

The effect of the Consumer Protection Act on Exemption Clauses in Standardised Contracts

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Declaration of Candidate

I, Christelle Kok, hereby declare that the contents of this dissertation represent my own unaided work and the dissertation has not previously been submitted for academic examination towards any qualification. Furthermore, it represents my own opinions and not necessarily those of the University of Pretoria.

Opsomming

Die doel van hierdie skripsie is om die uitwerking van die nuwe Verbruikers Beskermings Wet op uitsluitingsklousules te bespreek en te voorspel. Die studie beweer dat dié Wet die uitwerking mag hê om die gebruik van *onregverdige* uitsluitingsklousules uit te fasseer aangesien die Wet dit nietig en gevolglik onprakties sal laat. Uitsluitingsklousules is gereeld gebruik as 'n instrument om onregverdige kontraksterme op die verbruiker te plaas deur verskaffers se aanspreeklikheid vir watter rede ookal uit te sluit. Waar daar voorheen gesteun is op die kontrakteursvryheid beginsel sal die klem nou verskuif na geregtigheid en regverdigheid. Die Wet voorsien aan elke verbruiker, onder andere, die reg op goeie gehalte goedere en dienste en waarborg hierdie regte deur die aanspreeklikheid van die verskaffers voor te skryf en te beheer. Gevolglik kan aanspreeklikheid weens gebrekkige goedere en dienste nie meer deur middel van uitsluitingsklousules vermy word nie. Dispute rakende die “regverdigheid” van sodanige klousules kan verder ook getoets word deur die houe deur middel van die riglyne wat die Wet verskaf. Die studie verwelkom egter die voorskrifte van die Wet en meen dat dit 'n positiewe uitwerking op die land in geheel behoort te hou.

Summary

This dissertation discusses the continued existence and enforceability of exemption clauses within the framework of the subsequent movement towards consumer protection. It is argued that the provisions of the Act will lead to the consequence that unfair exemption clauses will be phased out because it could be declared void in terms of this Act and consequently its use will become impractical. Although exemption clauses can be viewed as an essential part of most contracts, such clauses are regarded as one of the most contentious clauses in practice, because they usually exclude the liability of the supplier for losses resulting from defective performance. This Act will lead to a shift away from the strict rule of freedom of contract towards a position of consumer awareness and fair contracting. The Act further provides consumers with the right to, *inter alia*, good quality goods and services and guarantees these rights by prescribing and controlling the liability of the suppliers. As a result, liability due to defective goods and services may no longer be exempted through exemption clauses. Disputes regarding the fairness of such clauses must further also be considered in view of the guidelines set out in the Act. This study however welcomes the enactment of the Act and believes that it could benefit the country as a whole.

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1. Introduction and Methodology

1.1 Introduction

For the past two centuries the South African law of contract was founded on the principle of freedom of contract which was based on the idea of individual autonomy and sanctity of contract.¹ Where an agreement contained an exclusion of liability clause, irrespective of how unfair such a clause was, the consenting parties would be held bound to the provisions of that clause.²

Exemption clauses generally affect consumers against whom it is enforced negatively as the intention thereof is to curtail their rights.³ Such clauses have traditionally obtained a bad reputation because they are often unreasonable and abused by the party in the stronger bargaining position.⁴

Any interference by the courts was regarded as a form of paternalism⁵ which was contrary to the concept of freedom of contract and contrary to public policy.⁶ Provided that a man was not a minor or mentally ill and his consent was not obtained by means of error, misrepresentation, fraud, undue influence or

¹ Hopkins “Exemption Clauses in Contracts” 2007 *De Rebus* 23.

² *Burger v Central South African Railways* 1903 TS 571; *Natal Motor Industries Ltd v Crickmay* 1962 2 SA 93 (N); *Government of the Republic of South Africa v Fibre Spinner’s and Weavers (Pty) Ltd* 1978 2 SA 794 (A); *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA); *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA).

³ Cohen “Exemption Clauses” 2007 *The Professional Accountant* 4.

⁴ Stoop “The current status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Contract Law” 2008 *SA Merc LJ* 496.

⁵ Paternalism is the principle or system of controlling in a parental way – Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 169.

⁶ Hawthorne “Distribution of Wealth, the Dependency Theory and Law of Contract” 2006 *SALJ* 52.

duress,⁷ his contractual undertakings would be enforced to the letter.⁸ The courts would not release him from the contract or create a better deal for him.⁹

The principle of social control has, however, steadily gained support and towards the early 19th century many countries, especially countries such as the Netherlands,¹⁰ the United States,¹¹ France¹² and England¹³ began to enact legislation to protect consumers and regulate unfair contractual terms. South Africa has however been relatively slow in development in this regard as up until the early 1990's the state was still controlled by the Apartheid regime.¹⁴ The Apartheid legacy included a disregard for consumer rights, and its policies were based on the belief that economic growth and development takes place solely through a path dictated by production factors such as investment in capital goods and cheap labour.¹⁵ This belief implicitly assumed that consumers in general played a minimal role in contributing to economic growth.¹⁶

The Apartheid regime was however abolished during 1994 and the so-called 'new South Africa' was established with the consequent movement towards a

⁷ The factors which influence consensus.

⁸ Hahlo "Unfair Contract Terms in Civil-Law Systems" 1981 *SALJ* 70; *Printing and Numerical Registering Co v Simpson* 1875 LR 19 eq 465; *Burger v Central South African Railways supra*; *Van Rensburg v Staughan* 1914 AD 317; *Wells v SA Alumenite Co* 1927 AD 69; *Haviland Estates Pty Ltd v McMaster* 1969 2 SA 312 (A); *Wynn's Car Hire Products (Pty) Ltd v First National Industry Bank Ltd* 1991 2 SA 754 (A); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Healthcare v Strydom supra*; *Barkhuizen v Napier* 2007 5 SA 323 (C).

⁹ *Ibid.*

¹⁰ Hawthorne "The Principle of Equality in the Law of Contract" 1995 *THRHR* 166. The author states that the Nieuw Burgerlijk Wetboek provided that the consequences of contracts as well as the application of any legal risks had to be both reasonable and equitable.

¹¹ *Idem* 167. The author states that the promulgation of the Uniform Commercial Code marginalized unconscionable contracts.

¹² *Ibid.* The justification of state intervention lay in the concept of protecting the weaker parties and restoring the inequality of bargaining power.

¹³ *Ibid.* The doctrine of equity influenced the adjustments of the common law on contracts. The Unfair Contract Terms Act 1977 was later enacted to provide for consumer protection measures.

¹⁴ GG 26774 of 2004-09-09 24. The author states that "South Africa lagged behind most developing nations such as Argentina, Brazil, Chile, Botswana, Uganda, Malawi etc. who have adopted a rights-based comprehensive approach to consumer protection."

¹⁵ GG 26774 of 2004-09-09 22.

¹⁶ *Ibid.*

free and democratic society. A new Constitution¹⁷ was enacted which derived the introduction of legislation to protect consumers.¹⁸

Although an end was put to Apartheid, its consequences remained. Due to the policy of Apartheid, the majority of South Africans are still burdened by poverty and/or illiteracy. These vulnerable consumers are particularly susceptible to an abuse of power by unscrupulous suppliers.¹⁹ In this regard, the main criticism against exemption clauses lies in the exploitation of the party in the weaker bargaining position who lacks understanding and experience.²⁰

Legislative control over unfair contract terms and exemption clauses are regarded in many countries as an essential tool in the law's response to the abuses that arise from the use of non-negotiated terms.²¹ South Africa however did have numerous pieces of such legislation, but which were either merely incidental to consumer protection or were scattered in numerous statutes²². The consumer laws were outdated, fragmented and predicated on principles contrary to the democratic system and since 1989 there was no substantial review of consumer protection legislation or practices.²³

The fundamental need for consumer protection relates to South Africa's continued adherence to the freedom of contract principle, inequality of bargaining power between the supplier of goods and services and the consumer, combined with the lack of knowledge of consumer rights and the technical components of the goods as well as the inequality of resources between the contracting

¹⁷ The Constitution of the Republic of South Africa 1996; hereinafter referred to as "the Constitution".

¹⁸ Hawthorne "Making Public Knowledge, Making Knowledge Public: Information obligations affect truth-in-lending and responsible lending" 2007 *SAPR/PL* 478.

¹⁹ Hopkins "Standard-form Contracts and the evolving idea of Private Law" 2003 *TSAR* 155.

²⁰ Naudé "Unfair Contract Terms Legislation: The implications of why we need it for its formulation and application" 2006 *Stell LR* 363.

²¹ *Idem* 361.

²² See par. 4.2 *infra* at 36 for a detailed discussion of these pieces of legislation which were in force prior to the Consumer Protection Act.

²³ Maseti *Overview of Consumer Protection Legislation in South Africa* (2009) 1 available at http://www.ncf.org.za/docs/conference/dti_presentation.pdf.

parties.²⁴ It was therefore necessary to develop a simple, comprehensive and accessible consumer law which would serve as a single reference to consumers and to business, which would outline the fundamental rules of conduct and grant consumers basic rights in order to give them certainty in their interaction in the market place.²⁵

The Department of Trade and Industry thus decided to include general unfair contract terms control in the new Consumer Protection Act²⁶. The primary purpose of this Act is to prevent exploitation or harm to consumers and to promote their social wellbeing. The Act seeks to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, whilst through the measures adopted therein seeks to promote a fair, efficient and transparent market place for consumers and businesses.²⁷

The Act will introduce general principles of consumer protection and will serve as an overarching governing statement on consumer protection matters in South Africa. This protection will be achieved by introducing, amongst others, a system of product liability²⁸ and improved redress.²⁹ Producers, distributors or suppliers will be liable for any damages in the form of death, injury, loss or damage to property and economic loss to the consumer or third party.³⁰ Consumers may also return the goods sold to the supplier without penalty and at the supplier's

²⁴ Hawthorne "The 'New Learning' and Transformation of Contract Law" 2008 *SAPR/PL* 82.

²⁵ GG 26774 of 2004-09-09 24.

²⁶ Act 68 of 2008; hereinafter referred to as "the CPA" or "the Act".

²⁷ Preamble of the CPA.

²⁸ S 55(2) provides for the consumer's right to safe and good quality goods. S 56(1) states that an agreement pertaining to the supply of goods to a consumer has an implied provision that the producer or importer, the distributor and retailer each warrant that the goods comply with the requirements and standards contemplated in s 55. The CPA thus introduces a policy of strict liability for harm caused as a result of either supplying unsafe goods or product failure; See par 5 *infra*.

²⁹ S 68 – 78 provides for the consumer's right to be heard and to obtain redress. A Consumer Commission, Consumer Courts or Tribunals and Consumer Protection Authorities have been established in order to enforce and protect consumers' rights.

³⁰ S 61.

risk and expense if the goods fail to meet the required standard.³¹ Consumers will furthermore be protected from unscrupulous businesses that tend to induce them to waive the obligations³² and liability of the supplier³³ in terms of an agreement.

An exemption clause is usually contained in a standard form agreement and consequently not open to negotiation. Consumers are thus frequently involuntarily subjected to such terms, hence these clauses are often categorised as *unfair contractual terms*. The Act will ensure that judges will no longer be able to simply rely on judicial precedents when deciding a case nor limit their enquiry to the contractual capacity of the parties and the legality of the transaction. Instead, the courts will have to apply the guidelines prescribed in the Act on principles of fairness and reasonableness.³⁴ There has thus been a shift away from the strict rule of freedom of contract towards a position of greater control by the legislature.

This dissertation will discuss the continued existence and enforceability of exemption clauses within the framework of the subsequent movement towards consumer protection. The provisions of the new CPA as listed above are in direct contrast to the effect of exemption clauses and this issue forms the crux of this discussion.

I will thus argue that the provisions of the Act will lead to the consequence that exemption clauses, as we know it, will be phased out because this Act will make it impractical. Where freedom of contract or sanctity of contract used to be the norm, the emphasis is going to shift towards consumer awareness and fair contracting. The CPA is thus going to change the face of South African law of contract.

³¹ S 56(2).

³² S 51(b)(ii).

³³ S 51(c)(i).

³⁴ Hopkins 2003 *TSAR* 160.

1.2 Methodology

I will start with a brief explanation of what an exemption clause is and why it may be regarded, in many circumstances, as an unfair contract term. I will continue with a discussion of the freedom of contract principle and the problems encountered therewith, followed by an outline of the existing protection measures which could provide consumers with some relief in harsh contractual relations. Lastly I present a broad overview of the CPA and the changes it could bring about with the emphasis on its effect on exemption clauses.

2. What is an exemption clause?

Exemption clauses³⁵ are contractual terms that exclude, alter or limit the liability that normally flows from contractual relations.³⁶ Although exemption clauses can be viewed as an essential part of most contracts³⁷ such clauses are regarded as one of the most contentious clauses in practice, because they usually exclude the liability of the supplier for losses resulting from defective performance.³⁸ Such losses can be enormous and to the detriment of the consumer. Contracting parties thus generally wish to both contain and control that risk.³⁹

A typical example of an exemption clause could read:

“Industrial Machinery suppliers will not be liable for any loss or damage whatsoever which is due to late or defective delivery; defective, faulty or

³⁵ Also referred to as “exclusion clauses”, “indemnity clauses” and “waivers”.

³⁶ Stoop 2008 *SA Merc LJ* 496.

³⁷ Van Loggerenberg “Onbillike Uitsluitingsbedinge in Kontrakte: ‘n pleidooi vir regshervorming” 1988 *TSAR* 424.

³⁸ Mckendrick *Contract Law: Text, Cases and Materials* (2008) 101.

³⁹ *Ibid.*

negligent workmanship; or defective or faulty material; or any act, default or omission of its employees, suppliers or subcontractors.”⁴⁰

or

“The Vendor shall not be under any liability to the Purchaser for any defects in the goods or for any damage, loss, death or injury (other than death or personal injury caused by the negligence of the Vendor) resulting from such defects or from any work done in connection therewith.”⁴¹

It is however important to realise that exemption clauses are not a creation of modern times – their existence was well known in Roman-Dutch law and they are referred to in the writings of Grotius, Voet and Van Leeuwen.⁴² The *pacta ad minuendam obligationem* were pacts made to diminish a debtor’s liability and the *pacta ad augendam obligationem* were pacts made for the purpose of increasing the debtor’s liability.⁴³ These pacts were added provisions to the recognised contracts to modify the normal rights and duties under such contracts.⁴⁴ Exemption clauses could be agreed to at the time or after the conclusion of a contract to affect both the *naturalia*⁴⁵ and the *essentialia*⁴⁶ of specific contracts, thereby limiting or excluding certain of the rights, duties and remedies of the contracting parties.⁴⁷ The rationale for recognising such clauses was founded in the principle of freedom of contract.⁴⁸ The enforceability of exemption clauses is

⁴⁰ The enforceability of this clause was determined in the case of *Elgin Brown & Hamer v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A).

⁴¹ This clause was found in the English case of *British Fermentation Products Ltd v Compare Reavell Ltd* 1999 BLR 352; Mckendrick 437.

⁴² Hopkins 2007 *De Rebus* 23; Van der Merwe *Contract General Principles* (2007) 297 - “...voetstoots clauses, for example, which exclude the *ex lege* liability of a seller for latent defects in the thing sold, were well known in Roman Dutch law.”

⁴³ Van Dorsten “The Nature of a Contract and Exemption Clauses” 1986 *THRHR* 195.

⁴⁴ *Ibid.*

⁴⁵ *Idem* 196. The author mentions the limitation or exclusion of the liability for eviction (D 19 1 11 18) and for latent defects (D 19 1 6 9 and D 21 1 14 9) in sale.

⁴⁶ *Ibid.* The author states that the amount owed by a debtor could be reduced by agreement (D 2 14 27 5) and that it could be agreed to deduct something from the property purchased after a sales contract has been concluded (D 18 1 72).

⁴⁷ *Idem* 197.

⁴⁸ Lerm A *Critical Analysis of Exemption Clauses in Medical Contracts* (LLD Thesis 2009 UP) 8.

currently still much the same as it was in the Roman-Dutch law period:⁴⁹ if the parties have full contractual capacity and the exemption clause was constructed in an unambiguous manner, then the contracting parties should basically live with what they have agreed to.⁵⁰

Exemption clauses are therefore not *per se* unacceptable - if the risks inherent in the execution of the contract performance cannot be satisfactorily covered by insurance, exemption clauses can be extremely useful in allocating the risks between the parties.⁵¹ However, the presence of such clauses does not always have these desired consequences⁵² as in practice it is often used as a tool to impose unfair contractual terms on consumers.

3. The Problem Identified

The central problem of the South African law of contract arose from the judiciary's continued adherence to the freedom of contract rule which prevented our courts from applying equitable solutions in situations where the contract or contractual term is clearly unfair, harsh or oppressive.⁵³ From this concept another matter of concern derived, namely the use and abuse of standard form contracts. Subsequently, a third issue emerged namely the inferior bargaining position of the consumer. It is important to realise that these three issues are interrelated. A detailed discussion of each problem will follow.

⁴⁹ Van Dorsten 1986 *THRHR* 197. The author states that in the classical Roman-Dutch law and the formalism of Roman law, all lawful agreements with *iusta causa* or *redelijke oorzaak* were enforceable; Grotius *Inleidinge tot de Hollandsche Rechtsgeleertheit* 3 3 1; Voet *Commentarius ad Padectas* 2 14 8.9; Van der Keessel *Prael* 3 3 1.

⁵⁰ Hopkins 2007 *De Rebus* 23; Van Dorsten 1986 *THRHR* 197.

⁵¹ Van Loggerenberg 1988 *TSAR* 424.

⁵² Devenish "The Interpretation and the validity of Exemption Clauses" 1979 *De Rebus* 69.

⁵³ Hopkins 2003 *TSAR* 155.

3.1 The Principle of Freedom of Contract

The South African law of contract was based on the classical theory⁵⁴ which was permeated by the principles of freedom of contract⁵⁵ and sanctity of contract.⁵⁶ Friedman describes the cornerstones of the classical theory of contract as freedom of movement, insurance against calculated economic risks, freedom of will and equality between parties.⁵⁷ These principles stemmed from the 16th and 17th century's social, economic and political philosophies which attempted to define basic human rights.⁵⁸ The philosophies were based on the underlying principle that humans gifted with mature reason should manage their own affairs without any interference by the state.⁵⁹ In this context it is inappropriate for judges to police the substantial fairness of an agreement which was validly entered into.⁶⁰ In matters of contract the parties are regarded to have intended their legal rights and obligations to be governed by the common law unless they plainly and unambiguously indicated to the contrary.⁶¹

⁵⁴ Hawthorne 2006 *SALJ* 48. The author states that in terms of the classical theory all contracting parties are treated like the average person without needs, and thus all people are treated as equal. The invisible hand of the market is deemed to be neutral and thus treat everyone equally; See also Hawthorne 1995 *THRHR* 164; Van der Walt "Enkele uitgangspunte vir 'n Suid-Afrikaanse ondersoek na Beheer oor Onbillike Kontraksbedinge" 1989 *THRHR* 82; *Wells v South African Alumenite supra*; *Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 SA 760 (A) 767; *Govender v Sona Development Co (Pty) Ltd* 1980 1 SA 602 (D).

⁵⁵ Kötz "Controlling Unfair Contract Terms: Options for Legislative Reform" 1986 *SALJ* 405. The author states that "[freedom of contract] stands for the idea that co-ordination and co-operation for common purposes is best achieved in a given society by allowing individuals and legal entities to make, for their own accounts and on their own responsibility, significant decisions on the production and distribution of goods and services by entering into enforceable agreements based on freely given consent."

⁵⁶ The principle acknowledge the autonomy of the contracting parties and requires the courts to respect and enforce their wishes; Hawthorne 2006 *SALJ* 55; *Wells v South African Alumenite Co supra*; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren supra*; *Govender v Sona Development Co (Pty) Ltd supra*.

⁵⁷ Friedman *Law in a Changing Society* (1959) 119; Hawthorne 1995 *THRHR* 165.

⁵⁸ Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 1.

⁵⁹ *Ibid.*

⁶⁰ Hawthorne 2006 *SALJ* 48 50; Cockrell "Substance and Form in the South African Law of Contract" 1991 *SALJ* 59.

⁶¹ Cohen 2007 *The Professional Accountant* 5.

The following statement, made by Sir George Jessel MR in 1875 in *Printing and Numerical Registering Co v Simpson*,⁶² expresses the philosophy which prevailed in the 19th century in civil law as well as in common law jurisdictions:⁶³

“...if there is one thing which is more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred...”

Provided that a man is not a minor or mentally ill and his consent was not obtained by means of error, misrepresentation, fraud, undue influence or duress, his contractual undertakings will be enforced to the letter.⁶⁴ If a person subsequently entered into a contract to his own detriment, he would have to carry the consequences of his inexperience and carelessness. The courts would not release him from the contract or create a better deal for him.⁶⁵

The following statement represents the similar philosophy which was adhered to by the South African courts. In 1903, in *Burger v Central South African Railways*⁶⁶ Innes CJ held that:

“...our law does not recognise 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.”

This judgment set the tone for most of the future decisions dealing with the question of unfair contract terms.⁶⁷ Innes CJ repeated his opinion in the case of *Van Rensburg v Staughton*⁶⁸ when he held that:

⁶² *Supra*.

⁶³ Hahlo 1981 SALJ 70; Hawthorne 2006 SALJ 48 49; *Burger v Central South African Railways supra*, *Van Rensburg v Staughton supra*; *Natal Motor Industries Ltd v Chickmay infra*, *Grinaker Construction v Transvaal Provincial Administration* 1982 1 SA 78 (A); *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A); *Brisley v Drotzky supra*.

⁶⁴ Hahlo 1981 SALJ 70; *Barkhuizen v Napier supra*.

⁶⁵ *Ibid*.

⁶⁶ *Supra*.

“The position for him is no doubt hard; but those who enter into onerous or one-sided agreements have only themselves to thank. A court of law cannot assist them merely because the results are harsh.”⁶⁹

In *Natal Motor Industries Ltd v Crickmay*,⁷⁰ Miller J, considering the effect of an exemption clause in an agreement of sale,⁷¹ held as follows:

“I am of the opinion therefore, that the plaintiff [seller] is protected by the said condition. To come to any other conclusion would be, to my mind, to revise or amend the condition rather than to construe it; and, although the condition is one which should be strictly construed, (it seems to me to give the plaintiff an extraordinary degree of protection) there is no warrant for construing it so strictly as to constrict it. The defendant, contracting on an equal footing with plaintiff, signed an agreement which derogated substantially from his common law rights and cannot be granted what would in effect be equitable relief.”⁷²

In 1982 the same reasoning was followed by Viljoen JA in *Grinaker Construction v Transvaal Provincial Administration*⁷³ where he stated:

“If the plaintiff has struck a bad bargain, the Court cannot, out of sympathy for him, amend the contract in his favour”.⁷⁴

Miller JA confirmed this principle in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*⁷⁵ in which he held:

⁶⁷ Hawthorne 2006 SALJ 50.

⁶⁸ *Supra*.

⁶⁹ Hawthorne 2006 SALJ 50.

⁷⁰ *Supra*.

⁷¹ The clause provided “I, [the purchaser] agree that you [the seller] accept no responsibility for loss or damage arising from any cause whatsoever in respect of customers’ cars or goods taken in by you for storage or repair, whether such loss or damage occurs whilst the car or goods are in your premises or under your control at the time of the loss or damage or not, and whether such loss or damage is due to your negligence or not.”

⁷² Aronstam 11.

⁷³ 1982 1 SA 312 (A).

⁷⁴ Hawthorne 2006 SALJ 51.

“And they signed the agreement containing terms which are now regarded by the Tamarillo [the appellant] as unfair and one-sided. Perhaps unfortunately for Tamarillo, the court is not empowered merely because an agreement may be found to operate strongly in favour of one of the contracting parties to the corresponding disadvantage of the other, to modify its terms or to afford the complaining party equitable relief.”

The Supreme Court of Appeal in *Brisley v Drotsky*⁷⁶ also relied on a statement made by Innes CJ in *Wells v South African Alumenite Co*⁷⁷ that;

“no doubt the condition is hard and onerous; but if people sign conditions they must, in the absence of fraud, be held to them. Public Policy so demands.”

From the above mentioned case law of the previous century it is thus clear that the courts refused to come to the assistance of a person who willingly, but unwisely, entered into a contract.⁷⁸ In effect the courts have endorsed that the parties to a contract must be free to choose the terms and the manner of their agreements themselves.⁷⁹ There was no general rule, either statutory or judge-made, that entitled a court to strike down a contractual provision on the sole ground that it was unfair.⁸⁰

The interests of the public or “public policy”⁸¹ did however influence the judiciary with regard to the enforcement of contractual terms.⁸² The principle was that no agreement or terms of agreement would be enforced which were contrary to

⁷⁵ *Supra.*

⁷⁶ *Supra.*

⁷⁷ *Supra.*

⁷⁸ Aronstam 11.

⁷⁹ Hopkins 2003 *TSAR* 152.

⁸⁰ Kötz 1986 *SALJ* 407.

⁸¹ Public policy represents the legal convictions of the community – it represents those values held most dear by society; *Barkhuizen v Napier supra.*

⁸² Hawthorne 1995 *THRHR* 173.

public interests.⁸³ Since the judiciary however also held that public policy requires that parties should keep with their promises, even if it is unreasonable and unfair,⁸⁴ public policy was more often used to enforce agreements rather than to release a party from it.⁸⁵ The principle is thus in contradiction with itself. The applicability of public policy will however be discussed to greater extent in paragraph 4.1.4.

The principle of freedom of contract and the court's reluctance to distantiate from it was however justified for the reasons which are best described by Moseneke DCJ:⁸⁶

“The notion of contractual autonomy belongs to a larger worldview and ideology. It flows from classical liberal notions of liberty and the neoliberal penchant for free, self-regulating and self-correcting markets driven by individual entrepreneurs who thrive on freedom of choice and freedom to strike handsome bargains. The law of contract is meant to facilitate the securing of market needs. It is meant to be a value-neutral set of muscular but predictable rules that curb uncertainty whilst inspiring confidence in the market place. For that reason, rules of contract ordinarily permit little or no judicial discretion”.

Therefore, one of the basic reasons for the adherence of the freedom of contract principle was the belief that the law should not interfere with the individual's right to make profit. The law should secure an environment where a free and self-regulating marketplace could flourish. It can be said that freedom of contract ensured certainty in the law of contracts. Contracting parties could consequently

⁸³ *National Chemsearch SA (Pty) Ltd v Borrowman* 1979 3 SA 1092 (T); *Magna Alloys & Research SA (Pty) Ltd v Ellis* 1984 4 874 (A); *Sasfin v Beukes* 1989 1 SA 1 (A).

⁸⁴ *Burger v Central South African Railways supra*, *Van Rensburg v Staughton supra*; *Natal Motor Industries Ltd v Chickmay infra*, *Grinaker Construction v Transvaal Provincial Administration supra*; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd supra*; *Brisley v Drotsky supra*; *Polygraph Centre – Central Provinces CC v Venter* 2006 4 All SA 612 (SCA).

⁸⁵ *Brisley v Drosky supra*; *Barkhuizen v Napier supra*.

⁸⁶ “Transformative Constitutionalism: Its Implications for the Law of Contract” 2009 *Stell LR* 9.

be assured of the enforceability of their agreement, free from interference by the courts.

However, freedom of contract reproduced social inequalities and allowed for the domination and exploitation of one contracting party by another.⁸⁷ Subsequently, the philosophy of consumer protection developed with the principle that the state has a social responsibility to protect the weak and uninformed.⁸⁸

As a result there derived a constant balancing of interests – two opposing social policies in the law of contract: the principle of freedom of contract on the one hand and the counter principle of social control over private volition in the interest of public policy, on the other.⁸⁹

Strydom⁹⁰ is of the view that no matter how highly we value the sanctity of contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights.⁹¹ The point is, just as freedom cannot exist without responsibility, freedom of contract cannot exist without control.⁹²

In South Africa too much emphasis was placed on freedom of contract.⁹³ The need thus developed to reconsider this principle against the backdrop of the Constitution, the importance of equality and fair dealing, the value of the state in the regulation of the economy, and consumer protection.⁹⁴ The crux of the matter is therefore that contractual *justice* can only be achieved if individual autonomy is given its rightful place. The CPA can potentially redress the existing

⁸⁷ Hawthorne 2006 *SALJ* 52.

⁸⁸ Kötz 1986 *SALJ* 406.

⁸⁹ *Ibid.*

⁹⁰ “The Private Domain and the Bill of Right” 1995 *SA Public Law* 52.

⁹¹ Hopkins 2003 *TSAR* 158.

⁹² Van der Walt 1989 *THRHR* 82.

⁹³ Sutherland “Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 2” 2009 *Stell LR* 53.

⁹⁴ *Ibid.*; See also the minority decision of Sach J in *Barkhuizen v Napier supra*.

imbalance in the interest of contractual justice, but should also guard against the overregulation of free business practice.

3.2 The use and abuse of standard form contracts

3.2.1 What is a standard form contract?

The development of mass production and distribution has introduced the mass contract, otherwise known as the standard form contract.⁹⁵ Standard form contracts are usually one-sided in nature, benefiting the organisation or supplier who makes use of it. These “tailor-made” agreements, which address the specific needs of an organisation, are drafted in advance by the lawyers of the organisation who intends to make use of it in their day-to-day business practices. It is thus a standard template intended for general and repeated use in all transactions with their clients.⁹⁶

The French labelled these contracts as *contracts d' adhesion*. In short, a contract of adhesion, as it was incorporated in the English law, is a contract prepared by one party and offered to another on a “take-it-or-leave-it” basis.⁹⁷ This is because the drafting party is only willing to transact on the terms contained in the standard form contract and no terms are open for any negotiation.⁹⁸

⁹⁵ Cheshire *Cheshire and Fifoot's Law of Contract* (1976) 20.

⁹⁶ *Ibid*; See also Naudé 2006 *Stell LR* 361.

⁹⁷ Friedman *Law in a Changing Society* (1972) 404; Hopkins 2003 *TSAR* 153.

⁹⁸ Rakoff “Contracts of Adhesion: An Essay in Reconstruction” 1983 *Harvard LR* 1173; Hopkins 2003 *TSAR* 153.

3.2.2 The benefits of the use of standard form contracts

The use of standard form contracts has certain benefits,⁹⁹

- the preparation cost of the agreement is lower due to the fact that there are no negotiations between the parties;
- it reduces costs by limiting the need for legal assistance;
- they serve an important economic purpose because it saves time and money to both the consumer and the supplying firm;
- it allows management of supplying firms to confine their risks; and
- it allows senior management to control the contractual arrangements made by subordinate staff without any effort.¹⁰⁰

Aronstam¹⁰¹ quoted N.S Wilson¹⁰² who wrote the following with regard to the advantages of standard form contracts:

“Preoccupation with the evils of standardized contracts from the point of view of the offeree must not allow their virtues to be overlooked. By saving time and trouble in bargaining, simplifying internal administration and facilitation planning they reduce administrative costs to an extent which must benefit both parties. They have...a lulling effect induced by the knowledge that one is signing “what everyone else has signed”. They also reduce risk to a calculable quantity and, perhaps most important of all, have potential, if drawn up in an enlightened manner, of becoming “a wide code, governing intra- or extra-trade relations of a business group.”

Standard form contracts have thus developed into an important tool in the modern business world. It allows for speedy and, generally, trouble-free negotiation proceedings and reduces the cost involved in contracting. It is

⁹⁹ Hopkins 2003 *TSAR* 153; Aronstam 24.

¹⁰⁰ Collins *The law of Contract* (2003) 119; Hawthorne 2008 *SAPR/PL* 90.

¹⁰¹ 24.

¹⁰² *Freedom of Contracts and Adhesion of Contracts* (1965) 14 *ICLQ* 176.

therefore clear that the use of standard form agreements hold certain advantages for both the supplier and consumer.

3.2.3 The negative impact of the use of standard form contracts

As indicated above, the standardisation of contractual terms have indeed simplified business practices. However, the use of such agreements is often abused to exploit consumers due to their inclusion of unfair terms.¹⁰³ What started off as a legitimate aid to planning and costing so easily became an expensive trap for the unwary consumer because the supplier is able to impose unfair terms upon the consumer which deprive the latter of reasonable rights of compensation or ousted the protection of common law.¹⁰⁴ Most standard form contracts include exemption clauses.¹⁰⁵

These limiting contractual terms are not subject to negotiation but it forms part of a detailed and invariable proposal to which the consumer must either accede completely or not at all.¹⁰⁶ Once a standard form agreement is signed, it is enforceable and considered to have been freely and voluntarily agreed to by the consumer.¹⁰⁷ However, because there are no real negotiation proceedings when entering into a standard form agreement, it cannot be said that there are 'freedom' in contracting. Lord Reid acknowledged this lack of real freedom of contract in *Suisse Atlantic v Rotterdamsche Kolen Centrale*¹⁰⁸ in which he said:¹⁰⁹

“In the ordinary way, the customer has no time to read [the standard terms], and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could

¹⁰³ Turpin “Contract and Imposed Terms” 1956 *SALJ* 146.

¹⁰⁴ Christie *The Law of Contract* (2006) 211.

¹⁰⁵ In *Afrox Healthcare v Strydom* the court acknowledged the fact that exemption clauses in standardised contracts are the rule, rather than the exception.

¹⁰⁶ Turpin 1956 *SALJ* 145.

¹⁰⁷ Hawthorne 2008 *SAPR/PL* 92.

¹⁰⁸ 1966 2 *ALL ER* 76.

¹⁰⁹ Naudé 2006 *Stell LR* 366.

take it or leave it. If he went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining”.

The realities of the marketplace made it practice for the consumer to enter into contracts without reading the standard terms, or at least, without bargaining about them.¹¹⁰ Even in a highly competitive market where alternative standard form contracts are available, companies compete only on the terms better known to the lay-consumer such as price, premiums and interest rates rather than on the punitive and oppressive terms.¹¹¹ Consumers are usually ignorant of these terms or at least unable to appreciate their importance because they are drafted by lawyers in obscure language and are set out in fine print.¹¹² It is also impractical for consumers to shop around or take legal advice on these terms as the cost in time and legal fees would simply not justify the effort.¹¹³ There are therefore no easy alternative for the reasonable person but to submit, even without reading the contract, and to focus only on the core terms.¹¹⁴

The use of standard form contracts has developed because of practical necessity in the market place, but without any corresponding legal development.¹¹⁵ This “take-it or leave-it” attitude endorsed by the law is entirely inadequate and hugely damaging to the welfare of the country’s vulnerable majority.¹¹⁶ Standard form contracts have attracted much attention over the last view years, but our courts have to a large degree managed to distance themselves from many of the substantive issues involving their inherent unfairness.¹¹⁷

¹¹⁰ *Idem* 369.

¹¹¹ Hopkins 2003 *TSAR* 156.

¹¹² Sutherland 2009 *Stell LR* 61; See also the minority decision of Sachs J in *Barkhuizen v Napier supra*.

¹¹³ Sutherland 2009 *Stell LR* 53.

¹¹⁴ Naudé 2006 *Stell LR* 367.

¹¹⁵ Eiselen “Die Standaardbedingprobleem: Ekonomiese magismisbruik of problem in eie reg?” 1989 *De Jure* 251.

¹¹⁶ Hopkins 2003 *TSAR* 154.

¹¹⁷ Van der Walt 1989 *THRHR* 89; Lewis “Fairness in South African Contract Law” 2003 *SALJ* 330; Hopkins 2003 *TSAR* 155; As mentioned by Sachs J in *Barkhuizen v Napier supra*.

3.3 The unequal bargaining power of consumers

The growth of business and trade associations and government monopolies, the expansion of domestic markets and the consequent increased buying power has enormously increased bargaining inequality in favour of the supplier.¹¹⁸

The result is thus more than simply a standard form contract which contain harsh provisions to the detriment of the consumer – it is objectionable because in most cases the consumer has no bargaining power to negotiate out of the prejudice resultant from the oppressive terms of the document.¹¹⁹ Such a position of vulnerability invites exploitation at the hands of those with significant bargaining power.¹²⁰

Again the policy of freedom of contract provides that if a party has freely entered into a contract there is no danger that the contract establishes unjustifiable positions of power. The social reality is, however, that true equality seldom exists and that many contracts are concluded out of necessity.¹²¹ It often happens that the weaker party is absolutely powerless and may have to surrender to the terms of the stronger party's will without the option of negotiation.¹²²

3.4 Conclusion

The whole ideology of freedom of contract is based on the assumption that the parties have a free choice, and in an ideal world, a consumer will always have a choice between companies who use exemption clauses and companies who do not.¹²³ In practice, many, if not all companies use standard form contracts which

¹¹⁸ Turpin 1956 *SALJ* 144.

¹¹⁹ Hopkins 2003 *TSAR* 154.

¹²⁰ Lewis "Fairness in South African Contract" 2003 *SALJ* 331.

¹²¹ Aronstam 14.

¹²² Hopkins 2003 *TSAR* 153.

¹²³ Lewis 2003 *SALJ* 331.

contain exemption clauses, so there is no real choice. In these circumstances choice is just an illusion – if the consumer wants the goods or services then he would just have to accept the exemption clause, whether he is conscious about it or not.¹²⁴

This places the supplier in a position to impose extremely wide and unreasonable exclusions of liability and it is this result which can no longer be ignored and which justifies the intervention by the legislator to protect an unfairly impacted party.¹²⁵

The principle of freedom of contract corresponds with the capitalist approach followed by South Africa up until 1994. The implementation of the new Constitution however introduced values which are more socialistic in nature. The Constitution strives to achieve social justice¹²⁶ and present a spirit of collectivism and humanitarianism.¹²⁷ In this regard, the freedom of contract principle does not relate with the ideals of the new South Africa and therefore this issue should have been addressed sooner.¹²⁸ The CPA may consequently fill an important vacuum which has developed within the South African legal system.

4. Existing Protection Measures

Before the operation of the CPA is going to be discussed, it is important to keep in mind that there are measures (common law and statutory protection measures) available to assist the judiciary in their task to let justice prevail in contractual injustices.

¹²⁴ *Ibid*; See also Hawthorne 2008 SAPR/PL 92.

¹²⁵ Van der Walt 1989 *THRHR* 90.

¹²⁶ Preamble of the Constitution

¹²⁷ Lerm 20.

¹²⁸ Van der Walt 1989 *THRHR* 90.

4.1 Common law limitations on the enforcement of exemption clauses

The harshness which often accompanies the operation of an exemption clause may be limited in a number of ways. Besides the traditional defences of *inter alia* error, misrepresentation, fraud, undue influence and duress impacting on a contract in general, the courts have adopted several measures, which influence the enforceability of exemption clauses in standardised contracts.¹²⁹ These principles are used to limit the onerous consequences of signing documents containing unconscionable provisions.¹³⁰ These principles are interrelated and are discussed in further detail below.

4.1.1 Contractual form

The first principle provides that the proposed term must be in a contractual form. Should the term be contained in a written document, the document must be such that a reasonable person would expect it to contain contractual terms.¹³¹

This principle can best be described in the English case of *Olley v Marlborough Court Ltd*¹³² in which Denning LJ held as follows:¹³³

“The first question is whether that notice formed part of the contract. *People who rely on a contract to exempt themselves from their common law liability must prove that contract strictly.* Not only must the terms of the contract be clearly proved, but also the intention to create legal relations – the intention to be legally bound – must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him,

¹²⁹ Hawthorne 1995 *THRHR* 171; Naudé 2006 *Stell LR* 362; Stoop 2008 *SA Merc LJ* 497; Lerm 422.

¹³⁰ Aronstam 37; McQuoid-Mason *Consumer law in South Africa* (1997) 39; Hawthorne 1995 *THRHR* 171; Christie 13 and 204.

¹³¹ Aronstam 26; McQuoid-Mason 40; *Annie Peard v John T Rennie & Sons* 1895 16 *NLR* 175; *Central South African Railways v McLaren* 1903 *TS* 727; *Chapelton v Barry Urban District Council* 1940 1 *ALL ER* 356 (CA); *Mercurius Motors v Lopez* 2008 3 *SA* 572 (SCA).

¹³² 1949 1 *ALL ER* 127 (CA).

¹³³ Aronstam 28.

before or at the time of the contract, a written notice specifying certain terms and *making it clear to him that the contract is in those terms.*" (own emphasis)

If a party wishes to rely on an exemption clause, he must therefore prove that the relevant clause was contained in a contract to which the other person was party.

4.1.2 Prior Notice

When an exemption clause is contained in a contract, the contract must be such that a reasonable person would expect it to contain an exemption clause. If not, the party who wishes to impose the clause must draw it to the attention of the other party.¹³⁴ A consumer will consequently not be bound to a term which was brought to their attention only after the contract has been concluded.¹³⁵

In *Fourie v Hansen*¹³⁶ reliance on an exemption clause failed as the court decided that for the said clause to be valid, it should have been specifically brought to the attention of the signatory. The court stated that the clause should have at least been printed in a different colour ink, or underlined or printed in another typesetting of a different size from the other clauses so as to draw the reader's attention to it.

In *Afrox Healthcare v Strydom*¹³⁷ the court however contended that exemption clauses in standardised contracts are the rule rather than the exception. The court subsequently held that the signatory's subjective expectations of what the

¹³⁴ *Weiner v Calderbank* 1929 TPD 654; *Chapelton v Barry Urban District Council supra*; *King's Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N); *Bok Clothing Manufacturers v Lady Land* 1982 2 SA 565 (C).

¹³⁵ McQuoid-Manson 40.

¹³⁶ 2000 1 All SA 510 (W).

¹³⁷ *Supra*; Aprox is the owner of a private hospital in which the respondent had been admitted for an operation. Upon such admission a contract was concluded between the parties which contained an exemption of liability clause. Certain negligent conduct by the hospital's nursing staff caused the respondent to suffer damages. The respondent consequently instituted action against the hospital for such damages. The hospital relied on the exemption clause contained in the signed contract.

agreement between them would contain played no role in the question whether there was a legal duty resting on the admissions clerk of the hospital to point out the content of the exemption clause in the contract.

In *Mercurius Motors v Lopez*¹³⁸ the respondent claimed damages for breach of contract of deposit flowing from the theft of his motor vehicle from the appellant's premises to which it had been delivered to be serviced. The appellant rose in defense that liability for loss by theft was exempt by means of an exemption clause. This clause¹³⁹ was contained on the reverse side of a document described as a 'repair order form', signed by the respondent when he delivered the vehicle. Navsa JA found that:

"A person delivering a motor vehicle to be serviced or repaired would ordinarily rightly expect that the depositary would take reasonable care in relation to the safekeeping of the vehicle entrusted by him or her."

The respondent reasonably did not expect the contract of deposit to contain such an exemption clause nor was his attention drawn to the condition on the reverse of the form, when he had signed it.

The court continued that:

"An exemption clause such as that contained in clause 5 of the conditions of contract, that undermines the very *essence* of the contract of deposit, *should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form*, and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question."
(own emphasis)

¹³⁸ *Supra*.

¹³⁹ The clause read as follows: "I/we acknowledge that MERCURIUS shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (including gross negligence) of their representatives, agents or employees."

To determine what the ‘essence’ of the contract is, the obligations essential to the purpose of the contract should be established.¹⁴⁰

The outcome of *Afrox Healthcare* and *Mecurius Motors* cases are in contradiction with each other. One may thus assume that the outcome of a matter is dependent on the views of the particular presiding officer. This could be regarded as a shortcoming of the common law measures which the CPA will strive to address.

4.1.3 Limiting interpretation

The effect of exemption clauses can also be limited by interpreting them restrictively within the normal confines of interpretation.¹⁴¹ This method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted¹⁴² and where the clause is set out in general language or broad terms.¹⁴³

Where an exemption clause stipulates an excessive adversity upon a person, or where it deprives him of one of his common law rights, the courts will construe the clause narrowly to place as light a burden as possible upon him or to restrict the exclusion of his right to the narrowest possible field.¹⁴⁴

In *Hotels, Inns and Resorts SA v Underwriters at Lloyds*,¹⁴⁵ Hlophe J stated as follows:

¹⁴⁰ Naudé & Lubbe “Exemption Clauses – A Rethink occasioned by *Afrox Healthcare v Strydom*” 2005 *SALJ* 454; Stoop 2008 *SA Merc LJ* 500.

¹⁴¹ Stoop 2008 *SA Merc LJ* 503; Christie 216; *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 3 SA 416 (A); *Huges v SA Furnigation Co supra*; *Cotton Marketing Board of Zimbabwe v Zimbabwe National Railways* 1990 1 SA 582 (ZS).

¹⁴² Christie 216.

¹⁴³ Stoop 2008 *SA Merc LJ* 503; *Essa v Divaris* 1947 1 SA 753 (A).

¹⁴⁴ Aronstam 34; McQuoid-Mason 42; *Weinberg v Olivier* 1943 AD 181; *Essa v Divaris supra*; *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Kemsley v Car Spray Centre (Pty) Ltd* 1976 1 SA 121 (SEC); *Drifters Adventure Tours CC v Hircock* 2007 2 SA 93 (SCA).

¹⁴⁵ 1998 4 SA 466 (C).

“For many years in this country the Courts have interpreted exemption clauses narrowly because ‘the law cannot stand aside and allow such traps to operate unchecked, and the Courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit...”

The narrow interpretation method of confirming exemption clauses within reasonable bounds can be brought into operation by inquiring into the wording of the clause and the surrounding circumstances.¹⁴⁶

This method correlates with the *contra proferentum* rule which is also often used to relieve persons whose rights were adversely affected by oppressive terms in a contract.¹⁴⁷ This rule provides that the words of a contract may be construed more strictly against the party who drafted the contract.¹⁴⁸ It is based on the principle that the ambiguity of his expression may not be used to induce another to enter into contract with him on the supposition that his words mean one thing, whilst at the same time he is hoping that a court will be able to interpret the same words according to a different meaning which will be more to his advantage.¹⁴⁹

In interpreting such clauses the court must first examine the nature of the contract in order to decide what legal grounds of liability would exist in the absence of the clause.¹⁵⁰ The clause will subsequently be afforded the minimum effectiveness by being interpreted to exempt the party concerned only from the liability stated specifically in the clause which would involve only the least degree of blameworthiness.¹⁵¹ The exemption clause will not apply to any other liabilities which would have existed in the absence of the clause.

¹⁴⁶ Christie 217; *Hotels, Inns and Resorts SA v Underwriters at Lloyds supra*.

¹⁴⁷ Christie 217; *Bristow v Lycett* 1971 4 SA 223 (RA); *Government of the Republic v Fibre Spinners & Weavers (Pty) supra*; *Lawrence v Kondotel Inns (Pty) Ltd* 1989 1 SA 44 (D); *Zietsman v Van Tonder* 1989 2 SA 484 (T).

¹⁴⁸ Aronstam 35; *McQuoid-Mason* 42; *Kötz* 1986 *SALJ* 407.

¹⁴⁹ *Ibid.*

¹⁵⁰ For instance strict liability, negligence, gross negligence; Christie 216.

¹⁵¹ Christie 216.

The purpose of such restricted interpretation is not to restrain an exemption clause but to ascertain what the parties intended the clause to cover.¹⁵² In *First National Bank v Rosenblum*¹⁵³ Marias J said:

“Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved *is plainly spelt out*.”¹⁵⁴ (own emphasis)

In *Van der Westhuizen v Arnold*,¹⁵⁵ Lewis AJA summarised the balance between enforcing and not enforcing exemption clauses as follows:

“The very fact...that an exemption clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application. This requires a consideration of the background circumstances...and a resort to surrounding circumstances if there be any doubt as to the application of the exclusion.”

In *Drifters Adventure Tours CC v Hircock*¹⁵⁶ the court found the correct approach to be as stated by Scott JA in *Durban’s Water Wonderland (Pty) Ltd v Botha*¹⁵⁷ in which was held as follows:

“If the language of the disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be

¹⁵² *Idem* 217.

¹⁵³ 2001 4 SA 189 (A).

¹⁵⁴ The clause in question read as follows: “The bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe-custody, whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage, and whether the loss or damage is due to the Bank’s negligence or not.”

¹⁵⁵ 2002 6 SA 453 (SCA).

¹⁵⁶ *Supra*.

¹⁵⁷ *Supra*.

given to that meaning. If there is ambiguity, the language must be construed against the proferens.”

The courts could thus reduce the impact of an exemption clause through interpretation by restricting them to the basis of liability to which they expressly refer and not to extend them to concurrent forms of liability in general.¹⁵⁸

These rules of restrictive interpretation could however not adequately relieve a consumer from his plight if the clause were clearly worded and unambiguous.¹⁵⁹ Where the wording of an exemption clause was unambiguous and clear, such a clause would be enforceable irrespective of its consequences.¹⁶⁰ Effectively the freedom of contract principle would be upheld in such cases. The CPA will however aim to protect a consumer against such contracts which clearly contain unfair terms.

4.1.4 Public Policy

Our courts will invalidate and refuse to enforce contracts which are contrary to public policy.¹⁶¹ In *Morrison v Anglo Deep Gold Mines Ltd*¹⁶² Innes CJ said:

“Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognize any arrangement which is contrary to public policy.”

An exemption clause may thus be struck down if it is contrary to public policy. Public policy is interpreted in terms of the interests of society in general as well

¹⁵⁸ Lubbe & Murray 340; *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA).

¹⁵⁹ Aronstam 46; *Durban's Water Wonderland (Pty) Ltd v Botha supra*; *Drifters Adventure Tours CC v Hircock supra*.

¹⁶⁰ *Ibid*.

¹⁶¹ *Barkhuizen v Napier supra*; *Jordan v Faber* 2010 JOL 24810 (NCB).

¹⁶² 1905 TS 775.

as the interests of individual contractants.¹⁶³ In *Napier v Barkhuizen*¹⁶⁴ the court held that public policy is today greatly influenced by the South African Constitution and the values which underlie it. A term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.¹⁶⁵ Ngcobo J, who delivered the majority decision stated that:

“This approach leaves space for the doctrine of *pacta servanda sunt* to operate, but at the same time allows court to decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them.”

It must however be emphasised that the power of the court to refuse to enforce a contract which is contrary to public policy or against good morals and to declare it void was never to be exercised hastily or rashly and the court warned that this measurement should only be used in the clearest of cases.¹⁶⁶ Public policy generally favours the utmost freedom of contract and requires that commercial transactions should not be trammelled by restriction on that freedom.¹⁶⁷ Although public policy therefore leaves room for protection of the consumer, it has limited application. An Act which lays down clear policy on contracts would make the use of public policy to protect consumers unnecessary.

The inequality of the bargaining power and the exclusion of liability due to fraudulent and negligent conduct are aspects which must be weighed-up against the principle of public policy in order to determine the enforceability of the relevant clause or agreement. Each aspect is discussed in more detail below.

¹⁶³ Van der Merwe 298.

¹⁶⁴ *Supra*.

¹⁶⁵ *Barkhuizen v Napier supra*.

¹⁶⁶ *Eastwood v Shepstone* 1902 TS 294; *Sasfin v Beukes supra*; *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C); *Afrox Healthcare v Strydom supra*.

¹⁶⁷ *Eastwood v Shepstone supra*; *Burger v Central South African Railways supra*, *Van Rensburg v Staughton supra*; *Natal Motor Industries Ltd v Chickmay supra*, *Grinaker Construction v Transvaal Provincial Administration supra*; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd supra*; *Brisley v Drotsky supra*.

4.1.4.1 *Status and bargaining power of the contracting parties*

The South African case law is not very rich in jurisprudence dealing with the status and bargaining power of the contracting parties.¹⁶⁸ In *Afrox Healthcare v Strydom*¹⁶⁹ Brand J stated that the unequal bargaining position between the parties is a *factor* which the courts consider along with other factors to assess public interest. This is recognition of the potential injustice that may be caused by the inequity of bargaining powers.¹⁷⁰ The court acknowledged that limits of exemption clauses are determined by business considerations such as savings in regard to insurance premiums, competition and the possibility of deterring possible clients.¹⁷¹ On the basis of these economic and capitalistic considerations, Brand J came to the conclusion that there is no evidence whatsoever that the respondent occupied a weaker bargaining position.

Many writers¹⁷² criticised the decision found in the *Afrox* case in that the court failed to consider the imbalance of the bargaining position between the patient and the hospital. In the minority decision of *Barkhuizen v Napier*¹⁷³ Sachs J asked whether the considerations of public policy in our present constitutional era doesn't compel courts to refuse to give legal effect to an imposed, onerous and one-sided ancillary term buried in a standard form contract that unilaterally and without corresponding advantage, limits the enjoyment of a constitutionally protected right. Sachs argued that holding a person to one sided terms which was not pertinently consented to cannot be said to be within the boundaries of public policy. Agreeing with this notion, Tladi¹⁷⁴ stated that such an approach is

¹⁶⁸ Lerm 819.

¹⁶⁹ *Supra*.

¹⁷⁰ *Jordan v Faber supra*.

¹⁷¹ (34E-F); Hawthorne "Closing the open norms in the Law of Contract" 2004 *THRHR* 299.

¹⁷² Van der Merwe (2003) 274-275; Van den Heever "Exclusion of Liability of Private Hospitals in South Africa" 2003 *De Rebus* 47-48; Hawthorne 2004 *THRHR* 301; Tladi "One Step Forward, for Constitutionalising the Common law: *Afrox Healthcare v Strydom* 2002" *SAPR/L* 477; Naudé & Lubbe 2005 *SALJ* 460; Lerm 399.

¹⁷³ *Supra*.

¹⁷⁴ 2002 *SAPR/LR* 477.

contrary to our constitutional values of equity and dignity. S 9(1) of the Bill of Rights reads as follows:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

These words are amplified by section 1(1)(ix) of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁷⁵ which reads:

“‘equity’ includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equity and also equity in terms of outcomes.”

Christie¹⁷⁶ points out that the intention was clearly to achieve effective, and not merely theoretical, equity, and this is made even clearer by the opening words of section 2 of the Promotion of Equity and Prevention of Unfair Discrimination Act which provide that:

“the objects of this Act are-

- (a) to enact legislation required by section 9 of the Constitution;
- (b) to give effect to the letter and spirit of the Constitution, in particular –
 - (i) the equal enjoyment of all rights and freedoms by every person;
 - (ii) the promotion of equity.

In this regard it is however important to mention that contractual autonomy is also recognised in the Bill of Rights as the right to privacy and dignity¹⁷⁷. Assessing the bargaining power between parties in order to determine the enforceability of a contractual term, would therefore again entail a balancing of the constitutional right of equity and the right to private autonomy. Whether this is indeed possible

¹⁷⁵ Act 4 of 2000 which was enacted as required by s 9(4) of the Bill of Rights.

¹⁷⁶ 19.

¹⁷⁷ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA).

depends on a factual enquiry. There is however certain factors to keep in mind and Cheshire¹⁷⁸ outlined the position as follows:

“... firstly, inequality in itself cannot be a ground of invalidity since there is usually no way for the stronger party to divest himself of the advantage and it would not be to the advantage of the weaker party to prohibit contracts between the parties altogether. Invalidity must be dependent on the stronger party taking unfair advantage of his position. Secondly, exact equal bargaining power is unusual. Where one party is in slightly the stronger position, the process of the bargaining should lead to an agreement where both parties concur equally in the result. Inequality of bargaining power should only be relevant where it is in great extent. Thirdly, when we talk of inequality of bargaining power we are often thinking of inequality in bargaining *skill*.”

In the recent case of *Jordan v Faber*¹⁷⁹ the court however acknowledged that the unequal bargaining position between the parties¹⁸⁰ was relevant to conclude that the contract between the parties was against public policy and thus void.

It is thus evident that the bargaining position between parties is evolving into a relevant factor and can even be regarded as a protection measure against unfair contractual practices. It however seems that the court will once again only come to the above conclusion where the inequality is of extreme extent.

4.1.4.2 Fraud

Proof of fraud on the part of the representor, often extremely difficult in practice, also renders the exemption clause ineffective on the grounds of public policy.¹⁸¹ Public policy has also been the basis upon which the courts have refused to

¹⁷⁸ Cheshire 19-20.

¹⁷⁹ *Supra*.

¹⁸⁰ In this case the bargaining position was between an attorney and his client. The court acknowledged that attorneys wield tremendous power over clients who depend on them to handle their affairs in stressful situations.

¹⁸¹ Lubbe & Murray 340; Christie 212.

permit a person to impose on another a contractual provision that excludes liability for any criminal act or intentionally wrongful act done in connection with the performance of the contract.¹⁸²

In *Hughes v SA Furnigation Co (Pty) Ltd*¹⁸³ Herbststein J said:

“If the contractor deliberately caused the fire no exclusionary clause would serve to relieve it from liability.”¹⁸⁴

Also in *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds*¹⁸⁵ Hlope J held:

“...the sub clause did not exempt the company from liability for loss or damage caused by fires deliberately started by one of its security personnel, as to hold otherwise would make a mockery of the rest of the clause and of the other provisions of the contract.”¹⁸⁶

An exclusion clause excluding liability for fraud or *dolus* is thus also deemed to be against public policy and void and the courts consequently protected consumers against such abuse.¹⁸⁷

¹⁸² Aronstam 43; Christie 212.

¹⁸³ 1961 4 SA 799 (C) 805G.

¹⁸⁴ In *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C) and *Micro Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 2 SA 709 (W) it was however said that a party could exempt himself from liability – even for his own willful default; Christie 213.

¹⁸⁵ *Supra*.

¹⁸⁶ In this case the parties entered into a contract in terms of which the defendant would furnish security services to a hotel operated by the plaintiff. In terms of clause 5.1 of the contract, the services and personnel would be provided specifically “to minimize the loss or damage by fire “at the hotel premises. Clause 5.3 however contained an exemption clause which read that FEND (the security company) ‘shall not be held liable for loss or damages sustained by the (plaintiff) from whatsoever cause.’

¹⁸⁷ In *Wells v South African Alumenite Company supra* the court held that liability for fraudulent conduct cannot be excluded by exemption clauses as such conduct is against public policy.

4.1.4.3 Negligence

It is trite law that the exemption of ordinary negligence¹⁸⁸ and even gross negligence¹⁸⁹ is not against public policy.¹⁹⁰ But, despite recognition given to the validity of exemption clauses exonerating a contracting party from liability for loss or damage caused by gross negligence, the South African courts have not upheld this principle without placing some limit to the rule.¹⁹¹

In *Mercurius Motors v Lopez*¹⁹² the court referred to the test for negligence and quoted it as follows:

- “(a) would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;
- (b) would a reasonable person have taken steps to guard against that possibility;
- (c) did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?

If all three parts of this test receive an affirmative answer, then the defendant has failed to measure up to the standard of the reasonable person and will be adjudged negligent.”¹⁹³

The court subsequently held that the appellant, by not safeguarding the keys of the motor vehicle and the consequent theft of the defendant’s vehicle, did not act as a reasonable person in their circumstances would have acted. The court stated that it was clearly foreseeable that theft of the vehicle would be facilitated by the availability of the keys and no discernible steps were taken to guard

¹⁸⁸ *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris* supra.

¹⁸⁹ *Government of the Republic of SA v Fibre Spinners and Weavers supra*; *First National Bank of South Africa Ltd v Rosenblum supra*.

¹⁹⁰ Lerm 430; Hopkins “Constitutional Rights & the Question of Waiver: How Fundamental are Fundamental Rights?” 2001 *SAPR/PL* 133.

¹⁹¹ Lerm 430; Hopkins 2001 *SAPR/PL* 137; Such a clause will be interpreted restrictively - see par 4.3 *supra*.

¹⁹² *Supra*.

¹⁹³ Burchell *Principles of Delict* (1993) 86; *Kruger v Coetzee* 1966 2 SA 428 (A) at 430.

against it. The court thus held that the appellant is liable for the damages obtained by the respondent irrespective of the exemption clause contained in the agreement.

In *Johannesburg Country Club v Stott & Another*¹⁹⁴ the court left open the question whether liability for damages for negligently causing the death of a person can be excluded by an exemption clause. Harmse JA however said:

“It is arguable that to permit such exclusion would be against public policy because it runs counter to the high value the common law and, now, the Constitution place on the sanctity of life.”

4.1.4.4 Did the principle of public policy provide adequate relief to consumers with regard to exemption clauses?

It is clear that the courts have, over the decades, recognised the role of public policy with regard to the enforcement of unconscionable exemption clauses. On the other hand, public policy, when measured against the background of the doctrine of freedom of contract, promotes the ethos that contracts freely entered into should be enforced. The current position is however that there are few clear guidelines as to when the courts will interpret public policy according to freedom of contract and when the principle of public policy will be applied to relieve a party of inherent unfairness. The CPA will strive to substitute the need to make use of public policy with the principle of fairness.

4.1.5 The principle of Bona Fides

In the minority decision of *Eerste Nationale Bank v Saayman*¹⁹⁵ Olivier JA measured the way in which the contract between the parties was concluded

¹⁹⁴ 2004 5 SA 511 (SCA).

¹⁹⁵ *Supra*.

against the principles of *bona fides*.¹⁹⁶ He described the role of *bona fides* as “eenvoudig om gemeenskaps opvattinge ten aansien van behoortheid, redelikheid en billikheid in die kontrakreg te verwesenlik.”¹⁹⁷ Olivier JA argued that *bona fides* is an element of the umbrella concept of public policy and that courts should apply the notion of *bona fides* to all contracts because public policy so demand. This notion to develop the concept of good faith did however not prosper.¹⁹⁸ In *Brisley v Drotsky*¹⁹⁹ the majority dismissed his views and held that good faith could not be accepted as an independent basis for setting aside or not enforcing contractual provisions.²⁰⁰ In *Afrox Healthcare v Strydom*²⁰¹ yet another attempt was made to persuade the court to set aside a contractual provision on the basis that it was in conflict with the principle of good faith.²⁰² Brand J held as follows:

“Aangaande die plek en rol van abstrakte idees soos goeie trou, redelikheid, billikheid en geregtigheid het die meerderheid in die *Brisley*-saak beslis dat, ofskoon hierdie oorwegings onderliggend is tot ons kontrakreg, dit nie 'n onafhanklike, oftewel 'n 'free floating' grondslag vir die tersydestelling of die nie-afdwinging van kontraktuele bepalings daarstel nie (par [22]); anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls kan lei, hulle op sigself geen regsreëls is nie. *Wanneer dit by die afdwinging van kontrakbepaling kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekristaliseerde en neergelegde regsreëls.* (Sien, byvoorbeeld, *Brummer v Gorfil Brothers Investments (supra op 419F-420G).*)”. (own emphasis)

¹⁹⁶ Glover “Good Faith and Procedural Unfairness in Contract” 1998 *THRHR* 330.

¹⁹⁷ 319B.

¹⁹⁸ Christie 16.

¹⁹⁹ *Supra*.

²⁰⁰ Christie 16.

²⁰¹ *Supra*.

²⁰² Christie 16.

The court subsequently rejected the concept of good faith and reaffirmed the concept of public policy as an instrument for handling cases of contractual unfairness that cannot satisfactorily be handled by the existing rules.²⁰³

In conclusion, it can therefore be said that these common law protection measures used by the court did not adequately succeed in dealing with unfair contractual practices. When, and the extent to which these measures are applied is dependant of the views and beliefs of the presiding officer. Whether an exemption clause would be enforced or whether a party would be relieved by means of one of the above protection measures remains a “gamble”. There is thus a need for clearer and more definite rules in this regard.

4.2 Statutory Protection Measures

Apart from the above provisions of common law, statutory measures have been introduced to deal with consumer protection issues. These statutory consumer protection measures were however fragmented and outdated, with almost 50% predating 1994 and with some going back as far as 1947.²⁰⁴ General consumer protection measures were contained in the following statutes which will be repealed by the enactment of the CPA:²⁰⁵

- The Sales and Services Matters Act ²⁰⁶ which regulated by-law agreements, the display and marketing of goods, and controlled and prohibited the sale of certain goods;
- The Trade Practices Act²⁰⁷ which sought to protect consumers against false or misleading advertisements (which was already largely repealed by the Consumer Affairs Act);

²⁰³ Christie 16; Lerm 370.

²⁰⁴ Maseti (2009) 9.

²⁰⁵ See Sec 121(2)(b) – (f) of the CPA.

²⁰⁶ Act 25 of 1964.

²⁰⁷ Act 76 of 1976.

- The Consumer Affairs (Unfair Business Practices) Act²⁰⁸ which provided for the prohibition and control of unfair business practices. An ‘unfair business practice’ was defined as any practice which directly or indirectly has, or is likely to have, the effect of harming relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer.
- The Price Control Act²⁰⁹ which promoted and controlled competitive prices; and
- The Business Names Act²¹⁰ which regulated the control of business names and for matters incidental thereto.

South Africa also had several consumer protection bodies. The most important of these include the Office for the Investigation of Unfair business practices,²¹¹ the Provincial Government Departments of Consumer Affairs,²¹² the South African Bureau of Standards,²¹³ statutory professional regulatory bodies²¹⁴ and “industry-specific” self regulatory bodies.²¹⁵

²⁰⁸ Act 71 of 1988.

²⁰⁹ Act 25 of 1964.

²¹⁰ Act 27 of 1960.

²¹¹ This Committee investigated unfair business practices and made recommendations to the Minister of Trade and Industry regarding such unfair conduct.

²¹² Makhubo “The right to have Access to Information and Consumer Rights” (1999) 4 available at <http://www.pmg.org.za/odb/Consumer%20Institute.htm>. The author mentions that Consumer Affairs Departments were established in all the provinces of South Africa under guidance of the Department of Trade and Industry. Its functions include the implementation and monitoring of credit and usury matters.

²¹³ *Ibid.* The author states that the South African Bureau of Standards (SABS) was established i.t.o the Standards Act 24 of 1945 and that its functions include a contribution towards the strengthening of the economy and enhancing the quality of life by promoting quality and standardisation.

²¹⁴ *Ibid.* The author mentions that such bodies include the Law Society of South Africa, the Dental and Medical Council, the Nursing Council, the Pharmacy Board, the Bar Council, the Council for Architects etc.

²¹⁵ *Idem* 5. The author mentions a few examples of these bodies such as members of the Furniture Traders Association, the Direct Marketing Association of South Africa, the Banking Council etc.

4.3 Were these protection measures effective?

Although the courts used common law grounds *indirectly* to solve the problem of the abuse of exemption clauses, these rules have been applied in such a random way that one cannot predict with absolute certainty whether or not the courts will come to the relief of an aggrieved party.²¹⁶ These measures may also have afforded only temporary relief from abuse since their effect could be circumvented by skilful draftsmen looking for the next “loophole” to achieve the enforcement of unfair clauses.²¹⁷

Even the statutory measures provided insufficient protection. Consumers were mostly unaware of their existence, not even to mention the rights and redress it provided for. The existing consumer protection bodies also provided little protection against unscrupulous practices. A study which was conducted in 1998 by the SABS revealed that more than 400 manufacturers have not complied with the legal minimum standard of safety. The study further revealed that as many as 65% of electrical and electronic household goods sold in South Africa are illegal or grey imports. This study thus proved how consumers’ well-being remained at risk.²¹⁸

One has to admit that a single piece of legislation had to be considered to address the issue of fairness in contractual relationships and product liability.²¹⁹ The CPA would be just that.

²¹⁶ Aronstam 46; Naudé 2006 *Stell LR* 379.

²¹⁷ *Ibid.*

²¹⁸ Makhubo (1999) 5.

²¹⁹ Van der Walt 1986 *SALJ* 646.

5. The Consumer Protection Act

5.1 Overview

The President of South Africa signed the Consumer Protection Bill into an Act of Parliament on 24 April 2009. The primary functioning of the Act will however only be effective from 31 March.²²⁰

The Act applies to every transaction occurring within the Republic unless it is exempted by section 5(2), or in terms of section 5(3) or 5(4).²²¹ It also applies to the *goods* and *services* pertaining to an agreement²²² as well as the *promotion* of goods and services.²²³ It even applies to the *goods* which are supplied in terms of an agreement that is *exempt* from the application of the Act.²²⁴ Those goods, and the importer, producer, distributor and retailer of the goods are subject to section 60²²⁵ and 61²²⁶ irrespective of the fact that the transaction was exempt from the Act.

Except to the extent expressly set out in item 3 of Schedule 2, the CPA does not apply to any agreement concluded or any goods or services delivered before the general effective date.²²⁷

²²⁰ See Item 2(1) and 2(2) of Schedule 2 which reads: “(1) Chapters 1 and 5 of this Act, section 120 and any other provision authorising the Minister to make regulations, and this Schedule, take effect on the date that is one year after the date on which this Act was signed by the President; (2) Subject to subitem (3), and items 4 and 5, any provision of this Act not contemplated in subitem (1) takes effect on the date that is 18 months after the date on which this Act was signed by the President”; The reason for this postponement is to enable the Minister to appoint and establish the necessary Committees, Tribunals and Authorities as proposed by the Act. It also grants the relevant entities and role-players the opportunity to prepare for the consequences and to comply with the requirements of the Act.

²²¹ S 5(1)(a).

²²² S 5 (1)(c).

²²³ S 5(1)(b).

²²⁴ S 5(5).

²²⁵ Which prescribes the safety monitoring and recall practices and process.

²²⁶ Which prescribes the liability for damaged caused by goods.

²²⁷ Item 3(1)(a)-(c), Sch. 2; see n 221.

The CPA sets the promotion and advancement of the economic and welfare of consumers in South Africa as its primary purpose.²²⁸ To achieve this purpose, the CPA prescribes certain fundamental “consumer rights” which consist of the following:

- the right of equality in the consumer market;²²⁹
- the right to privacy;²³⁰
- the right to choose;²³¹
- the right to disclosure and information;²³²
- the right to fair and responsible marketing;²³³
- the right to fair and honest dealing;²³⁴
- the right to fair, just and reasonable contract terms and conditions;²³⁵ and
- the right to fair value, good quality and safe goods.²³⁶

It is the right to fair, just and reasonable contract terms and the right to fair value, good quality and safe goods which is of importance for purposes of this study and will consequently be discussed next.

5.2 The Consumer’s right to fair, just and reasonable contract terms

5.2.1 Notice required for exemption clauses

Section 49(1) provides that any provision of a consumer agreement which purports to limit the risk or liability of the supplier or which impose an obligation on the consumer to indemnify the supplier for any cause, must be drawn to the

²²⁸ Van Eeden “A Guide to the Consumer Protection Act” (2009) 12; S 3(1).

²²⁹ S 8-10.

²³⁰ S 11-12.

²³¹ S 13-21.

²³² S 22-28.

²³³ S 29-39.

²³⁴ S 40-47.

²³⁵ S 48-52.

²³⁶ S 53-61.

consumer's attention. The effect of this provision is that if an agreement contains an exemption clause, the existence of that clause must be brought to the attention of the consumer. This must be done in a conspicuous manner and form which is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances of each case.²³⁷ The Act goes further by stipulating that such a provision must be written in plain language²³⁸ and that the consumer must be given adequate opportunity to receive and comprehend the provision.²³⁹

This section aims to ensure that the consumer understands the effect of the relevant clause or is given sufficient opportunity to clarify the meaning of such a clause.

5.2.2 When can a term be regarded as unfair, unjust and unreasonable?

Section 48(1) is regarded as the general unfairness standard and reads as follows:

“ A supplier must not-

- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services-
 - (i) at a price that is unfair, unreasonable or unjust; or
 - (ii) on *terms* that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) *require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer-*
 - (i) *to waive any rights;*
 - (ii) assume any obligation; or
 - (iii) *wave any liability of the supplier,*

²³⁷ S 49(4)(1)(a).

²³⁸ S 49(3).

²³⁹ S 49(5).

on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.”(own emphasis)

The terms “unfair”, “unreasonable” and “unjust” are not clearly defined by the Act and must thus be given their ordinary meaning, and if there is ambiguity about that meaning, it must be determined by having regard to the accepted principles of interpretation, as amplified by the Act.²⁴⁰ Admittedly, it is difficult to define *what* these concepts mean and it is thus understandable that the legislator rather chose to lay down guidelines as to *when* a term will be considered as unfair, unjust or unconscionable. Section 48(2) subsequently prescribes the following guiding principles:

“Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, *is unfair, unreasonable or unjust if-*

- (a) if it is *excessively one-sided* in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- (b) if the terms of the transaction or agreement are so *adverse* to the consumer as to be inequitable;
- (c) if the consumer relied on a false, misleading or deceptive representation, as contemplated in section 41 or statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- (d) the transaction or agreement was subject to a term, condition or a notice to a consumer contemplated in section 49(1), and-
 - (i) the terms, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”(own emphasis)

²⁴⁰ Van Eeden 182.

The drafters of standard form contracts must thus be wary of this provision since such contracts are often one-sided in nature and only to the benefit of the supplier. It subsequently runs the risk of being declared unfair, unjust or unconscionable and consequently being declared void.²⁴¹ Furthermore, because the Act does not specifically define the meaning of the terms “unfair”, “unjust” and “unconscionable”, the judges, adjudicators or chairpersons of the courts and Tribunals will have to interpret its meaning. Their opinions or discretion of what constitutes as such may be very diverse, but will nevertheless become precedents of our law. This may lead to the effect that the CPA can potentially introduce vagueness and uncertainty into the South African law of contract. However, if the courts, in applying the CPA on such matters, constantly rule against unfair exemption clauses, such clauses will no longer be practically viable and consequently the use thereof will cease.

5.2.3 Prohibited agreements and terms

In the interest of ensuring the consumer’s right to fair, just and reasonable contract terms, section 51(1) of the Act prohibits a supplier to make an agreement subject to any term or condition if:

- “(a) its general purpose or effect is to-
 - (i) defeat the purposes and policy of this Act;
 - (ii) mislead or deceive the consumer; or
 - (iii) subject the consumer to fraudulent conduct;
- (b) it directly or indirectly purports to-
 - (i) *wave or deprive a consumer of a right in terms of this Act;*
 - (ii) *avoid a supplier’s obligation or duty in terms of this Act;*
 - (iv) set aside or override the effect of any provision of this Act; or
 - (v) authorise the supplier to-
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;

²⁴¹ S 52(3).

- (c) it purports to-
- (i) *limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;*
 - (ii) *constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or*
 - (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1).”(own emphasis)

This provision provides that the exemption of liability for loss or damage due to gross negligence will no longer be permitted in the South African law of contracts. Section 51(3) states that such prohibited terms are void and thus unenforceable. In practice, liability of damages due to gross negligence was regularly exempted by means of exemption clauses. This provision will thus have severe consequences for businesses and even hospitals. If practices like hospitals cannot exempt such liability, it will lead to the consequence that their insurance fees will increase and subsequently hospitals will adapt their fees accordingly. Consumers will therefore end up paying more for services pertaining to this Act.

The question is however *what* will constitute *gross negligence* (otherwise referred to as *culpa*)? This phrase is not defined by the Act and it is thus not clear *when* conduct will be found to be grossly negligent and when an action will constitute only normal negligence. This is an issue that will have to be addressed in due practice. The court will probably consider the ordinary meaning of *culpa* which is defined as the conduct which falls short of what a reasonable person in the circumstances with the same level of expertise would do to protect a foreseeable risk or harm to another.

5.3 Powers imposed on the Courts

The CPA confers a responsibility on the courts to take a leading role in the development of consumer law and to pursue the realisation and enjoyment of consumer rights.²⁴² The court's duties include amongst the following:

5.3.1 *The expansion of the common law*

Section 4(2) states that in any matter before a court, in terms of this Act, the court *must* develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)²⁴³. The word “must” indicates that courts are compelled to develop the law with a view of improved realisation and enjoyment of consumer rights.

5.3.2 *Interpretation of contract terms to the benefit of the consumer*

Section 4(4)(a) compels a court, the National Consumer Commission²⁴⁴ or National Consumer Tribunal²⁴⁵ to interpret any standard form, contract or other document prepared by or on behalf of the supplier, to the benefit of the consumer so that any ambiguity that allows for more than one reasonable interpretation is resolved to the benefit of the consumer.²⁴⁶

Section 4(4)(b) continues that any restriction, limitation, exclusion or deprivation of a consumer's rights, in terms of an agreement *must* be construed to be limited

²⁴² Van Eeden 25.

²⁴³ (i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.

²⁴⁴ Hereinafter referred to the NCC.

²⁴⁵ Hereinafter referred to the NTC.

²⁴⁶ S 4(4)(a).

to the extent that a reasonable person would ordinarily contemplate or expect, having regard to the content of the document,²⁴⁷ the manner and form in which the document was prepared and presented²⁴⁸ and the circumstances of the agreement.²⁴⁹

The Act therefore stipulates that the court must interpret an ambiguous clause, which was drafted by or on behalf of the supplier, to the benefit of the consumer. There are therefore no more room for the judiciary to apply their discretion on whether or not a clause is to be considered strictly in accordance with the freedom of contract principle; or in terms of one of the common law defences as discussed in par 4.1.

The CPA should therefore bring about greater certainty to contractual relations as it lays down the principle of the presiding officer always having to consider the interests of the consumer. In effect the principle of freedom of contract will no longer be the basis of South African contract law. The CPA will bring about a definite shift from the strict rule of freedom of contract to a position of greater control.

5.3.3 The power to declare agreements and terms unfair and unjust

Section 52 confers upon the court several powers to ensure fair and just conduct, terms and conditions. In adjudicating the above-mentioned matters, the court must consider the following factors as contemplated in section 52(2):

- “(a) The fair value of the goods in question;
- (b) The nature of the parties to the agreement, their education, experience, sophistication and *bargaining position*;

²⁴⁷ S 4(4)(b)(i).

²⁴⁸ S 4(4)(b)(ii).

²⁴⁹ S 4(4)(b)(iii).

- (c) The circumstances of the agreement that existed or were reasonably foreseeable that the agreement was entered into;
- (d) The conduct of the supplier and consumer respectively;
- (e) *Whether there was any negotiation between the parties, and if so, the extent of that negotiation;*
- (f) Whether, as a result of the conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- (g) the extent to which any documents relating to the transaction or agreement satisfied the requirement of section 22²⁵⁰;
- (h) *Whether the consumer knew or ought reasonably to have known of the existence and extent of the exemption clause in the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any:*
 - i. Custom of trade; and*
 - ii. Any previous dealings between the parties;*
- (i) The amount for which and circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- (j) In the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.” (own emphasis)

If a court consequently finds that an agreement was indeed unfair, unjust or unreasonable, it can make a declaration to that effect and make any further order it considers just and reasonable in the circumstances.²⁵¹ In considering the above-mentioned guidelines, one must admit that the Act provides the court with detailed guiding principles for determining the fairness of contracts and contractual terms.

²⁵⁰ S 22 provide for the right to receive information in a plain and understandable language.

²⁵¹ S 52(3)(a) and (b).

5.3.4 Court Orders

If the court determines that an agreement was, in whole or in part, unconscionable, unreasonable or unfair it may make any further order that it considers just and reasonable in the circumstances. Such orders may include an order:

- to restore money or property to the consumer;²⁵²
- to compensate the consumer for losses or expenses relating to the agreement or the proceedings of the court;²⁵³ or
- requiring the supplier to cease any practice, or alter any practice, form or document, as required, to avoid a repetition of the supplier's conduct.²⁵⁴

The court thus doesn't only have the power to declare a terms unfair, unjust and unreasonable, but also have the authority to redress the situation. One can thus assume that the court is provided with sufficient powers to bring about the necessary changes to the current situation.

5.4 Consumer's right to good quality goods and services

The Act grants every consumer the right to receive quality services.²⁵⁵ If the supplier fails to deliver good quality services, the consumer may require the supplier to either:²⁵⁶

- remedy any defect in the quality of the services performed or goods supplied; or

²⁵² S 52(3)(b)(i).

²⁵³ S 52(3)(b)(ii)(aa)-(bb).

²⁵⁴ S 52(23)(b)(ii); See also Van Eeden 193.

²⁵⁵ S 54.

²⁵⁶ S 54(2).

- refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

Except in certain circumstances,²⁵⁷ section 55 grants every consumer a right to receive goods that:

- are reasonably suitable for the purposes for which they are generally intended;²⁵⁸
- are of good quality, in good working order and free from any defects^{259,260},
- will be useable and durable for a reasonable period in time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply;²⁶¹ and
- comply with any applicable standards set under the Standards Act,²⁶² or any other public regulation.²⁶³

If a consumer has specifically informed the supplier of the particular purpose for which he wishes to acquire the goods, and the supplier ordinarily offers such goods or acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.²⁶⁴

²⁵⁷ S 55(6) states the exception to such a right, namely (a) when the consumer was expressly informed that the particular goods were offered on a specific condition and (b) where the consumer expressly agreed to accept the goods in such condition.

²⁵⁸ S 55(2)(a).

²⁵⁹ “defect” means: (i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristics of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances; See S 53(a).

²⁶⁰ S 55(2)(b).

²⁶¹ S 55(c)(c).

²⁶² Act 29 of 1993.

²⁶³ S 55(2)(d).

²⁶⁴ See S 55(3).

It is the first time that such consumer rights have been provided for and ensured in South African legislation. The CPA should fill the vacuum that existed and will subsequently curb the exploitation of the consumer to a greater extent.

5.4.1 Liabilities of the supplier

Section 61 provides that the producer,²⁶⁵ importer,²⁶⁶ distributor²⁶⁷ or retailer²⁶⁸ of any goods is liable for any harm caused wholly or partially as a consequence of:

- supplying unsafe goods;²⁶⁹
- product failure or defect in any goods;²⁷⁰ and
- inadequate instructions or warnings provided with regard to any hazard arising from the use of any goods,²⁷¹

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.

The harm for which such a person may be held liable includes:²⁷²

- the death or injury to a person;²⁷³
- any illness of a person,²⁷⁴

²⁶⁵ A person who (a) grows or nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or (b) by applying personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in (a); See S 1.

²⁶⁶ A person who brings those particular goods, or cause them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course business; See S 1.

²⁶⁷ A person who, in the ordinary course of business- (a) is supplied with those particular goods by a producer, importer or other distributor; and (b) in turn, supplies those goods either another distributor or retailer. See S 1.

²⁶⁸ A person who in the ordinary course of business supplies those goods to a consumer; See S 1.

²⁶⁹ S 61(1)(a).

²⁷⁰ S 61(1)(b).

²⁷¹ S 61(1)(c).

²⁷² See S 61(5).

²⁷³ S 61(5)(a).

- any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable;²⁷⁵ and
- any economic loss that resulted from the harm reflected above.²⁷⁶

Section 61(4) however prescribes that if it is unreasonable to expect that the particular person should have discovered the unsafe product characteristics, failure, defect or hazard, he will not be held liable for any damage caused. However, the fact that they may be held liable for product failure, will lead to the effect that such persons will refrain from knowingly and intentionally exploiting consumers. With these strict liability provisions, exemption clauses will be curbed to a great extent. This assumption will be discussed further under paragraph 7.

5.5 Enforcement of the Act

5.5.1 The National Consumer Commission

The CPA makes provision for the establishment of a NCC which will be responsible for the execution of the provisions of the Act. It can enforce the Act by:

- investigating and evaluating alleged prohibited conduct and offences;²⁷⁷
- conducting interrogations²⁷⁸ and searches;²⁷⁹
- issuing and enforcing compliance notices;²⁸⁰
- negotiating and concluding undertakings and consent orders contemplated in section 74;²⁸¹

²⁷⁴ S 61(5)(b).

²⁷⁵ S 61(5)(c).

²⁷⁶ S 61(5)(d).

²⁷⁷ S 99(d).

²⁷⁸ S 102.

²⁷⁹ S 103-105.

²⁸⁰ S 99(e).

- appearing before the NCT as required by the Act,²⁸²
- referring alleged offences in terms of the Act to the NPA,²⁸³
- making referrals to the NCT²⁸⁴ or to the consumer court.²⁸⁵

The NCC is furthermore responsible to increase knowledge of the nature and dynamics of the consumer market, and to promote public awareness of consumer protection matters.²⁸⁶ This can be established by implementing education and information measures to develop public awareness of consumer protection matters by issuing explanatory notes outlining its procedures or publishing any orders and findings of the NCT or a court in respect of a breach of the Act.²⁸⁷

It is however important to mention that the Consumer Affairs Act²⁸⁸ established a similar body,²⁸⁹ referred to as the “Office for the Investigation of Unfair business practices”. Although the NCC’s functions are more extensive, the Office for the Investigation of Unfair business practices also included the investigation and evaluation of alleged prohibited conduct and offences. This office further had the authority to negotiate and conclude arrangements for the discontinuance of unfair business practices²⁹⁰ and the reimbursement of affected consumers.²⁹¹ These arrangements could subsequently be converted into a court order. The fact of the matter is however that very few consumers were aware of this body or of the fact that they could lodge a complaint of an alleged unfair business practice with this office. Similarly the success of the CPA and the implementation thereof are dependent on the effective functioning of the NCC. Providing consumers with

²⁸¹ S 99(f).

²⁸² S 99(g).

²⁸³ S 99 (h).

²⁸⁴ S 73(2)(b).

²⁸⁵ S 73(2)(a).

²⁸⁶ S 96.

²⁸⁷ S 96 (a) and (b).

²⁸⁸ See n 208 at 36.

²⁸⁹ S 3.

²⁹⁰ S 11(1)(a) of the Consumer Affairs Act.

²⁹¹ S 11(1)(b) of the Consumer Affairs Act.

rights in law has little meaning if consumers cannot achieve quick and effective redress and if those rights are not effectively enforced. A lack of enforcement results in a widespread non-compliance with legal provisions, defeating the objectives of regulation.²⁹²

The aim of the NCC is that it should be accessible to the “vulnerable” consumer who has no other legal means of protection due to lack of funds and education and due to ignorance of the law. It is therefore of extreme importance that the general public will be made aware of their consumer rights and are aware of the existence and functions of the NCC. This could be established by including consumer law in the curriculum of a school subject such as Life Orientation which is compulsory from grade 8 to 10. Popular television programs such as *Carte Blanche Consumer* can assist in making people aware of their rights as well as exposing businesses that make use of unfair practices. In this regard the media can play an important role in educating consumers.

The NCC will be financed from money appropriated by Parliament and any fees payable to the Commission in terms of the Act.²⁹³ A possible shortcoming in this regard could be that insufficient funds may be made available to the NCC and that this would subsequently limit its functioning. The government thus also plays an important role in ensuring the success of the CPA and the purposes it provides for. The Minister of the Department of Trade and Industry must ensure that the NCC properly executes its functions and that the funds allocated to it are used appropriately.

²⁹² GG 26774 of 2004-09-09 37.

²⁹³ See S 90 (1); The Commission may also invest money which is not immediately required; See S 90(2).

5.5.2 Provincial Consumer Protection Authorities

A Provincial Consumer Protection Authority is a body established within the provincial sphere of government and will share similar functions to the NCC, operating at a provincial level.²⁹⁴ Section 84(b) only grants the provincial authorities jurisdiction to facilitate the mediation or conciliation of disputes among persons resident or carrying business exclusively within its province. Its functions consist amongst the following:

- issuing compliance notices,²⁹⁵
- facilitating the mediation or conciliation of a dispute arising in terms of this Act;²⁹⁶
- referring disputes to the provincial consumer court within that province, if there is one,²⁹⁷ and
- requesting the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act arising within that province.²⁹⁸

The question however remains whether these provincial authorities will have the capacity to fulfil their duties and functions. It is most probable that some provinces like the Western Cape and Gauteng, will be able to implement the Act, but others, like the Eastern and Northern Cape will need more assistance and support from the government. These provincial authorities will however relieve a lot of pressure from the judiciary since it will facilitate relevant disputes amongst persons resident or carrying on business exclusively within that province.

²⁹⁴ Sec 1.

²⁹⁵ S 84(a).

²⁹⁶ S 84(b).

²⁹⁷ S 84(c).

²⁹⁸ S 84 (d).

6. Critiques against the Consumer Protection Act

Many of the comments and critique mentioned in this section are derived from the responses on the South African Law Commission's Report on the need for legislation to control unfair contract terms.²⁹⁹ Although some comments are not directly aimed at the Consumer Protection Act, the points of critique remain the same.

6.1 The existing measures of protection is sufficient

Several South African academic writers³⁰⁰ hold the view that where an exemption clause infringe on the right of a consumer, it will be struck down by the courts because it is contrary to public policy.³⁰¹

The courts however repeatedly stated that it should be used sparingly and only in severe circumstances.³⁰² In most cases the principle of public policy was rather used to enforce contracts than to strike them down.

Turpin³⁰³ argues that the courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly.

The principle of narrow interpretation was only used when terms were ambiguous. Where the exemption clause was clearly set out, it would be enforced, regardless of its consequences.

²⁹⁹ South African Law Committee's Response to Public Submissions available at <http://www.pmg.org.za/minutes/28?destination=minutes%2F28>; hereinafter referred to as "Response to Public Submissions Report".

³⁰⁰ Turpin 1956 *SALJ* 157; Van der Merwe (2003) 215.

³⁰¹ *Morrison v Anglo Deep Gold Mines supra*.

³⁰² *Eastwood v Shepstone supra*; *Sasfin v Beukes supra*; *Standard Bank of SA Ltd v Wilkinson supra*; *Afrox Healthcare v Strydom supra*.

³⁰³ 1956 *SALJ* 157.

It is also argued that the power of the court to test the fairness of clauses as proposed by the CPA is unnecessary since consumers are sufficiently protected by the rules relating to justifiable mistake, duress, and undue influence and fraudulent, negligent and innocent misrepresentations. According to Christie³⁰⁴ the common law principles thus give the courts all the power needed, and legislation is consequently unnecessary.

Despite of these protection measures, exploitation of consumers continued because consumers weren't protected by these legal measures from the start.

A recurring comment was that the existing legislation prior to the enactment of this Act was sufficient and that where greater protection was required, such protection should have been applied for on an *ad hoc* basis.³⁰⁵

The following question may serve as a counter argument – if there was sufficient statutory measures in place, then why was consumers constantly exploited by the inclusion of unfair contract terms?

Lewis³⁰⁶ furthermore argues that the extent of the CPA is contrary to the existing contract principles and does not carry with it sufficient weight to override those principles.

In my opinion, Lewis underestimates the impact that the CPA can have on South African consumer contracts. It has shifted the emphasis to the principles underlined by the Constitution and is consequently in line with the values of the new South Africa. The existing contract principle, based on freedom of contract, is not in touch with the changed circumstances and a legislative measure is needed. How long do South Africa and its academics want to hold on to this outdated principle which served the needs of a capitalist society which was

³⁰⁴ Christie 15; Response to Public Submissions Report par 2.2.1.6.

³⁰⁵ Jamneck 1997 *TSAR* 647; Response to Public Submissions Report par 2.2.1.23.

³⁰⁶ 2003 *SALJ* 330.

based on profit? It is time for our law of contract to be adjusted in line with our current needs as well as the internationally recognised position. If the CPA is implemented successfully, it will achieve the aim of a more just consumer environment.

6.2 Uncertainty will result from the Act

The most common and important argument against introducing legislation such as the CPA is that it would permanently damage two of the most fundamental principles in contract law – certainty and contractual freedom.³⁰⁷ It is argued that the very foundation of contract is to create certainty, to protect the expectations of the parties and to secure to each the bargain made. If a court is given the power to review, it means in practical terms that the court can re-make the contract, relieve one party of his or her obligations wholly or partially and subsequently frustrate the legitimate expectations of the other party. The argument is thus based that a contracting party would not know whether or not that contract was going to be rewritten by the court, using “vague” terms such as “good faith”, “fairness” and “unconscionability”.³⁰⁸

It is important to realise that the freedom of contract principle will be substituted by a principle of fairness and to secure this shift the CPA laid down sufficient guidelines as to how this can be established.³⁰⁹ In due practice the effectiveness of these principles can be tested and precedents will be laid down to assist the court in future proceedings.

It was also stated that the wide discretion afforded to a court will not only undermine legal certainty, but it will also destroy commercial certainty by

³⁰⁷ Lewis 2003 *SALJ* 344.

³⁰⁸ Hefer “Billikheid in die Kontraktereg” 2004 *Tydskrif vir Regswetenskap* 2004 14; Response to Public Submissions Report par 2.2.1.16 -2.2.1.17.

³⁰⁹ See for example S 48(2) which set out guidelines when a contract or term may be regarded as unfair and S 51(1) which sets out the prohibited agreements and terms. S 52(2) provides the courts with further factors which should be considered in considering the fairness of an agreement or term.

interfering with the market place and furthermore, that it could inhibit trade and commerce and discourage local and foreign investment.

In my view, the CPA will do just the opposite – by its prescribed guidelines greater certainty will be established. The Act will force the marketplace to make use of clear, just and fair contract terms and consequently assist in eradicating exploitation.

6.3 The Act will lead to a flood of litigation

It is alleged that a considerable period of uncertainty will be followed by expensive and non productive, time consuming litigation.³¹⁰ Jamneck³¹¹ noted that the most important disadvantages effect of such legislation is its creation of a litigation paradise. It is argued that the Act will encourage a party to a contract to challenge the validity of contracts or its terms on counterfeited grounds, simply because they no longer wish to be bound thereby.³¹² It was stated that any party who is unhappy about the consequences of a contract, which was freely and voluntarily entered into, will attempt to use the provisions of the Act to relieve him from his obligations.³¹³ It is thus alleged that the Act will become the first resort of the pleader in contract litigation³¹⁴ and that this will add to the already congested court rolls and onerous case loads to be dealt with by a legal system already overworked and understaffed.³¹⁵

Lewis believes that this argument is greatly exaggerated since any flood in England after the introduction of each piece of legislation was well contained.³¹⁶ Also in my opinion the extent of this argument is overstated. If the NCC properly executes their duty to educate businesses and suppliers to ensure that they are,

³¹⁰ Response to Public Submissions Report par 2.2.1.11.

³¹¹ Jamneck 1997 *TSAR* 637.

³¹² Response to Public Submissions Report par 2.2.1.17.

³¹³ Response to Public Submissions Report par 2.2.1.11.

³¹⁴ Response to Public Submissions Report Par 2.2.1.12.

³¹⁵ *Ibid.*

³¹⁶ 2003 *SALJ* 345.

firstly aware of the provisions of the Act and secondly compliant of its requirements, there is no reason to expect a flood of litigation. The only agreements that will end before court are those which are in whole or partially unfair. Part of the NCC's functions is to investigate alleged unfair matters and to refer only those matters which it finds to be unfair to the tribunal or courts. The NCC can thus counter the fear of a litigation paradise by limiting referrals to court.

6.4 The Act will lead to the reluctance of businesses to contract with consumers

Another point is that businesses will become reluctant to contract with consumers who might make use of this legislation to escape their contractual obligations.³¹⁷ It is alleged that the consequences of giving the courts a review power will be counter-productive as far as the weak, the uneducated and the economically disadvantaged are concerned, since nobody will be prepared to enter into contracts with them.³¹⁸

One must however not lose sight of the fact that the so-called weak and uneducated does not have the financial means to unnecessarily challenge the enforceability of their contracts. This argument, in my view, is again overstated. Businesses will rather become reluctant to use unfair terms in exemption clauses when entering into contracts with these consumers.

6.5 The principle of product liability in section 61 is too wide

Section 61 of the Act gave rise to many comments which includes that it is too wide, that it will have unintended consequences, will require huge infrastructure and costs and that it would force companies to take additional insurance – the

³¹⁷ Lewis 2003 *SALJ* 344.

³¹⁸ *Ibid.*

costs of which will be passed on to consumers.³¹⁹ It was also stated that the costs which will be incurred by such a provision will cripple small businesses. It was therefore suggested that the liability of suppliers should be limited to instances where the suppliers were actually at fault, rather than imposing such strict liability on suppliers.

The contention that the CPA will lead to increased prices for goods and services is a valid point and cannot be denied. However, in my view, this is a small price to pay for a fair consumer market which guarantees one the right to good quality goods and services.

Furthermore, the Act does not contain such a strict liability as was originally intended by the Department of Trade and Industry as the Act provides suppliers with adequate protection in this regard. Section 61(4) describes the circumstances in which liability in terms of section 61 will not arise. A supplier, retailer, distributor or producer will not be held liable if it is unreasonable to expect that they should have discovered the unsafe product characteristics or defect in the goods. The harshness of section 61 will thus only be applicable in cases where the consumer was intentionally exploited or where the supplier was negligent in not discovering the defect or hazard in the goods.³²⁰

Consumer protection is an integral part of a modern, efficient and just market place.³²¹ Confident consumers are one of the important drivers of competitiveness which leads to improved product quality and better service and enhanced performance by businesses.³²² The protection of consumers' rights to good quality goods and services will discourage the production and distribution of defective goods. In effect the CPA is more extensive than originally anticipated.

³¹⁹ Maphosa "Consumer Protection Act is now law – manufacturers and suppliers beware!" (2009) available at http://www.adamsadams.com/index.php/news/article/consumer_protection_and_suppliers_beware/.

³²⁰ Davidow "Insurance and Legal Liability: The unintended defect in the Consumer Protection Act" (2009) available at <http://www.webberwentzel.com/wwb/view/wwb/en/page107?oid=23144&sn=Detail%20>.

³²¹ GG 26774 of 2004-09-09 1.

³²² *Ibid.*

In my view the enactment of such an Act is positive and could benefit the country as a whole. The concern that the CPA would prejudice the interests of suppliers is superfluous. As long as all concerned parties comply with the requirements of the Act, it should create an environment in which contracting relations are fair and the wellbeing of all parties is protected.

7. Conclusion

Over the past few decades too much emphasis was placed on the principle of freedom of contract which led to the license of suppliers to exploit consumers. The formation and use of standard form agreements aggravated this position by eliminating the negotiation of contract terms and ultimately it placed the consumer in the inferior position of either accepting the terms or not to deal at all. In this context exemption clauses were used to exclude the liability of the supplier for whatsoever reason and the consumer would have no choice but to accept his fate. Exemption clauses were thus often used as the tool to impose unfair conditions on the consumer.

It is this position which the CPA aims to eliminate by prescribing that an exemption clause may not be unfair, unreasonable or unjust.³²³ The nature and effect of such a clause must be drawn to the attention of the consumer,³²⁴ and must be written in plain language.³²⁵ The consumer must consequently be aware of the clause and must have expected its extent.³²⁶ If the terms of an exemption clause are ambiguous and vague and possible to be interpreted in more than one way, the court *must* interpret it to the benefit of the consumer.³²⁷

The CPA thus aims to eliminate the situation where consumers are unaware of the existence of an exemption clause in a contract in which he enters. The

³²³ S 48(2).

³²⁴ S 48(2)(d) and 49(4).

³²⁵ S 49(3).

³²⁶ S 4(4)(b).

³²⁷ S 4(4)(a).

legislature attempts to create an environment where parties are certain about the content and extent of their agreements. This will certainly be an improvement on the current situation. It will limit the extent of the superior bargaining position of the supplier and subsequently curb unfairness in contractual relations.

The CPA further provides the consumer with a right to quality services³²⁸ and good quality goods³²⁹ and it holds the supplier liable for any loss or damage due to product failure or defects in goods.³³⁰ The Act guarantees these rights by prescribing that a contract may not be subject to a term which purports to waive or deprive a consumer of a right prescribed by this Act³³¹ or which intends to avoid a supplier from its obligations or duties in terms of this Act.³³²

A typical exemption clause which excludes the supplier's liability due to defects in the goods sold, will thus no longer be permissible under the CPA. For example, if a builder purchase cement bricks from a supplier for a certain purpose, and later it turns out that those bricks are of poor quality and the builder suffers damages because of the bricks supplied, the supplier will be held liable for such damages, irrespective of whether there is an exemption clause in the contract between the parties or not. To strengthen this position, the Act further prescribes that if the consumer explained to the supplier for which purpose he requires the goods in question, the consumer has a right to expect that the goods are reasonably suitable for the purpose as indicated.³³³

The outcome of the *Afrox*-matter would've therefore been completely different if the Act was in existence at the time of adjudication by the court since the Act gives consumers a right to quality services as contemplated in section 54. It

³²⁸ S 54.

³²⁹ S 55(2).

³³⁰ S 61.

³³¹ S 51(b)(i).

³³² S 51(b)(ii) and (iv)(bb).

³³³ S 55(3).

would therefore be prohibited to exempt oneself from liability due to poor quality services because such services are qualified in the Act.

It is however of utmost importance that the specific intervention by the state does not disturb the commercial trade and justice by ensuring that the balance is maintained between the rights of the supplier and the rights of the consumer. The shift towards an environment which strives to bring about fairness and control is however an improvement on the current and previous situation. The judiciary, in determining the fairness of contractual relations, must however guard against creating a new imbalance in the marketplace, namely the unfair oppressing of the rights of the supplier. The impact of the CPA is thus ultimately in the hands of the courts/ Tribunals and in this regard, only time will tell what effect the implementation of the CPA will hold.

The provisions of the CPA will effectively lead to the eradication of the use of exemption clauses which primary aimed to exploit the consumer by inducing unfair terms and consequences. In my view, this result is positive and in line with the Constitution and its underlying values.

It is however important to bear in mind that the use of *all* exemption clauses will not cease. Exemption clauses can play an important role in allocating the risk between parties where neither was at fault. The point is that it should be a fair allocation of risk and that both parties must be completely aware of the risks they are undertaking. Exemption clauses must thus in future be formulated in a manner compliant with the Act and exploitation of consumers by means of these clauses will consequently cease. The Act will thus lead to the consequence that exemption clauses, as we know it, will be phased out because such clauses will become impractical. Where freedom of contract used to be the norm, the emphasis is going to shift towards consumer awareness and fairness in contracting. The CPA is thus going to change the face of South African contract law.

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