thorny Park Estates (Pty) Ltd* 1967 2 SA 511 (D) 515A-C; *Heurand Estates (Pty) Ltd v McMaster* 1969 2 SA 312 (A) 336E-G; *Gronker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration* 1982 1 SA 78 (A) 96H-97B; *Tamarillo (Pty) Ltd v BN Ashken (Pty) Ltd* 1982 1 SA 398 (A) 486E-G; *Wynn's Car Hire Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 2 SA 754 (A) 760A-B.

⁶⁶ See p 15 above.

⁶⁷ *Rasheid v Durban City Council* 1975 3 SA 930 (D) 927B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) 673D-E; *Artiprat Ltd v Gebler Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) 265; *Dinkaba Platinum (Pty) Ltd v Econovoval Ltd* 1985 4 SA 615 (T) 627-630.

⁶⁸ P 417 below.

⁶⁹ P 203 below.

⁷⁰ Pp 308-209 below.

⁶⁴ See Premier's Notice 18 of 16 May 1997, Proclamation 42 of 1997, GNs 6716 and 6717 of 1999.

subsequent challenge on the ground that some of its terms were unreasonable. It would be difficult to estimate the extent of the damage that would be done to the conduct of business, personal trust and the ordinary person's respect for the law.

The Law Commission's other two criteria, unconscionable and oppressive, are a different matter because they are already applied by the common law to all contracts, however carefully negotiated. The courts will not enforce a contract or term that is "plainly improper and unconscionable" or "unduly harsh and oppressive".⁷¹ In each case the court will intervene only if it is driven to the conclusion that enforcement would be contrary to public policy,⁷² taking into account the circumstances at the time enforcement is sought.⁷³ These common law principles give the courts all the power they need, and legislation is not necessary. Admittedly, unconscionable and oppressive contracts flourish like the psalmist's green bay tree,⁷⁴ but this is only because the courts cannot do anything about contracts that are not brought before them. The ombudsman concept has the potential to put the ordinary person and the common law in touch with each other.

Unfair enforcement of a contract

The third type of contractual situation in which unfairness comes to the surface is the enforcement of a contract in circumstances that were not envisaged at the time it was made. The common law cannot yet claim to have this situation under control, as will be seen at pages 549-550 below. For many years this was regarded as the proper sphere for the *exceptio doli generalis*. So much so that in *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W), where the bank was seeking to enforce a deed of suretyship for a purpose that was never intended at the time of its execution, Botha J was able to say at 214H that:

"the present case appears to me to be tailor-made for the application of the general defence of the *exceptio doli*".

⁷¹ P 400 below.

⁷² P 399 below.

⁷³ Pp 422-423 below.

⁷⁴ The literature on this subject is extensive, and includes: Louw "Die billikheid in die Suid-Afrikaanse Kontrakereg" inaugural address Unisa 1979; Carey Miller "Juridiese *bonae fidei*: a new development in contract" (1980) 97 SALJ 531; Van der Walt "Afsanddoeningsbedinge in sekerheidsstellings- geldleens- en skuldterkeningskontrakte" (1988) 51 THRHR 833; Van Loggerenberg "Onbillike wisselingsbedinge in kontrakte: 'n pleidooi vir regshervorming" 1988 TSAAR 407; McDonald Mason "Consumer protection" (1989) 52 THRHR 32; Van der Walt in (1989) 52 THRHR 81; Van der Walt "Die Suid-Afrikaanse Regskommisste se ondersoek na die beheer oor onbillike kontrakbedinge" 1989 *Ontoer* 147; Penaar "Statutêre kontrakvoorskrifte met betrekking tot onroerende goed in die Suid-Afrikaanse reg" 1989-90 *Ontoer* 163; Van der Walt "Kontrakte en beheer oor kontrakterevryheid in 'n nuwe Suid-Afrika" (1991) 54 THRHR 367; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakterevryheid in die Suid-Afrikaanse reg" (1993) 56 THRHR 65; Hawthorne "The principle of equality in the law of contract" (1995) 58 THRHR 157.

But this is no longer the law. *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) was a similar case, but the Appellate Division decided that the *exceptio doli generalis* is no longer part of our law.⁷⁵ The Law Commission's proposed legislation would give the courts the power to intervene when the enforcement of a contract is unreasonable, unconscionable or oppressive, and this would undoubtedly fill the gap left by *Bank of Lisbon*. But suggestions for filling the gap by developing the common law have not been lacking. Lewis has suggested that the rules for interpretation of contracts should be relaxed. By allowing evidence of surrounding circumstances, including what passed during negotiations between the parties, whether or not the contract is ambiguous, much could be done to prevent a contract from being enforced in circumstances that were not envisaged at the time it was made.⁷⁶ Lambiris draws attention to the possibility, to which Jansen JA alluded in his dissenting judgment in *Bank of Lisbon* at 614E, of relying on the court's discretionary power to refuse an order of specific performance.⁷⁷ Van der Merwe, Lubbe and Van Huyssteen suggest an analysis and application of the concept of *bona fides*.

The suggested analysis and application have been convincingly carried out by Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A) 318ff in the context of the making of a contract. After reviewing the case law on the role of good faith in our modern law of contract he concludes at 326G:

"Ei hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrand op openbare beleid, steeds in ons Kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gewoelig is vir die opdragte van die gemeenskap, wat die uiteindlike skepper en gebuiker van die reg is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoortlikheid."

There is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA's reasoning, harnessed to the concept of public policy, in the context of the unfair enforcement of a contract. The foundation has long since been laid by the Appellate Division's recognition that in our law the concept of good faith is applicable to all contracts,⁷⁸ and its acceptance of the principle that in deciding whether public policy forbids the enforcement of a contract the circumstances existing at the time enforcement is sought must be taken into account.⁷⁹ Public policy is a question of fact not law⁸⁰ and changes with "the general sense of justice of the community, the *boni mores*, manifested

⁷⁵ See p 1415 above.

⁷⁶ Lewis "The demise of the *exceptio doli generalis*: is there another route to contractual equity?" (1990) 107 SALJ 26.

⁷⁷ Lambiris "The *exceptio doli generalis*: an obituary" (1988) 105 SALJ 644.

⁷⁸ *Tuckers Land and Development Compn (Pty) Ltd v Harts* 1980 1 SA 645 (A) 651C-652C; *Mutual and Federal Insurance Co Ltd v Ondishiroom Municipality* 1985 1 SA 419 (A) 433B.

⁷⁹ See p 422-423 below.

⁸⁰ Aquilino (Mr Justice Van den Heever) "Immorality and illegality in contract" (1941) 58 SALJ 337 346; *Ryland v Edros* 1997 2 SA 690 (C); *Arnold v Mulholland Motor Vehicle Accidents Fund* 1999 4 SA 1319 (A).

in public opinion",⁸¹ public opinion being understood in the sense of seriously considered public opinion on the general sense of justice and good morals of the community.⁸² By limiting good faith in the enforcement of a contract to the requirement to show that degree of consideration to the legitimate interests of the other party that public policy demands,⁸³ the Supreme Court of Appeal could tackle the unfair enforcement of contracts with a flexible instrument free from the rigidity inherent in an Act of Parliament.

Experience in Israel with the Contracts (General Part) Law 1973, ss 12 and 39 of which impose a criterion of good faith, indicates that a statute of this nature can lead to a form of demarcation dispute between the courts' new statutory power and their existing common law powers to intervene in cases of misrepresentation, fraud, duress, undue influence, mistake and common law illegality and unenforceability. The extent to which these common law powers had been modified or replaced by the new statutory power would be disputed, leading to uncertainty and expensive litigation.⁸⁴ The courts, which are practised in developing the common law seamlessly, would be unlikely to fall into the same difficulty, and the appointment of an ombudsperson with power to bring test cases could well render the Law Commission's proposed legislation unnecessary – unless, of course, the Supreme Court of Appeal fails the test.

Effect of the Constitution

The Bill of Rights in the 1996 Constitution⁸⁵ has already had a considerable impact on the law of contract, and will continue to do so.⁸⁶ The effect of some of the sections of the Bill of Rights on various areas of the law of contract will be noted in their proper place, but two questions are so broad that they will be considered here.

The first broad question is whether the effect and potential effect of the Bill of Rights on the law of contract is so pervasive that it must always be borne in mind. Very definitely. Constitutional law is no longer a matter for the specialist, and a contract lawyer cannot afford to profess ignorance of the Constitution, as will be apparent from the references to the Bill of Rights in subsequent chapters.

81 *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 3 SA 1129 (T) 1152H per Van Dijkhorst J, cited with approval in *Longman Distillers Ltd v Drop Inn Liquor Supermarkets (Pty) Ltd* 1990 2 SA 906 (A) 913G-H.

82 See Mr Justice Corbett "Aspects of the role of public policy in the evolution of our common law" (1987) 104 *SALJ* 52-67-68.

83 See Neels "Die aanvallende en beperkende werking van redelijkheid en billigheid in die kontraktereg" 1999 *TSAR* 684; Coekrell "Second-guessing the exercise of contractual power on rationality grounds" 1997 *Acta Juridica* 26-41-3.

84 The cases on ss 12 and 39 are reviewed by Cohen "Good faith in bargaining and principles of contract law" (1989) 9 *Tel Aviv U Stud in Law* 249 and Renner "Israeli contract law – recent trends and evaluation" (1995) 29 *JL* 360-363-8, fully justifying Cohen's conclusion in Beason and Friedmann 53-4 that the introduction of a statutory criterion of good faith has added to the uncertainty of Israeli law.

85 Constitution of the Republic of South Africa Act 108 of 1996 chapter 2 ss 7-39.

86 See Christie in *Bill of Rights Compendium* 3H.

The second broad question relates to inequality of bargaining power, to which reference was made at pages 16-17 above. It is a problem that has long bothered contract lawyers throughout the world because it often seems unfair to enforce a contract when it is obvious that the one party was in such a weak bargaining position that consent, even if genuine, was at best reluctant. The common law has evolved a number of techniques which can be applied in circumstances that may fall within the general ground of inequality of bargaining power, but has not tackled the problem head on by relying on that ground alone, or even primarily, to investigate whether a contract should be regarded as unenforceable. Foremost among these techniques are relaxation of the *causa subscriptor* rule,⁸⁷ limitations on the enforcement of exemption clauses,⁸⁸ construction *contra proferentem*,⁸⁹ duress,⁹⁰ undue influence⁹¹ and public policy.⁹²

In England Lord Denning MR made a bold move towards amalgamating duress and undue influence to counter inequality of bargaining power in *Lloyd's Bank Ltd v Bundy* [1975] 1 *QB* 326 (CA) 339C-D:

"English law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired because of his needs or desires, or his ignorance or infirmity coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

The House of Lords snuffed out this line of development in *National Westminster Bank plc v Morgan* [1985] 1 *AC* 686 by disapproving Lord Denning's reliance on inequality of bargaining power, but Lord Denning's approach has fared better in Australia. In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 *CLR* 447 the High Court laid down that a contract may be set aside when one party is under a special disadvantage or disability of which the other party knew or ought to have known, and that other party takes unfair or unconscientious advantage of his superior bargaining power. Carter and Harland *Contract Law in Australia* para [1514] suggest that this decision and those that follow it may have been influenced by the relatively recent Australian unfair contracts legislation, but in South Africa there is no need to wait for a lead from the legislature, because the Bill of Rights already points the way.

Section 9(1) of the Bill of Rights reads:

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

These words are amplified by s 1(1) (ix) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, enacted as required by s 9(4) of the Bill of Rights:

87 Pp 202-203 below.

88 Pp 209-217 below.

89 Pp 255-257 below.

90 Pp 349-359 below.

91 Pp 359-362 below.

92 Pp 392-404 below.

“equality’ includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.”

The intention is clearly to achieve effective, and not merely theoretical, equality, and this is made even clearer by the opening words of s 2 of the Act:

“The objects of this Act are –

- (a) to enact legislation required by section 9 of the Constitution,
- (b) to give effect to the letter and spirit of the Constitution, in particular –
 - (i) the equal enjoyment of all rights and freedoms by every person,
 - (ii) the promotion of equality,

To give effect to this constitutional and statutory intention in cases of unacceptable inequality of bargaining power it will be necessary for the courts to develop the common law in accordance with s 8(3)(a) of the Bill of rights. This process cannot, of course, be carried out until a suitable case arises, and in the ordinary course of litigation this may not happen for years. Once again, the appointment of an ombudsperson with power to bring test cases could well make it unnecessary to enact legislation on inequality of bargaining power – again unless the Supreme Court of Appeal fails the test.