THE UNILATERAL DETERMINATION OF PRICE IN ROMAN-DUTCH LAW

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1 Introduction
In a previous article, the author discussed the rule that prohibits the unilateral determination of the price by one of the parties to a contract of sale in Roman law. The author came to the conclusion that the rule is susceptible to many interpretations and that as found in Roman law it is very controversial. In this article, the author investigates how the Roman-Dutch writers interpreted the Roman-law sources and explains why such an investigation is of value for the future of South-African law.

2 Roman-Dutch law of sale

2.1 Introduction
In Roman-Dutch law, as in Roman law, the contract of sale was regarded as one of the most important and commonly used contracts. The Roman-Dutch law of purchase and sale was in essence the Roman law of purchase and sale as amended by Dutch custom.

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The requirements for a contract of sale in Roman-Dutch law were similar to those of Roman law, namely, *consensus*, a thing to be sold and a price.\(^4\) No formalities were required for the valid conclusion of a contract of sale.\(^5\) Although good faith and equity still played an important role in Roman-Dutch law, they could not be used to countermand established rules.\(^6\) A judge could consider good faith in a case but only to the extent that it did not conflict with the rules of Roman-Dutch law.\(^7\)

2.2 Certainty of price

Grotius states that the price must be certain and that a sale is concluded only once there is agreement on the price or the price is determined by a nominated third party.\(^8\) Van Leeuwen reiterates these requirements and states that the price must be certain or ascertainable by reference to a third party or “some definite thing”.\(^9\) Voet also requires the price to be definite (either in itself, by reference to something else or determined by a third party).\(^10\) Van der Linden mentions that the price must be “defined, either directly or by reference to something else”.\(^11\) Huber states that there is no sale without a price and the price must be certain or referred to a third party for determination.\(^12\) These rules are similar to those found in Roman law.\(^13\)

2.3 Unilateral determination of the price

2.3.1 Introduction

The same questions asked in Roman law are also asked in Roman-Dutch law, namely (a) is a contract that grants a discretion to determine the price void or valid (but not yet effective), and (b) does the rule refer to a discretion granted to the buyer only or to both parties?\(^14\)

\(^4\) Van Leeuwen *Censura forensis* part 1 book 4 (tr SH Barber & WA MacFadyen) (Cape Town, 1902) 14 19 1.

\(^5\) *Idem* at 14 19 3.

\(^6\) Du Plessis “Good faith and equity in the law of contract in the civilian tradition” (2002) 65 *THRHR* 397 at 405.

\(^7\) *Ibid*.

\(^8\) De Groot (n 2) 3 14 23.

\(^9\) Van Leeuwen (n 4) 14 19 2. See, also, Van Leeuwen *Het Rooms-Hollands-Regt* (tr JG Kotzé rev and ed with notes by CW Decker *Commentaries on Roman Dutch Law*, vol 2, 2 ed (London, 1923) 3 17 1.

\(^10\) Voet *Commentarius ad Pandectas* (tr P Gane *The Selective Voet being the Commentary of the Pandects*, vol 3 (Durban, 1956) 18 1 23.


\(^12\) Huber *Heedensdaegse rechtsgeleerthyt* (tr P Gane *The Jurisprudence of My Time*, vol 1 (Durban, 1939) 3 4 1 and 3 4 5.

\(^13\) See Du Plessis (n 1) at par 2 2.

\(^14\) *Idem* at par 2 4 1.
232 Is the contract of sale void or valid (but not yet effective)?

Once again, the answer to this question turns upon the interpretation of D 18 1 35 1 and other relevant Roman-law texts. In Roman-Dutch law there is also a difference of opinion on whether such a contract is void or valid but imperfect.

233 Interpretations and arguments rendering the contract void

The majority of the Roman-Dutch writers agree that the price may not be left to the discretion of either of the parties. Grotius is of the view that no contract of sale is concluded if the price has to be determined by either of the parties. This is supported by Van der Keessell, Van der Linden, Voet and Vinnius.

As pointed out by Kerr and Glover, the Roman-Dutch writers do not give reasons for their views except that they refer to the relevant Roman authorities. Grotius and Van der Keessell do not give reasons for their views. Van der Linden merely refers to D 18 1 35 1. Voet refers to D 18 1 35 1 in conjunction with C 4 38 13 and D 45 1 108 1. Therefore it seems that Voet and Van der Linden interpret “imperfectum” in D 18 1 35 1 as meaning void, and that Voet also believes that such a discretion amounts to a pure potestative condition. As discussed previously, both these views are open to criticism. Later, when discussing the approval of work done in letting and hiring, Voet distinguishes between a discretion to approve work and a discretion to determine the price. He states:

It should be borne in mind that it can indeed be entrusted to the discretion of the debtor or of the creditor to say what, of what sort and how much has to be made good, provided

15 JW Wessels The Law of Contract in South Africa vol 2, 2ed (Durban, 1951) at 1094 par 4447.
16 De Groot (n 2) 3 14 23.
18 Van der Linden (n 11) 1 15 8.
19 Voet (n 10) 18 1 23.
20 Vinnius In quatuor libros institutionum imperialium commentarius (Amsterdam, 1703) 3 24 3 3. (The author would like to thank Dr Carina van der Westhuizen for her assistance in the translation of this source.)
22 Van der Linden (n 11) 1 15 8.
23 Voet (n 10) 18 1 23.
24 JW Wessels The Law of Contract in South Africa vol 1, 2ed (Durban, 1951) at 141 par 432 agrees with this view.
25 See Du Plessis (n 1) at pars 2 4 2 1(a) and 2 4 2 1(c). See, also, G Lubbe “Kontraktuele diskresies, potestatiewe voorwaardes en die bapaalheidsvereiste” (1989) 5 TSAR 159 at 169-170 for Lubbe’s criticism of the views of Voet and Wessels.
26 Voet (n 10) 19 2 35.
that there exists an effective obligation to make something good, so that in such a case the discretion of debtor or creditor is to be taken as the discretion of a good man.\(^{27}\) (my emphasis)

He then states that where there is a discretion to approve work there is “an effective obligation to make something good,” while it cannot be left to the buyer to determine that “he should owe nothing by his settling”.\(^{28}\) It has already been shown that the discretion to determine the price does not amount to a pure potestative condition.\(^{29}\) Furthermore, it has been shown that there are arguments supporting the proposition that a discretion to determine the price will be subject to the “discretion of a good man,” which will prevent the buyer from determining that no price is payable.\(^{30}\) In fact, all the texts on which Voet relies to support his proposition that a discretion can be granted to either of the parties, provided that it is exercised according to the criterion of “a good man”, are the texts used to support the proposition that the price can be determined at the reasonable discretion of the buyer.\(^{31}\) If one accepts Voet’s argument, the buyer is permitted to determine “how much has to be made good” (namely the price) provided he does \emph{so arbitrio boni viri}, so that he will never be able to determine that no price is payable.

Vinnius, relying on D 18 1 35, states that the price cannot be determined according to the discretion of the seller or the buyer.\(^{32}\) He equates such a contract with one in which the buyer or seller has the power to decide whether he is bound to the contract.\(^{33}\) As shown above, this argument is open to criticism.\(^{34}\)

Van Leeuwen does not deal with this question in his \emph{Censura forensis}.\(^{35}\) However, in his \emph{Het Rooms-Hollands-Regt} he states that where someone promises something “if, or as much as, he shall feel disposed” that promise is void because the person cannot be held bound to more than he pleases.\(^{36}\) He refers to D 44 7 8, D 45 1 17 and D 45 1 108 1 in support of this proposition.\(^{37}\) However, as shown previously, all these texts deal with a pure potestative condition (\emph{si voluero}) and not with the situation where a party promises “as much as, he feels disposed”.\(^{38}\) There are also further arguments that even if a party could promise to pay as much as he felt disposed to, his discretion would have to comply with the standard of a \emph{bonus vir}.\(^{39}\)

\(^{27}\) \textit{Ibid.}  \\
\(^{28}\) \textit{Ibid.}  \\
\(^{29}\) See Du Plessis (n 1) at par 2 4 2 1(c).  \\
\(^{30}\) \textit{Idem} at par 2 4 4 2.  \\
\(^{31}\) Voet refers to D 17 2 6, C 5 11 3, D 38 1 30, D 50 17 22 1 and D 18 1 7. See, further, Du Plessis (n 1) at par 2 4 2 2(b).  \\
\(^{32}\) Vinnius (n 20) 3 24 3 3.  \\
\(^{33}\) \textit{Ibid.}  \\
\(^{34}\) See Du Plessis (n 1) at par 2 4 2 1(c).  \\
\(^{35}\) Van Leeuwen (n 4).  \\
\(^{36}\) Van Leeuwen (n 9) 4 3 5.  \\
\(^{37}\) \textit{Ibid.}  \\
\(^{38}\) Du Plessis (n 1) at par 2 4 2 1(c).  \\
\(^{39}\) These arguments are discussed in Du Plessis (n 1) at par 2 4 2 2 (b).
Huber merely states that the price may not be left to the discretion of the purchaser. He does not deal with the situation where the seller is granted the discretion to determine the price. 40

Finally, it may be mentioned that Pothier states that the price cannot be “left in the power of one of the parties” and that if the price has to be determined by one of the parties the sale is invalid. 41 It seems that he bases his view on D 18 1 35 1. 42 Later, when discussing the case where the parties agree that the thing will be sold “for such a price as shall be offered him for it”, Pothier argues that such a sale should not be allowed because of the increased risk of fraud. 43 He suggests that the buyer may involve someone who will offer a very low price and similarly the seller may involve someone who will offer a very high price. 44 Kerr and Glover argue that the increased risk of fraud could also be one of the reasons for Pothier’s view on the unilateral determination of the price in a contract of sale. 45 However, it has already been shown that any abuse of his power by one of the parties could probably be addressed by employing the principles of arbitrio boni viri. 46

2 3 4 Interpretations and arguments rendering the contract valid but imperfect

Although it is generally accepted that the Roman-Dutch writers consider a contract providing for the unilateral determination of the price to be void, there are two writers who disagree.

Donellus holds that where a contract grants a party the discretion to determine the price but he does not do so, there is no price and therefore no sale. 47 However, if the party determines the price, the sale is valid since the price is certain. 48 He seems to believe that the discretion must be exercised arbitrio boni viri since he relies on D 18 1 7. 49 He further argues that the rule in terms of which there is no obligation where the buyer or seller can decide whether he is bound does not contradict this view. 50 He states that whether someone is bound to a contract cannot be in his power, but that what such a

40 Huber (n 12) 3 4 5. See, also, Kerr & Glover (n 21) at 203.
41 Pothier Treatise on the Contract of Sale (tr LS Cushing, London, 1840) at 23, 29. Note that Pothier was a French jurist but is discussed here because his interpretation of the Roman-law texts is relevant to the discussion.
42 Ibid.
43 Pothier (n 41) at 27.
44 Ibid.
45 Kerr & Glover (n 21) at 205; Kerr (n 21) at 66.
46 See, also, Du Plessis (n 1) at pars 2 4 2 1(b) and 2 4 2 2(b).
47 Donellus Opera omnia vol 3 (Florence, 1847) at 788. (The author would like to thank Dr Paul Hasse and Dr Carina van der Westhuizen for their assistance in the translation of this source.) It should be noted that Donellus was a French humanist, but is discussed here because his interpretation of the Roman-law texts is relevant to the discussion.
48 Ibid.
49 Ibid.
50 Ibid.
person owes or *how much* may be. Finaly, he refers to D 18 1 35 1 in support of his argument. He argues that because this text refers to a situation where the seller gives the buyer the discretion to determine the price, the contract has not been concluded since the buyer has not yet accepted this condition. He argues that the contract is not concluded, not because the contract is void (“nullum”), but because the condition has not yet been accepted by the buyer. Once the buyer has accepted the condition and determined the price, the condition is fulfilled and the contract is concluded.

Noodt deals with this question in detail by considering the meaning of other relevant Roman-law texts. He refers to D 18 1 35 1 in which Gaius states that the contract is imperfect if the buyer has been granted a discretion to determine the price. He rejects the argument that such a contract amounts to a condition that the buyer can decide whether he wants to be bound or not. He investigates the possible tension between D 18 1 7 and D 18 1 35 1 and states that the real question to be answered is what is meant by the term “arbitrium”. He debates whether it refers to the pure will of the party or to the discretion of a good man as distinguished by Proculus in D 17 2 76. He argues that the meaning ascribed to the word “arbitrium” will determine whether the price can be ascertained or not. He argues that, in this context, it is probable that the parties intended “arbitrium” to refer to the discretion of a good man. If they did, the sale is valid because the buyer cannot choose whether he wants to be bound by the contract or not. He has to exercise his discretion according to the standard of a *bonus vir*.

Remarkably, Noodt noticed that the texts in D 18 1 7 and D 50 17 22 1 had to be read together because they originally formed part of the same discussion in Ulpianus’ commentary on the works of Sabinus. As discussed previously, these two texts deal with the sale of a slave on condition that the slave managed the seller’s accounts to the seller’s satisfaction. Ulpianus considered the question whether the seller’s discretion related only to the seller’s will or whether he had to exercise it according to the standard of a good man. Noodt classifies the first possibility as a condition of which the outcome

51 Ibid. Again, he refers to D 18 1 7.
52 Donellus (n 47) at 788.
53 D 18 1 35 1 refers to “cum emere volenti sic venditor dicit” (“when the seller says to the buyer”).
54 Donellus (n 47) at 789.
55 Ibid.
56 Noodt *Opera omnia* vol 2 (Lugduni Batavorum, 1735) at 388-389. (The author would like to thank Dr Paul Hasse for his assistance in the translation of this source.)
57 Ibid.
58 *Idem* 389.
59 See Du Plessis (n 1) at pars 2 4 2 1(c) and 2 4 2 2(b).
60 Noodt (n 56) at 389.
61 Ibid. See Du Plessis (n 1) at par 2 4 2 2(b).
62 Noodt (n 56) at 389.
63 Ibid.
64 Ibid.
65 Ibid.
66 See Du Plessis (n 1) at par 2 4 2 2(b).
is uncertain and undeterminable, but the second as a condition of which the outcome is inevitable and therefore certain and determinable. Ulpianus concluded that the seller was required to exercise his judgement in accordance with the standard of a *bonus vir*. If the seller could accept the accounts managed by the slave but did not, or if he received the accounts but pretended that he had not, the condition was considered to be fulfilled and the buyer could institute an action against the seller on the basis of a concluded sale.

Noodt states that these same principles applied to a discretion granted to the buyer to determine the price. If the buyer exercised the discretion in an inequitable manner, his decision could be corrected with reference to the judgement of a *bonus vir*. He further argues that if the buyer did not make a determination when in a position to do so, it had to be considered that the decision had been made. This line of thought allows him to conclude that a sale in which the price was to be determined by the buyer *arbitrio boni viri* would be valid since the price could be ascertained, as against a sale in which the price was to be determined according to the buyer’s pure will, which was uncertain.

Finally, it would seem that he agrees with Donellus’ interpretation of D 18 1 35 1 since he also holds that in this text the buyer has not yet accepted the condition imposed by the seller. Thus he argues that if the buyer does not accept the condition immediately and the seller revokes the condition before the buyer accepts it, there is no sale and the buyer has no action against the seller.

### 2 3 5 Discretion granted to the buyer only or to both parties?

De Groot, Voet, Van der Keessel, Van der Linden, and Vinnius hold that the discretion to determine the price could not be granted to the buyer or the seller. Huber states that the price may not be left to the discretion of the buyer. Thus most Roman-Dutch writers seem to agree that the discretion to determine the price may not be left to either of the parties. However, it seems that both Donellus and Noodt believed that the discretion to determine the price could be left to *either* of the parties.

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67 Ibid.
68 D 50 17 22 1. See Du Plessis (n 1) at par 2 4 2 2(b).
69 D 8 1 7pr. See Du Plessis (n 1) at par 2 4 2 2(b).
70 Noodt (n 56) at 389.
71 Ibid. He relies on D 17 2 76.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.
76 De Groot (n 2) 3 14 23.
77 Voet (n 10) 18 1 23.
78 Van der Keessel (n 17) 3 14 23.
79 Van der Linden (n 11) 1 15 8.
80 Vinnius (n 20) 3 24 3 3.
81 Huber (n 12) 3 4 5.
82 See par 2 3 4 above.
3 Conclusion

It is clear that the majority of the Roman-Dutch writers regarded a contract as void if it provided that one of the parties had a discretion to determine the price. However, their views are open to criticism, being based on a very conservative interpretation of D 18 1 35 1 and a misdirected appeal to the rules dealing with pure potestative conditions.83

Two writers criticised these views and argued that such a contract would be valid because the discretion had to be exercised arbitrio boni viri. This view is also supported by other jurists and modern researchers who have considered the meaning of the Roman-law texts.84

4 The value of this historical investigation for the future of South African law

Daube refers to certainty of price as a specialised question of certainty.85 The importance of this statement cannot be overestimated. Failure to recognise its importance has made writers confuse different rules and situations, so that arguments and views on the rule have become even more obscure. This confusion results from an incorrect interpretation and use of the Roman-law sources in which the rule is discussed.

It is unfortunate that these views were followed in South African law. In the past, South African courts were content to cite the Roman and Roman-Dutch authorities, especially Voet.86 Lubbe has argued that Wessels’ support for Voet’s view was a contributing factor in the acceptance of Voet’s view in South African law.87 Kerr argues that since Voet’s view is considered to be the “usual interpretation”, it should be followed.88 In Master v African Mines Corporation Ltd, Wessels J stated as follows:

Now this Court administers the Roman Dutch Law, and not the Roman Law of Justinian. If the Courts of Holland have placed a certain interpretation upon a lex in the Digest, and by virtue of that interpretation a certain practice was adopted, then this Court should follow the interpretation of the Dutch Courts, rather than that which modern investigators give to the text.89

Van Warmelo refers to the above case and concedes that our law is the Roman law as seen through the eyes of the Roman-Dutch writers.90 However, he asks whether the courts should not pay more attention to Roman law and consider the findings of modern

83 Lubbe (n 25) at 172-173.
84 See, again, Du Plessis (n 1) at par 2 4 2 2.
86 Kerr & Glover (n 21) at 205; Kerr (n 21) at 66.
87 Lubbe (n 25) 165 fn 39 commenting on Wessels (n 24) at 141 par 432. In addition, Lubbe criticises Wessels for preferring the views of Voet to other plausible interpretations purely because of historical patriotism (at 173).
88 Kerr (n 21) at 55 fn 222.
89 1907 TS 925 at 928-929.
writers and interpreters.\(^91\) He argues that the courts should be allowed to consider Roman law from other perspectives than that of Roman-Dutch law in order to improve Roman-Dutch law.\(^92\)

As shown previously\(^93\) and above, there are various other viewpoints that could be taken into account. In fact, it has been shown that two Roman-Dutch writers, Noodt and Donellus, held views different to Voet and the other Roman-Dutch writers.

The South African Supreme Court of Appeal questioned whether the rule should still apply in South African law since it considered the views of the Roman-Dutch writers to be illogical.\(^94\) The Supreme Court of Appeal itself has acknowledged that the views of the Roman-Dutch writers are not above criticism and may be re-investigated in the light of new research and findings.

## Abstract

In a previous article, the author discussed the rule that prohibits the unilateral determination of price by one of the parties to a contract of sale in Roman law. The author came to the conclusion that the rule is susceptible to many interpretations and that as expounded in Roman law it is controversial. In this article, the author investigates how the Roman-Dutch writers interpreted the Roman-law sources. Although it is clear that the majority of the Roman-Dutch writers regarded a contract as void when it conferred on one of the parties a discretion to determine the price, their views are based on a conservative interpretation of the Roman-law texts and a misdirected appeal to the rules dealing with pure potestative conditions. Two writers criticised these views and argued that such a contract would be valid since the discretion would have to be exercised *arbitrio boni viri*. This view is also supported by other jurists and modern researchers who have considered the meaning of the Roman-law texts. Finally, the author discusses why such an investigation is of value for the future of South-African law.

\(^91\) *Idem* at 575.
\(^92\) *Ibid.*
\(^93\) Du Plessis (n 1).
\(^94\) *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA) ([NBS Boland Bank v One Berg River Drive]) par [16].