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## THE UNILATERAL DETERMINATION OF PRICE – A QUESTION OF CERTAINTY OR PUBLIC POLICY?

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### 1 Introduction

It has been an established rule of South African law that "[t]here can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them".<sup>1</sup> Prior to 1993 the rule was firmly established in South African law and regularly applied by South African courts.<sup>2</sup> The courts accepted the application of the rule, but interpreted and applied it in different ways. This casuistic approach led to different results, to legal uncertainty and sometimes even to undesirable results.<sup>3</sup> Then in *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*<sup>4</sup> the Supreme Court of Appeal criticised the rule but stated that despite these criticisms it is still bound "by the view of our old authorities".

During the 1990s the steep increase in interest rates triggered a number of High Court cases attacking the standard discretionary clauses in loan agreements, which provide for the adjustment of the interest rate at the lender's discretion.<sup>5</sup> This

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<sup>1</sup> *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574 (hereafter *Westinghouse*).

<sup>2</sup> See eg *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 670 (hereafter *Burroughs*); *Steyn v Lomlin (Edms) Bpk* 1980 1 SA 167 (O) 170; *Westinghouse* 574; *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) 514-515 (hereafter *Murray & Roberts*).

<sup>3</sup> Otto 1998 *TSAR* 604; Lubbe 1989 *TSAR* 160; Kerr *Sale* 60-65; Hawthorne 1992 *THRHR* 638; Mofokeng 1998 *Juta's Business Law* 55-56; Osode 2000 *Afr J Int'l & Comp L* 170-171.

<sup>4</sup> *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) 186 (hereafter *Benlou Properties*). These remarks were made *obiter* in respect of the price in a contract of sale as the case dealt with a lease agreement.

<sup>5</sup> Cornelius 2003 *TSAR* 389; Lawack-Davids 2001 *Obiter* 181. For more background information on the reasons for the steep increase in interest rates see Otto 1998 *TSAR* 616.

question was referred to the Supreme Court of Appeal in *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd*.<sup>6</sup> The question before the court was whether or not a clause providing a party with the discretion to fix the performance of the other party is valid and enforceable in our law. The court set three requirements for a discretionary power to fix performance to be valid and enforceable: firstly, the discretion is not to fix a purchase price or rental payable;<sup>7</sup> secondly, the discretion is to fix the performance of the other party,<sup>8</sup> and, thirdly, the discretion must be exercised *arbitrio boni viri*.<sup>9</sup>

Although the matter before the court was in respect of a discretion granted to a lender to adjust the interest rate, the court did refer to the rule that a sale agreement is invalid if one of the parties is given the power to determine the purchase price payable.<sup>10</sup> The court raised a few questions in respect of the rule and commented that the rule as applied in South African law is "illogical".<sup>11</sup> The court also remarked that public policy, *bona fides* and contractual equity might also be employed when considering such issues.<sup>12</sup> However, the court made it clear that all of these comments were made *obiter*.<sup>13</sup> Despite the criticisms of the Supreme Court of Appeal, it would seem that the rule still forms part of our law.<sup>14</sup> This article investigates whether or not the rule should be retained in the South African common law. The answer to this question will depend on two separate questions: Is the rule a manifestation of the requirement of certainty of price? If not, does public policy require that the rule be retained?

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<sup>6</sup> *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 4 SA 928 (SCA) (hereafter *NBS Boland Bank*).

<sup>7</sup> *NBS Boland Bank* para 24.

<sup>8</sup> *NBS Boland Bank* para 24. Subsequently, in *Erasmus v Senwes Ltd* 2006 3 SA 529 (T) 538 (hereafter *Erasmus*), the court extended the last requirement to include a discretion that relates to a party's own performance.

<sup>9</sup> *NBS Boland Bank* para 25.

<sup>10</sup> *NBS Boland Bank* paras 9, 10, 16 and 32.

<sup>11</sup> *NBS Boland Bank* para 16.

<sup>12</sup> *NBS Boland Bank* para 28.

<sup>13</sup> *NBS Boland Bank* paras 16 and 32. See also Kerr *Sale* 55.

<sup>14</sup> Bradfield and Lehmann *Sale and Lease* 19; Cornelius *Interpretation* 148; Du Bois *et al Wille's Principles of SA Law* 891; Zulman and Kairinos *Norman's Purchase and Sale* 2; Osode 2000 *Afr J Int'l & Comp L* 175-176.

## 2 The rule as a manifestation of the requirement of certainty of price

### 2.1 Introduction

In general terms, a contract can be defined as "an agreement made with the intention of creating an obligation or obligations".<sup>15</sup> In other words, the parties must have the intention to be bound by the terms of the agreement. The enforcement of such agreements will be possible only if the obligations that the parties are binding themselves to are certain or can be ascertained.<sup>16</sup> As such, it is an accepted legal principle that the terms of a contract must result in certainty regarding their legal consequences.<sup>17</sup> This usually implies that the parties must clearly state the material aspects of the obligations and how they should operate.<sup>18</sup> No contract can exist if the agreement is so vague that its material aspects and obligations cannot be determined.<sup>19</sup>

The price is an essential element of a contract of sale.<sup>20</sup> Certainty of price is therefore a requirement for a contract of sale in South African law.<sup>21</sup> In 1964 the requirement of certainty of price was formulated in *Burroughs*:<sup>22</sup>

It is, I think, clear that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They must fix

<sup>15</sup> Van der Merwe *et al Contract* 9.

<sup>16</sup> De Wet and Van Wyk *Kontraktereg* 93; Hutchison and Pretorius *Kontraktereg* 218; Hawthorne 1992 *THRHR* 638; Lubbe 1989 *TSAR* 159; Otto 1998 *TSAR* 603; Otto 2000 *SALJ* 1.

<sup>17</sup> Bradfield and Lehmann *Sale and Lease* 17; Du Bois *et al Wille's Principles of SA Law* 754; Van der Merwe *et al Contract* 221; Hawthorne 1992 *THRHR* 638.

<sup>18</sup> Du Bois *et al Wille's Principles of SA Law* 754.

<sup>19</sup> De Wet and Van Wyk *Kontraktereg* 93.

<sup>20</sup> *Dawidowitz v Van Drimmelen* 1913 TPD 672 675 (hereafter *Dawidowitz*); *Meyer v Kirner* 1974 4 SA 90 (N) 97 (hereafter *Meyer*). See also Bradfield and Lehmann *Sale and Lease* 11; Fouché *Contracts* 136; Hackwill *Mackeurtan's Sale* 14; Mostert, Joubert and Viljoen *Koopkontrak* 6; Zulman and Kairinos *Norman's Purchase and Sale* 2; Schulze 2003 *Juta's Business Law* 201.

<sup>21</sup> *Coronel v Kaufman* 1920 TPD 207 209; *Deary v Deputy Commissioner of Inland Revenue* 1920 CPD 541 552; *Margate Estates Limited v Moore* 1943 TPD 54 59; *Hattingh v Van Rensburg* 1964 1 SA 578 (T) 582; *Meyer* 97; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 425 (A) 434; *Patel v Adam* 1977 2 SA 653 (A) 665 (hereafter *Patel*); *Johnston v Leal* 1980 3 SA 927 (A) 938; *Reymond v Abdalnabi* 1985 3 SA 348 (W) 349. See also Bradfield and Lehmann *Sale and Lease* 18; Fouché *Contracts* 137; Visser *et al Gibson's Mercantile Law* 114; Hackwill *Mackeurtan's Sale* 14; Roberts *Wessels' Contract Vol 2* 1093; Nagel *Commercial Law* 197; Van den Bergh 2012 *TSAR* 63.

<sup>22</sup> *Burroughs* 670.

the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. ... Moreover, in our law, which does not conform in this regard with certain other systems, there can be no valid contract of sale if the parties have agreed that the price is to be fixed by one of them or by his nominee.

The above formulation was approved in a number of cases - including cases before the Supreme Court of Appeal.<sup>23</sup> It is clear that a price must be determined in the contract itself or be capable of determination in accordance with some external standard.<sup>24</sup> An external standard would refer to an objective one.<sup>25</sup> Furthermore, it must also be determined without further reference to the parties.<sup>26</sup> It appears that this would mean that the parties may not agree that one of them has the power to determine the price.<sup>27</sup> In a case such as this it would appear that a discretionary power granted to one of the parties to determine the price would render the sale void in South African law.<sup>28</sup>

As shown above, the rule is traditionally viewed as a manifestation of the requirement of certainty of price. However, this view is not without criticism. The arguments for and against the rule dealing with the requirement of certainty of price are investigated below.

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<sup>23</sup> *Westinghouse* 574; *Shell SA (Pty) Ltd v Corbitt* 1986 4 SA 523 (C) 526 (hereafter *Shell*); *Genac Properties JHB (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 1 SA 566 (A) 576-577 (hereafter *Genac Properties*); *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 2 SA 225 (A) 233 (hereafter *H Merks*); *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 4 SA 141 (SCA) 158; *Pareto Ltd v Mythos Leather Manufacturing (Pty) Ltd* 2000 3 SA 999 (W) para 9 (hereafter *Pareto*).

<sup>24</sup> This is in accordance with the principle *certum est quod certum reddi potest* ("something is certain if it can be made certain") found in D 12 1 6 and D 45 1 74 (Mostert, Joubert and Viljoen *Koopkontrak* 10; Hawthorne 1992 *THRHR* 640). For examples of acceptable external standards see Du Bois *et al Wille's Principles of SA Law* 891; Hackwill *Mackeurtan's Sale* 15; Joubert *Contract* 179-180; Kerr *Sale* 33-34; Mostert, Joubert and Viljoen *Koopkontrak* 12; Van der Merwe *et al Contract* 227; Zulman and Kairinos *Norman's Purchase and Sale* 43; Nagel *Commercial Law* 198; Sharrock *Business Law* 272.

<sup>25</sup> Van der Merwe *et al Contract* 223. As pointed out by Laing *Price* 18, although an objective standard is required, the courts have given different meanings to what would be considered objective. See further para 0 below.

<sup>26</sup> There are differing opinions on whether these two requirements (an external standard and no further recourse to the parties) should be tested independently or not (Laing *Price Adaptation* 19). See further para 0 below.

<sup>27</sup> See further para 0 below.

<sup>28</sup> Hawthorne 1992 *THRHR* 638; Kerr and Glover 2000 *SALJ* 203; Otto 1998 *TSAR* 604; Schulze 2003 *Juta's Business Law* 201.

## ***2.2 Arguments that the unilateral determination of price does not comply with the requirement of certainty of price***

There are four main arguments in support of the assertion that a unilateral determination of price does not comply with the requirement of certainty of price and that this uncertainty cannot be remedied. They are: (a) the unilateral determination of price excludes agreement on one of the essential elements of a contract of sale; (b) the unilateral determination of price amounts to a pure potestative condition; (c) the unilateral determination of price is too vague to be enforceable; and (d) the court should not make a contract for the parties.

Each of these arguments is investigated below.

### *2.2.1 A discretion to determine the price excludes agreement on one of the essential elements of a contract of sale*

A tendency exists in South African law to distinguish between discretions granted in respect of essential elements of a contract and discretions granted in respect of non-essential elements of a contract.<sup>29</sup>

In respect of contracts of sale, *Machanick v Simon*<sup>30</sup> can be mentioned. The court stated that the price left to the discretion of the buyer in Roman law was imperfect.<sup>31</sup> The court stated that as the price is one of the essential elements of a sale, "there is no room for doubt in that case".<sup>32</sup> The court held that this can be distinguished from non-essential discretions which must be exercised *arbitrio boni viri*.<sup>33</sup> This distinction was followed in subsequent case law.<sup>34</sup>

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<sup>29</sup> Kerr *Sale* 64; Kerr *Contract* 132; Davids 1965 *SALJ* 110.

<sup>30</sup> *Machanick v Simon* 1920 CPD 333 (hereafter *Machanick*).

<sup>31</sup> *Machanick* 336. For a detailed discussion on the Roman law sources see Du Plessis 2012 *Fundamina* 15-31.

<sup>32</sup> *Machanick* 333.

<sup>33</sup> *Machanick* 333.

<sup>34</sup> See eg *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 1 SA 700 (A) 706-707 (hereafter *Dharumpal*) and *Burroughs* 670.

This distinction is based on the argument that a discretion to determine the price renders the contract void because *consensus* on an essential element of the sale (ie the price) is lacking.<sup>35</sup> This view is open to criticism. Laing argues that the reason for the requirement of certainty of price is to "place the price beyond the reach of consensus" and to ensure that no further agreement is necessary to determine the final price.<sup>36</sup> Where one of the parties is given the power to determine the price, no further agreement is necessary and there is *consensus* on the essential element of price.<sup>37</sup> The party must merely exercise the discretion and determine the price. This is supported by the criticism in *Benlou case*,<sup>38</sup> where the court remarked that it could not understand why the purchase price determined by a third party is *more* certain than the purchase price determined by one of the parties to the contract. Subsequently, the court in *NBS Boland Bank*<sup>39</sup> agreed with the criticism and expressed doubt as to the reasons for the distinction between a discretion to determine the price and other contractual discretions.

This distinction between discretions dealing with essential and non-essential terms was also applicable to the rent in a lease agreement. However, in *Genac Properties*<sup>40</sup> the court was willing to enforce a discretion that entitled the landlord to determine expenses to be paid (as part of the rent), because the court was of the view that it referred to an objective standard (the expenses were limited to expenses actually and reasonably incurred). This reasoning was followed in *Engen Petroleum Ltd v Kommandonek (Pty) Ltd*.<sup>41</sup> The court held that a clause providing for the adjustment

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<sup>35</sup> Kerr *Sale* 64.

<sup>36</sup> Laing *Price Adaptation* 20. Laing refers to the following extract in *Odensdaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) 665: "The contract itself must place the subject-matter of the transaction, the price and the fact of consensus out of range of the clash of the will of the parties."

<sup>37</sup> Laing *Price Adaptation* 59, 153-154.

<sup>38</sup> *Benlou Properties* 185. The court's comment was made in light of the fact that the determination of the purchase price or rent by a third party is acceptable in our law (*Pareto* para 9).

<sup>39</sup> *NBS Boland Bank* para 32. This remark was made *obiter*. See also Lubbe 1989 *TSAR* 173; Hutchison and Pretorius *Kontraktereg* 223.

<sup>40</sup> *Genac Properties* 579.

<sup>41</sup> *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 2 SA 170 (W) 173-174 (hereafter *Engen Petroleum*).

of the rental in the landlord's discretion is valid if it refers to an objective and reasonable discretion.<sup>42</sup>

There no longer seems to be a good reason for distinguishing between price discretions and other discretions,<sup>43</sup> especially on the ground that price discretions exclude agreement on one of the essential elements of a contract of sale.

### *2.2.2 A discretion to determine the price amounts to a pure potestative condition*

There is a tendency to equate a discretion to determine the price with a pure potestative condition.<sup>44</sup> The first reference in South African law to this argument can be found in Judge Wessels's reasoning in the *Dawidowitz* case. In this case the defendant pleaded that he and the plaintiff had agreed that he could pay the purchase price in monthly instalments, the amount of such instalments to be according to what the defendant could afford to pay.<sup>45</sup> This case did not actually deal with a discretion to determine the price, but with how the price should be paid.<sup>46</sup> Judge President De Villiers held that the defendant had not proved the agreement.<sup>47</sup> Although Wessels concurred with De Villiers's judgment, he went further and discussed the general principles applicable to sale:

Our law requires, as one of the elements of a contract of sale, that there shall be a certain price. It may very well be that, from the circumstances of the case, the Court will imply that the purchaser was to pay a reasonable sum for the goods which he received. But if you cannot gather this from the surrounding circumstance, if there is no price, there is no contract. If I say, for instance: 'I will buy your horse for what I think it is worth', or: 'for what I choose to pay for

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<sup>42</sup> *Engen Petroleum* 174. These remarks were made *obiter* as the court held that the contract expressly limited the discretion to an objectively ascertainable discretion (at 173).

<sup>43</sup> See also Cornelius 2003 *TSAR* 390.

<sup>44</sup> *Dawidowitz* 672; *Dharumpal* 707. See also Mostert, Joubert and Viljoen *Koopkontrak* 11. A pure potestative condition may be described as a condition "which depends entirely upon the will of the promisor" (Roberts *Wessels' Contract Vol 1* 406 para 1313). It is also known as a condition *si voluero* ("if I wish") and "refers to the situation where the existence of the contract is made dependent on the will of one of the parties" (Du Plessis 2012 *Fundamina* 21).

<sup>45</sup> *Dawidowitz* 672.

<sup>46</sup> Laing *Price Adaptation* 131 n 612. Therefore, the court's remarks regarding unilateral determinations of price were made *obiter* (Lubbe 1989 *TSAR* 163; Laing *Price Adaptation* 132 n 616).

<sup>47</sup> *Dawidowitz* 674.



it,' there is no sale. This principle applies to every form of contract. *If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract; it is void for vagueness*<sup>48</sup> (my emphasis).

Clearly, Wessels held that a discretion to determine the price ("I will buy your horse for what I think it is worth") amounted to a pure potestative condition ("it depends wholly on his own will what part of it he should perform").<sup>49</sup> This argument is open to criticism and must not be followed because a discretion to determine the price cannot be equated with a discretion to determine whether or not to be bound to the agreement.<sup>50</sup>

Reference must also be made to *Theron v Joynt*,<sup>51</sup> where the court stated as follows:

Waar een van twee mense, wat voorgee kontrakterende partye te wees, hom die reg voorbehou om na willekeur enige beding in die sogenaamde ooreenkoms eensydig te wysig, kom sy regposisie in alle opsigte ooreen met dié van iemand wat oënskyklik 'n verpligting aangaan op voorwaarde dat hy na willkeur daardie verpligting kan nakom of ontduik. Sulke handeling beskou ons reg as geen regshandeling nie of handeling sonder regsgevolge. (D 45 1 17; 45 1 46 3; 45 1 108 1).

The meaning of the term "willekeur" is uncertain.<sup>52</sup> In *Benlou Properties*<sup>53</sup> the court interpreted "willekeur" as a determination of price which "depends *entirely* on the will of one of the parties". In *NBS Boland Bank*<sup>54</sup> the court stated that even if it

<sup>48</sup> *Dawidowitz* 675. Strangely, in *Williams and Taylor v Hitchcock* 1915 WLD 51 it would seem that Wessels changed his mind. This seems to be true even though Wessels specifically distinguished this case from the case in *Dawidowitz* 53-54. The parties agreed that the purchaser would not be called upon to pay the purchase price "until such time as he is in a financial position to do so" (at 52). These facts are almost identical to the facts in *Dawidowitz*. Wessels J held that the contract was not void for vagueness and did not depend entirely on the will of one of the parties (at 54). See also Beck 1985 *SALJ* 666.

<sup>49</sup> Laing *Price Adaptation* 131 n 612.

<sup>50</sup> Du Plessis 2012 *Fundamina* 20-23. See also Laing *Price Adaptation* 131 n 612; Van der Merwe *et al Contract* 236, 243 n 146.

<sup>51</sup> *Theron v Joynt* 1951 1 SA 498 (A) 506. This remark was also *obiter* (see Lubbe 1989 *TSAR* 164 n 30).

<sup>52</sup> Kerr and Glover 2000 *SALJ* 204 argues that the word has been used in translations of Van der Keessel's work to refer to a discretion to determine the price.

<sup>53</sup> *Benlou Properties* 186.

<sup>54</sup> *NBS Boland Bank* paras 22-23. See further Lubbe 1989 *TSAR* 176; Du Plessis 2012 *Fundamina* 22.

refers to a discretionary power, the authorities listed by Deputy Chief Justice Van Heerden do not support his argument because all of these texts refer to a pure potestative condition. This was approved by the court in the *Erasmus* case,<sup>55</sup> where the court held that a discretion to amend the terms of a contract does not amount to a pure potestative condition.

A further argument is that such a discretion amounts to a pure potestative condition because it is uncertain whether the party will ever determine the price.<sup>56</sup> Laing<sup>57</sup> counters this argument as follows: first, such uncertainty has not prevented the recognition of third-party price determinations. Secondly, the failure to determine the price could possibly be construed as a breach of contract and be dealt with accordingly.

### *2.2.3 A discretion to determine the price is too vague to be enforceable*

In *NBS Boland Bank*<sup>58</sup> the court stated the following:

A recurring theme in those cases in which it was held that the clause in question is invalid is that a contract which empowers one of the parties to fix a prestation is void for vagueness. With one exception that was undoubtedly the view of Roman-Dutch law writers in regard to the determination of the price in a sale and the rental in a lease.

In his commentary on the above extract, Kerr<sup>59</sup> remarks that there is no reference in Roman-Dutch law supporting the view that a contract allowing for the determination of the price by one of the parties is void for vagueness. However, there are cases in South African law that do support such a view and almost all of these cases cite *Dawidowitz* as authority.<sup>60</sup> This is probably because the first mention of vagueness

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<sup>55</sup> *Erasmus* 537. See also Van der Merwe *et al Contract* 243 n 146.

<sup>56</sup> Laing *Price Adaptation* 122.

<sup>57</sup> Laing *Price Adaptation* 122. See also Van der Merwe *et al Contract* 235; Lubbe 1989 *TSAR* 171.

<sup>58</sup> *NBS Boland Bank* para 9.

<sup>59</sup> Kerr *Sale* 59; Kerr and Glover 2000 *SALJ* 208. See further Du Plessis *Unilateral Determination of Price* 39-48. There is also no reference to vagueness in the Roman law (see Du Plessis 2012 *Fundamina* 15-30 and Kerr *Sale* 58-59).

<sup>60</sup> *Dharumpal* 70; *Westinghouse* 574; *Shell* 525-526; *Murray & Roberts* 514; *Boland Bank Bpk v Steele* 1994 1 SA 259 (T) 274 (hereafter *Boland Bank*); *NBS Bank Ltd v Badenhorst-Schnetler*

in respect of a discretion to determine the price is found in this case, where the court stated as follows:

[I]f there is no price, there is no contract. If I say, for instance: 'I will buy your horse for what I think it is worth', or: 'for what I choose to pay for it,' there is no sale. This principle applies to every form of contract. If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract; it is *void for vagueness*<sup>61</sup> (my emphasis).

As shown above, a discretion to determine the price is not the same as a contract where the party can decide whether he wants to be bound to the contract or not.<sup>62</sup> Such a contract is also not void for vagueness. Vagueness refers to "indefinite terms", terms "not definitely or precisely expressed" or "deficient in details or particulars".<sup>63</sup> In respect of words and language, it means "[n]ot precise or exact in meaning".<sup>64</sup> Therefore, vagueness refers to a contract where the intention of the parties cannot be determined because the terms are indefinite, imprecise, insufficient or unclear in their meaning and, consequently, the contract is void for vagueness.<sup>65</sup>

Where one of the parties is in clear language given the power to determine the price, the agreement cannot be described as vague.<sup>66</sup> The only thing that is not certain is the eventual price.<sup>67</sup> However, the moment the price is determined, this uncertainty disappears.<sup>68</sup> Another example of such a contract is a contract of sale where the price is to be determined by a third party. Such contracts are not considered void for vagueness.<sup>69</sup>

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*Bedryfsdienste BK 1998 3 SA 729 (W) 736 (hereafter NBS Bank)*. Other cases that do not refer to *Dawidowitz* directly refer to one of the cases listed above. See for example, *H Merks 233* referring to *Westinghouse*.

<sup>61</sup> *Dawidowitz 675*. See the full extract from this judgment in para 0 above.

<sup>62</sup> See para 0 above.

<sup>63</sup> Kerr *Sale 57* where he refers to the dictionary meaning of "vague" and "vagueness".

<sup>64</sup> Kerr *Sale 57*.

<sup>65</sup> Kerr *Sale 65*; Sharrock *Business Law 89*.

<sup>66</sup> Kerr *Contract 133*; Laing *Price Adaptation 65*.

<sup>67</sup> Kerr *Sale 65*; Laing *Price Adaptation 65*.

<sup>68</sup> Van der Merwe *et al Contract 235*.

<sup>69</sup> Kerr *Sale 57-58*. See para 0 above.

A further argument that the contract is void for vagueness is that it is uncertain how the eventual price should be determined. If the party with the discretion fails to determine the price, what guidelines must the court follow to make such a determination? It is argued below that in the absence of guidelines in the contract itself the court should imply that such a discretion should be exercised *arbitrio boni viri*.<sup>70</sup> It will also be shown that there are principles and guidelines that could be followed to make such a determination.<sup>71</sup>

#### 2.2.4 *The principle that the courts should not make a contract for the parties*

Kerr argues that the unilateral determination of price according to the standard *arbitrio boni viri* should not be allowed. One of the reasons for his view is that such an interpretation would result in the same problems encountered in third-party price determinations.<sup>72</sup> Where there is a dispute, the court acting in the place of a reasonable person will have to determine the price or set the contract aside.<sup>73</sup> Kerr<sup>74</sup> argues that this will breach the principle that the courts should not make a contract for the parties. In support of his argument, Kerr<sup>75</sup> refers to the *H Merks* case. However, in this case the parties agreed that the "price may be increased by mutual agreement from time to time".<sup>76</sup> This can be distinguished from the unilateral determination of price where no further agreement is required. Alternatively, this principle is usually applied where there is uncertainty as to what the parties intended.<sup>77</sup> This is not the case in discretions to determine the price as the parties'

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<sup>70</sup> See para 0 below.

<sup>71</sup> See para 0 below.

<sup>72</sup> Kerr *Sale* 71.

<sup>73</sup> Kerr *Sale* 71. However, these "concerns" have not resulted in third-party determinations not being recognised in South African law. See para 0 below in respect of how this problem is dealt with in third-party price determinations.

<sup>74</sup> Kerr *Sale* 71. However, Kerr concedes that his real reason for distinguishing the two instances from each other is because the unilateral determination of price was not allowed in Roman law, while third-party determinations were. This is not the case and there are various interpretations in Roman law that would allow for one of the parties to determine the price, including that such a discretion would have to be exercised *arbitrio boni viri* (Du Plessis 2012 *Fundamina* 24-29). See also Kerr and Glover 2000 *SALJ* 208; Beck 1985 *SALJ* 662.

<sup>75</sup> Kerr *Sale* 71.

<sup>76</sup> *H Merks* 230.

<sup>77</sup> See eg *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 3 SA 583 (C) 592 (hereafter *Bellville-inry*).

intention is usually clear. Furthermore, this principle could be tempered by the application of the maxim *ut res magis valeat quam pereat*.<sup>78</sup> Where this is not possible (as in the case of a clearly unfettered discretion), the courts will not be willing to imply an *ex lege* term of reasonableness and determine the price for the parties.<sup>79</sup>

### **2.3 Arguments that the unilateral determination of price does comply with the requirement of certainty of price or does not need to**

There are also arguments that the unilateral determination of price does comply with the requirement of certainty of price or does not need to. The following main arguments are investigated:

- (a) the use of the word "imperfectum" in D 18 1 35 1;
- (b) where the discretion refers to an objective or external standard;
- (c) the standard of *arbitrio boni viri* should apply to such discretions;
- (d) the discretion can be granted to either the seller or the buyer;
- (e) the contract should be interpreted in favour of its validity, and
- (f) the contract could be enforced as an innominate contract.

#### *2.3.1 The use of the word "imperfectum" in D 18 1 35 1*

In *Benlou Properties* the court considered the interpretation of D 18 1 35 1 by the Roman-Dutch writers and Daube's contradictory arguments.<sup>80</sup> The court stated the following:

According to *Daube* there is much to be said for a construction that the text does not condemn a sale as invalid if the price is to be fixed by the buyer, but merely provides that the sale is *imperfectum* until the price has been fixed.<sup>81</sup>

<sup>78</sup> *Bellville-inry* 592. See para 0 below.

<sup>79</sup> Laing *Price Adaptation* 152 referring to *Benlou Properties* 187-188.

<sup>80</sup> For a detailed discussion on the interpretation of D 18 1 35 1 see Du Plessis 2012 *Fundamina* 15-31. See also Du Plessis *Unilateral Determination of Price* ch 2.

<sup>81</sup> *Benlou Properties* 186. However, the court stated that it was "bound to the views of our old authorities". See further Du Plessis 2012 *Fundamina* 24-26.

In *NBS Boland Bank*<sup>82</sup> the court stated that "in some cases providing for discretionary determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being." The court was not specifically discussing a discretion to determine the price, but this would be a plausible interpretation that would allow for a valid contract as soon as the price was determined.

### 2.3.2 Where the discretion refers to an objective or external standard

In *Burroughs Machines* the court stated that the parties "must fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them".<sup>83</sup> From the above formulation, it is clear that when the price is not fixed in the contract itself, it must be capable of determination in accordance with some external standard (which will be an objective standard).<sup>84</sup> Furthermore, it should not be necessary to consult with the parties before determining the price. According to some writers, this would mean that there should be no further need to consult the parties to ascertain their *intention*.<sup>85</sup> Therefore, no further *agreement* should be necessary to determine the final price.<sup>86</sup> This would accord with the reason for the rule, namely, to "place the price beyond the reach of consensus".<sup>87</sup> On this interpretation, where one of the parties may determine the price, the determination would not fall foul of this second requirement, as the price can be determined without any further agreement between the parties. However, such a discretion would still have to meet the first requirement, namely, it must refer to some external or objective standard.<sup>88</sup> Such an interpretation has been viewed as an interpretation

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<sup>82</sup> *NBS Boland Bank* para 24.

<sup>83</sup> *Burroughs* 670.

<sup>84</sup> See para 0 above.

<sup>85</sup> Hawthorne 1992 *THRHR* 640; Laing *Price Adaptation* 19. *Contra* Kerr who merely states that the price should be ascertainable without further reference to the parties (Kerr *Sale* 33).

<sup>86</sup> Laing *Price Adaptation* 20; Van der Merwe *et al Contract* 227.

<sup>87</sup> Laing *Price Adaptation* 20. See n 36 above.

<sup>88</sup> Van der Merwe *et al Contract* 237.

"stretching the limits of the meaning of the term 'objectively ascertainable'",<sup>89</sup> but it is clear that our courts have been prepared to follow such an interpretation.

In *Murray & Roberts*<sup>90</sup> the court was prepared to accept that an agreement between the parties that the price would have to be determined by one of the parties together with a third party would be valid because it would "on the face of things" refer to an objective and external standard. This was also the case in *Stead v Conradie*.<sup>91</sup> In this case, a clause in a contract provided that one of the parties could determine the "current value" of the property, which would form the basis of the price to be paid.<sup>92</sup> The court held that "current value" referred to the market value, which could be objectively ascertained.<sup>93</sup> The court said that the discretion was not left to the absolute discretion of the party and therefore it was valid as it referred to an external standard, which could be determined without further reference to the parties.<sup>94</sup>

The courts have also been prepared to follow such an interpretation in respect of contracts of lease. In *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*<sup>95</sup> the court had to decide whether a provision in a rental agreement providing for the tenant to be liable for certain costs incurred by the landlord was valid. The court *a quo* held that in effect the clause meant that the landlord could determine such costs in his discretion and therefore the clause was invalid.<sup>96</sup> However, this decision was reversed on appeal. The court referred to the provisions in the contract that required that the costs had to be reasonable and any dispute concerning the

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<sup>89</sup> Hawthorne 1992 *THRHR* 647.

<sup>90</sup> *Murray & Roberts* 515. However, the court accepted that whether this method would refer to an objective and external standard or not would depend on the relationship between the contracting parties and the independence and competence of the third party who jointly with one of the parties would determine the price. However, Hawthorne 1992 *THRHR* 642 argues that the judgment has indicative (but not authoritative) value because the court dealt with the specific facts only and refused to lay down a general rule.

<sup>91</sup> *Stead v Conradie* 1995 2 SA 111 (A) 123 (hereafter *Stead*).

<sup>92</sup> *Stead* 123.

<sup>93</sup> *Stead* 123.

<sup>94</sup> *Stead* 123.

<sup>95</sup> *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) 747 (hereafter *Proud Investments*).

<sup>96</sup> *Proud Investments* 750.

reasonableness of the costs should be referred to the landlord's auditors.<sup>97</sup> The auditors would act as experts and their decision would be final and binding on the parties.<sup>98</sup> The auditors would have to consider the fair market costs of the services supplied and call for evidence from suitably qualified persons in making their decision.<sup>99</sup> The Supreme Court of Appeal held that the discretion was valid as it did provide for an "objective determination of reasonableness ... by the landlord's auditors as expert outsiders without any reference to the landlord".<sup>100</sup>

In the case of *Genac Properties*<sup>101</sup> the court stated that the discretion to determine expenses to be paid (as part of the rent) was objectively ascertainable because the expenses were limited to expenses actually and reasonably incurred. Therefore, the court held that the expenses were "not subject to the landlord's will or whim".<sup>102</sup>

In *Benlou Properties*<sup>103</sup> the court stated that a discretion would be invalid if the rent could be determined in one of the party's unfettered discretion. As the discretion granted to the lessor to determine additional rent was subject to three qualifications, all of which referred to an objective standard, the court held that the clause was valid.<sup>104</sup>

In *Engen Petroleum*<sup>105</sup> the lessee was granted the right to adjust the rental payable in terms of the lease agreement. However, such a right was subject to three requirements: firstly, the discretion might be exercised only on reasonable grounds;

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<sup>97</sup> *Proud Investments* 747.

<sup>98</sup> *Proud Investments* 747.

<sup>99</sup> *Proud Investments* 747.

<sup>100</sup> *Proud Investments* 751. Hawthorne 1992 *THRHR* 643-644 criticises the judgment as not setting an objective standard because the auditors were appointed by the landlord and therefore acting as his agent. However, Laing *Price Adaptation* 137 n 643 argues that as the contract referred to reasonable costs it already constituted an objective standard and the auditors were obliged to act reasonably.

<sup>101</sup> *Genac Properties* 579.

<sup>102</sup> *Genac Properties* 579.

<sup>103</sup> *Benlou Properties* 182. See also Brand 1993 *Codicillus* 83.

<sup>104</sup> *Benlou Properties* 184. First, it was limited to a certain percentage (74,4%) of the increased expenditure. Secondly, the expenditure actually had to be incurred and, finally, only increases in expenses applicable at the date of commencement of the negotiations would be taken into account. Therefore no new expenses could be claimed from the tenant.

<sup>105</sup> *Engen Petroleum* 173.



secondly, such a right would arise only if certain circumstances changed to make the continued performance of the lessee uneconomic; finally, the adjustment had to render the lessee's obligations economical as opposed to uneconomical. The court held that all these requirements referred to an objective standard which could be determined and, as such, the clause was valid.<sup>106</sup>

Therefore a discretion will be valid if it is subject to an external or objective standard and this could include a reference to reasonableness.<sup>107</sup>

### 2.3.3 *The standard of arbitrio boni viri should apply to such discretions*

The courts are also willing to read reasonableness into a discretion unless it is clear from the contract that the discretion is not subject to these standards.<sup>108</sup> Therefore, once reasonableness is implied, the discretion refers to an objective standard and complies with the requirement of certainty of price.<sup>109</sup>

The court in *NBS Boland Bank*<sup>110</sup> stated that "unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio boni viri*". The court referred to various previous cases supporting this proposition.<sup>111</sup> In addition, the court referred to D 50 17 22.<sup>112</sup>

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<sup>106</sup> *Engen Petroleum* 173-174.

<sup>107</sup> *Laing Price Adaptation* 138, where the author states that the court regards "reasonableness as a concept quite capable of objective ascertainment".

<sup>108</sup> *Laing Price Adaptation* 154 argues that this is a manifestation of the principle of good faith that underlies the South African law of contract.

<sup>109</sup> See para 0 above.

<sup>110</sup> *NBS Boland Bank* para 25. Referred to with approval in *Juglal v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA) 261 (hereafter *Juglal*); *Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd* 2007 6 SA 404 (D) para 37 (hereafter *Koumantarakis Group*). Prior to the decision in *NBS Boland Bank*, the court in *Benlou Properties* held that reasonableness would be implied by law as the standard where one of the parties was granted a discretion.

<sup>111</sup> *Moe Bros Appellants v White Respondent* 1925 AD 71 77; *Holmes v Goodall & Williams, Ltd* 1936 CPD 35 40; *Dharumpal* 707; *Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 4 SA 781 (W) 789 (hereafter *Herbert Porter*); *Bellville-inry* 592; *Remini v Basson* 1993 3 SA 204 (N) 210 (hereafter *Remini*). Reference can also be made to *Machanick* 340-341 and *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 3 SA 373 (C) 383 (hereafter *Joosub Investments*).

<sup>112</sup> *NBS Boland Bank* paras 25-26.

As discussed elsewhere, D 50 17 22 1 should be read together with D 18 1 7 *pr.*<sup>113</sup> These two texts deal with the sale of slaves and a condition imposed by the seller, namely, that the sale of the slave is conditional on his satisfaction of the accounts managed by the slave on his behalf.<sup>114</sup> To ensure that the seller did not stall the sale for frivolous or captious reasons, the seller was required to make his judgment *arbitrio boni viri*.<sup>115</sup> The Supreme Court of Appeal was prepared to deduce, from this passage, a general implied term of reasonableness applicable to all contractual discretions (save contracts of sale and lease). As the passage originally deals with a contract of sale, there does not seem to be any reason why the rule should not be extended to apply to the unilateral determination of price.<sup>116</sup> The court itself also expressed doubt as to the reasons for the distinction between a discretion to determine the price and other contractual discretions.<sup>117</sup> The court did not decide whether these principles should apply to a contract of sale or lease, but there seems to be authority in our case law for applying this principle to both types of contract.

Laing traced such authority back to 1909 in the case of *Dickinson & Fisher v Arndt & Cohn*.<sup>118</sup> In this case the parties agreed that the price was subject to market fluctuations.<sup>119</sup> The court held that this would mean "that the price may be increased at the option of the sellers ... upon fluctuation upwards in the market price".<sup>120</sup> Therefore, before the price could be adjusted there had to be an increase in market prices.<sup>121</sup> Furthermore, the court held that the adjustment of the seller might not result in a price "for too much".<sup>122</sup> Although this does not explicitly refer to a reasonable discretion, it clearly refers to a limited discretion. Soon thereafter the court had to consider a contract of sale of a jeweller's business where the parties agreed that the price would be "the amount of the stock-in-trade at marked price

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<sup>113</sup> See Du Plessis 2012 *Fundamina* 26-27.

<sup>114</sup> See Du Plessis 2012 *Fundamina* 26-27.

<sup>115</sup> See Du Plessis 2012 *Fundamina* 26-27.

<sup>116</sup> See Du Plessis 2012 *Fundamina* 26-27.

<sup>117</sup> *NBS Boland Bank* para 32.

<sup>118</sup> *Dickinson & Fisher v Arndt & Cohn* 1909 30 NLR 172 (hereafter *Dickinson & Fisher*); Laing *Price Adaptation* 131.

<sup>119</sup> *Dickinson & Fisher* 175.

<sup>120</sup> *Dickinson & Fisher* 183.

<sup>121</sup> *Dickinson & Fisher* 187.

<sup>122</sup> *Dickinson & Fisher* 183.

less 15 per cent., provided always that in the event of the purchaser considering the cost price of any portion of the stock-in-trade as too high, he shall be entitled to decline to purchase same".<sup>123</sup> As it happened, the buyer rejected the majority of the stock because he considered the marked prices as excessively high.<sup>124</sup> The seller argued that the buyer's argument that he was entitled to reject the stock would amount to a claim to determine his own price, which was not allowed.<sup>125</sup> The court held that the parties considered that the buyer was not likely to reject the stock *mala fide* as he would need it in the new business, which indicated that the parties intended that he would act *bona fide*.<sup>126</sup> Finally, the court held that in line with the principle of freedom of contract, the parties could leave a condition of the contract to the discretion of one of them and that in the present case such a discretion had to be exercised *bona fide*.<sup>127</sup>

In respect of contracts of lease, this type of reasoning reflects in the more recent cases of *Benlou Properties* and *Engen Petroleum*, which deal with a discretion to adjust the rental in a lease agreement.<sup>128</sup>

If these principles should apply to a discretion to determine the price in a contract of sale, it is necessary to determine the meaning of the phrase *arbitrio boni viri*. On various occasions the courts have discussed the standard against which a discretionary power must be tested. Despite earlier indications that the standards of *arbitrio boni viri* and reasonableness can be distinguished from each other,<sup>129</sup> cases that are more recent indicate that *arbitrio boni viri* would refer to a reasonable discretion.<sup>130</sup> In the *Juglal* case<sup>131</sup> the court held that the person must "act

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<sup>123</sup> *Lichtheim v Stern* 1910 WLD 284-285 (hereafter *Lichtheim*).

<sup>124</sup> *Lichtheim* 286.

<sup>125</sup> *Lichtheim* 284.

<sup>126</sup> *Lichtheim* 288.

<sup>127</sup> *Lichtheim* 288. See also Lubbe 1989 *TSAR* 164-165 for his discussion of this case.

<sup>128</sup> *Benlou Properties* 186; *Engen Petroleum* 174-175.

<sup>129</sup> Cockrell 1997 *Acta Juridica* 34 and the cases mentioned in n 40.

<sup>130</sup> This would accord with the views of the South African writers. Cornelius 2003 *TSAR* 390 proposed that the discretion should be exercised in good faith and reasonably. He argued that good faith would refer to the purpose for the exercise of the discretion and reasonability would refer "to the various socio-economic factors that influence the sustainability of a particular performance". McLennan 2000 *SA Merc LJ* 487 also referred to the differences between good faith and reasonableness and argued that "the test should expressly include objectivity: the

reasonably and ... exercise a reasonable discretion". This would refer to an objective standard.<sup>132</sup> In the *Erasmus* case<sup>133</sup> the court referred to the dictionary meaning of *arbitrio boni viri*, namely, "the decision of a good man", which is explained as "a reasonable decision". The court has also held that in the current-day context this would mean "the judgment of a fair-minded person".<sup>134</sup>

In *Erasmus*<sup>135</sup> the court held that "the concept of reasonableness is so settled in our law that it can readily be used, and is used, as an objective standard that is justiciable by a court". The fact of the matter is that the courts are comfortable and familiar with working with terms such as "fairness" and "reasonableness" and already there are various guidelines laid down that could be used in such an assessment.<sup>136</sup> Generally, the courts have referred to the dictionary meaning of "reasonable", namely that which is equitable or fair, and not asking too much.<sup>137</sup> In respect of contractual discretions, the courts have considered the following factors to determine whether or not the discretion was exercised reasonably:

- (a) the intention of the parties when the contract was concluded;<sup>138</sup>
- (b) the facts of the particular case (ie the terms and circumstances of the contract);<sup>139</sup>

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determination must be exercised fairly *and* reasonably". Otto also refers to the test of reasonableness (Otto 2000 *SALJ* 5).

<sup>131</sup> *Juglal* para 26.

<sup>132</sup> *Unilever South Africa Ice Cream (Pty) Ltd (known as Ola South Africa (Pty) Ltd) v Jepsen* 2008 2 SA 456 (C) 461; *Remini* 210; *Joosub Investments* 383; *F W Knowles (Pty) Ltd v Cash-Inn (Pty) Ltd* 1986 4 SA 641 (C) 650 (hereafter *F W Knowles*); *Herbert Porter* 789. This is why the court has been willing to regard a discretion in respect of the price or rent subject to some measure of reasonableness as a reference to an objective standard (cf para 0 above).

<sup>133</sup> *Erasmus* 538. See also Cockrell 1997 *Acta Juridica* 32.

<sup>134</sup> *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 3 SA 544 (SCA) para 8.

<sup>135</sup> *Erasmus* 538.

<sup>136</sup> Otto 2000 *SALJ* 5. In Visser *et al Gibson's Mercantile Law* 114 the author states the following: "Terms to be bound by what is 'fair and reasonable' are well known throughout the law of contract ... [a]nd the courts have to, and do assess what is reasonable in all manner of contexts."

<sup>137</sup> *Koumantarakis Group* para 50. See also *Bryer v Teabosa CC t/a Simon Chuter Properties* 1993 1 SA 128 (C) 137 (hereafter *Bryer*).

<sup>138</sup> *Koumantarakis Group* para 39.

<sup>139</sup> *Koumantarakis Group* para 49; *F W Knowles* 649-650. A good example is where the contract already prescribes certain criteria for the exercise of the discretion. See para 0 above.

- (c) the viewpoint of both parties in order to achieve a balance between the interests of both parties;<sup>140</sup>
- (d) the commercial rationality of the decision measured against a reasonable man in the mercantile world,<sup>141</sup> and
- (e) what is customary and usual, which does not necessarily equate with what is fair and reasonable.<sup>142</sup>

In an article in response to the judgment in *NBS Boland Bank*, Otto<sup>143</sup> reviewed all the relevant case law and compiled a list of guidelines or factors that could be used to test whether a discretion to adjust the interest rate was exercised reasonably. These factors could be adapted for use in discretions to determine the price. Such adjusted factors would include the following:

- (a) contract terms dealing with how the price must be determined;<sup>144</sup>
- (b) the prices "customarily levied ... at that particular time in respect of that class of customer", where the contract does not prescribe how the price should be determined;<sup>145</sup>
- (c) price movements in the market for the same goods under the same circumstances;<sup>146</sup>
- (d) general economic fluctuations;<sup>147</sup> and
- (e) prices charged by other sellers.<sup>148</sup>

<sup>140</sup> *F W Knowles* 650; *Erasmus* 540. Van der Merwe *et al Contract* 240 proposes that consideration must be given to the interests of the party bound by the discretion in such a way as not to "reduce what was intended as a mutually beneficial exchange of performances to a transaction serving the interests of one party only".

<sup>141</sup> *Koumantarakis Group* para 42.

<sup>142</sup> *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 1 SA 704 (C) 708.

<sup>143</sup> Otto 2000 SALJ 5-7.

<sup>144</sup> Otto 2000 SALJ 6 referring to *NBS Bank* and *Investec Bank (Pty) Ltd v GVN Properties CC* 1999 3 SA 490 (W) (hereafter *Investec Bank*).

<sup>145</sup> Otto 2000 SALJ 7 referring to *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* 1988 4 SA 73 (N). Otto provides possible examples in respect of the classes of customer, namely "individual and corporate customers" and "new and longstanding customers".

<sup>146</sup> Otto 2000 SALJ 7 referring to *Boland Bank* and *ABSA Bank Ltd v Deeb* 1999 2 SA 656 (N).

<sup>147</sup> Otto 2000 SALJ 7 referring to *Standard Bank of SA Ltd v Friedman* 1999 2 SA 456 (C) (hereafter *Standard Bank*).

<sup>148</sup> Otto 2000 SALJ 7 referring to *Standard Bank*.

It is clear that a discretion to determine the price should accord with the standard of *arbitrio boni viri* and that this should refer to a reasonable standard. The question that now arises is this: when can an unreasonable exercise of a discretion to determine the price be attacked and how must this be done? The court in *NBS Boland Bank*<sup>149</sup> asked if the determination would be considered to be noncompliant "if it is merely unjust, or whether it must be manifestly unjust?" In this respect, the court was asking if the principles governing third-party price determinations should be applicable to a price determination by one of the parties.<sup>150</sup> The analogy between third-party price determinations and unilateral price determinations would seem appropriate.<sup>151</sup> Firstly, the third party is required to act reasonably in determining the price, which is the same standard as that required in a case of unilateral price determinations.<sup>152</sup> Secondly, the problems faced in determining whether or not a unilateral determination of price was unreasonable are similar to those faced in third-party price determinations.<sup>153</sup> Therefore, the principles applicable to third-party determinations will provide useful guidelines for testing unilateral price determinations.

Generally, if the third party does not fix the price there is no sale.<sup>154</sup> Where this is due to the actions of one of the parties the situation is not clear, but there is authority to suggest that it should be dealt with as a fictional fulfilment of a condition or a breach of contract.<sup>155</sup> In respect of the unilateral determination of a price it has been suggested that this could possibly be dealt with as a breach of contract.<sup>156</sup>

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<sup>149</sup> *NBS Boland Bank* para 29.

<sup>150</sup> *NBS Boland Bank* para 29. See also Zulman and Kairinos *Norman's Purchase and Sale* 45.

<sup>151</sup> Laing *Price Adaptation* 155.

<sup>152</sup> Laing *Price Adaptation* 155.

<sup>153</sup> Laing *Price Adaptation* 155.

<sup>154</sup> Laing *Price Adaptation* 20; Hackwill *Mackeurtan's Sale* 16; Kerr *Sale* 37; Sharrock *Business Law* 272.

<sup>155</sup> Kerr *Sale* 38.

<sup>156</sup> See para 0 above.

Where the price determined by the third party does not differ too much from the amount that might have been expected, the parties are bound to it.<sup>157</sup> However, if the price falls outside this range it does not have to be paid or accepted.<sup>158</sup> Such a price is referred to as a price that is "manifestly unjust", "manifestly unfair" or "altogether too high or too low".<sup>159</sup> This manifestly unjust price is not void *ipso facto* but must be set aside by the court.<sup>160</sup> The court can then replace the price determined by the third party with the price the court considers reasonable.<sup>161</sup> The party attacking the third-party determination will have to put evidence before the court of what a reasonable determination would be, which will enable the court to determine a reasonable price.<sup>162</sup> Once the court has determined the price, the non-aggrieved party (the party not disadvantaged by the price determined by the third party) then has the choice either to accept the court's determination or to resile from the contract.<sup>163</sup> Different reasons are proposed for this rule.<sup>164</sup> First, the court in *Hurwitz*<sup>165</sup> stated that if the court quantifies the price the court's method will probably be different from the method that the parties agreed on. However, in the *Van Heerden*<sup>166</sup> case the court stated that the right to resile comes into play rather because the parties should have a choice not to become involved in the time-consuming and expensive endeavour of obtaining the court's determination. Kerr<sup>167</sup> suggests that whether or not a party should be bound by the court's decision would depend on the intention of the parties. Did they want the price to be determined by that specific third party alone or did they instead intend a reasonable

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<sup>157</sup> *Dublin v Diner* 1964 1 SA 799 (D) 802 (hereafter *Dublin*); *Van Heerden v Basson* 1998 1 SA 715 (T) 718 (hereafter *Van Heerden*). See also Kerr *Sale* 39; Bradfield and Lehmann *Sale and Lease* 20.

<sup>158</sup> *Gillig v Sonnenberg* 1953 4 SA 675 (T) 683 (hereafter *Gillig*); *Dublin* 804-805. This is based on the assumption that the parties "did not intend an arbitrary but a just estimation *tanquam boni viri*" (*Machanick* 339). See also Bradfield and Lehmann *Sale and Lease* 20; Kerr *Sale* 39.

<sup>159</sup> Sharrock *Business Law* 272; Kerr *Sale* 39.

<sup>160</sup> *Hurwitz v Table Bay Engineering (Pty) Ltd* 1994 3 SA 449 (C) 456 (hereafter *Hurwitz*).

<sup>161</sup> Nagel *Commercial Law* 198.

<sup>162</sup> Kerr *Sale* 39 and 51; Bradfield and Lehmann *Sale and Lease* 20.

<sup>163</sup> *Gillig* 683; *Dublin* 805; *Hurwitz* 459; *Van Heerden* 720; See also Bradfield and Lehmann *Sale and Lease* 20; Nagel *Commercial Law* 198; Sharrock *Business Law* 272.

<sup>164</sup> For a more detailed discussion of this issue see Kerr *Sale* 39-55 and Laing *Price Adaptation* 38-47.

<sup>165</sup> *Hurwitz* 459.

<sup>166</sup> *Van Heerden* 720. Referred to with approval in *Breau Investments (Pty) Ltd v Maverick Trading* 236 CC 2010 1 SA 367 (GNP) paras 17-19. In this case the court confirmed that one of the parties may also exercise the right to cancel after litigation has commenced.

<sup>167</sup> Kerr *Sale* 49-50.

determination?<sup>168</sup> In the latter instance, it could be argued that the parties should be bound to the price determined by the court. It is submitted that the parties' intention should also be the determining factor when deciding if the parties must be bound to the court's determination in cases dealing with unilateral determinations of price.

#### 2.3.4 *The discretion can be granted to either the seller or the buyer*

A further consequence of the principles discussed above and the criticisms levied at viewing price discretions as pure potestative conditions is that the discretion should be valid whether it is granted to the seller or the buyer (as long as it results in certainty of the price).

In *NBS Boland Bank*<sup>169</sup> the court referred to the Roman-law texts dealing with pure potestative conditions. The court stated that all of these texts deal with a situation where the promisor has a right to determine his performance but do not deal with the situation where the promisee has the right to determine the promisor's obligation.<sup>170</sup> Therefore the court held that where a party can determine the other party's performance such a contract is valid (provided the discretion must be exercised *arbitrio boni viri*), but did not answer the question of whether a party could determine his own performance.<sup>171</sup>

Subsequently the court in *Erasmus*<sup>172</sup> held that a discretion granted to a party to determine his own performance would be allowed if the discretion was "subject to an objective standard and thus fettered". The court held that there is no reason to limit the rule that discretionary powers must be exercised *arbitrio boni viri* to discretions granted to the promisee.<sup>173</sup>

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<sup>168</sup> Kerr *Sale* 50-51.

<sup>169</sup> *NBS Boland Bank* para 22. Specifically, the court referred to D 45 1 17, D 45 1 46 3 and D 45 1 108 1. See further Du Plessis 2012 *Fundamina* 22-23.

<sup>170</sup> *NBS Boland Bank* para 23.

<sup>171</sup> *NBS Boland Bank* paras 24-25.

<sup>172</sup> *Erasmus* 537-538. The court's reasons were that all contracts are subject to the principle of good faith and that parties should be held bound to their contracts. See also Van der Merwe *et al Contract* 239.

<sup>173</sup> *Erasmus* 538.



Therefore, if these principles are extended to apply to sales it would mean that a discretion granted to either the buyer or the seller would be valid, provided the discretion is not an unfettered one.

### *2.3.5 A contract should be interpreted in favour of its validity*

It is an established principle that the courts should favour an interpretation that renders the contract valid rather than an interpretation that renders it void.<sup>174</sup> This rule of interpretation refers to the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*.<sup>175</sup>

This is in accordance with the principle that the court should "rather try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all than he has intended".<sup>176</sup> The court should not act as the destroyer of bargains but rather give operation to agreements made with a serious intention to be binding.<sup>177</sup> This is in accordance with the public policy that agreements entered into freely should be enforced.<sup>178</sup> This is probably one of the reasons why the courts are willing to imply that a discretion must be exercised reasonably rather than unfettered.<sup>179</sup>

Kerr<sup>180</sup> concedes that this principle forms part of the rules of interpretation, but he argues that this principle should not be used to "validate an agreement which lacks *consensus* on an essential requirement". However, as shown above, such contracts

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<sup>174</sup> Joubert *Contract* 62 and the authorities listed in n 35; Hutchison and Pretorius *Kontraktereg* 277; Otto 1998 *TSAR* 603; Otto 2000 *SALJ* 3.

<sup>175</sup> Cornelius *Interpretation* 126.

<sup>176</sup> *Hoffman and Carvalho v Minister of Agriculture* 1947 2 SA 855 (T) 860. Referred to with approval in *Sadie v Annandale* 1992 2 SA 240 (O) 244. See also Du Bois *et al Wille's Principles of SA Law* 755.

<sup>177</sup> *Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A) 931; *Genac Properties* 579; *Engen Petroleum* 175. See also Lubbe 1989 *TSAR* 164, where he criticises the decisions in *Burroughs* and *Patel*.

<sup>178</sup> *Benlou Properties* 187. See further para 0 below.

<sup>179</sup> See para 0 above.

<sup>180</sup> Kerr *Sale* 64.

do not lack *consensus*. Furthermore, the courts have referred to this principle when dealing with discretions to determine the performance of one of the parties.<sup>181</sup>

### 2.3.6 *The contract can be enforced as an innominate contract*

Some South African commentators argue that where a contract of sale fails because of uncertainty of price, the contract could possibly be enforced as an innominate contract.<sup>182</sup> In *Burroughs*<sup>183</sup> the court did not decide this issue but seemed doubtful that the courts would "ever enforce a purported sale in which the price is neither fixed nor determinable by reference to some stated external standard".

In *Murray & Roberts*<sup>184</sup> the court dealt with an innominate contract, where the parties agreed that Murray & Roberts Construction together with a third party would determine the price at which certain stands would be sold to the public. However, the court held that the price was a material term of the contract and would have to be ascertained with reference to an external standard. The court stated explicitly that it was not laying down a general rule.<sup>185</sup> However, the judgment is indicative that even if the court had been willing to view a contract granting one of the parties a discretion to determine the price as an innominate contract, such a discretion would also need to refer to an external standard where the price was a material term of the contract. As the standard for a certain price in a contract of sale would be identical to the standard required of a price in an innominate contract, regarding the contract as an innominate contract would take the issue no further.

## 2.4 **Conclusion**

It should be clear from the above discussion that the rule that prohibits the unilateral determination of price should not be seen as a manifestation of the

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<sup>181</sup> See eg *Genac Properties* 579 and *Boland Bank* 276.

<sup>182</sup> See eg Hackwill *Mackeurtan's Sale* 18-19 dealing with a contract of sale "at a reasonable price".

<sup>183</sup> *Burroughs* 675.

<sup>184</sup> *Murray & Roberts* 514-515.

<sup>185</sup> *Murray & Roberts* 515.

requirement of certainty of price.<sup>186</sup> There are various circumstances where the unilateral determination of the price results in certainty of price or can be applied in such a way as to arrive at certainty of price. Most of these arguments require that the discretion to determine the price should not be unfettered and be subject to some objective standard. These requirements may be incorporated into the contract (either expressly or tacitly) or an objective standard (in the form of reasonableness) will be implied by law.<sup>187</sup>

### **3 The rule and public policy**

#### ***3.1 Introduction***

As the requirement of certainty of price should not be used as the test against which a unilateral determination of price is tested, the validity of such discretions should rather be assessed against public policy.<sup>188</sup>

#### ***3.2 The concept of public policy***

It is a fundamental principle of the law of contract that agreements made with a serious intention to be legally binding should be enforced.<sup>189</sup> However, when a contract is against public policy it will not be enforced.<sup>190</sup>

The concept of public policy is difficult to define but it is generally accepted that a contract will be contrary to public policy if it runs counter to the interests of the community.<sup>191</sup> In *Barkhuizen v Napier*<sup>192</sup> the court defined public policy as "the legal convictions of the community". As the interests and views of the community change

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<sup>186</sup> Van Huyssteen, Van der Merwe and Maxwell *Contract* 235.

<sup>187</sup> Hawthorne 1992 *THRHR* 641.

<sup>188</sup> Van Huyssteen, Van der Merwe and Maxwell *Contract* 235.

<sup>189</sup> Hutchison and Pretorius *Kontraktereg* 183.

<sup>190</sup> *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7 (hereafter *Sasfin*); *Jordan v Farber* [2010] JOL 24810 (NCB) para 12 (hereafter *Jordan*); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 38 (hereafter *Bredenkamp*). See also Hutchison and Pretorius *Kontraktereg* 183.

<sup>191</sup> *Sasfin* 8. See also Van Huyssteen, Van der Merwe and Maxwell *Contract* 127.

<sup>192</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28 (hereafter *Barkhuizen*).

over time, public policy is not a static concept but subject to change.<sup>193</sup> Firstly, the principles and rules governing public policy are subject to change.<sup>194</sup> Secondly, public policy is also context-sensitive and dependent on the circumstances of the specific case.<sup>195</sup> There is no specific formula or test which must be followed to determine whether or not a term in a contract is contrary to public policy.<sup>196</sup> In most cases the courts weigh up various policy considerations or interests against one another to determine if a term in a contract would be contrary to public policy.<sup>197</sup>

The courts have set some rules that should be followed when embarking on a public policy investigation.<sup>198</sup> Firstly, public policy is anchored in the values enshrined in the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*)<sup>199</sup> and the court must consider these values together with any other policy considerations.<sup>200</sup> Secondly, the courts will be hesitant to declare a term contrary to public policy and will do so in clear cases only.<sup>201</sup> Thirdly, the term itself must be contrary to public policy. Neutral terms that can be implemented in a way that would not be contrary to public policy will not result in the contract's being against public

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<sup>193</sup> *Bredenkamp* para 38; *Sasfin* 8. See also Van Huyssteen, Van der Merwe and Maxwell *Contract* 127 and 200; Hutchison and Pretorius *Kontraktereg* 185; Kruger 2011 *SALJ* 713.

<sup>194</sup> Hutchison and Pretorius *Kontraktereg* 185; Christie and Bradfield *Contract* 360; Kruger 2011 *SALJ* 715.

<sup>195</sup> Christie and Bradfield *Contract* 360-361; Kruger 2011 *SALJ* 733.

<sup>196</sup> Van der Merwe *et al Contract* 199.

<sup>197</sup> *Bredenkamp* para 38. See also Van der Merwe *et al Contract* 199; Hutchison and Pretorius *Kontraktereg* 186.

<sup>198</sup> Hutchison and Pretorius *Kontraktereg* 185.

<sup>199</sup> The values are dignity, equality and freedom (*Barkhuizen* para 28). See further *Bredenkamp* para 39 where the court stated that "[t]he common law derives its force from the Constitution and is only 'valid' to the extent that it complies or is congruent with the Constitution".

<sup>200</sup> *Barkhuizen* para 30 where the court stated as follows: "The proper approach to the constitutional challenge to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by constitutional values, in particular, those found in the Bill of Rights. 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 constitutional values even though the parties may have consented to them." See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22 where the court stated that "issues of public policy in turn cannot be considered without reference to section 39(2) [of the Constitution]". See also *Bredenkamp* para 39; *Jordan* para 12-13; *Brisley v Drotzky* 2002 4 SA 1 (SCA) 34 (hereafter *Brisley*). See further Hutchison and Pretorius *Kontraktereg* 183, 185; Sutherland 2008 *Stell LR* 407; Christie and Bradfield *Contract* 361.

<sup>201</sup> *Sasfin* 9; *Brisley* 35-36; *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA) para 8 (hereafter *Afrox Healthcare*); *Juglal* para 12. See also Hutchison and Pretorius *Kontraktereg* 185; Christie and Bradfield *Contract* 360.

policy.<sup>202</sup> Fourthly, the court will be cautious to declare a term contrary to public policy merely because it is against the court's individual feeling of justice or fairness.<sup>203</sup>

If a term is contrary to public policy, it will be unenforceable or void.<sup>204</sup> The price is one of the essential elements of a contract of sale and without a price there can be no sale. Where a discretion to determine the price is contrary to public policy, there is no price and the contract will be void.

### ***3.3 Policy considerations relevant to the unilateral determination of price***

This discussion aims to identify and investigate considerations that may be relevant in determining whether a unilateral determination of price is against public policy or not. The following considerations or factors are discussed: (a) contractual autonomy and the sanctity of contracts; (b) the principle of simple justice between man and man; (c) the principle that the parties should (as far as possible) have equal bargaining power; and (d) practical considerations in favour of the unilateral determination of price.

#### *3.3.1 Contractual autonomy and the sanctity of contracts*

Generally, public policy demands that contracts entered into freely should be enforced.<sup>205</sup> This is also the case in respect of contractual discretions. In *Benlou Properties*<sup>206</sup> the court stated as follows:

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<sup>202</sup> *Juglal* para 12. See also Hutchison and Pretorius *Kontraktereg* 185.

<sup>203</sup> *Sasfin* 9. See also Hutchison and Pretorius *Kontraktereg* 185. The same principle applies in respect of the enforcement of a contractual term. In *Bredenkamp* the court stated that it does not believe "that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated" (para 50) and "that fairness is not a freestanding requirement for the exercise of a contractual right" (para 53).

<sup>204</sup> Van Huyssteen, Van der Merwe and Maxwell *Contract* 200-204; Van der Merwe *et al Contract* 200-201.

<sup>205</sup> *Sasfin* 9. Also referred to as the *maxim pacta sunt servanda*.

<sup>206</sup> *Benlou Properties* 187.

Nor is there a policy reason why such an undertaking should be void merely because it relates to an exercise of discretion. Although pronounced in a different context, the following oft-quoted dictum of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 is apposite:

'... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice'.

In the case of *Erasmus*<sup>207</sup> the court cited contractual autonomy as one of the reasons why a discretion to determine a party's own performance should be allowed.

When a party agrees to the unilateral determination of price by the other party, he is agreeing (and thus exercising his contractual autonomy) "to forfeit his autonomy regarding the determination of the consequences of the contract".<sup>208</sup> Therefore, giving effect to the discretionary clause would be in accordance with the principle of contractual autonomy.<sup>209</sup> Therefore it can be argued that public policy dictates that discretionary powers to determine the price should be valid.

The fact that a person should be allowed to determine his own matters, even to his detriment, has been held to refer to the constitutional values of dignity and freedom.<sup>210</sup> Although contractual autonomy is an important policy consideration, it is not the only or the most important consideration.<sup>211</sup> Other values in the *Constitution* (for example equity) may reduce the weight given to contractual autonomy.<sup>212</sup>

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<sup>207</sup> *Erasmus* 538.

<sup>208</sup> Laing *Price Adaptation* 152.

<sup>209</sup> Laing *Price Adaptation* 153.

<sup>210</sup> *Barkhuizen* para 57; *Afrox Healthcare* para 23. See also Hutchison and Pretorius *Kontraktereg* 187.

<sup>211</sup> *Barkhuizen* para 15. See also Barnard and Nagel 2010 *PELJ* 456.

<sup>212</sup> *Brisley* 34-36. See also Van Huyssteen, Van der Merwe and Maxwell *Contract* 57 n 8; Barnard and Nagel 2010 *PELJ* 456.

### 3.3.2 *The principle of simple justice between man and man*

In both of the cases referred to above, the court added a proviso that the discretion may not be unfettered.<sup>213</sup> The court in *Benlou*<sup>214</sup> referred to the rules governing the certainty of price for this proviso. However, in *Erasmus*<sup>215</sup> the court referred to the fact that "all contracts are subject to the principle of good faith" and therefore extended discretionary powers to include the determination by a party of its own performance provided it did so *arbitrio boni viri*. Good faith is a factor that is taken into account when deciding whether a term is against public policy or not.<sup>216</sup>

Although the role of good faith in the concept of public policy is not very clear,<sup>217</sup> good faith has been thought to inform the principle of simple justice between man and man.<sup>218</sup> This principle requires that the parties' individual interests must be weighed against each other.<sup>219</sup> The unreasonableness of a term against one of the parties must be weighed up against the interests of the other party, who is protected by the term.<sup>220</sup> However, the courts will not hold a term as contrary to public policy merely because it is unreasonable or unfair to one of the parties to the contract.<sup>221</sup> The term would have to go so far as to be contrary to the interests of the public.<sup>222</sup> Where the term goes further than what would reasonably be necessary to protect the interest of the party in whose favour it is, this could indicate that the term is contrary to public policy.<sup>223</sup> This could be the case where the effect of the

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<sup>213</sup> *Benlou Properties* 186; *Erasmus* 538.

<sup>214</sup> *Benlou Properties* 186.

<sup>215</sup> *Erasmus* 538.

<sup>216</sup> Van der Merwe *et al Contract* 199; Lawack-Davids 2001 *Obiter* 188.

<sup>217</sup> Van der Merwe *et al Contract* 199. See also the discussion of the role of good faith as a policy consideration in Lubbe 2004 *SALJ* 411-413.

<sup>218</sup> Hutchison and Pretorius *Kontraktereg* 193-194; Van Huyssteen, Van der Merwe and Maxwell *Contract* 130.

<sup>219</sup> Hutchison and Pretorius *Kontraktereg* 193. This seems to accord with Lubbe's view that good faith, in the context of public policy, should not only encompass honesty but also require that a party's pursuit of his own interest "must be tempered by a reasonable measure of concern" for the other party's interest (Lubbe 1990 *Stell LR* 20 as quoted by Naudé 2009 *SALJ* 518).

<sup>220</sup> Hutchison and Pretorius *Kontraktereg* 193.

<sup>221</sup> *Dickinson & Fisher* 79; *Sasfin* 9. See also Van Huyssteen, Van der Merwe and Maxwell *Contract* 127.

<sup>222</sup> Hutchison and Pretorius *Kontraktereg* 194.

<sup>223</sup> *Sasfin* 10. See also Hutchison and Pretorius *Kontraktereg* 195; Van Huyssteen, Van der Merwe and Maxwell *Contract* 129.

term is to place one of the parties almost entirely in the economic power of the other party.<sup>224</sup>

As is shown below, there are practical considerations that would necessitate a discretion to determine the price.<sup>225</sup> However, none of these would require the seller to reserve an unfettered discretion to determine the price. It is therefore not surprising that there is no authority in our case law that allows for an unfettered discretion.<sup>226</sup> Kerr<sup>227</sup> argues that this is because allowing unfettered discretions would result in a greater possibility of fraud or abuse by a party to impose unfair and unreasonable obligations. This would explain why the courts would require that a discretion to determine the price or the rent would need to be limited by an external objective standard or reasonableness.<sup>228</sup> This further explains why the courts would read reasonableness into the discretion where possible.<sup>229</sup>

A further argument by Kerr<sup>230</sup> is that the party alleging that the discretion was exercised unreasonably would have the *onus* to prove this. This can be very difficult where the buyer does not know what factors were taken into account in determining the price or how the price was set. In *FW Knowles*<sup>231</sup> the court remarked that the person alleging that he has exercised his discretion reasonably and has good reasons alone can know what it consists of and should be obliged to establish it. However, the court did not decide this issue and accepted that the onus is on the

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<sup>224</sup> *Sasfin* 13-14. See also Van der Merwe *et al Contract* 219; Van Huyssteen, Van der Merwe and Maxwell *Contract* 129.

<sup>225</sup> See para 0 below.

<sup>226</sup> Kerr *Sale* 66.

<sup>227</sup> Kerr *Sale* 66. In *NBS Boland Bank* para 30 the court questioned whether such discretions would be invalid (as contrary to public policy) or valid but assailable if not exercised in good faith. As pointed out by Van der Merwe *et al Contract* 242, what is meant by an unfettered discretion is not clear and therefore it is difficult to determine whether the discretion would be regarded as valid or not. They submit that this will have to be determined with reference to the specific facts of the case with special consideration given to the possibility of abuse of power by the party exercising the discretion.

<sup>228</sup> Laing *Price Adaptation* 154 argues that the willingness of the court to imply a term of reasonableness in contractual discretions is a manifestation of the principle of good faith. As good faith informs public policy, the willingness of the court to imply a term of reasonableness can also be found in policy considerations.

<sup>229</sup> See para 0 above.

<sup>230</sup> Kerr *Sale* 72; Kerr and Glover 2000 *SALJ* 207.

<sup>231</sup> *FW Knowles* 650.



party alleging that the discretion was exercised unreasonably to show that this occurred.<sup>232</sup> This decision was confirmed in subsequent case law.<sup>233</sup>

In *ABSA Bank Ltd v Lombard*<sup>234</sup> the court dealt with the discretion of a bank to adjust the interest rate in respect of a loan. The debtor placed evidence before the court that the bank increased the interest rate upon an increase in the prime lending rate, but failed to reduce the interest rate when the prime lending rate decreased.<sup>235</sup> The court held that this evidence was enough to establish a *prima facie* case that the bank had exercised its discretion unreasonably.<sup>236</sup> It is, of course, easier to prove this in the case of interest rates as all of them are linked to some interest rate or other (for example, the prime lending rate or the Reserve Bank rate) that can be determined with ease. However, using the guidelines and factors outlined above to determine reasonableness, it could be possible to establish a *prima facie* case for unreasonableness in respect of a discretion to determine or adjust a price. Specifically, the factors adjusted from those proposed by Otto in respect of interest rate discretions could provide good examples of the kind of evidence that could be put before the court to establish a *prima facie* case that the seller exercised his discretion unreasonably.<sup>237</sup>

### 3.3.3 *The parties should (as far as possible) have equal bargaining power*

As shown above, there is authority in our case law that supports a limited discretion, either because the discretion must be exercised reasonably or because the discretion refers to an objective or external standard.<sup>238</sup> These standards would appear to overcome the possible problem that one of the parties might abuse such power.

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<sup>232</sup> *FW Knowles* 650.

<sup>233</sup> *Bryer* 134; *Southern Life Association Ltd v Miller* 2005 2 All SA 371 (SCA) 137; *Koumantarakis Group* para 38.

<sup>234</sup> *ABSA Bank Ltd v Lombard* 2005 5 SA 350 (SCA) (hereafter *ABSA Bank*)

<sup>235</sup> *ABSA Bank* 353-354.

<sup>236</sup> *ABSA Bank* 354.

<sup>237</sup> See para 0 above. However, this may still impose problems that should be addressed in consumer contracts. See further Du Plessis *Unilateral Determination of Price* 113-114.

<sup>238</sup> If the discretion refers to a reasonable discretion, the courts regard such a discretion as referring to an objective standard. See paras 0 and 0 above.

Kerr<sup>239</sup> argues that there is a further danger in allowing a limited discretion. His concern is in respect of limited discretions where an unequal bargaining position exists.<sup>240</sup> This refers to the policy consideration that parties, as far as possible, should have equal bargaining power, which can be deduced from the underlying constitutional value of equality.<sup>241</sup> Where an unequal bargaining position is present, the weight given to the principle of contractual autonomy (and the values of freedom and dignity) must be decreased.<sup>242</sup>

It has been said, and it is true, that market competition should temper this problem to some extent.<sup>243</sup> However, Kerr<sup>244</sup> argues that if such a discretion is allowed, dominant parties would include such discretions in their standard-form contracts. The other party would then either have to accept the determined price or attack the discretion.<sup>245</sup> Attacking the discretion would be a time-consuming and expensive endeavour and, more often than not, the costs of attacking the discretion would exceed the determined price.<sup>246</sup> Kerr's<sup>247</sup> fear is that this would result in the dominant party's setting a price above the appropriate value "secure in the knowledge that few, if any, opposing contracting parties would be in a financial position to challenge the determination". There would seem to be some merit in this argument. However, an unequal bargaining position *per se* will not be enough to indicate that a term is contrary to public policy. This factor must be considered together with other relevant factors.<sup>248</sup>

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<sup>239</sup> Kerr *Sale* 66.

<sup>240</sup> Kerr *Sale* 66; Kerr and Glover 2000 *SALJ* 207.

<sup>241</sup> Hutchison and Pretorius *Kontraktereg* 187.

<sup>242</sup> *Barkhuizen* para 57. See also Hutchison and Pretorius *Kontraktereg* 187.

<sup>243</sup> Laing *Price Adaptation* 124; Otto 1998 *TSAR* 620; Woker 2010 *Obiter* 218. See also *Investec Bank* 495, referring to *Standard Bank* 468-469.

<sup>244</sup> Kerr *Sale* 72; Kerr and Glover 2000 *SALJ* 207; See also Woker 2010 *Obiter* 230 discussing this issue in the context of consumer contracts.

<sup>245</sup> Kerr *Sale* 72; Kerr and Glover 2000 *SALJ* 207.

<sup>246</sup> Kerr *Sale* 72; Kerr and Glover 2000 *SALJ* 207; See also Woker 2010 *Obiter* 230 and Naudé 2006 *Stell LR* 380, 384 discussing this issue in the context of consumer contracts.

<sup>247</sup> Kerr *Sale* 72; Kerr and Glover 2000 *SALJ* 207.

<sup>248</sup> *Afrox Healthcare* para 12. *Jordan* is a good example, where the court looked at an unequal bargaining relationship in the context of various other considerations. See also Barnard and Nagel 2010 *PELJ* 457.

Finally, unequal bargaining relationships are commonly found in consumer contracts. Kerr<sup>249</sup> predicted that consumer legislation would influence whether or not the rule would remain a part of South African law. In this respect, the *Consumer Protection Act* 68 of 2008 ("the CPA") effects the application of the rule in contracts of sale governed by this Act. Section 23(3) of the CPA prohibits a retailer from displaying any goods for sale without displaying a price in relation to those goods.<sup>250</sup> Section 23(6)(a) states that the supplier may not require a consumer to pay a higher price than the displayed price.<sup>251</sup> If two prices are displayed concurrently in respect of the same goods, the retailer is bound to the lower displayed price.<sup>252</sup> This would seem to exclude the possibility that the price can be determined by the seller's exercising an objective or reasonable discretion. However, section 48(1)(c) states that a consumer may waive a right provided such a waiver is not on unfair, unreasonable or unjust terms or provided such unfair, unreasonable or unjust terms are not imposed as a condition for entering into the transaction. This means that a discretion to determine the price could possibly be attacked as being an unfair, unreasonable or unjust term. The term must then be assessed by applying the test of fairness in section 48(2)<sup>253</sup> and considering the list of factors set out in section 52(2).<sup>254</sup> Once the price has been determined, the price would also be

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<sup>249</sup> Kerr *Sale 72*, where Kerr refers to the 1998 Final Report of the South African Law Commission Project 47 on "Unreasonable stipulations in contracts and the rectification of contracts" (SALC *Project 47*).

<sup>250</sup> Section 23 does not apply to a transaction where an estimate was given for repair and maintenance services in terms of s 15 of the CPA or a transaction governed by s 43 of the *Electronic Communications and Transactions Act* 25 of 2002. S 23(4) provides a further exception: "A retailer is not required to display for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier's premises to which the public does not ordinarily have access." The meaning of s 23(4) is unclear (see Du Plessis "Price discretions and the consumer's right to disclosure and information in terms of the Consumer Protection Act 68 of 2008" to be published in 2013 *THRHR*).

<sup>251</sup> There are a few exceptions to this rule (see s 23(7)-(10) of the CPA).

<sup>252</sup> Section 23(6)(b) of the CPA.

<sup>253</sup> Section 48(2)(a) of the CPA provides that a term is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than a consumer. S 48(2)(b) states that if a term of an agreement is so adverse to the consumer as to be inequitable, the term will be unfair, unreasonable or unjust.

<sup>254</sup> Reference can also be made to the presumed unfair terms contained in reg 44(3) of the regulations in terms of s 120(1)(d) of the CPA (*Consumer Protection Act Regulations*, GN R293 in GG 34180 of 1 April 2011). Reg 44(1) provides that these terms would be applicable to consumer contracts between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her

subject to section 48(1)(a)(i), which provides that a supplier may not offer to sell or enter into an agreement to sell any goods at a price that is unfair, unreasonable or unjust.<sup>255</sup>

### 3.3.4 Practical considerations in favour of the unilateral determination of price

Although practical considerations are not a policy consideration *per se*, they are relevant to establishing the purpose of the term in order to determine whether or not the term protects the interests of the favoured party more than reasonably necessary. There are a number of practical considerations that would favour (or even necessitate) the use of discretionary powers in respect of the price.<sup>256</sup> As will be seen below, none of these would make it necessary for the seller to reserve an unlimited discretion to determine or adjust the price.

The discretion may be necessary as the final act to finalise the price.<sup>257</sup> This could be the case where the contract contains a price escalation clause.<sup>258</sup> Laing<sup>259</sup> refers to the escalation clause in *Burroughs*, where the court had to consider an escalation clause dealing with a change in the manufacturing costs of the goods. As pointed out by Laing,<sup>260</sup> the price does not automatically change if the manufacturing costs change: the seller would have to exercise a discretion to determine what the change was and apply such a change to the price.

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business or profession. Reg 44(3)(h) provides that a term is presumed unfair if it allows the supplier to increase the price agreed on when the agreement was concluded without the consumer having the right to terminate the agreement (subject to the exceptions listed in reg 44(4)(b)). Secondly, reg 44(3)(i) provides that a term is presumed unfair if it allows the supplier to alter the terms of the contract unilaterally. The same exceptions as in the first instance apply and a further exception is where the supplier has the right to amend the terms of an open-ended agreement unilaterally, provided the supplier informs the consumer of the amendment and the consumer has the right to dissolve the agreement immediately (reg 44(4)(c)(iv)).

<sup>255</sup> A detailed discussion of these provisions is outside the scope of this article. For such a detailed discussion see Du Plessis *Unilateral Determination of Price* ch 4.

<sup>256</sup> Van der Merwe *et al Contract* 236.

<sup>257</sup> Laing *Price Adaptation* 124; Hawthorne 1992 *THRHR* 646-647.

<sup>258</sup> Laing *Price Adaptation* 124.

<sup>259</sup> Laing *Price Adaptation* 124. The clause read as follows: "It is not possible for Burroughs Machines Limited ... to quote a firm price for the new equipment offered in this order. We are informed by our factory that the price quoted as 'approximate' is not final and is subject to change at any time prior to delivery, to provide for possible changes in manufacturing costs, and fluctuations in the rate of exchange" (*Burroughs* 672).

<sup>260</sup> Laing *Price Adaptation* 124.

It also possible that one of the parties may be better equipped to determine what the price change should be.<sup>261</sup> Using the same example above, the seller would be in a better position to determine what the change in manufacturing costs is and how to apply this to the price.<sup>262</sup> The buyer may not have the necessary knowledge, skills or capabilities to make such an assessment.<sup>263</sup>

Furthermore, it may not be possible for the parties to agree on a purely objective method for adjusting the price. If the unilateral determination of a price is not allowed, the parties would have to agree on any price change.<sup>264</sup> This may not be practical or in the interests of the parties.<sup>265</sup> This is especially true where there is an established and continuing relationship between the parties - for example, between a supplier and a supermarket.<sup>266</sup> It would be impractical, costly and time consuming if the parties had to agree on every price change every time such a change occurred.<sup>267</sup> The buyer may feel it is more important to ensure the supply of the goods and may not be too concerned about slight or marginal adjustments to the price.<sup>268</sup> This can be illustrated by the fact that in the *Westinghouse* case<sup>269</sup> the seller indicated that "98% of its customers accepted escalation clauses of this nature and were prepared to accept [its] figure of increased costs".

Finally, where a price escalation clause does not provide for a specific formula by which to calculate the price, it may result in the conclusion that "the determination of the amount of escalation might in the last resort be left to the decision of appellant [the seller]".<sup>270</sup> This is especially true in cases where the escalation clause includes increases that would be more difficult to determine - for example, increases

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<sup>261</sup> Laing *Price Adaptation* 124.

<sup>262</sup> Laing *Price Adaptation* 124.

<sup>263</sup> This may make it more difficult for the buyer to prove that the seller exercised its discretion unreasonably. Laing *Price Adaptation* 124 argues that this would also allow for a greater possibility of abuse of this power by the seller (especially in standard form contracts) that would need to be addressed.

<sup>264</sup> Laing *Price Adaptation* 125.

<sup>265</sup> Laing *Price Adaptation* 125.

<sup>266</sup> Laing *Price Adaptation* 125.

<sup>267</sup> Laing *Price Adaptation* 125.

<sup>268</sup> Laing *Price Adaptation* 125.

<sup>269</sup> *Westinghouse* 574.

<sup>270</sup> *Westinghouse* 574.

in labour costs, as was the case in *Westinghouse*.<sup>271</sup> As stated above, the majority of Westinghouse's clients were prepared to accept the increase in price (presumably because they found it reasonable). However, if our law were not to allow any discretionary powers in respect of price, it would leave all Westinghouse's contracts open to attack and possibly void.<sup>272</sup> As pointed out by Laing,<sup>273</sup> that would be "quite bizarre".

### **3.4 Final remarks on the rule and public policy**

It appears that in most cases public policy would dictate that a discretion to determine the price should be enforced, provided that such a discretion is not unfettered and subject to an external objective standard or reasonableness. However, in cases where an unfair bargaining position is present, public policy may dictate otherwise. As stated above, public policy is context-sensitive and dependent on the facts of a particular case.<sup>274</sup> Whether a term providing for the unilateral determination of the price would be contrary to public policy or not will depend on the facts of the case.<sup>275</sup> In fact, the court may identify other factors that may be relevant to a public policy investigation in a specific case. However, it is submitted that at a minimum the considerations and factors discussed above should be taken into account when making such an assessment.

## **4 Conclusion**

It has been shown that the rule that prohibits the unilateral determination of price should not be regarded as a manifestation of the requirement for certainty of price. Where a discretion to determine the price is subject to an external objective standard or reasonableness, this will result in the price being certain and consequently the contract of sale should be valid. This also seems to accord with the principle of contractual autonomy. Where an unequal bargaining relationship is

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<sup>271</sup> See for instance the escalation clause in *Westinghouse* 566.

<sup>272</sup> Laing *Price Adaptation* 128.

<sup>273</sup> Laing *Price Adaptation* 128.

<sup>274</sup> See para 0 above.

<sup>275</sup> Kruger 2011 *SALJ* 733.

present, further investigation is required because the term could possibly be regarded as contrary to public policy. This reasoning is reflected in recent developments in consumer law that have marked a departure from the traditional reverence reserved for contractual autonomy to a contractual order striving to protect consumers against unfair business practices (including unfair contract terms and prices).

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**List of abbreviations**

Afr J Int'l & Comp L	African Journal of International and Comparative Law
CPA	Consumer Protection Act
PELJ	Potchefstroom Electronic Law Journal
SALC	South African Law Commission
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg