

# **THE EFFECT OF THE CONSUMER PROTECTION ACT ON CONTRACTUAL FREEDOM**

by

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Submitted in fulfilment of the requirements for the  
degree  
LLM

In the Faculty of Law,  
University of Pretoria

2013 September

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## OPSOMMING

Die doel van hierdie skripsie is om te bepaal of en tot watter mate kontraktuele vryheid geskend en/of omseil word deur die Verbruikers Beskermings Wet en om te bevestig of die beperking wat geskep word deur die Wet die antwoord is op die probleem van ongelykheid van bedingingsmagte tussen kontrakteurende partye. 'n Fundamentele konsep van kontraktereg kontrakteurvryheid: die idee dat die partye vry is om te besluit of om 'n kontrakteur; met wie om 'n kontrakteur; en op watter voorwaardes om 'n kontrakteur. Ten spyte van die feit dat die kontrakteursvryheid 'n diep vertroude beginsel in ons samelewing is, het dit 'n taamlik wankelrige fondament gebaseer op verskeie aannames en wanneer dit objektief beskou word blyk die waarheid te wees dat wanneer 'n kontrak beding word daar altyd sosiale en ekonomiese druk is wat tydens die onderhandeling geïmpliseer word. Met inagneming van laasgenoemde kan dit gesê word dat realisties gesproke die fundamentele konsep van gelykheid in die bedingingsmagte van kontrakteurdepartye die uitsondering eerder as die reël is en dat hierdie ongelyke posisie sonder twyfel 'n ondermyning is van die ware idee van kontrakteursvryheid. Ons gemene reg het verskeie reëls en beginsels ontwikkel om hierdie onregverdigheid tydens kontrakbedinging aan bande te lê. Die Wet het prysingswaardige bedoelings, soos die bevordering van billike sakepraktyke en die beskerming van die kwesbare teen uitbuiting en onveilige en gevaarlike goedere en/of produkte. Ten spyte van die goeie bedoelings van die Wet en elke ander aspek wat moontlik 'n invloed kan hê blyk dit dat die probleem by die toepassing van hierdie beginsels te wees. Dus ten spyte van die beperking van kontrakteursvryheid deur die regulasies van die Wet blyk dit nie die antwoord te wees op die probleem van ongelykheid in die bedingingsmag van die partye tydens kontrakbedinging te wees nie.

## SUMMARY

The purpose of this mini-dissertation is to determine whether and to what extent contractual freedom are infringed and/or obviated by the Consumer Protection Act and to establish if the limitation created by the CPA is the answer to the problem of inequality of bargaining powers of contracting parties. A fundamental concept of law of contract is freedom of contract: the idea that the parties are free to decide whether or not to contract; with whom to contract; and on what terms to contract. Despite the fact that freedom of contract is deeply engrained in our society it has a rather shaky foundation based on multiple assumptions and when objectively viewed the truth is that when making a contract there is always social and economical pressure that is implied in negotiating each and every contract. Having regard to the above it can be said that realistically speaking the fundamental concept of equality in the bargaining powers of contacting parties is the exception rather than the rule and that this unequal position has without a doubt undermined the true notion of freedom of contract. Our Common law has developed many rules and principles to curb this unfairness in the making of contracts. The CPA has praiseworthy intentions such as the promotion of fair business practice and the protection of the vulnerable from exploitation and unsafe and hazardous goods and/or products. Despite the good intentions of the CPA and every other aspect that might have an influence the problem remains enforcement of these principles. Thus despite the infringement of contractual freedom by the regulations of the CPA it appears not to be the answer to the problem of inequality in the bargaining power of parties negotiating a contract.

## ACKNOWLEDGEMENTS

I would like to express my appreciation to:

- Prof. D.J. Lötze for his guidance and support, as well as valuable contributions he made as my supervisor;
- A special thank you to my husband, Conrad, for all your patience throughout this study. Your constant support, love and motivation has enabled me to successfully complete this mini-dissertation;
- My parents, for all your constant love and support throughout my years of study. Thank you for the interest you have shown in my studies and your faith in my abilities has enabled me to succeed in life;
- To all my friends and student colleagues who have made my studies memorable and without whom my student years would not have been enjoyable.

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# 1. Introduction and Methodology

## 1.1 Introduction

The South African law of contract is essentially an application of the Common Law<sup>1</sup> influenced and modernized by legislation, judicial innovation and some borrowing from the English Law.<sup>2</sup> Our Common law notion of contract is compiled from Roman principles which were substantially influenced by Dutch writers giving us our Common law notion of contract that differs fundamentally from the original Roman contract.<sup>3</sup>

A contract by definition is an agreement entered into by two or more persons, who have the capacity to do so, with the intention of creating a legal obligation that is possible and which agreement complies with the formalities required. These five requirements are supported by the cornerstones of contracts namely: freedom of contract, sanctity of contract, privity of contract and good faith.

A fundamental concept of law of contract is freedom of contract: the idea that the parties are free to decide whether or not to contract; with whom to contract; and on what terms to contract.<sup>4</sup> The principle of freedom of contract goes hand in hand with the principle of sanctity of contract<sup>5</sup> with the result that a contractual obligation created in circumstances which are consistent with freedom of contract and consensuality requires exact enforcement.<sup>6</sup> This position is confirmed by and clearly set out, in the often quoted with approval, famous words of the English Judge Jessel MR<sup>7</sup>:

*“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost*

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<sup>1</sup> Nagel CJ (red) *Kommersiële Reg* (2011) 4de Uitgawe 6.

<sup>2</sup> Hutchison D *et al The Law of Contract in South Africa* (2009) 11.

<sup>3</sup> Hutchison (2009) 11.

<sup>4</sup> Hutchison (2009) 23.

<sup>5</sup> *Pacta servanda sunt.*

<sup>6</sup> Van Der Merwe S *et al Contract General Principles* (2007) Third Edition 11.

<sup>7</sup> Jessel MR, in *Printing & Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 at 465.

*liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice”.*

This is consistent with our constitutional values of dignity and autonomy but by no means does this imply that a Court should enforce an unfair contract.<sup>8</sup>

Despite the fact that freedom of contract is deeply engrained in our society it has a rather shaky foundation based on multiple assumptions.<sup>9</sup> For example, and for most importance to this paper, the assumption that the contracting parties have more or less equal bargaining power and that each party is looking after his and/or her own interests and will act to their own benefit and even more optimistically that the party will act to the good of the community.<sup>10</sup> Another assumption is that the parties in fact do negotiate the terms in the contract. This inequality in bargaining power in the making of contracts is a problem found the world over and has long bothered contract lawyers.<sup>11</sup>

When objectively viewed the truth is that when making a contract there is always social and economical pressure that is implied in negotiating each and every contract.<sup>12</sup> A direct consequence of this unequal position is that it has left the door wide open for abuse with unreasonable terms that are imposed upon the parties.<sup>13</sup> Does it seem fair to enforce a contract when it is obvious that due to the inequality in bargaining power of the parties that the weaker party's consent can at best be seen as reluctant.<sup>14</sup>

In light of the above it can be said that realistically speaking the fundamental concept of equality in the bargaining powers of contacting parties is the exception rather than the rule and that this unequal position has without a doubt undermined the true notion of freedom of contract.<sup>15</sup> It is probably fair to say that this problem of

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<sup>8</sup> Christie RH & Bradfield GB *Christie's The Law of Contract in South Africa* (2011) Sixth Edition Durban: LexisNexis 12.

<sup>9</sup> Hutchison (2009) 25.

<sup>10</sup> Van der Walt CFC "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 (54) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 367.

<sup>11</sup> Christie (2011) 14.

<sup>12</sup> Hutchison (2009) 25.

<sup>13</sup> Hutchison (2009) 26.

<sup>14</sup> Christie (2011) 14.

<sup>15</sup> Hutchison (2009) 25.



inequality of bargaining power is closely related to unfairness in the making of contracts.<sup>16</sup>

Our Common law has developed many rules and principles to curb this unfairness in the making of contracts.<sup>17</sup> The problem however remains that the Common law has not tackled the problem head on by regarding a contract unenforceable by relying on the ground of inequality on its own or as a primary ground.<sup>18</sup> This is one of the areas of our present law that is open for criticism and further development in this area can without a doubt be anticipated.<sup>19</sup>

Similar to the position in many Western societies South Africa to has had a rise in consumer protection movement,<sup>20</sup> resulting in the CPA which came into effect on 31 March 2011.<sup>21</sup>

The CPA has praiseworthy intentions such as the promotion of fair business practice and the protection of the vulnerable from exploitation and unsafe and hazardous goods and/or products.<sup>22</sup>

South African Law, in particular the Law of Contract, has a dynamic and changing nature<sup>23</sup> aiming to achieve a balance between relevant principles and policies in order to achieve justice and fairness.<sup>24</sup> I hope that the incorporation of the principles as set out in the CPA will eliminate a big part of the unfairness present in the making of contracts.

I will argue that despite the good intentions of the CPA and every other aspect that might have an influence the problem remains enforcement of these principles. No proper mechanism has been put in place of or in replacement of the courts.

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<sup>16</sup> Christie (2011) 14.

<sup>17</sup> Christie (2011) 14.

<sup>18</sup> Christie (2011) 14.

<sup>19</sup> Christie (2011) 12.

<sup>20</sup> Hutchison (2009) 25.

<sup>21</sup> The Act was signed on 24 April 2009 by former President Kaglema Motlanthe.

<sup>22</sup> Melville NJ *The Consumer Protection Act Made Easy* (2010) 1.

<sup>23</sup> Jansen Van Rensburg v Grieve Trust 2000 (1) SA 315 (C).

<sup>24</sup> Van Der Merwe (2007) 11.

Thus despite the infringement of contractual freedom by the regulations of the CPA it appears not to be the answer to the problem of inequality in the bargaining power of parties negotiating a contract.

## 1.2 Methodology

I will start with a brief layout of the historical development of contractual freedom and to identify the characteristics of contractual freedom followed by an outline of the problem of inequality of bargaining powers of contracting parties. I will continue by briefly identifying the purpose of the Consumer Protection Act, 68 of 2008<sup>25</sup> and to layout the CPA's prescribed requirements for a valid agreement. Lastly I determine whether and to what extent the CPA infringes and/or take away any of the characteristics of contractual freedom and to establish if the limitation created by the CPA is the answer to the problem of inequality of bargaining powers of contracting parties.

## 2. The historical development of contractual freedom

The South African law of contract is in essence an application of the Common law<sup>26</sup> influenced and modernized by legislation, judicial innovation and some borrowing from the English law.<sup>27</sup> Our Common law notion of contract is compiled from Roman principles which were substantially influenced by Dutch writers giving us our Common law notion of contract that differs fundamentally from the original Roman contract.<sup>28</sup> In order for us to understand the foundations of the law of contract known to us today we need to take a look at our roots and the historical background of our

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<sup>25</sup> Hereinafter referred to as the CPA.

<sup>26</sup> Nagel (2011) 6.

<sup>27</sup> Hutchison (2009) 11.

<sup>28</sup> Hutchison (2009) 11.

system, particularly the generalisation of the notion of contracts and the significance of the principle that agreements must be honoured.<sup>29</sup>

Under Roman law the law of contract never developed into a generalised theory of contract and could rather be described as a law of contracts, meaning that Roman law only recognised a number of distinct categories<sup>30</sup> of contracts.<sup>31</sup> All other contracts that fell outside the defined contracts were not acknowledged as a contract, despite the intention of the parties, and could not give rise to an action.<sup>32 33</sup> It must be remembered that this was during the developing years<sup>34</sup> and that the system was slowly progressing away from the strict formalities<sup>35</sup> of the early years to the more informal consensual contracts based on good faith.<sup>36</sup> This development was prompted by the commercial needs of the growing trade and commerce of the Roman state however the Roman law never reached the point where all agreements were perceived as enforceable contracts.<sup>37</sup>

The process of generalisation was completed by the Roman-Dutch writers. They accepted that the fundamental principle of the law of contract was that all agreements entered into by parties, with the intention to be bound thereto, should be enforced,<sup>38</sup> as a matter of good faith. This basis was reached by discarding the strict distinctions of the Roman law and incorporated the Canon law<sup>39</sup> and Germanic customs. Thus all contracts was said to be based on mere agreement<sup>40</sup> and good faith<sup>41 42</sup>.

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<sup>29</sup> Hutchinson (2009) 11.

<sup>30</sup> Real, verbal, liberal or consensual contracts.

<sup>31</sup> Hutchinson (2009) 11.

<sup>32</sup> Hutchinson (2009) 12.

<sup>33</sup> An example hereof is an exchange contract - according to Roman law no contract of exchange arose by the mutual promises of two persons to exchange slaves. This agreement was a mere pact and thus unenforceable by action. Something more was required to convert this *nudum pactum*, into a contract, and that was delivery of the one or the other slave. See *Conradie v Rossouw* 1919 AD 279 at 305.

<sup>34</sup> Around the sixth century.

<sup>35</sup> The strict and rigid formalities of the *stricti iuris* contracts.

<sup>36</sup> Hutchinson (2009) 11.

<sup>37</sup> Hutchinson (2009) 12.

<sup>38</sup> *Pacta sunt servanda est.*

<sup>39</sup> The body of mediaeval commercial law also known as law merchant.

<sup>40</sup> Consensus between the contracting parties.

<sup>41</sup> *Bonae fidei.*

<sup>42</sup> Hutchinson (2009) 12.

In Modern law a contract by definition is an agreement entered into by two<sup>43</sup> or more persons<sup>44</sup>, who have the capacity<sup>45</sup> to do so, with the intention<sup>46</sup> of creating a legal obligation<sup>47</sup> that is possible and which agreement complies with the formalities required. These five requirements are well established and are the technical basis on which we find contractual liability. On the other side we find the ideological underpinnings of contracts which are known as the cornerstones of contracts.<sup>48</sup> These fundamental ideas include: freedom of contract,<sup>49</sup> sanctity of contract,<sup>50</sup> privity of contract<sup>51</sup> and good faith.<sup>52</sup> All these factors contributes towards reaching the ultimate goals of a contract, being that a person must keep a promise, to creating legal certainty and to establishing order in society.

The fundamental concept of freedom of contract advocates the thought of party autonomy and includes among other the idea that the people are free to decide whether or not to contract; with whom to contract; and on what terms to contract.<sup>53</sup> The principle of freedom of contract goes hand in hand with the principle of sanctity of contract<sup>54</sup> with the result that a contractual obligation created in circumstances which are consistent with freedom of contract and consensuality requires exact enforcement.<sup>55</sup> <sup>56</sup> The twin notion of freedom of contract and sanctity of contract,

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<sup>43</sup> The conclusion of a contract is by nature a bilateral act and can even be a multilateral act. Hutchinson (2009) 6.

<sup>44</sup> An agreement may be to the benefit of one of the parties or to both of them. Grotius *Inleiding tot de Hollandsche Rechtsgeleertheit* at 3.6.2.

<sup>45</sup> A person not a minor, mentally challenged or mentally ill who's consent was obtained without any error, misrepresentation, undue influence, fraud or duress.

<sup>46</sup> The promise must have been made with the intention that it should be accepted. Grotius *Inleiding tot de Hollandsche Rechtsgeleertheit* at 3.1.48.

<sup>47</sup> In order to qualify as a contract the agreement does not need to be of a specific type, such as sale or lease, but must be lawful and possible. Hutchinson (2009) 7.

<sup>48</sup> Hutchinson (2009) 21.

<sup>49</sup> Party autonomy – suggests that a person is free to decide whether or not, with whom and on what terms to contract.

<sup>50</sup> *Pacta sunt servanda* – the idea a contract entered into freely and seriously must be honoured and can be enforced by the courts.

<sup>51</sup> This proposes that a contract only creates rights and duties for the parties to the agreement and not for third persons.

<sup>52</sup> The idea that contracting parties behave honestly and fairly in their dealings with one another.

<sup>53</sup> Hutchison (2009) 23.

<sup>54</sup> *Pacta servanda sunt*.

<sup>55</sup> Van der Merwe (2007) 11.

<sup>56</sup> *Printing and Numerical Registering Co v Simpson* 1875 LR 19; *Burger v Central South African Railways* 1903 TS 571; *Wells v SA Alumenite Co* 1927 AD 69; *Brisley v Drotzky* 2002 (4) SA 1

which are entrenched in the economical and political philosophies of *laissez-faire* liberalism and individualism, reached their peak in the nineteenth century and reflect what the English writers generally referred to as the classical law of contract.<sup>57</sup> This position is confirmed by and clearly set out, in the often quoted with approval, famous words of the English Judge Jessel MR<sup>58</sup>:

*“If there is one thing which, 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 and enforced by courts of justice”.*

The result being that if a man is not mentally ill or a minor and his consent was obtained without error, misrepresentation, fraud, undue influence or duress his contractual undertaking, even if entered into to his own detriment, will be enforced to the letter and the courts will not create a better deal for him nor will they release him from the contract.<sup>59</sup>

Viewed from a current position the above judgment is consistent with our constitutional values of dignity<sup>60</sup> and autonomy<sup>61</sup> but by no means does this imply that a Court should enforce an unfair contract,<sup>62</sup> and it is at this point where good faith comes in. The function of good faith in the law of contract is to give expression to the community’s sense of what is fair, just and reasonable. Thus the principle of good faith is one characteristic of the wider notion of public policy and with the basis of for its application being that the public interest so demands. Accordingly good faith has a dynamic role to play in ensuring that the law remains susceptible to and in tune with the views of the community.<sup>63</sup>

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(SCA); *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (C).

<sup>57</sup> Hutchison (2009) 23. According to Hahlo this was the philosophy which prevailed in the nineteenth century in civil law as well as in common law, Hahlo HR “Unfair Contract Terms in Civil-Law Systems” 1981 (88) *SALJ* 70.

<sup>58</sup> Jessel MR, in *Printing & Numerical Registering Company v Sampson supra* at 465.

<sup>59</sup> Hahlo (1981) 70. *Barkhuizen v Napier supra*.

<sup>60</sup> Section 10 of the Constitution of the Republic of South Africa.

<sup>61</sup> Chapter 2 of the Constitution of the Republic of South Africa – The Bill of Rights.

<sup>62</sup> Christie (2011) 12.

<sup>63</sup> Hutchinson D “Non-variation clauses in contract: any escape from the Shifren Straitjacket?” 2001 (118) *SALJ* 742.

Returning to the development of contractual freedom, the philosophy underlying freedom of contract stems from the classical theory.<sup>64</sup> According to the classical theory<sup>65</sup> all contracting parties are treated equal like the average person without needs and further that the invisible hand of the market is deemed to be neutral and also treat everyone equally.<sup>66</sup> Thus confirming that contracting parties should manage their own affairs without any interference by the state and that if a contract was validly entered into it would be inappropriate for a judge to determine the substantial fairness of that agreement.<sup>67</sup>

During the 18<sup>th</sup> century as well as in the Common law jurisdictions the approach of the courts were that even if a contracting party entered into a contract to his detriment the court will not release him from that contract or create a better deal for him, he has to carry the consequences of his choices.<sup>68 69</sup>

A similar approach was taken in the South African courts as can be seen for the statement made by Judge Innes CJ in *Burger v Central South African Railways*<sup>70</sup>:

*“...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.”*

The above judgement set the tone for most of the future decisions dealing with unfair contract terms.<sup>71</sup> In *Van Rensburg v Staughton*<sup>72</sup> Judge Innes CJ repeated this opinion and held that:

*“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.”*

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<sup>64</sup> The theory on which the South African law of contract are based on. Hawthorne L “Distribution of Wealth, the Dependency Theory and the Law of Contract” 2006 (69) *SALJ* 48. Hawthorne L “The Principle of equity in the law of contract” 1995 (58) *THRHR* 157. *Wells v South African Alumenite* 1927 AD 69. *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

<sup>65</sup> The classical theory is also adhered to in the Anglo-American law of contract.

<sup>66</sup> Hawthorne (2006) 48.

<sup>67</sup> Hawthorne (2006) 50.

<sup>68</sup> It makes no difference if the choice was made due to inexperience or carelessness.

<sup>69</sup> *Printing & Numerical Registering Company v Sampson supra* 462.

<sup>70</sup> 1903 TS 571 at 576.

<sup>71</sup> Hawthorne (2006) 50.

<sup>72</sup> 1914 AD 317 at 328.

The same reasoning was followed in 1982 by Judge Viljoen JA in *Grinaker Construction v Transvaal Provincial Administration*<sup>73</sup> 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.”*

The principle was reconfirmed by Judge Miller JA in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*<sup>74</sup> where it was held:

*“And they signed the agreement containing terms which are now regarded by 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.”*

In 2002 the Supreme Court of Appeal in *Brisley v Drotsky*<sup>75</sup> relied on the judgment given by Judge Innes CJ in *Wells v South African Alumenite Co*<sup>76</sup> and held that:

*“No doubt the condition [’n bepaling dat die koper hom nie op ’n wanvoorstelling mag beroep nie] is hard and onerous; but it people sign conditions they must, in absence of fraud, be held to them. Public Policy so demands.”*

It is clear from the above cases that the Courts refused to assist contracting parties who willingly entered into a contract and in effect endorsed that contracting parties are free to negotiate their contract terms and that they should do so wisely as they will be held thereto. The Court’s continued adherence to the freedom of contract rule and reluctance to differ there from are however justified and at as best described by the words of Moseneke DCJ<sup>77</sup>:

*“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*

<sup>73</sup> 1982 (1) SA 78 (A) at 96.

<sup>74</sup> 1982 (1) SA 398 (A) at 436.

<sup>75</sup> 2002 (4) SA 1 (SCA) at 14.

<sup>76</sup> 1927 AD 69 at 73.

<sup>77</sup> Moseneke D “Transformative Constitutionalism: Its implications for the law of contract” 2009 *SLR* 3 at 9.



*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 the law of contract should set the stage for a free and self-regulating marketplace and should not interfere with contracting parties' right to make a profit. Further it should establish an environment of certainty wherein contracting parties can be assured that their agreement will be enforced as they agreed thereon without any unnecessary interference by the courts. This ideological view however opened the field for exploitation of one contracting party by another,<sup>78</sup> which in turn led to the development of consumer protection legislation. Notwithstanding the above and the fact that freedom of contract is profoundly engrained in our society there is no doubt in my mind that it is without a doubt taken for granted.<sup>79</sup>

### 3. The characteristics of contractual freedom

Despite the fact that freedom of contract is deeply engrained in our society it has a rather shaky foundation based on multiple assumptions.<sup>80</sup> For example, and for most importance to this paper, the assumption that the contracting parties have more or less equal bargaining power and that each party is looking after his and/or her own interests and will act to their own benefit and even more optimistically that the parties will act to the good of the community<sup>81</sup>. A further assumption of great value is the assumption that the parties in fact do negotiate the terms in the contract.<sup>82</sup> The above amount to what is known as inequality in bargaining power in the making

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<sup>78</sup> Hawthorne (2006) 52.

<sup>79</sup> Hutchison (2009) 24.

<sup>80</sup> Hutchison (2009) 25.

<sup>81</sup> Van der Walt CFC “Kontrakte en beheer oor kontrakteervryheid in ‘n nuwe Suid-Afrika” 1991 (54) *THRHR* 367.

<sup>82</sup> Specifically having regard to the vast amount of standard form contracts in use today.



of contracts and it is a problem found the world over and has long bothered contract lawyers.<sup>83</sup>

The classical model of contract is based on the assumption<sup>84</sup> that parties have equal resources (informed by right to equality) the characteristics of contractual freedom include, keeping in mind that these are not absolute values:

- (i) Parties should be allowed to negotiate contracts with minimal state interference.<sup>85</sup> The role of law and the courts is not one of regulating the contract but merely recognising and enforcing the agreement reached between the contracting parties. Hawthorne compares contracting to a game of cricket:

*“with the judge’s role being equivalent to that of a neutral umpire who ensures that the game is played according to the rule, but who never personally participate in the game itself. Provided the rules are fair, and the parties abide by them, the outcome will be fair.”*

Thus the law and the court’s role are to ensure procedural fairness rather than substantive fairness.<sup>86</sup> Taking the above as the correct view I believe that Judge Meer J in *Daljosaphat Restorations v Kasteelhof*<sup>87</sup> had mistaken in his approach when stating that the courts are superior and can do anything the law does not forbid. I believe that the courts should only interfere where there is procedural unfairness and not in any other circumstances. This also applies to cases where one of the contracting parties are the government. Brand JA in *Government of Republic of South Africa v Thabiso*<sup>88</sup> made it clear that the administrative law has no role to play in the determination of procedural fairness and that once the tender had been awarded the relationship between the contracting parties was governed by the principles of contract law, hence no further interference by the state or courts.

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<sup>83</sup> Christie (2011) 14.

<sup>84</sup> Hutchinson (2009) 24.

<sup>85</sup> *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C); *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA).

<sup>86</sup> Hutchinson (2009) 24.

<sup>87</sup> 2006 (6) SA 91 (C).

<sup>88</sup> 2009 (1) SA 163 (SCA).

- (ii) The terms of the contract should not be interfered with and should be given full force and effect as the parties intended.<sup>89</sup> In terms of the *laissez-faire* theory<sup>90</sup> the parties are licensed to achieve their desired results which in turn will maximise their own and society's collective wealth.<sup>91</sup> According to Hawthorne in the current economic free market it is fundamental that individual's are free to decide about his/her own interests.<sup>92</sup> In *Barkhuizen v Napier*<sup>93</sup> Judge Moseneke DCJ held that this freedom is a right that is protected in terms of the constitution:
- "... our constitutional values allow individuals the dignity and freedom to regulate their affairs...."*
- (iii) A person should be free to select the parties he contracts with.<sup>94</sup>
- (iv) A person is free to decide not to contract.<sup>95</sup> In *Everfresh Market Virginia v Shoprite Checkers*<sup>96</sup> the court goes one step further and stressed that if an option to renew a contract is applicable the terms applicable to the contract must be determined otherwise the option will be unenforceable thus the a contracting party will be free to decide not to contract despite the option.<sup>97</sup>
- (v) A preference for clear and certain rules rather than open-ended standards. The rules should be obvious and uncomplicated and in line with current business expectations with little room for the exercise of judicial discretion. This will play a vital role in establishing commercial certainty.<sup>98</sup> According to Judge Sachs J in his judgement in the *Barkhuizen*-case<sup>99</sup> the

<sup>89</sup> There are however an exception to this general rule that all agreements should be honoured and that is when an immoral agreement that is in violation of the public policy is entered into. As is indicated in the *Barkhuizen*-case our courts recognise this and our Constitution reinforces it. *Barkhuizen v Napier supra* at 349.

<sup>90</sup> An economic theory.

<sup>91</sup> Hutchinson (2009) 24.

<sup>92</sup> Hawthorne L "Contract law's choice architecture: the hidden default rules" 2009 (73) *THRHR* 599.

<sup>93</sup> 2007 (5) SA 323 (CC) at 325.

<sup>94</sup> Exclusions are restraint of trade and option contracts.

<sup>95</sup> Hutchinson (2009) 24.

<sup>96</sup> 2012 (1) SA 256 (CC) at 257.

<sup>97</sup> "an option to renew a lease on terms to be agreed is unenforceable".

<sup>98</sup> Hutchison (2009) 24.

<sup>99</sup> 2007 (5) SA 323 (CC) at 375.

foundation of the law of contract is to create certainty in order to secure each contracting parties expectation and their bargain.

- (vi) Self interested individualism. True to our human nature contracting is an inherently adversarial process in which each contracting party is out to maximise their own benefit from the transactions, without any regard for the interests of the other party.<sup>100</sup> This has been the view of our courts all along and as can be clearly seen form the words of Judge De Villiers AJA<sup>101</sup>:

*“This disposes of the exception. According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2).”*

- (vii) An assumed fairness of exchange.<sup>102</sup> It is believed that during negotiations each contracting party is looking after his or her own interest and the agreement reached is a result of the bargain struck between the parties.<sup>103</sup>
- (viii) A contract is a discrete event.<sup>104</sup> A contract is a once-off event rather than a long-term relationship involving a continued mutual co-operation and trust between the contracting parties.<sup>105</sup>

From a judiciary view public policy<sup>106</sup> influences the enforcement of the above the greatest. Public police is best described as:<sup>107</sup>

*“the legal convictions of the community; it represents those values held most dear by society.”*

The above policy meaning that no agreement or terms thereof will be enforced if it is found that they are contrary to the public policy.<sup>108</sup> However it the principal is more

<sup>100</sup> Hutchison (2009) 24.

<sup>101</sup> *Conradie v Rossouw supra* at 320.

<sup>102</sup> *Conradie v Rossouw supra. Barkhuizen v Napier supra.*

<sup>103</sup> Hutchison (2009) 24.

<sup>104</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

<sup>105</sup> Hutchison (2009) 24.

<sup>106</sup> “Public police represents the legal convictions of the community – it represents those values held most dear by society

<sup>107</sup> *Barkhuizen v Napier supra* at 333.

often used to enforce agreements rather than to release parties there from<sup>109</sup> with the result that the principal is thus contradicting itself.<sup>110</sup> Be that as it may, the result is that there is a balancing of interests needed – on the one hand the principal of freedom of contract and on the other hand the principal social control over private volition in the interest of public policy.<sup>111</sup>

With the development of society and the growth of production and distribution of services and goods the role of contracts inevitably increased and the above characteristics and the balancing of freedom of contract and public policy came under considerable strain. An example of the strain under which the characteristics are is clearly visible when analysing the assumption that contracting parties actually have real freedom of choice with regard to whether, with whom and on what grounds to contract. This assumption in turn is additionally influenced by further number of assumptions namely that parties enjoy equal bargaining power, that there is near-perfect market competition and that parties actually negotiate the terms of the contract they enter into.<sup>112</sup>

From the above it is clear that in our everyday situations the above assumptions are simply not correct. Accordingly what we recognise as the detailed structure of the classical law of contract foundations rests on a rather shaky foundation.<sup>113</sup>

#### **4. The problem of inequality of bargaining powers of contracting parties**

When examining contracts, specifically looking at consumer contracts, economic and social pressures often leave one party with little or no choice whether to enter into

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<sup>108</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

<sup>109</sup> Public policy requires that a promise made should be kept even if it is unreasonable and unfair. *Burger v Central South African Railways supra*; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A); *Sasfin v Beukes supra*; *Brisley v Drotsky supra*.

<sup>110</sup> *Brisley v Drotsky supra*; *Barkhuizen v Napier supra*.

<sup>111</sup> Kötz H "Controlling Unfair Contract Terms: Options for Legislative Reform" 1986 (103) *SALJ* 406.

<sup>112</sup> Hutchison (2009) 24.

<sup>113</sup> Hutchison (2009) 25.

the contract.<sup>114</sup> It is in these circumstances where freedom of contract reproduce social inequality and allows domination and exploitation by one contracting party over another.<sup>115</sup> This is especially seen where the markets are dominated by a few large entities that leave their contracting partner with little or no room for negotiations and where the negotiation of the terms only occurs in a small fraction of cases.<sup>116</sup> In this chapter I will elaborate on my observation that in most consumer contracts it appears that equality of bargaining power is the exception rather than the rule and it is here where inequality of bargaining power or a lack thereof starts to play a profound role.<sup>117</sup>

As a result of the court's adherence to the freedom of contract rule a constant balancing act came into to play with contractual freedom on the one hand and the interest of public policy on the other hand. I must however emphasise that I do concur with Strydom<sup>118</sup> whom is of the view that no matter how high we value sanctity of contract, freedom of contract can not justify enforcement of an agreement that has the effect that it is limiting the other party's fundamental rights.

When objectively viewed the truth is that during negotiations of contracts there will always be social and economic pressure that is present during the negotiation of each and every contract.<sup>119</sup> More often that not the weaker party is absolutely powerless and has no choice but to surrender to the terms of the stronger party without the option of negotiating of the terms of the agreement.<sup>120</sup> A direct consequence of this unequal position is that it has left the door wide open for abuse with unreasonable terms that are imposed upon the parties.<sup>121</sup> It hardly seems fair to enforce a contract when it is obvious that due to the inequality in bargaining power of the parties that the weaker party's consent can at best be seen as reluctant.<sup>122</sup>

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<sup>114</sup> Hutchison (2009) 25.

<sup>115</sup> Hawthorne (2006) at 52.

<sup>116</sup> Hutchison (2009) 25.

<sup>117</sup> Hutchison (2009) 25.

<sup>118</sup> Strydom HA "The Private Domain and the Bill of Rights" 1995 *SA Public Law* 52. *Barkhuizen v Napier supra*.

<sup>119</sup> Hutchison (2009) 25.

<sup>120</sup> Lewis C "Fairness in South African Contract" 2003 *SALJ* 331.

<sup>121</sup> Hutchison (2009) 26.

<sup>122</sup> Christie (2011) 14.

I am of the view that the biggest burden that is placed on equal bargaining powers is standard form contracts. Standard form contracts are widely used, and abused, one sided agreements tailored for the specific needs of that organisation, usually by the organisations in house legal department, benefitting only the organisation.<sup>123</sup> These pre-drafted standard form contracts is the terms on which the supplier is willing to contract on and is used in the supplier's day to day operations.<sup>124</sup> The pre-drafted contract is used in each and every transaction no matter the needs of the consumer.<sup>125</sup> The terms of these contracts is thus not open for negotiation and it boils down to a take it or leave it scenario<sup>126</sup>, leaving the consumer in an inferior position, tied to the contract because once the contract is signed the consumer is viewed to have entered into the contract freely and voluntarily.<sup>127</sup> However can it truly be said that there were freedom of contract when no real negotiations took place before, during or after the contract was entered into.<sup>128</sup> In *Suisse Atlantic v Rotterdamsche Kolen Central*<sup>129</sup> Lord Reid acknowledged the lack of true freedom of contract, when he said:

*"In the ordinary way, the consumer has no time to read (the standard terms), and, if he did read them, he would probable not understand them. If he did understand them and object to any of them, he would generally be told that he could take it or leave it. If he went to another supplier, the result would be the same. Freedom of contract must surely imply some choice or room for bargaining."*

<sup>123</sup> In the *Barkhuizen v Napier supra* at 362 in paragraph 137 standard form contracts are described as "Standard-form contracts are thus ordinarily the product not of negotiations but of the employment of legal teams by sellers of goods and services to serve their interests. In a business context such a standard-form contract preserves the wisdom of the in-house lawyers about the best way in which to handle recurrent problems of negotiation and performance."

<sup>124</sup> Even if alternative standard form contracts are available, usually in were there is a highly competitive market, suppliers compete only on the terms better known to the consumer such as price and interest rates and not on the punitive and oppressive terms. Hopkins K "Standard Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice Versus Natural Justice" 2003 (1) *TSAR* 156.

<sup>125</sup> Naudé T "Unfair contract terms legislation: the implications of why we need it for its formulation and application" 2006 (17) *Stell LR* 361.

<sup>126</sup> Hopkins is of the view that this take it or leave it position endorsed by the law is vastly damaging to the welfare of the country's vulnerable majority. Hopkins (2003) 154.

<sup>127</sup> Hopkins (2003) 153. The French has labelled these contracts as *contracts d' adhesion*, meaning a contract of adhesion, stemming from the English law.

<sup>128</sup> Naudé (2006) 361.

<sup>129</sup> 1966 2 ALL ER 76.

The use of standard form contracts without a doubt has many benefits<sup>130</sup> and they serve a vital economic role in that it saves time and money for both the consumer and the service provider and it has without a doubt become a significant tool in modern business world holding its advantages. However despite the simplification brought about by standardisation of contracts I feel that it does not justify the exploitation of consumers that are more often than not caused by the inclusion of unfair terms in standard form contracts.<sup>131</sup> What started out as a legitimate aid was turned into an expensive trap for unsuspecting consumers because the suppliers are able to inflict unfair terms upon the consumer.<sup>132</sup>

Deprivation of consumer's reasonable rights and the protection offered by the common law are often due to exemption clauses,<sup>133</sup> wherein the consumer does away with his rights<sup>134</sup>, because the reasonable consumer are left with no other alternative but to submit to the contract, even without reading it and to focus only on the core items.<sup>135</sup> The biggest question still to be answered is will the CPA be the tool to counter the above?

In light of the above it can be said that realistically speaking the fundamental concept<sup>136</sup> of equality in the bargaining powers of contacting parties is based on an assumption and is the exception rather than the rule and that this unequal position has without a doubt undermined the true notion of freedom of contract.<sup>137</sup> In fact in practice choice is only an illusion and if the consumer wants the goods or services he just has to accept the agreement whether he is conscious about it or not.<sup>138</sup> It is probably fair to say that this problem of inequality of bargaining power is closely

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<sup>130</sup> Hopkins (2003) 153. These benefits include but are not limited to: preparation costs of agreements are lower due to the lack of negotiations between parties; there is no need for legal assistance thus reducing the costs; confinement of risk; and senior management can control subordinates contractual arrangements easier.

<sup>131</sup> Christie (2011) 12.

<sup>132</sup> Christie (2011) 14.

<sup>133</sup> The rights limiting clause is included in the standard form contract which can not be negotiated and is enforced once the consumer has signed the agreement.

<sup>134</sup> In the Afrox-case the court acknowledges that exemption clauses are the rule rather than the exception in standardised contracts.

<sup>135</sup> Naudé (2006) 367.

<sup>136</sup> Alternatively stated the whole ideology of freedom of contract.

<sup>137</sup> Hutchison (2009) 25.

<sup>138</sup> Lewis (2003) 331.



related to unfairness in the making of contracts<sup>139</sup> especially if taking into consideration that in most cases the consumer has no bargaining power to negotiate out of the oppressive terms of the agreement<sup>140</sup> and the fact that this position of vulnerability on the consumers' side invites exploitation at the hands of the suppliers, those with the significant bargaining power.<sup>141</sup>

## 5. Previous protection measures

Prior to the CPA there were Common Law and Statutory protection measures in place to assist the judiciary in its task to allow justice to prevail in cases of contractual injustices. In this chapter I will give a brief overview of the previous measures that were in place.

The traditional defences impacting on a contract in general, *inter alia*, error, misrepresentation, fraud, undue influence and duress have always been available to any party influenced thereby,<sup>142</sup> these defences will not be discussed in detail in this paper. Besides the above the courts adopted several measures, which too will not be discussed in detail in this paper, to limit the onerous consequences of an agreement that contains unconscionable provisions and include but are not limited to: public policy, contractual form, prior notice and limiting interpretation.<sup>143</sup>

In addition to the above common law provisions the legislature also introduced statutory measures to deal with consumer issues.<sup>144</sup> However these measures were outdated and fragmented with almost half of them predating 1994 and dating as far back as 1941.<sup>145</sup> The instrument for protection was contained in among other the following legislation:

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<sup>139</sup> Christie (2011) 14.

<sup>140</sup> Hopkins (2003) 153.

<sup>141</sup> Lewis (2003) 331.

<sup>142</sup> Hawthorne (1995) 171. Naudé (2006) 362.

<sup>143</sup> Christie (2011) 14. Hawthorne (1995) 171.

<sup>144</sup> There also were several consumer protection bodies, for example the Office of the Investigation of Unfair Business Practices and the South African Bureau of Standards to name a few.

<sup>145</sup> Christie (2011) 14.



- (i) The Business Names Act<sup>146</sup> regulating the control of business names and matters incidental thereto;
- (ii) The Price Control Act<sup>147</sup> controlling and promoting competitive prices;
- (iii) The Sales and Services Act<sup>148</sup> regulating by-law agreements, display and marketing of goods and controlled and prohibited the sale of certain goods;
- (iv) The Trade Practices Act<sup>149</sup> seeking the protection of consumers against false or misleading advertisements<sup>150</sup>;
- (v) The Consumers Affairs (Unfair Business Practises) Act<sup>151</sup> providing for the prohibiting and controlling of unfair business practices.<sup>152</sup>

In terms of Section 121(2) of the CPA all the above was however repealed with the enactment of the CPA.

Our Common law developed many rules and principles to curb this unfairness in the making of contracts.<sup>153</sup> The problem however remained that despite the fact that the common law gave an indirect ground to resolve the abuse of inequality of bargaining power the courts applied the rules in such a random way that it was impossible for one to predict with certainty whether or not and to what extent the courts would have granted relief to an aggrieved party.<sup>154</sup> Further the relief was only of a temporary nature since their effect was circumvented by skilful draftsman using the next loophole to achieve the desired enforcement of unfair contract terms.<sup>155</sup> The Common law has thus not tackled the problem head on by regarding a contract unenforceable by relying on the ground of inequality on its own or as a primary ground.<sup>156</sup> <sup>157</sup> Although I wish I could say that the statutory measures provided

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<sup>146</sup> Act 27 of 1960.

<sup>147</sup> Act 25 of 1964.

<sup>148</sup> Act 25 of 1964.

<sup>149</sup> Act 76 of 1976.

<sup>150</sup> Note that this act was largely repealed by the Consumers Affairs Act.

<sup>151</sup> Act 71 of 1988.

<sup>152</sup> "Unfair business practise" was defined as any practise 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.

<sup>153</sup> Christie (2011) 14.

<sup>154</sup> Naudé (2006) 379.

<sup>155</sup> Naudé (2006) 379.

<sup>156</sup> Christie (2011) 14.

<sup>157</sup> According to Christie this is one of the areas of our present law that is open for criticism and further development in this area can without a doubt be anticipate, see Christie (2011) 14.

better protection the truth is it did not. Mostly consumers were not even aware of the existence of the measures not even mentioning the rights they had and the remedies it provided them with.

With the implementation of the Constitution values that have a more socialistic nature<sup>158</sup> were introduced and social justice was strived for.<sup>159</sup> As seen above our contractual relationships does not support the ideas of the Constitution and according to Van der Walt<sup>160</sup> a single piece of legislation had to be considered to address this issue of fairness in contractual relationships. Thus it is not surprising that similar to the position in many Western societies South Africa to has had a rise in consumer protection movement,<sup>161</sup> resulting in the CPA which came into effect on 31 March 2011.<sup>162</sup>

The CPA has praiseworthy intentions such as the promotion of fair business practice and the protection of the vulnerable from exploitation and unsafe and hazardous goods and/or products.<sup>163</sup>

South African Law, in particular the Law of Contract, has a dynamic and changing nature<sup>164</sup> aiming to achieve a balance between relevant principles and policies in order to achieve justice and fairness.<sup>165</sup> I truly hope that the incorporation of the principles as set out in the CPA will eliminate a big part of the unfairness present in the making of contracts.

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<sup>158</sup> Contrary to the more capitalistic approach followed prior to 1994.

<sup>159</sup> The Preamble of the Constitution.

<sup>160</sup> Van der Walt CFC "Die Huidige Posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge" 1986 (103) SALJ 646.

<sup>161</sup> Hutchison (2009) 25.

<sup>162</sup> The Act was signed on 24 April 2009 by former President Kaglema Motlanthe.

<sup>163</sup> Melville NJ *The Consumer Protection Act Made Easy* (2010) 1.

<sup>164</sup> Jansen Van Rensburg v Grieve Trust 2000 (1) SA 315 (C).

<sup>165</sup> Van Der Merwe (2007) 11.

## 6. The Consumer Protection Act

As seen above consumer protection legislation is not new to South Africa in fact the CPA is the result of numerous years of debate and legal development resulting in a single piece legislation replacing all previous legislation.<sup>166</sup>

The CPA was signed on 24 April 2009<sup>167</sup> however the primary functioning of the CPA only came into effect 31 March 2011.<sup>168</sup> The reason for the postponement was to enable the Minister to establish and appoint the necessary committees, tribunals and authorities as proposed by the Act.<sup>169</sup> Unless expressly set out in item 3 of Schedule 2 the Act does not apply to any agreements and/or any goods and services provided before the general effective date.<sup>170</sup>

The purpose of the Act is set out in the preamble to the CPA:

*“To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission, to repeal the sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act 17 of 1941), the Business Names Act, 1960 (Act 27 of 1960), the Price Control Act, 1964 (Act 25 of 1964), the Sales and Service Matters Act, 1964 (Act 25 of 1964), the Trade Practices Act, 1976 (Act 76 of 1976), the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988), and to make consequential amendments to various other Acts; and to provide for related incidental matters”*

<sup>166</sup> Van Eeden E *A Guide to the Consumer Protection Act* (2009) Durban: LexisNexis 23.

<sup>167</sup> The English text was signed by the President.

<sup>168</sup> See section 2(1) and 2(2) of Schedule 2.

<sup>169</sup> Further it also gave the opportunity for preparation for the consequences and to comply with the requirements of the Act by the relevant entities and role-players.

<sup>170</sup> Item 3(1)(a) to (c) of Schedule 2.

The above is confirmed and clearly set out in section 3<sup>171</sup> of the CPA where it states that the purpose of this Act are to promote and advance the social and economic welfare of consumers in South Africa.<sup>172</sup> <sup>173</sup> The purpose include encouraging fair business practices<sup>174</sup>, protecting consumers from unconscionable<sup>175</sup>, unfair, unjust or otherwise improper trade practises and defective, misleading, unfair and fraudulent conduct.<sup>176</sup> Enhancement of consumer consciousness and access to information whilst also encouraging responsible and knowledgeable consumer choice and actions.<sup>177</sup> The promotion of consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism.<sup>178</sup> Providing for a consistent, accessible and efficient structure of consensual resolution dispute arising from consumer transactions<sup>179</sup> and further providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.<sup>180</sup>

It must however be remembered that consumer has a broad meaning. In section 1 consumer is defined as:<sup>181</sup>

*“in respect of any particular goods or services, means-*

*(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;*

*(b) a person who has entered into a transaction with a supplier in the*

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<sup>171</sup> Section 3 contains explicit indication with regard to the interpretation of the CPA's purpose and policy.

<sup>172</sup> Section 3(1).

<sup>173</sup> Section 3(1)(a) & (b). This is done by establishing a legal framework in order to achieve and maintain a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of the consumers generally and by reducing and ameliorating any disadvantages experienced in accessing any supply of goods and/or services by consumers. Consumers specifically include those who are low-income persons or persons living in low-income communities (Section 3(1)(b)(i)); living in remote, isolated or low-density population region or communities (Section 3(1)(b)(ii)); are minors, seniors or other similar vulnerable consumers (Section 3(1)(b)(iii)) or 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 (Section 3(1)(b)(iv)).

<sup>174</sup> Section 3(1)(c).

<sup>175</sup> “Unconscionable” is defined in Section 1 as “when used with reference to any conduct, means- (a) having a character contemplated in section 40; of (b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.”

<sup>176</sup> Section 3(1)(d).

<sup>177</sup> Section 3(1)(e).

<sup>178</sup> Section 3(1)(f).

<sup>179</sup> Section 3(1)(g).

<sup>180</sup> Section 3(1)(h).

<sup>181</sup> Section 1.

*ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);*

- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and*
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)."*

The definition of 'consumer' also includes juristic person<sup>182</sup> and thus the protection offered is not restricted to individuals who obtained the goods for his/her personal use.<sup>183</sup>

The Act applies to every transaction<sup>184</sup> occurring within the RSA unless it is exempted by section 5(2) or in terms of section 5(3) or (4)<sup>185</sup> and includes the promotion of goods<sup>186</sup> and services<sup>187 188</sup> and applies to the goods and services

<sup>182</sup> Definition of 'person', section 1.

<sup>183</sup> Van Eeden (2009) 41. Van Eeden states that the definition of a person including a juristic person might be somewhat surprising since the act over emphasizes the protection of consumers in which the individual as consumer is clearly focused on.

<sup>184</sup> 'Transaction' is defined as "(a) *in respect of a person acting in the ordinary course of business- (i) and agreement between or among that person and one or more other persons for the supply or potential supply of goods or services in exchange for consideration; of (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; of (iii) the performance by, or at the direction of that person of any services for or at the direction of a consumer for consideration; or (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a);*

<sup>185</sup> Section 5(1)(a).

<sup>186</sup> 'Goods' is defined as "*includes- (a) anything marketed for human consumption; (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded; (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible; (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and (e) gas, water and electricity*".

<sup>187</sup> 'Service' is defined as "*includes, but are not limited to- (a) any work or undertaking performed by one person for the direct or indirect benefit of another; (b) the provision of any education, information, advice or consultation, except advice that is subject in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002); (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any service- (i) constitute advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002); or is regulated in terms of the Long-term Insurance Act, 1998 (Act 52 of 1998), or the Short-term Insurance Act, 1998 (Act 53 of 1998); (d) the transportation of an individual or any goods; (e) the provision of- (i) any accommodation or*

pertaining to the agreement.<sup>189</sup> Further it applies to goods supplied in terms of an exempted transaction<sup>190</sup> but only the extent provided for in section 5(5).<sup>191</sup>

To achieve the purpose, promotion and advancement of the economic and welfare of the South African consumer,<sup>192</sup> certain ‘fundamental consumer rights’ are prescribed in chapter 2 of the CPA, namely:

- (i) the right to equality in the consumer market;<sup>193</sup>
- (ii) the consumer’s right to privacy;<sup>194</sup>
- (iii) the consumer’s right to choose;<sup>195</sup>
- (iv) the right to disclosure and information;<sup>196</sup>
- (v) the right to fair and responsible marketing;<sup>197</sup>
- (vi) the right to fair and honest dealings;<sup>198</sup>
- (vii) the right to fair, just and reasonable terms and conditions;<sup>199</sup> and
- (viii) the right to fair value, good quality and safety.<sup>200</sup>

The right to fair, just and reasonable terms and conditions are of greatest importance to this study will be discussed further.

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*sustenance; (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product; (iii) access to any electronic communication infrastructure; (iv) access, or of a right to access, to an event or to any premises, activity or facility; or (v) access to or use of any premises or other property in terms of a rental; (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the services”.*

<sup>188</sup> Section 5(1)(b).

<sup>189</sup> Section 5(1)(c).

<sup>190</sup> Section 5(1)(d).

<sup>191</sup> Van Eeden (2009) 47. In terms of section 5(5) these good and the importer, producer, distributor and the retailer, despite the fact that the transaction was exempted from the Act, are still subject to section 60 and 61. Section 60 prescribes the safety monitoring and recall practices and procedures. Section 61 prescribes the liability for damaged caused by goods.

<sup>192</sup> Van Eeden (2009) 12.

<sup>193</sup> Part A, Section 8 to 10.

<sup>194</sup> Part B, Section 11 to 12.

<sup>195</sup> Part C, Section 13 to 21.

<sup>196</sup> Part D, Section 22 to 28.

<sup>197</sup> Part E, Section 29 to 39

<sup>198</sup> Part F, Section 40 to 47.

<sup>199</sup> Part G, Section 48 to 52.

<sup>200</sup> Part H, Section 53 to 61.

## 7. The CPA's prescribed requirements and prohibited provisions for a valid agreement

Contrary to the common law that is not concerned with the fairness<sup>201</sup> of the parties bargaining power the CPA constitutes the first legislation designed to regulate unfairness in contracts.<sup>202</sup> In this chapter I will discuss the requirements prescribed by the Act along with the contractual provisions that are prohibited by the Act.

The CPA stipulates rules that confine both the supplier and the consumer's freedom of contract with regard to contract making process, the terms that may or may not be included in the agreement as well as the process of enforcement of the contract. Thus the CPA is laying down requirement for both procedural and substantive fairness.<sup>203</sup> The CPA confers upon the court certain powers to administer consumer contracts and to manage the relationship between the consumer and the supplier.<sup>204</sup>

Section 48(1) is the first comprehensive and structured administrative and judicial mechanism that unambiguously deals with unfairness in contracts and clearly states when a term can be regarded as unfair, unreasonable or unjust, and reads as follows, this section has become known as the generally unfairness standard:<sup>205</sup>

*"A supplier may not<sup>206</sup>*

- (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 service, 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*

<sup>201</sup> The common law will only render a contract unfair at the presence of fraud, duress and undue influence.

<sup>202</sup> Van Eeden (2009) 169.

<sup>203</sup> Van Eeden (2009) 170.

<sup>204</sup> Van Eeden (2009) 171.

<sup>205</sup> Van Eeden (2009) 181. Section 48 relates to the substantive unfairness at entering into an agreement.

<sup>206</sup> Thus a prohibiting section.



*are supplied at the direction of the consumer-*

- (i) to waive any rights;*
- (ii) assume any obligation; or*
- (iii) waive any liability of the supplier.*

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

The section comprises of two main components the first being the activity and the second the term. Activity, taking into account supplying, offering, entering into an agreement, imposing and requiring, sets out the relation to which unfair terms are used<sup>207</sup> and on the other end term, includes a term or an agreement and price, boiling down to the unfair terms themselves.<sup>208</sup>

It should however be kept in mind that since the CPA does not define the words ‘unfair’, ‘unreasonable’ or ‘unjust’ they must be given their ordinary meaning. If any ambiguity should arise the meaning thereof must be determined applying the normal principals of interpretation and assistance can be drawn from the provisions of section 2(1) and (2)<sup>209</sup>, stating that when the Act is interpreted it must be done in such a manner that it gives effect to the purpose of the Act, as set out in section 3.<sup>210</sup>

Section 48(2) subsequently stipulate when agreements or transactions are ‘unfair’, ‘unreasonable’ or ‘unjust’ and lay down the following guidelines:

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

- (a) if 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;*

<sup>207</sup> Van Eeden (2009) 181.

<sup>208</sup> Van Eeden (2009) 182.

<sup>209</sup> Section 2(2) determines that when the Act is applied or interpreted appropriate international and foreign law and international conventions and declarations or protocols may be considered.

<sup>210</sup> Van Eeden (2009) 182.



- (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 or 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.”*

The first procedural requirement is that certain designated consumer agreements must be in writing.<sup>211</sup> The Act does not call for consumer agreements in general to be in writing however, the Minister may prescribe categories of consumer agreements that are required to be in writing.<sup>212</sup> Should the agreement between the supplier and the consumer not be in writing the supplier is required to keep a record of the transaction entered into over the telephone or any other recordable manner as prescribed.<sup>213</sup> The consumer is not entitled to access the record<sup>214</sup> but should a complaint be lodged with the NCC the NCC can summons the supplier to furnish them with a copy of the record alternatively to inspect the record.<sup>215</sup>

Where the agreement between the consumer and the supplier is in writing, irrespective of the fact if it is voluntarily or required by the Act, Section 50(2) determines:

- “(a) It applies irrespective of whether or not the consumer signs the agreement; and*

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<sup>211</sup> There is no general formality requirement that contracts must be in writing, see Christie (2011) 105. There are however certain categories of contracts that are required by legislation to be in writing such as credit agreements, as determined by section 93 of the National Credit Act, 34 of 2005, and sale of land, as determined by section 2(1) of the Alienation of Land Act, 68 of 1981.

<sup>212</sup> Section 50(1). In terms of section 7 a franchise agreements is an agreement that must be in writing and must be signed.

<sup>213</sup> Section 50(3).

<sup>214</sup> This is bizarre since in terms of section 50(2) the consumer is entitled to a free copy of the agreement but not to a copy of the recording on which the agreement is based. Van Eeden (2009) 175.

<sup>215</sup> Section 102(1)(b). Van Eeden (2009) 174.

- (b) *the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must-*
- (i) *satisfy the requirements of section 22; and*
  - (ii) *set out an itemised break-down of the consumer's financial obligations under such agreement."*

Thus the parties will be able to hold one another to the agreement even if it was not signed by the consumer but the reverse, where a supplier did not sign the agreement, does not apply. It must be that the legislature must have had a specific scenario in mind here but I can not see why the absence of the consumer's signature can have an enforceable agreement as a result but where the supplier's signature is not present the same is not true.<sup>216</sup> Further the supplier must provide a copy of the agreement to the consumer free of charge<sup>217</sup> however there are no stipulations with regard to a period within which the supplier must provide such a copy or access. Van Eeden advocates that the Minister should by regulation specify a time period within which the copy or access must be provided.<sup>218</sup> This copy of the agreement must comply with Section 22, Right to information in plain and understandable language.<sup>219</sup> In terms of the provision of section 22(2) terms of an agreement is in plain language when it can reasonable be terminated that the ordinary consumer of the class of persons for whom the term is intended, whom has an average literacy skill and has minimal experience as a consumer of the goods concerned could be expected to grasp the content, significance and importance of the term having regard to:

- (i) the context, comprehensiveness and consistency;<sup>220</sup>
- (ii) the organisation, form and style;<sup>221</sup>
- (iii) the vocabulary, usage and sentence structure;<sup>222</sup>

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<sup>216</sup> Van Eeden (2009) 175.

<sup>217</sup> See Van Eeden how submits that a 'free electronic access copy' implies that the copy is printable. Van Eeden (2009) 176.

<sup>218</sup> Van Eeden (2009) 176.

<sup>219</sup> Another procedural fairness requirement being transparency.

<sup>220</sup> Section 22(2)(a).

<sup>221</sup> Section 22(2)(b).

<sup>222</sup> Section 22(2)(c).

- (iv) the use of any illustrations, examples, headings or other aids to reading and understanding<sup>223</sup>

of the terms.

The next procedural fairness requirement relates to notification.<sup>224</sup> In terms of section 49(1) any provision or notice to a consumer that purports to-

- (a) limit in any way the risk or liability of the supplier or any other person;*
- (b) constitute an assumption of risk or liability by the consumer;*
- (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or*
- (d) be an acknowledgement of any fact by the consumer,*

must be brought under the attention of the consumer in a manner and form that it complies with the requirements set out section 49(3) to (5).<sup>225</sup> Section 49(2) goes further and states that where any activity or facility is involved that may be the subject of certain specified risks it too must be brought to the attention of the consumer subject to the provisions of section 49(3) to (5). In terms of section 49(3) to (5) determines that the above mentioned provisions must be in plain language as depicted in section 22. Further the notice must be drawn to the attention of a consumer in a noticeable manner that is to be expected to draw the attention of the ordinary alert consumer, having regard to the circumstances.<sup>226</sup> This notice must be brought to the consumer's attention at the earliest of the time at which the agreement is entered into, start to engage in activity or enter or obtain access to the facilities<sup>227</sup> or is expected to offer payment for the transaction or agreement.<sup>228</sup> Hereafter the consumer must be given adequate opportunity<sup>229</sup> to take in and grasp the provision.<sup>230</sup>

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<sup>223</sup> Section 22(2)(d).

<sup>224</sup> Van Eeden (2009) 177.

<sup>225</sup> The effect hereof is for example: should an exception clause for instance be included in the agreement the existence thereof must be brought to the attention of the consumer.

<sup>226</sup> Section 49(4)(a).

<sup>227</sup> Section 49(4)(b)(i).

<sup>228</sup> Section 49(4)(b)(ii).

<sup>229</sup> The Act does not determine what an adequate opportunity is but according to Van Eeden suppliers must ensure that they have proof that the consumer was not under any form of pressure and understood the agreement and that it was reasonable for him to sign the agreement under the prevailing circumstances.

<sup>230</sup> Van Eeden (2009) 178.

On the other end of the spectrum the Act prohibits certain terms, conditions, agreements and transaction.<sup>231</sup> The Act defines ‘prohibited conduct’ as ‘any act or omission in contravention of the Act’.<sup>232</sup> Section 51(1) determines that a supplier must not make an agreement or transaction subject to any condition or term, thus prohibits the inclusion of a term or condition, if:<sup>233</sup>

- the common purpose and effect thereof is to:
  - defeat the policy and purpose of the Act;<sup>234</sup>
  - deceive and/or mislead a consumer;<sup>235</sup>
  - subject the consumer to deceitful conduct;<sup>236</sup>
- it directly or indirectly implies to:
  - waive or deny a consumer a right in terms of the Act;<sup>237</sup>
  - avoid a supplier’s responsibility or duties in terms of the Act;<sup>238</sup>
  - override or set aside the effect of any of the provision of the Act;<sup>239</sup>
  - authorises the supplier to do anything that is unlawful in terms of the Act<sup>240</sup> or fail to do anything that is required in terms of the Act;<sup>241</sup>
- they purport to:
  - limits or exempts a supplier of goods and/or services from liability for any loss, directly or indirectly, attributable to the gross negligence of the supplier or any person acting for or in control of the supplier;<sup>242</sup>
  - represent the assumption of risk or liability by the consumer for a loss contemplated in section 51(1)(c)(i);<sup>243</sup>
  - impose an duty on a consumer to pay for damages to, or otherwise assume the risk of handling, any goods exhibited by the supplier, except to the extent contemplated in section 18(1);<sup>244</sup>
- they result from an offer prohibited in terms of section 31;<sup>245</sup>

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<sup>231</sup> Section 50.

<sup>232</sup> Section 1.

<sup>233</sup> Van Eeden (2009) 189.

<sup>234</sup> Section 51(1)(a)(i).

<sup>235</sup> Section 51(1)(a)(ii).

<sup>236</sup> Section 51(1)(a)(iii).

<sup>237</sup> Section 51(1)(b)(i).

<sup>238</sup> Section 51(1)(b)(ii).

<sup>239</sup> Section 51(1)(b)(iii).

<sup>240</sup> Section 51(1)(b)(iv)(aa).

<sup>241</sup> Section 51(1)(b)(iv)(bb).

<sup>242</sup> Section 51(1)(c)(i).

<sup>243</sup> Section 51(1)(c)(ii).

<sup>244</sup> Section 51(1)(c)(iii).

- it requires the consumer to enter into a supplementary agreement or sign a document prohibited in section 51(2)(a);<sup>246</sup>
- it purports to relinquish to any person, charge, set-off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;<sup>247</sup>
- if falsely expresses an acknowledgement by the consumer that:
  - prior to the entering into of the agreement there was no representations or warranties made with regard to the agreement by the supplier or a person on behalf of the supplier;<sup>248</sup>
  - a consumer has received the goods or services or a document required by the Act to be delivered to the consumer;<sup>249</sup>
- it requires a consumer to forfeit any money to the supplier;
  - when a consumer exercises any right in terms of the Act;<sup>250</sup>
  - to which the supplier is not entitled to in terms of any other law or the Act;<sup>251</sup>
- it on behalf of the consumer expresses;
  - that any person authorised thereto and acting on behalf of the supplier may enter the premises of the consumer in order to take possession of goods to which the agreement relate to;<sup>252</sup>
  - to sign an undertaking in advance sign any documentation relating to the enforcement of the agreement, irrespective of the fact if such documentation is completed or incomplete at the time of the signing thereof;<sup>253</sup>

<sup>245</sup> Section 51(1)(d). Section 31 prohibits negative option marketing and determines that a supplier may not promote, offer to enter into an agreement or induce a person to accept any goods or services or to enter into or modify such an agreement on a basis that the goods or services will automatically be supplied or the agreement modified unless the consumer decline such an offer or inducement.

<sup>246</sup> Section 51(1)(e).

<sup>247</sup> Section 51(1)(f).

<sup>248</sup> Section 51(1)(g)(i).

<sup>249</sup> Section 51(1)(g)(ii).

<sup>250</sup> Section 51(1)(h)(i).

<sup>251</sup> Section 51(1)(h)(ii).

<sup>252</sup> Section 51(1)(i)(i).

<sup>253</sup> Section 51(1)(i)(ii).

- consent to a predetermined value of the costs relating to the enforcement of the agreement, excluding what is consistent with the Act;<sup>254</sup>
- on behalf of the consumer commit to;
  - deposit with the supplier, or a nominee of the supplier, an identity document, debit or credit card, bank or automatic teller machine card or any comparable identifying document or device;<sup>255</sup> or
  - make available a personal identification code or number to be used to access an account.<sup>256</sup>

Further a supplier may not, in terms of section 51(2):

- directly or indirectly require or persuade a consumer to enter into a additional agreement that contains any of the provisions prohibited in section 51(1);<sup>257</sup>
- require or demand a consumer to:
  - provide the supplier permanent or temporary possession of any instrument mentioned in section 51(1)(j)(i) other than for purpose of identification or to enable him to make a copy of such instrument;<sup>258</sup>
  - disclose any personal identification code or number contemplated in section 51(1)(j)(ii);<sup>259</sup> or
- directly or knowingly allow any person to do anything referred to in this section on behalf of or to the benefit of the supplier.<sup>260</sup>

Any agreement, transaction, term or notice that purports to contravene this section is void.<sup>261</sup> However in terms of section 51(4) a supplier may still require personal identification from the consumer in order to comply with requirements of such a transaction in the normal course of business.

I believe that the above provision will have severe consequences in practice, especially seen from the point of view that liability of damages due to gross

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<sup>254</sup> Section 51(1)(i)(iii).

<sup>255</sup> Section 51(1)(j)(i).

<sup>256</sup> Section 51(1)(j)(ii).

<sup>257</sup> Section 51(2)(a).

<sup>258</sup> Section 51(2)(b)(i).

<sup>259</sup> Section 51(2)(b)(ii).

<sup>260</sup> Section 51(2)(c).

<sup>261</sup> Section 51(3).

negligence can no longer be exempted by means of an exemption clause.<sup>262</sup> Hospitals for instance will no longer be able to excuse themselves from gross negligence which will subsequently lead to an increase in insurance premiums and this will ultimately to an increase and adaption of their fees accordingly, which will only be carried by the consumer. The end result being that the consumer pays more for services pertaining to the NCA.<sup>263</sup>

From the above it is clear that the NCA prescribes various requirements, and further and even of more importance, prohibits the inclusion of numerous provisions for a valid agreement.

## **8. Enforcement powers bestowed upon the court's to ensure fair and just agreements and enforcement of the Act**

In this chapter I will do an overview of the powers bestowed upon the courts in order to ensure fair and just conduct, terms and conditions prevail.<sup>264</sup>

Several academic writers, such as Christie<sup>265</sup>, hold the view that the common law principles gave the courts the powers needed and that this legislation is unnecessary. The above is based on the argument that the consumers are sufficiently protected by the rules relating to justifiable mistake, duress, fraudulent, negligent and innocent misrepresentation and undue influence. Thus according to them this legislation is not needed and that consumer was already sufficiently protected. However I do not concur with this and feel that despite these measures, exploitation of consumers still occurred and the main reason here for is that consumers are not protected from the negotiation stage.

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<sup>262</sup> These type of exemption clauses was the rule rather than the exception.

<sup>263</sup> An issue not discussed in this paper is what will constitute as gross negligence, especially since it is not defined by the Act. I believe that time will tell and that the courts will probable apply the ordinary meaning of *culpa* being: the lack of actions that a reasonable person in the same level of experience would have taken to avoid a foreseeable risk or harm.

<sup>264</sup> Section 52.

<sup>265</sup> Christie (2011) 1.

In terms of section 4(4)(a)<sup>266</sup> a Court, the National Consumer Commission or the National Consumer Tribunal must interpret any standard form, contract or any other document prepared by or on behalf of the supplier to the benefit of the consumer, so that any ambiguity that could allow for more than one reasonable interpretation to be resolved to the benefit of the consumer. Further section 4(4)(b) determines that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in terms of the agreement is restricted to the extent that a reasonable person would ordinarily believe or expect having regard to the content of the document,<sup>267</sup> the manner and form in which the document was organized and presented<sup>268</sup> and the status of the transaction or agreement.<sup>269</sup> Thus the CPA compels a court to interpret an ambiguous clause, which was drafted by or on behalf of the supplier, to the consumers' benefit. I believe that there is therefore no more room for the judiciary to apply their discretion with regard to whether or not a clause should be considered strictly in accordance with the freedom of contract principle or in terms of one of the common law principles.

In terms of section 52 the court has several categories of powers.<sup>270</sup> Starting off with if in any proceedings that are before the court and regarding an agreement or transaction between a consumer and a supplier wherein a person claims that<sup>271</sup> the supplier disregarded sections 40, 41 or 48,<sup>272</sup> and where the Act does not otherwise make available a remedy adequate to correct the relevant prohibited conduct, unfairness, injustice or unconscionability<sup>273</sup> the court, after taking into consideration the principals and provisions of the Act and the factors set out in section 52(2), may make an order reflected in section 52(3), if it is determined that the transaction or agreement was in part or in whole unconscionable, unjust, unreasonable or unfair. The factors that a court must consider among other include the nature of the parties to the agreement and their relationship, education, experience sophistication and, of

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<sup>266</sup> Under the heading of 'Realisation of Consumer Rights'.

<sup>267</sup> Section 4(4)(b)(i).

<sup>268</sup> Section 4(4)(b)(ii).

<sup>269</sup> Section 4(4)(b)(iii).

<sup>270</sup> Van Eeden (2009) 191.

<sup>271</sup> Section 52(1).

<sup>272</sup> Section 52(1)(a).

<sup>273</sup> Section 52(1)(b).



most importance to this paper, short bargaining power,<sup>274</sup> circumstances that existed or was reasonable foreseeable when the agreement was entered into,<sup>275</sup> the parties respective conduct,<sup>276</sup> the extent of negotiations,<sup>277</sup> to what extent the agreement satisfies the requirements of section 22,<sup>278</sup> whether a consumer knew or ought to have known the existence and extent of any provision of an agreement.<sup>279</sup>

A precondition for the court to exercise its power in terms of section 52(3) is that it must be alleged that the Act does not otherwise provide a sufficient remedy to correct the prohibited conduct, unfairness, injustice or unconscionability. However it is not clear how one must indicate any relevant remedies and how their sufficiency will be assessed.<sup>280</sup>

Once a court has determined that a agreement or transaction is in whole or in part unjust, unconscionable, unreasonable or unfair a court may, in terms of section 52(3), may make a declaration to that effect<sup>281</sup> and may make any order that it considers reasonable and just in the circumstance, which include but are not limited to an order-

- to return money or property to the consumer;<sup>282</sup>
- to compensate the consumer for expenses or losses relating to:
  - the agreement or transaction,<sup>283</sup>
  - the court proceedings;<sup>284</sup>
- to order the supplier to end any practise or to alter any practise, form or document, as necessary to avoid a recurrence of the supplier's behaviour.<sup>285</sup>

Further in any proceedings before the court<sup>286</sup> wherein a person claims that the agreement in question or a term or condition thereof or a notice to which the

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<sup>274</sup> Section 52(2)(b).

<sup>275</sup> Section 52(2)(c).

<sup>276</sup> Section 52(2)(d).

<sup>277</sup> Section 52(2)(e).

<sup>278</sup> Section 52(2)(g).

<sup>279</sup> Section 52(2)(h).

<sup>280</sup> Van Eeden (2009) 191.

<sup>281</sup> Section 52(3)(a).

<sup>282</sup> Section 52(3)(b)(i).

<sup>283</sup> Section 52(3)(b)(ii)(a).

<sup>284</sup> Section 52(3)(b)(ii)(b).

<sup>285</sup> Section 52(3)(c).

agreement or transaction is allegedly subject is void in terms of the Act or that the requirements set out in section 49 was not satisfied, a court may<sup>287</sup>

- make an order:
  - where the provision or notice is void in terms of any provision of the Act;
    - where it is reasonable in the circumstance having regard to the agreement, transaction, provision or notice as a whole, divide any part of the agreement, provision or notice in question or alter it in order to make it lawful;<sup>288</sup>
    - declare the agreement, notice or provision as a whole to be void from the date that it allegedly took effect;<sup>289</sup>
  - where the provisions of section 49 was not satisfied the provision or notice may be severed from the agreement or it may be declared that it has no effect or force with regard to the agreement or transaction;<sup>290</sup>
- Make any additional order that is reasonable and just in the circumstances having regard to the agreement, provision or notice in question.<sup>291</sup>

I concur with Van Eeden who is of opinion that the NCA further confers a responsibility on the court to take a leading role in the development of consumer law and to chase the realisation and enjoyment of consumer rights.<sup>292</sup> In terms of section 4(2) in any matter before a court in terms of the NCA the court must<sup>293</sup> 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).

However I believe that the biggest hurdle here will be the enforcement of the CPA. Enforcement of the CPA is set out in Chapter 6, section 99 to 119, of the CPA. The

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<sup>286</sup> Concerning an agreement or transaction between a consumer and a supplier.

<sup>287</sup> Section 52(4).

<sup>288</sup> Section 52(4)(a)(i)(aa).

<sup>289</sup> Section 52(4)(a)(i)(bb).

<sup>290</sup> Section 52(4)(a)(ii).

<sup>291</sup> Section 52(4)(b).

<sup>292</sup> Van Eeden (2009) 25.

<sup>293</sup> 'Must' compels the courts to develop the law having regard to the improved realisation and enjoyment of consumer rights.

National Consumer Commission<sup>294</sup> is responsible for the execution of the provision of the CPA and can enforce the provisions thereof by, among other:

- promoting informal resolution,<sup>295</sup> receiving complaints<sup>296</sup> and monitoring of the consumer market;<sup>297</sup>
- investigation and evaluation of alleged prohibited conduct and offences;<sup>298</sup>
- issuing and enforcing compliance notices;<sup>299</sup>
- negotiating and concluding undertakings and consent orders;<sup>300</sup>
- referring matters to the Tribunal and appearing before the Tribunal;<sup>301</sup>
- referring alleged offences to the National Prosecuting Authority.<sup>302</sup>

I believe that the aim of the NCC is to assist the vulnerable consumer, those consumers that have no other legal protection due to a lack of education and funds and due to ignorance of the law. In terms of section 96 the NCC is furthermore responsible to endorse public consciousness of consumer protection matters and to raise awareness of the nature and dynamics of the consumer market. However I feel that the effective functioning of the NCC will greatly be dependent on the ability of the NCC to ensure that consumers are aware of them and know the process of lodging complaints, unlike its predecessor, the Office for the Investigation of Unfair Business Practices<sup>303</sup> where most consumers were not even aware of the body.

Affording consumers rights and protection has little meaning if achieving quick and effective redress thereof is not effectively enforced.<sup>304</sup> Further a lack of enforcement will result in widespread non-compliance with the provisions of the CPA which will be defeating the purpose of the Act. Being financed by money appropriated by Parliament and fees payable to the NCC in terms of the CPA<sup>305</sup> the NCC is, according to me unfortunately, a government body meaning that government plays

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<sup>294</sup> Hereinafter referred to as the NCC.

<sup>295</sup> Section 99(a).

<sup>296</sup> Section 99(b).

<sup>297</sup> Section 99(c).

<sup>298</sup> Section 99(d).

<sup>299</sup> Section 99(e).

<sup>300</sup> Section 99(f).

<sup>301</sup> Section 99(h).

<sup>302</sup> Section 99(i).

<sup>303</sup> As established in terms of the Consumer Affairs Act, Act 71 of 1988.

<sup>304</sup> GG 26774 Of 2004-09-09 37.

<sup>305</sup> Section 90.

an important role in ensuring the success of the CPA. More than this the Minister of Trade and Industry is responsible for ensuring that the funds that are allocated are use appropriately and that the NCC properly executes its functions.

Then there is the Provincial Consumer Protection Authority, defined in section 1 as

*“a body established within the provincial sphere of government, and designed by the responsible Member of the Executive Council of a province to have general authority to deal with consumer protection matters within the province.”*

and are regulated in terms of section 84. It shares similar functions to the NCC only operating at a provincial level, consisting of:

- issuing of compliance notices;<sup>306</sup>
- facilitate the mediation or conciliation of disputes between parties resident or carrying on business exclusively within the province;<sup>307</sup>
- referring disputes to the provincial consumer court within that province, if there is one;<sup>308</sup>
- requesting the NCC to initiate a complaint in respect of any apparent offence or prohibited conduct in terms of the Act arising within that province.<sup>309</sup>

The question however remains if the authorities will have the capacity, assistance and support from government in order to fulfil their duties and functions. However if these authorities could function properly it will relieve a lot of pressure from the judiciary.

Thus the Act has conferred upon the courts multiple powers in order to ensure that consumer agreement will be fair and just however it simultaneously places a duty on the court develop consumer law. However the problem remains that in order to enforce any rights the consumers need to be aware of these rights and initiate steps to enforce these rights, without steps from the consumer the rights mean very little.

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<sup>306</sup> Section 84(a).

<sup>307</sup> Section 84(b).

<sup>308</sup> Section 84(c).

<sup>309</sup> Section 84(d).

**9. Whether and to what extent does the CPA infringe and/or limit any of the characteristics of contractual freedom and is the limitations created the answer to the problem of inequality of bargaining powers of contracting parties**

The question now arises that having regard to all the above does the Act infringe or limit any of the consumer and/or the suppliers contractual freedom and should the last statement be true to what extent does it infringe or take away the supplier and/or consumers contractual freedom.

I concur with Lewis<sup>310</sup> who is of opinion that the most common argument against introducing legislation such as the CPA is that it will permanently damage at least two of the fundamental principles of the law of contract, namely certainty and contractual freedom. The very reason for entering into a contract is to protect the parties' expectations and to secure the bargain made, thus certainty. However now the courts are given the power to review the terms and can re-make the contract or relieve a party of his or her obligation, wholly or partially, while all of this is based on the courts using wide terms such as good faith, fairness and unconscionability. I believe that inevitably, in more cases than not, the above will lead to the frustration of parties in that they will not know whether or not the contract was going to be enforced or rewritten by the court on the above terms. Thus even if one accepts that the parties indeed negotiated the contract and that they are at once that the contract entered into is the true reflection of the agreement between them a court can decide that the contract is not fulfil the principle of fairness 'standard'. My question to now is that having regard to this where does freedom of contract fit into then?

Closely related hereto is the effect that the above uncertainly will have on the commercial certainty. I do hope that the uncertainty created will not be interfering with the market place and that it will not restrain trade and commerce and discourage local and foreign investment.

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<sup>310</sup> Lewis (2003) 344.

The freedom of contract principle will be substituted by principles of fairness and in order to achieve this change, the CPA lays down sufficient guidelines as to how to establish the principle of fairness. For example section 48(2) sets out guidelines to establish when a contract or term thereof may be regarded as unfair, section 51(1) sets out prohibited terms and agreement and section 52(2) supplies the courts with factors which should be considered when considering the fairness of an agreement or term of the agreement. However these principles of fairness is a wide discretion and I believe that it will be up to the presiding officer to interpret the principles and little or no regard will be given to the true intention of the parties.

With regard to the courts discretion in terms of section 4, laying down the principle that the presiding officer must always consider the interest of the consumer, I believe that the effect will be that freedom of contract will no longer be the basis of consumer contract law in South Africa. Thus it is my humble opinion that the CPA brings about a change from the strict application of the principle of freedom of contract to a position of greater control by the judiciary. I however do not believe that this total limitation will be the answer to bargaining inequality.

However despite the good intentions of the CPA and every other aspect that might have an influence the problem remains enforcement of these principles. No proper mechanism has been put in place of or in replacement of the courts. Thus despite the infringement of contractual freedom by the regulations of the CPA it appears not to be the answer to the problem of inequality in the bargaining power of parties negotiating a contract. I believe that the biggest problem here is that consumers are not aware of their rights. Ironically this is contrary to one of the regularly used arguments against implementation of the CPA, that the Act will lead to a flood in litigation.

It is clear that to some extent the CPA does infringes and take away some of the characteristics of Contractual Freedom however I believe that the limitation created by the CPA is not the answer to the problem of inequality of bargaining powers of contracting parties.

## 10. Conclusion

The South African law of contract was founded on the principle of freedom of contract which in turn is based on the idea of individual autonomy and sanctity of contract. Any interference by the courts was regarded as a form of paternalism which was contrary to the concept of freedom of contract and contrary to public policy.<sup>311</sup> A court would not discharge a person from his contract or create a better deal for him provided that the person was a mentally fit major who consented to the contract without any influence by means of<sup>312</sup> error, misrepresentation, undue influence, duress or fraud.<sup>313</sup>

The principle of social control however steadily gained support towards the 19<sup>th</sup> century and many countries<sup>314</sup> began to enact legislation to protect consumers and regulate unfair contract terms.<sup>315</sup> South Africa however was a bit slow out of the blocks with regard to development in this area.

Before the implementation of the CPA the existing consumer laws were outdated and fragmented and there was a great need for a simple, comprehensive and accessible consumer law which could serve as a single indication to consumers which at the same time could outline the fundamental rules of conduct and which granted consumers basic rights in order to give them certainty in their interaction in the market place.<sup>316</sup>

The primary purpose of the Act is prevention of exploitation and harm to consumers and to promote consumer's wellbeing. Further the CPA seeks to promote and create an economic environment that supports and strengthens a culture of consumer rights and responsibility while simultaneously promoting a fair, efficient and transparent market place.<sup>317</sup>

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<sup>311</sup> Hawthorne L "The Principle of equity in the law of contract" 1995 (58) *THRHR* 157.

<sup>312</sup> The factors that influence consensus.

<sup>313</sup> Hahlo HR "Unfair Contract Terms in Civil-Law Systems" 1981 (88) *SALJ* 70.

<sup>314</sup> Such as the Netherlands, the United States and France.

<sup>315</sup> Hawthorne L "The Principle of equity in the law of contract" 1995 (58) *THRHR* 166.

<sup>316</sup> GG 26774 of 2004-09-09 24.

<sup>317</sup> Preamble to the CPA.

I believe that one of the biggest problems with consumer protection and contract terms are that consumers are frequently involuntarily subjected to clauses, usually contained in standard form contracts, which terms and conditions are not open for negotiation and can more often than not be categorised as unfair contract terms. Hopkins<sup>318</sup> is of the opinion that the CPA will ensure that judges are no longer able to simply rely on judicial precedents when decide a matter nor will they be restricted to limit their enquire to contractual capacity of the parties or the legality of the transaction. Thus a shift away from the strict rule of freedom of contract towards one where greater control by the legislature is possible, I however feel that is not yet a reality and that even if it might be true is in still not the answer to the age old problem of inequality of bargaining positions.

In my view, despite the good intentions of the CPA and every other aspect that might have an influence the problem remains enforcement of these principles. No proper mechanism has been put in place of or in replacement of the courts, the latter of course only being a problem if the consumers were aware of their rights in the first place.

I feel that despite the infringement of contractual freedom by the regulations of the CPA it appears not to be the answer to the problem of inequality in the bargaining power of parties negotiating a contract.

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<sup>318</sup> Hopkins (2003) 160.



## BLIOGRAPHY

### Books

Christie RH & Bradfield GB *Christie's The Law of Contract in South Africa* (2011) 6<sup>th</sup> Edition Durban: LexisNexis

Hutchison D *et al The Law of Contract in South Africa* (2009) Cape Town: Oxford University Press

Melville NJ *The Consumer Protection Act Made Easy* (2010) Pretoria: Book of Life.

Nagel CJ (red) *Kommersiële Reg* (2011) 4<sup>de</sup> Uitgawe Durban: LexisNexis

Schulze H (ed) *Algemene Beginsels van Kommersiële Reg* (2010) 7<sup>de</sup> Uitgawe Kaapstad: Juta & Kie Bpk

Van Eeden E *A Guide to the Consumer Protection Act* (2009) Durban: LexisNexis

Van der Merwe S *et al Contract General Principles* (2007) 3<sup>rd</sup> Landsdown: Juta Law

### Case Law

#### A

*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)

*Amalgamated Beverage Industries Ltd v Rand Vista Wholesalers* 2004 (1) SA 538 (SCA)

#### B

*Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A)

*Barkhuizen v Napier* 2007 (5) SA 323 (CC)

*Bedford Square Properties (Pty) Ltd v Liberty Group Ltd and Others* 2010 (4) SA 99 (GSJ)

*Botha (Now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A)

*Brisley v Drotsky* 2002 (4) SA 1 (SCA)

*Burger v Central South African Railways* 1903 TS 571

#### C

*Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another* 2005 (3) SA 205 (N)

*Coetzee v Comits* 2001 (1) SA 1254 (C)

*Conradie v Rossouw* 1919 AD 279

*Coolcat Restaurante BK h/a Die Kafeteria, UOVS v Vrystaatse Regering en Andere* 1999 (2) SA 635 (O)

*Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC)

#### D

*Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C)

*De Beer v Keyser and Others* 2002 (1) SA 827 (SCA)

*Du Plessis v De Klerk and Another* 1996 (5) BCLR 658 (CC)

#### E

*Eerste Nasionale Bank v Saayman NO* 1997 (4) SA 302 (A)

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)

*Ex Parte Minister of Justice: In Re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A)

#### F

*First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 (2) SA 853 (BG)

*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

#### G

*Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP)

*Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA)

#### J

*Janse Van Rensburg v Grieve Trust* 2000 (1) SA 315 (C)

#### K

*Knox D'Arcy v Shaw* 1996 (2) SA 651 (W)

#### M

*Mpakathi v Kghotso Development CC and Others* 2005 (3) SA 343 (SCA)

#### N

*Napier v Barkhuizen* 2006 (4) SA 1 (SCA)

*Nedfin Bank Bpk v Meisenheimer en Andere* 1989 (4) SA 701 (T)

*Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM)

**P**

*Printing & Numerical Registering Company v Sampson* (1875) LR 19

**R**

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

**S**

*SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A)

*Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C)

*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)

*Schutte v Schutte* 1986 (1) SA 872 (A)

*Sonap Petroleum (formerly known as Sonarep) SA (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A)

*South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA)

*Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd and Another v Göbel NO and Others* 2011 (5) SA 1 (SCA)

*Standard Bank of SA Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2012 (1) SA 634 (WCC)

*Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C)

*Suisse Atlantic v Rotterdamsche Kolen Central* 1966 (2) ALL ER 76

**T**

*Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A)

*Trust Bank van Afrika Bpk v Eales en Andere* 1989 (4) SA 509 (T)

*Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A)

**W**

*Wells v South African Alumenite Company* 1927 AD 69

**Government or Official Publications**

Government Gazette 26774, September 2009

## Journal articles

Bhana D “The role of judicial method in relinquishing of constitutional rights through contract” 2008 (24) *South African Journal on Human Rights* 300

Brand FDJ “The role of good faith, equity and fairness in South African law of contract – the influence of the common law and the Constitution” 2009 (126) *The South African Law Journal* 71

Cockrell A “Substance and Form in the South African Law of Contract” 1992 (109) *The South African Law Journal* 40

Du Plessis R “Good faith and equity in the law of contract in the civilian tradition” 2002 (65) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 397

Floyd TB & Pretorius CJ “A Reconciliation of the different approaches to Contractual Liability in the absence of Actual Consensus : Sonap Petroleum (formerly known as Sonarep) SA (Pty) Ltd v Pappadogianis 1992 3 SA 234 (A)” 1992 (55) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 668

Glover G “Lazarus in the constitutional court: an exhumation of the exception doli generalis?” 2007 (124) *The South African Law Journal* 449

Grové NJ “Commentary on Eerste Nasionale Bank v Saayman NO” 1998 (61) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 328

Hahlo HR “Unfair Contract Terms in Civil-Law Systems” 1981 (88) *The South African Law Journal* 70

Hawthorne L & Thomas PH J “Bank of Lisbon and South Africa Ltd v De Ornelas” 1989 (22) *De Jure* 143

Hawthorne L “The Principle of equity in the law of contract” 1995 (58) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 157

Hawthorne L “The end of bona fides” 2003 (15) *South African Mercantile Law Journal* 271

Hawthorne L “Closing the open norms in the law of contract” 2004 (67) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 294

Hawthorne L “Distribution of Wealth, the Dependency Theory and the Law of Contract” 2006 (69) *The South African Law Journal* 48

Hawthorne L “Contract law’s choice architecture – the hidden role of default rules” 2009 (73) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 599

Hopkins K “Standard Form Contracts and the Evolving Idea of Private Law Justice : A Case of Democratic Capitalist Justice Versus natural Justice” 2003 (1) *Tydskrif vir die Suid Afrikaanse Reg* 150

Hutchison D “Non-variation clauses in contracts: any escape from the Shifren straitjacket” 2001 (118) *The South African Law Journal* 720

Kötz H “Controlling Unfair Contract Terms: Options for Legislative Reform” 1986 (103) *The South African Law Journal* 405

Lewis C “Fairness in South African Contract law” 2003 (120) *The South African Law Journal* 330

Monseneke D “Transformative constitutionalism: its implications for the law of contract” 2009 *Stellenbosch Law Review* 3

Naudé T “Unfair contract terms legislation: the implications of why we need it for its formulation and application” 2006 (17) *Stellenbosch Law Review* 361

Naudé T “The use of black and grey lists in unfair contract terms legislation – a comparative perspective?” 2007 (124) *The South African Law Journal* 128

Naudé T “Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective” 2010 (124) *The South African Law Journal* 515

Pretorius C “Individualism, collectivism and the limits of good faith” 2006 (69) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 638

Strydom HA “The Private Domain and the Bill of Rights” 1995 *SA Public Law* 52

Van Aswegen A “The Implication of the Bill of Rights for the Law of Contract and Delict” 1995 (11) *South African Journal on Human Rights* 50

Van der Vyfer JD “The Private Sphere in Constitutional Litigation” 1994 (57) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 378

Van der Walt CFC “Die Huidige Posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge” 1986 (103) *The South African Law Journal* 646

Van der Walt CFC “Kontrakte en beheer oor kontrakteervryheid in ‘n nuwe Suid-Afrika” 1991 (54) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 367

Van der Walt CFC “Aangepaste voorstelle vir ‘n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg” 1993 (56) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 65

Woker T “Why the Need for Consumer Protection Legislation? A look at some of the reasons behind the Promulgation of the National Credit Act and the Consumer Protection Act” 2010 *Obiter* 217

## Legislation

Constitution of the Republic of South Africa, 108 of 1996

Consumer Affairs Act, 71 of 1988

Consumer Protection Act, 68 of 2008

## Other

Zimmerman R “*Good faith and equity in modern Roman-Dutch law*” in Zimmerman R & Visser DP (ed) (1996) *Southern Cross* 217

## Websites

<http://www.pmg.org.za>