

# A consumer's fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act

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## OPSOMMING

### **Die verbruiker se fundamentele reg op gelykheid ingevolge die Wet op Verbruikersbeskerming en die rol van die Wet op Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie**

Die doel van hierdie bydrae is om die bepalings van Deel A van die Wet op Verbruikersbeskerming 68 van 2008 (WVB) te ondersoek. Deel A reguleer die verbruiker se fundamentele verbruikersreg van gelykheid in die verbruikersmark in Suid-Afrika. Die bepalings (artikels 8–10) in Deel A is uniek in die sin dat die toets vir onbillike diskriminasie in die verbruikersmark gebaseer is op een of meer van die gronde van onbillike diskriminasie soos in óf artikel 9 van die Grondwet óf Hoofstuk 2 van die Wet op Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie 4 van 2000 (Wet op Gelykheid) vervat. Daarbenewens word eksklusiewe jurisdiksie aan die gelykheidshof toegeken oor hierdie deel van die WVB, 'n afwyking van die roetes van regstelling wat normaalweg vir verbruikers ingevolge die WVB beskikbaar is. Artikel 8 wat 'n lys van verskeie vorme van onregverdige diskriminasie verskaf, word ontleed en bespreek asook artikel 9 ingevolge waarvan sekere differensiasie deur verskaffers in die verskaffing van goedere of dienste geregverdig kan word. Artikel 10 bied 'n vermoede van onregverdige diskriminasie asook 'n bepaalde bewyslas wat krities ondersoek word.

## 1 INTRODUCTION

The purpose of this contribution is to examine the provisions of Part A (sections 8 to 10) of the Consumer Protection Act<sup>1</sup> that regulate the fundamental consumer right to equality in the consumer market. It is the first time in the history of consumer law in South Africa that the right to equality entrenched in section 9 of the Bill of Rights in the Constitution is now also a specific fundamental consumer right available to consumers in terms of the CPA. The provisions of Part A of the

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1 68 of 2008 ("the CPA").

CPA is unique in the sense that the test for unfair discrimination in the consumer market is based on one or more of the grounds of unfairness in terms of either section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>2</sup> In addition, the equality court is given exclusive jurisdiction over this Part of the CPA, a divergence from the routes of redress available to consumers in terms of section 69 of the CPA or the civil courts in the case of a contravention of Part G of the CPA (dealing with the consumer's right to fair, just and reasonable terms and conditions). Section 8 which lists various forms of unfair discrimination is analysed and discussed as well as section 9 in terms of which certain differentiation by suppliers in the supply of goods or services (and the marketing thereof) may be justified with particular reference to minors and persons of at least 60 years of age. The presumption of unfair discrimination in section 10 is also investigated. Pertinent issues resulting from the analyses are discussed, including situations of price discrimination, students and "elderly persons" (persons of at least 60 years of age) as consumers, the role of the equality court as well as situations where not only the consumer's right to equality but also other fundamental consumer rights may be infringed upon simultaneously. The contribution is summarised by way of a conclusion and recommendations.

## **2 THE CONSUMER'S FUNDAMENTAL RIGHT OF EQUALITY IN THE CONSUMER MARKET (CHAPTER 2 PART A CPA)**

Section 8 of the CPA governs protection against discriminatory marketing. Section 8(1)(a)–(g) provides that a supplier of goods or services must not unfairly exclude any person or category of persons from accessing any goods or services offered by the supplier; grant any person or category of persons exclusive access to any goods or services offered by the supplier; assign priority of supply of any goods or services offered by the supplier to any person or category of persons; supply a different quality of goods or services to any person or category of persons; and charge different prices for any goods or services to any persons or category of persons. It further provides that a supplier may not unfairly target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier. This may not be unfairly done on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Equality Act.

Section 8(2)(a)–(j) provides that, subject to section 9 of the CPA,<sup>3</sup> a supplier must not directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination on one or more grounds set out in section 9 of the Constitution, or one or more grounds set out in Chapter 2 of the Equality Act when *inter alia* assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement; deciding whether to enter into a transaction or agreement; determining any aspect of the cost of a transaction or agreement or interacting with the consumer in the supplier's place of business including the demonstration of goods or negotiating

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<sup>2</sup> 4 of 2000 ("the Equality Act").

<sup>3</sup> S 9 CPA: Reasonable grounds for differential treatment in specific circumstances.

terms of a transaction or agreement. A supplier may also not treat a person differently (directly or indirectly) in selecting, preparing, packaging or delivering any goods for or to the consumer; providing any services to the consumer; proposing terms; assessing or requiring compliance; exercising any right of the supplier under a transaction or agreement; determining whether to continue, enforce or seek judgment in respect of a transaction or agreement; or determining whether to report, or reporting, any personal information of such a person.<sup>4</sup>

The provisions of section 8(1) and (2) also apply in respect of a consumer which is an association or juristic person and serve to prevent unfair discrimination against that association or juristic person based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person.<sup>5</sup>

Nothing in section 8 is intended to limit the authority of a court to consider any conduct between a supplier and a consumer that is not contemplated in section 8; or find that any such conduct constitutes unfair discrimination within the meaning of the Constitution or the Equality Act.<sup>6</sup>

## **2 1 Section 9: Reasonable grounds for differential treatment in specific circumstances**

Section 9 of the CPA provides reasonable grounds for differential treatment of consumers in specific circumstances. On a literal reading of section 9, it is not a contravention of section 8 for a supplier to refuse to supply any specific goods or services or access thereto, to a minor or to require the consent of a parent, guardian or other responsible adult before supplying or providing access to any particular goods or services to an unemancipated minor in accordance with any public regulation or as a reasonable precaution to protect the health, welfare or safety of a minor.<sup>7</sup> It is also not a contravention of section 8 if the supplier refuses on reasonable grounds, to enter into an agreement with a minor for the supply of any goods or services, or to continue or renew such an agreement unless the supplier has reason to believe that the minor is emancipated.<sup>8</sup>

It further does not amount to discriminatory marketing if a supplier reasonably designates any facility or service, permanently or from time to time, for the exclusive use of minors generally or minors who are above or below a specified age or adults who are at least 60 years old or if goods or services are advertised, or it is agreed to supply such goods or services or they are supplied at a discounted price solely on the basis that the consumer is a minor who has not yet attained a specified age or is an adult who has attained a specific age of at least 60 years.<sup>9</sup>

Section 9(2) provides that where a supplier reasonably provides and designates separate but substantially equivalent facilities for the exclusive use of persons of each gender or offers to supply or provide access to a facility exclusively to persons of one gender, it also does not amount to a contravention of section 8.

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4 S 8(2)(a)–(j) CPA.

5 S 8(3) CPA.

6 S 8(4) CPA.

7 S 9(1)(a) CPA.

8 S 9(1)(b) CPA.

9 S 9(1)(c) and (d) CPA.

Finally, it is not a contravention of section 8 for a supplier to market any goods or services in a manner that implies or expresses a preference for a particular group of consumers who are distinguishable from the general population on the basis of a ground of discrimination set out in section 9(3) of the Constitution, if the particular goods or services are reasonably intended or designed to satisfy any specific needs or interests that are common to or uniquely characteristic of that particular group of consumers.<sup>10</sup>

The defences set out in section 9 must all be read subject to sections 5(2), 6 and 14 of the Equality Act as discussed below.

## **2 2 Section 10: Equality court jurisdiction of Part A, CPA**

In respect of an alleged contravention of Part A, an accredited consumer protection group, or any person contemplated in section 20(1) of the Equality Act, may either institute proceedings before an equality court in terms of Chapter 4 of the Equality Act; or file a complaint with the National Consumer Commission (NCC), which must refer the complaint to the equality court, if the complaint appears to be valid.<sup>11</sup>

Section 10(2) provides that in any proceedings contemplated in Part A of Chapter 2 of the CPA, there is a presumption that any differential treatment contemplated in section 8 is unfair discrimination, unless it is established that the discrimination is fair and a court may draw an inference that a supplier has discriminated unfairly if:

- (a) the supplier has done anything contemplated in section 8 in respect of a consumer in a manner that constituted differential treatment compared to that accorded to another consumer;
- (b) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and
- (c) the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.

## **3 RELEVANT PROVISIONS OF THE CONSTITUTION AND THE EQUALITY ACT REFERRED TO IN PART A CPA**

### **3 1 Section 9 of the Constitution: Constitutional right to equality**

Section 9 of the Constitution forms part of the Bill of Rights and governs the constitutional right to equality. Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>12</sup> Section 9(3) sets out the grounds for unfair discrimination and provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age,

<sup>10</sup> S 9(3) CPA.

<sup>11</sup> S 10(1) CPA.

<sup>12</sup> S 9(2) Constitution.

disability, religion, conscience, belief, culture, language and birth. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of section 9(3) and national legislation must be enacted to prevent or prohibit unfair discrimination.<sup>13</sup> Section 9(5) provides that discrimination on one or more of the grounds listed in section 9(3) is unfair unless it is established that the discrimination is fair.<sup>14</sup>

### 3 2 Provisions of the Equality Act

Section 5(2) of the Equality Act provides that “if any conflict relating to a matter dealt with in [the Equality Act] arises between [the Equality Act] and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending [the Equality Act]”, the Equality Act prevails. Section 6 of the Equality Act prohibits unfair discrimination and section 14 sets out a general test for fairness/unfairness, to be applied in all contexts where the Equality Act applies. Section 1 of the Equality Act contains a general definition of “discrimination” to be applied in all contexts where the Equality Act applies.

Chapter 2 of the Equality Act regulates the prevention, prohibition and elimination of unfair discrimination, hate speech and harassment.<sup>15</sup> Section 6 sets out the prevention and general prohibition of unfair discrimination. Sections 7 to 12 govern the prohibition of unfair discrimination on grounds of race, gender, disability, hate speech, harassment and dissemination and publication of unfair discriminatory information that unfairly discriminates. Section 20(1) of the Equality Act regulates who may institute proceedings in terms of this Act.<sup>16</sup>

## 4 ANALYSIS OF THE CONSUMER’S FUNDAMENTAL RIGHT TO EQUALITY IN TERMS OF THE CPA

### 4 1 Introduction

Jacobs *et al*<sup>17</sup> state with merit that section 8 of the CPA is important in South Africa’s new constitutional dispensation, in which the state is committed to the goal of achieving equality. The writers appropriately refer to De Waal and Currie<sup>18</sup> who explain that the idea of equality is a difficult and deeply controversial social ideal which has at its most basic and abstract the formal idea of equality in that people who are similarly situated in relevant ways should be treated similarly.

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13 S 9(4) Constitution.

14 *Ibid.*

15 Ss 6–12 Equality Act.

16 S 20(1) includes any person acting in their own interest; any person acting on behalf of another person who cannot act in their own name; any person acting as a member of, or in the interests of, a group or class of persons; any person acting in the public interest; any association acting in the interests of its members; and the South African Human Rights Commission, or the Commission for Gender Equality.

17 Jacobs, Stoop and Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 (13) *PELJ* 302 318 (hereafter “Jacobs *et al*”).

18 *Bill of Rights handbook* (2005) 230.

The Schedule to the Equality Act contains an illustrative list of unfair practices in certain sectors. Van Eeden<sup>19</sup> correctly argues that Item 9 to the Schedule is of particular importance in the case of consumer protection. Paragraph 9 deals with the provision of goods, services and facilities. Unfairly refusing or failing to provide the goods or services or to make the facilities available to any person or group of persons on one or more of the prohibited grounds in terms of Chapter 2 of the Equality Act may amount to an unfair practice.<sup>20</sup> Section 9(b) and (c) provides that imposing terms, conditions or practices that perpetuate the consequences of past unfair discrimination or an exclusion regarding access to financial resources or unfairly limiting access to contractual opportunities for supplying goods or services may amount to unfair practices. It should be noted that the Schedule to the Equality Act is also subject to the general prohibition of unfair discrimination contained in section 6, and to the general test of fair/unfair discrimination contained in section 14. This much is clear from the wording of section 29(1) of the Equality Act.

The writer further argues that there are two different types of discriminatory conduct involving consumers and suppliers contemplated in the CPA.<sup>21</sup> The first type of discriminatory conduct is governed by Part A (sections 8 and 9 in particular) and deals with the consumer's fundamental consumer right to equality in the consumer market. Any conduct by suppliers in this instance must be discriminatory on the grounds contemplated in section 9 of the Constitution or Chapter 2 of Equality Act. According to Van Eeden the elements of discrimination on these grounds (within the context of the consumer market) are spelled out in greater detail in sections 8 and 9 of the CPA.<sup>22</sup>

The second type of discriminatory conduct refers to conduct on grounds of discrimination other than the grounds established by section 9 of the Constitution, Chapter 2 of Equality Act or sections 8 and 9 of the CPA.<sup>23</sup> Van Eeden discusses section 68 of the CPA and the discriminatory conduct of a supplier in response to a consumer asserting or seeking to uphold any rights in terms of the CPA, or in response to an agreement or provision of an agreement having been declared void or severed in terms of the CPA.<sup>24</sup> The writer refers to the conduct of a supplier in terms of section 68 as "prohibited retaliatory discrimination".<sup>25</sup> Such conduct, according to the writer, consequently contemplates prior conduct by a consumer in relation to the CPA, or a prior decision by a court or the National Consumer Tribunal (NCT) acting in terms of the Act.<sup>26</sup> Section 68 is intended to prevent suppliers from victimising consumers for asserting their rights under the Act.<sup>27</sup> Contrary to the first type of discriminatory conduct as explained in the previous paragraph, the equality court does not have jurisdiction

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19 *Consumer protection law in South Africa* (2013) 199–200 (hereafter "Van Eeden (2013)").

20 Para 9(a) Schedule to Equality Act.

21 Van Eeden (2013) 200.

22 *Ibid.*

23 *Idem* 200 209–210.

24 *Idem* 200.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

nor does section 68 require such conduct to be unfair.<sup>28</sup> There are also no grounds of justification for such conduct.<sup>29</sup> The focus of this discussion however, will be on Part A of the CPA in particular and further discussion of section 68 falls outside the scope of this contribution.

According to Van Eeden a further distinction should be made between the conduct described in terms of section 8(1) and that described in terms of section 8(2) of the CPA. It is further argued that section 8(1) refers to certain actions that may not be carried out *unfairly*<sup>30</sup> on the basis of one or more grounds of unfair discrimination while the conduct contemplated in section 8(2) comprises of differentiating between persons in a *manner*<sup>31</sup> that amounts to unfair discrimination.<sup>32</sup> This is a somewhat forced interpretation. Section 8(1) and (2) of the CPA both prohibit *conduct* that is *unfair*. Section 8(1) commences with the sentence that “a supplier of goods or services must not *unfairly*...” and then proceeds to list particular forms of *conduct* in section 8(1)(a) to (g). Similarly, section 8(2) prohibits *unfair* discrimination and then lists various forms of *conduct* in section 8(2)(a) to (j). This interpretation accords with the general prohibition of unfair discrimination in section 6 of the Equality Act, read with the definition of “discrimination” in section 1 and the general test for unfairness in section 14 in the Equality Act. The definition of “discrimination” in section 1 of the Equality Act requires conduct in the form of an act or omission that must have directly or indirectly withheld a benefit or imposed a burden on the complainant, based on one or more prohibited grounds. All of the scenarios listed in section 8(1)(a) to (g) meet the definition of “discrimination” in section 1 of the Equality Act. The scenarios listed in section 8(2)(a) to (j) do not necessarily amount to a benefit being withheld or a burden being imposed, hence the general requirement contained in section 8(2) that these scenarios must amount to unfair *discrimination*. Because the equality courts have jurisdiction to apply sections 8 and 9 of the CPA, the definition of discrimination as set out in section 1 of the Equality Act should apply in these circumstances. Ideally the CPA should have included the same definition of “discrimination” as contained in the Equality Act, and sections 8 and 9 of the CPA should rather have appeared as a schedule to the CPA, as examples of scenarios that could amount to unfair discrimination, and examples of what could amount to defences to a claim of unfair discrimination.

The Equality Act does not contain a list of explicit exclusions, similar to those found in section 9 of the CPA. In this sense, there is a conflict between section 9 of the CPA and sections 6 and 14 of the Equality Act. The general prohibition of unfair discrimination as set out in sections 6 and 14 of the Equality Act should therefore be held to apply. At best, section 9 of the CPA can be read as a guide to the equality courts that the situations listed in this section will in most instances probably amount to fair discrimination, but in all cases the general defence in section 14 of the Equality Act will be the overriding consideration.

The protection given in terms of section 8 is broadened further by providing that the section also applies in respect of a consumer that is an association or juristic person, to prohibit unfair discrimination against that association or

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28 *Ibid.*

29 *Ibid.*

30 Own emphasis.

31 Own emphasis.

32 Van Eeden (2013) 200.

juristic person based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person.<sup>33</sup> This provision is broadened by the definition given to juristic persons in terms of section 1 of the CPA which includes partnerships, trusts and body corporates.<sup>34</sup>

## 4.2 Prohibited discriminatory marketing

Van Eeden argues that the word “accessing” mentioned in section 8(1)(a) carries a connotation of “pursuing access” or of “seeking gain”.<sup>35</sup> The writer is correct in stating that excluding persons in a promotional activity inevitably excludes them from accessing the goods or services as well.<sup>36</sup>

Where persons are exclusively granted access to goods or services, “grant” can be interpreted to include “granting or bestowing of a right or privilege, or in a more passive sense of ‘allowing’ or ‘inviting’”.<sup>37</sup>

Section 8(1)(c) provides that unfairly assigning priority of supply can also amount to discriminatory conduct. Van Eeden states that this suggests an express or *de facto* assignation where, for example, certain consumers or persons are unfairly ranked before others in the supply of the goods or services.<sup>38</sup>

The unfair supply of different quality goods or services is, according to Van Eeden, factually determinable with reference to the quality of the goods or services themselves.<sup>39</sup> The writer argues that “different quality” should also include inferior quality.<sup>40</sup> It is submitted however that such a statement should be made with caution. This is due to the fact that the consumer has a fundamental right in terms of the CPA in particular reference to the quality of goods or services. Part H of the CPA governs the consumer’s fundamental right to good quality, fair value and safety. Section 54 deals with the consumer’s right to demand quality service whereas sections 55 and 56 deal with the consumer’s right to safe, good quality goods including the implied warranty of quality. It is argued that a different quality does not necessarily imply an inferior quality and that the “difference in quality” referred to in section 8(1)(d) should not be construed to include the standards and requirements contemplated in section 55 pertaining to the quality of goods. Upon analysis of section 8(1)(d), Van Eeden argues that it must be presumed that the legislature deliberately did not specify whether it is permissible to supply goods or services of different qualities when different prices are charged.<sup>41</sup>

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33 S 8(3) CPA.

34 See *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town* 2009 1 SA 644 (Eqc) 665 where it was confirmed that a juristic person had the right to a reputation, good name and fame, the right to privacy and the right to identity. It was therefore axiomatic that a juristic person, like a natural person, could also enjoy the right to equality. It is however doubtful whether a juristic person would be able to (in terms of the CPA) claim unfair discrimination based on, for example, “age”.

35 Van Eeden (2013) 203.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Idem* 204.

41 *Ibid.*

With reference to section 8(1)(f) and (g),<sup>42</sup> and in the case of lease agreements where the Rental Housing Act<sup>43</sup> is also applicable, section 4 of the Rental Housing Act should be taken into account.<sup>44</sup> The wording of section 4 is very similar to the provisions contained in section 9 of the Constitution. A landlord is prohibited from unfairly discriminating against tenants or potential tenants in the advertising, negotiating or during the term of the lease on one or more of the same grounds as provided for in terms of section 9 of the Constitution. Should a landlord fail to comply with section 4 of the Rental Housing Act, he will be guilty of an offence in terms of section 16(a) of the Rental Housing Act.<sup>45</sup>

In essence, section 8(2) governs the prohibition of discriminatory conduct of suppliers in assessing the ability of the consumer to pay the costs or meet the obligations of the proposed transaction or agreement. It also deals with the supplier unfairly entering and exercising terms and provisions within the transaction or agreement as well as enforcing such a transaction or agreement and the reporting of the consumer's personal information.

Van Eeden argues that just as it is important for a consumer to have an indication of a supplier's liability to render its promised performance, the ability of the consumer to pay the price, or to otherwise meet the obligations of a proposed transaction or agreement, is important to the supplier.<sup>46</sup> Assessing the financial position of the consumer prior to the conclusion of the agreement (by for example requiring financial statements, employment history or previous default judgements from the consumer) could be necessary for the supplier to do, but the supplier should tread with caution.<sup>47</sup> The writer explains that the reason for caution is that the consumer's ability to pay the costs and meet the proposed obligations of the transaction or agreement covers virtually the entire personal aspect of the consumer's life.<sup>48</sup> Any "assessment" done by a supplier should therefore be done in an all-inclusive manner and not amount to unfair differentiation on one or more of the grounds of unfair discrimination.<sup>49</sup>

Section 8(2)(b) provides that a supplier must not unfairly discriminate against a consumer in deciding whether to enter into a transaction or agreement or offer to enter into a transaction or agreement. Van Eeden warns that the *process*<sup>50</sup> of deciding whether or not to enter into a transaction commences at least as soon as the particular consumer or segment of consumers is identified.<sup>51</sup> On the other hand, the writer argues that it is unavoidable that in the process of obtaining and capturing personal data of a consumer, one or more of the categories of differentiation listed in section 9 of the Constitution or Chapter 2 of the Equality

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42 Where a supplier is guilty of discriminatory conduct in the unfair exclusion or unfair targeting of particular communities, districts, populations or market segments.

43 50 of 1999.

44 Van Eeden (2013) 204.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Idem* 205.

49 *Ibid.* See also s 8(2)(j) CPA.

50 Own emphasis.

51 Van Eeden (2013) 205.

Act will be reflected.<sup>52</sup> This does not however necessarily amount to unfair discrimination when one takes into account the *Harksen* test and section 14 of the Equality Act as explained below.<sup>53</sup>

Though the possible grounds for discriminatory conduct in terms of section 8 are quite extensive they are, in terms of section 8(4), not exhaustive. The provisions of section 8 do not limit the court's authority to consider any conduct between a supplier and consumer discriminatory within the meaning of section 9 of the Constitution or the relevant provisions in terms of the Equality Act.

In terms of the definition of "prohibited grounds" in section 1 of the Equality Act, "poverty" or "socio-economic status" will in all likelihood amount to a prohibited ground, as discrimination based on poverty or socio-economic status may be seen to cause or perpetuate systemic disadvantage, and undermines human dignity.<sup>54</sup> Inability to pay obviously relates very closely to a consumer's socio-economic status. If a particular consumer is denied the opportunity to enter into a transaction, based on that consumer's inability to pay, that conduct will in all probability amount to "discrimination" based on socio-economic status in terms of section 6 of the Equality Act, read with the definitions of "discrimination" and "prohibited grounds" in section 1 of the Equality Act. The question then arises in which circumstances this kind of discrimination will amount to unfair discrimination.<sup>55</sup>

## **5 PROHIBITED CONDUCT AND EQUALITY: THE ROLE OF COURTS, CONSUMER COURTS AND EQUALITY COURTS RELATING TO PART A**

### **5 1 Jurisdiction of equality court relating to Part A**

A "court" in terms of section 1 of the CPA does not include a consumer court whereas a "consumer court" is defined as a body of that name, or a consumer tribunal that has been established in terms of applicable provincial consumer legislation.<sup>56</sup> An "equality court" in terms of the CPA has the meaning set out in the Equality Act.<sup>57</sup> In terms of the Equality Act<sup>58</sup> every High Court is an equality court for the area of its jurisdiction and the Minister of Justice must designate one or more magistrates' courts in an administrative region as equality courts for such a region. Only a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an equality court may sit in that capacity.<sup>59</sup> The equality court may also sit with assessors.<sup>60</sup> It holds an inquiry into alleged unfair discrimination, hate speech or harassment and its order has the effect of a civil judgment and it can make a wide range of orders.<sup>61</sup>

<sup>52</sup> *Ibid.*

<sup>53</sup> See discussion of "price discrimination" and s 8(1)(e) CPA below.

<sup>54</sup> See para (b) of the definition of prohibited grounds in s 1 of the Equality Act. See also s 34 of the Equality Act.

<sup>55</sup> See also para 5 5 "Onus of proof" below.

<sup>56</sup> S 1 CPA.

<sup>57</sup> *Ibid.*

<sup>58</sup> S 16 read together with s 31 Equality Act.

<sup>59</sup> S 16 Equality Act.

<sup>60</sup> S 22 Equality Act.

<sup>61</sup> S 21 Equality Act.

There should be no doubt as to the reason why the legislature gave the equality court jurisdiction when it comes to redress over this fundamental right. The equality court is, after all, best suited to interpret any possible breach of the consumer's right to equality in the consumer market, especially taking into account the interpretation of the Constitution and the Equality Act, the latter being the piece of legislation regulating the jurisdiction, *locus standi* requirements and processes of the equality courts.

Part A of the CPA confirms the powers of the equality court as it provides that the court may consider any conduct of a supplier towards a consumer, even if it is not contemplated in section 8, as constituting unfair discrimination within the meaning of the Constitution or Equality Act.<sup>62</sup> When it comes to the justification of differential treatment the court may assess the reasonableness of *any*<sup>63</sup> conduct to the extent contemplated in section 9 of the CPA and determine that such conduct is not justified in terms of section 9 and constitutes unfair discrimination.<sup>64</sup> Alternatively the court may determine any conduct contemplated in section 8 as fair and justified in the circumstances of that particular transaction or the marketing of goods or services as the case may be. Sections 8(4) and 9(4) of the CPA in effect make sections 8(1), 8(2), 9(1), 9(2) and 9(3) of the CPA superfluous. In terms of section 5(2) of the Equality Act, these sections must in any event be read subject to the general prohibition against unfair discrimination (section 6 of the Equality Act) and the general test for fair/unfair discrimination (section 14 of the Equality Act).

Perhaps it is also relevant, at this stage, to mention the provisions in terms of section 21(2) of the Equality Act, which provides that, after holding an inquiry, the equality court may make an appropriate order in the circumstances, including *inter alia* an interim order; a declaratory order; making a settlement between the parties an order of court; order payment of damages of any proven financial loss;<sup>65</sup> order that an unconditional apology be made; and an appropriate order of costs against any party to the proceedings.

## 5.2 Supplier guilty of prohibited conduct in terms of Part A

It is clear from the wording of section 8 that a supplier may not unfairly discriminate against a consumer by way of his marketing practices or directly or indirectly treat any person differently in a manner that amounts to unfair discrimination. Should a supplier not adhere to the provisions of section 8, he would be acting in contravention of the Act and be guilty of prohibited conduct. "Prohibited conduct" is defined as an act or omission in contravention of the CPA.<sup>66</sup> Van Eeden<sup>67</sup> explains that the prohibited conduct that is embodied in the consumer's fundamental rights is subject to investigation and evaluation by the NCC,<sup>68</sup> to referral by the NCC or National Consumer Tribunal (NCT) or a

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62 S 8(4) CPA.

63 Own emphasis.

64 S 9(4)(a) CPA.

65 S 21(2) Equality Act: This includes future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or the harassment in question.

66 S 1 CPA.

67 Van Eeden "Consumer protection" 5(1) *LAWSA* paras 242-250.

68 Ss 99(d) and 72(d) CPA.

consumer court.<sup>69</sup> Such prohibited conduct is also open to consideration<sup>70</sup> and prohibition<sup>71</sup> or the levying of an administrative fine by the NCT<sup>72</sup> whereupon contravention of any such prohibition constitutes a criminal offence.<sup>73</sup> It can further be argued that in terms of sections 8 and 9 of the CPA specified conduct on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of Equality Act constitutes “prohibited conduct”.<sup>74</sup>

It is submitted that a complainant should follow the course of action open to him or her in terms of the CPA in relation to prohibited conduct and simultaneously lodge a complaint of unfair discrimination at the equality court, to ensure that, should the matter in the equality court not succeed, the complainant may still obtain relief based on the prohibited conduct of the supplier and the matter may be taken further by either the NCC or the NCT in terms of the CPA. At the very least the supplier may incur an administrative fine in terms of section 112.

An administrative fine imposed in terms of section 112 may not exceed the greater of either 10 per cent of the respondent’s (supplier’s) annual turnover during the preceding financial year; or R1 million.<sup>75</sup> When determining an appropriate administrative fine, the NCT must consider factors such as the nature, duration, gravity and extent of the contravention; any loss or damage suffered as a result of the contravention; and the behaviour of the respondent.<sup>76</sup> An administrative fine payable in terms of section 112 must be paid into the National Revenue Fund. A similar result (ie payment of an amount of money into the National Revenue Fund) may follow if the equality court hears the matter. In terms of section 21(2)(e) of the Equality Act, the equality court’s presiding officer may grant an order for the payment of damages in the form of an award to an appropriate body or organisation. The equality court order will not be a fine, as it is a civil court that only grants civil remedies, and will not be subject to the limitation set out in section 112 of the CPA.

### **5 3 Section 51: Prohibited transactions, agreements, terms or conditions; the role of the civil courts and Part A**

A prohibited transaction, agreement, term or condition<sup>77</sup> should be distinguished from “prohibited conduct” as discussed directly above. Prohibited transactions form part of the consumer’s right to fair, just and reasonable terms and conditions governed by Part G of the CPA. Section 48 (which also forms part of Part G) regulates unfair, unjust and unreasonable terms and conditions and should be read together with regulation 44 to the Act which provides for an extensive list of contract terms which are presumed to be unfair. The list in

<sup>69</sup> S 73(1)(c)(ii) and (2).

<sup>70</sup> S 75(4).

<sup>71</sup> S 150 NCA as amended by item 9 of Sch 1 of the Act.

<sup>72</sup> S 151 NCA as amended by item 10(a) of Sch 1 of the Act.

<sup>73</sup> S 109(1), read with s 111(1)(b) CPA.

<sup>74</sup> *Ibid.*

<sup>75</sup> S 112(2) CPA.

<sup>76</sup> S 112(3) CPA.

<sup>77</sup> For purposes of convenience a prohibited transaction, agreement, terms and condition as provided for in terms of s 51 of the CPA will be referred to as a “prohibited transaction”.

regulation 44 is however only applicable where the consumer is a natural person.<sup>78</sup> Writers such as Naudé argue that unfair terms and conditions as set out in section 48 can also be referred to as a list of grey terms and the prohibited transactions provided for in terms of section 51 as black-listed terms.<sup>79</sup>

The civil court has primary jurisdiction over this Part of the CPA and this has also been confirmed by the NCT itself in *AH Oosthuizen v National Consumer Commission*.<sup>80</sup> In the case of prohibited transactions, the court may declare such a transaction void.<sup>81</sup> Furthermore, the court has specific powers in terms of section 52 to ensure fair and just conduct, terms and conditions which include a long list of considerations in section 52(2) that the court may take into account to determine a contravention of Part G. Section 52 also provides a wide range of powers to the court in making an appropriate order.<sup>82</sup>

The question may be asked what possible relevance this might have to instances of unfair discrimination in the consumer market and the particular route of redress provided for in Part A of the CPA, namely, the equality court? We would argue that should unfair discrimination in terms of section 8 also amount to prohibited conduct in terms of section 51, more than one fundamental right of the consumer has been violated. It is therefore open to a complainant to lodge a complaint in the equality court based on section 8 of the CPA read with section 6 of the Equality Act, as well as to follow the course of action set out in section 51 of the CPA. The legislature in effect created two causes of action to be enforced in two separate forums with two outcomes and two possible remedies.<sup>83</sup>

A prohibited transaction, term or condition (in terms of section 51) which may also amount to unfair discrimination in terms of section 8 would be where a supplier, for example, charges a different (increased) price for goods to a person based on his religion<sup>84</sup> and then includes a term in the transaction excluding its (the supplier's) liability in terms of section 8 or includes a term in which the consumer waives his right to institute action against the supplier in such an instance. Charging an increased price to a consumer based on his religion will most certainly amount to unfair discrimination in terms of the Constitution or Chapter 2 of the Equality Act. This is furthermore a transaction which "directly purports to waive or deprive a consumer of a right in terms of the CPA" (the right to equality in the consumer market in particular) in terms of section 51(1)(b)(i) and also a transaction which has the effect of defeating the purposes of the CPA in terms of section 51(1)(a)(i) inevitably also amounting to a prohibited transaction. Many more examples are possible and will most likely crystalize in practice. It is submitted that in such instances the consumer should have proper access to justice and relief and therefore will be able to lodge simultaneous claims in both the equality court (based on the unfair discrimination of the supplier in terms

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78 Reg 44(1) CPA.

79 Naudé "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *SALJ* 505 511 520 521 (hereafter "Naudé (2009)").

80 NCT/7652/2013/78(1)(b)&(CPA). See also Naudé (2009) 525 536.

81 S 51(3) CPA.

82 S 52(3) and (4) CPA.

83 Cf *Minister of Environmental Affairs and Tourism v George* 2007 3 SA 62 (SCA) para 17.

84 S 8(1)(e) CPA read together with s 9 of the Constitution or Ch 2 of the Equality Act.

of section 8) as well as the civil court (based on the prohibited transaction induced by the supplier in terms of section 51).

#### **5 4 *Locus standi* and realisation of rights: Section 20(1) of the Equality Act, not section 4 of the CPA**

The wording of section 4 of the CPA which deals with the realisation of consumer rights and *locus standi* is an almost *verbatim* repetition of the provisions in section 20(1) of the Equality Act, save for one difference. In terms of section 4 of the CPA a person acting in public interest must obtain leave from the NCT or a court (a court in this instance is assumed to include a civil court with jurisdiction or the equality court) before approaching a court, the NCC or NCT for redress. No such leave is required for a person acting in public interest in terms of section 20(1) of the Equality Act and it is submitted that in the case of a realisation of the rights contained in Part A of the CPA, leave from the NCT or court is not necessary. This is confirmed by the specific inclusion in terms of section 10(1) of the CPA of an accredited consumer group to institute proceedings, keeping in mind that an “accredited consumer group” means a consumer protection group that has been accredited by the NCC in terms of section 78 of the CPA.<sup>85</sup>

#### **5 5 Onus of proof**

##### *5 5 1 Difference in approaches to burden of proof: Constitution versus Equality Act*

There is a difference in approach between the Constitution and the Equality Act pertaining to the burden of proof.<sup>86</sup>

From *Walker*<sup>87</sup> and *Harksen*<sup>88</sup> a certain approach has become evident regarding the burden of proof when dealing with a dispute in terms of section 9 of the Constitution. In terms of section 9 litigation, the applicant needs to prove differentiation and needs to prove that the differentiation occurred on one of the listed grounds contained in section 9(3). A presumption of unfair discrimination arises if the applicant succeeds. The onus of showing that the discrimination is fair rests on the respondent.<sup>89</sup> Discrimination can be difficult to prove, not only because it may raise issues requiring an assessment of sociological and statistical information, but also because much of this information is out of the reach of ordinary people.<sup>90</sup> It is most often in the hands of the respondent. The division of the enquiry into stages is practically valuable because it limits the burden of disadvantaged complainants and ensures there is a proper focus on the contextual enquiry when fairness is considered.<sup>91</sup> It also preserves a conceptual distinction between what is discriminatory, but legitimate, and what is illegitimate and

<sup>85</sup> S 1 CPA.

<sup>86</sup> See also Kok “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Why the controversy?” 2001 *TSAR* 294.

<sup>87</sup> *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

<sup>88</sup> *Harksen v Lane* 1998 1 SA 300 (CC).

<sup>89</sup> S 9(5) Constitution.

<sup>90</sup> Cheadle *et al South African constitutional law: The Bill of Rights* (2014) para 4.8.3.5.

<sup>91</sup> *Ibid.*

unconstitutional.<sup>92</sup> The nature of the enquiry into unfairness may mean that, in order that the presumption in section 9(5) be discharged effectively, a broad range of evidence, including statistical and sociological evidence, as well as socio-economic analysis, may be relevant to the enquiry. If the respondent cannot discharge this onus, the Court will accept that unfair discrimination occurred.

Alternatively, the differentiation could have occurred on a ground not listed in section 9(3), for example, nationality or HIV/AIDS status. In such a case, the applicant needs to prove that differentiation occurred and that the ground on which the differentiation occurred “is based on attributes and characteristics which may have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”.<sup>93</sup> The Court will then accept that the applicant has proven that discrimination has occurred. The applicant will also need to “establish”<sup>94</sup> (which we assume means “prove”) that the discrimination was unfair. If the applicant successfully manages this as well, the Court will accept that unfair discrimination occurred. The respondent then bears the onus of justifying the breach of section 9. If it cannot do so, the Court will grant appropriate relief to the applicant.

The Equality Act deals with an equality complaint in a different way. The applicant needs to show, on a *prima facie* basis, that “discrimination” as defined in the Act took place. This would mean that the applicant needs to show (on a *prima facie* basis) that the applicant has been burdened or disadvantaged or an advantage has been withheld on a ground listed in the Act.<sup>95</sup> (This list follows the list in section 9(3) of the Constitution.) The respondent then bears the onus of either showing that the applicant was not so burdened or that an advantage was not so withheld or that the discrimination was not based on one of the listed grounds. Alternatively, the burden or withholding of an advantage could have occurred on a ground not listed in the Act, for example nationality or HIV/AIDS status. In this case, the applicant needs to show *prima facie* that the ground on which the burden was imposed or the advantage withheld is of such a nature that it causes or perpetuates systemic disadvantage or undermines human dignity or adversely affects the equal enjoyment of rights and freedoms in a serious manner that is comparable to the imposing of a burden or the withholding of an advantage on one of the listed grounds. If the applicant succeeds, the respondent either needs to prove that the applicant was not so burdened or that an advantage was not so withheld, or needs to prove that the ground on which the discrimination was based is of such a nature that it does not cause or does not perpetuate systemic disadvantage; or that it does not undermine human dignity; or that it does not adversely affect the equal enjoyment of rights and freedoms in a serious

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92 *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC).

93 *Harksen v Lane* 1998 1 SA 300 (CC) para 53.

94 *Ibid.*

95 It seems as if “discrimination” carries two different meanings in s 13. It would appear as if “discrimination” in s 13(1) carries the meaning as per the definition in s 1. “Discrimination” in s 13(1)(a) seems to carry the meaning of the definition but without the words “any person on one or more of the prohibited grounds”. The latter is covered by s 13(1)(b).

manner and that it is not comparable to the imposing of a burden or the withholding of an advantage on one of the listed grounds. It is extremely unlikely that an unlisted ground exists that does not fit all of the qualifiers.

Assuming the applicant could *prima facie* show that the respondent discriminated against him and assuming that the respondent could not prove the contrary, the respondent has another opportunity to escape liability in that he may proceed to prove that the discrimination was fair in terms of the Equality Act. In summary, section 13 of the Equality Act has the effect that the applicant must establish a *prima facie* case of “discrimination” (as defined in the Act). If the applicant succeeds, the respondent must then prove one of the following to avoid liability:

- (a) discrimination did not take place; or
- (b) discrimination did not take place on a prohibited ground (as defined in the Act); or
- (c) the discrimination was fair.

The differences in approach between the Constitutional Court's interpretation of section 9 and the Equality Act is summarised forthwith. Regarding the evidence to be led, the Act expects less from an applicant than does section 9 of the Constitution. Section 9 requires the applicant to *prove* “differentiation”. The Equality Act requires the applicant to *establish* “discrimination” on a *prima facie* basis. (There is no real difference between “differentiation” and “discrimination” in this context.) In terms of section 9, once differentiation on a listed ground has been proven, a presumption of unfair discrimination arises that the respondent must *rebut*. In terms of the Equality Act, once discrimination has been shown to exist on a *prima facie* basis, the respondent must *prove* the contrary. A burden to rebut is a lesser burden than a full onus. Again, the Equality Act expects less from a respondent than does section 9. According to section 9, if discrimination on an unlisted ground is in issue, it is the applicant that has to *prove* discrimination, that the unlisted ground is of such a nature that it offends dignity and that the discrimination was unfair. In terms of the Act, the applicant needs to show on a *prima facie* basis that discrimination on an unlisted ground exists and that the unlisted ground fits one of the conditions of paragraph (b) of the definition of prohibited grounds. Once the applicant has done this, it is the respondent that has to *prove* that the alleged discrimination is not discrimination; alternatively that it was not *unfair* discrimination. Therefore, the Equality Act never burdens the applicant with a full onus and affords the same status to unlisted grounds than listed grounds regarding the presumption of unfairness, with the added advantage to the applicant that the respondent not only carries a burden of rebuttal once unfairness has been presumed, but a full onus.

This structure is neither controversial nor unconstitutional.<sup>96</sup> The Constitution sets a minimum benchmark regarding the protection of human rights. What the Equality Act does in essence is to grant more protection to equality than the Constitution does by expecting less from an applicant in an equality dispute than

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<sup>96</sup> This aspect of the Equality Act received wide coverage in the press. See eg *The Citizen* (1999-11-27) 7; *Financial Mail* (1999-12-03) 54; *Beeld* (1999-12-06) 8; *Business Day* (1999-11-03) 11.

the Constitution.<sup>97</sup> If this argument does not suffice, the Constitutional Court stated in *Prinsloo v Van der Linde*<sup>98</sup> that as long as the onus in a civil case<sup>99</sup> is not imposed arbitrarily, no constitutional complaint exists.<sup>100</sup> The shifting of the onus to the respondent by section 13 is not arbitrary. It is of course also possible for a respondent in an equality dispute, to argue that the Equality Act infringes section 9 of the Constitution by burdening the respondent with a heavier load than section 9 allows. However, such an infringement will most likely be found to be justifiable in terms of section 36 of the Constitution.<sup>101</sup>

### 5.5.2 Onus of proof in terms of the CPA

Section 10 of the CPA provides that, in any proceedings contemplated in Part A, there is a presumption that any differential treatment contemplated in section 8 is unfair discrimination, unless it is established that the discrimination is fair. The equality court may furthermore draw an inference that a supplier has discriminated unfairly if the supplier has done anything contemplated in section 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer; in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.<sup>102</sup>

Tait and Tait argue that the CPA seems to go further than the Equality Act in that it creates a presumption of unfairness where any differential treatment contemplated in section 8 in terms of the CPA takes place.<sup>103</sup> The writers submit that the complainant has to establish only that there was an action within the ambit of section 8 and that the differentiation was based on a prohibited ground as contemplated in the Equality Act, which also includes unspecified grounds for the presumption of unfairness, to come into operation. The respondent (supplier) then has the burden to show that the differentiation was fair. The writers add that section 10(2)(b)(i)–(iii) provides for certain scenarios, which, if they exist, will allow a court to draw an inference of unfair discrimination from them.<sup>104</sup> However, the writers criticise these grounds.<sup>105</sup> The first scenario,<sup>106</sup> according to the

97 *MEC for Education: KwaZulu-Natal v Pillay* CCT 51/06 para 43: “The legislature, when enacting national legislation to give effect to the right to equality, may extend protection beyond what is conferred by section 9. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution.”

98 1997 3 SA 1012 (CC).

99 None of the powers accorded to equality courts listed in s 21 of the Act relates to criminal penalties.

100 Para 38.

101 S 36: Limitation of rights.

102 S 10 CPA.

103 Tait and Tait “Equality, the Consumer Protection Act and customer-segment pricing strategies: Is there relief for the poor rich tourist?” 2010 *Obiter* 434 (hereafter Tait and Tait).

104 *Ibid.*

105 *Ibid.*

106 The supplier has done anything contemplated in s 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer.

writers, is difficult to distinguish from the substantive part of section 8(1) and seems to be an unnecessary repetition.<sup>107</sup> The second and third scenarios (section 10(2)(b)(ii)–(iii))<sup>108</sup> do not assist the consumer any more than what section 8 already does and is, according to the writers, also somewhat unclear as to how it will assist a consumer or the court.<sup>109</sup> We would argue that the three scenarios must be read together, as is clear from the use of the word “and” at the end of section 10(2)(b)(ii). Read conjunctively, these three subparagraphs then make it clear that an equality court may draw an inference of unfair discrimination if a supplier acted in a way that constituted differential treatment, that the differential treatment appears to be based on a prohibited ground, and that the supplier could not offer justification for the differential treatment.

However, we should not lose sight of section 5(2) of the Equality Act. If there is a conflict between the wording of the CPA and the Equality Act, the Equality Act prevails. Section 10(2)(b) of the CPA conflicts with the Equality Act in the following manner:

Section 10(2)(b)(i) requires “differential treatment” while the definition of “discrimination” in section 1 of the Equality Act requires harm to the consumer in the form of either a benefit that was withheld or a burden that was imposed.

Section 1 of the Equality Act defines “discrimination” as an act or omission causing harm to a complainant “based on” a prohibited ground while section 10(2)(b)(ii) of the CPA refers to treatment that “appears to be based on” a prohibited ground. Section 14 of the Equality Act contains a long list of factors to be considered when ascertaining if the discrimination complained of was fair, while section 10(2)(b)(iii) only mentions reasonability/justifiability. In these circumstances, the Equality Act should be taken to prevail and section 13 of the Equality Act should be applied instead of section 10(2) of the CPA. In terms of section 13 of the Equality Act a complainant must make out a *prima facie* case of discrimination (ie, harmful conduct based on a prohibited ground) and the defendant/respondent must then prove that the discrimination either did not occur, or that the discrimination was fair.

Tait and Tait correctly state that differential treatment on a prohibited ground will still require a finding that the ground for differentiation is a prohibited ground.<sup>110</sup> According to the writers, if the ground is specified, the consumer’s task is easier but if the ground is unspecified the consumer must establish the ground and the court must still find that, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons.<sup>111</sup> We may add that in terms of the definition of “prohibited grounds” in section 1 of the Equality Act, additional prohibited grounds may be established if the complainant can show that discrimination based on the additional ground either causes or perpetuates systemic disadvantage (ie poverty, HIV status) or undermines human dignity (ie weight or physical appearance) or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a listed ground.

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107 Tait and Tait 443.

108 In the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination.

109 Tait and Tait 444.

110 Tait and Tait 443.

111 *Ibid.*

Although the court may determine that any conduct in terms of section 8 may be fair in the circumstances,<sup>112</sup> clearly the supplier will have a heavier burden of proof to justify fairness or differential treatment in the case of such conduct due to the presumption that any differential treatment contemplated in section 8 is unfair discrimination (in terms of the presumption provided for in section 10(2)(a)). Conversely, conduct in terms of section 9 is presumed to be fair unless the complainant (consumer, accredited consumer group etc.) can prove that it is unfair. Section 9(1) to (3) of the CPA also appears to be in conflict with the Equality Act in that it does not allow for a contextual assessment of the particular circumstances of each case but rather allows for a defence in absolute terms. Section 14 of the Equality Act requires a nuanced assessment of each individual case on its own merit. In terms of section 5(2) of the Equality Act, section 14 of the Equality Act should be applied instead of section 9(1) to (3) of the CPA.

## 6 DISCUSSION OF PARTICULAR ISSUES

### 6.1 Section 8(1)(e): Price discrimination

#### 6.1.1 *Charging different prices for goods or services to category of persons, South African citizens v foreign tourists*

Tait and Tait make out a very interesting argument when interpreting the provisions of section 8(1)(e) (charging different prices for goods or services to a person or a category of persons) in reference to customer-segment pricing and suppliers in South Africa charging different prices for South African citizens than for foreign tourists (non-citizens).<sup>113</sup>

The writers argue that the travel and tourism industry is an increasingly important part of the South African economy and the protection of the tourist consumer is of national concern.<sup>114</sup> In this, the CPA plays a critical role to ensure that consumers of tourism services and products which include both citizens and non-citizens are protected.<sup>115</sup> The rationale for charging foreign tourists an increased price for the supply of tourism services stems from the generation of more foreign exchange reserves. Forcing overseas visitors to spend more Rands, forces them to spend more foreign currency.<sup>116</sup> On the other hand, Tait and Tait argue that the price differentiation between citizens and non-citizens reflects negatively on South Africa's tourism industry and the manner in which we treat foreign tourists.<sup>117</sup>

The writers propose that the price differentiation as explained above is a clear discrimination on the grounds of citizenship. Although nationality does not fall under the grounds of discrimination as provided for in terms of section 9 of the Constitution or section 1 of the Equality Act, it is one of the grounds to be given special consideration to in terms of section 34 of the Equality Act.<sup>118</sup> Tait and

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112 S 9(4)(b) CPA.

113 Tait and Tait 445.

114 *Idem* 437.

115 *Idem* 438.

116 *Ibid.*

117 See *contra* the view by Edwards "Price and prejudice: The case against consumer equality in the information age" 2006 *Lewis & Clark LR* 559–596.

118 Tait and Tait 441–442.

Tait argue that the wording of section 8 puts the issue squarely in the ambit of a constitutional inquiry and the test formulated in the *Harksen v Lane* case<sup>119</sup> should be applied.<sup>120</sup> The writers apply the three phases of the “*Harksen test*”<sup>121</sup> and ultimately find that customer-segment pricing aimed at the tourist market where differentiation is based on citizenship cannot pass a constitutional challenge based on equality and is also what the CPA aims to achieve.<sup>122</sup> We may add that in our view “citizenship” also meets the requirements set out in paragraph (b) of the definition of “prohibited grounds” in section 1 of the Equality Act.

## 6.2 The student’s right to equality as a consumer in a consumer market

In his contribution dealing with the implication of the CPA on students as consumers, Reddy discusses the right of equality of students in the consumer market.<sup>123</sup> The writer argues that the duty not to discriminate established in section 8(2) confirms the responsibility of Higher Education Institutions (HEIs) as suppliers not to differentiate between students in such a manner that it amounts to unfair discrimination.<sup>124</sup> Reddy refers to section 8(1)(a) and argues that HEIs may not unfairly exclude any person or category of persons from access to goods or services such as the opportunity to study or take up accommodation or have access to certain facilities of the HEI, or conversely, grant exclusive access.<sup>125</sup> Where an institution does not allow females into a particular programme, or if there is an unfair language or age requirement for students, Reddy argues that this may be viewed as unfair discrimination.<sup>126</sup> Further examples given by the writer of possible unfair discrimination by HEIs in terms of section 8 (CPA) include unfairly discriminating against anyone when assessing the ability of a person to pay costs<sup>127</sup> (for instance tuition fees and other charges) in deciding whether to enter into a transaction with the student or not (whether for example income from informal businesses should be taken into account).

The statement is made that the supply of different quality goods or services to different groups (for example students on different campuses or part-time and full-time students) as well as the targeting of certain communities or market segments may amount to unfair discrimination in the consumer market.<sup>128</sup> What must not be lost sight of is that the CPA in section 8 and the Equality Act in section 6 prohibits unfair discrimination *on a prohibited ground*. If a particular prohibited ground cannot be identified, the situation complained of will not

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119 *Harksen v Lane* 1998 1 SA 300 (CC).

120 Tait and Tait 437.

121 *Idem* 437–441. The test firstly establishes whether the conduct actually differentiates between people or categories of people, secondly whether the discrimination is unfair, and thirdly if it is unfair discrimination whether it can be justified under s 36 of the Constitution (the limitation clause).

122 *Idem* 441.

123 Reddy “Students as consumers: The implication of the Consumer Protection Act for higher education institutions in South Africa” 2012 *SAJHE* 586 592.

124 *Ibid.*

125 *Idem* 593.

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

amount to discrimination and section 8 of the CPA and section 6 of the Equality Act will not be applicable. Some of the examples that Reddy mentions, such as harmful treatment based on sex or age or language, will amount to discrimination. Other examples, such as differentiated treatment based on being a full-time student or part-time student, or being students on different campuses, do not necessarily amount to discrimination because a prohibited ground may not necessarily be identified.

Reddy refers to the reasonable grounds for differentiation in section 9 of the CPA and argues that it is not discriminatory for HEIs to market services showing a preference for a particular group of students who are “distinguishable from the general population on the basis of a ground of discrimination set out in section 9(3) of the Constitution”. In the supply services for specific needs, discrimination will be allowed if it can be justified.<sup>129</sup> The writer argues that fair discrimination will be allowed in South Africa to promote access to services for example using matriculation results to differentiate between students in granting access.<sup>130</sup> Although (according to Reddy) the CPA was not primarily introduced to protect foreign consumers, it could be argued that the Act aims to protect the interest of *all* consumers including foreign consumers.<sup>131</sup> Reddy refers to the article by Tait and Tait and poses the questions whether or not a similar argument could be made against the setting of higher fees for foreign students.<sup>132</sup> In our view, such differentiated treatment at the very least amounts to discrimination based on nationality/citizenship/ethnic origin and a HEI would have to provide persuasive justification for setting higher fees for foreign students.

It is argued that HEIs should re-evaluate their access policies.<sup>133</sup> If, for example the marketing of their courses are only limited to private schools, they might be contravening section 8 of the CPA.<sup>134</sup> In our view, such practices would in most instances amount to discrimination based on socio-economic status. The methods of marketing such as the particular newspaper or magazine used in their marketing efforts could come under scrutiny of the CPA and, finally, if the HEI targets students from rural areas, enough should be done to ensure that the majority of potential students have access to their application systems whether or not the system is computer-based or internet-based.<sup>135</sup>

### 6.3 The “elderly person’s” right to equality in the consumer market

There is no defining age of retirement or even a consistent definition of “older person” in terms of South African law. Van Eeden refers to the definition of “older person” in terms of the Older Persons Act<sup>136</sup> (meaning a male of 65 years and older or a female of 60 years and older) and the meaning of “retired persons” in terms of the Housing Development Schemes for Retired Persons Act<sup>137</sup>

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129 *Ibid.*

130 *Ibid.*

131 *Idem* 594.

132 *Ibid.*

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 13 of 2006.

137 65 of 1988.

(meaning both males and females older than 50 years) and the Social Assistance Act<sup>138</sup> (where persons older than 60 qualify for an older person's grant).<sup>139</sup> In addition, one of the purposes of the CPA in terms of section 3(1)(b) is reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers who are vulnerable consumers which also include consumers who are *seniors*.<sup>140</sup> Unfair discrimination based on *age*<sup>141</sup> is also one of the grounds listed in section 9 of the Constitution and referred to in section 8 of the CPA as well as one of the listed grounds in the definition of "prohibited grounds" in section 1 of the Equality Act.

On the other hand, the differential treatment in the supply of goods or services to persons of at least 60 years may be justified in certain instances in terms of section 9 of the CPA. A supplier may, for example, reasonably designate any facility or service for the exclusive use of persons of 60 years or older. "Facility" in terms of the CPA means "any premises, space or equipment set up to fulfil a particular function, or at, or on which a particular service is available".<sup>142</sup> "Service" includes the provision of any education, information, advice or consultation,<sup>143</sup> access to an event or to any premises, activity or facility; the transportation of an individual or any goods; access to any electronic communication infrastructure; the use of any premises or other property in terms of a rental; and a right of occupancy of immovable property, other than in terms of a rental.<sup>144</sup> Taking the abovementioned definitions into account, relevant examples in practice could be the exclusive use of transport (like a mini-bus or bus) by older persons to and from a medical clinic, hospital, shopping mall or church. It could be the exclusive use of or access to a facility for extracurricular activities including sports (for example "bowls") or entertainment (exclusive entrance to legitimate gambling facilities). It could also include the exclusive use or rental of immovable property. Van Eeden discusses the access of older persons to residential facilities and housing development schemes.<sup>145</sup>

A supplier may advertise, offer or agree to supply any goods or services at a discounted price solely on the basis that the consumer is 60 years or older. It is common practice for many suppliers to offer what is known as "pensioner's discount" in the supply of services such as movie theatres or vacation accommodation.

As set out above, these examples are all subject to the general defence of fairness set out in section 14 of the Equality Act.

## 7 CONCLUSION

The CPA should be amended to incorporate sections 6, 13 and 14 of the Equality Act, as well as the definitions of "discrimination" and "prohibited grounds" in the Equality Act. The current wording of large parts of sections 8, 9 and 10 of

138 13 of 2004.

139 Van Eeden (2013) 555.

140 Own emphasis.

141 Own emphasis.

142 S 1 CPA.

143 Excluding advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

144 S 1 CPA definition of "service".

145 Van Eeden (2013) 555–563.

the CPA probably conflicts with the Equality Act and leads to uncertainty for consumers and suppliers on what they have to establish either as a cause of action or a defence to a complaint of unfair discrimination. Section 8(1) and (2) of the CPA should rather have been included as a schedule to the CPA of examples of instances of possible unfair discrimination. A redrafted section 8(1) could then merely state that “A supplier of goods or services must not unfairly discriminate against any person” while section 1 of the CPA should incorporate the definitions of “discrimination” and “prohibited grounds” as contained in section 1 of the Equality Act. Similarly section 9(1), (2) and (3) should rather have been included as a schedule to the CPA of examples of possible defences open to suppliers when faced with a complaint of unfair discrimination. Section 9 could then be deleted in its entirety. Section 10(2) should also be deleted as it conflicts with the Equality Act. Where a consumer’s right to equality and other rights as contained in the CPA have been infringed, we argued above that a consumer would be entitled to lodge two claims simultaneously, in the equality courts and the ordinary civil courts, and be entitled to two remedies.