

**ANALYSING AND COMPARING THE IMPACT OF MISREPRESENTATION AND  
NON-DISCLOSURE ON THE VALIDITY OF A CONTRACT:  
SIMILARITIES, DIFFERENCES AND REMEDIES**



**Kayra Ramphal**

**214505144**

**Supervisor: Adv. DC Subramanien**

## **DECLARATION**

I, Kayra Ramphal, hereby declare that this dissertation was composed by myself, the work contained therein is my own except where expressly stated otherwise. Further, that this work has not been submitted for any other degree at any other university.

## **ACKNOWLEDGEMENTS**

Firstly, I would like to express my sincere gratitude and appreciation to my supervisor Adv. Darren C Subramanien, for his instrumental guidance and encouragement. Your knowledge and motivation has made this process seamless. I cannot thank you enough for all of your support.

To my editor, Adv. Shadia Alli, thank you for your expert knowledge and assistance. I am immensely grateful and appreciative for your constant motivation.

My sincere thanks to my family and friends for your constant support and confidence in me. You mean the world to me.

Lastly, to my father Robin, there are not enough words to thank you for all that you have done for me. I am forever grateful for your unwavering belief in me, love and support.

To my guardian angel, my late mother Vanitha, I dedicate this to you.

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## **SUMMARY**

This dissertation explores the concepts of non-disclosure and misrepresentation in South African law. The principal focus surrounds the effect non-disclosure as a form of misrepresentation has on the liability of contracting parties. In order to explore this effectively, the study explores the concept of duty of disclosure, and whether such a duty exists in South African law. Instances when a duty to disclose arises are explained, such as positive steps taken to conceal facts, the seller having sole knowledge of the material fact, an omission or misleading language, and a change in circumstances. Similarly to the English law duty of disclosure in relation to information in contracts *uberrimae fidei*, the similar South African law concept in insurance or agency contracts known as ‘utmost good faith’, is discussed and explored. The study determines whether such a concept should be a mandatory requirement in pre-contractual negotiations. Additionally, this study explores the various avenues of relief that are available to those who have fallen victim to misrepresentation. This results in an analysis of the effectiveness and success of the current traditional methods of claiming and quantifying damages that are adopted by South African legislature and the judiciary. The discussion then explores the proposed alternate method which aims to combine a claim into one of delict and that of contractual liability, or on the other hand institute a claim solely based on contractual liability. Lastly, this study explores the effect the Consumer Protection Act 68 of 2008 has had on contractual agreements, remedies and penalties, and how this ground-breaking legislation has altered the approach previously adopted by the common law and whether it has done enough to protect consumers.

## Chapter 1: INTRODUCTION

South African law is a multifaceted and mixed legal system. The background and history of South Africa has led to a unique approach not only to the law of contract, but the way a layperson interprets and understands contractual performance and their reciprocating obligations.

The background of contract law and the relevant basic principles that we take for granted sets out the framework for this dissertation. In order for a valid contractual agreement to be in existence, certain elements must be present. One such elements is that there must be a consensus or a 'meeting of the minds'<sup>1</sup> between the contracting parties.<sup>2</sup> Moreover, the contracting parties must see eye to eye with regard to all facets of the contract.<sup>3</sup> Where a party has entered a contract, or otherwise been induced to enter said contract as a result of a false representation by the other party, this amounts to misrepresentation.<sup>4</sup>

Whether a duty of disclosure exists varies in each jurisdiction. In South African law there is no general duty of disclosure.<sup>5</sup> In a contractual context, disclosure and the duty to disclose, relates to any pertinent or material information that a contractor should divulge to the contracting party if the failure to disclose said information would affect whether the latter party entered into the contract or not<sup>6</sup>. The uncertainty surrounding whether there is a duty to disclose in South African law has spread to other areas of a contract. Misrepresentation, and the corresponding liability, is often regarded as only occurring when a positive act has been committed by a contractor in order to induce the other party to enter into the contract. This study shows that is incorrect, as there are a number of scenarios that impose a duty to disclose information on the contracting party.<sup>7</sup>

Conversely, despite the fact that the aforementioned instances exist there are still certain types of contracts in different industries that are treated differently. Contracts that seemingly require a higher duty of disclosure are those relating to insurance or agency. These are required to have

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<sup>1</sup> *Consensus ad idem*.

<sup>2</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 29-30.

<sup>3</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 29-30.

<sup>4</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 315.

<sup>5</sup> *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 SCA.

<sup>6</sup> *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 at para 21.

<sup>7</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 322-331.

been negotiated in ‘utmost good faith’.<sup>8</sup> In comparison, a party to a contract of sale who has specific knowledge that can impact whether the transaction will be concluded or not, has no duty to disclose such information to the other contracting party.<sup>9</sup> This creates uncertainty amongst the parties of a contract regarding whether this duty exists in our law or not. This leads to the question of whether the time has come for distinct and unambiguous legislative intervention to put an end to the debate. The importance of entering into a contract while being aware of all the material facts, as well as equipped with all the necessary information to validly consent to the transaction, cannot be overemphasized. However, it is still possible for people to be lulled into a false sense of security due to any fraudulent misrepresentation on the part of the other contracting party, or as a result of his or her silence. This can be avoided if there was a duty to disclose certain facts prior to concluding the contract, and not only those that are currently deemed to be material.

It is imperative to gain clarity for laypersons as to when a party cannot remain silent and is required to speak, and more importantly when the failure to do so will result in liability. South Africans who do not have a specialised knowledge of the law of contract enter into various agreements on a ‘good faith’ basis daily. These agreements are the centre of South African culture, and are founded on the basis that all parties involved will negotiate and contract with good intentions and on good faith and *ubuntu*. The importance of good faith and *ubuntu* in a contract, especially in a society as unique as ours, was observed and regarded as vital by the Constitutional Court.<sup>10</sup> In spite of this acknowledgement, there has been no proper development of the common law as to implement these concepts into our law. When the concept of good faith was adopted from Roman-Dutch law, the problems were adopted along with it. The ambiguous and vague nature of the concept was never clarified in South African law of contract.<sup>11</sup>

This leads to the question of whether the current legislation has done enough to protect the consumer. In order to determine this, chapter two of this study addresses the issues identified

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<sup>8</sup> ‘The art of law – a would-be purchaser must be cautious and protect his own interests’  
<http://www.roodtinc.com/archive/newsletter157.asp>, accessed on 16 March 2018.

<sup>9</sup> *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province* (20800/2014) ZASCA 61.

<sup>10</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10) 2011 ZACC 30. Majority Moseneke DCJ at para 71.

<sup>11</sup> E van der Sijde ‘*The role of good faith in the South African law of contract*’ (unpublished LLM thesis, University of Pretoria, 2017) 7.



by exploring the current position of duty of disclosure in South African law, and when this duty arises. In addition, whether the element of negotiating in good faith is part of the law of contract. After exploring these concepts, chapter three explores the traditional method of quantifying damages, and thereafter this study attempts to seek developments in the law. This is done by exploring an alternate method of claiming and quantifying damages, and determining whether this is in fact a viable option or not. Chapter four explores the inroads made by the Consumer Protection Act, and the effect it has had on the common law. Lastly, chapter five aims to provide viable solutions to the issues raised. This concluding chapter explores the ways in which the Consumer Protection Act needs to be developed in order to better protect consumers, and provides an argument for the development of the common law to include good faith in South African law of contract.

This study is an important avenue to advance our knowledge and understanding of misrepresentation and non-disclosure. As South Africa is a developing country, it is imperative that the laws of the land develop with it.

## CHAPTER 2: MISREPRESENTATION AND NON-DISCLOSURE

### 2.1. INTRODUCTION: WHAT CONSTITUTES A VALID CONTRACT?

There are numerous principles and elements that must be met in order for a valid contractual agreement to be concluded. That which is often taken for granted forms the basic framework for day-to-day contracts such as sale agreements and insurance contracts. To understand what constitutes a valid contract, it is also necessary to understand the six basic elements of a contract, namely offer, acceptance, consideration, mutuality of obligation, competency and capacity, and a written instrument.<sup>12</sup> One such required element is that there must be a consensus or a ‘meeting of the minds’<sup>13</sup> between the contracting parties.<sup>14</sup> This indicates that there must be a consensus between the parties with regard to what is offered and what is being accepted.<sup>15</sup>

Additionally, the contracting parties must see eye to eye with regard to all facets of the contract.<sup>16</sup> These elements indicate that in order for a contract to be enforceable it must be lawful, agreed upon by all parties, all parties must be competent and capable of performing the duties set out in the contract, and include a bargaining element.<sup>17</sup> Should any of these elements be missing, the contract is then void. When a contract is void it is regarded as being null from the beginning or conclusion of the contract.<sup>18</sup> This concept differs from that of a voidable contract which is legally binding until it is invalidated by the option of the party that is protected by law.<sup>19</sup>

Where a party has entered a contract, or otherwise been induced to enter said contract as a result of a false representation by the other party, this amounts to misrepresentation.<sup>20</sup>

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<sup>12</sup> C MacMillan ‘Elements of the law of contract’ (2012) *DPHU* available at [http://www.dphu.org/uploads/attachments/books/books\\_4071\\_0.pdf&ved=](http://www.dphu.org/uploads/attachments/books/books_4071_0.pdf&ved=), accessed on 29 April 2019.

<sup>13</sup> *Consensus ad idem*.

<sup>14</sup> RH Christie *Christie’s Law of Contract in South Africa* 7<sup>th</sup> (2016) 29-30.

<sup>15</sup> RH Christie *Christie’s Law of Contract in South Africa* 7<sup>th</sup> (2016) 29-30.

<sup>16</sup> RH Christie *Christie’s Law of Contract in South Africa* 7<sup>th</sup> (2016) 29-30.

<sup>17</sup> C MacMillan ‘Elements of the law of contract’ (2012) *DPHU* available at [http://www.dphu.org/uploads/attachments/books/books\\_4071\\_0.pdf&ved=](http://www.dphu.org/uploads/attachments/books/books_4071_0.pdf&ved=), accessed on 29 April 2019.

<sup>18</sup> L Nadew ‘Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of Their Effects’ (2008) 2(1) *Mizan Law Review* 1.

<sup>19</sup> L Nadew ‘Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of Their Effects’ (2008) 2(1) *Mizan Law Review* 1.

<sup>20</sup> R Sharrock *Business Transactions Law* 9<sup>th</sup> (2017) 315.

Misrepresentation occurs when a false or incorrect statement is made by a contractor or agent to the contracting party, which consequently induces the latter party to conclude the contract.<sup>21</sup> The effect of such misrepresentation is that the party who was induced into concluding the contract may rescind the contract.<sup>22</sup> This can only be done if the misrepresentation was material, and is therefore essential to whether the contracting party would have entered into the contract or not.<sup>23</sup> The duty to disclose a material fact faced by a defendant arises when he has sole knowledge of the material fact which the plaintiff would have relied upon and must be in line with the *boni mores* of the community.<sup>24</sup>

Such actions are regarded as non-disclosure, which is often thought of as misrepresentation by silence. As a result, the failure to disclose a material fact to the other contracting party when there is a legal duty to do so constitutes misrepresentation.<sup>25</sup> Non-disclosure and misrepresentation are treated in the same manner, in that they are both grounds for rescission of the contract if the defendant is under a duty to disclose such facts and fail to do so.<sup>26</sup>

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<sup>21</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 315.

<sup>22</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 29-30.

<sup>23</sup> *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 at para 21.

<sup>24</sup> *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C).

<sup>25</sup> G Wille *Wille's Principles of South African Law* 7<sup>th</sup> (2007) 778.

<sup>26</sup> R Sharrock *Business Transactions Law* 9<sup>th</sup> (2017) 134.

## 2.2. DOES A DUTY OF DISCLOSURE EXIST IN SOUTH AFRICA?

It must be noted that in South African law there is no general duty of disclosure.<sup>27</sup> However, there are circumstances whereby there are exceptions to this rule, and as a result the contractor is under a duty to disclose, such as:

- a) when the contractor has actively taken steps to prevent the other party from discovering certain facts that would affect his or her decision on whether to enter into the contract or not;<sup>28</sup>
- b) where the contractor has sole knowledge of the material fact which the plaintiff would have relied upon;<sup>29</sup>
- c) where the contractor has omitted pertinent facts or has used language that is misleading;<sup>30</sup>
- d) where a change in circumstances renders a fact or declaration, which was previously made by the contractor, incorrect.<sup>31</sup>

The case of *McCann v Goodall Group Operations (Pty) Ltd*<sup>32</sup> aptly set out other instances when a duty to disclose exists.

“A negligent misrepresentation may give rise to delictual liability and to a claim for damages, provided the prerequisites for such liability are complied with.

- i. A negligent misrepresentation may be constituted by an omission, provided the defendant breaches a legal duty, established by policy considerations, to act positively in order to prevent the plaintiff’s suffering loss.
- ii. A negligent misrepresentation by way of an omission may occur in the form of a non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.
- iii. Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid<sup>33</sup>.”

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<sup>27</sup> *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 SCA.

<sup>28</sup> *Dibley v Furter* 1951 (4) SA 73 (C).

<sup>29</sup> RH Christie *Christie’s Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>30</sup> RH Christie *Christie’s Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>31</sup> RH Christie *Christie’s Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>32</sup> *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C).

<sup>33</sup> *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at para 726A-G.

Each of these principles will be discussed and explored in turn.

## 2.3. INSTANCES WHEN A DUTY TO DISCLOSE ARISES

### 2.3.1. Positive steps to conceal facts

This occurs when the contractor has actively taken steps to prevent the other party from discovering certain facts that would affect his or her decision on whether to enter into the contract or not.<sup>34</sup> This concept can be expressed as fraudulent misrepresentation, which is described by Bradfield<sup>35</sup> as “the telling of a deliberate lie,” or a false statement of fact, that induces someone into a contract. The onus of proving fraudulent misrepresentation is on the party who has suffered damages, and must be specifically pleaded.<sup>36</sup> It is insufficient for the allegation of fraud to be a general one and must be done in a clear and distinct manner.<sup>37</sup> Nevertheless, it is often an uphill battle to prove a claim of fraud as there must be either a positive misrepresentation or non-disclosure by either the defendant or his or her agent.<sup>38</sup> Moreover, the plaintiff must allege that the fraud or misrepresentation was not only false, but either intentional to induce the conclusion of the contract or negligent.<sup>39</sup>

The concept of fraudulent misrepresentation can be seen in *Dibley v Furter*.<sup>40</sup> In this case the purchaser of a farm claimed that the agreement of sale was rescinded and therefore sued the seller for the return of the purchase price of the property, sought to return the *merx*, as well as instituted a claim for damages.<sup>41</sup> The purchaser based the claim on the basis that the farm in question had a graveyard on a portion of the property.<sup>42</sup>

The purchaser only became aware of its presence after the contract was concluded, as the seller had removed all physical signs of the graveyard. The purchaser expressed that he would not have purchased the farm had he known of the graveyards existence.<sup>43</sup> The purchaser claimed

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<sup>34</sup> *Dibley v Furter* 1951 (4) SA 73 (C).

<sup>35</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 341.

<sup>36</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 343.

<sup>37</sup> *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 at para 14.

<sup>38</sup> *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 at para 14

<sup>39</sup> *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 at para 14

<sup>40</sup> *Dibley v Furter* 1951 (4) SA 73 (C).

<sup>41</sup> *Dibley v Furter* 1951 (4) SA 73 (C) at 75.

<sup>42</sup> *Dibley v Furter* 1951 (4) SA 73 (C).

<sup>43</sup> *Dibley v Furter* 1951 (4) SA 73 (C) at 76.

that this amounted to a latent defect. It is important to note that the duty to disclose is also relevant to latent defects.<sup>44</sup>

Although, in this case the graves did not affect the purpose for which the farm was purchased. The court ultimately held that the purchaser could rely on fraudulent misrepresentation, as the purchaser would not have bought the farm had he been aware of the existence of the graveyard.<sup>45</sup>

### **2.3.2. Sole knowledge of the material fact**

It is a common misconception that misrepresentation, and liability as a result of such, only occurs when a party has committed a positive act to induce the contract. Conversely, a contracting party is also under a duty to disclose any information that he has sole knowledge of, which the other party would have relied upon,<sup>46</sup> and where silence and ultimately a lack of communication to the other party would amount to misrepresentation.<sup>47</sup> In order to determine whether a failure of a duty to disclose will result in the defendant's failure amounting to unlawfulness, one must look at the general test for liability.<sup>48</sup>

This is expressed as follows:

“[a] party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him ‘would be mutually recognised by honest men in the circumstances<sup>49</sup>”

The principle was explored in *Speight v Glass*,<sup>50</sup> in which the plaintiff had purchased shares in a hotel in its entirety, and at the time of the conclusion of the contract he was unaware that the town council was exploring the possibility of constructing a road that

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<sup>44</sup> *Dibley v Furter* 1951 (4) SA 73 (C) at 82.

<sup>45</sup> *Dibley v Furter* 1951 (4) SA 73 (C).89.

<sup>46</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>47</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>48</sup> *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 SCA at para 5.

<sup>49</sup> *Pretorius and Another v Natal South Sea Investment Trust Ltd* (under judicial management) 1965 (3) SA 410 (W) at para 418E-F.

<sup>50</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D).

would run through the property that the hotel was on.<sup>51</sup> The seller on the other hand was aware of this possible construction, and as a result the purchaser was of the opinion that the court should cancel the contract, and he should be reimbursed for the purchase price of the property.<sup>52</sup> The purchaser based his allegations on the basis that he would not have entered into the contract had he been aware of the construction.<sup>53</sup> Furthermore, he alleged that the seller was under a duty to disclose the planned construction.<sup>54</sup>

The seller countered that while he was cognizant of the proposed construction, he was not informed or in any way aware that the construction of the road had been approved.<sup>55</sup> The court ultimately held that there was not sufficient evidence to prove that the seller had deliberately or fraudulently failed to disclose the information.<sup>56</sup> It is not common practice that the contractor informs the other party of all aspects regarding his knowledge of a material characteristic. The court also had to determine whether the seller had sole or exclusive knowledge of the construction of the road which the purchaser would have relied upon. If this had occurred, then the seller did have a duty to disclose the information.<sup>57</sup>

The court ultimately determined that the seller had no specialised knowledge of the terms of the construction.<sup>58</sup> The court further agreed with the counter allegation of the seller that the necessary information, and full details of the construction plan, was accessible to the purchaser through the town council.<sup>59</sup> As a result, the claim for the cancellation of the contract of sale was dismissed due to the failure of the purchaser to prove that the seller had a duty to disclose the information to him.<sup>60</sup>

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<sup>51</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 779.

<sup>52</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 783.

<sup>53</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 779.

<sup>54</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 780.

<sup>55</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 779.

<sup>56</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 784.

<sup>57</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 782.

<sup>58</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 783.

<sup>59</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 783

<sup>60</sup> *Speight v Glass and Another* 1961 (1) SA 778 (D) at 784.

### 2.3.3. Omission or misleading language

A legal duty to disclose in this instance occurs when the contractor has omitted pertinent facts or has used language that is misleading.<sup>61</sup> Certain policy considerations may also necessitate the communication of certain facts or information to the plaintiff<sup>62</sup>. Often during the negotiation process the contractor may use vague, unclear or elusive language in order to secure a sale, or to ensure the conclusion of the contract. Nonetheless, a duty to disclose exists if such previously used equivocal terms require clarification.<sup>63</sup> This indicates that non-disclosure or an omission in the face of the existence of certain circumstances would result in the failure being wrongful.<sup>64</sup>

An obvious example of a scenario where the defendant or contractor has used misleading language<sup>65</sup> was seen in *Marais v Edlman*.<sup>66</sup> The defendant, the seller of the farm, had erroneously informed the purchasers that the borehole on the property had been pumped for three years without any issue. Even though this statement was correct, this had in actual fact occurred 14 years prior to the sale occurring.<sup>67</sup> The defendant also omitted information regarding the depth of the borehole, and that it was no longer as deep as it had been previously.<sup>68</sup> As a result, the court held that this amounted to a non-disclosure of facts.<sup>69</sup>

### 2.3.4. Change in circumstances

This occurs when a change in circumstances renders a fact or declaration, which was previously made by the contractor, incorrect.<sup>70</sup> It relates to certain circumstances that arise and in turn result in a previously made fact or representation, which was truthful at the time of its communication, to become incorrect.<sup>71</sup> In conjunction with this principle, Bigwood<sup>72</sup> explores the concept of supervening falsification' that was seen in the English law case of *With v*

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<sup>61</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>62</sup> *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C).

<sup>63</sup> *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C).

<sup>64</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 287.

<sup>65</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>66</sup> *Marais v Edlman* 1934 CPD 212.

<sup>67</sup> *Marais v Edlman* 1934 CPD 212.at 215-216.

<sup>68</sup> *Marais v Edlman* 1934 CPD 212.at 215-216.

<sup>69</sup> *Marais v Edlman* 1934 CPD 212.at 216.

<sup>70</sup> RH Christie *Christie's Law of Contract in South Africa* 7<sup>th</sup> (2016) 323.

<sup>71</sup> R Bigwood 'Pre-contractual misrepresentation and the limits of the principle in *With v O'Flanagan*' (2005) 64(1) *Cambridge Law Journal* 94.

<sup>72</sup> R Bigwood 'Pre-contractual misrepresentation and the limits of the principle in *With v O'Flanagan*' (2005) 64(1) *Cambridge Law Journal* 94.



*O'Flanagan*,<sup>73</sup> which will be discussed further. 'Supervening falsification' relates to the considerable interval of time that has passed between when the false representation was made, and when the contracting party has relied on the aforementioned representation to enter into the contract.<sup>74</sup> Alternatively, it is then safe to say that when a contractor makes a representation that is false, and he is initially unaware of the incorrect nature of the representation, this does not amount to supervening falsification. The contractor can be liable for misrepresentation, but as he was unaware of the false representation initially he will not be liable for fraudulent misrepresentation.<sup>75</sup>

In *With v O'Flanagan* case,<sup>76</sup> the plaintiff sought to purchase the medical practice of the defendant. During the negotiation process, the defendant represented that the practice made a profit of £2000 in a year.<sup>77</sup> Regrettably during the period between when the representation was made and when the contract of sale was concluded, the defendant fell ill and as a result of his inability to work the value of the practice declined drastically.<sup>78</sup> This decrease in value was known to the defendant, but not to the plaintiff and when the latter party consequently became aware of this fact, he sought to have the contract rescinded. This claim was based on the principle that the defendant had a duty to inform the plaintiff that the circumstances that were material to the sale, and had induced him to purchase the practice, were no longer correct.

The court held that the contract could be set aside, regardless of the fact that the contract was not based on *uberrimae fidei*,<sup>79</sup> and thus did not form part of the scenarios where English law imposes a duty to disclose facts.<sup>80</sup> This will be explored further in a comparative exploration of how English law and English judicial discretion differs from the approach adopted by South African law when dealing with non-disclosure and misrepresentation.

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<sup>73</sup> *With v O'Flanagan* [1936] 1 All ER.

<sup>74</sup> R Bigwood 'Pre-contractual misrepresentation and the limits of the principle in *With v O'Flanagan*' (2005) 64(1) *Cambridge Law Journal* 94.

<sup>75</sup> R Bigwood 'Pre-contractual misrepresentation and the limits of the principle in *With v O'Flanagan*' (2005) 64(1) *Cambridge Law Journal* 94.

<sup>76</sup> *With v O'Flanagan* [1936] 1 All ER.

<sup>77</sup> *With v O'Flanagan* [1936] 1 All ER.67 at 729.

<sup>78</sup> *With v O'Flanagan* [1936] 1 All ER.at 730.

<sup>79</sup> R Bigwood 'Pre-contractual misrepresentation and the limits of the principle in *With v O'Flanagan*' (2005) 64(1) *Cambridge Law Journal* 94.

<sup>80</sup> KE Gjelsten *Pre-contractual duty to disclose information – A comparison between Norwegian and English contract law* (unpublished LLM thesis, University of Oslo, 2007) 28.

## 2.4. A COMPARATIVE LOOK AT NON-DISCLOSURE AND MISREPRESENTATION

### 2.4.1 Introduction

South African law is known as an uncodified legal systems that is fuelled by multiple sources, such as common law, statute and the Constitution,<sup>81</sup> the foundations of which arise from Roman-Dutch and English law. South African contract law adopted various concepts from these two very different legal systems. The concept of ‘good faith’ in South Africa, which will be discussed later on in this chapter and in chapter five, was received from Roman-Dutch law in the context of contract law.<sup>82</sup> As South Africa has gained its Common Law system from England, it is imperative to look at how judicial discretion differs from the approach adopted by South African courts. This is considered in relation to whether the difference, if any, can be implemented in South African law to ease the burden faced by a contracting party when proving a claim of non-disclosure or misrepresentation. This will also provide an avenue for improving South Africa’s current practices by adopting the current policies that have already been developed in a first world country, and thereafter adapting the policies to suit a unique South African model. This will ultimately aid in the answering the question of whether or not a blanket duty of disclosure should exist in our law.

### 2.4.2. Non-disclosure

Similar to that in South Africa, there is no general rule or duty of disclosure in English law.<sup>83</sup> What has become apparent is that English law has adopted somewhat of a conservative approach to imposing liability when there has been a failure to disclose, which stems from the reluctance to enforce this duty. As *With v O’Flanagan*<sup>84</sup> is an English law decision and is the leading authority in this particular area, it will form an appropriate starting point to explore how English law deals with non-disclosure.

As was discussed previously, the court determined that the contract could be set aside, regardless of the fact that the contract was not based on *uberrimae fidei*.<sup>85</sup> This is important to

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<sup>81</sup> B Lenel ‘The History of South African Law and its Roman-Dutch Roots’ (2002) <http://www.lenel.ch/docs/history-of-sa-law-en.pdf>, accessed on 22 February 2018.

<sup>82</sup> E van der Sijde ‘*The role of good faith in the South African law of contract*’ (unpublished LLM thesis, University of Pretoria, 2017) 77.

<sup>83</sup> KE Gjelsten *Pre-contractual duty to disclose information – A comparison between Norwegian and English contract law* (unpublished LLM thesis, University of Oslo, 2007) 28.

<sup>84</sup> *With v O’Flanagan* [1936] 1 All ER.

<sup>85</sup> Utmost good faith.

note as while there is no general duty of disclosure, English law also contains certain exceptions or scenarios where the nature of the contract, or relationship between the contractants, requires a duty to disclose.<sup>86</sup> This gives rise to four groups of duty of disclosure:

“duty to disclose information in contracts *uberrimae fidei*, duty to disclose information in relation to court, tribunal or state agency, duty to disclose information in relations of confidence, and duty to disclose information in relations of influence or advantage<sup>87</sup>”

This indicates that the courts are aware that strict application of the general rule can result in inequality. The application of this strict rule was seen in *Sykes v Taylor-Rose*.<sup>88</sup> In this case the applicants had purchased a house from the respondents, unaware of the murder that had occurred in the house previously.<sup>89</sup> When the respondents had purchased the home, they too were unaware of its history. They later received an anonymous letter with newspaper articles informing them of what had transpired, which resulted in the respondents selling the property. A pre-contractual question enquired whether “[i]s there any other information which you think the buyer may have a right to know?”<sup>90</sup> To which the responding answer was a negative.

After the conclusion of the sale, the applicants were made aware of the history of the house through a documentary and were no longer able to stay in the house. When selling the property, they felt the history of the property should be disclosed. As a result, the house sold for £25,000 less than initially asked for. The applicants thereafter instituted a claim of misrepresentation against the respondents for the losses they incurred as a result of the misrepresentation, which was dismissed in the court a quo. On appeal, the court looked at the pre-contractual question and stated that it was intended to be subjective, and the answer was one that was honestly given by the respondents.<sup>91</sup> The court ultimately held that there was no duty imposed upon the respondents to disclose the history of the house to the applicants prior to the conclusion of the contract of sale. However, the court held that had the question been more specific and less subjective, and directly related or enquired as to the value of the property, then the court may have found otherwise.<sup>92</sup>

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<sup>86</sup> KE Gjelsten *Pre-contractual duty to disclose information – A comparison between Norwegian and English contract law* (unpublished LLM thesis, University of Oslo, 2007) 28.

<sup>87</sup> KE Gjelsten *Pre-contractual duty to disclose information – A comparison between Norwegian and English contract law* (unpublished LLM thesis, University of Oslo, 2007) 28.

<sup>88</sup> *Sykes v Taylor-Rose* [2004] EWCA Civ 299.

<sup>89</sup> *Sykes v Taylor-Rose* [2004] EWCA Civ 299 at para 4.

<sup>90</sup> *Sykes v Taylor-Rose* [2004] EWCA Civ 299 at para 10.

<sup>91</sup> *Sykes v Taylor-Rose* [2004] EWCA Civ 299 at para 51.

<sup>92</sup> *Sykes v Taylor-Rose* [2004] EWCA Civ 299 at para 50.

### 2.4.3. Misrepresentation

As the meaning of misrepresentation as a contractual concept was explored above when dealing with South African law<sup>93</sup>, it will not be explained further. Despite this, as the duty to provide and communicate correct information is regarded as being an expansion of the duty of disclosure,<sup>94</sup> the legislative remedies imposed in English law will be explored. English law has legislation that deals specifically with misrepresentation. Misrepresentation can be looked at as occurring in three different categories, namely fraudulent misrepresentation, innocent misrepresentation, and negligent misrepresentation.<sup>95</sup> The Misrepresentation Act of 1967<sup>96</sup> defines what actions amount to negligent, which is dealt with in section 2(1)<sup>97</sup> and innocent misrepresentation which is dealt with in section 2(2),<sup>98</sup> and sets out the remedies that are available for such. This is beneficial as it is often difficult or a grey area in determining what exactly amounts to a negligent misrepresentation, and what is innocent misrepresentation.

## 2.5. GOOD FAITH

What has been shown in this chapter is that in South African law there is no general duty of disclosure, nevertheless exceptions to this rule does exist. Nevertheless, what must be considered is whether a duty to disclose should exist when a circumstance arises that does not fall within these conditions or exceptions. An example that is often used to describe this is a scenario where a person purchases a house from another, but unknown to the buyer the house was the scene of a death or murder in the past.<sup>99</sup> This may not affect the use for which the property was purchased, nor does it amount to a latent defect. While to the purchaser of the house it may not only be uncomfortable for him or her to live in the house where the death had occurred, but for some the house may become unliveable. What becomes a pertinent question is “should this fact have been disclosed to the potential purchasers?”

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<sup>93</sup> This definition has been discussed at ‘2.1. Introduction: What constitutes a valid contract?’ above.

<sup>94</sup> KE Gjelsten *Pre-contractual duty to disclose information – A comparison between Norwegian and English contract law* (unpublished LLM thesis, University of Oslo, 2007) 28.

<sup>95</sup> KE Gjelsten *Pre-contractual duty to disclose information – A comparison between Norwegian and English contract law* (unpublished LLM thesis, University of Oslo, 2007) 28.

<sup>96</sup> The Misrepresentation Act 1967 Chapter 7.

<sup>97</sup> The Misrepresentation Act 1967, Chapter 7, s 2(1).

<sup>98</sup> The Misrepresentation Act 1967, Chapter 7, s 2(2).

<sup>99</sup> R Widing ‘Knockin’ On Heaven’s Door: Stigmatized Properties’ (21 June 2016)

<http://certifiedrealty.com/knockin-on-heavens-door-stigmatized-properties/> accessed on 22 February 2018.

This forms part of a case study whereby the new purchasers of a house started to hear ‘noises’ in their home.<sup>100</sup> They were later informed by neighbours that the property had been the scene of the death of a child. The purchasers claimed that they would not have purchased the property had they known about the death. When the estate agent who sold the house was contacted, he stated that he was aware of the death but did not disclose it as the sellers were not obliged to do so by law.<sup>101</sup> Furthermore, he stated that nobody would want to purchase a home that a person had died in.<sup>102</sup>

What is apparent from this scenario is that the seller was aware that by disclosing this fact, the prospective purchasers would be hesitant about concluding the contract. As a result of the non-disclosure by the seller, the buyers were at a disadvantage as they would not have concluded the contract had they been aware of the fact. Correspondingly, as this circumstance was not a material fact, a latent defect, nor did it fall under the exceptions whereby a seller has a legal duty to disclose a fact, the seller was not obliged to disclose his knowledge of the death.

This gives rise to the question “what can we do to remedy this?” South African law has a similar concept to the English law duty of disclosure regarding contracts in *uberrimae fidei*. Contracts relating to insurance or agency are required to have been negotiated in ‘utmost good faith’. This means that when contracting with an insurance company, the person seeking insurance must disclose all necessary and relevant information to the insurer.<sup>103</sup> In comparison, a party to a simple contract of sale who has specific knowledge that can impact whether the transaction will be concluded or not, has no duty to disclose such information to the other contracting party.<sup>104</sup> This can be taken to be a direct consequence of the fact that in a contract of sale the assumption is that of good faith and not utmost good faith. This then creates the impression that our law distinguishes and identifies with fluctuating degrees of good faith, when this is in fact not the case.

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<sup>100</sup> R Widing ‘Knockin’ On Heaven’s Door: Stigmatized Properties’ (21 June 2016)  
<http://certifiedrealty.com/knockin-on-heavens-door-stigmatized-properties/> accessed on 22 February 2 2018

<sup>101</sup> R Widing ‘Knockin’ On Heaven’s Door: Stigmatized Properties’ (21 June 2016)  
<http://certifiedrealty.com/knockin-on-heavens-door-stigmatized-properties/> accessed on 22 February 2 2018

<sup>102</sup> R Widing ‘Knockin’ On Heaven’s Door: Stigmatized Properties’ (21 June 2016)  
<http://certifiedrealty.com/knockin-on-heavens-door-stigmatized-properties/> accessed on 22 February 2 2018

<sup>103</sup> ‘The art of law – a would-be purchaser must be cautious and protect his own interests’  
<http://www.roodtinc.com/archive/newsletter157.asp>, accessed on 16 March 2018.

<sup>104</sup> *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province* (20800/2014) ZASCA 61.

In order for equality to be present amongst contracting parties, the writer is of the opinion that contracts *uberrimae fidei* should become written into the requirements for a valid contract. This is currently used where the contract is between parties that do not have the same bargaining power, such as an insurer and the insured. Although, if you place this in the context of a contract that has been induced as a result of misrepresentation or non-disclosure, this too results in an unequal balance of power amongst the contracting parties.

## **2.6. CONCLUSION**

The importance of entering into a contract while being aware of all the material facts, as well as equipped with all the necessary information to validly consent to the transaction, cannot be overemphasized. Despite this fact, it is still possible for people to be lulled into a false sense of security due to any fraudulent misrepresentation on the part of the other contracting party, or as a result of his or her silence. This can be avoided if there was a duty to disclose certain facts prior to concluding the contract, and not only those that are currently deemed to be material.

## CHAPTER 3: CONTRACTUAL AND DELICTUAL DAMAGES

### 3.1. INTRODUCTION: WHAT REMEDIES ARE AVAILABLE TO AN AGGRIEVED PARTY?

As explained in the previous chapter, a party that was induced into entering a contract as a result of a material misrepresentation may have the option to rescind said contract.<sup>105</sup> This is a remedy that is only available to the aggrieved party, by his or her choice.<sup>106</sup> The aggrieved party may be entitled to claim delictual damages which allows for the misrepresentee to be financially compensated for any losses he or she has suffered as a direct result of the misrepresentation, whether the aggrieved party chooses to uphold the contract or not.<sup>107</sup> What must also be noted is that the aforementioned party is not automatically entitled to damages. The court will examine whether the element of fault is present, as well as the measure of damages, this is regarded as delictual liability.<sup>102</sup> The concept of delictual liability will be further discussed below.

The usual remedy of rescission and damages that is granted by the courts, applies to fraudulent and negligent misrepresentation,<sup>103</sup> which will be discussed in detail below.<sup>108</sup> The innocent party may also institute a claim for damages simultaneously with a claim to rescind the contract.<sup>104</sup> This is because, as opposed to damages relating to a breach of contract, a claim in terms of delict is not inconsistent with a claim for rescission.<sup>109</sup>

As the judicial system faces an increasing number of cases dealing with fraudulent non-disclosure, it is often a challenge to enforce the idea that liability for misrepresentation and non-disclosure should be overseen by the same rules.<sup>110</sup> The attitude of the court in respect of non-disclosure and misrepresentation, where the defendant has failed in his duty to disclose, is

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<sup>105</sup> HJ Erasmus *Law of South Africa* 2 ed (2005) 65.

<sup>106</sup> J Poole 'Remedies for Misrepresentation' 2006 *Inter Alia* 46.

<sup>107</sup> RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 341.

<sup>102</sup> RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 341.

<sup>103</sup> J du Plessis 'Jurists, Structures, and the Development of the South African Law of Contract Symposium' (2016) 62 *Loyola Law Review* 652-653.

<sup>108</sup> See '3.2.2 An exploration of fault as a requisite for liability, (a) *Fraudulent misrepresentation*' below for full a discussion on fraudulent misrepresentation and '3.2.2 An exploration of fault as a requisite for liability, (c) *Negligent misrepresentation*' below for a full discussion on negligent misrepresentation.

<sup>104</sup> RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 345.

<sup>109</sup> RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 345.

<sup>110</sup> G Wille *Wille's Principles of South African Law* 9 ed (2007) 779-780.

that these are both grounds for rescission of the contract are regarded as ‘traditional grounds’ for rescission.<sup>111</sup>

Case law has discovered that discrepancies arise from within principles relating to rescission due to misrepresentation and quantifying damages due to misrepresentation.<sup>112</sup> This arises from applying the principles developed for remedies relating to fraudulent misrepresentation to non-fraudulent misrepresentation.<sup>113</sup>

As the current system of quantifying damages has difficulties, it is imperative to explore the current remedies available to those who have fallen victim to misrepresentation, as well as consider whether a more effective system is present.

## **3.2. DAMAGES**

### **3.2.1. How are claimable damages quantified?**

The current position provides that where a contract concluded based on pre-contractual misrepresentation is upheld, damages are generally claimable based on delict.<sup>114</sup> In a scenario where the aggrieved party or plaintiff elects to uphold the contract and claim damages for financial losses suffered, delictual damages will then be quantified traditionally based on one of two circumstances; firstly, where the plaintiff was induced to enter into the contract solely based on his reliance on the misrepresentation, which is known as *dolus dans*,<sup>115</sup> and secondly, where the party would still have entered into the contract. The sole change would however be that the terms relating to said contract would have varied as a result of the misrepresentation.<sup>116</sup> This is known as *dolus incidens*.<sup>117</sup>

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<sup>111</sup> J du Plesis ‘Illegal Contracts and the Burden of Proof’ (2015) 132(3) *SALJ* 685.

<sup>112</sup> J Poole ‘Remedies for Misrepresentation’ 2006 *Inter Alia* 46.

<sup>113</sup> J Poole ‘Remedies for Misrepresentation’ 2006 *Inter Alia* 46.

<sup>114</sup> A Du Plesis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 413.

<sup>115</sup> HJ Erasmus ‘Damages’ In W A Joubert (2 ed) *LAWSA* vol 26 Second Reissue (1999) para 65.

<sup>116</sup> JP Van Niekerk ‘Of insurance misrepresentation, materiality, inducement and no-claim bonuses’ (2008) 20(1) *SA Merc* 122.

<sup>117</sup> A Du Plesis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *South African Law Journal SALJ* 414.



With regard to the first instance, the plaintiff would not have concluded the contract if he or she was aware of the misrepresentation.<sup>118</sup> As a result, the appropriate measure is to place the aggrieved party in the financial position that he or she would have been in had the contract not been concluded,<sup>119</sup> and not to place the aggrieved party in the financial that he or she would have been in had the misrepresentation been true.<sup>120</sup>

In order to quantify the damages related to the particular circumstance, the court will look at the value of what the performance would have been and compare this to the value of the counter-performance.<sup>121</sup> Damage has been suffered, and can be claimed by the plaintiff, when the value of the counter-performance is greater than that of the value of the performance.<sup>122</sup> From this statement, it is possible to deduce that should the value of the two amounts be equal or if the counter-performance is less than that of the performance, the plaintiff cannot claim for damages.<sup>123</sup>

With regard to the second instance of misrepresentation, this explores the performance that the contracting party actually agreed to, and would have received, if the fraud or misrepresentation was not present.<sup>124</sup>

### **3.2.2. An exploration of fault as a requisite for liability**

In order for an aggrieved party to be successful in his or her delictual claim for damages, the element of fault must be present.<sup>125</sup> When an aggrieved party seeks to claim damages in delict, as a result of a contractual non-disclosure, fault is obligatory.<sup>126</sup> Fault in terms of contract law comprises of a wilful, reckless and negligent breach of contract.<sup>127</sup> This amounts to a failure to perform, however the actions of the contractor will only be considered wilful should he or she

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<sup>118</sup> HJ Erasmus 'Damages' In W A Joubert (2 ed) *LAWSA* vol 26 Second Reissue (1999) para 65.

<sup>119</sup> Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 414.

<sup>120</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 346.

<sup>121</sup> A Bunbury 'Quantification of Contractual Damages: Have We Moved on from Fuller and Perdue?' (2014) 13(1) *Hibernian Law Journal* 3-4.

<sup>122</sup> A Bunbury 'Quantification of Contractual Damages: Have We Moved on from Fuller and Perdue?' (2014) 13(1) *Hibernian Law Journal* 4.

<sup>123</sup> A Bunbury 'Quantification of Contractual Damages: Have We Moved on from Fuller and Perdue?' (2014) 13(1) *Hibernian Law Journal* 4.

<sup>124</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 415.

<sup>125</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 352.

<sup>126</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 354.

<sup>127</sup> RA Hillman 'The Future of Fault in Contract Law' (2014) 52 *Duquesne Law Review* 277.

deliberately decide not to perform.<sup>128</sup> The contractor will also be liable for negligent or reckless behaviour should he or she fail to ensure proper performance.<sup>129</sup> However, should surrounding circumstances ensure that performance is impossible, yet the contractor has done all that is reasonable possible to avoid a breach of contract, he or she will not have wilfully or negligently breached the contract.<sup>130</sup> With regard to the element of fault in the context of non-disclosure, an objective-subjective test of reasonable foreseeability must be shown.<sup>131</sup> This means that information that was not communicated to the aggrieved party was in fact material, and he or she was unaware of this.<sup>132</sup>

*(a) Fraudulent misrepresentation*

When exploring the element of fault in relation to fraudulent misrepresentation, an illustration of fraud is that of a deliberate or intentional lie.<sup>133</sup> It is submitted that case law dealing with the aforementioned claim for damages concentrates on fault in relation to fraud. This was apparent in *Bayer South Africa (Pty) Ltd. v Frost*,<sup>134</sup> and will be dealt with later in this chapter.

This approach was altered in *ABSA Bank Ltd v Fouche*,<sup>135</sup> whereby the court explored whether a party's non-disclosure was negligent and in turn met the requirement for fault when instituting a claim for delictual liability.

The respondent entered into a written contract to hire a safety deposit box from the appellant, ABSA Bank.<sup>136</sup> Eight years after the conclusion of the contract, the branch of the bank in question was burglarized and multiple safety deposit boxes were broken into, including that belonging to the respondent.<sup>137</sup> The respondent lost valuable jewellery in the theft and instituted a claim against the appellant to recover the value of the items lost.<sup>138</sup> The *court a quo* found in favour of the respondent, and the appellant was found liable.<sup>139</sup>

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<sup>128</sup> RA Hillman 'The Future of Fault in Contract Law' (2014) 52 *Duquesne Law Review* 276.

<sup>129</sup> RA Hillman 'The Future of Fault in Contract Law' (2014) 52 *Duquesne Law Review* 276.

<sup>130</sup> RA Hillman 'The Future of Fault in Contract Law' (2014) 52 *Duquesne Law Review* 276-277.

<sup>131</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 354.

<sup>132</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 354.

<sup>133</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 341.

<sup>134</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A).

<sup>135</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA.

<sup>136</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 1.

<sup>137</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 2.

<sup>138</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 2.

<sup>139</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 2.

On appeal, the respondent accepted that she did not have a claim in terms of contract, as a result the appellant could not be held liable for any loss arising from negligence.<sup>140</sup> The respondent sought to claim damages on the basis that she had been induced into entering the contract as a result of the appellant's fraudulent non-disclosure of pertinent facts relating to shortcomings in the security system.<sup>141</sup> Should this action fail, the respondent sought to claim damages as a result of the negligent non-disclosure of the appellant.<sup>142</sup>

The respondent based the aforementioned allegations on the fact that the officials of the appellant failed to inform her that the security system lacked motion detectors that was linked to the alarm, and that the branch in question did not employ a guard at night.<sup>143</sup> These were features that officials failed to inform her of, either negligently or intentionally, and were also not apparent to a customer in her position.<sup>144</sup> Furthermore, the respondent alleged that she would not have entered into the contract had she been aware of the inadequacies in the security system.<sup>145</sup> The court had to determine whether the information regarding the inadequacies in the security system formed part of the 'exclusive knowledge' of the branch officials.<sup>146</sup> This explores the concept of involuntary reliance, which states that each party to a contract must obtain pertinent information relating to the contract himself or herself.<sup>147</sup>

This concept was described by Millner<sup>148</sup> and relates to situations in which a misrepresentee was unable to obtain the aforementioned information, and had to be dependent on the disclosure of the other party to protect his or her interests. This is said to occur either when the information was within the 'exclusive knowledge' of the misrepresentor, or when the parties to the contract were in a relationship of trust.<sup>149</sup> A duty of disclosure does not exist where the misrepresentee failed to obtain the aforementioned information himself or herself, yet failed to do so.<sup>150</sup>

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<sup>140</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 3.

<sup>141</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 3.

<sup>142</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 3.

<sup>143</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 7.

<sup>144</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 7.

<sup>145</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 7.

<sup>146</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 8.

<sup>147</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 354.

<sup>148</sup> Millner 'Fraudulent non-disclosure' (1957) *SALJ* 188-189.

<sup>149</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 354.

<sup>150</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (1)' (2015) 2 *TSAR* 355.

In the event that the aforementioned information is ‘exclusive’, the court has to explore the question of “whether an honest person in the position of the branch officials would have thought to communicate it to a future depositor?”<sup>151</sup> The court provided that an official of the appellant would be aware that the security was not at a high level.<sup>152</sup> It appears that the respondent had an inflated concept of the appellant’s obligations, which in reality only included the obligation not to negligently lose or damage the object in the safety deposit box.<sup>153</sup>

The court emphasized the fact that the respondent undertook the responsibility of insuring the contents of the safety deposit box, but failed to do so.<sup>154</sup> This suggests that the respondent was aware that she was required to bear some risk, in terms of the contract.<sup>155</sup> The respondent became aware of the level of security at the branch during the eight years in which she removed her jewellery to wear, and subsequently returned it.<sup>156</sup>

Consequently, the court was not swayed by the allegation that the officials of the appellant failed to inform her of pertinent information, either negligently or intentionally, which subsequently induced to enter into the contract.<sup>157</sup> The court further stated that the aforementioned information regarding the security did not sufficiently influence her decision to contract.<sup>158</sup> As a result, the court dismissed the appeal.

*(b) Innocent misrepresentation*

Innocent misrepresentation occurs when one party to the contract remains silent on a pertinent fact of the contract, without the intention to mislead the contracting party, yet this failure to disclose ultimately leads to the latter party suffering a disadvantage.<sup>159</sup> Where an innocent misrepresentation has occurred and has induced a contract, there can be no claim for delictual damages.<sup>160</sup> Although, it has been stated that an innocent misrepresentation may allow for the

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<sup>151</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 9.

<sup>152</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 15.

<sup>153</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 16.

<sup>154</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 17.

<sup>155</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 17.

<sup>156</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 21.

<sup>157</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 21.

<sup>158</sup> *ABSA Bank v Fouche* 2003 (1) SA 176 SCA at para 21.

<sup>159</sup> RH Christie *Christie’s Law of Contract in South Africa* 7 ed (2016) 344.

<sup>160</sup> RH Christie *Christie’s Law of Contract in South Africa* 7 ed (2016) 344.

aggrieved party to institute a claim for avoidance.<sup>161</sup> Avoidance in a contract of sale amounts to cancellation or termination by a party to a contract, when the agreement can no longer be continued due to impossibility, or alternatively it would be inequitable to enforce performance of the contract.<sup>162</sup> This may be brought about due to a number of scenarios, including where the other party to the contract is in breach of the contract<sup>163</sup> through non-performance.<sup>164</sup> The consequence of this is that all parties to the contract are released from their respective obligations in respect of the contract.<sup>165</sup>

The United Nations Convention on Contracts for the International Sale of Goods (the CISG), states that as the termination of the contract in this scenario is one-sided, and gives rise to severe consequences, it has provided for strict requirements for the remedy of avoidance.<sup>166</sup>

The requirements for avoidance are as follows:

- i. There must be a fundamental breach of contract;<sup>167</sup>
- ii. The aggrieved party must provide the guilty party with notice;<sup>168</sup>
- iii. There may be a time limit (this is not always required);<sup>169</sup>
- iv. And lastly, if there are goods involved there must be the return of “substantially unchanged” products.<sup>170</sup>

The CSIG has emphasized the fact that in order for one party to unilaterally terminate the contract, the other party must have committed what it regards as a “fundamental breach”.<sup>171</sup>

This was reinforced by other academics that state avoidance or termination of the contract

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<sup>161</sup> M Nortje ‘Pre-contractual duties of disclosure in the South African common law (1)’ (2015) 2 *TSAR* 352.

<sup>162</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 423.

<sup>163</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 423.

<sup>164</sup> K Saare ‘The Buyer’s Free Choice between Termination and Avoidance of a Sales Contract’ (2008) 15 *Juridica International* 45.

<sup>165</sup> K Saare ‘The Buyer’s Free Choice between Termination and Avoidance of a Sales Contract’ (2008) 15 *Juridica International* 43.

<sup>166</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 424.

<sup>167</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 425.

<sup>168</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 425.

<sup>169</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 425.

<sup>170</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 425.

<sup>171</sup> U Magnus ‘The Remedy of Avoidance of Contract under CSIG – General remarks and special cases’ (2005-2006) 25(423) *Journal of Law and Commerce* 424.

should only be a viable remedy where there has been a “fundamental non-performance” of the contractual obligations by the other party.<sup>172</sup> A party should not be allowed to avoid the contract, and his or her corresponding obligations and performance due to a simple breach, such as late or sub-standard performance.<sup>173</sup> It is submitted that this is vital in upholding the principles of *pacta sunt servanda*<sup>174</sup> and freedom of contract, as parties should hold sacred contracts that they have willingly entered into.<sup>175</sup>

*(c) Negligent misrepresentation*

Bradfield<sup>176</sup> explores the fact that there has been a long-standing debate regarding whether a party, who was induced into entering a contract as a result of a negligent misrepresentation, could claim damages as a result of such. This matter was ultimately explored and decided in *Bayer South Africa (Pty) Ltd. v Frost*.<sup>177</sup> In the Appellate Division, there were multiple causes of action however, the research will only focus on the allegation that respondent was induced to use the new pesticide as a result of the appellant’s employee making an unlawful and negligent misstatement,<sup>178</sup> as this is pertinent to this discussion.

Frost, the respondent, was the lessee of three farms. Upon which, one of the farms in question comprised of a vineyard and “other lands”.<sup>179</sup> In order to properly maintain the vineyards, a pesticide was required to be sprayed to eliminate any weeds, yet had no ill-effects on the budding vines.<sup>180</sup> The pesticide was applied by the use of a tractor but, inclement weather often made this process impossible.<sup>181</sup> Consequently, the respondent changed pesticides to one that could be sprayed onto the vineyard by means of a helicopter.<sup>182</sup>

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<sup>172</sup> K Saare ‘The Buyer’s Free Choice Between Termination and Avoidance of a Sales Contract’ (2008) 15 *Juridica International* 43.

<sup>173</sup> K Saare ‘The Buyer’s Free Choice Between Termination and Avoidance of a Sales Contract’ (2008) 15 *Juridica International* 45.

<sup>174</sup> Agreements freely entered into should be enforced.

<sup>175</sup> JC Kanamugire ‘The Current Status of Exemption Clauses in the South African Law of Contract’ (2014) 5(9) *MJSS* 168-169.

<sup>176</sup> RH Christie *Christie’s Law of Contract in South Africa* 7 ed (2016) 343.

<sup>177</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A).

<sup>178</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 5.

<sup>179</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 2.

<sup>180</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 3.

<sup>181</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 4.

<sup>182</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 4.

The new pesticide came into contact with the crops on the “other lands” and caused damages amounting to R55 000, which resulted in the respondent instituting action against appellant for damages in respect of the loss caused to his crops.<sup>183</sup> The respondent alleged that a representative of the appellant, during negotiations to conclude an oral agreement to spray the new pesticide by helicopter, represented that the pesticide could be sprayed by helicopter without damaging the other crops.<sup>184</sup>

Corbett CJ stated that a person who was induced to enter a contract due to a negligent misrepresentation can institute a delictual claim for damages.<sup>185</sup> It was additionally stated that as a formula to determine unlawfulness is not in existence, each matter will be determined on a case by case basis. The circumstances surrounding each case will explore whether a causal connection exists between the misstatement and the monetary losses suffered.<sup>186</sup>

The court ultimately determined that the employee, acting as the appellant’s representative, had created a reasonable expectation that the appellant would prevent damage from occurring to the other crops.<sup>187</sup> The appellant had failed to ensure the truthfulness of the representations made by taking the necessary and reasonable steps.<sup>188</sup> As a result, the appellant had made the representations negligently, and its conduct was unlawful.<sup>189</sup> The appeal was consequently dismissed.<sup>190</sup>

### **3.3. DOES A PARTY HAVE AN ALTERNATIVE TO CLAIMING DAMAGES IN DELICT?**

The research will now aim to explore prospective developments in the law, which may well provide an important avenue to advance our knowledge and understanding of misrepresentation and non-disclosure. As South Africa is a developing country, it is imperative that the laws of the land develop with it.

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<sup>183</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 4-5.

<sup>184</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 7.

<sup>185</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 25.

<sup>186</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 25.

<sup>187</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 9.

<sup>188</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 43.

<sup>189</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 43.

<sup>190</sup> *Bayer South Africa (Pty) Ltd. v Frost* 1991 (4) SA 559 (A) at para 45.

In *Trotman v Edwick*,<sup>191</sup> Van den Heever JA explained the difference between quantifying damages in contract as opposed to delict as follows:

“A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words, that the amount by which his patrimony has been diminished by such conduct should be restored to him.”<sup>192</sup>

Du Plessis<sup>193</sup> proposed that an alternative to the aforementioned traditional approach of quantifying damages should be adopted. The recommendation states that a claim should either be combined into a claim of delict and that of contractual liability, or alternatively one solely based on contractual liability.<sup>194</sup> The exploration of this proposed approach will aim to determine how to formulate damages resulting from pre-contractual misrepresentation and fraud, and how this can be enumerated as contractual damages.<sup>195</sup> More importantly, this study will provide an insight as to whether Du Plessis’ approach to contractual liability, as a remedy for misrepresentation, is in fact a viable option.

The proposed approach states that where a party has been induced to enter a contract as a result of a misrepresentation or a lack of consensus, and the aggrieved party elects to uphold the contract, he or she should have contractual remedies available.<sup>196</sup> This will ensure that the parties still have a valid and enforceable contract in which the ordinary rights, obligations and performance will continue to apply in terms of the contract for both parties.<sup>197</sup>

With regard to a breach of contract, this will arise where an inadequate performance is rendered by one of the parties, and is not what was provided for in terms of the contract.<sup>198</sup> The general

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<sup>191</sup> *Trotman v Edwick* 1951 (1) SA 443 (A).

<sup>192</sup> *Trotman v Edwick* 1951 (1) SA 443 (A) at para 449B-C.

<sup>193</sup> A Du Plessis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 415-416.

<sup>194</sup> A Du Plessis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 415-416.

<sup>195</sup> A Du Plessis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 417.

<sup>196</sup> A Du Plessis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 416.

<sup>197</sup> A Du Plessis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 415-416.

<sup>198</sup> A Du Plessis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 416.



standard for determining wrongfulness will in turn also be used to determine whether the aforementioned performance has been carried out within the terms stipulated in the contract.<sup>199</sup> In the event of a breach of contract occurring, the normal common-law remedies will apply.<sup>200</sup> Where the aggrieved party has deduced the misrepresentation to form part of the contract, either in the form of a warranty or a term of said contract, he or she should have a contractual action available.<sup>201</sup>

Du Plesis states that an advantage of relying on a solely contractual approach to claiming damages is that it enforces certainty and eliminates the need for different approaches to quantifying damages.<sup>202</sup> This will in turn eradicate challenges associated with applying delictual elements to a contractual matter, and subsequently importing a contractual approach to quantifying damages into a claim in terms of delict.<sup>203</sup>

This approach was adopted by Jansen JA in the dissenting judgement of *Ranger v Wykerd*.<sup>204</sup> The dissertation will only explore the dissenting judgement as this is pertinent to quantifying damages solely based on a contractual method and the difficulties that arise as a result of the traditional method of quantifying damages.

The respondents in this case were a married couple, and although the second respondent owned the property which was sold to the appellant, the first respondent conducted the negotiations regarding the sale.<sup>205</sup> The appellant was eager to purchase a property with a swimming pool, which the first respondent was made aware of during the negotiation process.<sup>206</sup> The respondents were cognisant of the fact that the swimming pool had faults that affected its use, which was not brought to the attention of the appellant.<sup>207</sup> During the negotiation process, the first respondent made a fraudulent misrepresentation to the appellant by stating that the

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<sup>199</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 416.

<sup>200</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 416.

<sup>201</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 416.

<sup>202</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 431.

<sup>203</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 430.

<sup>204</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A).

<sup>205</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 990.

<sup>206</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 990.

<sup>207</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 990.

swimming pool was structurally sound and in good condition.<sup>208</sup> This representation induced the appellant to purchase the property for R22 000; subsequently, the appellant later became aware of the defects and spent a further R1 250 to repair the damage.<sup>209</sup>

The appellant instituted a delictual claim against the first and second respondents for the cost of the repairs.<sup>210</sup> As the first respondent was not a party to the contract, the appellant could not claim contractual damages of any form.<sup>211</sup> Due to the fact that the fraudulent misrepresentation would not have prevented the appellant from entering the contract as he would have factored in the repair costs when purchasing the property,<sup>212</sup> the court a quo held that he failed to prove any patrimonial loss. On appeal, the majority found the first respondent liable in delict.<sup>213</sup>

In the dissenting judgement, Jansen JA indicated that while the court had adopted the delictual measure of damages, it had also determined damages by “making good the representation” which in actuality was adopting a contractual approach.<sup>214</sup> It was stated that although this approach is in direct opposition to the method currently adopted by our legal system, which aims to ensure that a claim for damages is made in delict, this would assist in lessening any confusion as a result of the differing methods that have been adopted by the court.<sup>215</sup> As a result, in the event that it is appropriate to apply to the case in question and notwithstanding the fact that the action arose from delict, a contractual measure of damages should be adopted.<sup>216</sup>

In order to demonstrate that the proposed approach is viable, Du Plesis provides a guideline as to how to determine damages resulting from pre-contractual fraudulent misrepresentation.<sup>217</sup> The court in *Colt Motors (Edms) Bpk v Kenny*<sup>218</sup> devised a guideline comprised of a practical approach to determine when an aggrieved party would need to prove market value when

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<sup>208</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 990.

<sup>209</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 990.

<sup>210</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 991.

<sup>211</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 991.

<sup>212</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 990.

<sup>213</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 991.

<sup>214</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 989.

<sup>215</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 989.

<sup>216</sup> *Ranger v Wykerd & Another* 1977 (2) SA 976 (A) at para 989.

<sup>217</sup> A Du Plesis ‘Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld’ (2008) 125(2) *SALJ* 435-436.

<sup>218</sup> *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T).

instituting a claim for damages.<sup>219</sup> This guideline was adopted and amended in order to suit enumerated a claim for contractual damages.<sup>220</sup>

The first step explores whether the statement of fraudulent misrepresentation amounted to a term of the contract in question.<sup>221</sup> Secondly, the aggrieved party needs to prove that there is a causal connection between the misrepresenter's actions and the breach of contract.<sup>222</sup> The last step explores the enumeration of contractual damages.<sup>223</sup>

The intention of the proposed approach is to dissuade fraud in contractors.<sup>224</sup> South African law of damages does not provide for punitive damages, therefore it will be difficult to hold a misrepresenter liable for more than his or her compensatory duty.<sup>225</sup>

### 3.4. CONCLUSION

It is imperative to explore remedies that are available to aggrieved parties who have fallen victim to misrepresentation. Proposed alternative remedies and methods of quantifying a claim for damages is necessary not only to conduct research that will explore innovative avenues to remedy longstanding problems, but also allows for the simultaneous development of what has already been recognised in the field.

The development of Du Plesis' proposed principles aims to deviate from the traditional method of quantifying damages that are suffered as a result of misrepresentation,<sup>226</sup> while still respecting the current method and adopting it to the future. With regard to the feasibility of the proposed alternative, the claiming of both contractual and delictual damages is not currently

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<sup>219</sup> The original practical guideline can be found at *Kenny* supra note 209 at para 397 of Stegmann J judgement.

<sup>220</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 435.

<sup>221</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 435.

<sup>222</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 436.

<sup>223</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 436.

<sup>224</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 438.

<sup>225</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 439.

<sup>226</sup> A Du Plesis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 416.

unheard of.<sup>227</sup> As was stated by Bradfield,<sup>228</sup> a statement may simultaneously be a fraudulent misrepresentation and a term of the contract in question.

However, the current process is that this can only occur when the aggrieved party has not sought rescission of the contract, which is not in line with a claim for breach of contract.<sup>229</sup> Furthermore, the claim for delictual damages must solely relate to the fraudulent misrepresentation, while damages can only be claimed as a result of the representation being a term of the contract and consequently a breach of contract.<sup>230</sup>

What must be noted is that granted developing the law alongside societal developments and advances is valuable, awarding damages based on a contractual measure provides for any fraudulent misstatement to become a term in a contract.<sup>231</sup> Due to the fact that there is no blanket rule determining how damages should be granted, each matter must be determined on a case-by-case basis.<sup>232</sup>

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<sup>227</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed ed (2016) 346.

<sup>228</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 346.

<sup>229</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 346.

<sup>230</sup> RH Christie *Christie's Law of Contract in South Africa* 7ed (2016) 346.

<sup>231</sup> RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 346.

<sup>232</sup> RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 346.

## CHAPTER 4: THE EFFECT OF THE CONSUMER PROTECTION ACT 68 OF 2008

### 4.1. INTRODUCTION

In South Africa, common law is regarded as a secondary source of law, which is derived from Roman-Dutch Law.<sup>233</sup> The principles adopted from this source of law have governed multiple aspects and areas in the law of contract, including warranty against *caveat subscriptor*, freedom of contract, the passing of the risk rule, the parole evidence rule, latent defects,<sup>234</sup> and exemption clauses that exempt a person from liability for a latent defect which is also known as a *voetstoots* clause.<sup>235</sup>

This chapter aims to discuss the common law position specifically relating to latent defects in conjunction with exemption clauses, and explore how the introduction of the Consumer Protection Act<sup>236</sup> (herein referred to as the CPA), which will be discussed at length later in the chapter, has altered the approach to this.

Prior to the enactment of the CPA, consumers often signed contracts that contained ambiguous clauses that we colloquially refer to as “fine print”. It is stated that this was done because consumers often believed it was futile to object to standard form contracts, which are structured on a “take it or leave it” basis.<sup>237</sup> The enactment of the CPA changed this drastically. The CPA applies to every transaction relating to the supply or promotion of goods or services that has occurred within the Republic of South Africa, unless otherwise exempted by the CPA.<sup>238</sup> In addition, a ‘transaction’ is defined as relating to any person who is party to an agreement with one or more persons for the purpose of supplying goods in exchange for anything of value

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<sup>233</sup> B Lenel ‘The History of South African Law and its Roman-Dutch Roots’ (2002) <http://www.lenel.ch/docs/history-of-sa-law-en.pdf>, accessed on 22 February 2018.

<sup>234</sup> J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoots* clauses and liability for damages’ (2012) 45(3) *De Jure* 456.

<sup>235</sup> S Tennant ‘The Consumer Protection Act and five common law principles’ (2013) 36 *De Rebus*.

<sup>236</sup> Consumer Protection Act 68 of 2008.

<sup>237</sup> M Tait ‘Exemption provisions and the Consumer Protection Act, 2008: Some preliminary comments’ (2014) 35(3) *Obiter* 630.

<sup>238</sup> Consumer Protection Act 68 of 2008 s 5(1) (a) – (b).

given in return, such as monetary payment.<sup>239</sup> The CPA not only aims to ensure the rights of consumers are protected, but has promoted fair business practices.<sup>240</sup>

The CPA does not apply, among others, to transactions of promotion or supply to the State, instances where the consumer is a juristic person with an asset value or annual turnover that is equal to, or in excess of, the threshold value and services relating to an employment contract.<sup>241</sup> This then prompts the question that, if based on the fact that the scope of the CPA excludes certain contracts of sale which do not fall under its domain, will the common law position apply in these scenarios?<sup>242</sup> Due to the scope of the CPA, where a contract does not fall under that domain, the legal position will revert to the common law position that applied before the CPA came into effect.<sup>243</sup> The common law in relation to the law of contract is any law that was created by the courts, and not by legislature.<sup>244</sup> This is regarded as an uncodified legal system, as the judges develop and interpret laws that are already in existence.<sup>245</sup>

## 4.2. LATENTS DEFECTS

### 4.2.1. What is a latent defect?

The duty to disclose also has an impact on a ‘latent defect’ when entering into a contract.<sup>246</sup> The term ‘latent defect’ was aptly described in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*<sup>247</sup> as any abnormality that affects or impairs the usefulness or effectiveness in relation to the purpose for which the *res vendita*<sup>248</sup> was sold or is used, and could not be identified by a reasonable inspection made by an ordinary person prior to the purchase of the thing.<sup>249</sup> It must be noted that the seller is under an obligation to disclose latent defects only, and not patent defects, only if he or she is aware of such defects.

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<sup>239</sup> Consumer Protection Act 68 of 2008 s 1.

<sup>240</sup> Consumer Protection Act 68 of 2008 s 3(1).

<sup>241</sup> Consumer Protection Act 68 of 2008 s 5(2).

<sup>242</sup> J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages’ (2012) 45(3) *De Jure* 456.

<sup>243</sup> J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages’ (2012) 45(3) *De Jure* 456.

<sup>244</sup> Y Mupangavanhu ‘Fairness is a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008’ (2015) 48(1) *De Jure* 118.

<sup>245</sup> Y Mupangavanhu ‘Fairness is a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008’ (2015) 48(1) *De Jure* 118.

<sup>246</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 59.

<sup>247</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

<sup>248</sup> The *res vendita* is known as the thing sold, or the *merx*.

<sup>249</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at para 683H-684A.

Patent defects can be easily discovered upon a reasonable inspection, while a latent defect is within the “exclusive knowledge” of the seller.<sup>250</sup> By looking at the usefulness of the thing sold we can determine that the test explored by the court is objective in nature.<sup>251</sup> This test relates to what a reasonable person would have been able to detect, and not what a person with expert knowledge would notice.<sup>252</sup> This means that if a buyer of “normal” intelligence and ability would have noticed the obvious defect, it would be patent.<sup>253</sup>

The current position in South African law is that the defect in question must be material in nature and as a latent defect is anything that affects the usefulness of the thing sold. The defect must therefore have an impact of the usefulness of the *merx*.<sup>254</sup> In addition the defect must also have been in existence at the time the contract was concluded. The purchaser bears the onus of proving that at the time, he or she was not aware of the existence of the defect.<sup>255</sup> The duty of disclosure automatically applies to the seller regardless of whether he or she was aware of the defect, and this duty includes the seller adopting the responsibility should a defect be present.<sup>256</sup> On the other hand, there are methods in which the seller can exempt himself from liability for latent defects.

#### **4.2.2. The common law warranty against latent defects**

##### *(a) Exemption clause*

The common law allows for a seller to include an exemption clause that expressly excludes certain forms of liability, or he or she may include a *voetstoets* clause.<sup>257</sup> An exemption clause

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<sup>250</sup> M Nortje ‘Pre-contractual duties of disclosure in the South African common law (1)’ (2015) 2015(2) *Journal of South African Law* 355.

<sup>251</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 60.

<sup>252</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 60.

<sup>253</sup> M Nortje ‘Pre-contractual duties of disclosure in the South African common law (1)’ (2015) 2015(2) *Journal of South African Law* 355.

<sup>254</sup> J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages’ (2012) 45(3) *De Jure* 456.

<sup>255</sup> J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages’ (2012) 45(3) *De Jure* 457.

<sup>256</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 59.

<sup>257</sup> JC Kanamugire ‘The Current Status of Exemption Clauses in the South African Law of Contract’ (2014) 5(9) *MJSS* 166.

is used in order to exclude or exempt liability that a contractant would normally face in terms of a contractual agreement.<sup>258</sup> They are used in standard form contracts, and can take the form of an exclusion of liability for a breach of contract or a warranty for latent defects.<sup>259</sup> This type of clause can be highly unfair and one-sided as it may deprive the other party the opportunity to seek legal redress<sup>260</sup>, as well preventing the seller from being held liable unless they acted fraudulently. These types of agreements may also have an effect on the purpose and crucial requirements of an agreement.<sup>261</sup> Despite all of this, exemption clauses are not a new concept in South African law of contract. Our law has since early times regarded exemption clauses as valid, and has been used in Roman-Dutch law.<sup>262</sup>

Additionally, since early times, despite how unfair or harsh these terms may appear to be, the courts regard them as binding and enforceable where such a clause is clear and unambiguous.<sup>263</sup> Certain scenarios exist whereby exemption clauses will not be enforced. This occurs when the clause is contrary to public policy or if, in the context of such an agreement, it is regarded as unusual.<sup>264</sup>

This was seen in *Naidoo v Birchwood Hotel*,<sup>265</sup> whereby Naidoo instituted a claim for damages against the Birchwood Hotel when a gate to the entrance of the hotel fell and caused Naidoo bodily injuries.<sup>266</sup> Birchwood Hotel claimed that it was exempt from liability for damages due to prominently displayed disclaimers which were found in and around the hotel.<sup>267</sup> The court had to determine whether these disclaimers would in fact exempt the hotel from liability.

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<sup>258</sup> JC Kanamugire ‘The Current Status of Exemption Clauses in the South African Law of Contract’ (2014) 5(9) *MJSS*164.

<sup>259</sup> JC Kanamugire ‘The Current Status of Exemption Clauses in the South African Law of Contract’ (2014) 5(9) *MJSS* 165.

<sup>260</sup> Y Mupangavanhu ‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)’ (2014) 17(3) *PER* 1172.

<sup>261</sup> Y Mupangavanhu ‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)’ (2014) 17(3) *PER* 1172.

<sup>262</sup> JC Kanamugire ‘The Current Status of Exemption Clauses in the South African Law of Contract’ (2014) 5(9) *MJSS* 164.

<sup>263</sup> Y Mupangavanhu ‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)’ (2014) 17(3) *PER* 1167.

<sup>264</sup> Y Mupangavanhu ‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)’ (2014) 17(3) *PER* 1167.

<sup>265</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

<sup>266</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 2.

<sup>267</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 5-6.



In so doing, the court explored the court stated that a party who signs a contract is typically bound to the ordinary meaning and effect of the words in the contract.<sup>268</sup> The court went further and stated that exemption clauses that are contrary to public policy would not withstand constitutional scrutiny.<sup>269</sup> In order to explore this, the court looked at the two-stage test set out in *Barkhuizen v Napier*.<sup>270</sup> The first question in the test asks whether the clause in question was objectively unreasonable, and the second question looks at, if the clause was found to be reasonable then should it be enforced in the circumstances.<sup>271</sup> In applying this test to the circumstances of *Naidoo v Birchwood Hotel*, the court stated that a guest in a hotel, and this is not an activity that is risky or a circumstances in which the guest expects to have his life threatened.<sup>272</sup> The court held that to prevent Naidoo from claiming redress for his injuries would be contrary to the notions of justice and fairness.<sup>273</sup>

This case indicates that although an exemption clause may be harsh, one that excludes liability for negligently causing bodily injuries or death will be contrary to public policy. In contrast, any exemption clause that is contrary to public policy cannot and will not be enforced.<sup>274</sup>

(b) *Voetstoets clause*

Since Roman-Dutch times, the *voetstoets* clause has been described as being the foundation of trade.<sup>275</sup> It allows for the *merx* to be sold “as is” or “with all its faults”. This means that should the parties to the contract agree that the sale be *voetstoets*, should purchaser discover that the *merx* is defective after the conclusion of the sale, the seller cannot be held liable for the aforementioned impairment.<sup>276</sup> This clause eliminates the purchaser’s use of *aedilition* remedies, which will be discussed further in the chapter,<sup>277</sup> and *actio empti*.

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<sup>268</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 39.

<sup>269</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 44-45.

<sup>270</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 28-29.

<sup>271</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 49.

<sup>272</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 52.

<sup>273</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 52.

<sup>274</sup> *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) at para 53.

<sup>275</sup> C Morrissey ‘Does this mean voetsek *voetstoets*?: consumer law’ (2010) 10(4) *Without Prejudice* 12.

<sup>276</sup> J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoets* clauses and liability for damages’ (2012) 45(3) *De Jure* 460.

<sup>277</sup> See ‘4.2.2 (c) *Aedilition* remedies’ below for full a discussion.

It must be noted that where the seller was aware of the defect and had failed to disclose this information to the purchaser, he or she is guilty of fraudulent non-disclosure.<sup>278</sup> The courts have ruled that the seller can no longer rely on the *voetstoots* clause where he has deliberately misrepresented a material fact relating to the defect,<sup>279</sup> as was illustrated in *Banda v Van der Spuy*.<sup>280</sup> In this case, the appellants had purchased a house which had a leaking thatch roof, from the respondents. The roof leaked both prior to the sale, and after the sale which led to the dispute.<sup>281</sup> As the agreement was *voetstoots*, the appellants instituted an action based on *actio quanti minoris*, for a reduction to the purchase price in order to fix the defects.<sup>282</sup> The appellants had to prove that the respondents had the requisite knowledge of the defects and fraudulently neglected to inform them of such.<sup>283</sup>

There needed to be an assessment of the objective facts in order to determine whether the respondents were aware of the defect which caused the leak, and whether they were aware that the repair was not a permanent solution to the problem.<sup>284</sup> As the roof had begun to leak before the sale, the person who conducted the repair had provided a warranty for the restoration which had lapsed by the time the property was sold to the appellants.<sup>285</sup> The respondent had dishonestly informed the appellants that the warranty was still valid, as he was aware that the repairs were not sufficient and the lack of a valid warranty could affect the sale of the property.<sup>286</sup> The Supreme Court of Appeal stated that once this is paired with the fact that the respondent did not have faith in the adequacy of the repairs, and was aware that the leak will cause structural defects, the respondents were obliged to disclose this information to the appellants.<sup>287</sup> As a result, the court held that the respondents, the sellers, were liable for the latent defects that affected the intended purpose of the *res venditia*.<sup>288</sup>

In addition, the severity of the leaking roof as a latent defect is such that the house can no longer be regarded as habitable. As a result of the fraudulent non-disclosure of the defects, the

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<sup>278</sup> M Hands ‘The *Voetstoots* clause – and other pitfalls: property law’ (2013) 13(1) *Without Prejudice* 24.

<sup>279</sup> M Hands ‘The *Voetstoots* clause – and other pitfalls: property law’ (2013) 13(1) *Without Prejudice* 24.

<sup>280</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA).

<sup>281</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 1.

<sup>282</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 1.

<sup>283</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 6.

<sup>284</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 11.

<sup>285</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 13.

<sup>286</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 16.

<sup>287</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 22.

<sup>288</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 24.

*voetstoets* clause could not be relied on by the respondents.<sup>289</sup> The appellants were entitled to the difference between the purchase price and the value of the house with the defective roof.<sup>290</sup>

The appellants instituted an alternate claim based on the fraudulent or, should that not succeed, negligent misrepresentation by the respondents in relation to the representation regarding the repair of the roof and the condition of the roof.<sup>291</sup> The first appellant stated that he would not have concluded the transaction had he been aware that the warranty had lapsed.<sup>292</sup> Likewise if he was aware of the defects in the roof, he would have sought a quotation to determine the cost of any repairs he would have to make and he would have negotiated this into the contract with the respondents.<sup>293</sup> This suggests that the fraudulent misrepresentation had either induced the appellants into concluding the contract, or agreeing to pay the purchase price requested by the respondents. As a result, the court stated that the appellants had suffered a patrimonial loss, and the appellants were entitled to the reasonable cost of repairing the roof.<sup>294</sup>

What this illustrates is that a seller may only rely on a *voetstoets* clause for protection if he or she was honest, and did not hide any latent defects. Additionally, should the purchaser succeed in proving fraudulent non-disclosure on the part of the seller, which is a difficult task, he or she is entitled to restitution<sup>295</sup> in the form of *aedilician* remedies, or based on delict as a result of the fraudulent misrepresentation.<sup>296</sup>

The court also stated that failure to obtain approval for construction would amount to a latent defect.<sup>297</sup> This was ultimately decided in *Odendaal v Ferraris*,<sup>298</sup> whereby the respondent purchased a property from the appellant after an inspection of the property, throughout which the appellant had concealed a substantial list of defects relating to the property.<sup>299</sup> After moving into the property, the respondent discovered that the outbuilding which he was not able to gain

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<sup>289</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 24.

<sup>290</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 25.

<sup>291</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 26.

<sup>292</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 28.

<sup>293</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 28.

<sup>294</sup> *Banda and another v Van der Spuy and another* [2013] JOL 30458 (SCA) at para 32.

<sup>295</sup> M Hands 'The *Voetstoets* clause – and other pitfalls: property law' (2013) 13(1) *Without Prejudice* 24.

<sup>296</sup> J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoets* clauses and liability for damages' (2012) 45(3) *De Jure* 462.

<sup>297</sup> M Hands 'The *Voetstoets* clause – and other pitfalls: property law' (2013) 13(1) *Without Prejudice* 24.

<sup>298</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA).

<sup>299</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 3.

access to during the inspection, had water damages and a partially collapsed roof.<sup>300</sup> Furthermore, the respondent discovered that the outbuilding had only been approved as a storeroom, the carport had been refused approval on three previous occasions, and the carport failed to comply with regulations.<sup>301</sup> After a period of consideration and back-and-forth between the parties, in which the respondent instructed the bank to place a hold on payment in relation to the transaction<sup>302</sup> pending quotations that would determine the cost of bringing the structures up to municipal code,<sup>303</sup> the appellant sought to cancel the contract and instituted eviction proceedings.<sup>304</sup>

The court held that the failure to obtain statutory authorisation in relation to the carport and outbuilding amounts to defects in which the *voetstoots* clause may apply.<sup>305</sup> The court held that despite this, the respondent had failed to prove a claim of fraud against the appellant, and as a result he cannot avoid the consequences of the *voetstoots* clause.<sup>306</sup> The court held further that the respondent had objectively viewed the property and had no basis to suspend payment and transfer of the property.<sup>307</sup> As a result, the court granted the order of eviction.<sup>308</sup>

(c) *Aedilician remedies*

*Aedilition* remedies provides that a seller is liable to a purchaser for any latent defects that renders the thing was partially or completely unfit for the use it was purchased.<sup>309</sup> Where a latent defect is present, the purchaser has two options, he or she may either rescind the contract and claim a return of the purchase price, or claim for a reduction in the purchase price.<sup>310</sup>

The purchaser may rely on *actio redhibitoria* in order to rescind the contract if the defect is such that he or she would not have purchased the *merx*. The purchaser will need to return the thing and can claim a refund of the purchase price.<sup>311</sup> The purpose is to place the parties in the

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<sup>300</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 6.

<sup>301</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 7.

<sup>302</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 9.

<sup>303</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 13.

<sup>304</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 15.

<sup>305</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 23.

<sup>306</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 42.

<sup>307</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 43.

<sup>308</sup> *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para 44.

<sup>309</sup> WA Joubert 'Products Liability' In W A Joubert (2 ed) *LAWSA* vol 30 First Reissue (1999) para 314.

<sup>310</sup> WA Joubert 'Products Liability' In W A Joubert (2 ed) *LAWSA* vol 30 First Reissue (1999) para 314.

<sup>311</sup> WA Joubert 'Products Liability' In W A Joubert (2 ed) *LAWSA* vol 30 First Reissue (1999) para 314.

position they were in prior to the conclusion of the contract.<sup>312</sup> The purchaser must within a reasonable time, notify the seller of his or her intention, and he or she cannot show any intention that indicates the desire to retain the thing or the right to use the *actio redhibitoria* is lost.<sup>313</sup> However, if the purchaser would still have purchased the *merx* but done so at a reduced price, he or she may rely on the *actio quanti minoris*. This allows for the purchaser to seek a reduction in the purchase price however, if the purchaser bought the thing while having knowledge of the defect, the right to use the *actio quanti minoris* is lost.<sup>314</sup>

As seen above, despite the fact that there is a breach of warranty against latent defects, *aedilitian* remedies will not be available where the agreement includes an express or tacit guarantee, if the warranty expressly excluded, the defect is patent, the defect did not exist at the time of the conclusion of the contract, the sale was *voetstoets*, or if the defect was corrected.<sup>315</sup>

### **4.3. THE APPROACH OF THE CONSUMER PROTECTION ACT**

#### **4.3.1. Latent defects**

The preamble of the CPA acknowledges that there are vulnerable members of South African society, as well as the high level of illiteracy and economic inequality amongst consumers due to historical disparity and disadvantages. This creates the thought that such vulnerable members of society need greater protection.<sup>316</sup> Prior to the enactment of the CPA, the idea that responsibility falls on the purchaser to ensure that the thing being purchased is in good quality.<sup>317</sup> The CPA has subsequently changed this stance.

Chapter 2 Part H of the CPA deals with the consumer's right to fair, just and reasonable terms and conditions. It is necessary to now focus on section 55 deals with the consumer's rights to safe, good quality goods and section 56 relates to the implied warranty of quality, in order to determine how the enforcement of the CPA has affected common law provisions. These

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<sup>312</sup> J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoets* clauses and liability for damages' (2012) 45(3) *De Jure* 458.

<sup>313</sup> WA Joubert 'Products Liability' In W A Joubert (2 ed) *LAWSA* vol 30 First Reissue (1999) para 314.

<sup>314</sup> WA Joubert 'Products Liability' In W A Joubert (2 ed) *LAWSA* vol 30 First Reissue (1999) para 314.

<sup>315</sup> J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoets* clauses and liability for damages' (2012) 45(3) *De Jure* 459.

<sup>316</sup> K Govender 'One step forward, two steps back' (2014) 14(11) *Without Prejudice* 35.

<sup>317</sup> *Caveat emptor*.

sections provide that any goods, land and buildings sold must be done with an implied warranty that the goods are free of latent defects.<sup>318</sup>

Section 55 ensures that consumers receive goods that are of good quality, lacks defects, is effective in relation to its quality and can be used for the purpose for which it was purchased.<sup>319</sup> Should the consumer inform the supplier of the precise reason for which the product is being purchased, or the use of these goods, and if the supplier ordinarily supplies these products and conducts himself in a manner that indicates that he is knowledgeable regarding the products, the consumer has a right to expect that the goods he or she will receive will be reasonably suitable for the task.<sup>320</sup>

Prior to the enactment of the CPA there was a distinction between a latent defect and a patent defect, as discussed above<sup>321</sup>. However, in terms of section 55(5) (a), the CPA provides that this distinction is now irrelevant. Additionally, the CPA states that the defect need not have been detectable by the consumer prior to delivery. Looking at this practically, this should then negate the need to explore the objective test that relates to what a reasonable person would have been able to detect, and not what a person with expert knowledge would notice.<sup>322</sup> This means that it is unnecessary for the court to look at whether the defect would have been detectable by a buyer of “normal” intelligence and ability<sup>323</sup> or whether the defect was within the “exclusive knowledge” of the seller.<sup>324</sup> Section 55(5) (a) and (b) of the CPA does not apply if the consumer has agreed to accept goods in a specific condition.<sup>325</sup> Despite the fact that there is no specific clause relating to the *voetstoots* clause, it can be implied that where the purchaser has not expressly agreed to purchase goods “as is”, should he or she receive goods other than what was requested or of a substandard quality, the supplier cannot rely on the *voetstoots*

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<sup>318</sup> M Hands ‘The *Voetstoots* clause – and other pitfalls: property law’ (2013) 13(1) *Without Prejudice* 24.

<sup>319</sup> Consumer Protection Act 68 of 2008 s 55(2) (a)-(d).

<sup>320</sup> Consumer Protection Act 68 of 2008 s 55(3).

<sup>321</sup> This issue has been discussed at ‘4.2.1. What is a latent defect?’ above.

<sup>322</sup> Consumer Protection Act 68 of 2008 s 55(3).

<sup>323</sup> M Nortje ‘Pre-contractual duties of disclosure in the South African common law (1)’ (2015) 2015(2) *Journal of South African Law* 355.

<sup>324</sup> M Nortje ‘Pre-contractual duties of disclosure in the South African common law (1)’ (2015) 2015(2) *Journal of South African Law* 355.

<sup>325</sup> JM Otto ‘Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement’ (2014) 26(2) *SA Merc* 261.

clause.<sup>326</sup> The approach of the CPA to the *voetstoets* clause will be discussed further in the chapter.

Section 56 relates to the remedies available to consumer that have been sold defective goods where the agreement as governed by the CPA.<sup>327</sup> This section provides that any agreement that relates to the supply of goods to the consumer contains an implied provision whereby the producer or importer and distributor or retailer warrant that the goods comply with the terms set out in section 55.<sup>328</sup> Section 56(1) (2) of the CPA provides that should the goods not comply with section 55, the consumer may return the goods to the supplier within six months, without any penalty and at the expense of the supplier. The consumer then has the choice to have the supplier either repair or replace the defective goods, or refund the purchase price.<sup>329</sup>

Although not expressly stated in the CPA, if a defect is discovered within six months of the sale of the goods it is presumed to have been present at the time of the sale.<sup>330</sup> As a result, this negates the previously discussed common law clause which states that the defect must also have been in existence at the time the contract was concluded. Furthermore, the purchaser no longer bears the onus of proving that the defect existed at the time of the sale,<sup>331</sup> the onus now falls on the supplier to prove that it was not defective.<sup>332</sup>

This was seen in *Mia v Car King Second-Hand (Pty) Ltd and Another*,<sup>333</sup> in which the National Consumer Tribunal (herein referred to as the NCT), had to consider a claim for the return of the purchase price of a vehicle by the respondent due to defects in the vehicle.<sup>334</sup> The applicant had purchased the vehicle from the dealership, in relation to a 'rent to own' agreement, and soon discovered that the vehicle had defects that required it be returned to the dealership for

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<sup>326</sup> JM Otto 'Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement' (2014) 26(2) *SA Merc* 261.

<sup>327</sup> JM Otto 'Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement' (2014) 26(2) *SA Merc* 261.

<sup>328</sup> Consumer Protection Act 68 of 2008 s 56(1).

<sup>329</sup> Consumer Protection Act 68 of 2008 s 56(2) (a) – (b).

<sup>330</sup> JM Otto 'Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement' (2014) 26(2) *SA Merc* 262.

<sup>331</sup> J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages' (2012) 45(3) *De Jure* 457.

<sup>332</sup> JM Otto 'Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement' (2014) 26(2) *SA Merc* 262.

<sup>333</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128.

<sup>334</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 17.

repairs.<sup>335</sup> The defects included a hooter that would sound automatically as soon as the vehicle was driven out of the dealership, the clutch made a noise when pressed, and a faulty gearbox.<sup>336</sup> Upon collection of the vehicle, it was unfortunately involved in a motor vehicle collision which was reported to the insurer and subsequently revealed that the vehicle had previously been involved in another collision, which the respondent had not disclosed to the applicant upon purchase of the vehicle.<sup>337</sup>

In order to decide this matter, the NCT had to consider sections 55 and 56 of the CPA. The NCT stated that in terms of section 55 (2)(a) of the CPA, the applicant was entitled to the delivery of a vehicle that was without defects.<sup>338</sup> Section 56 (2) of the CPA stated that if the vehicle was discovered to have defects, within six months of delivery of the vehicle, the applicant was entitled to either request the vehicle to be repaired to replaced.<sup>339</sup> The applicant elected to have the vehicle repaired, which complied with section 56 2(a) of the CPA.<sup>340</sup> The applicant would have benefitted from these repairs if the vehicle was not involved in the collision; additionally, as a replacement vehicle was provided during the period of the repairs and the vehicle had been insured, the applicant had suffered no substantial loss.<sup>341</sup>

Therefore, the applicant could not be placed in a better position than she would have found herself had the collision not occurred.<sup>342</sup> The only way that the applicant could have successfully claimed that the vehicle be replaced, or the return of the purchase price of the vehicle under section 56 (3), was if the collision had not occurred and the defects had not been fixed within three months of the vehicle being handed in for repairs.<sup>343</sup> The NCT concluded that although the respondent had sold the applicant a vehicle with a defective engine<sup>344</sup>, the applicant failed to discharge the onus that any of the conduct on behalf of the respondent amounted to that which was prohibited in terms of the CPA.<sup>345</sup>

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<sup>335</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 14.

<sup>336</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 14.

<sup>337</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 15-16.

<sup>338</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 31.

<sup>339</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 31.

<sup>340</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 32.

<sup>341</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 31-33.

<sup>342</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 34.

<sup>343</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 32.

<sup>344</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 26.

<sup>345</sup> *Mia v Car King Second-Hand (Pty) Ltd and Another* [2017] ZANCT 128 at para 35.



### 4.3.2. Voetstoots clause

There is no doubt that the CPA provides more protection to the consumer, nonetheless there is much confusion surrounding how the CPA affects the *voetstoots* clause as there is no provision that directly deals with this in the CPA. As was stated above the supplier can escape section 56 if he or she describes every detail of the product that is to be sold, as well as including every defect in the agreement that the purchaser will sign.<sup>346</sup> The consumer must then expressly agree to purchase the property in its current state.<sup>347</sup> It is stated that sellers of property are also no longer able to protect themselves from subsequent claims by purchasers due to defects by using the *voetstoots* clause.<sup>348</sup>

What must also be noted is that it is impossible for a supplier to contract out of section 55.<sup>349</sup> As a result, even if a customer purchases goods “as is”, he or she is still entitled to receive goods that comply with section 55.<sup>350</sup> It is stated that there needs to be clarity regarding the *voetstoots* clause and the CPA as scenarios that have no clear cut and dry answer exists. This may occur where a consumer is sold a product by a retailer that is defective, but he or she did not enter into a contract with a *voetstoots* clause; however, the retailer purchased the product from a distributor in terms of a contract that did include a *voetstoots* clause<sup>351</sup>. In this scenario, the CPA would allow the consumer redress against the retailer in terms of section 56, but it is unclear as to whether the consumer has a claim against the distributor.

To allow such a claim twice would surely be unfair. As a result of certain loose ends regarding the CPA, it is imperative that transparency is gained either through the judiciary or through a clarification of the law.

### 4.3.3. Non-disclosure

The concept of non-disclosure was explored in chapter 2. This section aims to discuss the statutory intervention by the CPA in relation to non-disclosure. Chapter 2 Part F of the CPA deals with the consumer’s right to fair and honest dealing. Section 41 relates to false,

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<sup>346</sup> M Truter ‘The *voetstoots* clause – should latent defects be disclosed in property sales?’ (2017) *De Rebus* [www.derebus.org.za/voetstoots-clause-latent-defects-disclosed-property-sales/](http://www.derebus.org.za/voetstoots-clause-latent-defects-disclosed-property-sales/), accessed on 12 Oct 2018.

<sup>347</sup> M Truter ‘The *voetstoots* clause – should latent defects be disclosed in property sales?’ (2017) *De Rebus* [www.derebus.org.za/voetstoots-clause-latent-defects-disclosed-property-sales/](http://www.derebus.org.za/voetstoots-clause-latent-defects-disclosed-property-sales/), accessed on 12 Oct 2018.

<sup>348</sup> M Truter ‘The *voetstoots* clause – should latent defects be disclosed in property sales?’ (2017) *De Rebus* [www.derebus.org.za/voetstoots-clause-latent-defects-disclosed-property-sales/](http://www.derebus.org.za/voetstoots-clause-latent-defects-disclosed-property-sales/), accessed on 12 Oct 2018.

<sup>349</sup> C Morrissey ‘Does this mean voetsek *voetstoots*?: consumer law’ (2010) 10(4) *Without Prejudice* 13.

<sup>350</sup> C Morrissey ‘Does this mean voetsek *voetstoots*?: consumer law’ (2010) 10(4) *Without Prejudice* 13.

<sup>351</sup> C Morrissey ‘Does this mean voetsek *voetstoots*?: consumer law’ (2010) 10(4) *Without Prejudice* 13.

misleading or deceptive representations and prohibits a supplier from making a false, misleading or deceptive representation, either directly or indirectly.<sup>352</sup>

It must be noted that section 41 of the CPA does not apply with retrospective effect, which was noted in *Accordian Investments (Pty) Limited v National Consumer Commission*.<sup>353</sup> The NCT had to determine this matter which dealt with defects to a vehicle, in which the application for such was brought on the last day of the prescribed period, which is fifteen business days from the date of the receipt of the notice.<sup>354</sup> This is set out in Table 2 of the Regulations of the CPA.<sup>355</sup> The NCT stated that respondent could not rely on section 41 on the basis that in addition to the fact that there was no evidence of false, misleading or deceptive representations, it cannot be applied retrospectively in relation to agreements that have been entered into prior to the effective date.<sup>356</sup>

Worth mentioning is the fact that the CPA prohibits the supplier from exaggerating, making use of an innuendo, or using ambiguous language in relation to a material fact, or deliberately concealing a material fact.<sup>357</sup> This is of vital importance as it imposes a statutory duty to speak on a seller, even when he or she has failed to correct what amounts to a false representation as a result of the consumer's misapprehension, regardless of whether this is caused by his or her actions.<sup>358</sup> As the CPA does not provide a definition or guidelines as to what constitutes materiality, this is a scenario where the legal position will revert to the common law position that applied before the CPA came into effect,<sup>359</sup> but only in relation to what constitutes materiality.<sup>360</sup>

The CPA does not state whether the supplier must have intentionally misled the consumer, or whether the non-disclosure or misrepresentation must be unintentional or innocent. Based on the wide range of scenarios that are covered in section 41, it can be presumed that the CPA

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<sup>352</sup> Consumer Protection Act 68 of 2008 s 41(1) (a).

<sup>353</sup> *Accordian Investments (Pty) Limited v National Consumer Commission* [2013] ZANCT 57.

<sup>354</sup> *Accordian Investments (Pty) Limited v National Consumer Commission* [2013] ZANCT 57 at para 6.

<sup>355</sup> *Accordian Investments (Pty) Limited v National Consumer Commission* [2013] ZANCT 57 at para 6.

<sup>356</sup> *Accordian Investments (Pty) Limited v National Consumer Commission* [2013] ZANCT 57 at para 6.

<sup>357</sup> Consumer Protection Act 68 of 2008 s 41(1) (b).

<sup>358</sup> Consumer Protection Act 68 of 2008 s 41(1) (c).

<sup>359</sup> J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages' (2012) 45(3) *De Jure* 456.

<sup>360</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 75.

intends to apply to all types of non-disclosure.<sup>361</sup> What must be noted is that due to the lack of an express provision relating to the intention of the supplier, the section 41 CPA does not expressly state whether a supplier should be held liable for innocent non-disclosure.<sup>362</sup> This creates yet another area of uncertainty, and another shortfall by the CPA.

#### 4.4. CONCLUSION

It is submitted that although the CPA solves many problems, it also leaves something to be desired, as was discussed above in relation to the obscurity regarding the CPA and the *voetstoots* clause, and the lack of a requirement that discusses the intention of suppliers or sellers with regard to non-disclosure. The failure by the CPA to expressly determine the meaning of certain words and phrases is not limited to these sections.<sup>363</sup> This leaves the court to determine this on its own.<sup>364</sup>

Despite its shortfalls, the CPA has provided a considerable mechanism for easy and informal access to dispute resolution.<sup>365</sup> In terms of section 69 of the CPA which deals with “enforcement of rights by [the] consumer”, it allows for the consumer to enforce any rights provided for in the CPA. This section also provides for avenues that the consumer must approach prior to approaching the courts for relief. These avenues provide for the consumer to approach “an ombud, the consumer courts, the National Consumer Commission and the National Consumer Tribunal to obtain relief.”<sup>366</sup> This is vital as vulnerable members of society may not have the ability to approach the courts, either due to illiteracy or poverty. The CPA is also highly lauded as it allows consumers to still access common law remedies in conjunction with the other forms of relief, after the aforementioned avenues have been exhausted.<sup>367</sup> The need for developments in our law cannot be overemphasized, and the areas in which the CPA

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<sup>361</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 76.

<sup>362</sup> RV Cupido *Misrepresentation by Non-disclosure in South African Law* (unpublished LLM thesis, Stellenbosch University, 2013) 77.

<sup>363</sup> Y Mupangavanhu ‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of Naidoo v Birchwood Hotel 2012 6 SA 170 (GSJ)’ (2014) 17(3) *PER* 1188-1189.

<sup>364</sup> Y Mupangavanhu ‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of Naidoo v Birchwood Hotel 2012 6 SA 170 (GSJ)’ (2014) 17(3) *PER* 1189.

<sup>365</sup> Y Mupangavanhu ‘Fairness is a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008’ (2015) 48(1) *De Jure* 134.

<sup>366</sup> Y Mupangavanhu ‘Fairness is a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008’ (2015) 48(1) *De Jure* 134.

<sup>367</sup> Y Mupangavanhu ‘Fairness is a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008’ (2015) 48(1) *De Jure* 134.

can be developed and clarified should not overshadow the importance of the enactment of such a piece of legislation in South African law.

## CHAPTER 5: POSSIBLE DEVELOPMENTS TO PREVENT NON-DISCLOSURE AND MISREPRESENTATION

### 5.1 INTRODUCTION: IS THE CURRENT SYSTEM OF CONTRACT LAW APPROPRIATE IN SOUTH AFRICA?

South African law of contract is based on an amalgamation of Roman-Dutch law and English law, which has resulted in a mixed legal system that is lauded worldwide.<sup>368</sup> However, due to the fact that vital legal sources were in Latin or Dutch, the English law of contract was adopted in South African law verbatim.<sup>369</sup> As this system has been used in our law for such an extensive period of time, it has become the backbone to the formation of a contract. Additionally, the fact that it was adopted into South African law after it had already been developed in another country as a working and thriving system<sup>370</sup> may result in a ‘don’t fix what is not broken’ attitude.

The law of contract was not designed with our unique South African society in mind. The requirements needed to enter into a valid contract does not consider the good faith negotiations that citizens enter into on a daily basis,<sup>371</sup> or the concept of *ubuntu* that is exclusive to South Africa. There has been a call to develop these rules and the common law in light of the Constitution,<sup>372</sup> but the courts have stopped short every time.

This chapter will explore the concept of *ubuntu*, the failure of the judiciary to give the necessary prominence that *ubuntu* and good faith needed, and how these concepts should be developed in relation to contract law in order to avoid pre-contractual non-disclosure and misrepresentation.

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<sup>368</sup> A Hutchinson ‘Decolonising South African Contract Law: An Argument for Synthesis’ in Luca Siliquini-Cinelli & Andrew Hutchinson (eds) *The Constitutional Dimension of Contract Law: A Comparative Analysis* (2017) 155-156.

<sup>369</sup> A Hutchinson ‘Decolonising South African Contract Law: An Argument for Synthesis’ in Luca Siliquini-Cinelli & Andrew Hutchinson (eds) *The Constitutional Dimension of Contract Law: A Comparative Analysis* (2017) 155-156.

<sup>370</sup> A Hutchinson ‘Decolonising South African Contract Law: An Argument for Synthesis’ in Luca Siliquini-Cinelli & Andrew Hutchinson (eds) *The Constitutional Dimension of Contract Law: A Comparative Analysis* (2017) 156-157.

<sup>371</sup> Own emphasis.

<sup>372</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 45.

## 5.2. UBUNTU AND GOOD FAITH

It can be stated that *ubuntu* encapsulates what it means to be South African. *Ubuntu* is a philosophical concept that is comprised of cultural and communal aspects.<sup>373</sup> The notion can be articulated through the phrase “*ubuntu ngumuntu ngabantu*” which translates to “a person is a person through other people”.<sup>374</sup> It is stated that the word ‘*umuntu*’ signifies a person’s “humaneness”,<sup>375</sup> and emphasizes the importance of the community as opposed to the needs or interests of just the individual.<sup>376</sup> When a person refers to *ubuntu*, the words immediately conjure feelings and thoughts of unity, a willingness to help and compassion and consideration for the needs of others, and a deep seated sense of justice.<sup>377</sup>

In cases of defamation, *ubuntu* has been the reason the use of an apology is suggested of damages.<sup>378</sup> This was seen in the case of *Dikoko v Mokhatla*<sup>379</sup>, whereby the Constitutional Court held that the Constitutional value of human dignity is closely related to *ubuntu*.<sup>380</sup> In cases of defamation, the concept of mutual respect, dignity and harmony should be emphasized in our law instead of seeking financial compensation which will further the animosity between the parties and may cause financial loss for the defendant.<sup>381</sup> The court reinforced the idea that it must not be forgotten that the main purpose of compensation is not to punish the defendant, but to restore dignity to the plaintiff.<sup>382</sup> In scenarios like these it appears that the court has gotten the position right. However, the use of *ubuntu* in a legal sense has not been fully utilized due to factors such as cultural narrow-mindedness, ignorance and a lack of clarity regarding a definition of the word.<sup>383</sup>

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<sup>373</sup> S Nkosi ‘Ubuntu and South African Law: Its Juridical Transformative Impact’ (2018) 33(1) *Southern African Public Law* 2.

<sup>374</sup> A Hutchinson ‘Decolonising South African Contract Law: An Argument for Synthesis’ in Luca Siliquini-Cinelli & Andrew Hutchinson (eds) *The Constitutional Dimension of Contract Law: A Comparative Analysis* (2017) 170.

<sup>375</sup> S Nkosi ‘Ubuntu and South African Law: Its Juridical Transformative Impact’ (2018) 33(1) *Southern African Public Law* 2.

<sup>376</sup> A Hutchinson ‘Decolonising South African Contract Law: An Argument for Synthesis’ in Luca Siliquini-Cinelli & Andrew Hutchinson (eds) *The Constitutional Dimension of Contract Law: A Comparative Analysis* (2017) 170.

<sup>377</sup> S Nkosi ‘Ubuntu and South African Law: Its Juridical Transformative Impact’ (2018) 33(1) *Southern African Public Law* 2.

<sup>378</sup> WA Joubert ‘Ubuntu’ in WA Joubert (2 ed) *Law of South Africa* vol 5 Second Reissue para 28.

<sup>379</sup> 2007 1 BCLR 1 (CC).

<sup>380</sup> *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC) at para 68.

<sup>381</sup> *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC) at para 68.

<sup>382</sup> *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC) at para 68.

<sup>383</sup> S Nkosi ‘Ubuntu and South African Law: Its Juridical Transformative Impact’ (2018) 33(1) *Southern African Public Law* 2-3.

Even though there is no exact meaning of *ubuntu* and can be regarded as vague, the concept is often described in the same manner as fairness, justice, good faith and reasonableness.<sup>384</sup> This was seen in *Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Ltd*<sup>385</sup>, which is often regarded as a missed opportunity and failure by the Constitutional Court to develop the common law in this regard, purely as a result of a technicality.<sup>386</sup>

This case dealt with a dispute regarding a lease whereby Everfresh challenged an ejectment claim by the lessor, Shoprite<sup>387</sup> on the basis that Shoprite refused to make a *bona fide* attempt to negotiate the renewal of the lease in good faith.<sup>388</sup> Therefore, Everfresh contended that the right to evict did not accrue to Shoprite unless a *bona fide* attempt to negotiate was made.<sup>389</sup> The Constitutional Court had to consider whether to develop the law of contract to be in line with the Bill of Rights and constitutional values.<sup>390</sup> The issue of developing the common law, as stated above, was not raised in the *court a quo* or on appeal and was raised in the Constitutional Court as a court of first instance.<sup>391</sup>

Everfresh contended that the common law should be developed to state that parties that agree to negotiate should have to do so reasonable, and in good faith.<sup>392</sup> Shoprite contended that such a provision, in relation to good faith, is too vague to be included in our law.<sup>393</sup> The minority judgement went on to find in favour of Everfresh by stating that that whether good faith should be developed into a requirement in contract law is of vital importance.<sup>394</sup> Furthermore, the concept of *ubuntu* is of vital importance, and citizens may place a higher value on negotiating in good faith as a result of this.<sup>395</sup> Furthermore, the inequality of bargaining power during negotiations between vulnerable and often poor individuals and powerful corporations should not be ignored.<sup>396</sup> People should not be allowed to abscond from negotiations purely on the

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<sup>384</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 170-171.

<sup>385</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30.

<sup>386</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 63.

<sup>387</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 2.

<sup>388</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 9.

<sup>389</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 2.

<sup>390</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 1.

<sup>391</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 1.

<sup>392</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 22.

<sup>393</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 22.

<sup>394</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 22.

<sup>395</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 23.

<sup>396</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 24.

basis that they have found a more lucrative alternative.<sup>397</sup> Although this appeared to mean that the common law should be developed to give effect to *ubuntu* and good faith, this was not the case. The majority judgement did emphasize the importance of *ubuntu* by stating that contracting parties should relate to one another in good faith, and that there is no reason that constitutional values would not require the negotiation between parties to be done in a reasonable manner and in good faith.<sup>398</sup> Despite this, the court held that there was no “exceptional circumstances” that would persuade the Constitutional Court to be a court of first and last instance.<sup>399</sup>

The mere fact that Everfresh did not raise the issue of developing the common law in the High Court or the Supreme Court of Appeal first, resulted in the Constitutional Court sidestepping what would have been a ground-breaking judgement. Despite the failure of the court to develop the common law, what the Everfresh case indicates is that the Constitutional Court is willing to explore and develop the role of good faith in relation to *ubuntu* in the law of contract.<sup>400</sup> It is submitted that good faith in relation to *ubuntu* provides for an ethical standard in contracting that is contrary to the approach by the Supreme Court of Appeal in relation to good faith.<sup>401</sup>

The Supreme Court has adopted a conservative approach regarding good faith, and surrounding concepts of fairness, *ubuntu* and reasonableness.<sup>402</sup> The court regards good faith has a creative function, but is not the most important value in contract law.<sup>403</sup> This needs to be placed in context by exploring the reason for this type of approach. What has been discovered is that the Supreme Court of Appeal needs to constantly pay regard to the doctrine of *stare decisis*, and consider how any judgement it makes will affect lower courts.<sup>404</sup> What also needs to be considered is that the approach by the Supreme Court of Appeal may be heavily influenced by

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<sup>397</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 24.

<sup>398</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 72.

<sup>399</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 73.

<sup>400</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 67.

<sup>401</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 75.

<sup>402</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 52.

<sup>403</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 53.

<sup>404</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 55.



autonomy, contractual freedom and the maxim *pacta sunt servanda*.<sup>405</sup> The maxim dictates that agreements that are freely entered into by contractants must be enforced.<sup>406</sup> Nevertheless, this should not mean that contractual freedom is absolute.<sup>407</sup>

This conservative approach was criticised by the Constitutional Court in *Barkhuizen v Napier*.<sup>408</sup> This case dealt with the constitutionality of a time limitation clause.<sup>409</sup> The Supreme Court of Appeal warned that the fact that a term in a contract is harsh does not mean that it is in contravention of constitutional values.<sup>410</sup> The principles of autonomy and dignity were correspondingly emphasized.<sup>411</sup> Ngcobo J in the Constitutional Court criticised the approach by the Supreme Court of Appeal, and stated that *pacta sunt servanda* is not a “sacred cow” that should have a higher regard than any other principle.<sup>412</sup> This is not the correct position in law, as the common law is also subject to constitutional scrutiny and control, therefore *pacta sunt servanda* is also subject to constitutional values.<sup>413</sup>

It must be understood that although *pacta sunt servanda* is a time-honoured part of South African common law,<sup>414</sup> this cannot be a shield to the Supreme Court of Appeal to hide behind in order to avoid constitutional development.<sup>415</sup> It is submitted that the Supreme Court of Appeal can no longer afford to sit back and hope that the Constitutional Court will solve the matter. This then leads to the question ‘what are the possible solutions?’

### 5.3. DEVELOPMENT OF THE CONSUMER PROTECTION ACT

It is stated that considering the fact that the purpose of the CPA is to ensure the rights of consumers are protected<sup>416</sup> and the preamble acknowledges the vulnerable members of society,

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<sup>405</sup> A Opperman ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakout attempt?’ (2017) 17(1) *Without Prejudice* 11.

<sup>406</sup> JC Kanamugire ‘The Current Status of Exemption Clauses in the South African Law of Contract’ (2014) 5(9) *MJSS* 168.

<sup>407</sup> A Opperman ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakout attempt?’ (2017) 17(1) *Without Prejudice* 11.

<sup>408</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5.

<sup>409</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5 at para 1.

<sup>410</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5 at para 12.

<sup>411</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5 at para 12.

<sup>412</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5 at para 15.

<sup>413</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5 at para 15.

<sup>414</sup> K Manolios ‘Pacta servanda sunt v *Ubuntu*’ (2018) 18(4) *Without Prejudice* 32.

<sup>415</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 68-69.

<sup>416</sup> Consumer Protection Act 68 of 2008 s 3(1).

it is peculiar that concepts such as good faith and *ubuntu*, which deal with fairness, are not in a position of esteem in the common law or under the CPA.<sup>417</sup>

Although section 41 of the CPA relates to the statutory intervention by the CPA in relation to non-disclosure and ways in which this can be prevented, as was discussed in chapter 4, this section is not without its flaws. It is submitted that in order to prevent pre-contractual misrepresentation or non-disclosure, along with the development of the common law in light of constitutional values in relation to *ubuntu* and good faith, the CPA should have an express term that requires parties to a contract to negotiate in good faith. This would take steps towards addressing the issue of unequal bargaining power between parties, which may also be a cause for non-disclosure.<sup>418</sup> Moreover, if parties have a duty to negotiate in good faith, this will allow for the contracting parties to relate to one another.<sup>419</sup> Additionally, as was seen in chapter 2, there are scenarios whereby a duty to disclose is imposed.<sup>420</sup> This is reinforced by section 41 of the CPA. This should also be the position regarding *ubuntu* and good faith as there is no reason that constitutional values would not require the negotiation between parties to be done in a reasonable manner and in good faith.<sup>421</sup>

#### 5.4. CONCLUSION

The aim of this dissertation was to explore the effect non-disclosure, as a form of misrepresentation, has on the liability of contracting parties in the South African law of contract. As was determined in chapter two, although there is no general duty of disclosure,<sup>422</sup> certain scenarios may arise in which the duty to disclose will be imposed on a contractant. There are still hurdles regarding what information should be disclosed prior to concluding a contract, in addition to material facts, and whether a party should be obliged to disclose any additional information at all. This is weighed against the concept of good faith and *ubuntu* during the negotiation process on one hand, and the maxim *pacta sunt servanda* after the contract has been concluded, on the other.<sup>423</sup>

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<sup>417</sup> AM Louw ‘Yet another call for a greater role of good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16(5) *PER* 48-49.

<sup>418</sup> Own emphasis.

<sup>419</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 72.

<sup>420</sup> *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C).

<sup>421</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10 [2011] ZACC 30 at para 72.

<sup>422</sup> *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 SCA.

<sup>423</sup> M Nortje ‘Pre-contractual duties of disclosure in the South African common law (part 2)’ (2015) 2015(3) *TSAR* 581.

This dissertation has discovered that although the concepts of *ubuntu* and good faith are often regarded by the courts as vital in our society, particularly in light of constitutional values as seen above, these concepts are not given the importance and prevalence that they require in order to have a meaningful effect on the eradication or prevention of pre-contractual non-disclosure and misrepresentation. This is because the quest for profit by big corporations, or even a regular civilian contractant when entering into contracts with an ordinary citizen, promotes the approach adopted by the courts that favour self-reliance and self-interest.<sup>424</sup> This leaves no room for disclosure in a competitive marketplace.<sup>425</sup>

Where non-disclosure is acknowledged as a form of misrepresentation, this may give rise to penalties for the wrongdoer and remedies for the aggrieved party. Chapter three discussed the available remedies, as well as proposed alternative remedies and methods of quantifying a claim for damages, in the form of combining a claim into one of delict and that of contractual liability, or alternatively one solely based on contractual liability.<sup>426</sup> It is necessary to explore innovative avenues to remedy longstanding problems, but also allows for the simultaneous development of what has already been recognised in the field.

The aim of this last chapter was to show that although there are many remedies available to those who have fallen victim to misrepresentation, as discussed in chapter three, and statutory preventative measures as well as remedies that are available in the form of the CPA as discussed in chapter four, there needs to be further preventative measures. There needs to be a development of the common law that is in line with a South African model of thinking and contracting. This developing needs to extend to the CPA and should take into consideration good faith, *ubuntu* and a sense of community values.<sup>427</sup> The aim should be to eradicate misrepresentation, and not just aim to remedy the instances where it does occur. Parties in a contract need to regard each other with mutual respect, and not just as a profit making interaction. As a result, it is submitted that that the aforementioned development will force

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<sup>424</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (part 2)' (2015) 2015(3) *TSAR* 581.

<sup>425</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (part 2)' (2015) 2015(3) *TSAR* 581.

<sup>426</sup> A Du Plessis 'Pre-contractual misrepresentation, contractual terms, and the measure of damages when the contract is upheld' (2008) 125(2) *SALJ* 415-416.

<sup>427</sup> A Hutchinson 'Decolonising South African Contract Law: An Argument for Synthesis' in Luca Siliquini-Cinelli & Andrew Hutchinson (eds) *The Constitutional Dimension of Contract Law: A Comparative Analysis* (2017) 170.

courts to not only take notice of the principles and concepts that underpin the common law that relates to non-disclosure, but to engage with it in a meaningful manner.<sup>428</sup>

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<sup>428</sup> M Nortje 'Pre-contractual duties of disclosure in the South African common law (part 2)' (2015) 2015(3) *TSAR* 582.

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