

THE INEQUALITY OF BARGAINING POWER IN CONSUMER CONTRACTS

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SUMMARY

Freedom and sanctity of contract are principles well found in our law, however, true freedom of contract has become undermined with the increased use of standard-form contracts and this has an effect on equality. An important feature of the supreme law of the country, the Constitution of the Republic of South Africa, is the principle of equality, which is provided for in section 9. The application of this principle has a significant effect on contract law. Inequality of bargaining power occurs when the terms and provisions of a contract are unfair, unjust and unreasonable. This is the case when a term is “excessively one-sided” or provides for a provision that is adverse to the consumer. The case is the same where one party is afforded greater protection while the other is defenseless. There is a possibility that the Consumer Protection Act, 68 of 2008 (the “CPA”), in trying to promote equal bargaining power, has caused the opposite to happen. The consumer has now been afforded with greater protection and more rights. It is perhaps possible to conclude that, whether the contract will continue is now more strongly determined by the consumer, even though the supplier has fulfilled his obligations in terms of the CPA. A party to a contract who enjoys a large amount of bargaining power in comparison to the other party to the contract may be able to persuade others to act while they themselves do very little or nothing at all.

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CHAPTER 1

INTRODUCTION

1.1 Background

Freedom and sanctity of contract are principles well found in our law and provide for party autonomy and the fact that contracts seriously and voluntarily entered into, are to be honoured and enforced. However, true freedom of contract has become undermined with the increased use of standard-form contracts and this has an effect on equality.¹

An important feature of the supreme law of the country, the Constitution of the Republic of South Africa² (the “Constitution”) is the principle of equality, which is provided for in section 9. The application of this principle has a significant effect on contract law as market transactions are being regulated; the law of contract becomes the market order and to a large extent directs the order of wealth and power.³

Inequality of bargaining power occurs when the terms and provisions of a contract are unfair, unjust and unreasonable.⁴ This is the case when a term is “excessively one-sided” or provides for a provision that is adverse to the consumer.⁵ The case is the same where one party is afforded greater protection while the other is defenseless.

In England this problem was solved by the enactment of the Unfair Contract Terms Act, 1977⁶ and it has been suggested that similar legislation be enacted in South Africa. The South African Law Commission has proposed to enact legislation that will provide broad discretionary powers for the courts in the case of unfair terms.⁷ In the meantime, the Consumer Protection Act⁸ (the “CPA”) regulates unfair and unreasonable terms in contractual relations.⁹

1.2 Research question

One has to look at the concept of equality in commercial transactions and determine what equality in this context truly means as it clearly has different interpretations. By trying to put the consumer on equal footing with the supplier, has the CPA perhaps not tipped the scales too far in favour of the consumer?

¹ See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 2012 (2nd edition) 21 for a general discussion.

² Act 108 of 1996.

³ For a comprehensive discussion see Collins H *The Law of Contract* 1993 (2nd edition) 3.

⁴ S48(2) of the CPA.

⁵ *Ibid.*

⁶ *George Mitchell (Chesterhall Ltd) v Finney Lock Seeds Ltd* 1983 (1) All ER 108 (CA).

⁷ South African Law Commission Project 47 *Stipulations in Contracts and the Rectification of Contracts* (1998).

⁸ 68 of 2008.

⁹ See generally Hutchison & Pretorius 26.

This dissertation will critically analyze the concept of equality and how the CPA attempts to create commercial equality. Aspects such as the inequality of bargaining power between a consumer and supplier in consumer contracts, how effectively the consumer is protected, the obligations imposed on the supplier while not being given adequate guidelines and protection will be discussed.

The consumer is strongly protected in how the contract is presented, which includes the language used, as well as having terms and conditions brought to their attention in a conspicuous manner. The supplier has to carefully draft the contract in order to comply with the CPA. Even after the supplier has complied with the CPA, the consumer still has different outlets available to him to escape contractual liability. This is where the inequality presents itself.

As will be seen, the supplier has many duties and responsibilities towards the consumer as provided for by the CPA in addition to the protection available to the consumer.

1.3 Methodology

This dissertation was compiled from the essays written for purposes of the LLM modules on general law of contract, interpretation of contracts and drafting of contracts, with specific focus on the topic at hand. It will critically analyze the concept of equality in a national and international context. Then the focus will shift to certain parts of the CPA which may have an effect on equality.

Sources that will be referred to are books, legislation, case law and the opinions of writers.

Chapter 2 will contain a discussion on the concept of equality. Chapter 3 will cover the plain language requirement. Language is an important aspect that is addressed in the CPA and section 22 states that it is a consumer's right that information must be in plain and understandable language. Section 4 of the CPA contains a statutory *contra proferentem* rule which does not operate in the same way as the common law rule. This study will illustrate how section 22, together with section 4, work strongly in favour of the consumer and how the inequality of bargaining power occurs.

In chapter 4 the focus will be on the right to just, fair and reasonable terms and conditions. This chapter discusses the obligations of the supplier in section 49 of the CPA, which stipulates that the consumer's attention must be drawn to certain terms and conditions. This is followed by a discussion on the common law, how the CPA has changed the common law position and its effect on the equality of bargaining power between the consumer and the supplier.

In chapter 5, the focus is on how a drafter must address these aspects in the contract in order to comply with the CPA, to protect himself against an unfair interpretation and a possible solution to the problem. By doing so, the supplier can attempt to place himself on equal footing with the consumer. This then followed by the conclusion.

1.4 Delimitations

This dissertation will not focus on detailed discussion of good faith and public policy, but will attempt to limit the discussion to equality as far as possible.

CHAPTER 2

THE CONCEPT OF EQUALITY

2.1 Introduction

The principle of equality is a major cornerstone of the Constitution. The application of this principle has a significant effect on contract law as market transactions are being regulated; the law of contract becomes the market order and to a large extent directs the order of wealth and power.¹⁰

Legislative intervention in the law of contract has increased in order to provide relief from poverty and hardship. The right to equality poses two challenges, namely, the assessment of the “distributive scheme” that has been created by the law of contract and the chance to examine the “redistribution of wealth”.¹¹

Therefore, it is important to first determine the concept of equality in general before discussing it in a commercial context.

2.2 The concept of equality in terms of the Constitution

2.2.1 Introduction

In the eighteenth century, critical philosophers formulated the model of equality by basing their theories on the concept of natural law. This ideal of equality was “positivised” in most Western legal systems with the aim of legitimizing the emancipation of the “bourgeois” after the American and French revolutions. South Africa is following the same route by accepting fundamental rights which in turn recognize the principle of equality.¹²

In South Africa, the right to equality can be found in the Constitution. Section 9 of the Constitution provides that:

“(1) everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to

¹⁰ *Supra*.

¹¹ For a discussion focused on these challenges see Gabel and Feinman “Contract Law as Ideology” in Kairys (ed) *The Politics of Law: A Progressive Critique* (1982) 176.

¹² For a comprehensive discussion on this aspect see Hawthorne L “The Principle of Equality in the Law of Contract” (1995) 58 *THRHR* 158.

protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

Similar provisions on equality can be found in the Universal Declaration of Human Rights (1948) (the “UDHR”). Article 1 provides that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Article 7 is a reflection of section 9(2) and (3) and provides that:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

In terms of the founding provisions of the Constitution, South Africa can be seen as:

“one sovereign, democratic state founded on the...values of...human dignity, the achievement of equality and the advancement of human rights and freedoms...The Bill of Rights includes a detailed and substantive equality right that embraces...positive measures to advance equality...the Bill of Rights as a whole is described as a cornerstone of democracy that affirms the democratic values of...equality...”¹³

Therefore, achieving equality is of vital importance. However, achieving this constitutional imperative may prove difficult due to the “deep inequalities of the past.” The extent and complications of these inequalities make it more difficult to achieve equality and make it

¹³ S7(1) of the Constitution.

difficult for courts to enforce the Constitution.¹⁴ Chief Justice Beverley McLaughlin (of the Canadian Supreme Court) has described equality as “the most difficult right”.¹⁵

2.2.2 The meaning of equality

The historical, legal and socio-political conditions of society all have an influence on the meaning of equality. To understand equality in the South African context one needs to refer to the nature of the inequalities that distinguished the country’s past and still torment it today.¹⁶

For many centuries the past was characterized by the subordination and exclusion of black people in economic, social and political life.¹⁷ During apartheid, a person’s skin colour was the determining factor of whether such a person, amongst other things, was entitled to access education, vote or own a piece of land. The product of this system is inequality based on race.¹⁸

However, South Africa is also a “patriarchal society” where women have been subordinated and limited to the amount of economic opportunities than men. This has caused women to become indigent and heavily dependent on men for basic things.¹⁹

Race, gender and class are not the only inequalities that exist in our society as there are other inequalities that intertwine with gender and race. Xenophobia is also deeply rooted in South Africa.²⁰ Other prejudices that exist are those against lesbian and gay people, people with an HIV status are stigmatized²¹ and disabled people are continually being discriminated against.²²

Section 9 of the Constitution covers all of these inequalities and acknowledging them is vital to the “constitutional project of transformation”.²³

¹⁴ See Albertyn & Goldblatt “Equality” in Woolman (eds) *Constitutional Law of South Africa* (2nd edition) 2006 35-2 for a general discussion.

¹⁵ McLachlin “Equality: The Most Difficult Right” (2000) 14 *The Supreme Court Law Review* 17.

¹⁶ For a discussion focused only on historical inequalities in South Africa see Albertyn & Goldblatt 35-3.

¹⁷ *Brink v Kitshoff* NO 1996 (4) SA 197 (CC); *Pretoria City Council v Walker* 1998 (2) SA 263 (CC).

¹⁸ For a comprehensive discussion on the apartheid system and inequality see Albertyn & Goldblatt 35-4.

¹⁹ See Statistics South Africa *Census 2001: Census in Brief* (2003) 55, 71.

²⁰ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) 2006 ZACC 23; 2007 (4) BCLR 339 (CC) ; 2007 (28) ILJ 537 (CC) (12 December 2006) .

²¹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

²² South African Human Rights Commission *Towards a Barrier-free Society: A Report on Accessibility in Built Environments* (2002).

²³ For a comprehensive discussion on constitutional transformation see Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146.

2.3 The concept of equality in terms of the Consumer Protection Act

2.3.1 Introduction

The preamble of the CPA, like the Constitution, takes into account South Africa's history and how apartheid and discriminatory laws of the past have led to the majority of the nation's population to be living in poverty and being illiterate.²⁴ To elevate this burden, the preamble states "that it is necessary to develop and employ innovative means to fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers."²⁵ The preamble has laid the basis for better protection of the consumer.

2.3.2 The meaning of equality in a commercial context

Everyone is equal before the law and has the right to equal benefit and protection of the law.²⁶ In terms of section 9(2) of the Constitution, equality includes the full and equal enjoyment of all freedoms and rights. Further, the State and any person are prohibited to unfairly discriminate on certain recognized grounds.²⁷

The Promotion of Equality and Prevention of Unfair Discrimination Act²⁸ (the "Equality Act") contains a schedule which lists unfair discriminatory practices. The conduct includes the failure or unfair refusal to provide goods or services, or to make facilities available to any person or group of persons on one or more of the prohibited grounds;²⁹ the imposition of practices, conditions or terms that perpetuate the consequences of past unfair discrimination or exclusion regarding access to financial resources;³⁰ and the unfair limitation of access to contractual opportunities for supplying goods or services.³¹ The first two practices are of most importance as they are the most relevant to the "legal framework of the consumer market" as provided for in the CPA.³²

The discriminatory conduct that is recognized by the legislature as infringing on the right of equality in the consumer market is defined in section 8(1) and (2) of the CPA. The CPA identifies two types of discriminatory conducts in the consumer market. The first discriminatory conduct involves the supplier and it concerns conduct that is discriminatory on the grounds contained in

²⁴ The Preamble of the CPA.

²⁵ *Supra*.

²⁶ S9(1) of the Constitution.

²⁷ S9(3) and (4) of the Constitution.

²⁸ 4 of 2000.

²⁹ Par 9(a) of the Equality Act.

³⁰ Par 9(b) of the Equality Act.

³¹ Par 9(c) of the Equality Act.

³² Van Eeden E *Consumer Protection Law in South Africa* (2013) 200.

section 9 of the Constitution and section 1(xxii) and chapter 2 of the Equality Act.³³ In the case of discrimination as contemplated in section 8 and 9 of the CPA, proceedings may be instituted before an equality court³⁴ or a complaint may be lodged with the NCC (Nation Consumer Commission), in which case the NCC must refer the complaint to an equality court should the complaint be valid.³⁵

The second discriminatory conduct relates to conduct on the grounds of discrimination other than the grounds contained in section 9 of the Constitution and chapter 2 of the Equality Act, or those grounds which are embodied in section 8 and 9 of the CPA. The grounds embodied in sections 8 and 9 are the conduct of the supplier when responding to a consumer who is asserting or seeking to uphold his/her rights in terms of the CPA, or when responding to an agreement that has been declared void in terms of the CPA. “Prohibited retaliatory discrimination” therefore considers the prior conduct of a consumer in relation to the CPA, and its purpose is to stop suppliers from victimizing consumers for upholding their rights in terms of the CPA. The retaliatory conduct and discrimination contemplated under section 68 of the CPA does not have to be unfair and there are no grounds to justify such conduct.³⁶

2.4 The concept of equality in the law of contract

In contract law, power concerns the bargaining strength of the parties to the contract in connection with each other.³⁷ In determining the bargaining power of the parties, the factors considered by the courts are the educational level and socio-economic status of the parties.³⁸ In law there are different interpretations of equality. The one interpretation is that people and circumstances will always be different and since all people are different, each must be treated differently. One must keep in mind that reality is complicated and that actually nothing is identical to anything. Thus this makes it hard to motivate why two cases are to be viewed as equal. However, any claim to equality or inequality must be determined against two criteria. The first is that the quality must not be “illusory” and secondly, the quality must be relevant. Where the differentiation does not meet these criteria, discrimination is present. Differentiation “*vis-à-vis* a specific group on the basis of illusory or irrelevant criteria” can be viewed as discrimination.³⁹

On the other hand, one interpretation of equality insists on total equality where every individual receives the same treatment. There is very little support for such an interpretation as

³³ “Prohibited grounds of discrimination involving unfairness” as contemplated in s14 of the Equality Act.

³⁴ S10(1)(a) of the Equality Act.

³⁵ S10(1)(b) of the Equality Act.

³⁶ See Van Eeden 200 for a general discussion.

³⁷ Kim N “Bargaining Power and Background Law” (2009) 12 *Vand J. Ent. & Tech. I.* 93.

³⁸ *Weaver v Amer Oil Co.* 22 Ill.257 Ind. 458, 276 N.E.2d 144 (1971).

³⁹ For a discussion focused only on these criteria see Hawthorne 158.

it fails to take into account that factual differences between people require different treatment. In terms of the interpretation of equality in the UDHR, the aim is not to remove every social inequality that exists, but instead, aims to achieve equality on a fundamental level so that all people may have an equivalent life.⁴⁰ One must bear in mind that all contracting relationships will involve some unequal bargaining, but it is only when the stronger party to the contract abuses their position of strength that the law deems intervention necessary.⁴¹ Such an interpretation allows for differentiation among people, but declines differentiation where it causes inequality regarding human dignity. The principle of equality should be interpreted in such a way so that unequal treatment can be prescribed in unequal circumstances, so that the result can be one of equality on a fundamental level.⁴²

Three phases of equality can be identified. The first is formal equality. This means that the law is applied the same regardless of the circumstances of the individual. The legislature acknowledges this requirement but does not take into account the social realities and the law is thus applied without exception. The result is that the social inequalities that already exist are reproduced by the enforcement of the law. The second phase is procedural inequality. This phase incorporates certain procedures in order to compensate for the unequal social position of the individuals. Thus the law uses procedure to try and correct social inequalities. The final phase is material inequality. This phase is directed at the outcome of the application of the law. All social inequalities are measured against the law and only those that meet the test of social justice are allowed to continue. Such an interpretation of the concept of equality allows for unequal treatment to be prescribed where there are unequal societal circumstances, only if doing so would cause equality on a more fundamental level.⁴³

2.5 The doctrine of inequality

It has been said that the right to equality in a way forces the law of contract to develop a doctrine of inequality. There are many mechanisms available that promise contractual equality and that are part of South African contract law. There are some reservations about applying these mechanisms and it is suggested that an extreme solution be preferred and that is to introduce into the law of contract the doctrine of inequality.⁴⁴

Equality and inequality are parallel concepts and it is feasible to assess the comparative positions of the parties and the level of control enjoyed during the conclusion of the contract. The doctrine of inequality coerces courts to inspect fairness of the market relations as well as

⁴⁰ Article 1, 2 and 7.

⁴¹ Arnow-Richman R "Cubewrap Contracts and Worker Mobility: The Dilutions of Employee Bargaining Power via Standard Form Noncompetes" (2006) *Michigan State Law Review* 963.

⁴² For a discussion only focused on the interpretation of equality see Hawthorne 159.

⁴³ See generally Hawthorne 160.

⁴⁴ For a comprehensive discussion on this aspect see Hawthorne 175.

the fairness of the practices, instead of presuming that there are adequate resources for each party and fairness of market relations. The pivotal question is the unfairness of the market and this is evident in the terms of the contract. All contracts could become invalid, in which the one party has large financial resources, if the doctrine is interpreted too literally. But this would amount to a misunderstanding as the inequality of resources can be neutralized by information or competition.⁴⁵

In the English case of *Lloyds Bank Ltd v Bundy*⁴⁶ Lord Denning suggested the principle of inequality of bargaining power, where he developed an idea that where a party enters a contract that is unfair and whose bargaining power is seriously impaired due to his own needs, he is allowed to revoke the contract if undue influence was present. The outcome of this judgment is that it welcomed the principle of inequality of bargaining power as a test to attribute responsibility.⁴⁷

2.6 Conclusion

The law of contract involves, among others, sanctity of contract (*pacta sunt servanda*) and freedom of contract. As these values are in competition with one another, it is difficult to find a balance between them.⁴⁸

Doctrine of party autonomy assumes that parties enjoy equal bargaining power, have access to information in order to make an informed choice and that they negotiate the terms of their contract.⁴⁹ This is, however, an incorrect assumption as party autonomy is greatly challenged by many developments in contract law, such as the introduction of standard-form contracts, which undermine true freedom of contract. These contracts are presented on a take-it-or-leave-it basis. Mass production and consumption of goods and services has led to mass contracting on standardized terms and conditions, as a matter of convenience, and imposed on the consumer.⁵⁰ Deals are usually concluded by those in society who have access to substantial resources, have negotiating power⁵¹ and have legal representation which not everyone can afford. These challenges to party autonomy prove to be unfair towards the weaker party.

To reduce and control this unfairness in contracts, and therefore protect the consumer, the CPA was enacted. What is of great interest is that the Act deals with the consumer's right to "fair,

⁴⁵ See Collins 66- 68 for a general discussion.

⁴⁶ 1975 QB 326 (3) All ER 757.

⁴⁷ See Collins *supra*.

⁴⁸ For a discussion that only focuses on the competition of contract law values see Hutchison & Pretorius 22.

⁴⁹ De Villiers "Limitations on party autonomy in the context of cross-border consumer contracts: the South African position" (2013) 3 *THRHR* 478.

⁵⁰ For a comprehensive discussion on standard form contracts and their effects see Hutchison & Pretorius 24.

⁵¹ For a more comprehensive discussion on this aspect see Smith R & McCarthy T "Putting standard form contracts under the microscope: contract law" (2008) 8 *Without Prejudice* 32.

just and reasonable” terms and conditions, and provides for those terms and conditions which are void from the outset.⁵²

The principle of good faith is well entrenched in our legal system, however, there has been a great debate about the role it should play in contract law. Good faith in contracts should be protected as it controls the creation, performance and the consequences of contract and it has the possibility to consider inequality between the parties and provide for a solution.⁵³

Both the Constitution and the CPA take into account South Africa’s history when determining equality. The consumer is afforded many rights under the Constitution as well as under the CPA, while the supplier is given many onerous duties towards the consumer. One could conclude that the CPA may have caused inequality in reverse when one looks at the position of the supplier.

The right to equality emphasizes that the law must take “distributive consequences” into consideration. The principle of equality should not mean that the law prevents the gaining of knowledge, power or wealth, but that these resources must be used in a manner to protect the weaker parties.⁵⁴

⁵² Chapter 2, Part G.

⁵³ *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A).

⁵⁴ See Hawthorne 176 for a detailed discussion on this aspect.

CHAPTER 3

THE PLAIN LANGUAGE REQUIREMENT IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

3.1 Introduction

With regard to consumer contracts, the traditional way of practicing law has almost come to an end as a result of a “new era of consumerism” that is supported by various Acts, such as the CPA.⁵⁵ There have been demands for the legislature to intervene “to adjust contract terms, interpretation of enforcement to correct the negative impact of the inequality of bargaining power.”⁵⁶

Louw declares that there have always been protection measures that existed in the South African common law, for example the *contra proferentem* rule, but things began to change when the legislature intervened and consumers acquired various rights.⁵⁷ One of these rights is the right to information in plain and understandable language.⁵⁸

The “plain language movement” is a global movement and it focuses on changing classical legal writing by promoting “plain language drafting”.⁵⁹

Frank states that the CPA is at the heart of the “consumer revolution” in South Africa and it has moved the power from suppliers to consumers.⁶⁰ He explains that consumers are now able to make informed choices when entering into an agreement without being deceived by the supplier. Where the wording could have been simplified, the consumer now has a right of recourse. Before, the burden was on the consumer, “buyers beware”, but today the onus has now moved to the supplier.⁶¹

Such a change, however, is not a way of achieving equality, as it goes from one extreme to another. One could conclude that there is the possibility that the supplier is now in the old position of the consumer.

⁵⁵ Louw E “Simply legal – Legal language in South Africa” 2011 (Dec) *DR* 22.

⁵⁶ See Barnhizer DD “Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions” (2010) *Wake Forest Law Review Forthcoming*; *MSU Legal Studies Research Paper No. 8-13 1* for a general discussion.

⁵⁷ Louw 23.

⁵⁸ *Ibid.*

⁵⁹ For a comprehensive discussion on this aspect see Collins KD “The Use of Plain-Language Principles in Texas Litigation Formbooks” (2005) 24 *Review for Law Students* 429.

⁶⁰ Frank B “Simply unclear – Is the legislature an obstacle to plain language?” 2012 (Nov) *DR* 44.

⁶¹ *Ibid.*

3.2 Right to disclosure and information

3.2.1 Section 22: Right to information in plain and understandable language

First of all, it is necessary to quote section 22 from the CPA:

“(1) The producer of a notice, document or visual representation that is required...to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation –

(a) in the form prescribed in terms of the Act or any other legislation, if any, for that notice, document or visual representation; or

(b) in plain language, if no form has been prescribed for that notice, document or visual representation.

(2) For purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons, for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort...”⁶²

3.2.2 Construction of section 22

The principle of plain language is considered in a very serious light by the legislature as it is also a requirement under the National Credit Act.⁶³ However, the CPA differs slightly from the National Credit Act, in that the CPA does not require that information should be produced in one of the official languages.

Where the CPA or any other legislation requires a document, notice or visual representation to be produced, such document etc must be furnished in plain language and further in the prescribed form, if any.⁶⁴

The purposes that are set out in section 3 of the CPA need to be given effect when interpreting section 22, such as the right to receive information in plain language.⁶⁵ Section 22 aims to improve consumer awareness as well as information and it promotes informed decisions and behavior.⁶⁶ By encouraging consumers to make an informed decision, Stoop and Churr explain

⁶² S22 of the CPA.

⁶³ S64 of Act 34 of 2005.

⁶⁴ S22(1)(a)-(b) of the CPA.

⁶⁵ S2(1) of the CPA.

⁶⁶ S3(e) of the CPA.

that consumers are able to make a comparison of products and services.⁶⁷ Accordingly, they state that information in consumer agreements that is accessible promotes “consumer confidence, empowerment and the development of a culture of consumer responsibility”. Further, standard form documents that are required by legislation increase consumer protection as basic information has to be produced in a “uniform format”, therefore decreasing the likelihood of consumers being misled.⁶⁸

Section 22 can be seen as advancing procedural fairness, in other words, fairness in the actual process of contracting and this allows a consumer to look after his/her own interests in consumer agreements. A significant aspect of this is transparency, which involves issues of importance given to certain terms, the size of the writing, the language used and the construction of the contract as well as giving consumers enough opportunity for reflection. Therefore, one can conclude, that plain and understandable language is of great importance to transparency.⁶⁹

However, even though the supplier has this obligation to write in plain and understandable language, the CPA in addition provides the consumer with the protection of section 4(4).

It will be difficult for a supplier to have equal bargaining power where he has to meet the reasonable expectation of the consumer and the consumer in addition to that is afforded a statutory *contra proferentem* rule which applies from the outset. Such a combination only enables the consumer not to be loyal to his agreement and allows him to escape contractual liability, while the supplier is left defenseless.

Both parties should be responsible for their obligations and afforded the same reasonable remedies in order for them to bargain on equal terms. One could lead to the conclusion that the CPA has afforded the consumer too much protection in comparison to the supplier, thus, maybe causing inequality occur.

3.2.3 Documents and notices to which section 22 applies

According to Hutchison, it may first appear that section 22 does not apply to a document or notice produced voluntarily.⁷⁰ However, section 50 requires that a copy of a written agreement must be furnished to the consumer and that such written agreement must be in plain language,

⁶⁷ Stoop P & Churr C “Unpacking the right to plain and understandable language in the Consumer Protection Act, 68 of 2008” *PER / PELJ* 2013 (16) 528.

⁶⁸ *Supra*.

⁶⁹ For a comprehensive discussion on procedural fairness and transparency see Stoop & Churr 528.

⁷⁰ For a discussion focused only on this aspect see Hutchison & Pretorius 444.

notwithstanding whether the written agreement is required by the CPA or not.⁷¹ Further, in terms of section 49, an indemnity clause and exemption clause must also be in plain language.⁷²

Section 22(1)(a) and (b) provide that where no form is prescribed by the CPA or any other legislation, then the agreement must be in plain language.

The CPA has elevated the plain and understandable language requirement to a consumer right as suppliers are now forced to draft contracts in plain and understandable language to meet the consumer's reasonable expectation. In addition to the obligation of the supplier, the consumer is afforded a defense and an opportunity to escape contractual liability, while, as stated before, the supplier is left mostly defenseless. Is the consumer perhaps not placed beyond equal footing with the supplier, as it might seem that both parties do not have equal protection.

3.3. Section 4 of the CPA (Realisation of consumers' rights)

3.3.1 Introduction

Section 4 of the CPA provides for "realisation of consumer rights" and this section also sets out the way in which the CPA and consumer contracts are to be interpreted. This section illustrates the status of bargaining power between the parties.

3.3.2 Section 4(3)

Section 4(3) of the CPA provides that "if any provision of this Act...can reasonably be construed to have more than one meaning...court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realization...of consumer rights..."

One may ask whether this means that when the CPA is ambiguous, the interpretation favouring the consumer's case must always be preferred.⁷³ It would seem that equality is affected in the case of an ambiguity. It would appear that the supplier is outright at a disadvantage due to the fact that he drafted the contract.

Section 3(d) of the National Credit Act provides that "the purpose of the Act is to promote equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers". Therefore, it is evident that this section recognises that an excessive "consumer-centric" approach will not always be advantageous to the consumer market. However, there is no similar provision in the CPA.

⁷¹ S50 of the CPA.

⁷² S49 of the CPA.

⁷³ See also Hutchison & Pretorius 434 for a general discussion on this aspect.

The provisions in section 4(3) do not override assumptions of interpretation and existing rules, and these provisions should be read in conjunction with the existing rules of interpretation. Section 4(3) is capable of conflicting and broad interpretation. When interpreting the CPA to promote the spirit and purposes of the Act, special importance may be given to social or economic welfare to a greater or lesser degree, one could discover that there is tension between efficiency and fairness, and what is to the advantage of the consumer must generally be determined. It is evident that a balancing of remedies and rights is contemplated and such remedies must be fair to consumers and suppliers.⁷⁴

3.4 Section 4(4)

3.4.1 Breakdown of section 4(4)

This section is to be applied to documents that are prepared or published by the supplier and provides that these documents are to be interpreted to the benefit of the consumer.⁷⁵ These documents are the following: standard forms; contracts; other documents.⁷⁶

This section defines ambiguity as being “...any ambiguity that allows for more than one reasonable interpretation...” and such ambiguity is to be interpreted to the benefit of the consumer.⁷⁷ The supplier is clearly not given the benefit of the doubt and is not given an opportunity to defend himself. It is clear that when only one party can be heard, equality does not exist. One concludes that the CPA has gone a bit too far in protecting the consumer.

Where there is a restriction or limitation to the consumer’s rights, the court must have regard to “the content of the document; the manner and form in which the document was prepared and presented; and the circumstances of the transaction or agreement”.⁷⁸

3.4.2 Codification of the *contra proferentem*

Section of 4(4)(a) of the CPA provides that “...the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier...to the benefit of the consumer...” where there is an ambiguity.⁷⁹

Section 4(4)(a) can be seen as a type of codification of the *contra proferentem* rule⁸⁰ in so far as it applies to consumer contracts. It is not a true codification as it does not repeal the common law. Hutchison and Pretorius explain that this rule basically provides that words that are

⁷⁴For a discussion focused only on the balancing of rights and remedies see Van Eeden 39

⁷⁵S4(4) of the CPA.

⁷⁶*Ibid.*

⁷⁷S4(4)(a) of the CPA.

⁷⁸S4(4)(b) of the CPA.

⁷⁹S4(4)(a) of the CPA.

⁸⁰See generally Hutchison & Pretorius 453.

ambiguous are to be interpreted against the person who drafted them or for whose benefit they were drafted.⁸¹

The rights in the CPA are in addition to those rights that are available to the consumer under the common law. Section 4(4)(a) does not repeal or replace the common law *contra proferentem* rule. The statutory *contra proferentem* rule is available to the consumer in addition to the common law *contra proferentem* rule making this section that much stronger for the consumer. While the consumer has this strong protection, the supplier does not have as strong of a defense. By examining this section one could come to the conclusion that the CPA has caused an inequality to occur as it seems that it does not provide equal protection to all people.

The *contra proferentem* rule is usually applied to standard form contracts and as a result of mass production, standard form contracts have become a necessity in the case of consumer contracts.⁸² The *contra proferentem* rule can be seen as being random as there really isn't any logical rationale for it and it is usually regarded as a rule of last resort by our courts, but this does not apply in the case of exemption clauses.⁸³ At common law, whether the rule will be selected or rejected, depends on whether the court is convinced that there is "a bargaining power disparity."⁸⁴

Language used in contract cannot be standardized and ambiguous at the same time because if a word possesses only one meaning it is not capable of numerous reasonable interpretations. Uniformity of language is destroyed when ambiguity exists. The main purpose of this rule is to discourage ambiguity and the reason for this is because standard form contracts are detrimental to drafters and "social utility."⁸⁵

Section 4(4)(a) is not subject to the common law rule and therefore it is not to be used as a last resort but it can be used from the outset as far as consumer contracts are concerned. However, it seems that section 4(4) perhaps goes beyond the traditional rules of interpretation as it also provides that a court must interpret an agreement to the benefit of a consumer so that "any restriction, limitation, exclusion or deprivation of a consumer's legal rights" is limited:

⁸¹Hutchison & Pretorius 274.

⁸²See Cserne P "Policy Considerations in Contract Interpretation: the *Contra Proferentem* rule from a Comparative Law and Economics Perspective". http://works.bepress.com/peter_cserne/28 (31 August 2014) 6 for a general discussion.

⁸³ See Christie *The Law of Contract in South Africa* 2010 (6th edition) 233 for a general discussion on this aspect.

⁸⁴ *First Fin. Ins. Co. v. Purolator Sec., Inc.*, 388 N.E.2d 17, 21-22 (Ill. Ct. App. 1979). And see Barnhizer DD "Inequality of Bargaining Power" (2004) 76 *University of Colorado Law Review* 9 for a general discussion.

⁸⁵ Horton D "Flipping the Script: *Contra Proferentem* and Standard Form Contracts" <http://ssrn.com/abstract=1154243> (26 November 2015).

“to the extent that a reasonable person would ordinarily contemplate or expect, having regard to –

- (i) the content of the document;
- (ii) the manner and form in which the document was prepared; and
- (iii) the circumstances of the transaction or agreement.”⁸⁶

On the other hand, there seems to be no similar provision for the supplier where his rights are restricted or limited, showing one the possibility that suppliers might not be on equal footing with the consumer and thus causing inequality in reverse.

3.5 Application of section 4(4)(a)

3.5.1 Introduction

As stated above, section 4(4)(a) of the CPA in a way codifies the *contra proferentem* rule. This section states that courts must interpret consumer contracts “so that any ambiguity that allows for more than one reasonable interpretation... is resolved to the benefit of the consumer”.

Christie submits that the *contra proferentem* rule does not determine the common intention of the parties and that it is a rule of last resort that is applied once all the other mechanisms for determining the common intention of the parties have been unsuccessful. The exception to this limitation (that the rule may only be used as a rule of last resort) is that it does not apply to exemption clauses⁸⁷ and now, with the result of section 4(4)(a) of the CPA, it does not apply to consumer contracts.

There is the possibility that inequality of bargaining power between the parties might occur, as the consumer is given an opportunity to escape his contractual obligations by interpreting the wording of the contract in another manner. This interpretation will be interpreted against the supplier for the sole reason that he is the drafter of the contract. The effect could be that there will be inequality of bargaining power as the consumer is given an opportunity to go back on his word by interpreting a word or clause in another manner than previously agreed. A party to a contract who enjoys a large amount of bargaining power in comparison to the other party to the contract may be able to persuade others to act while they themselves do very little or nothing at all.⁸⁸

⁸⁶ S4(4)(b)(i)-(iii) of the Consumer Protection Act 68 of 2008.

⁸⁷ *Durban’s Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) All SA 411 (A).

⁸⁸ Bridgeman C “Misrepresented intent in the context of unequal bargaining power” 2006 *Michigan State Law Review* 993.

However, it has to be determined whether section 4(4)(a) applies only if there is an ambiguity or does it apply even if the terms of the contract appear on the face of it to be clear but the consumer can show an alternative meaning that the words can reasonably have?

3.5.2 *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA)

The case of *Drifters Adventure Tours CC v Hircock*⁸⁹ (from hereafter the “*Hircock*” case) affords us an opportunity to gain an understanding of how our courts approach the interpretation of exemption clauses in contracts and how they apply the *contra proferentem* rule.⁹⁰ The facts of the case are the following:⁹¹

The appellant was a tour operator who worked across the borders from South Africa. Due to the negligent driving of the employee of the appellant, the respondent sustained injuries in an accident. Vicarious liability for damages was denied by the appellant who relied on the exemption clause which provided:

“I have read...and accept the conditions...as set out by Drifters in their brochure and on the reverse side...I further absolve Drifters...of any liability whatsoever...”

On the reverse side of the booking form were the conditions which read as follows:

“Due to the nature of...driving and the general third-world conditions...Drifters, their employees...do not accept any responsibility for any...injury...accident...experienced from time of departure to time of return...”

The question in this case was “whether the exemption clause protected the appellant from liability for damages sustained by the respondent from the negligent driving of one of the appellant’s employees on a public road”.⁹²

Having regard to the interpretation of indemnity clauses, the court established that the exemption clause should be read with reference to the whole contract and not in isolation.⁹³ Essentially what the court meant is that the exemption clause on its own could exclude liability; however, reference to the conditions caused a person to also read the reverse side.⁹⁴

⁸⁹2007 (2) SA 83 (SCA).

⁹⁰See Marx F and Govindjee A “Revisiting the Interpretation of Exemption Clauses *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA)” (2007, Volume 28) *Obiter* 622 for a general discussion.

⁹¹*Ibid.*

⁹²See Marx & Govindjee 623 for a general discussion.

⁹³*Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) par 88B.

⁹⁴*Drifters Adventure Tours CC v Hircock* 88G.

According to the court, the reference to “driving” was ambiguous and it had to be construed against the *proferens* (in other words the person for whose benefit the contract was drafted).⁹⁵ The court explained that the cause of the ambiguity was due to the fact that the word “driving” in the conditions only referred to driving in “general third-world conditions” and not to negligent driving anywhere in the country or terrain. Therefore, the exemption clause did not exclude the appellant’s liability for negligent driving on public roads.

The court found that the exemption clause had more than one reasonable meaning and that it had to be construed against the *proferens*⁹⁶, thus the court applied the *contra proferentem* rule. As a result, the exemption clause did not exclude the appellant’s liability for negligent driving on public roads.

For an exemption clause to be enforceable it has to be clear, unambiguous and it cannot be against public policy.⁹⁷ The language used should be susceptible to only one meaning in order to prevent the court from using the *contra proferentem* rule to the drafter’s disadvantage.⁹⁸

Another case to be considered in this regard is the case of *Walker v Redhouse*⁹⁹ (hereafter cited as the “Walker” case) which also dealt with the interpretation of an exemption clause and the *contra proferentem* rule. In this case the court stated that while an exemption clause will be interpreted *contra proferentem* when it is ambiguous, “one should not strain the meaning of the language to find the ambiguity”.¹⁰⁰ The court further quoted the case of *Durban’s Water Wonderland (Pty) Ltd v Botha*¹⁰¹, where it was said that “...the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be “fanciful” or “remote”...”¹⁰².

3.6 Section 4(4)(a) v exemption clauses

Even though in the *Hircock* case the terms in the exemption clause appeared on the face of it to be clear, the court still construed the exemption clause as being ambiguous and applied the *contra proferentem* rule where the consumer was able to show a reasonable alternative meaning. This leads one to ask the question of whether section 4(4)(a) will apply in the same manner or will it apply only in the case of ambiguity.

⁹⁵ *Ibid.*

⁹⁶ *Drifters Adventure Tours CC v Hircock* 88G-H.

⁹⁷ For a comprehensive discussion on the enforceability of exemption clauses see Marx & Govindjee 624.

⁹⁸ See Marx & Govindjee 629 for a general discussion on this aspect.

⁹⁹ 2007 (3) SA 514 (SCA).

¹⁰⁰ *Walker v Redhouse* [13].

¹⁰¹ *Supra.*

¹⁰² *Walker v Redhouse* [14].

In view of the fact that the CPA was enacted to afford the greatest protection for the consumer and to put the consumer on equal footing with the supplier, it would appear that section 4(4)(a) must be read as being very wide and it will apply in the same way as the *contra proferentem* rule was applied in the *Hircock* case.

Further, section 4(4) provides that it will apply in the following cases: when there is an ambiguity; the consumer can show more than one reasonable interpretation; and where the consumer is deprived of his/her legal rights, therefore it does not apply in the case of an ambiguity only.

3.7 Conclusion

The values and purpose of the CPA seem to provide for a great amount of support in favour of a further relaxation of the *contra proferentem* rule.¹⁰³ The conventional approach to interpreting a contract would be to determine the joint intentions of the parties and then to give effect thereto.¹⁰⁴ As a result of the CPA such an approach cannot be followed, as the courts now have to interpret contracts in such a way as to promote the spirit and purpose of the CPA and with the inclusion of the statutory *contra proferentem* rule, the consumer is ensured preference and greater protection as the legislature now requires a court to first consider the provisions of the CPA and how a reasonable consumer would have understood the contract, term or word before giving effect to the parties' joint intention.¹⁰⁵ The CPA has elevated the plain and understandable language requirement to a consumer right as suppliers are now forced to draft contracts in plain and understandable language to meet the consumer's reasonable expectation. In addition to the obligation of the supplier, the consumer is afforded a defense and an opportunity to escape contractual liability, while, as stated before, the supplier is left mostly defenseless. Is the consumer perhaps not placed beyond equal footing with the supplier, as it might seem that both parties do not have equal protection as contemplated by the Constitution.

One could observe this is a perhaps very dangerous and unfair situation for the supplier, especially when one takes into consideration section 22 and 49 of the CPA (which will be discussed in Chapter 4). There is a possibility that the CPA might have caused inequality in reverse as it appears that the bargaining power now lies in the hands of the consumer.

¹⁰³ S4(3) & (4) of the CPA

¹⁰⁴ See Kerr AJ *The Principles of The Law of Contract* 2002 (6th edition) 386 for a general discussion on this aspect.

¹⁰⁵ S3 & 4 of the CPA.

A party to a contract who has a large amount of bargaining power and who is not certain about the probability of a performance will basically not commit or will secure the right to cancel the contract.¹⁰⁶

¹⁰⁶ For a comprehensive discussion on this aspect see Bridgemen 1001

CHAPTER 4

THE RIGHT TO JUST, FAIR AND REASONABLE TERMS AND CONDITIONS

4.1 Introduction

The CPA goes further than just the plain and understandable language requirement by allowing the courts to observe the nature of the contractual terms and the fairness of the conduct of the supplier in contractual dealings with consumers.¹⁰⁷ This can be found in section 49 of the CPA, which provides for notice required for certain terms and conditions. The bargaining power of parties does not only determine the price of the goods or services but also non-price terms.¹⁰⁸

Section 49 has the potential to have an impact on the equality of the parties' position in the contract as it adds to the level of protection of the consumer who is already adequately protected.

4.2 Section 49

Section 49 provides:

“(1) Any notice to consumers or provision of a consumer agreement 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 drawn to the attention of the consumer...

(2)...if a provision or notice concerns any activity or facility that is subject to any risk-

...

(c) that could result in serious injury or death,

The supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer...and the consumer must have assented to that

¹⁰⁷ Newman S “The Application of the Plain and Understandable Language Requirement in terms of the Consumer Protection Act – Can We Learn from Past Precedent?” 2012 *Obiter* 637.

¹⁰⁸ Choi A & Triantis G “The Effect of Bargaining Power on Contract Design” (2012) 98 *Virginia Law Review* 1665.

provision...by signing or initialing the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

(3) A provision, condition or notice...must be written in plain language...

(4) The fact, nature and effect of the provision or notice...must be drawn to the attention of the consumer-

(a) in a conspicuous manner...

(b) before the earlier of the time which the consumer

(i) enters into the agreement...

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice..."

4.3 Overview of section 49

Section 49 sets out the terms which need to be brought to the attention of the consumer and the way in which this should be done.¹⁰⁹ Therefore, the core of section 49 is found at subsection (1) which requires that, basically, an exemption clause is to be drawn to the attention of the consumer, whereas subsection (3) – (5) provide for the way in which the attention must be drawn to the consumer.¹¹⁰

Where a notice or provision fails to satisfy the requirements of section 49, the notice or provision can be ordered to be severed from the agreement by the court or it can be declared to have no effect or force as far as the transaction is concerned.¹¹¹

Newman explains that there are no guidelines of how the notice should take place when drafting a contract, and therefore it will be up to the drafter to determine an effective method.¹¹² One can observe that this section adds to the high protection that the consumer has and it increases the supplier's obligations towards the consumer. Exemption clauses must be written in plain language and brought to the attention of the consumer. As was seen in the *Drifter's case (supra)*, there is still a danger that, even though the supplier complied with the

¹⁰⁹ S49(4) of the CPA.

¹¹⁰ See Tait M & S Newman "Exemption Provisions and the Consumer Protection Act, 2008: Some Preliminary Provisions" 2014 (35) *Obiter* 633 for a general discussion on this aspect.

¹¹¹ S52(4)(a) of the CPA.

¹¹² Newman 647.

CPA, the consumer may interpret the clause in another manner resulting in him escaping in contractual liability.

Inequality of bargaining power is referred to as a factor “contributing to procedural unconscionability,” it is, however, inadequate on its own. Unless the inequality is due to incapacity, undue influence or duress, courts usually require something more that affects the inequality of bargaining power. For example, that the weaker party didn’t have an opportunity to read or understand the implications of the term.¹¹³

What could make this an unfair situation is the fact that the supplier is not given any guidelines in how the required notice is to take place. Therefore, the supplier does not have any statutory defense to rely on should the consumer declare proper notice was not given.

One could conclude that the bargaining positions of the parties in such a situation is unequal as mammoth obligations are placed on the supplier (with vague guidelines) while the consumer is afforded adequate protection and is placed in a secure position. The consumer is given sufficient time to read the terms and conditions and these are explained to him by the supplier.

4.4 Exemption clauses and section 49 of the Consumer Protection Act

4.4.1 Introduction

The most suitable method of reducing risk of liability of the supplier is by inserting a clause in the contract with a consumer (either by way of a written and signed agreement or by means of a displayed notice) whereby the supplier is exempt from any liabilities which he would otherwise be bound to accept.¹¹⁴

Exemption clauses are generally included in standard form contracts and also in the form of a displayed notice, for example, in hotels, restaurants, and parking garages amongst others. In *Afrox Healthcare (Pty) Ltd v Strydom*¹¹⁵ the judge stated that “exclusionary clauses in standard contracts were the rule rather than the exception.” According to Van Eeden, a large portion of consumer law development can be attributed to “legislative responses to business disclaimers of accountability for negative consequences attendant upon their dealings with consumers.”¹¹⁶ The CPA has inserted a number of provisions which has affected the use of provisions by

¹¹³ § 208 cmt Restatement (Second) of Contracts (1979). See also Choi & Triantis 1729 for a comprehensive discussion on this aspect.

¹¹⁴ Christie 191.

¹¹⁵ 2002 (6) SA 21 (SCA).

¹¹⁶ Van Eeden 4.

suppliers that aim to exempt the supplier from liability for harm caused to consumers due to the negligent conduct of the supplier.¹¹⁷

As a result of the CPA the supplier now has to bring the exemption clause to the attention of the consumer in a conspicuous manner. There are no guidelines of how this should take place. The supplier is left to determine this for himself and hope that he will be protected should there be any misunderstanding on the consumer's part.

One could observe that such a situation is slightly unfair and perhaps does the opposite of promoting equal bargaining as the supplier does not have a defense that he can invoke, but instead has many onerous duties placed on him.

4.4.2 Exemption clauses and the common law position

As stated above, exemption clauses are generally included in standard form contracts. A standard form contract is a contract that is drafted beforehand by a supplier and it is given to a consumer on a "take-it-or-leave-it" basis.¹¹⁸ The authoritative expression of the bargaining power issue as perceived by the courts is "the absence of power linked to a party's status *vis-à-vis* the opposing party." This inequality presents itself by the "the absence of choice and inability to negotiate in the face of a take-it-or-leave-it agreement."¹¹⁹ The majority of consumers accepts and signs a contract without being aware of the exemption clause or without knowing the consequences of signing such an agreement.¹²⁰ The reason for this is because "little is perceived practically in attempting to resist the terms of a standard form contract", or because the provision is drafted in complicated legal language as well as being written in small print.¹²¹ Tait and Newman state that the implication of signing such a contract is that the *caveat subscriptor* rule will apply and the signatory will be held bound to it even though he did not read or understand the contract.¹²² The cornerstone for such contractual liability is that the signatory has created a reasonable reliance in the mind of the other party that consensus had been reached.¹²³

However, the *caveat subscriptor* rule is not complete as a signatory can escape contractual liability in the case of where he did not read the contract by relying on *iustus error*. *Iustus error* will apply in the case of where a contract contains an abnormal provision which the reasonable consumer would not expect for that type of contract, or where the agreement strayed from

¹¹⁷ For a discussion focused only on how suppliers abused exemption provisions see Tait & Newman 629.

¹¹⁸ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) par 135.

¹¹⁹ See Arnow-Richman 970 for a general discussion.

¹²⁰ See Tait & Newman 630 for a general discussion on this aspect.

¹²¹ *Barkhuizen v Napier* par 135.

¹²² Tait & Newman *supra*.

¹²³ *Ibid.*

previous negotiations, or where there was a misrepresentation of the terms.¹²⁴ Duress, commercial bribery or undue influence is also grounds for escaping contractual liability by the signatory.¹²⁵

A notice displayed by a supplier can also contain an exemption provision. In terms of the common law, an exemption clause contained in a notice will apply to a consumer where the supplier took the necessary steps to bring such a notice to the attention of the consumer, making him aware thereof.¹²⁶ A supplier may contract out of liability provided that he does so in clear and unequivocal terms.¹²⁷

As long as an exemption provision is in accordance with general requirements for the conclusion of a valid contract, a provision or term that excludes liability is valid. Exemption clauses for harm caused negligently as well as harm caused through gross negligence have been enforced by our South African courts.¹²⁸

Even though public policy sanctions the use of exemption clauses and even allows for them to be enforced, there are, however, limits.¹²⁹ One of these limits is that a party cannot contract out of liability for fraudulent conduct.¹³⁰ Tait and Newman declare that as a general rule, exemption clauses are to be interpreted restrictively and this causes the application of an exemption clause to be limited. The *contra proferentem* rule plays an important role in this regard, as where more than one reasonable interpretation of the exemption clause exists, the interpretation favouring the consumer will be preferred.¹³¹

In terms of the CPA, the supplier has to bring the exemption clause to the attention of the consumer and explain its consequences. After the consumer is fully aware and informed about the exemption clause, he may still escape contractual liability by relying on section 4 of the CPA in addition to the common law *contra proferentem* rule.

Such a strict rule could possibly cause an unfair situation for the supplier. This is because where the words could not have been made any simpler, the consumer is still given an opportunity to escape liability instead of being bound to the contract.

¹²⁴ See Tait & Newman 630 for a general discussion on this aspect.

¹²⁵ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

¹²⁶ *Durban's Water Wonderland (Pty) Ltd v Botha and Another*.

¹²⁷ See generally Tait & Newman 631.

¹²⁸ *Ibid.*

¹²⁹ See Christie 191 for a general discussion on this aspect.

¹³⁰ *Ibid.*

¹³¹ *Drifters Adventure Tours CC v Hircock supra*.

As a result of *Afrox Healthcare Bpk v Strydom* there are now very few common law mechanisms available for regulating exemption clauses and it is this very situation that has called for consumer protection against unfair contract terms in South Africa.¹³²

The facts of *Afrox Healthcare Bpk v Strydom* are the following. The appellant was the owner of a hospital and the respondent was a patient that had been admitted to the hospital for an operation as well as post-operative medical treatment. When the patient was admitted, an agreement was concluded between the parties. According to the respondent, “it was a tacit term of this agreement that the appellant’s nursing staff would treat him in a professional manner and with reasonable care”. After the operation the respondent experienced post-operative complications due to the negligent conduct of a nurse, leaving the respondent permanently disabled. It was argued by the respondent that the nurse’s negligent conduct had constituted a breach of contract by the appellant and thus instituted an action holding the appellant responsible for the damages he suffered. However, the admission document signed by the respondent contained an exemption clause, which stated that the respondent

“absolved the hospital and/or its employees and/or agents from all liability and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused by the patient whatever the cause/causes are, except only with the exclusion of international omission by the hospital, its employees or agents.”¹³³

The appellant thus relied on this exemption clause contained in hospital admission forms to avoid liability. The respondent argued that such a clause was contrary to public interest, it was contrary to the principles of good faith, and that there was a legal duty on the admission clerk to bring his attention to the relevant clause. The evidence reveals that the respondent had not read the contract before he signed it and that the contract was not explained to him. The respondent based his argument on public policy by alleging that there was unequal bargaining power between the parties at the time of conclusion of the contract. The Supreme Court in this case noted that inequality in bargaining power would not *per se* justify the conclusion that a term of a contract which favoured a “stronger” party would be against public policy. At the same time it had to be accepted that unequal bargaining power could be a factor that might, together with other factors, play a role in considering public policy.¹³⁴

¹³² Tait & Newman 632.

¹³³ *Afrox Healthcare Bpk v Strydom* 26.

¹³⁴ *Afrox Healthcare Bpk v Strydom* 27.

The court cited a cautionary principle that was laid down in the case of *Sasfin (Pty) Ltd v Beukes*¹³⁵ that “the power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases.”¹³⁶ Based on the evidence, the court did not find that the respondent had occupied a weaker bargaining position and that there was no legal duty on the appellant to explain the content of the admission form. One could, however, theorize about the type of evidence the court would have to contemplate in order to show inequality of bargaining power. The following examples could be considered: “Is the consumer expected to have approached other hospitals to ascertain their contractual terms; would it make a difference whether the admission to hospital was pre-arranged by telephone or in an emergency; did the patient live close by or far away; and has a survey been conducted of hospital admission terms in the area.”¹³⁷

Tait and Newman state that the courts are concerned whether it is unconstitutional to exclude liability for death or personal injury caused by the supplier. In terms of *Johannesburg Country Club v Stott*¹³⁸, such an exemption clause would be against public policy. The Supreme Court of Appeal expressed that “it is arguable that to permit such exclusion of liability for death or personal injury would be against public policy because it runs counter to the high value the common law and, now, the Constitution, place on the sanctity of life.”¹³⁹

In *Naidoo v Birchwood Hotel*¹⁴⁰ the court expressed that a provision that excludes liability of a party for the negligent causing of death of another would most likely not withstand a constitutional challenge.¹⁴¹

4.5 The impact of the Consumer Protection Act on exemption clauses

The use of exemption clauses in consumer contracts are controlled by numerous provisions in the CPA. There are various “methods of control” which can be separated into different categories.¹⁴²

The first class of these methods comprises of rules that provide for the requirements that need to be met for a provision to be considered as part of the contract. These rules are known as “tests of incorporation”. Section 49 of the CPA comprises of tests of incorporation. The

¹³⁵ 1989 (1) SA 1 (A).

¹³⁶ At 9B.

¹³⁷ See Van Eeden 77 for a general discussion.

¹³⁸ 2004 (5) SA 511 (SCA).

¹³⁹ At par 12.

¹⁴⁰ *Supra*.

¹⁴¹ At par 44 – 45.

¹⁴² Tait & Newman 632.

result is that before an exemption clause becomes part of the contract, it must first comply with certain formal requirements.¹⁴³

The second class of methods concerns the content of the exemption clause and this is known as “substantive control or content control”.¹⁴⁴

Finally, the third class is interpretational control and this relates to the “rules and process of interpretation”.¹⁴⁵ In the case of an ambiguous provision, it will usually be interpreted against the person who drafted the contract, who is generally the supplier. This is according to the *contra proferentem* rule which has been incorporated into the CPA in section 4(4)(a).

The focus will be on the first category.

4.5.1 Tests of incorporation

4.5.1.1 Section 49(3): The exemption clause must be written in plain language

The exemption clause must be written in plain language.¹⁴⁶ This requirement can also be found in section 50(2)(b)(i) of the CPA which provides that if an agreement is in writing, it must be in plain language, regardless of the fact that the writing is required by the CPA or not.

4.5.1.2 The exemption clause must be noticeable

In terms of section 49(4), the exemption clause must be brought to the attention of the consumer in a conspicuous manner. However, no guidelines have been published on how this is to be done.

As regards drafting, Tait and Newman declare that the supplier would have to put the exemption clause on the first page of the contract.¹⁴⁷ The supplier will then have to further draft the clause in bold lettering, a large font and place the exemption clause in a box with a clear heading and a space for signature.¹⁴⁸ By doing this, Tait and Newman conclude that the supplier will then be seen as having taken reasonable steps to bring the exemption clause to the attention of the consumer.

¹⁴³ Tait & Newman 632.

¹⁴⁴ Section 48 & 51 of the CPA.

¹⁴⁵ See Tait & Newman *supra*.

¹⁴⁶ Section 49(3) of the CPA.

¹⁴⁷ Tait & Newman 634.

¹⁴⁸ *Ibid.*

4.6 The *caveat subscriptor* rule: From a contractual liability perspective

4.6.1 Introduction

Affixing a signature to a written document has become an important rite for present day commerce.¹⁴⁹ By appending his signature to a contract, the signatory indicates that he has been accustomed to the contents of the contract and agrees to be bound to that contract.¹⁵⁰

4.6.2 An analysis of the *caveat subscriptor* rule

Christie explains this rule of interpretation as a matter of common sense, that when a person signs a document he signifies his consent to the contents of the contract and if the subsequent outcome is not to his liking he has only himself to blame.¹⁵¹

It has sometimes been stated that this rule may be viewed as a rebuttable presumption that the person who signed the contract knows what the contract contains.¹⁵² Christie declares that this view is appropriate where the issue is whether the person signing knew the contents of the contract, and it is inappropriate where the issue is whether the signatory should be held bound by it.

The doctrine of quasi-mutual assent is the true basis of this rule, which poses the question “whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signifying his intention to be bound by it”.¹⁵³

Therefore, only a reasonable person may rely on this doctrine and such a person is entitled to assume that the signatory has indicated his intention to be associated with the contents of the contract.¹⁵⁴

A relevant case in this regard is *George v Fairmead (Pty) Ltd.*¹⁵⁵ A hotel guest had signed a hotel register without reading it, it contained contractual terms to which the hotel guest was bound to. The judge stated that “When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify by doing so, his assent to whatever words appear above his signature”.¹⁵⁶

¹⁴⁹ Cornelius *S Contemporary Private Law* 2012 IAITL, Athens 1.

¹⁵⁰ *Ibid.*

¹⁵¹ Christie *The Law of Contract in South Africa* 2010 (6th edition) LexisNexis: Pietermaritzburg 181.

¹⁵² *Ibid.*

¹⁵³ Christie 182.

¹⁵⁴ See Christie 184 for a general discussion.

¹⁵⁵ 1958 (2) SA 465 (A).

¹⁵⁶ *George v Fairmead* 472.

4.7 The change brought about by the Consumer Protection Act regarding the common law position

Section 49(1) of the CPA now requires that a supplier is to draw the attention of the consumer to any term or condition that purports to limit the liability of the supplier, imposes an obligation on the consumer and any acknowledgement of a fact by the consumer.

How this affects the equality of bargaining power is that the supplier not only explains the terms and conditions of the contract, but the supplier also has to physically point out certain terms to the consumer. This is a process that will no doubt require a large amount of effort from the supplier. The supplier exposes everything in the contract to the consumer, but the fact is that the consumer will always have an escape route as everything will ultimately be interpreted in favour of the consumer. It is interesting to refer to the common law position in this regard. As stated by Christie, there is no general rule at common law which provides that a signatory must be clearly or directly warned of what is in the contract before he signs it.

A relevant case in this regard is *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers*.¹⁵⁷ The appellant and his wife went to the offices of the respondent who was a courier company. The appellant countersigned American Express travellers' cheques (that were worth US \$16 000) and in the meantime his wife completed and signed the respondent's standard form document entitled "dispatch note" with the assistance of an employee of the respondent, Mrs. Barnard. The appellant was aware that the dispatch noted amounted to a contract between him and the respondent.¹⁵⁸

Where the appellant's wife had signed the dispatch note, the following appeared in red ink:

"This shipment is accepted by Sun Couriers subject to the conditions of carriage printed on the reverse of the copies and understood. In particular, your attention is drawn to Sun Couriers maximum liability of R50 per shipment for loss of damage. If you wish Sun Couriers to accept a higher liability, the value of this shipment must be declared in the space provided. Refer the published tariff for conditions and exclusions."¹⁵⁹

The conditions of the carriage printed on the reverse included the following:

"8.2 Subject to what is stated below, the courier will accept the responsibility up to the value of the goods declared on the dispatch document. If no value is declared, the maximum responsibility that will be accepted is R50.

¹⁵⁷ 2007 (2) SA 599 (SCA).

¹⁵⁸ At par1.

¹⁵⁹ At par 2.

8.6 The maximum compensation in respect of any single shipment of goods shall be R100 000.

8.7 The courier accepts no responsibility in respect of and will not pay compensation in the event of loss or damage to jewelry, precious stones and metals, negotiable instruments, or any article exceeding R3000 of value per kilogram of gross mass, irrespective of the contents.”¹⁶⁰

The travellers’ cheques were “negotiable instruments” as referred to in 8.7. The respondent relied on the above clauses to limit or exclude his liability. The appellant on the other hand contended that it was never his intention to limit the respondent’s liability or to exempt him from liability, and further that he was not aware of these clauses in the contract.¹⁶¹

However, the appellant’s main argument was that “Mrs. Barnard had made express oral representations inconsistent with the conditions printed on the reverse side of the dispatch note.”¹⁶² In evidence it was clear that the appellant knew that a written agreement would be concluded and that it would be signed by either himself or his wife; that the agreement would contain standard terms and conditions; and that there was a possibility that the agreement would contain exclusions.¹⁶³

The court accepted that the appellant believed that when the agreement was entered into on his behalf, the respondent would be held liable if the cheques happen to get lost. Thus there was *dissensus* as Mrs. Barnard clearly intended to conclude the agreement subject to the conditions which excluded the respondent’s liability. The main question arose “whether despite the appellant’s unilateral mistake the *caveat subscriptor* rule applies and the appellant is nevertheless bound by the exclusionary clauses on the basis of quasi-mutual assent.”¹⁶⁴

The judge stated that:

“There was no obligation on Mrs. Barnard to point out the possible consequences of an exemption clause. To hold otherwise would be to introduce a degree of paternalism in our law of contract at odds with the *caveat subscriptor* rule.”¹⁶⁵

The judge concluded that based on this reasons, amongst others, the mistake under which the appellant was laboring was not excusable and it followed that the exclusionary clauses formed part of the agreement of the parties.¹⁶⁶

¹⁶⁰ *Supra*.

¹⁶¹ At par 3.

¹⁶² At par 4.

¹⁶³ At par 5.

¹⁶⁴ At par 6.

¹⁶⁵ *Hartley v Pyramid Freight* [9].

In *Afrox Healthcare (Pty) Ltd v Strydom*¹⁶⁷ the judge held that:

“The respondent’s subjective expectations about what the agreement between himself and the appellant would contain played no role in the question of whether a legal duty had rested upon the admission clerk to point out the content of the exclusionary to the respondent. What was important was whether a provision such as the relevant exclusionary clause was, objectively speaking, unexpected.”¹⁶⁸

The common law position provides for a state of equality between the parties to the contract as everyone is responsible for their own actions, acknowledgments and understandings.

4.8 Conclusion

There has been a huge argument for legislation to protect the consumer due to the legislative responses to business disclaimers of accountability for negative consequences attendant upon their dealings with consumers.¹⁶⁹ The aftermath of *Afrox Healthcare Bpk v Strydom*¹⁷⁰ is a clear example of this.

As a result of section 49, suppliers are now burdened with the task of drafting their agreements and exemption clauses in a certain way. This method of drafting aims to protect the consumer by ensuring clarity and informed decision making. As stated earlier, no guidelines on drafting have been published yet, therefore it is crucial as to what kind of method of drafting the supplier chooses. By not meeting the consumer’s reasonable expectation could result in the consumer escaping contractual liability. By referring to the common law, one notices that there is no general rule at common law which provides that a signatory must be clearly or directly warned of what is in the contract before he signs it. It is the signatory’s duty to make himself aware of the contract. By signing a contract, the *caveat subscriptor* rule comes into operation whether the signatory read the contract or not. The supplier should be able to rely on this act of signing, however, it seems that the consumer will be protected by the CPA even from something to which he agreed to.

The CPA has imposed these strict rules regarding exemption clauses on the supplier, but one must determine how attainable it is for the supplier to comply with all these rules. Perhaps this has caused the supplier to be placed in an unfair position, considering all the other onerous duties that have been placed upon him, the repeals of certain common law rules by the CPA and additional rules to the common law rules.

¹⁶⁶ At par 10.

¹⁶⁷ 2002 (6) SA 21 (SCA).

¹⁶⁸ *Afrox Healthcare (Pty) Ltd v Strydom* 29.

¹⁶⁹ *Supra*.

¹⁷⁰ *Supra*.

CHAPTER 5

RULES TO COMPLY WITH THE REQUIREMENTS OF PLAIN LANGUAGE IN DRAFTING A CONTRACT

5.1 Introduction

In terms of section 22(2) of the CPA, plain language is language that:

“an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort...”

When determining whether a document is in plain language, the following features must be taken into account¹⁷¹:

- “(a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- (b) the organisation, form and style of the notice, document or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.”¹⁷²

The supplier must take these aspects into account and adopt a certain drafting technique in order to achieve its objectives, namely, that the contract is interpreted by the consumer and the courts in the way the supplier intended and to avoid any ambiguities.¹⁷³ The supplier must be aware of how the words are understood and used by the courts and other legal drafters.¹⁷⁴ Unfortunately, the universal practice of contract drafting has been to revise or copy and paste from precedent contracts.¹⁷⁵

¹⁷¹ S22(2) of the CPA.

¹⁷² *Ibid.*

¹⁷³ Anderson M & Warner V *Drafting and Negotiating Commercial Contracts* 2007 (2nd edition) 43.

¹⁷⁴ Anderson 44.

¹⁷⁵ Adams KA “Dysfunctional Drafting” 2008 (Sep) *National Law Journal*.

By doing so, the supplier can attempt to place himself on equal footing with the consumer and ensure that they have a more equal bargaining power.

The second objective of the supplier when drafting a contract is intelligibility. Conventional contract language contains “jargon and old-fashioned language” which is not normally used in daily speech. Examples would be, “hereinafter”, “determine” and “in the event that” (which means *if*). Technical language in a contract may be required, but it is possible to draft a contract in plain modern English.¹⁷⁶

A balance needs to be struck between avoiding “legal jargon” which the consumer does not comprehend and using “technical language” which will permit that the contract is interpreted in a particular way by the courts.¹⁷⁷

What can be concluded from all of this is that plain language is language that is straightforward and direct, its aim is to convey its message to its intended readers certainly and successfully without any undue effort.¹⁷⁸ It stays away from vagueness, elaborate vocabulary and complicated sentence construction, and makes use of the number of words as may be necessary.¹⁷⁹ According to Gouws, it is language that is understood by the intended audience the first time they hear or read it.¹⁸⁰

The focus will now be on a discussion on the drafting techniques that suppliers should adopt when drafting a consumer contract in order to ensure that it is in plain language and that it complies with the CPA.

By doing so, the supplier will clearly illustrate to the court that he has complied with the CPA, the consumer made an informed decision and that any other reasonable meaning should not be interpreted against the supplier. By adhering to what was agreed to in the beginning, the parties will enjoy equal bargaining power.

When drafting a contract, one must bear in mind that sometimes no matter how clear a contract is drafted, there will always be a possibility of a different interpretation by other parties. It is important to note that “it is not possible for a drafter or interpreter to accurately predict or anticipate the long term interpretation of a text. All meaning is subject to context, but context cannot be determined in an exhaustive or comprehensive way.”¹⁸¹

¹⁷⁶ For a discussion focused only on modern English see Anderson 44.

¹⁷⁷ *Ibid.*

¹⁷⁸ Gouws M “A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act” 2010 (22) *SA Merc LJ* 81.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Cornelius S “The complexity of legal drafting” 2004 (4) *TSAR* 4.

5.2 Stating obligations clearly

According to Anderson, good contract drafting is unambiguous and direct. The contract should express the parties' rights and obligations in such a manner that there can only be one interpretation of the words used.

Ambiguity is the “cardinal sin” of drafting. In the case of vagueness there is an uncertainty while ambiguity is without justification. Three forms of ambiguity exist. The first is contextual ambiguity when provisions in a contract contradict each other; semantic ambiguity is the use of words that have various meanings; and syntactic ambiguity occurs from the word order used and how the words are punctuated.¹⁸²

Therefore, the contract should clearly express “who has the obligation, to whom it is owed, what the obligation is and when the obligation must be preformed”.¹⁸³ In other cases it may also be necessary to state where the obligation is to be performed and how the obligation is to be performed.

5.3 Active and passive

In general the supplier should use the active form as it is more direct, rather than the passive form. The passive form has the potential of making the meaning unclear especially in the case of long sentences.¹⁸⁴ While using the active voice will promote clarity.¹⁸⁵

5.4 Circumventing jargon and archaic language

Anderson provides the following examples:

Example 1

In the event that there shall be a determination of this Agreement by the vendor, the purchaser shall be entitled to a reimbursement of all financial consideration given by him pursuant to clause 4 thereof.

Example 2

If the seller terminates this Agreement, he shall reimburse to the buyer all payments made by the buyer under clause 4 of this Agreement.

¹⁸² See Haggard T *Legal Drafting in a Nutshell* 1996 31 for a general discussion.

¹⁸³ See Anderson 46 – 47 for a general discussion on this aspect.

¹⁸⁴ *Ibid.*

¹⁸⁵ Haggard 5.

Example 2 basically means the same thing but it uses language that is simpler and more modern. Anderson and Warner point out that the outcome is a sentence that is shorter (23 words instead of 34) and one that is easier to understand.

In some situations, the drafter may decide to use an “old-fashioned” word or phrase because it reflects the drafter’s intention, however, Anderson suggests that such words or phrases should not be used out of habit.

Lawyers sometimes use pairs of words which is also a type of unnecessary jargon unless the words have a meaning that differs from the other one. For example “last will and testament”, “sell and convey”, “goods and chattels” and “fit and proper”.¹⁸⁶

According to Anderson, the reasons for these particular pairings are historical, going back to the years following the Norman Conquest. These days it is enough to use the word “will” on its own. This custom, for legal purposes has become irrelevant, but still exists in some legal terminology.¹⁸⁷

Latin words and phrases are also another type of legal jargon. The use of Latin words has fortunately almost died out, especially in the case of wording of contracts, but some still exist, for example, *mutatis mutandis*. It is recommended that these Latin phrases should be avoided, however, there are cases which call for such phrases because repeating the same thing in English could appear clumsy or require more words to say. Any word which is not part of everyday speech should be circumvented unless “its meaning is clear from the context” or “it is defined in the agreement”.¹⁸⁸

The important aspect here is that the supplier needs to critically look at what he has drafted and to make sure that it is written in plain language and that it means what he intended. The main goal of the drafter is to put forth the terms and conditions of a contract in a language that will be interpreted by everyone in the same way.¹⁸⁹

5.5 Simplest form

Simplicity refers to what needs to be said and how it is presented.¹⁹⁰ The drafter should focus on using more modern English and a direct style. Short sentences should be used instead of

¹⁸⁶ Anderson 50.

¹⁸⁷ *Ibid.*

¹⁸⁸ Anderson 51.

¹⁸⁹ For a comprehensive discussion on exact same interpretation see Sjostrom WK *An Introduction to Contract Drafting* 2007 (2nd edition) 2.

¹⁹⁰ Haggard 7.

very long impressive, but difficult to understand, sentences. Further, the text should be broken up into numbered paragraphs.¹⁹¹

5.6 A plain and intelligible style

The drafting techniques discussed in the above sections aim to help the supplier to write in plain and intelligible style, but the technique in this section goes a step further and is especially relevant to section 22 of the CPA.¹⁹²

The tone of contractual language is usually very formal, even after complex sentences and legal jargon has been removed.¹⁹³ A legal document deals with serious matters and therefore is not read like “conversational English.”¹⁹⁴ Anderson explains that in order to lighten the tone and make the words more intelligible, the following techniques should be applied.

The style and usage will help to avoid ambiguity and promote simplicity, brevity and clarity.¹⁹⁵

5.6.1 You and we/us

These days most standard consumer contracts provided by major consumer suppliers refer to the consumer as “you”. Using this technique ensures that the contract is easier to understand and it appears less intimidating to the consumer. Further, the supplier should also consider using the word “must” instead of “shall”.¹⁹⁶

5.6.2 Avoiding technical language

Technical language in consumer contracts should be avoided so as to enable the consumer to understand the contract and to deal with it without seeking legal advice. Where a legal word is used then the supplier should explain its meaning. Anderson suggests that some phrases should be replaced with modern English, for example, “service of notices” should be replaced with “notify us in writing”.¹⁹⁷

5.6.3 Keeping it simple

It is important to use simple and straightforward language in consumer contracts as consumers do not ordinarily take legal advice on the terms of the contract and are not expected to understand complicated contractual language. Drafter’s are usually inclined toward

¹⁹¹ See Anderson 52 for a general discussion on this aspect.

¹⁹² Anderson 53.

¹⁹³ *Ibid.*

¹⁹⁴ Haggard 7.

¹⁹⁵ Haggard 30.

¹⁹⁶ Anderson 53.

¹⁹⁷ *Ibid.*

unnecessary complexity.¹⁹⁸ In consumer contracts, the style and content of the contract should be kept as simple as possible in order to avoid having the term be declared by a court as unenforceable.¹⁹⁹

5.6.4 Provide explanations

It may occur that even straightforward and simple language used may not be sufficient to save a clause from being unfair. According to Anderson, instead of depending on a statutory provision that relates to the meaning, the supplier should use descriptive language. Drafters try to convince themselves that legal language is more precise than standard language and that by moving away from the traditional way of drafting could be dangerous.²⁰⁰

5.7 Definitions and consistent use of words

The same ideas should be expressed by the same words throughout the whole contract, because the court will most likely assume that another meaning is intended if different words are used. Anderson provides the following examples as illustrations: where the agreement refers to “the company and its subsidiaries” in one part of the agreement, and to “the company, its subsidiaries and affiliates” in another part, the court may presume that affiliates in the earlier part of the agreement are excluded. Accordingly, such a phrase should be used throughout the agreement and it should be defined from the outset.²⁰¹

“Elegant variations” should be avoided. This literary technique may be passable in non-legal writing in order to prevent repeating a word, but not in contracts. Although the use of definitions can assist in creating consistency of the wording, their considerable use can hinder readers in comprehending the meaning of the individual clauses. There is a risk that the reader will not concentrate on the outcome of the clause and will have to go back and forth from the clause to the definitions. This can be very frustrating for a reader.²⁰² Definitions have the potential to be powerful tools for the drafter and will promote brevity and clarity.²⁰³

5.8 Circumventing unnecessary words

There are many unnecessary wordings, such as the following.

“Verbose phrasing.” Instead of using many words, use one or fewer words that sum up the point of the sentence.

¹⁹⁸ Haggard 7.

¹⁹⁹ Anderson 53.

²⁰⁰ Adams 1.

²⁰¹ For a comprehensive discussion on consistent use of words see Anderson 55.

²⁰² *Supra*.

²⁰³ Haggard 30.

“Belt and braces words.” Instead of writing “the said company” or “the aforesaid company”, write “the company”.

“Clearly redundant words.” Such words, which do not contribute anything to the intended meaning, should be avoided.²⁰⁴

5.9 Sentence structure and length

Long sentences are difficult to comprehend and the rule to be kept in mind when drafting is “only put one idea in each sentence”. One way of doing this is breaking up the clause into numbered paragraphs, creating shorter and understandable sentences.²⁰⁵

Brevity requires the use of very few words. Legal professionals are very busy people and are not reading legal documents for pleasure. However, if an idea requires the use of 26 words then it must be written in that way. But if the idea requires a total of 6 paragraphs to be expressed fully, then anything less would be insufficient.²⁰⁶

5.10 Punctuation and word order

A clause should be drafted in such a manner that if a comma is included somewhere in the sentence, the meaning of the sentence remains the same, but this is not always practical. Punctuation is very helpful in breaking up and reducing sentences, as well as using indentation and numbering.²⁰⁷ In the case of word order, Anderson suggests that it is preferable to “get to the point” in the beginning of the sentence rather than leaving it to the end.

5.11 Conciseness and comprehensiveness

No supplier wants to forget a clause which might turn out to be crucial at a later date. This results in lengthier contracts. This result is powered by the use of “standard contract precedents” in most law firms, as they deal with many improbable events. At the same time, however, there is also the need to be concise, by avoiding any irrelevant words.²⁰⁸

5.12 Use of white space and the size of font

The size of the type can have a considerable impact on how “readable” the contract is. Once a contract has been drafted, the next step is for the drafter to check what has been written, and it will be difficult to do so where the typeface used is quite small. The same applies where the

²⁰⁴ For a discussion that only focuses on circumventing unnecessary words see Anderson 57.

²⁰⁵ See generally Anderson 58.

²⁰⁶ For a comprehensive discussion on brevity see Haggard 5 – 7.

²⁰⁷ Anderson 62.

²⁰⁸ *Ibid.*

type is very close together and where there are no spaces between clauses.²⁰⁹ Ample use of white space will promote easy readability and use of reference.²¹⁰

5.13 Use of headings

Headings are very helpful as they assist in locating clauses in the contract and aid in understanding the subject of the clause.²¹¹ The universal headings and provisions that are typically included in all contracts are the following: title; preamble; recitals; words of agreement; performance provision; consideration provision; representation and warranties; and concluding clause and signature blocks.²¹²

5.14 Logical sequence of clauses

For a logical sequence to exist, first start with the definitions; this should be followed by a provision introducing the agreement; the “main provision” should then follow; leave the “less important” provisions for towards the end of the contract.²¹³

5.15 Grouping of clauses

Provisions that cover the same general topic should be grouped together.²¹⁴

5.16 Use of schedules

The use of schedules aids in the logical organization of contract wording. Where the obligations of the parties are set out in the schedule, a statement that the schedule forms part of the agreement must be included in the main agreement, otherwise they won’t be binding on the parties.²¹⁵

5.17 Conclusion

As the CPA has brought upon the supplier many onerous duties, especially when it comes to drafting, the supplier must be very careful in how the contract is written and presented. If the supplier is not careful the rules of interpretation will operate against him. An obvious example is the *contra proferentem* rule. In addition to this rule, the CPA also provides a codified *contra proferentem* rule (section 4(4)) and in no way does this repeal the common law rule.

²⁰⁹ Anderson 63.

²¹⁰ Haggard 31.

²¹¹ Anderson 64.

²¹² Sjostorm 2.

²¹³ Anderson 64.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

In terms of section 9 of the Constitution, everyone is equal before the law and is entitled to equal protection. Taking this into account, one could come to the conclusion that the CPA has perhaps over stepped too far in favour of the consumer. In trying to balance the rights and duties of the parties in a commercial transaction, the CPA might have caused the opposite effect, namely, causing another party to now be in a weaker position.

CONCLUSION

The golden rule of interpretation is to determine the intention of the parties at the time that the contract was concluded from the plain meaning of the words used. With the enactment of the CPA, determining the intention of the parties is no longer the principal motive and the court now has to determine whether the reasonable expectations of the consumer have been met in order to determine contractual liability.

Consumers are the weaker parties in agreements and need to be protected and the goal of the CPA is to place the consumer on equal footing with the supplier. When one looks at all the onerous duties, obligations and responsibilities that are now placed on the supplier, one might be able to conclude that the CPA has overreached that goal.

In terms of section 9 of the Constitution everyone is equal before the law and is entitled to equal protection. The consumer is well protected under the CPA. Section 4(4)(a) of the CPA provides for the *contra proferentem* rule in addition to the one that exists at common law. This rule does not determine the intention of the parties and the statutory rule in the CPA is very wide as it operates not only in the case of ambiguity but also where the consumer's rights are limited or deprived and it operates from the outset. A possible solution would be for the courts to be able to limit section 4(4)(a) of the CPA by making it a rebuttable presumption. In this way section 4(4)(a) of the CPA is defensible and the supplier can protect himself by showing that the term used could not be made any simpler or clearer.

Consumer contracts are generally concluded in standard form contracts. Standard form contracts are cost effective as they save companies the expense of negotiating and drawing up separate individual contracts and they have a communicative purpose whereby "members of an entity speak with one voice". By limiting discretion, uniformity reduces the likelihood of inferiors furthering their own interests. But these benefits can only exist if standard terms have a solitary meaning. Standard contract language that is capable of numerous meanings takes away the advantage of uniformity and can cause disorder.

The use of plain and understandable language has been made mandatory in consumer contracts as a result of the CPA. The CPA provides a specific standard that needs to be met before a contract can be considered to be in plain language. This standard refers to text, grammar, illustrations and visual aspects. However, plain language is not the one and only answer for consumers who cannot comprehend contracts as education is just as important because it also directs ones attention to the current level of literacy in South Africa. One also notices that section 49 requires the supplier to bring to the attention of the consumer any exemption clause, thus providing the consumer with the opportunity to read the clause and the

supplier would have to explain its meaning and implications. This ensures that the consumer is completely aware and informed.

There is a possibility that the CPA, in trying to promote equal bargaining power, has caused the opposite to happen. It is perhaps possible to conclude that, whether the contract will continue is now more strongly determined by the consumer, even though the supplier has fulfilled his obligations in terms of the CPA.

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