

# CODEX 8 26(27) 1: THE FORGOTTEN TEXT

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L. Hawthorne\*

## 1. Introduction

Since the demise of the *exceptio doli generalis* in *Bank of Lisbon and South Africa Ltd v De Ornelas* (hereafter the *Bank of Lisbon* case),<sup>1</sup> South African contract lawyers have debated the possibility of exploring other avenues in order to protect contracting parties against the enforcement of unfair contracts or terms. The debate has vacillated between several possibilities, one being the possible recognition of the open norms of good faith or public policy as the general clause to ameliorate unfair terms. In this category, public policy has been given Constitutional Court approval<sup>2</sup> and the slow process of concretisation is under way. The other stream is dominated by the legislature, which has seen fit to promulgate several pieces of legislation aimed at protecting contracting parties. Since 1998, the Protection against Illegal Eviction Act,<sup>3</sup> the National Credit Act<sup>4</sup> and the Consumer Protection Act<sup>5</sup> have been accepted. Protection for weak parties locked into unfair contracts is thus available and developing.

In a recent publication, Thomas<sup>6</sup> dealt with the *stare-decisis*<sup>7</sup> rule, which originates in English law, the *curia jus novit*<sup>8</sup> rule originating in the European civil law, and their

1 1988 (3) SA 580 (AD).

2 *Barkhuizen v Napier* 2007 (3) SA 323 (CC) [par 27-par 30].

3 19 of 1998.

4 34 of 2005.

5 68 of 2008.

6 Ph J Thomas “Die resepsie van die Romeinse reg in die Suid-Afrikaanse regstelsel: *stare decisis* en *curia ius novit*” (2012) 9(3) *LitNet Akademies* 237-253.

7 GR Dolezalek “*Stare Decisis*” *Persuasive Force of Precedent and Old Authority (12<sup>th</sup>-20<sup>th</sup> Century)* (University of Cape Town, Cape Town, 1989) *passim*.

8 This rule pertains to a judge’s obligation to find and apply the law *ex officio* and is part of the inquisitorial system of procedure; Art 1 *Zivilgesetzbuch* (Switzerland); art 9 *Wet op de rechterlijke organisatie* (Netherlands); § 293 *Zivil Process Ordnung*. I Meier *Iura novit curia* (Zurich, 1975) at 1; Crommelin “*Ius curia novit*” available at [https://openaccess.leidenuniv.nl/bitstream/handle/.../02\\_05.pdf?](https://openaccess.leidenuniv.nl/bitstream/handle/.../02_05.pdf?) (accessed 5 Oct 2013) at 61f; Douglas Brooker *Va Savoir! – The Adage “Iura Novit*

\* Professor, Department of Private Law, University of South Africa.

impact on South African legal development. Thomas draws attention to two cases, which for purposes of his argument respectively signify the end of the early and late reception of Roman law in South Africa. Both cases, *Brink's Trustees v South African Bank* (hereafter *Brink's Trustees* case)<sup>9</sup> and the *Bank of Lisbon* case, concern banks, securities provided for loans to these banks, and the *exceptio doli*. With hindsight, it is possible to construct an argument that part of the *exceptio doli* should have been retained. Thus the present essay proposes to revisit these two cases in order to construct another castle in the air. In the case of *Brink's Trustees*, both parties relied on a source that could have played a role in the *Bank of Lisbon* case and might have prevented the general abrogation of the *exceptio doli*.

I dedicate this paper to my friend and esteemed colleague Laurens Winkel, who has shown a keen interest in the *Bank of Lisbon* case. I hope that he enjoys my narrative of what might have been had the *exceptio doli generalis* been retained as an equitable remedy in South African law.

## 2. *Brink's Trustees v South African Bank*

The facts of this 1847 case are pedestrian. Brink had borrowed six hundred pounds from the South African Bank and as security had pledged a mortgage bond of one thousand pounds in his favour.<sup>10</sup> A while later Brink went insolvent.<sup>11</sup> His trustees offered the bank payment of the six hundred pounds plus interest in return for the mortgage bond. The bank refused the offer, arguing that Brink had other debts to the bank, albeit unsecured, which he had incurred both before and after the secured debt; the bank insisted that these debts also had to be repaid before the pledged thing would be returned.<sup>12</sup> The bank contended that it was entitled to retain the *superfluum* of the mortgage bond to pay for these other debts plus interest. Brink denied that he had entered into any agreement with the bank concerning the pledge of the bond as security for any of his other debts to the bank.<sup>13</sup>

Both parties relied on Codex 8 26(27) 1. Imp. Gordianus A. Festo. 2:

*Ac si in possessione fueris constitutus, nisi ea quoque pecunia tibi a debitore reddatur vel offeratur, quae sine pignore debetur eam restituere propter exceptionem doli mali non cogaris. Iure enim contendis debitores eam solam pecuniam, cuius nomine pignora obligaverunt, offerentes audiri non oportere, nisi pro illa satisfecerint, quam mutuam simpliciter acceperint. 3. Quod in secundo creditore locum non habet: nec enim necessitas ei imponitur chirographarium etiam debitum priori creditori offerre. (a 239).<sup>14</sup>*

Curia" in Contemporary France (2005) <http://law.bepress.com/expreso/eps/845> (accessed 3 Oct 2013).

9 (1882) 2 Menzies part 3 at 399-403.

10 Menzies (n 9) at 399.

11 *Idem* at 400.

12 *Ibid.*

13 Menzies (n 9) at 401.

14 "And if you were put in possession, you are not compelled to give it up on the plea of fraud, unless also the money due to you without security is repaid or offered to you. For you rightly contend that debtors who only return the money for which the pledge was given ought not to be heard unless

It was successfully argued for the plaintiffs<sup>15</sup> that, although this text granted the bank a *jus retentionis* against Brink in respect of all his debts to it, the right of retention was limited to Brink himself. Consequently, in terms of this text the bank was entitled to keep the pledge until the debtor had paid not only the amount of the debt for which the bond had been pledged, *but also all other debts due by him to the bank* (my emphasis).<sup>16</sup> However, this retention right could not be exercised against Brink's creditors after his insolvency.<sup>17</sup> This distinction, namely that the bank could enforce the retention right against the pledgor, but not against the latter's creditors after his insolvency, is explained by the legal remedy available to realise the retention right, namely the *exceptio doli mali*.<sup>18</sup> In order to exercise a retention right, the holder of the right must raise the *exceptio doli* as a defence against a claim for the pledged thing.<sup>19</sup> Without remedy, no right, thus if the holder cannot raise the *exceptio doli* the retention right cannot be exercised. The *exceptio doli* made provision for two situations, *si in ea re nihil doli mali Ai. Ai. factum sit neque fiat*.<sup>20</sup> In the situation under discussion the second scenario applied, namely that the plaintiff was acting in conflict with the requirements of good faith by instituting his action. Thus, this defence would succeed against Brink if he sued for the return of the pledge on mere payment of the secured debt, while refusing to pay his other debts to the bank. Conversely, the exception could not be raised against the insolvent debtor's other creditors when these claimed that the pledge should be surrendered to the general body of creditors on payment of the secured debt, since they were not instituting their claim in bad faith. The debtor's insolvency had divested him of his estate and vested it in the general body of creditors represented by the trustees.<sup>21</sup> In consequence, the trustees were

they also pay the money received on a simple loan" (translation Blume). M Kaser *Das römische Privatrecht* (München, 1971) at 538 speaks of "das gordianische Retentionrecht"; see, also, at 538 n 17.

- 15 Menzies (n 9) at 401. The Attorney General William Porter acted for the plaintiffs. According to Thomas (n 6) at 241, he was allowed to practise privately while holding public office.
- 16 Menzies (n 9) at 401; R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town, 1990) at 229.
- 17 Menzies (n 9) at 401.
- 18 C 8 26(27) 1 2; J Story *Commentaries on the Law of Bailments* (Cambridge, 1832) at 304-306; Kaser (n 14) at 521-522; Zimmermann (n 16) at 229.
- 19 Kaser (n 14) at 436: "eine Zurückbehaltungsrecht, das er mittels exceptio doli gegenüber der Vindikation geltend macht"; DH van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (Durban, 1977) at 156ff and 352.
- 20 Kaser (n 14) at 488; R Zimmermann "Good faith and equity" in R Zimmermann & D Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (Oxford, 1996) 217-260 at 218 explains: "*Factum est* referred to fraudulent behaviour in the institution of the action (against which the exception was now raised), particularly in the act of concluding the contract. *Fiat*, on the other hand, comprised all cases where the bringing of the action itself could be taken to constitute *dolus*."
- 21 Menzies (n 9) at 401-402. The following sources are cited there: "*Burton on Insolvent Law*, p. 145, 146; *Van der Keessel, Thes.* 435 and 450; *Van Leeuwen, Cens. For., lib. 4, tit. 87, §§ 1 and 2*; *Voet*, 13, 6, 10; 16, 2, 15; 20, 6, 16; 41, 1, 42; *Carpzovius, Const.*, 40, *defn.* 3; *Cujacius on the Code, lib. 8, tit. 27, p. 1, 114, 1, 115*; *Faber, lib. 8, tit. 16, defn. 4*; *Grotius, Inleid.*, 3, 19, § 16; *Storey on Bailments*, § 305; *Kent's Commentaries, vol. 2, p. 584*; *Adams vs. Claxton, 6 Ves. Junr.*; *Henley on Bankruptcy*, p. 294; *Cooke on Mortgages, p. 491*; *Smith's Merc. Law, p. 461*; *Stair's Instit.*, b. 3, tit. 4, § 23; *Bell's Comment, vol. 1, p. 684*; 2<sup>nd</sup>, p. 22."

entitled to institute the *actio pignoratitia* or the *rei vindicatio* in order to demand the return of the pledge.

For the defendant it was argued that, correctly construed, Codex 8 26(27) 1 granted the retention right not only against the debtor himself, but also against all persons deriving any right from him or through him.<sup>22</sup> Consequently, this right of retention could be exercised against all the debtor's personal creditors except a *secundus creditor hypothecarius*, a posterior creditor in whose favour a second mortgage had been constituted over the object pledged by the first creditor.<sup>23</sup> The reason for this conclusion was that the second creditor had thus acquired a real right in the thing pledged. Because of this right, he (the second creditor) had a preferential claim over the personal debts of the debtor. It was also argued that this *secundus creditor hypothecarius* was the only exception against whom the bank's retention right could not be enforced.<sup>24</sup> The court found for the plaintiffs.

### 3. The Gordian retention right

The legal question in the *Brink's Trustees* case was whether the pledgee had a retention right over the pledge in respect of other unsecured debts of the pledgor. Codex 8 26 (27) 1 provided a positive answer to this question. However, the subsidiary question, whether this retention right could be enforced against other parties than the pledgor, in this case against the general body of creditors of the insolvent debtor, was answered in the negative. This distinction stemmed from the character of the *exceptio doli*, a special defence against an action, which was based on the argument that either the plaintiff had acted dishonestly in contracting, or the institution of the claim was contrary to good faith. The trustees' argument that as representatives of the body of creditors they had not acted in bad faith in demanding the return of the pledged thing and that consequently the *exceptio doli* could not be raised as a defence against their claim was upheld by the court. It may be mentioned that Voet unequivocally supported this interpretation in his commentary on the Pandects.<sup>25</sup>

However, the rule embodied in Codex 8 26(27) 1, that the holder of the pledged object, the pledgee, could exercise a right of retention until his debtor had paid all outstanding

22 Menzies (n 9) at 402 according to which the advocates Brand and Watermeyer relied on the following sources: "*Pandects, lib. 20, tit. 4, l. 20; Van Leeuwen, Cens. For., lib. 4, tit. 10, § 37; Faber, lib. 8, tit. 16, defn. 2; Carpzovius, part 2<sup>nd</sup>, tit. 25, defn. 25; Christinaeus, vol. 4, decis. 169; Huber, Praelectiones, b. 20, tit. C.; Voet, 13, 7, § 6; 16, 2, § 20; 42, 7, § 5; 20, 4, § 37; Leyser, vols. 3 and 4, §§ 175 and 231, vol. 7, p. 515 and 560; Hollandsche Regt. Book, p. 245, § 1, 205; Grotius, Inleid., b. 2, part 48; Van der Linden, Inst., p. 178; Pothier on Pledges, cap. 2, § 47; Muhlenbruch, Doctrina Pandect, 2<sup>nd</sup> vol., p. 208; Burge, vol. 3, pp. 286, 585; Code Napoleon, art. 2,082; Mackeldey's Mod. Civ. Law, vol. 1, p. 384; Kent's Comment., vol. 4, p. 176; Storey's Equity Jurisprud., vol. 2, p. 248, § 1,010; 270, § 1,034-5; Zande's Decisions, b. 3, tit. 10, dec. 7; Van der Berg's Consult., vol. 1, com. 36; Praezius and Brunnevan on the Code, b. 8, tit. 27."*

23 Menzies (n 9) at 402.

24 *Ibid.*

25 Johannes Voet *Commentarius ad pandectas* (tr P Gane *The Selective Voet being the Commentary on the Pandects* vol 3, Durban, 1956) 20 6 16: "Resoluto autem jure pignoris quod semel ab initio jure constitit vel postea firmatum fuit, creditor illud adhuc retinere potest pro alio debito chirographico, si modo ipse debitor, non alius creditor hypothecarius, pignus repetat."

debts to him whether secured or not, and that this retention right arose when the pledgee raised the *exceptio doli* to ward off a claim demanding release of the pledge, was firmly settled as precedent in the law of the Cape Colony. Wille and Millin<sup>26</sup> stated that this had also become settled law in the Union, and referred to both *Brink's Trustees* and *Smith v Farrelly's Trustee*<sup>27</sup> in support of the view that a pledgee had the right to retain the pledged property in respect of another liquid debt due whilst the pledge remained in force.

Because remedies precede rights, it may be asserted that without access to the remedy of *exceptio doli* no retention right can be exercised. However, when the death sentence was imposed on the *exceptio doli*, neither bar nor bench mentioned Codex 8 26(27) 1, Voet 20 6 16, or the precedents of *Brink's Trustees* and *Smith v Farrelly's Trustees*.

#### 4. *Bank of Lisbon and South Africa Ltd v De Ornelas*<sup>28</sup>

The facts of this case are well known and a brief summary will suffice. In 1981, the De Ornelas Fishing Company obtained overdraft facilities from the Bank of Lisbon. The bank demanded that both De Ornelas brothers mortgage their homes in favour of the Bank. They were also obliged to bind themselves as sureties to the Bank to secure their company's debt under the overdraft. At a later stage, a negotiable certificate of deposit was also handed over to the Bank as additional security.<sup>29</sup> It was the intention of all the parties that the security would cover the company's overdraft. However, both the bonds and the deeds of suretyship were drafted in the widest possible terms to provide security for any debt that the company owed the appellant, irrespective of how the debt arose. When, a few years later, the Bank refused to extend the overdraft, the company paid off the outstanding balance of the overdraft and closed its account with the bank.<sup>30</sup> The De Ornelas brothers then requested the cancellation of the mortgage bonds and deeds of suretyship and the return of the negotiable certificate of deposit. The bank refused to return or cancel the securities held to secure the overdraft facilities until the outcome of an action that the bank intended to institute against the company for damages resulting from an alleged breach of contract.<sup>31</sup> This claim arose from a transaction for the forward purchase of dollars, which was apparently not within the contemplation of any of the parties when the security was furnished.

At first glance the similarities between the *Bank of Lisbon* case and the *Brink's Trustees* case are striking. In both instances, a bank lent money to a client against security; in both cases, the secured debt was paid off, but the bank refused to return the pledges, arguing that other unsecured debts were outstanding. In *Brink's* case, the bank relied on the *exceptio doli*, which defence did not succeed, however, since Brink had gone insolvent and his estate had vested in the general body of the creditors represented by the trustees.

26 P Millin *Wille and Millin's Mercantile Law of South Africa* (Johannesburg, 1975) at 317.

27 1904 TS 949.

28 1988 (3) SA 580 (AD).

29 *Idem* at 607F-G.

30 *Idem* at 607I.

31 *Idem* 608A.

However, in the case of the De Ornelas brothers there had been no insolvency and the pledgors themselves claimed return of the pledges.

The De Ornelas brothers applied in the Cape of Good Hope Provincial Division of the Supreme Court for an order compelling the bank to cancel the deeds of suretyship and the mortgage bonds and to return the negotiable certificate of deposit. The bank opposed this application on the ground that it was contractually entitled to retain the securities until the company had discharged its entire indebtedness to the bank.<sup>32</sup> The respondents alleged by way of replication that the bank's conduct amounted to *dolus generalis*.<sup>33</sup> The court *a quo* upheld the application, against which judgement the bank appealed.<sup>34</sup>

At this stage, one may ask why the bank did not resort to the *exceptio doli* in opposing the application. Codex 8 26 (27) 1, Voet 20 6 16, *Brink's Trustees* and *Smith v Farrelly's Trustees* all provided authority for the contention that the pledgee had a retention right over the pledge in respect of the pledgor's other unsecured debts. In order to exercise this retention right, the holder of a right must raise the *exceptio doli* as a defence against a claim for the pledged thing. In the *Bank of Lisbon* case it could be argued that when the brothers instituted an action for the return of the pledges on payment of the secured debt only, while refusing to pay their other debts to the bank, they were not complying with the requirements of good faith. However, the bank (the appellant) opposed the application on the ground that it was contractually entitled to retain the securities until the respondent's entire indebtedness to the bank had been discharged.<sup>35</sup> The pledgor's answer was that the bank's conduct amounted to *dolus generalis*.

On appeal, the bank argued that the De Ornelas brothers' application was based on the *replicatio doli* and that the *exceptio doli* no longer existed in modern law.<sup>36</sup> Even if it did, it would not apply to deeds of suretyship and mortgage bonds, which according to statute had to be in writing. Should the *exceptio doli* still exist, the facts of the case would fall outside the limits, scope and extent of the application.<sup>37</sup> For the De Ornelas brothers it was averred that the bank was attempting to use the securities for a purpose not intended by the parties when the contracts were concluded. Such an attempt to abuse a right would constitute unconscionable conduct and result in gross injustice or great

32 *Idem* at 608A-B.

33 *Idem* at 608F.

34 *Idem* at 607E.

35 *Idem* at 608A-B.

36 *Idem* at 608F-G.

37 *Idem* at 582C-E. The authorities relied on were cited there as: "Zuurbekom Ltd v Union Corporation Ltd 1947 1 SA 514 (A); Senekal v Home Sites (Pty) Ltd 1950 1 SA 139 (W); North Vaal Mineral Co Ltd v Lovasz 1961 3 SA 604 (T); Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd 1962 3 SA 399 (T); Hauptfleish v Caledon District Council 1963 4 SA 53 (C); Otto v Heymans 1971 4 SA 148 (T); OK Bazaars (1929) Ltd v Universal Stores Ltd 1973 2SA (281) (C); Rashid v Durban City Council 1975 3 SA 920 (D); Paddock Motors (Pty) Ltd v Igesund 1976 3 SA (A); Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977 2 SA 436 (T); 1977 2 SA 425 (A); Novick v Comair Holdings Ltd 1979 2 SA 116 (W); Rand Bank Ltd v Rubenstein 1981 2 SA 207(W); Neuhoff v New York Timbers 1981 4 SA 666 (T); Edwards v Tuckers Land & Development Corporation (Pty) Ltd 1983 1 SA 617 (W); Sohm R *Institutes of Roman law* (1892) 275-278."

inequity.<sup>38</sup> Counsel for the De Ornelas brothers also referred to the fact that the exception is a defence, but argued that there seems to be no reason why the remedy should not also be available to a plaintiff because the principle is the same.<sup>39</sup>

The majority of the Appellate Division held that the *exceptio doli* did not form part of South African law of contract.<sup>40</sup> Consequently, the De Ornelas brothers did not have recourse to this remedy to ward off the bank's argument that it was contractually entitled to retain the securities until their entire indebtedness to the bank had been discharged. Thus the issue to be decided was whether or not the bank had a contractual right, derived from the deeds of suretyship and mortgage bonds, to retain the securities claimed until the outstanding debt for the forward purchase of dollars had been repaid.<sup>41</sup> The court found in favour of the bank, holding that the securities were intended to cover any transaction that could have arisen between the bank and the De Ornelas fishing company.<sup>42</sup>

As stated above, no reference to Codex 8 26(27) 1, Voet or the South African precedents is to be found. Furthermore, when the De Ornelas brothers sought the return of their pledges they were debarred from raising the *exceptio doli* on the basis that they were acting contrary to good faith towards their creditor because other unsecured debts remained unpaid. It is ironic that they should have relied on this defence in these circumstances.

## 5. Codex 8 26(27) 1: The two faces of the *exceptio doli*

It is trite that the *exceptio doli* served two purposes; and a distinction has been drawn between the *exceptio doli specialis* or *praeteriti* and the *exceptio doli generalis* or *praesentis*.<sup>43</sup> The court considered the first function of this special defence in the *Bank of Lisbon* case. However, the relevant Codex text dealt with the exercise of a retention right. This is not the place to discuss the question how Brink pledged a mortgage bond

38 (n 28) at 588E.

39 *Idem* at 589G. Authorities referred to were: "Aronstam *Consumer protection, freedom of contract and the law* 3<sup>rd</sup> ed (1979) 28-32, 39; Buckland (1963) *A textbook of Roman law* Cambridge University Press 654; Goudsmit *Pandecten systeem* Leiden Hazenberg 95; Kaser (1965) *Roman private law* (Dannenbring's translation) 33 IV 4 at 143-4; 33 III 2 at 155; Sohm 1892 para 53 at 275-81; Voet (Gane's translation) 44 4 1 and 2; *Viljoen v Hillier* 1904 TS 312; *Waterval Gold Mining Co v New Bullion Gold Mining Co* 1905 TS 717; *Farrar and Others v Geldenhuys Gold Mining Co* 1908 TH 16; *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Sampson v Union & Rhodesia Wholesale Ltd (in Liquidation)* 1929 AD 468; *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170; *Senekal v Home Sites* 1950 1 SA 139 (W); *Zuurbekom*; *Van der Walt v Minnaar* 1954 3 SA 932; *Sette v DH Saker (Pty) Ltd* 1957 2 SA 87; *North Vaal*; *Hauptfleish*; *Otto*; *OK Bazaars*; *Rashid*; *Quadrangle Investments Ltd v Witind Holdings Ltd* 1975 1 SA 572 (A); *Rashid*; *Paddock*; *Aris*; *Novick*; *Edwards*; *Neuhoff*; *Sunday v Surrey Estate Meat Market* 1983 (2) SA 521 (C); *Dithaba Platinum v Erconovaal Ltd* 1985 4 SA 615."

40 (n 28) at 605I.

41 *Idem* at 608G-H.

42 *Idem* at 609E-G.

43 Van Zyl (n 19) at 352 n 410.

of one thousand pounds in favour of himself,<sup>44</sup> nor the argument that the *exceptio doli* would not apply to deeds of suretyship and mortgage bonds that by statute must be in writing. The second function of the *exceptio doli* has mainly been the implementation of retention rights.<sup>45</sup> Codex 8 26(27) 1 granted a creditor a retention right in respect of the pledgor's unsecured debt. Abolition of the *exceptio doli in toto* without addressing the dual function of this remedy was a drastic step, especially in view of the circumstances of the particular case. Applied to the facts of the *Bank of Lisbon* case, this text granted the Bank of Lisbon a *jus retentionis* over the pledges, namely the deeds of suretyship, mortgage bonds and negotiable certificate of deposit furnished to secure the overdraft facilities, in respect of the unsecured debts, *in casu* the loan to forward purchase dollars.

## 6. Conclusion

The adagium “no remedy, no right” applied in both Roman law and the English common law. The question may be asked: what is a right without a remedy? The *exceptio doli* as the defence necessary to exercise retention rights has formed part of the South African common law. Thus, the *Bank of Lisbon* decision has two consequences. Firstly, the Gordian retention right was abolished and secondly, although the *exceptio doli* was not abolished, it was held that it had never formed part of South African law. This places the retention rights realised by this remedy into question. Thus the decision in *Lisbon* is regrettable on two counts. Firstly, the *exceptio doli* should have been raised by the bank and not by the pledgors; and secondly, because the existence of the *exceptio doli* was denied, retention rights are left up in the air. It is difficult to comprehend why the court denied the existence of the *exceptio doli* in South African law, when this was in reality the remedy that enabled the bank to retain and exercise its *jus retentionis* against the respondents' claims that their pledges be surrendered.

44 It is trite law that a pledge is a limited real right of security in a movable asset, constituted by delivery of the asset to the creditor to secure fulfilment of a principal obligation agreed to between the creditor and the debtor or a third person. However, the identification of incorporeal rights embodied in negotiable instruments with the paper on which they are recorded, means that pledge of such instruments results in these rights forming part of the security of the pledge, in contrast with rights flowing from pledge of title deeds, mortgage bonds or written contracts in general. Cf CG van der Merwe & A Pope “Real security” in F du Bois (ed) *Wille's Principles of South African Law* (Johannesburg, 2007) 630-665 at 643ff, esp 645; FR Malan “Share certificates, money and negotiability” (1977) 94 *SALJ* 245-256 at 245; *Venter v Crooks* 1912 CPD 41; *Lief v Dettmann* 1964 (2) SA 252 (A). It is accepted on judicial authority that movable incorporeal assets may form the subject matter of a pledge: see CG van der Merwe *Sakereg* (Durban, 1989) at 673ff; G Lubbe (rev TJ Scott) “Mortgage and pledge” in *The Law of South Africa* first re-issue vol 17 (Durban, 2008) at 369; JC de Wet & A van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (Durban, 1993) at 415-424; *Robb v Standard Bank Ltd* 1979 (2) SA 420 (R); *North Coast Plastic & Packaging Industry (Pty) Ltd v Haynes Industries (Pty) Ltd* 1981 (1) SA 913 (A) at 917.

45 Van Zyl (n 19) at 352.

## Abstract

In C 8 26(27) 1 Emperor Gordianus decreed that the pledgee's retention right over the pledged thing applied to both the secured and unsecured debts of the pledgor. This retention right was enforced by the *exceptio doli*. If the pledgor should claim for return of the pledge after payment of the secured debt, but other unsecured debts were outstanding, the pledgee could raise the *exceptio doli* until the latter debts had been paid. Voet shows that this rule was received in Roman-Dutch law. It was also adopted in the law of the Cape Colony and in the Transvaal. However, in the *Bank of Lisbon* case, no mention was made of the Codex text, Voet, the Cape law nor *Smith v Farrelly's Trustee*; and it is submitted that abrogation of the *exceptio doli* effectively abolished the pledgee's retention right.