THE EFFECT OF THE CONSUMER PROTECTION ACT 68 OF 2008 ON EXEMPTION CLAUSES IN STANDARD-FORM CONTRACTS

BY

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TABLE OF CONTENTS

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EXECUTIVE SUMMARY

One of the reasons why the Consumer Protection Act 68 of 2008 (CPA) was enacted, was to protect consumers against suppliers who enforced onerous terms and conditions to the disadvantage of the consumer. Exemption clauses are amongst such onerous terms and conditions and according to Part G of the CPA (sections 48-52), exemption clauses must not be drafted on terms that are unjust, unfair and unreasonable. As almost all consumer agreements are drafted unilaterally in the form of standard-form contracts, this research will focus on the history of standard-form contracts and exemption clauses; the advantages and disadvantages of using them, landmark cases in which exemption clauses in standard-form contracts were dealt with, the effect of exemption clauses in standard-form contracts in light of the CPA and the legal remedies that are available to the consumer in instances where the supplier does not comply with the provisions of the CPA.

The research will focus on the criticisms that have been levelled against the CPA as well as recommendations on what the legislature can do to rectify some of the problems that have been associated with the CPA.

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

The Constitution has brought upon constant developments within the law that have become known to reflect the norms of a modern society. Section 39 of the Constitution allows for this kind of development. The kind of development that "promotes the values that underline an open and democratic society based on human dignity, equality and freedom".[1] Most of the principles of contract law stem from the common law and the vigorous application of most of these principles, as reflected in court judgments, have made it difficult to change them in light of constitutional values but more so in South African contract law.[2] To name a few some of these principles are the *caveat subscriptor*[3] rule, the principle of *pacta sunt servanda*[4] and exemption clauses. The application of these principles can be seen in most standard-form contracts. The enactment of the CPA has brought some changes in the application of these common law contract principles. This is due to the CPA setting out guidelines and requirements when applying the CPA in consumer agreements. The change that the CPA will bring in the interpretation of consumer agreements as well as consumer protection in South Africa will be discussed below.

1.2 CONSUMER PROTECTION ACT 68 OF 2008

Before the enactment of the CPA, there was no legislation that exclusively dealt with consumer protection. Woker states that until recently, it was incorrect to use the

[1] Section 1(a) of the Constitution.
[2] See cases of *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *BK Tooling (Edms) Bpk v Scope Engineering* 1979 (1) SA 391 (A); *Magna Alloys & Research (SA) (Pty) v Ellis* 1984 (4) SA 874 (A); *Sasfin v Beukes* 1989 (1) SA 1 (A) and *Donelly v Barclays International Bank* (1990) (1) SA 375 (W).
[3] In terms of the common law principle *caveat subscriptor*, when an agreement is reduced to writing and signed by the parties, they are bound to its terms as signature signifies assent thereto. S Tennant and V Mbele (2013) *De Rebus* 17 at 17.
[4] "Sanctity of contract: Agreements that are freely and voluntarily entered into by parties must be honoured" Van der Merwe *et al The Law of Contract in South Africa (*2012) at 454.

term consumer law in South Africa because there was no comprehensive and systematic body of law which was designed specifically to deal with consumer issues.[5] The National Credit Act[6] as well as the CPA were promulgated for the effective regulation of consumer protection in South Africa. The Act not only makes provision for reasonable and fair terms in consumer agreements, but also for appropriate redress measures that a consumer has when a supplier or manufacturer have contravened the Act. Section 3 makes provision for the purpose of the CPA and this includes the promotion and advancement of social and economic welfare of consumers in South Africa by, *inter alia*, establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.[7]

1.2.1 Purpose of the CPA

The CPA was introduced with the aim of providing substantive consumer protection measures and enforcing compliance thereof. In terms of section 3(1) of the Act, one of the purposes of the Act is to "advance the social and economic welfare of South African consumers by protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices".[8] This purpose can be interpreted to include unfair, unjust and unreasonable terms and conditions in consumer agreements, and the section of the CPA that deals with such terms and conditions can be found in Part G of the CPA. Sharrock is of the view that the purposes of the CPA are significant because section 2(1) of the CPA provides the

[5] T Woker (2010) *Obiter* 218 at 218.
[6] 34 of 2005.
[7] Section 3(1)(a) of the CPA.
[8] Section 3(1) CPA.

CPA must be interpreted in a manner that gives effect to these purposes.[9] In addition, Sharrock goes on to say that "a purposive method of interpretation may produce results that differ from those that would be obtained following the traditional approach to interpretation.[10]

1.2.2 Application of the Act

Section 5 of the CPA deals with the application of the Act. The CPA has a wide field of application and it applies to any transaction occurring within the Republic.[11] This will be the case even if the supplier or manufacturer of goods or services resides outside South Africa but the conclusion and effect of the consumer agreement was in South Africa. The CPA applies to both natural and juristic persons.[12] The CPA does not apply in cases where the consumer is the State and the Minister has the discretion to exempt the application of the CPA from any juristic person whose annual turnover or asset value at the time of the transaction equals or exceeds a minimum threshold.[13] Exempt from the application of the Act are employment contracts[14], collective bargaining agreements within the meaning of section 23 of the Constitution and the Labour Relations Act 66 of 1995.[15] Credit agreements under the CPA do not fall within the ambit of the Act, however the goods and services that are the subject of the credit agreement do fall within the ambit of the CPA.[16] Agreements that do not fall within the ambit of the CPA will be fall under the common law and any common law remedies will be applicable to that kind of agreement. This

[9] Sharrock (2010) *SA Merc LJ* (22) 295 at 299.
[10] Sharrock (2010) *SA Merc LJ* (22) 295 at 299.
[11] S5(1)(a).
[12] The CPA in section 1 defines a consumer as a person. Sharrock op cit note 10 at 300, states that a 'person' as referred to in the Act includes a juristic person.
[13] S5(2)(b).
[14] S5(2)(e).
[15] S5(2)(f).
[16] S5(2)(d).

ofcourse is the case where there is no specific legislation that governs that particular agreement.

1.2.3 Interpretation of the Act

In terms of section 4(2), the Tribunal or court must develop the common law as necessary to improve the realization and enjoyment of consumer right[17] and also promote the spirit and purposes of the Act.[18] To the extent that is consistent with advancing the purposes and policies of the Act, the Tribunal or a court must also interpret a standard form, contract or other document to the benefit of the consumer.[19] If any provision of the Act, read in its context, can reasonably be construed to have more than one meaning, a court or the NCT must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realization and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).[20] It is also important to take congnisance of section 2(10) of the CPA which states that "no provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law". This allows any consumer to still be in a position to choose whether they will use the remedies as envisaged by the CPA or follow the route afforded to them in the common law.

[17] S4(2)(a).
[18] S4(2)(b). Also see Jacobs *et al* (2010) *PERJ* 13 (3) 309.
[19] S4(4) of the CPA.
[20] Van Eeden (2009) 195.

1.2.4 Part G of the Act

Part G of the Act which entrenches the consumer's right to fair, just and reasonable terms and conditions in consumer contracts consists of five sections.[21] Section 48 deals generally with unreasonable, unfair and unjust terms. Section 49 and 50 deal with bringing the consumer's attention to certain clauses in contracts and how these clauses must be written in a simple and conspicuous manner. Section 51 includes a non-exhaustive list of prohibited agreements and clauses. Section 52 grants the courts powers on how to deal with agreements that are considered to be unjust or that include clauses that are considered to be unreasonable and unjust.

Part G does not include what is meant by "unfair", "unjust" and "unreasonable", and neither does section 1 which is the definition part of the Act. Section 2(2) of the CPA however, allows appropriate foreign law, international conventions and agreements to be taken into consideration when interpreting a section in the Act. Naudé[22] states that section 2(2) can be used to interpret the meanings of what would be considered to be unfair, unreasonable or unjust because the CPA does not give any clarity with regards to the definitions of these words.[23] In attempting to give an explanation of what would be considered as unfair by the courts, Naudé gives the example of the Unfair Terms Directive's test[24] which defines a contractual clause to be unfair when

[21] S48-52 of the CPA.
[22] Naudé (2011) *SALJ* 505-534 at 516.
[23] Sharrock op ci note 10 at 307, Sharrock states that it was not necessary for the legislature to adopt the "cumbersome triad" of "unfair, unreasonable and unjust" in Part G because the word "unfair" would have served the "Unfairness Standard" equally well on its own. Sharrock states that the legislature could have just defined the word unfair to be inclusive of the words unjust and unreasonable.
[24] As above fn19 – The Directive has been copied out in the UK's Unfair Terms in Consumer Contracts Regulations,1999.

"…it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer".[25]

Section 52 allows courts exclusive jurisdiction to adjudicate contractual disputes with regards to the CPA. There is an implication from the wording of section 52 read with section 48(2), that a consumer who has a contractual dispute with another party will have to approach the courts to have that contractual term declared unfair, unreasonable or unjust before relief can be sought by the consumer. This can lead to endless and expensive administrative procedures which can be a huge halt to a consumer seeking immediate relief and in a more cost-effective way. For example, if a consumer wants to file a civil suit for financial compensation from a wrongdoer in a consumer agreement, that consumer will have to first approach the courts and file an application to have the basis of his contractual dispute be declared unfair, unreasonable or unjust by the courts first before that consumer can make a claim for any financial compensation by the other party in the contract.[26] Fortunately the consumer can still use any common law rights afforded to him.[27]

1.3 STANDARD-FORM CONTRACTS

Standard-form contracts are defined as "contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it basis, thus eliminating opportunity for arm's length negotiation".[28] These documents are convenient in that they facilitate the offer and acceptance stage between parties

[25] Naudé op cit note 15 at 512.
[26] See in this regard Naudé *(2011) SALJ* 505-534 at 518.
[27] Section 2(10) allows a consumer to not be precluded from exercising any rights afforded in terms of the common law.
[28] *Barkhuizen v Napier* (2007) 5 SA 323 (CC) at para 135 (Sachs judgment); see also RD Sharrock (2010) 22 *SA Merc LJ* 295 at 296.

because all that would be left is for the parties to sign the standard form contract in order to have conclusive proof of their agreement on paper. Turpin describes a standard-form contract to be "a contractual document embodying terms designed to control the legal results of a transaction and employed without variation in all transactions of a similar class".[29] Although standard-form contracts are used widely around the world and the use of such contracts has its advantages (such as it facilitates the conclusion of an agreement between the parties in a more convenient and expeditious way) standard-form contracts have been criticised for their unequal bargaining position against a signatory to the contract who had nothing to do with the drafting thereof.[30]

There have been criticisms regarding the application of the common law precedents of sanctity and freedom of contract by the courts.[31] Hopkins comments that the South African constitution includes the right to equality, freedom and human dignity and that these rights should be interpreted in favour of the vulnerable consumer who, by signing a "take it or leave it" standard-form contract, is forced into an unequal bargaining position and who now ends up having to suffer the consequences due to the unreasonable terms in the agreement. Turpin is of the opinion that such intervention by the courts does not interfere with the freedom and sanctity to contract but that by doing this the courts will serve as a supervisory function and adjust the inequality that is created between signatories of a standard-form contract.

[29] Turpin (1956) 73 *SALJ* 144 at 144.
[30] See *Goedhals v Massey-Harris & Co* (1939) 314 (EDL); *Bhikhagee v Southern Aviation (Pty) Ltd* (1949) 4 SA 105 (E); *George v Fairmead (Pty) Ltd* (1958) 2 SA 465 (A) and K Hopkins (2003) 1 TSAR 150.
[31] Turpin *73 SALJ (1956) 144-158;* Hopkins *1 TSAR (2003) 150 – 160 and* Pretorius *73 THRHR (2010) 492 – 502.*

This research will look at why standard-form contracts are preferred against contracts that were drafted bilaterally, why there are unfair terms imposed in standard-form contracts, the advantages and the disadvantages of such standard-form contracts and the common law rights of parties with regards to contract law weighed against the fundamental constitutional rights of the often vulnerable consumer.

1.4 EXEMPTION CLAUSES

Exemption clauses are also called exclusionary clauses or exception clauses.[32] These clauses limit or exclude the liability of one of the parties to a contract in the event of an unforeseen circumstance. Poole describes an exemption clause to be a clause which seeks either to exclude a party's liability for breach or to limit that liability to a specified amount.[33] Exemption clauses can be found in the history of Roman law, of which much of it was later received into the South African law of contract.[34] In recent times however, the courts and legislature have introduced ways in which these clauses can be interpreted and applied, more so in favour of the disadvantaged party in the contract.[35]

In the case of *Afrox Healthcare Bpk v Strydom*[36], the court held that an exemption clause may be excluded in a contract on the basis that it is against public interest or the *boni mores* of the community.[37] For a clause to be excluded on the basis of it being against public policy it must be shown that the "arrangement necessarily

[32] Van Der Merwe *Contract – General Principles* (2012) p250.
[33] Poole *Textbook on contract law* (2004) at 195.
[34] Barnard "*A critical legal argument for contractual justice in the South African Law of Contract*" (2005) Unpublished LLD Thesis, University of Pretoria at 50.
[35] See case of *Barkhuizen v Napier* (2007) 5 SA 323 (CC) and section 48 of the CPA.
[36] 2002 (6) SA 21 (SCA).
[37] At 39 of the case in para 27, 28 and 29.

contravenes or tends to induce contravention of some fundamental principle of justice or of general or statutory law, or that it is necessarily to the prejudice of the interests of the public".[38]

There is no specific legislation that exclusively deals with exemption clauses but there is legislation that includes provisions on exemption clauses or unfair contractual terms. A good example of this legislature is the Consumer Protection Act 68 of 2008[39] wherein Part G of the Act governs the prohibition of provisions, transactions, agreements, terms and conditions that should not be included in contracts because they are considered to be unfair, unjust or unreasonable provisions. By creating a list of prohibited provisions and clauses in consumer contracts, the CPA has provided some relief to vulnerable consumers.

Through case law the following has transpired: -

1) Exemption clauses that are against public policy are prohibited;[40]
2) Exemption clauses that exclude any form of liability that have not been drawn to the attention of the consumer will be deemed to be excluded from a contract (between a supplier and/or manufacturer), more so exemption clauses that are considered to be "surprising" contractual clauses;[41] and
3) An exemption clause that undermines the very essence of a contract must be brought to the attention of the consumer.[42] Due to the fact that an exemption clause can easily influence an individual's decision to conclude an agreement,

[38] *Morrison v Angelo Deep Gold Mines Ltd (1905) TS 779 at 785*.
[39] Hereinafter referred to as the CPA or the Act.
[40] *Afrox Healthcare Bpk v Strydom* (2002) 6 SA 21 (SCA).
[41] See the cases of *Durban's Water Wonderland and (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) and *Mercurius Motors v Lopez* (2008) 3 SA 572 (SCA). Also see section 49(2) of the CPA.
[42] See case of *Mecurius Motors v Lopex* (2008) 3 SA 572 (SCA).

it would make sense that this would be done before consensus is reached between the contracting parties so as to assist both parties to make an informed decision before signing on the "dotted line".

1.5 RESEARCH QUESTION

Has the CPA alleviated the inclusion of unfair, unreasonable and unjust terms in standard-form contracts?

1.6 RESEARCH STATEMENT

This research will focus on evaluating the use and effect of exemption clauses in standard-form contracts and the effect that the application of Part G of the CPA will have on the interpretation of exemption clauses in standard-form contracts.

1.7 RESEARCH AIMS

Some of the provisions in the CPA, including the provisions that have been highlighted above have drastically changed the way contracts would have to be drafted to comply with the CPA and this study aims to look at:

1) A historical overview of the inclusion of exemption clauses in standard-form contracts.
2) The effect that the application of Part G of the CPA will have on exemption clauses in standard-form contracts in future.
3) Whether the forms of redresses available to a consumer in terms of the CPA will be effective in enforcing Part G of the CPA to the full benefit of a consumer.

1.8) METHODOLOGY

This research is about the interpretation and application of exemption clauses before and after the enactment of the CPA. The research is literature based and therefore will include reference to relevant legal writings including case law, legislation and academic writings.

1.9 OVERVIEW OF CHAPTERS

This chapter dealt with the application, purpose and interpretation of the CPA, a brief summary of what standard-form agreements and exemption clauses are; and the effect that the use of exemption clauses on consumers and consumer protection. This chapter will also elaborate on what this research aims to achieve in subsequent chapters as well as the method that will be used in achieving these aims.

The focus of chapter two will be on the brief discussion of the use and history of standard-form contracts and exemption clauses before the enactment of the CPA. The chapter will focus on what standard-form contracts entail, the advantages and disadvantages of standard–form contracts, why the use of standard-form contracts is detrimental to the party who had no input in drafting the contract, and lastly, the unfair advantage that the drafter of the contract has in drafting and enforcing these kinds of agreements. The chapter will also include reasons behind why drafters of standard-form contracts include such liability clauses in contracts as well as the disadvantages of the inclusion of exemption clauses in standard-form contracts

using well-known case law such as, *inter-alia*, *Du Toit v Atkinsons Motors*[43]; *Afrox Healthcare Bpk v Strydom*[44]; *Mercurius Motors v Lopez*[45] and *Sasfin v Beukes*[46]. .

The focus of chapter three will be on the discussion of Part G of the CPA which refers to the exclusion of unfair, unreasonable or unjust contract terms and conditions in standard-form consumer agreements, prohibited transactions under the CPA, the application of Part G in case law and criticisms that have been leveled against the CPA and the remedies and redress that is available to an affected consumer.

The focus of the fourth and final chapter, will be a summary of all the preceding chapters and it will include my perceptions on whether the CPA has succeeded in prohibiting standard-form contracts that include provisions that are unfair, unreasonable and unjust and whether the redress and remedies that the CPA has made available to consumers will be sufficient in protecting affected consumers.

1.10 CONCLUSION

The CPA will clearly bring a whole new dimension as to the way contracts, more so standard–form contracts, will be interpreted and applied. There was no legislation that provided a list of terms that were prohibited in consumer agreements and now the CPA has such a list. Part G of the CPA however, is based on “unreasonable”, “unfair” and “unjust” terms in agreements without giving a definition of these words. Section 52 of Part G also implies that courts must first declare an agreement of term

[43] (1985) 2 SA 893 (A).
[44] (2002) 6 SA 21 (SCA).
[45] (2008) 3 SA 572 (SCA).
[46] (1989) 1 SA 1 (A).

in an agreement as unlawful before any further steps can be taken which prolongs any remedy that a vulnerable consumer in such a predicament might have.

There is a possibility that there may be problems which may arise from the court's application and interpretation of the CPA along with common law principles such as consumers being bound to what they have agreed on based on the *caveat subscriptor* principle, as well as the legislature and the judiciary being limited in interfering with the application and interpretation of such agreements due to the sanctity of a contract. The CPA is still fairly new, with not that many judgements delivered on it, we are yet to see whether the courts are willing to compromise common law contract principles in order to advance consumer protection.

The enactment of the CPA is the first step towards consumer protection, this study will include the provisions that afford consumers with this protection but also recommendations with regards to possible amendments that must be made to prevent loopholes that standard-form contract drafters might use against consumers, more so standard-form contracts which almost always include exemption clauses. This is the reason why the next chapter will focus on the history and use of standard-form contracts and exemption clauses before the enactment of the CPA. Various case law in which exemption clauses in standard-form contracts were used to observe how the courts dealt with these inclusions in the past as well as how these cases have been vital in enforcing the need to draw a signatory's attention to onerous clauses provisions in a contract.

CHAPTER 2:

THE USE OF STANDARD-FORM CONTRACTS AND EXEMPTION CLAUSES PRIOR TO THE ENACTMENT OF THE CPA

2.1 INTRODUCTION

The use of standard-form contracts around the world in the consumer trade industry has become a major influence of how businesses create their relationships with consumers. Many criticisms have been leveled against the use of these contracts mainly because of the unequal bargaining power that they bring.[47] Chapter two will focus on the history of how standard-form contracts came to be dominant in the consumer trade industry. Seeing that most exemption clauses are provisioned in standard-form agreements, this chapter will also be focusing on the history of the interpretation of exemption clauses in the past by the judiciary through some case law and whether or not there is a duty on the contract drafter of a standard-form agreement to inform the other party (the signatory to such agreement) about the presence and effect of an exemption clause in a standard-form contract. The focus will be the principles that courts take into account when interpreting and enforcing standard-form contracts and exemption clauses prior to the implementation of the CPA.

2.2 STANDARD-FORM CONTRACTS

Standard-form contracts can be described as "contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it basis, thus eliminating opportunity for arm's length negotiation.[48] Standard-form contracts are widely used by different industries, such as the credit industry[49], insurance industry[50] and car dealers[51]. This is so mainly because of the convenience that these standard-form contracts bring in facilitating an agreement between two or

[47] *Op cit* note 23.
[48] *Op cit* note 21.
[49] See *Sebola and Another v Standard Bank of South Africa* (2012) 5 SA 142 (CC).
[50] See *Barkhuizen v Napier* (2007) 5 SA 323 (CC).
[51] See *Mercurius Motors v Lopez* (2008) 3 SA 572 (SCA).

more parties. As far back as the nineteenth century business people progressed their businesses by forming business relationships between themselves and consumers through contracts.[52] These contracts were not in standard-form because each party had the opportunity to negotiate the terms and conditions of each contract according to their specifications because of the prevailing economic circumstances allowed it at the time.

It could be argued that a contract that was "freely entered" into at the time had a different meaning to the meaning that exists today. Clearly "freely-entered" into meant that a party to a contract played a role in negotiating the provisions that could be included in the agreement that the parties entered into. This obviously meant that there was consensus between the parties in that there was no duress, undue influence or any external factors that could unfairly affect or influence the consensus of either parties to the agreement. The meaning of the contracts that were "freely-entered" into has drastically changed today in light of the plight of standard-form contracts. Contracts that are freely-entered into does not mean that parties to an agreement actually sat down and together considered each and every single term and condition that would form part of the agreement. Freely-entered into now means, that if a signatory to a unilaterally drafted agreement did not enter into the agreement under duress,[53] misrepresentation[54] or fraud by the mere act of signing, he or she freely entered into the agreement. If a dispute arises, the onus lies with the signatory to show that the contract was not freely entered into.

[52] Kornhauser (1976) Vol 64 No.5 California Law Review 1151 at 1155-1153.
[53] See *Afrox Healthcare Bpk v Strydom* (2002) 6 SA 21 (SCA).
[54] See *Du Toit v Atkinsons Motors Bpk* (1985) 2 SA 893 (A).

As Gluck[55] states, the nineteenth century brought with it the development of a thriving economy which lead to mass production.[56] This development brought with it the doctrine best outlined clearly by Smith and known as "economic *laissez-faire*".[57] This doctrine allowed individuals, in most times business professionals, to pursue self-interest during the economic boom by making huge profits free from government restrictions, limitations and interference. This would inadvertently lead to the wealth of society as a whole because the new economic order relied on efficiency and the expeditious completion of a contract. Suddenly, there was no time to negotiate the contents of an agreement with each and every party and this lead to the introduction of standard-form contracts, a mass produced document that was meant to be used over and over again.[58]

As stated above, standard-form contracts are convenient to use because they save time. As the business industries have progressed over a number of years, business professionals have come to realize that "time is money". A contract is defined simply as "an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations".[59] It is clear that the traditional methods of sitting down with another party to negotiate clauses of an agreement have been found to be time-consuming, and as a result standard-form contracts have been created in order to be used to expedite the pre-contract stage so that time is not wasted in negotiating terms of a contract. Inevitably the practice of using standard-form contracts can be found to be economical because a large amount of money is saved in legal fees.

[55] Gluck (1979) 28 *The International and Comparative Law Quaterly* 72.
[56] At 73.
[57] Op cit note 48 at 72.
[58] Op cit note 48 at 73.
[59] Van der Merwe *et al The Law of Contract in South Africa (*2012) at 6.

The advantages that standard-form contracts bring have lead to them being widely used around the world. These contracts however, have also been the subject of many legal disputes.[60] This is mainly because the drafters of standard-form contracts have come to abuse the economic power that they have over the vulnerability of their consumers and their clients. Pre-drafters of standard-form contracts have made it a custom to include exemption clauses and other onerous provisions which are a burden to consumers. The courts have reacted to this by interpreting these provisions by looking at the prevailing and surrounding circumstances at the time of the signing of the contract as well as by using the principles of *bona fides*, reasonableness, public policy and the provisions of the Constitution.[61] In most times, the decisions taken by the courts are in favor of consumers and in other times, the courts follow a positivist approach by applying the long-standing rigid private law rules to the detriment of the consumer (and client).

In the case of *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd,*[62] the appellant had entered into an agreement in which the respondent (who was in the business of organizing trade exhibitions) allowed the appellant to exhibit his company at an exhibition which was organized by the respondent and scheduled to take place from the 24th to the 27th of July 1981. A standard-form agreement was used which included a "General Conditions" page on the reverse side of the main standard-form agreement. On the reverse side of the standard –form agreement, there was a clause that bound the appellant to the payment of fees and all monies due under the

[60] See cases of *Burger v Central South African Railways* (1903) 571 TS; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* (1999) 1 SA 982 (SCA); *Glen Comeragh v Colibri and Another* (1979) 3 SALR (TPD); *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers* (1993) 3 SA 424 (A); *Sasfin v Beukes* (1989) 1 SA 1 (A).
[61] See *Naidoo v Birchwood Hotel* (2012) 6 SA 170 (GSJ); *Du Toit v Atkinson's Motors Bpk (*1985) 2 SA 893 (A).
[62] (1986) 1 303 SA.

agreement even in the event that the respondent unilaterally changed the exhibition dates. After the signing of the agreement the respondent changed the exhibition dates to the 30th July – 01st August 1981. These new dates were not suitable with the appellant and as a result the agreement between the parties was cancelled by the appellant. The respondent instituted a claim against the appellant for the fees and monies that were due on the basis that the appellant had signed the agreement which clearly stated on the front by signing the agreement he also bound himself to the "General Conditions" that were on the reverse side of the main agreement. The appellant in response to the claim stated that he did not read the "General Conditions" on the reverse side, that they were never brought to his attention by the respondent and that he signed the agreement as a result of what the respondent had communicated to him before the signing of the agreement. In the *court a quo*, judgment was given in favor of the respondent. The appellant appealed the decision and the appeal court held that the appellant had no reason to believe that the exhibition would be held on any other date other than the dates that were agreed upon by both parties, that the respondent failed in warning the appellant by drawing the appellant's attention to the terms and conditions that were in conflict with what was arranged.[63]

In the case of *Kempston Hire (Pty) Ltd v Snyman*[64] the appellant occasionally leased motor vehicles to a company (Two Way Marketing (Pty) Ltd) in which the respondent was an employee. Kempston Hire (Pty) Ltd would deliver the leased motor vehicles to Two Way Marketing (Pty) Ltd at their business premises whereby an employee of the appellant would present a standard-form contract of lease document which was

[63] At 317-318 of case.
[64] (1988) 4 SA 465 (TPD).

to be signed by any employee of Two Way Marketing (Pty) Ltd, this employee would be the personnel that received the motor vehicle. This lease agreement included a clause which stated that "[T]he person signing this contract on behalf of the hirer shall be jointly and severally liable to the lessor for all obligations of the hirer under this agreement".[65] This clause not only bound Two Way Marketing (Pty) Ltd but it also bound the person who was signing the lease agreement on behalf of Two Way Marketing (Pty) Ltd as surety. The lessee went into liquidation and the appellant instituted a claim against the respondent (after having signed for the receipt of the motor vehicles as an employee of Two Way Marketing (Pty) Ltd) as surety). The respondent stated that he did not scrutinize the contents of the lease agreement and that he did not know that the lease agreement imposed personal liability on the signatory who signed the lease agreement on behalf of the company. The court *a quo* found in favor of the respondent and dismissed the appellant's claim. The appellant appealed against the decision. The appellant based his claim on the *caveat subscriptor* rule,[66] clause 33 of the signed lease agreement and on the basis that the respondent bound himself by signing a contract that clearly stated the signatory has read and understood the content, terms and conditions of the lease agreement.

Just as in the case of *Spindrifter*, the court stated that the respondent was relying on i*ustus error*. In order for a party to rely on *iustus error*, that party must show that he was misled with regards to the contents or nature of the agreement.[67] In deciding against the appellant, the court held that the defendant had shown that he was

[65] At 466 of case.
[66] A latin phrase that entails that by virtue of a signatory's signature in a contract, the signatory is aware and unequivocally understands the contents of the agreement.
[67] At 468 the court quoted the principle as stated and applied in the case of *Du Toit v Atkinsons Motors Bpk* (1985) 2 SA 893 (A).

misled as to the contents of the standard-form agreement and in particular regarding clause 33. The plaintiff, by adopting the practice of requiring the signature of an employee on the standard-form lease agreement such as the defendant's, must have known that those employees would not have expected to find themselves assuming personal responsibility as sureties for the shortcomings of their employer Two Way Marketing (Pty) Ltd.[68] The plaintiff must have known too, that none of the employees such as the defendant would study the contract and search for a clause such as clause 33.

2.3 EXEMPTION CLAUSES AND COMMON LAW DOCTRINES

An exemption or an exclusionary clause is known to be any clause or provision in an agreement that purports to [completely or partially][69] exempt or exclude a party from a liability that would otherwise be imposed by law.[70] Stoop defines an exemption clause to be a contractual term that aims to limit, alter or exclude the liability, obligations or remedies of a contracting party that normally emanate from a contract.[71]

In most times an exemption clause is found in a standard-form agreement.[72] This is due to the drastic effects and consequences of such a clause in the event that a dispute stemming from a breach arises between the parties to a contract, the standard-form agreement would make it easier for the contract drafter to enforce the exemption clause. It would be difficult for an exemption clause to be included in an

[68] At 468 G-H.
[69] My addition.
[70] Hutchison *et al* (2011) at 450.
[71] Stoop (2008) 20 *SA Merc LJ* 496 at 496.
[72] See e.g *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* (1986) 1 SA 303 (A); *Bhikhagee v Southern Aviation* (1949) 4 SA 105 (E) and *Burger v Central South African Railways* (1903) 571 TS.

agreement which was not in a standard-form i.e one in which the contractual provisions were negotiated between all parties to an agreement. This is because due to the severe liability an exemption clause brings to a contract, it would be difficult for one party to convince the other party on which the exemption clause is against, to have such a clause included in a non standard-form agreement.

It is true that the common law *caveat subscriptor* rule imposes a duty upon signatories to a contract to thoroughly read and acquaint themselves on the contents of a contract before binding themselves to the agreement. However seeing that there is a duty upon a signatory to read a contract, there should be a duty also imposed on the drafter of a standard-form agreement that not only an onerous exemption clause but in fact any exemption clause must be drawn to the attention of the signatory. It is important to note however, that as much as signatories to an agreement, in most times, expect for their attention to be drawn to onerous provisions in the contract, there are contracts that have an inherent element of danger and any signatory to such a contract should expect some level of non-liability from the service provider or drafter of such an agreement. Such agreements are usually tacit agreements[73] concluded between a paying customer and a service provider who is in the business of providing theme park and playground activities.[74]

By looking at various common law principles including the *caveat subscriptor* the consensus amongst legal practitioners[75] was and still is, that the vigorous statutory control of common law doctrines would lead to not only the courts assisting in the

[73] Usually ticket sales agreements, see e.g the *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA) and for a ticket sale example see *Central South African Railways v Mclaren* 1903 TS 727.
[74] See *Durban's Water Wonderland (Pty) Ltd v Botha* (1999) 1 SA 982.
[75] Naudé and Lubbe 2005 *SALJ* 441 at 442.

interpretation of contracts but in also indicating what according to the court is the correct contractual provision(s) to include. This would be to such an extent that the contract in question would not only adequately reflect the intention of the parties. A more favoured approach in the interpretation of a contract is the judicial development of common law doctrines in light of the Bill of Rights, the prevailing surrounding circumstances, principles of good faith as well as public policy. Some of the case law in which some of the well-known common law doctrines were developed in light of the above various factors include the case of *Jajbhay v Cassim*[76]. In this matter the court held that the *par delictum* doctrine could be relaxed "in order to come to the relief of one of the parties where such a course is necessary in order to prevent (an) injustice or to satisfy the requirements of public policy".[77]

In the case of *Bank of Lisbon and South Africa Ltd v De Ornelas*,[78] the Appelleate Division, brought to an end the uncertainty of the applicability of the *exeptio doli*. The court held that the common law doctrine of the *exeptio doli* had no place in South African law and that in fact it was never introduced into Roman-Dutch law and that the doctrine could not be utilised as a defence based on equity in South African contract law.[79]

2.4 ***CAVEAT SUBSCRIPTOR***

The *caveat subscriptor* rule is used by a party who wants to enforce onerous terms and conditions in a standard-form agreement. By relying on the *caveat subscriptor*, a party would merely state that a signatory bound himself or herself to the contents of the agreement by having signed the agreement and in doing this, implying that

[76] 1939 AD 537.
[77] At 558.
[78] 1988 (3) SA 580 (A).
[79] At 607B.

they have read and fully understood the standard-form agreement in its entirety. It is important to note that along with the interpretation of this doctrine, the courts usually take into consideration the privity of a contract between parties in that even though a court would have to decide on the reasonableness and fairness of the application of the *caveat subscriptor* rule, courts are expected to restrict their interference in a contractual relationship.

When giving judgment in the Burger case, the court held that "it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature".[80] Christie[81] describes the true basis of the *caveat subscriptor* principle as being the doctrine of quasi mutual assent and the question being simply "whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signifying his intention to be bound by it".[82] Using judgements where the *caveat subscriptor* was upheld, Christie states that it is clear that a signatory having an attitude of "I haven't read this document but I'm signing it because I'm prepared to be bound by it without reading it"[83] entitles the other party to regard the document as binding. This is illustrated in the case of *Goedhals v Massey-Harris & Company*[84] whereby a farmer was bound by a form he had signed without having read it. In the case of *Mathole v Mothle*[85], the court bound a sick man (who had difficulties with concentrating) to a document he had signed which contained latin words that made it difficult to understand the document as a whole. The court held that the man "was

[80] *Op cit* note fn 91 at 578.
[81] Christie *The Law of Contract in South Africa* 6ed at 182.
[82] Christie at 182.
[83] Christie at 183.
[84] (1939) 314 EDL.
[85] (1951) 1 SA 256.

content to execute the document without desiring that it be explained to him in a language which he could understand".[86]

It is clear that a court will not easily dismiss the application of the *caveat subscriptor* doctrine by merely stating that the document was not read and therefore a signatory was unaware of the exemption clauses or the onerous terms in the standard-form contract. Christie is of the view that the *caveat subscriptor* is a doctrine of quasi mutual assent and it is therefore unquestionable that the doctrine can only be applied in favour of a party whose in the positon of a reasonable person.[87] In addition, Christie states that a party will not be bound by a document he has signed when he has been misled either as to the nature of the document or as to its contents, which has been considered above.[88] Find below cases whereby the court decided against the *caveat subscriptor* doctrine.[89]

2.5 THE NEED TO DRAW THE ATTENTION OF THE SIGNATORY

In most times in which a dispute on exemption clauses has arisen and taken to court, it is a dispute arising from an exemption clause that has been provisioned in a standard-from agreement. The issues with exemption clauses has also brought to light whether or not there is a need for a signatory to be made aware of a clause excluding liability on the part of the contract drafter before the signing of a contract. There have been many cases as shown below where clearly the courts are divided as to whether contract drafters are obligated to draw a signatory's attention to such onerous clauses. This is also taking into consideration the *caveat subscriptor*

[86] At 258G-H.
[87] Christie at 185.
[88] Christie at 186.
[89] Chapter 3 para 3.3.

doctrine that ensures the contract drafter that the signatory is aware of the contents provisioned in the standard-form agreement.

2.5.1 *ABSA bank Ltd v Trzebiatowsky*

In the case of *ABSA v Trzebiatowsky*[90] the defendants raised the defence of ignorance when confronted by a suretyship clause that made the defendants liable in their personal capacity. In this matter the defendants were married to each other and they applied for a loan for the payment of three Woolworths franchises that were being sold by an owner who planned on immigrating. The loan application was made and granted by ABSA bank, the applicant. After non-payment of the loan amount ABSA bank requested money from the second defendant (the wife of the first defendant) in her personal capacity. The second defendant refused payment in her personal capacity on the basis that there were many documents that she signed on the day she affixed her signature on the loan agreement with ABSA. Secondly, that many of those documents had complex provisions and that she did not read the documents she was requested to sign because she put her faith and trust on a Mr Van Niekerk[91] and the first defendant, her husband. The court refused and dismissed her application and ordered that she pay back the full amount of R700000.

2.5.1.2 Judgment

The court held that the second defendant's defence of ignorance was not valid because the second defendant was a business woman who had been involved in many business operations before, she should have known that firstly, she had to read any document that she was signing and secondly a suretyship clause of that

[90] (2012) 5 SA 134 (ECP).
[91] An employee of the Applicant who had been previously involved in many business dealings with both defendents.

nature was not unexpected in a loan agreement with a bank. In this matter the court held that there was no need at all for ABSA or ABSA's representative, in this case Mr Van Niekerk to bring to the attention of the defendents the content of the loan agreement and that there was no misrepresentation by ABSA for omitting to do so. The court based its decision on the fact that she was given the opportunity to read the documents, there was no need for Mr Van Niekerk to tell her about the contents of the loan application because the agreement between the defendants and ABSA had long been the subject of many business meetings between ABSA bank and the defendants. Secondly, on the day that the second defendant signed the agreement was a day that was mean't only for the affixing of the signatures.

Pretorius[92] concurs with Shamrock[93] and unequivocally states that the decision in *ABSA v Trzebiatowsky* was correct in not accepting the defence of ignorance by the second defendant and that such a defence is insufficient to justify an agreement being declared void *ab inito*. Both authors state that the *caveat subscriptor* rule should also be applied in such a way that that when a signatory affixes his or her signature on a document, they are aware of the full contents of the agreement and by signing the agreement, they are not only agreeing to those terms and provisions but they are making the other party reasonably rely on their signature as reflecting their true intention and consensus.

[92] (2013) *OBITER* 149.
[93] (1989) 106 *SALJ* 458.

2.5.2 *Afrox Healthcare Bpk v Strydom*

In the case of *Afrox Healthcare (Pty) Ltd v Strydom*,[94] the appellant, a hospital that was privately-owned, admitted a patient, the respondent, who upon admission signed an admission document which contained an exemption clause which excluded any form of liability from the hospital, the employees of the hospital as well as any of its agents for any loss, damages or negligence that the respondent could experience whilst being a patient at the hospital. This exemption clause excluded any intentional acts or omissions. The respondent instituted an action against the appellant after a nurse at the hospital acted negligently after an operation that had been undergone by the respondent, led to complications that caused the respondent to suffer damages. In court documents the Respondent argued that it had been the legal duty of the admission clerk to draw his attention to the clause.

The Respondent alternatively argued that at the time of the signing of the admission agreement between himself and the hospital, he had been unaware of the exemption clause and that the document had been signed by him without having read it.[95] The Respondent stated that even though he was given the opportunity to go through the admission document himself, the clerk who was processing his admission into the hospital had not only the responsibility but also a legal duty to show him the exemption clause.[96] The Respondent stated that he expected such a legal duty by the admission clerk because he did not expect to find the kind of exemption clause in the admission document. The appellant denied liability and based its argument on the exemption provision contained in the admission agreement that the respondent

[94] (2002) 6 SA 21 (SCA).
[95] At 41F.
[96] At 42 A-D.

had signed. The Transvaal provincial division ruled in favor of the respondent and the appellant appealed the decision.

2.5.2.1 Judgement

In giving judgment the Appeal court held that the respondent's subjective expectations with regards to the contents of the admission documents were irrelevant.[97] The court held that what was relevant was to see if objectively speaking, the exemption clause used in the contract was expected.[98] The court held that there was no legal duty on the admission clerk to draw the respondent's attention to the exemption clause, that the kind of exemption clause contained in the agreement between the respondent and the appellant was expected and is the kind of provision that a patient can expect to find in an admission document of any hospital.[99] The court held that if a party, just like the respondent is given an opportunity to read an agreement that he is about to affix his or her signature on and by his or her own accord fails to read the terms of the agreement, that party does that at his own risk. The Appeal court held that the respondent was a consenting adult who did not sign the agreement under duress and that a signatory's attention can be drawn to a provision of an agreement only if there is a legal duty on the other party to do so and in this case there was no legal duty on the admission clerk to do so.[100] The applicant did not act inappropriately by not drawing the attention of the respondent to the exclusionary clause and a clause excluding liability was not to be unexpected from a hospital. This matter was decided before the enactment of the CPA and was not applied by the court in its judgment. The CPA has no retrospective

[97] At 42D.
[98] At 42B.
[99] At 41F-I.
[100] *Op cit* note 67.

application but it will be used in chapter three in analysing whether there would have been a different outcome had the CPA been in operation at the time.

2.5.3 *Brink v Humphries*

In the case of *Brink v Humphries*[101] the case concerned a credit application on behalf of a company that also included a suretyship clause. The contract denier signed the credit application agreement in his representative capacity for the company that was requesting credit. The suretyship clause at the bottom of the credit application agreement was phrased in such a way that the signatory would be liable for the payment of the credit in his personal capacity. After numerous High Court decisions regarding contracts were suretyship liability was disputed, the Appellate division decided in favour of the contract assertor. The Appellate division had to decide whether the contract denier (the signatory) had been misled by the credit application agreement. The court in deciding was split. The majority decision held that the contract denier had been misled and the majority raised a number of reasons for their decision. The majority found that the form of the credit application agreement was misleading in that the title of the document "Credit Application" and not "Credit Application and Suretyship Agreement" caused the contract denier to be under the mistaken impression that he was signing in his representative capacity, and the denier was unaware of the suretyship clause. The court used the above test that was formulated in the *Sonap*[102] case and in addition had to enquire whether a reasonable man would have also been misled under the circumstances, the court took cognisance of the *caveat subscriptor* rule but held that even though the suretyship clause preceded the signature of the contract denier, the clause was in

[101] *Ibid* at fn 21.
[102] *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* (1992) 3 SA 234 (A).

capital letters, the clause was not sufficiently prominent in the agreement and the credit application agreement was therefore a “trap for the unwary” and the contract deniers mistake was reasonable under the circumstances.

2.5.3.1 Dissenting Judgment

The sole dissenting judgement was Navsa JA, who shared the same sentiments as Sharrock[103], one of the authors of have strongly criticised contract deniers escaping suretyship liability. Navsa JA found that the contract denier was in this case not entitled to escape the suretyship liability on the basis of Justus error. The basis for Navsa JA’s decision was that the contents and language used in the credit application agreement were simple and unambiguous, this made the document to not be misleading and even if the contract denier was misled by the document, a reasonable man would not have been misled by the form of the document, making the rationale of the contract denier fail the third threshold of the test established in Sonap.

The majority decision in Brink is in contradiction with the case of *Afrox Healthcare Bpk v Strydom*[104] and *Davids v ABSA Bank*.[105] The majority judgment in Brink saw it relevant to regard the subjective expectation of the inclusion of a suretyship clause in the agreement. This contradicts what the same court in Afrox held, which was that a duty to point out an exemption clause of the nature that was raised in the Afrox matter only arose if that exemption clause was objectively unexpected in such a contract. Even though the court in David and Brink are of different hierarchies, it is

[103] (1989) 106 SALJ 458.
[104] 2002 (6) SA 21 (SCA).
[105] *Ibid* fn 21.

interesting to note the different approaches taken in both decisions. In the case of David's the court decided in favour of the signatories and they were, just like in Brink, also able to avoid suretyship liability. The court held that the contract was declared void ab initio because the contract assertor failed to draw the attention of the contract denier to the suretyship clause and that had the applicant done so, this would have been vital in the respondent deciding whether or not to accept the terms and contents of the agreement.

2.5.4 *Mercurius Motors v Lopez*

In the case of *Mercurius Motors v Lopez,*[106] the standard-form contract included an onerous term in which the liability of the Appellant was excluded unfairly against the Respondent. The court gave judgment in favor of the Respondent after stating that the clause excluding liability in the standard- form agreement was unclear, ambiguous and that it was located in a part of the contract in which a consumers attention would not be easily drawn to the exemption clause.[107] The court held that for a contract of deposit, the customer could not have reasonably expected to find that exemption clause and therefore it would've been appropriate for the car dealer to draw the attention of the customer to the onerous exemption provision. It would therefore have been imperative for the SCA to conclude on whether there is a duty to draw the attention of the signatory to an exemption clause. In the *Afrox*[108] matter, however, the court took the opposite approach, in that it held that the exemption clause could've been reasonably expected to be in such a contract and that in effect it was not necessary for the hospital to draw the patient's attention to the onerous

[106] (2008) 3 SA 572 (SCA).
[107] At 577J – 577C. As the CPA was not in operation at the time this matter was not decided, the possible outcome of the courts decision will be discussed in chapter three.
[108] 2002 (6) SA 21 (SCA).

exemption provision. In deciding that the exemption clause was unenforceable in the Mercurius Motors matter, the court held that the exemption clause that was provisioned was of such a nature that a reasonable person would not expect it to be in a contract of deposit. Seeing that it was unexpected in such a contract, it was imperative for the applicant to draw the attention of the respondent to the exemption clause.[109] Just like Afrox above, the possible outcome of this matter will be discussed

2.5.5 *Van Wyk v Otten*

In the matter of *Van Wyk v Otten*[110] the Plaintiff wanted to cancel a purchase and sale agreement that was concluded between himself and the defendant because the motor vehicle that the plaintiff had purchased had latent defects. Some days later, after the plaintiff had signed the purchase and sale agreement, the defendant requested the plaintiff to sign an additional document, which was in essence, unbeknown to the plaintiff, an extension and amendment of the initial purchase and sale agreement. This additional document provided that the plaintiff brought the motor vehicle on condition that the seller did not guarantee the absence of any material latent defects on the motor vehicle. This clause excluded the seller from any liability in respect of the motor vehicle and the court found that this provision excluded the purchaser from cancelling the agreement based on the presence of latent defects.

The court granted the plaintiff's prayer to cancel the agreement on the basis that the additional document was signed days later, that the provision deprived the plaintiff of

[109] This decision is also in line with the views expressed by Naude and Lubbe in (2005) 122 *SALJ* 441 at 454.
[110] (1963) 1 SA 415 (O).

the right to cancel the agreement after discovering material latent defects on the vehicle and most importantly, that the defendant failed to let the plaintiff know that the additional document was an amendment to the original purchase and sale agreement. The court declared the contract to be void *ab initio*. In deciding this the court looked at all the surrounding circumstances and held that the seller was obliged to draw the attention of the purchaser to the guarantee that latent defects would not be a valid reason to cancel or rescind the purchase and sale agreement. In addition, the purchaser was not informed by the seller that the additional document he was signing was in fact not just any other document but an extension and amendment of the purchase and sale agreement between both parties.

2.6 TICKET SALES

Ticket sales contracts are in a way standard-form contracts because they are terms and conditions that have been pre-written by the drafting party, that will be applicable to the other party to the ticket sale contract (the promisor). In light of fairness as well as good faith, it is however required that the promisee takes reasonable steps to bring those pre-written terms and conditions to the attention of the promisor.[111] Only once this reasonable step is taken by the promisee, will the pre-written terms and conditions be deemed to be incorporated into the ticket sale contract between both parties. The difference between ticket sales contracts and the traditional standard-form contract is that one is an unsigned agreement and the other is a signed agreement. In the case of standard-form contracts, as can be seen in the above

[111] A good example in this instance would be as found in the case of *Central South African Railways v Mclaren* 1903 TS 727.

example of cases[112], it is not an obligation to bring an onerous term or condition to the attention of the signatory party.

In ticket sales cases, the promisor is not expected to sign any document because these kinds of agreements are considered to be unsigned contracts. In the case of signed standard-form contracts, the *caveat subscriptor* rule would be applied, in that any party who is a signatory to an agreement is responsible for what he or she signs. This means that there would be no duty on the part of the promissee to bring to the attention of the other party the terms and conditions in the contract that would be considered to be onerous.[113]

In the case of *Central South African Railways v Mclaren,*[114] a case applied in many law reports,[115] the court held that there are three questions asked in ticket sales contracts. These questions were, firstly did the signatory party know that there was printing or writing on the ticket; secondly, did the signatory party know that the writing or printing on the ticket contained conditions relating to the terms of the contract. Lastly, did the drafter of the conditions reflected on the ticket sale contract do what was reasonably sufficient to give the signatory party notice of the conditions?[116] If all these questions are answered in the negative the ticket sale contract will not be binding. If the last two questions were answered in the affirmative, the ticket sales

[112] *Op cit* note 62.
[113] See chapter 3 for an in depth discussion about bringing the attention of the consumer to any onerous term in a consumer agreement.
[114] 1903 TS 727.
[115] *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 182 (SCA); *Tomasi v Bhangasi Horse Safaris CC* (8496/2007) [2009] ZAKZHC 11 (20 February 2009); *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd* 1977 2 SA 709.
[116] These questions were quoted by Innes CJ from the English case *Richardson Spence & Co (*1877) 36 LT 540.

contract will remain binding.[117] The court in this case used reasonableness in describing what would be considered as sufficient notice to the consumer.[118] The court did this despite the fact that the respondent bared the risk by not having read the terms and conditions of the ticket agreement between them.

The significance of asking each question as held in the Central Railways case was questioned in the case of *King's Car Hire (Pty) Ltd v Wakeling*.[119] In this case the court stated that the third question may be asked only if the either questions 1 or 2 were answered in the negative. Christie submits that the first question would then not serve any useful purpose.[120] Christie makes the following example, that if a customer knows the document contains terms but goes ahead with the contract without reading them he is bound; if his knowledge falls short of this…the customer is bound if the supplier took such steps as would have drawn the attention of the reasonable customer to the terms contained or referred to in the document.[121] This view makes sense because not all three questions need to be asked to find out whether a customer is bound to the terms of an unsigned agreement. If a person is aware that there is writing on the ticket, that person would've probably read what is written, if not that person would've atleast known that there were terms on the ticket. Secondly, if the person knew that the writing on the ticket included terms and conditions of the agreement, it won't be necessary for the other party to do what would be considered as reasonably sufficient to bring the other party's attention to the conditions on the ticket.

[117] The CPA has however changed this position. The change will be discussed further in a chapter 4.
[118] At 735.
[119] (1970) 4 SA 640 (N).
[120] Christie at 188. Here Christie also brings to light the fact that the court in Central SAR v Mclaren reached its decision without asking question 1 and 2 separately.
[121] Christie at 188-189.

Principles of good faith, fairness and reasonableness must therefore be used in the preparation of a standard-form agreement so that the interests of both the drafter and the signatory are taken into account. If a one-sided standard-form agreement is drafted in favor of the drafter or signatory, the duty will lie with the drafter to bring the unusual and burdensome terms and conditions in the standard-form agreement to the attention of the signatory so that a well-informed decision is made. In effect, this would mean that the same principles of *bona fide* and reasonableness applied in unsigned agreements will also be applicable in signed standard-form agreements. Also, the same defences available to a consumer in signed documents are the same defences that are available to consumers in ticket sales cases.

2.7 CLASSICAL THEORY OF CONTRACT AND PATERNALISM

Freedom of contract forms the basis of the classical theory of contract.[122] This theory has developed over the years due to the ever-changing economy as well as growth in industrial capitalism. Followers of the classical theory especially economists, have incorporated the principle of *laissez-faire* in applying the classical contract theory, thus promoting economic liberalism.[123] This theory has allowed business-orientated persons to freely negotiate the contents and terms of their business agreements.

Hawthorne further states that "Friedman describes the cornerstones of the classical theory of contract as the freedom of movement, insurance against calculated economic risks, freedom of will and equality between the parties".[124] Furthermore,

[122] Hawthorne (1995) 58 *THRHR* 157 at 162.
[123] *Op cit* note 81 at 163.
[124] *Op cit* note 81 at 165.

Hawthorne states that these four elements are characteristic of the social function of contract in the formative era of modern industrial and capitalist society.[125] The classical theory of contract relies on individuals and the freedom of individuals to choose what they want. This means that because of this freedom that it allows, parties to a contract are treated equally before the law.[126]

The problem with the classical theory is that it does not take cognizance of social equality as well as the economic differences between the parties to a contract. Hawthorne is of the view that the classical theory does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract.[127] In overlooking these disparities, the classical theory tacitly permits domination and exploitation of the weaker party. By stating that no one can be forced to contract, the classical theory ignores the reality that economic necessity provides strong compulsion to contract; that many members of society fail to achieve economic conditions which enable them to enjoy the freedom to contract, and that private individuals rarely possess the resources to litigate,[128] and this still reigns true today.

Hawthorne defines paternalism as "any legal rule that prohibits an action on the ground that it would be contrary to the actors' welfare".[129] Paternalism has been used by the judiciary as a way to develop and interpret the law in order to address the imbalance that the freedom of contract in a free market has created. Hawthorne refers to Cockrell who defines paternalism as a principle that "protects the promisor

[125] *Idem* 165 of article.
[126] *Op cit* note 81 at 165-166.
[127] *Op cit* note 81 at 166.
[128] *Op cit* note 81 at 166 of article.
[129] *Op cit* note 81 at 168 of article.

from himself or herself by preventing him or her from acting in a manner contrary to his or her own best interests".[130] Paternalism is used to justify interpreting the unreasonableness of a contract in favour of the signatory, it is almost like a defence. This of course would be after all the circumstances of both parties have been observed by the courts. As Christie put it, this defence cannot be put on the broad basis that the signatory will not be bound to any unreasonable term, because that would introduce a form of paternalism quite foreign to the general principle of freedom of contract on which the whole law of contract is based.[131] In the case of Burger[132], the court held that "our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable".[133]

2.8 CONCLUSION

The inclusion of exemption clauses in standard-form contracts is not going to come to an end anytime soon due to the convenience and expedition that comes with the use of standard-form contracts and exemption clauses. The principle of *caveat subscriptor* has been used in enforcing standard-form contracts against signatory parties who claim to not have been made aware of onerous clauses in the agreement that in most times is an exemption clause.[134] It is recommended that the courts use the principle of firstly drawing the attention of any party to any onerous term and condition and that secondly, the courts use the principles of reasonableness, *bona fides* and paternalism in interpreting a standard-form agreement and enforcing an exemption clause.

[130] Cockrell (1992) *SALJ* 40 at 61.
[131] Christie at 185.
[132] *Burger v Central South African Railways* (1903) 571 (TS).
[133] *Op cit* note fn 132 at 579.
[134] *Op cit* note 23.

This would allow the courts to better protect the interests of the signatory party who is usually at a much more weaker bargaining position. In no way is it being argued that by stating that every court dispute in which a standard-agreement is subject, must be solved by interpreting the agreement in favour of the signatory party. It is a submission, that in addition to the application of paternalism, there must be a balance between applying the *caveat subscriptor* rule and enforcing exemption clauses by looking at all surrounding circumstances to come to a just conclusion. The courts cannot allow the application of the *caveat subscriptor* rule blindly to the detriment of the signatory party who in most times is in a weaker bargaining position.

The circumstances of each case must be evaluated separately. It is not enough for a standard-form agreement to have an unusual and onerous term and condition whereupon a claimant to an action will in their defence, rely on it in addition to using the *caveat subscriptor* rule, the clause must be precise and clear enough for a signatory's attention to be easily drawn to it. The next chapter will now focus on the effects of the CPA on exemption clauses in standard-form contracts and the recourse's that are available to a consumer when the drafter of a contract has not adhered to the provisions of the CPA.

CHAPTER 3

THE EFFECT OF THE CPA ON EXEMPTION CLAUSES IN STANDARD-FORM CONTRACTS

3.1 INTRODUCTION

The Consumer Protection Act (CPA) was promulgated in March 2009 and it came into effect on the 1st of April 2011. The Pre-amble to the CPA states that innovative means must be employed and developed in order to protect the interests of all consumers and to ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace. Amongst the reasons of why the CPA was created is, *inter alia*, to promote and protect the economic interests of consumers as well as to improve access to information that is necessary so that consumers are able to make informed choices according to their individual needs and choices.

The CPA has definitely brought about noticeable changes in respect of the agreements that are concluded between suppliers and consumers in that there are prohibited transactions, terms and conditions must not be drafted in such a way that they are unfair, unjust or unreasonable and in addition the CPA has also included contract terms that are presumed not to be fair and reasonable.[135] These changes will protect consumers in that they will allow consumers the opportunity to make an informed decision before signing a consumer agreement. In addition, there are legal redresses that the CPA has in place in cases where the supplier has not complied with the requirements that are set out in the Act. This chapter will look at the sections that deal with these prohibited transactions and provisions as well as the redresses that are available to consumers in cases of non-compliance with the Act by suppliers.

[135] Regulation 44 of the CPA makes provision for the contracts that are presumed to not be fair or reasonable. This regulation only applies to natural persons.

3.2 UNFAIR, UNJUST AND UNREASONABLE PROVISIONS

The section of the Act that deals with the issue of exemption clauses in standard-form contracts is Part G of the CPA, comprising of sections 48-52. The CPA does not directly refer to exemption clauses or standard-form contracts but makes reference to entering into agreements that are unreasonably one-sided and therefore to the disadvantage of the consumer, but most importantly the CPA deals with the consumer's right to fair, just and reasonable terms and conditions. In respect of standard-form agreements, the CPA states that agreements or notices that are excessively one-sided in favour of any person other than the consumer or any other person to whom good are to be supplied will be considered as being unfair, unreasonable and unjust.[136] This provision would apply to drafters of standard-form agreements and will force the drafters of standard-form agreements to refrain from drafting clauses that unfairly waive the rights of consumers and that are to the total benefit of the drafter i.e supplier, manufacturer, distributor and producer.

Exemption clauses must not be constructed in such a way that they are interpreted to be unfair, unjust and unreasonable. Suppliers must not require a consumer to waive any rights or liabilities of the supplier on terms that are unfair, unreasonable or unjust or impose any such terms as a condition of entering into a transaction.[137] The keywords that are at the forefront of Part G are "unfair"; "unreasonable" and "unjust". Unfortunately, section 1 of the CPA[138] , does not define these words. The CPA does however provide guidelines as to when an agreement or term of an agreement would

[136] S48(2)(a).
[137] S48(1)(c).
[138] The definitions section in Part A of the CPA. See Sharrock (2010) *SA Merc LJ* (22) 295 for an in-depth and critical discussion of some of the definitions in provisioned in section 1 of the CPA.

be considered to be unfair, unjust or unreasonable.[139] Some of these guidelines include terms and conditions that are excessively one-sided and in favour of any person other than the consumer[140]; terms that are so adverse to the extent that they are inequitable[141] and provisions that lead the consumer to rely upon false, misleading or deceptive representation.[142] Naude submits that the list of factors that courts must take into consideration when assessing the unfairness of a term or condition focuses largely on the circumstances under which a consumer has concluded that consumer agreement (procedural fairness) and that the CPA has failed in giving guidelines that focus on the substantive fairness of a term.[143] The prohibition in section 48 deals with applying unfairness in terms and conditions generally, and not just to standard-form contracts or terms that have not being negotiated between the consumer and the drafter of a consumer agreement. Sharrock is of the view that even terms specifically agreed to after "hard-bargaining" are subject to the unfairness standard.[144]

The CPA has also included extensive requirements that suppliers must adhere to before an agreement can be concluded, whereby the liability of the supplier is limited or there is an obligation on the part of the consumer to indemnify the supplier or any other person.[145] In these instances the attention of the consumer must be drawn in a manner that satisfies the requirements as provisioned in section 49(3) – (5). Some of these requirements are that the provision must be written in plain language and the fact, nature and effect of the provision must be drawn to the attention of the

[139] See section 48 and regulation 44.
[140] S48(2)(a) of the CPA.
[141] S48(2)(b) of the CPA.
[142] S48(2)(c) of the CPA.
[143] Above Naudé at 515.
[144] Sharrock at 307.
[145] S48(1)(c).

consumer in a conspicuous manner and in a manner that is likely to attract the attention of an ordinarily alert consumer.[146] The CPA also provides that a consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provisions as contemplated in section 49(1).[147]

This clearly and fairly puts some responsibility on any party concluding an agreement with a consumer to draw the consumers' attention to any provision that seeks to limit the liability of the supplier or to impose any obligation on the consumer. This differs to the situation where the CPA is not applicable whereby a supplier would not have drawn the attention of the consumer to an unfair or unreasonable provision but would have rather cited the *caveat subscriptor* rule in their defence. The CPA has made it harder for drafters of standard-form contracts to enforce their agreements in light of contractual conflict between parties in the event that the necessary requirements were not adhered to at the time the contract was concluded.

Section 49 states that if a provision or notice concerns any activity or facility that is subject to any risk, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3)-(5), and the consumer must have assented to that provision or notice by signalling or initialling the provision or otherwise acting in a manner consistent with the acknowledgment of the notice, awareness of the risk and acceptance of the provision. This section implies that if a consumer to an

[146] S49(4)(1)(a). Also see section 22 of the CPA which includes requirements on what will be considered as plain and understandable language, and this includes notices, documents and visual representations. In terms of section 22(3), the Commission may also publish guidelines for methods of assessing whether a notice, document or visual representation satisfies these requirements.
[147] S49(5).

agreement has read and fully understood the terms of the agreement, regardless of whether or not those terms are unfair, they will be enforceable.

Naudé is of the view that the counter-signing requirement of this section is problematic if the courts do not sufficiently grasp that substantive unfairness on its own should be sufficient reason for setting aside a term, regardless of procedural aspects such as the particular individual consumer's knowledge of the term as evidenced by signature.[148]

3.3 RECOURSE AND THE RIGHT TO REDRESS THAT CONSUMERS HAVE AGAINST SUPPLIERS

Section 3(1)(h) of the CPA reads as follows:

3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—
(h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

In addition to the provisions in the CPA regulating consumer protection, the legislature has also included provisions that deal with the forms of redresses that are available to consumers who have been wronged by suppliers and manufacturers. A consumer seeking redress must have *locus standi* and must approach the court according to the manner as prescribed in the CPA.[149] If a consumer approaches any court, that consumer would do so according to the rules that govern that particular court. In the case of Magistrate's Courts for example, the consumer would follow

[148] Naudé (2009) *SALJ* 505 at 512.
[149] Chapter 5 of the CPA.

the Magistrate's Court Act[150] and in the case of the High Courts, the consumer would also follow the Supreme Courts Act.[151] A consumer who has *locus standi* according to the CPA, is provisioned in section 4(1)(a) – (e) as a person whose acting on his or her own behalf;[152] any authorised person acting on behalf of some else;[153] a person acting as a member of, or in the interest of, a group or class of affected persons;[154] with leave of the Tribunal or court, a person acting in the public interest[155] and; an association acting in the interest of its members.[156]

The CPA has given the consumers a number of alternatives that they may approach when facing a dispute with a supplier. In some instances, the consumer is forced to approach certain ombudsman and established bodies that have been specially established for consumer protection.

These are the remedies that consumers have against suppliers that they have entered into contracts with and are facing disputes with such suppliers. In relation to Part G of the CPA, such disputes that the Act relates to, are that suppliers must not conclude agreements that include provision(s) , terms or conditions whose aims are there to defeat the purpose(s) of the Act,[157] that are there to mislead or deceive the consumer[158] or subject the consumer to fraudulent conduct,[159] if the agreements purport to waive or deprive a consumer of a right in terms of the Act,[160] avoid a

[150] 32 of 1944 as amended.
[151] 10 of 2013.
[152] S4(1)(a).
[153] S4(1)(b).
[154] S4(1)(c).
[155] S4(1)(d).
[156] S4(1)(e).
[157] S51(1)(a)(i).
[158] S51(1)(a)(ii).
[159] S51(1)(a)(iii).
[160] S51(1)(b)(i).

suppliers obligation or duty in terms of the Act;[161] to set aside or override the effect of any provision of the Act[162] and the agreement authorises a supplier to either do anything that is unlawful or to fails to do anything in terms of the Act.[163]

Naudé is of the view that these sections of the CPA are unnecessarily verbose because they aim to prohibit contractual exclusion or limitation of the consumer's rights and the suppliers obligations under the CPA.[164] Naudé submits that the legislature could have just provisioned that "any term or notice which directly or indirectly waives or restricts the consumer's rights under this Act or in any other way contravenes this Act shall be void".[165]

In the courts ensuring that suppliers comply with the Act by entering into agreements that have fair, just and reasonable terms and conditions, the courts must first declare that a part or the whole agreement or transaction was unjust, unfair or unreasonable.[166] Once this declaration has been made, the court may then make an order that is just or reasonable under the circumstances. If a consumer alleges that an agreement or the terms and conditions thereof are void, not unfair, unreasonable or unjust but void, the court may make an order that the part, term or condition that the consumer alleges to be void be severed from the agreement in order to make it lawful or the court can declare the entire agreement to be void. Obviously if the first instance is ordered by the court, the contract between the supplier and the consumer will remain in operation but this is of course if after severing the void term and/or

[161] S51(1)(b)(ii).
[162] S51(1)(b)(iii).
[163] S51(1)(b)(iv)(aa) and (bb).
[164] Naudé at 519.
[165] Naudé at 519.
[166] S52(3)(a).

condition from the agreement, the *essentialia* and *incidentalia* of the agreement remain the same as was initially intended by both the supplier and the consumer. If this won't be the case after the severability of the term and/or condition, then the whole consumer agreement will have to be voided. If the whole consumer agreement is voided in this way or in accordance with section 52(4)(a)(i)(bb) then the whole consumer agreement will come to an end.

3.4 CRITICISMS OF THE ACT

Even though the CPA sets out to achieve what no other Act has done before in South Africa in respect of consumer protection, there have been criticisms[167] labelled against the CPA on various issues.

3.4.1 National Consumer Commission[168]

69. (1) A person contemplated in section 4(1) may seek to enforce any right in terms of

this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by—

(c) (iv) filing a complaint with the Commission

In respect of the NCC, the flaw with establishing one such institution in one area is that consumers are everywhere in South Africa and from different provinces. The offices of the NCC being only in Gauteng, Centurion, make them to not easily be accessible to every consumer and no branch offices have been created to accommodation for the consumers who are not in close proximity to the offices.

[167] See Van Heerden & Barnard *JICLT* Vol 6 (2011) 131 and Van Niekerk, Stoop and Jacobs *PERJ* Vol 13 (2010) 302.
[168] Hereinafter NCC.

3.4.2 Industry Ombud and Ombudsman

69. (1)(b) referring the matter to the applicable ombud with jurisdiction…

(c) if the matter does not concern a supplier contemplated in paragraph (b)—

(i) referring the matter to the applicable industry ombud

A consumer can also lay an complaint with the industry ombuds. The problem with this is that not every supplier is registered to an industry ombuds and the problem with industry ombuds is that if there is no ombuds in a particular industry for certain products, goods or services that are supplied to consumers, there is no other alternative other than to either approach the ombudsman, NCC or one of the consumer courts referred to in the CPA.

Van Heerden and Barnard discuss the difference between an industry ombud and an ombudsman as follows, that if a supplier complained against is a financial institution that belongs to an ombud scheme recognised under the Financial Services Ombud Schemes Act[169], the matter can, as one of a number of alternatives, be referred to the ombud scheme for resolution in terms of section 70(1)(a) of the CPA. Complaints against any supplier not belonging to one of these schemes may be dealt with by an industry ombud, accredited in terms of section 82(6), if the supplier falls under any such ombud. Such ombuds may be provided for in industry codes and must be approved by the Consumer Commission.[170] An ombudsman that may be approached in South Africa would be the Public Protector, a statutory body established in terms of the Constitution[171] and the Public Protector Act[172]

[169] 37 of 2004.
[170] Van Heerden & Barnard *JICLT* Vol 6 (2011) 131 at 134.
[171] Constitution of the Republic of South Africa.
[172] 23 of 1994.

3.4.3 Consumer Courts

69 (1)(c)(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court.

A consumer can also approach the consumer courts which the CPA defines as meaning "a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation".[173] The problem with these kinds of courts is that they are not easily accessible like the small claims courts which are found in every jurisdiction, these courts have only been established in Gauteng, the Free State and Limpopo[174], making them difficult to access by consumers living in provinces in which these courts haven't been established.

3.4.4 Alternative Dispute Resolution Agents

69(1)(c)(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70.

The CPA also makes reference to using alternative dispute resolution agents to sort out disputes between consumers and suppliers. This is a problem because agents usually have to be paid in order to mediate issues and negotiate solutions between consumers and suppliers. There are many advantages and disadvantages attached to using alternative dispute resolution agents and some of the advantages being that it is more economical to use such agents because it is more cost effective than litigation, dispute resolution mechanisms are more efficient and the decision ends with the agent so it is not appealable. If the alternative dispute resolution decisions were appealable, this would make the consumer vulnerable to endless and costly

[173] Section 1 of the CPA.
[174] Van Heerden & Barnard *JICLT* Vol 6 (2011) 131 at 135.

litigation.[175] A big disadvantage to using alternative dispute resolution agents is that most of the time the agents are qualified and trained practitioners from different profession, the question then is, who will be paying for their services, would it be the consumer, the supplier or both…a supplier would definitely not pay an agent to the benefit of a disadvantaged consumer.

3.4.5 Civil Courts

69(1)(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

Another redress that consumers have is to approach the civil court. Civil courts are the Magistrate Courts and the High Courts. The problem with these courts are that they are not efficient, any dispute arising between a supplier and a consumer will most probably lead to action proceedings, which are costly and can take years to resolve. In this case, either party takes responsibility of their own legal costs, the supplier will almost always have money to cover for legal fees but an average consumer would not have the finances for litigation. It is a pity also that disputes relating to consumer agreements are not covered by the Legal Aid Act because this would've made it easier for consumers who did not have the money for litigation to get free legal representation for these kinds disputes. Another option that consumers can use in civil courts is to approach the small claims court whose jurisdiction are claims that are not in excess of R12000. No legal representation is required in small claims courts and the matters are usually finalised expeditiously so this avenue might more beneficial to consumers whose consumer agreements and credit are worth less.

[175] It can also be one of the clauses of a consumer agreement that were there to be a problem, an ADR agent would be used and the final decision is final.

A criticism that was advanced by Jacobs, Stoop and Van Niekerk[176], which I agree with is that the CPA only offers consumer protection, in that the Act applies only to consumer agreements between suppliers and consumers. As a result, the CPA will not have application in other prominent contracts such employment contracts, credit agreements and transactions whereby the consumer is the state.[177]

3.5 CASE LAW

Seeing that the CPA is still fairly new, there aren't many cases that have been delivered and that deal with sections 48 to 52. It is interesting however, to look at some of the landmark cases in which exemption clauses were interpreted and whether or not some or all of these decisions would've been decided differently in light of the CPA.

3.5.1 Naidoo v The Birchwood Hotel[178]

In the case of *Naidoo*, the plaintiff Mr Naidoo, was a coach driver who had driven guests from Durban to Johannesburg to stay for the night at the Birchwood Hotel. Mr Naidoo woke up in the morning and around 08:00, drove the bus he was driving the day before to the electrical gate to exit the Hotel. Mr Naidoo could not exit because the gate was closed. After some time, a guard came to try and open the gate but when Mr Naidoo realised that the guard might need some assistance, he got out of the bus to assist him. As they were both trying to open the gate, it dislodged from the rails and fell on top of Mr Naidoo, injuring him. Mr Naidoo later

[176] Jacobs *et al* (2010) *PERJ* 13 (3) 301.
[177] At 309-311.
[178] 2012 (6) SA 170 (GSJ).

sued the Hotel for delictual damages for their negligence in not taking the reasonable steps to repair the gate as soon as they realised that something was wrong with it.

The court named reasonable steps as including doing regular checks to see if the gate was functioning properly and if it was malfunctioning to inform the public about such malfunction so that they are aware.[179] In their defence, the Hotel raised a disclaimer notice in which there was an exemption clause to this effect:

"The guest hereby agrees…the Hotel shall not be responsible for any injury to, or death of, any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft or any cause…arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel".[180]

This disclaimer notice was behind a registration card that every Hotel guest must sign before their stay at the hotel. At the bottom of the front page of the registration card where the guest had to sign were the words "Please read Terms and Conditions on reverse". The Hotel stated that by virtue of Mr Naidoo having signed this registration card, he absolved the Hotel from any responsibility in respect of any damage that he might suffer during his stay. The court found that the Hotel was negligent in not taking the necessary reasonable steps to take care of its guest. The court differentiated this matter to the facts in *Durban Water Wonderland*[181] and *Afrox*.[182] The court held that in those matters the activities that were undertaken by the plaintiffs had inherent risks in their livelihood because in Afrox the plaintiff was

[179] At 176 para D.
[180] At 178 para F-G.
[181] *Supra* in chapter 2 and 3.
[182] *Supra* in chapter 2 and 3.

undergoing an operation and in Durban Water Wonderland the plaintiff was flung out of a ride in an amusement park. The court further stated that no person would imagine that being a guest in a hotel would be dangerous and that guests in a hotel do not take their own lives in their hands when exiting a hotel gate. The court further held that enforcing the exemption clause in the registration card would be unfair and unjust and in stating this quoted Ngobo J in the case of *Barkhuizen*:

> "(A) court will bear in mind the need to recognise freedom of contract, but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to the courts".[183]

I am in agreement with Sharrock[184] who is of the opinion that the court in *Naidoo* seems to have confused an exemption clause to a clause that seeks to limit a consumer's right to redress and access to the courts. The latter excludes a contractual party to get access to the courts for legal relief when entitled to do so. The Hotel in *Naidoo* raised an exemption clause as its defence in order to limit any liability for the bodily injuries that were suffered by Mr Naidoo, this was not a clause that limited or excluded a guest's right to approach the courts for legal redress. The court used the decisions in *Barkhuizen* and *Bafana Finance Mabopane*[185] to reject the exemption clause defence raised by the Hotel.

Be that as it may, the outcome of the *Naidoo* case was fair under the circumstances and the case was instrumental in re-aligning contractual principles with the spirit,

[183] At 183 para B.
[184] Robert Sharrok *Annual Survey of South African law* (2012) 402 at 435-436.
[185] *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA).

purport and object of the Bill of Rights.[186] The court did not use the CPA in evaluating the evidence because the incident occurred in 2008, before the enactment of the Act. If this incident had occurred after the enactment of the CPA, the court's decision would have probably remained the same. This is because section 49 of the CPA states that the attention of the consumer must be drawn to an unfair, unjust or unreasonable term or condition. This was not done by the Hotel, in addition, Mr Naidoo did not sign or initial next to the exemption clause to show that he had read and understood the exemption clause. These are the inaccuracies that the CPA seeks to address and as Mupangavanhu[187] correctly states in her article that "…public policy is no longer rooted in the notion of contractual certainty. Public policy also demands some level of fairness in contracts. The law needs to embrace normative and constitutional values so as to adapt to the changing needs of the community, especially where there is a need to protect the weaker party to a contract".[188]

3.5.2 *Afrox Healthcare Bpk v Strydom*[189]

The Afrox case would have definitely been decided differently in light of the CPA. The court would've expected the hospital in this case to have drawn the attention of the patient to the clause in the admission documents that excluded the hospital's liability. The hospital in this case failed in doing this and would therefore have been in contravention of the CPA.

[186] Chapter 2 of the Constitution of the RSA.
[187] Y Mupangavanhu *PERJ* Vol 17 (2014) 1167.
[188] At 1188.
[189] *Supra*.

3.5.3 *Mercurius Motors v Lopez*[190]

The court in this matter delivered a judgement in which it held that the clause which excluded the liability of the dealer was not in line with public policy. The exemption clause in this case provisioned that the customer left his motor vehicle at his own risk and that the dealership would not be responsible for losses of any kind in respect of the motor vehicle. The court held that motorists have an expectation that their motor vehicles will be well looked after when they leave them for a service at a dealership and in this case the dealership failed to take reasonable steps to adequately look after a customer's motor vehicle. In addition, the dealership failed to draw the attention of the consumer to the exemption clause that was included in the standard-form agreement between the customer and the dealership.

3.6 CONCLUSION

The CPA has created stringent requirements that have forced drafters of standard-form agreements to make changes not only in the way they draft standard-form agreements but also in the way they conclude them with consumers. Suppliers can no longer hide behind inserting terms and conditions in small print and relying on the *caveat subscriptor* in their defence in court. Before a consumer agreement is concluded, a consumer's attention must be drawn to onerous terms and conditions and there are redresses available to consumers if suppliers do not comply with the CPA. These changes will assist in fulfilling the need to "protect the interest of all consumers who are subjected to abuse or exploitation in the marketplace".[191] The next chapter will also recommend the steps that government can take in educating

[190] *Supra*.
[191] Preamble of the CPA.

consumers about the CPA as well as other improvements that may still be effected by the legislature in order to comply with the preamble of the CPA.

CHAPTER 4

CONCLUSION

The enactment of legislation that solely provided for consumer protection was imperative in South Africa. Many of the provisions in the Consumer Protection Act (CPA) were included due to the conflicts that arose in different industries between consumers and suppliers as well as manufacturers. One of these very important provisions is of course the provisions dealing with unfair, unjust and unreasonable terms in consumer agreements and transactions. As already stated above, there have been many judgements delivered against consumers that dealt with the effects and restrictions of exemption clauses.[192] The CPA has made a significant change in the way unfair terms in contracts should be interpreted. The CPA has however failed in omitting to define the words unfair, unreasonable and unjust to make it easier for the courts to apply these in matters. I am in agreement with Mupangavanhu, in that the writeris of the view that courts must not completely ignore Brand JA's call in *Potgieter v Potgieter*[193] for caution, namely that endorsing the notion that judges may decide cases on the basis of what they regard as reasonable and fair, will give rise to intolerable legal uncertainty.[194]

The research question was whether the CPA has alleviated the inclusion of unfair, unreasonable and unjust terms in standard-form contracts. The CPA will never be able to completely alleviate the inclusion of unfair and unreasonable terms in consumer agreements for as long as there are sections in the CPA that allow for the use and enforcement of unfair terms on the grounds that the consumer read, understood and signed the agreement.[195] It is therefore clear that the CPA has not managed to completely let go of previous practices that had been and still are

[192] See Chapter 2.
[193] (2012) 1 SA 637 (SCA).
[194] *Op cit* note 186.
[195] S49.

abused by big players in the consumer industry. The problem with this provision is that a court will never really know if a consumer signed the agreement after having thoroughly gone through it and most importantly whether the consumer was in fact given the opportunity to calmly go through the agreement. The legislature in this instance should have just nullified the inclusion of unfair contract terms in consumer agreements.

Naudé is seems to be of the view that the CPA has focused more on the procedural fairness of an unfair term or condition instead of its substantive fairness. This seems to be true as there are more provisions in the CPA that deal with the steps and processes to be taken before and during the conclusion of a consumer agreement instead of what will happen if the provisions in the CPA are not adhered to.

The government and other relevant bodies and organisations have not done enough in publicising the CPA. This is an Act that is the first of its kind in South Africa, one that is there to protect the interests and welfare of South African consumers, surely the government should do more in promoting the awareness of the Act amongst consumers. Secondly the legislature is still trailing behind in making some of the redresses that are available to consumers easily accessible. Consumer courts still need to be established in various other provinces and part of the reasonable steps to be taken by the legislature should be include making attorneys readily accessible to consumers who require legal advice or assistance with consumer protection laws.

Naudé was correct in submitting that the Act has failed in sufficiently taking into account the typical problems that are faced by consumers on a daily basis when confronted with standard contract terms. It is safe to say that the Act has managed to bring to light aspects of consumer law that had been ignored and abused for a very long time but it is also important to note that the legislature of the CPA has failed in putting itself in the shoes of the often vulnerable consumer.

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