

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

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### SUMMARY

The unilateral determination of price has been a controversial issue for an extended period of time. During the 1990s the Supreme Court of Appeal asked if the rule should still form part of South African law. Specifically, the court raised a few questions in respect of the rule and commented that the rule as applied in South African law is illogical. The court also remarked that public policy, *bona fides* and contractual equity might also be employed when considering such issues. Despite the criticisms of the Supreme Court of Appeal, it would seem that the rule still forms part of our law. This article investigates whether or not the rule should be retained in the South African common law. The answer will depend on two separate questions: Is the rule a manifestation of the requirement of certainty of price? If not, does public policy require that the rule be retained? The article shows that the rule prohibiting the unilateral determination of price should not be seen as a manifestation of the requirement of certainty of price. This is because there are various circumstances where the unilateral determination of the price results in certainty of price or can be applied in such a way as to arrive at certainty of price. Most of these arguments require that the discretion to determine the price should not be unfettered and should be subject to some objective standard. This can be done expressly or tacitly in the contract, or an objective standard (in the form of reasonableness) will be implied by law. Thereafter, the article considers various public policy considerations that could be used to determine if a discretion to

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determine the price should be enforced. The article argues that public policy may dictate that such a discretion should be valid and enforceable provided that it is not unfettered and subject to an external objective standard or reasonableness. However, in cases where an unfair bargaining position is present, public policy may dictate otherwise. The article accepts that whether a term providing for the unilateral determination of the price would be contrary to public policy or not will depend on the facts of the case. However, it is submitted that, at a minimum, the considerations and factors discussed in the article should be taken into account when making such an assessment.

**KEYWORDS:** Certainty of price; Contracts of sale; Contractual autonomy; Contractual discretions; Public policy; Unequal bargaining relationship; Unilateral price determination