

**THE INFLUENCE OF THE CONSUMER PROTECTION ACT 68 OF 2008 ON THE
CONCEPT OF PLAIN LANGUAGE IN STANDARD-FORM CONTRACTS**

by

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SUMMARY

The purpose of this dissertation and the research contained therein was to discuss and investigate the influence of the CPA on concept of plain language in standard-form consumer contracts. In order to do so, it was important to discuss the historic background of the law of contract as well as the position where the CPA was not applicable. This refers to a position where common law principles determined the law of contract (including standard-form contracts). One of the fundamental principles of common law is freedom of contract. Freedom of contract is a notion that parties are free to decide whether or not to contract, with whom to contract, the nature of the contract and the terms of the contract.

Despite the fact that freedom of contract is deeply engrained in our legal system, does not erase the fact that when it comes to consumer contracts (in particular standard-form contract or *contrat d'adhésion*) it is to the detriment of consumers. Under the principle of freedom of contract the assumption is that parties have equal bargaining powers which is, in fact, not always true.

In light of the above, the South African legislature promulgate the Consumer Protection Act, Act 68 of 2008 which aims at improving the quality of information conferred to consumers by the sellers, to ensure consumers make informed decisions which are in line with their needs prior to contracting. Though the CPA changes the common law, it still makes provision to preserve common law. Section 2(10) of the CPA leaves no doubt that the common law is not replaced in its entirety by the Act for those matters that apply to it.

The introduction of the CPA brought about changes to the South African consumer protection law. One of the changes is Section 22 which deals with plain language. A fundamental consumer right under the CPA, the consumer's right to disclosure and information (Part D) of the Act includes section 22 within its ambit and provides that consumers have the right to information in plain and understandable language. It is perceptible from this that the legislature envisions the plainness of language in contracts (including standard-form contracts) and other legal documents as means to redress imbalances between suppliers and consumers.

While it is undeniable that there will now be additional burdens on being in business, everyone will benefit from the CPA. We are all consumers, after all.

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Table of Contents

SUMMARY	ii
Acknowledgement.....	iii
CHAPTER 1 INTRODUCTION AND OVERVIEW	1
1.1 Introduction.....	1
1.2 Research aim and overview of dissertation	2
1.3 Delineations and limitations	2
CHAPTER 2 THE POSITION WHERE THE CPA IS NOT APPLICABLE (COMMON LAW POSITION) 4	
2.1 Introduction.....	4
2.2 General principles of the law of contract (common law position).....	5
2.2.1 Freedom of contract, <i>pacta sunt servanda</i> and <i>caveat subscriptor</i>	5
2.2.2 Good faith and fairness in contracts as oppose to unfair contract terms	6
2.2.3 Formalities	8
2.3 Standard-form contracts.....	9
2.4 The Plain Language Movement (PLM) prior to the CPA.....	11
2.4.1 Standard form-contracts and plain language	11
2.5 Chapter conclusion	13
CHAPTER 3 THE PLAIN LANGUAGE MOVEMENT (PLM) AND THE CONCEPT OF PLAIN LANGUAGE IN CONTRACTS (PRIOR TO THE CPA)	14
3.1 Introduction.....	14
3.2 The PLM: Background.....	14
3.3 Plain language: Background.....	16
3.4 Criticism of archaic legal writing.....	19
3.5 Criticism of the Plain Language Movement.....	20
3.6 The concept of plain language in contracts (prior to the CPA)	22
3.7 Chapter conclusion	24
CHAPTER 4 THE INFLUENCE OF THE CONSUMER PROTECTION ACT 68 OF 2008 ON STANDARD-FORM CONTRACTS AND PLAIN LANGUAGE	25
4.1 Introduction.....	25
4.2 Background of consumer protection in South Africa and the implementation of CPA 26	
4.3 General application of the CPA, interpretation and purpose	28
4.4 The plain language requirements in terms of section 22 and its role throughout the CPA 32	
4.4.1 Section 22: The right to plain language	32

4.4.2	The role of plain language requirement in terms of section 22 throughout the CPA	36
5.	Plain language in term of the NCA and the overlap of the NCA and the CPA	38
	Chapter conclusion	42
CHAPTER 5 CONSUMER PROTECTION LAW PERTAINING TO PLAIN LANGUAGE IN CONTRACTS IN AUSTRALIAN CONSUMER LAW		44
5.1	Introduction	44
5.2	Relevant legislation in terms of Australian consumer law and its effect on contracts	45
5.2.1	Definition of the consumer	45
5.2.2	Plain language	47
5.2.3	Standard-form Contracts	49
5.3	Chapter conclusion	50
CHAPTER 6 CONCLUSION		52
6.1	Introduction	52
6.2	Plain language in standard-form consumer contracts in terms of the CPA	53
6.3	Conclusion taking into account comparative discussion	55
BIBLIOGRAPHY		58

CHAPTER 1 INTRODUCTION AND OVERVIEW

1.1 Introduction

“Out of intense complexities intense simplicities emerge. Broadly speaking, the short words are the best, and the old words when short are best of all.”¹

The above statement made by former British Prime Minister Winston Churchill should be the premise from which any consumer contract should be assessed. Writers such as Hawthorne argue that at its core a consumer contract always suggests unequal bargaining positions between the parties.² The writer argues that the consumer is often the unwilling, unwitting contracting party in dealings with multi-national producers and distributors who outstrip the consumer in knowledge, power and resources.³ It is for exactly this reason that a simplified consumer contracts in plain language are is key to bring the parties to such a contract on equal bargaining positions. Where the parties conclude a consumer contract in terms of a standard-form contract drafted by lawyers in favour of producers or distributors (as mentioned above), plain language becomes even more paramount.

The purpose of this dissertation and the research contained therein is to discuss the influence of the Consumer Protection Act 68 of 2008 (hereafter the CPA) on standard-form consumer contracts and the concept of plain language in South Africa. This is not to say that all standard-form contracts are *prima facie* invalid, unfair or even against public policy.

The concept of plain language is also not something that is solely applicable to consumer agreements but would apply to all legal documentation as well as the drafting of legislation. However, for purposes of this dissertation the focus will be on the origin of “plain language”, the role of the Plain Language Movement and the application of the test for plain language as introduced by the CPA (section 22). All of which will be discussed in the context of consumer contracts.

This chapter will address the background and the motivation for the dissertation as well as the research aim thereof and how the research aim is to be addressed. A brief outline of the

¹ Winston Churchill <http://1.usa.gov/1LHG75A> (accessed on 21/09/2015).

² Hawthorne (2008) 440.

³ *Ibid.*

chapters will also be discussed which will include the scope, limitations and delineations of the dissertation.

1.2 Research aim and overview of dissertation

The research aim of this dissertation is to investigate the influence of the CPA on plain language in standard-form contracts. A chronological and systematic discussion is therefore warranted. The position where the CPA is not applicable needs to be discussed first. This will include a proper analysis of the position in terms of the general law of contract in South Africa (the common law position) and how it has been influenced by case law prior to the implementation of the CPA. In other words the most relevant common law principles pertaining to the law of contract (and standard-form contracts in particular). The concept of plain language and the influence of the Plain Language Movement leading up to the implementation of the CPA will then be discussed. The introduction to the CPA as well as the contents of the most relevant provisions in terms of the CPA will then be assessed. It should be noted that although the consumer is provided with a right to plain language in terms of section 22 of the CPA, this fundamental right of a consumer is present throughout the CPA and also referred in terms of other provisions (and consumer rights) throughout the CPA. Though mention is also made of the plain language requirements in terms of the National Credit Act 34 of 2005 (hereafter the NCA) as well as the overlap between the provisions of the CPA and NCA, the main focus of the dissertation and the research will be the influence of the CPA on standard-form contracts and plain language. In an attempt to give proper interpretation to the provisions of the CPA, a comparative analysis is made with Australian consumer law. The research findings (including the comparative position) and whether or not the research aim has been properly addressed will form part of the concluding chapter.

1.3 Delineations and limitations

The South African law is based on Roman-Dutch law (also known as the common law), but contemporary South African law is not limited thereto as regards its sources.⁴ Through court decisions, a vast number of legislative enactments over the years and the introduction of certain legislation from English law, the South African law was further enriched and developed.⁵ Moreover, the South African Constitution of 1996 as well as many Acts passed on account of the Constitution including modern commercial legislations, such as the NCA and the CPA, introduced (as will be shown) new important principles into our legal system.⁶

⁴ Nagel *et al* (2011) par 2.02.

⁵ *Ibid.*

⁶ *Ibid.*

Wherever “his” is used it will also refer to other genders as well. The term “supplier” will be used as an umbrella term to describe all types of suppliers that may be bound to a consumer contract in terms of the CPA or other consumer legislation. As will be shown, consumer protection and some form of consumer contracts were in existence prior to the implementation of the CPA. However, for purposes of this dissertation terms such as “consumer contracts”, “consumer agreements” and “consumer transactions” will only be used where either the CPA or Australian consumer law is applicable and will be clear from the context of those sentences. With regard to the position prior to the CPA and where the CPA is not applicable, the terms “transaction”, “agreement” and “contract” will be used interchangeably as to avoid confusion. The same will also apply to the terms “legislation” and “statutes”.

The full titles of the sources referred to in this dissertation are provided in the bibliography, together with an abbreviated "mode of citation". This mode of citation is used to refer to a particular source in the footnotes. However, legislation and court decisions are referred to in full unless otherwise indicated.

CHAPTER 2 THE POSITION WHERE THE CPA IS NOT APPLICABLE (COMMON LAW POSITION)

2.1 Introduction

As explained in the previous chapter⁷ the main source of the South African legal system as a mixed legal system is our common law.⁸ An accurate analysis of the position in terms of the CPA is not possible prior to the discussion of the relevant common law principles and case law that govern South African contract law (including standard-form contracts). According to De Stadler common law can be described as a body of rules that are not contained in legislation and at times are referred to as “unwritten” law. The writer further submits that the South African legal rules are predominately formed by common law as opposed to legislation. However, the predicament with common law in South Africa is that many ordinary consumers lacks access to them as they are contained only in either court judgments or legal textbooks.

A thorough analysis of the common law position with regard to the general principles of the law of contract and the concept of plain language would warrant a dissertation on its own and therefore only the most relevant of these as it pertains to the research aim will forthwith be discussed. This involves a brief discussion on the common law principles governing contracts (which include standard-form contracts) such as freedom of contract, *pact sunt servanda*⁹ and *caveat subscriptor*.¹⁰ The concepts of fairness and good faith as oppose to unfair terms in contracts will also be discussed. The approach by the court when dealing with standard-form contracts is included as well as a brief mention of the role of formalities. Although the concept of plain language and the Plain Language Movement (PLM) are comprehensively discussed in Chapter 3 it is briefly mention in this chapter for purposes of completeness.

⁷ See 1.3 above.

⁸ Nagel *et al* (2011) par 2.02.

⁹ Hiemstra & Gonin (1992) 251: “agreements are to be observed”.

¹⁰ *Idem* 293: “let the signer beware”.

2.2 General principles of the law of contract (common law position)

2.2.1 Freedom of contract, *pacta sunt servanda* and *caveat subscriptor*

According to Barnard¹¹ the South African common law of contracts was *inter alia* formed on two important principles, that is the freedom of contract as well as the *maxim pacta sunt servanda*.

It is Hutchison's submission that consensus and reliance are fundamental principles of the law. He is, however, firm in the belief that the following concepts are equally as important:

- a. Freedom of contract which implies that all persons are free to decide whether, with whom and on what terms to conclude a contract;
- b. Sanctity of contract which is a common law principle that contracts are entered into freely and seriously. They must be honoured by parties and enforced by courts;
- c. Good faith (*bona fide*) in that parties to contracts ought to act fairly and honestly; and
- d. Privity of contract where contracts create rights and duties for the parties.¹²

The writer is further of the opinion that freedom of contract entails that parties enter into contracts at free will and without external interference and that the courts will uphold and enforce contracts when satisfied that contracts are not immoral, illegal or contrary to public policy.¹³

Louw¹⁴ submits that consensus became part of the law that was internationally accepted by merchants and traders and the outcome of the development was the acceptance of the *maxim pacta servanda sunt* as one of the guiding principles of the law of contract. The principle *pacta servanda sunt* can be loosely translated to mean "agreements must be adhered to".¹⁵ Under this principle it can be argued that if a person does not understand what he is agreeing to then there can be no agreement and therefore such a contract would be seen as void, but the latter argument has not always been used.¹⁶

¹¹ Barnard (2013) 2.

¹² Hutchison (2009) 7. For the purpose of this paper only freedom of contract and good faith are discussed.

¹³ *Ibid.* Unfortunately an assumption of parties always having equal bargaining powers are problematic when dealing with consumer contracts in terms of the CPA as discussed in chapter 4 below.

¹⁴ Louw (2010) 11.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The principle of *caveat subscriptor* provides that a party who signs a written contract is ordinarily bound by the terms of such a contract regardless of whether or not the party read or understood the term.¹⁷ According to Maxwell,¹⁸ this principle was created to prevent parties from escaping contractual liabilities of a contract that they failed to read or understand. The signatory could, however, still escape contractual liability in circumstances where the contract was signed as a result of misrepresentation, duress, undue influence or commercial bribery, all of which indicate the absence of consensus (a requirement for the conclusion of a valid contract).¹⁹

2.2.2 Good faith and fairness in contracts as oppose to unfair contract terms

Our courts do not only consider the common law principles of freedom of contract and *pacta sunt servanda*, but also considers the concept of good faith and public policy.²⁰ The concept of good faith in contracts has always been present in our common law. In the case of *Wells v South African Alumenite Company*²¹ for example Innes CJ proclaimed that were people sign conditions, it must be devoid of fraud and shall be enforced by courts of law.

According to Hawthorne,²² in South Africa, the concepts of good faith, good morals, reasonableness and public policy, when engaging in contracts, has their root in the codifications of Western Europe. The reason for the development of the principle of good faith was due to the fact that formal rules were not flexible enough to deal with the complexity of modern, developing society.²³ Joubert²⁴ submits that there are two general ideas of common laws which involve the prohibitions which affect the validity of a contract. The said ideas are good morals and public policy. Where contract are contrary to any one of the two, it would become void and unenforceable. The reason for this prohibition rest on public interest, where a contract is constituted in bad faith, the public interest demands that it be declared invalid.²⁵

In discussing the case of *Barkhuizen v Napier*²⁶, Hawthorne agrees with the decision of the Constitutional Court that parties to a contract are obliged to act *bona fide*.²⁷ *In casu* the

¹⁷ Maxwell (2009) 237.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Hawthorne (2008) *SAPR* 91.

²¹ 1927 AD 69.

²² *Idem* 86.

²³ *Ibid.*

²⁴ Joubert 130-132.

²⁵ *Ibid.*

²⁶ 2007 SA 323 (CC).

Constitutional Court held that good faith is not a “self-standing rule”, but an underlying value that is given expression through existing rules of law.²⁸ Hawthorne²⁹ argues however that although the decision of the Constitutional Court signifies an effort to give effect to the rule of law and at the same premise give effect to substantive justice, but the problem was that it carried the risk of leading to a compromise. The Constitutional Court declared that public policy is profoundly rooted in the Constitution and the values that it underlies are informed by the concept of *ubuntu*.³⁰ Therefore, the proper approach in determining whether a contractual term is unfair and not in good faith and therefore also contrary to public policy depends on the values entrenched in the Constitution.³¹ As part of Hawthorne’s comments on the *Barkhuizen*-case, the writer states that it seems the courts still favour the “fundamental principle of orthodox contract law”³² which entails freedom of contract as oppose to substantive justice of public policy despite the fact that contract (and standard-form contracts *in casu*) are devoid of freedom on the part of the vulnerable party (consumers).³³

Beale³⁴ aptly states that contractual justice is concerned with both procedural fairness (the way conclusion of a contract takes place) and substantive fairness (the contents of the contract itself). The court decision in *South African Forestry Co Ltd v York Timbers Ltd*,³⁵ is referred to with merit where the court stated that although courts are not permitted to superimpose on clear expressed intention of the parties to the contract, the court could, however, superimpose in instances where a contract is ambiguous. In such instances the principle that all contracts are governed by good faith would be applied and the intention of the parties will be determined on the basis that they negotiate with one another in good faith.³⁶

In many instances contracts (including standard-form contracts) contain *unfair terms*³⁷ which are contrary to the requirement of good faith and public policy. This also results in a

²⁷ Hawthorne (2008) *SAPR* 87.

²⁸ 347G-H.

²⁹ Hawthorne (2008) *SAPR* 90.

³⁰ 339E.

³¹ 333G-334A.

³² Hawthorne (2008) *SAPR* 92.

³³ *Ibid.*

³⁴ Beale (2010) 757.

³⁵ 2005 3 SA 323 (SCA).

³⁶ Brand (2009) *SALJ* 83.

³⁷ Woodroffe & Lowe (2013) 196 par 10.18 describe “unfair terms” as any terms which are contrary to the requirements of good faith and cause a significant imbalance in the parties’ rights and duties under the contract, often to the detriment of the consumer.

significant imbalance in the bargain positions of the parties.³⁸ Unfair terms are often unfair due their complex, ambiguous and unclear nature and wording. In the same breath it should be noted that exemption clauses are legitimate clauses in instances where parties have equal bargaining powers. It is only where parties are unequal due to unfairness that these type of clauses may lead to injustice.³⁹ In recent years (and prior to the implementation of the CPA) the court has attempted to give proper interpretation to exemption clauses in contracts.⁴⁰ However, many writers argue that the interpretation by the courts of such clauses is unsatisfactory in correcting unequal bargaining positions.⁴¹

If the wording of contract terms are not in plain language it would be unfair if the intention of wording terms in such a way was to deceive the other contracting party or causes unequal bargaining positions which in turn would be against public policy. The court will always give effect to the true intention of the parties and the true nature of the contract and will not give effect to unfair terms against public policy. This approach is confirmed by the case of *Zandberg v Van Zyl*.⁴² The court stated that as a general rule, the parties to a contract express themselves in a language calculated without subterfuge or concealment to embody the contract at which the parties have arrived.⁴³ According to the court however parties to a transaction frequently conceal the real character (or true intention) of the agreement. The parties “call it by a name, or give it shape, intended not to express but disguise its true nature”.⁴⁴ In such circumstances the court would give effect to what the transaction really is and not what form it purports to be. The court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention.⁴⁵

2.2.3 Formalities

In general formalities are not a requirement for a valid contract in South Africa.⁴⁶ However where the parties agree on formalities or the law provides thus formalities will be a

³⁸ Woodroffe & Lowe (2013) 196-197.

³⁹ *Ibid.*

⁴⁰ An in-depth discussion of exemption clauses and the influence of the CPA thereon falls outside the scope of this dissertation. See for example decisions of *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA); *Ndlovu v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 2 SA 518 (C).

⁴¹ Naudé & Lubbe 441-463; Visser 188-193; Marx & Govindjee 622- 635; and Hawthorne (2009) 352-360.

⁴² 1910 AD 303.

⁴³ *Idem* 305.

⁴⁴ *Ibid.*

⁴⁵ Kahn (1971) 4.

⁴⁶ *Goldblatt v Fremantle* 1920 AD 123 128: Innes CJ held that “...subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity”. See also Nagel *et al* (2011) par 7.04.

requirement for validity.⁴⁷ A number of statutes place requisites that ought to be complied with in order for contracts to be valid such as section 2(1) of the Alienation of Land Act,⁴⁸ section 93 of the NCA and section 50 of the CPA.⁴⁹ Formalities will only be discussed as relates to plain language and the research aim of the dissertation. It is important to note that although as a general rule contracts need not be in writing, it is advisable to do so from a practical point of view in order to lessen the burden of proof in a dispute with regard to enforcement.⁵⁰

Language usage and the influence thereof on formal statutory requirements have always been at issue. This can be illustrated by the case of *Clements v Simpson*⁵¹ where the court took note of the verbose description of the thing sold (property) and held that meticulous accuracy is not required as long as it can be reduced to certainty.⁵² Inelegant, clumsy and bad drafting will not impair the validity of a contract, as long as the intention of the parties can be determined with reasonable certainty from the wording of the contract without using extrinsic evidence.⁵³ As will be shown under the discussion of the CPA, the intention of the parties will always be important and at the centre of any contract. However, the role of plain language has become much more prominent since this decision.⁵⁴

2.3 Standard-form contracts

One of the devices most commonly used for the imposition by one party of contractual terms on another has been the standard-form contract or adhesion contract. The latter is the name derived from the French term *contrat d'adhésion*, used to describe those contracts whose terms and conditions are fixed in advance by one of the parties to it and which are open to acceptance in that form alone.⁵⁵ For purposes of this dissertation however the term “standard-form contract” will be used. During the fifteenth century standard insurance policies were used in Europe. In the seventeenth century the model of standard-form contracts were used as the charter parties and bills of lading were drafted in standardised format. It was in the nineteenth century however where the use of standard-form contracts, during the period of *Laissez-faire*, took flight and in the last quarter of the said century the

⁴⁷ Nagel *et al* (2011) par 7.04.

⁴⁸ 68 of 1981.

⁴⁹ See discussion of section 50 CPA as part of chapter below.

⁵⁰ Christie & Bradfield 109.

⁵¹ 1971 3 SA 1 (AD).

⁵² *Idem* at par 8H-9A.

⁵³ *Ibid.*

⁵⁴ See chapter 5 formalities.

⁵⁵ Aronstam (1979) 16.

use of standard-form contracts became a worldwide phenomenon.⁵⁶ According to Kahn⁵⁷ a standard-form contract is a one-sided product of an economically superior party, making clauses that favours him, especially the exemption from liability provisions, which are made to the detriment of the other (weaker) party.

The problem with standard-form contracts is that more often the drafter who is requested to draft a contract on behalf of the supplier would invariably tend to include contingencies in favour of the supplier. This practice is not *per se* wrong, but as soon as the terms to the contract are used indiscriminately then there would be a potential danger of abuse.

It could be argued that in practice, standard-form contracts contain standard clauses such as dispute resolution or arbitration clauses which are complex and require the use of expensive dispute resolution agencies as opposed to simple dispute resolution methods that can be devised by both parties to the agreement. Even though the weaker party can agree with these clauses, such a party is, more often than not, not made aware of such clauses and also do not get an opportunity to negotiate the contents thereof. These clauses would inevitably tend to lean towards the one party to the detriment of the other.⁵⁸

Where it is argued that a standard-form contract does not reflect the true intention of the parties, the parole evidence will apply.⁵⁹ In the case of *Union Government v Vianni Ferro-Concrete Pipes*⁶⁰ the court confirmed the parole evidence rule in that when a contract is reduced to writing, the writing is regarded as the exclusive memorial of the transaction between the parties. Accordingly, no other evidence may be given to save a document of secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by the parole evidence rule. Cornelius⁶¹ states that the problem with the application of the parole evidence rule in standard-form contracts was that even where a party had no option to discuss the terms of the contract, the contract terms would stand. It is for this reason that the court held in *Henderson v Arthur*⁶² that if the parole evidence rule was applied to its full consequence stringently without taking the circumstances of each particular case into account, it would lead to injustices. The exception

⁵⁶ *Idem* 17.

⁵⁷ Kahn (1971) 34.

⁵⁸ Brand (2009) 30-31.

⁵⁹ These same arguments would apply to ordinary contracts which are not a standard-form contracts but the discussion of the parole evidence rule is in accordance with the research aim: Standard-form contracts.

⁶⁰ 1941 AD 43.

⁶¹ Cornelius (2002) 50-59.

⁶² (1907) 1 KB 10.

to the parol evidence rule is rectification but will not be applied to validate and invalid contract.

2.4 The Plain Language Movement (PLM) prior to the CPA

The PLM can be described as a discipline or in some instances an informal association through the collaboration of individual plain language proponents (such as linguists, legal writers, editors, legal translators and members of the legal profession).⁶³ It has been in development for decades in various countries.⁶⁴ The focus of this dissertation is the PLM as it pertains to plain language in contracts but “Law” is only one aspect of the PLM.⁶⁵ Some proponents promote plain medicine, others plain government, plain technical writing, plain finance, and plain scientific papers to name but a few.⁶⁶

Locke describes the PLM as an attempt to demonstrate the benefits of writing clearly and concisely, in a reader-focused style and that proponents of the PLM spread the message that writing in plain language can save the writer and the reader time, effort, and money.⁶⁷

The writer correctly states that there is no universally accepted meaning for the concept of “plain language” but that leaders of the PLM propose that people who use documents written in plain language can quickly and easily: Find what they need; understand what they find; and act on that understanding.⁶⁸

Clearly, the PLM assisted in developing the concept of plain language but (as will be shown in chapter 3) however the concept of plain language also developed outside the premise of the PLM in terms of case law for example.

2.4.1 Standard form-contracts and plain language

Even prior to the implementation of the CPA plain language was regarded as important not only in relation to contracts in general but also to standard-form contracts in particular. Though the PLM existed prior to the implementation of the CPA which also gave body to the concept of plain language, simplified language and wording in contracts was also acknowledged by our courts.

⁶³ Adler 70.

⁶⁴ *Ibid.* See also Williams 116-117.

⁶⁵ Adler (2012) 70.

⁶⁶ *Ibid.*

⁶⁷ Locke (2003) 5.

⁶⁸ *Ibid.*

The role of plain language in standard-form contracts is apparent in that a contract drafted on instruction of a party and then also in favour of that party containing standard terms which the weaker party might not understand must be put clearly and simply. (This would often be the case with regard to consumer agreements in terms of the CPA). Standard-form contracts should be in plain language even in with the presence of the *contra proferentum*-rule where a contract will be interpreted against the drafted thereof.⁶⁹ In *Western Bank Ltd v Sparta Construction Co*⁷⁰ Coetzee J remarked that it was undesirable for standard-form contracts to be developed without ensuring adequate protection of the weaker party. Christie discusses the case of *Levenstein v Levenstein*⁷¹ where it was affirmed that a contract would be void if it is vague and there is a use of uncertain language it would therefore justify the notion that the parties were never in agreement.⁷²

According to Patterson,⁷³ as with most forms of contracts, the standard-form contracts are commonly used in commercial relationships and offer both advantages and disadvantages. The reduced cost of not drafting a new contract for each individual transaction and the time saved in that parties need not negotiate a new contract for each transaction is seen as prime advantage to use standard-form contracts. I submit that this is partly correct since the omission to negotiate terms in a standard contract places the consumer in an inferior to the consumer who can include obscure terms in a contract devoid of the consumer's knowledge. It is Patterson's further assertion that standard-form contracts also offer greater certainty regarding the meaning of contractual terms and a reduction in agency costs.⁷⁴

According to courts and many commentators of the law, however, the aforementioned benefits or purported advantages are outweighed by disadvantages insofar as the standard-form contracts are used as contract of adhesion and the consumers are without any powers to read or negotiate any terms of a contract.⁷⁵ Aronstam, however, submit that right to freedom of contract in itself presents a dilemma in the case of standard-form contracts and the disadvantage to such contracts is that it is impractical for the weaker party to negotiate terms.⁷⁶

⁶⁹ Hiemstra & Gonin (1992) 304. See also *Cairns (Pty) Ltd v Playdon v Co Ltd* 1948 3 SA 99 (A).

⁷⁰ 1975 1 SA 839 (W) 840.

⁷¹ 1955 3 SA 615 (SR) 619.

⁷² Christie (2006) 102-103.

⁷³ Patterson (2010) 332.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Aronstam (1979) 14.

2.5 Chapter conclusion

The common law principles as discussed above play (and have played) an important role in the interpretation of contracts and standard-form contracts in particular. It is clear from the case law discussed above that there is a constant attempt to find a balance between common law principles such as freedom of contract, *pacta sunt servanda* and *caveat subscriptor* on the one hand and fairness, *bona fides* and public policy on the other. Hahlo & Kahn⁷⁷ is referred to with merit where the writers remark that since the law comprises of reasonable rules and not arbitrary *ad hoc* decisions, the individuals in the same legal circumstance have a legitimate expectation to be treated alike. This statement is important when it has been argued above that standard-form contracts and the wording of such contracts often result in unequal bargaining positions to the disadvantage of the weaker party.

Woker⁷⁸ states that in general, many courts have been disinclined to come to the aid of the weaker party who foolishly engaged in contracts without having fully understood the meaning and implications of certain contractual terms. This practice by courts has led to a position where weaker parties to contracts are left vulnerable and exposed. These contracts are predominantly standard-form contracts. The approach by the courts was criticised by the South African Law Commission as being unfair towards weaker parties (such as consumers). To this end, in 1995 the Unfair Contract Committee was established with its mandate being to remove unfair terms in standard-form contracts, for according to the Commission, contracts must act in public interest and any undue Latin phrases or misleading terms must to be removed.⁷⁹ From the above it is apparent that consumer rights weren't always adequately protected by courts and the need for legislative reform such the CPA was needed.⁸⁰

As part of an attempt to bring parties of a standard-form contract into equal bargaining positions the inclusion of the concept of plain language into such contracts are needed and as will be seen in chapter 4 below, is also why section 22 was introduced in terms of the CPA.

⁷⁷ Hahlo & Khan (1973) 34.

⁷⁸ Woker (1997) 28.

⁷⁹ *Ibid.*

⁸⁰ Aronstam (1979) 36 where the writers points out South African courts' approach has always been that a party who signs a contract does so at his own peril and no relief was granted if he signs a contract without reading its conditions.

CHAPTER 3 THE PLAIN LANGUAGE MOVEMENT (PLM) AND THE CONCEPT OF PLAIN LANGUAGE IN CONTRACTS (PRIOR TO THE CPA)

3.1 Introduction

This chapter aims to give a brief overview of the Plain Language Movement (hereafter PLM), the principles in which it is based as well as the criticism thereto. The concept of “plain language” prior to the CPA will also be discussed. The main reason for including this into the dissertation is to illustrate that the need for plain language was present even before the implementation of the CPA. An attempt will also be made to illustrate that the application of plain language was not sufficient and led to the inclusion thereof in the CPA. It should be noted that in general plain language is an important aspect and concept in legislative drafting and other legal documentation (Including standard-form contracts). The focus however will be on plain language in contracts and standard-form contracts in particular.

3.2 The PLM: Background

According to Gowers,⁸¹ in 1946, writer George Orwell in his paper, "Politics and the English Language", criticised what he saw as the dangers of "ugly and inaccurate" modern written English. He used political writing as an example where a term *pacification* can be used to mean that defenceless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets..." and yet the inhabitants would not have a clue of what the politician was saying.⁸²

Subsequent to Orwell's paper, Gowers drafted a document for the HM Treasury and submitted that writing was an instrument used for conveying ideas from one mind to another and the writer's vital job was to make the reader apprehend the meaning of the text readily and precisely.⁸³

Louw⁸⁴ submits that although it is debatable when precisely the PLM begun, it is accepted that it was started by ordinary people in the street, who changed from resistance to action, and the drive was supported by academics who continually published literary writing on the matter calling for change in the use of traditional legal language.

⁸¹ Gowers E "Plain Words, a guide to the use of English" (1948) www.ourcivilisation.com/smartboard/shop/ Gowerse (accessed on 22/04/2014).

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Louw (2010) 102.

Throughout the years many legal drafters⁸⁵ have identified the need to make contracts more comprehensive amongst non-expert or laypersons.⁸⁶ Though the writer refers to plain language in statutes, Gouws argues that the need for plain language can be traced back to the sixteenth century when Edward VI wished that the “superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them.”⁸⁷

According to Louw⁸⁸ since the inception of traditional language there has been a cry for plain language. The calls for plainer use of language lead to the formation of a number of movements and organisations such as PLAIN and the Plain English Campaign.⁸⁹ The drive for plainer language gathered momentum over the years and along the way picked a fitting term called the PLM.⁹⁰

Locke⁹¹ submits that the PLM in the United States began as early as 1970s following the government’s request to its regulation writers to be less “bureaucratic” when drafting regulations. The purpose of such call was to attempt to make “all major regulations understandable to those who must comply with them.”⁹² According to Locke,⁹³ the PLM is a programme which intends to exhibit the benefits of drafting in a manner that is clear, concise and reader focused.

As a movement that advocates for plain legal language, the PLM intends to transform traditional legal writing in all legal documents by promoting the use of plain language when drafting. The PLM advocates for a clear and effective use of legal language which takes into account the intended audience who may be bound by documents they are required to sign.⁹⁴ Over the past three decades the phrase “plain Language” has become prevalent when legal

⁸⁵ See Louw (2010) 91-93. According to Louw as early as the 1770s great philosopher like Jeremy Bentham expressed the need to simplify the legal language. The philosopher referred to legal language as “literary garbage” and argued that plain legal language was a necessity for proper governance.

⁸⁶ Bivins (2005) iii: “Unversed in the law, frequently have difficulty understanding traditional legal writing”.

⁸⁷ Gouws (2010) 79.

⁸⁸ Louw (2010) 5.

⁸⁹ *Ibid*

⁹⁰ *Ibid*.

⁹¹ Locke (2003) 5.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ Louw (2010) 2.

academics and practitioner refer to the drafting of legislation, contracts (including standard-form contracts) and other legal documents.⁹⁵

The Law Reform Commission of Victoria (LRCV)⁹⁶ stated that the central platform of the PLM is the right of the audience, meaning the right to understand any document that confers a benefit or imposes an obligation. The LRCV rightfully submit that it should not be the reader's responsibility to have to labour to discover the meaning of words or phrases in a document. According to the LRCV a document is inequitable if it cannot be understood by all the parties who have read it.⁹⁷

According to Williams⁹⁸ the growth of the PLM in recent decades and in all major English-speaking countries has amplified the calls for radical changes in legal language. This can be witnessed through a number of cases of enacted legislative texts which followed the principles of plain language and can be found in several countries like South Africa, Australia and Canada.⁹⁹

Louw¹⁰⁰ submit that the central point of the PLM is the assumption that the parties to legal documents and the ordinary person comprise the audience of the legal document and legislation. The heart of the movement advocates clear and effective use of language intended audience.

3.3 Plain language: Background

According to Bekink and Botha¹⁰¹ the issue of 'plain language' drafting of legislation, contracts and other legal documents has over the past three decades became one of the new slogans among legal academics and practitioners. Depending on once view, it led to a healthy (and sometimes robust) debate, not only as to what plain language drafting should and should not be, but its consequences for drafting and legal interpretation as well.¹⁰²

⁹⁵ *Idem* 92.

⁹⁶ LRCV "Legislation, Legal Rights and Plain English" (1985) Discussion Paper 1 Victorian Government Printer 1 8-9.

⁹⁷ *Ibid.*

⁹⁸ Williams C "ESP Across Culture 1 Legal English and Plain Language: An Introduction" (2004) http://www.scienzepolitiche.uniba.it/area_docenti/documenti_docente/materiali_didattici/116_Williams (accessed on 14/03/2014) 111.

⁹⁹ *Ibid.*

¹⁰⁰ Louw (2010) 92.

¹⁰¹ Bekink B & Botha C Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing) (2007) <http://repository.up.ac.za/handle/2263/3430> (accessed on 10/10/2015)34-67.

¹⁰² *Ibid.*

This research when regards is to plain language, focuses on its inception and influence in the South Africa context and to some extent the Australia context. To properly understand what plain language entails it is important to visit its historic background even if there is no intention to delve deep into other jurisdictions which gave rise to plain language.

A submission made by Elliot¹⁰³ is that throughout the world attempts were made to make legal, business and government communication more accessible and understandable to those who must read them. The label "plain language" is a convenient one to provide a focus to concerns about improving official writing. One of the first Parliamentary Counsel in the United Kingdom (the lawyers in the UK who draft legislation) was concerned that "layfolk" (ordinary consumers) were not kept in mind when drafting legislation.¹⁰⁴ The calls for plain language has been so strong in many jurisdictions and in the United Kingdom for example a plain language campaign within Government led by former Prime Minister Margaret Thatcher revolutionised government forms and government communication. In other jurisdictions such as Australia, the work of the Victorian Law Reform Commission on plain language dominated the latter part of the 1980's.¹⁰⁵

In Canada, Australia, New Zealand and South Africa plain language principles have penetrated the legal cultures more intensely, and many new laws are drafted in plain language these days.¹⁰⁶ The perfect example is the Constitution of South Africa which was written in such a manner that is easily understandable to ordinary people.¹⁰⁷

It is further submitted by Stoop and Chürr that in 2010, the Parliament of Australia, also known as the Commonwealth Parliament or Federal Parliament approved legislation implementing the Australian consumer law.¹⁰⁸ This legislation regulates, among other things, unfair terms in standard-form consumer contracts as well as the unfair contract terms law. The main objective of the Australian Consumer Law is to protect and safeguard consumers and to ensure fair trading in Australia.¹⁰⁹

¹⁰³ Elliott D "How Legal Language Evolved" (1991) <http://www.davidelliott.ca> (Accessed on 27/08/2014) 4.

¹⁰⁴ *Ibid.*

¹⁰⁵ Elliott (1991) 4.

¹⁰⁶ Williams C "ESP Across Culture 1 Legal English and Plain Language: An Introduction" (2004) http://www.scienzepolitiche.uniba.it/area_docenti/documenti_docente/materiali_didattici/116_Williams (Accessed on 14/03/2014) (n38) 117.

¹⁰⁷ Van der Westhuizen J (2001) 62.

¹⁰⁸ Stoop & Chürr (2013) 519.

¹⁰⁹ *Ibid.*

The case of Australian is relevant comparatively speaking as their "plain language concept" in consumer contracts is fairly new and the country's legislation has recently undergone some reform in this regard.¹¹⁰

In South Africa, plain language has taken a forefront. Writers Monty and Hurwitz submit that over the past few years, even prior to the implementation of the CPA, there was a steady move away from the more formal use of archaic language in the commercial legal environment (this includes the drafting of contracts) and towards the more "fashionable" use of simpler, colloquial language (plain language).¹¹¹

Cheek¹¹² recommends that a legal language should be regarded as plain language communication if it meets the needs of its audience, by using language, structure, and design that is so clearly and effectively that the audience has the best possible chance of readily finding what they need, understanding it, and using it.

According to Louw¹¹³ the terms 'plain language' is not problematic to understand as it conveys what it exactly means and what the PLM intends to achieve. Louw acknowledges that there are many good definitions of plain language, she however describes plain language as 'the idiomatic and grammatical use of language that most effectively presents ideas to the reader'.¹¹⁴

It is therefore my contention that plain language can be viewed as a movement initiated to afford protection and a piece of mind to average and ordinary consumers who enter into contracts with unprincipled supplier. The development of plain language has however encountered various challenges and stern resistance from other legal language proponents along the process. The challenges vary from the definition of plain language to what ordinary consumers ought to be as well as what would be the appropriate criterion to determine what is plain language and what is not, what an ordinary or average consumer is and what is not.

¹¹⁰ *Ibid.*

¹¹¹ Monty and Hurwitz (2012) 58.

¹¹² Cheek (2010) 5.

¹¹³ Louw (2010) 99.

¹¹⁴ *Ibid.*

3.4 Criticism of archaic legal writing

In South Africa the use of archaic legal writing in legal documents was introduced by the adoption of both the Roman-Dutch and the English principles.¹¹⁵ Legal terminology was also adopted from them and many Latin terms such as *domicilium citandi et executandi* and archaic English words such as *hereinbefore* and *in lieu of* found their way into our Legal terminology.¹¹⁶ Notwithstanding the fact that the use of Latin terms and archaic English has become a common practice in our legal system (including law of contract), the use of such terms has led to a criticism that it makes the understanding of contracts by the average layperson difficult.¹¹⁷

Van der Westhuizen¹¹⁸ states that it has been a contention by philosophers that lawyers generally utilise language to misrepresent and conceal the truth as well as to unearth legal loopholes for the benefit of their clients and to the detriment of the other party. Van der Westhuizen¹¹⁹ further infers that there was a conception that lawyers intentionally draft feebly because it was part of their job to attempt to confuse consumers.

The problem with archaic legal writing is that where a contract is presented in a complex and inaccessible nature it is unreasonable to expect consumers to understand their rights in terms of such a contract.¹²⁰ Wydick¹²¹ submits that during the 1970s, the press criticised lawyers for what he called the frustration and outrage felt by consumers when attempting to understand and ultimately conclude insurance policies or instalment agreements with suppliers because of their mystified nature. According to Elliot¹²² a renowned legal writer Mellinkoff argues that legal writing has four exceptional characteristics, namely that they are wordy, unclear, pompous and very dull. The writer further views legal writing as an impediment to ordinary consumer comprehension.¹²³

Another valid criticism levelled at archaic legal language is that ordinary consumers repeatedly complain of the inability to comprehend legal documents which are meant to provide vital information.¹²⁴ Bivins¹²⁵ argues that traditional archaic legal writing is often

¹¹⁵ Louw (2010) 98.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Van der Westhuizen (2001) 62.

¹¹⁹ *Idem* 63.

¹²⁰ Omar D (2001) 58.

¹²¹ Wydick (1998) 5

¹²² Elliot (1991) 6.

¹²³ *Ibid.*

¹²⁴ Bivins (2005) 1.

found in documents such as leases, government regulations, legislation and standard-form contracts which are confusing and incomprehensible.

In support of the above view, Bivins¹²⁶ further submits with merit that laypersons may not be acquainted with the meaning of words such as “domicile,” “abutting,” or “mitigating” or may experience difficulty reading lengthy sentences containing numerous subordinate clauses. The incomprehensible nature of legal documents not written in plain language is contrary to the believe that when laypeople understand the extent of their rights and responsibilities, they are much more likely to respond and take a more active role in matters that affect them.¹²⁷

In short, good legal writing should not deviate unnecessarily and without justifiable grounds from ordinary well-written plain language.¹²⁸ Contracts need to be clear and the language used must be certain. To this effect, Barnard¹²⁹ submits that the most accurate description of plain language is “the writing and setting out of essential information in a way that gives a co-operative, motivated person a good chance of understanding the document at first reading, and in the same sense that the writer meant it to be understood”.

3.5 Criticism of the Plain Language Movement

The PLM as drive for plain language is openly critical of the use of legalese or traditional legal writing in legal documents. It is for this reason that many traditional legal writers have not favoured nor accepted plain language drafting in legal document.¹³⁰

One of the criticism of PLM is that what is usually plain for one consumer is not necessarily plain for another. What one consumer may find to be comprehensive and unambiguous might be incomprehensible and confusing to the next consumer. A legitimate concern is the danger of ignoring the fact that what is plain language to a particular audience who is reading or using a text in a contract may not be plain to another.¹³¹

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Wydick (1998) 5.

¹²⁹ Barnard (2013) 178.

¹³⁰ Louw (2010) 104.

¹³¹ Schriver KA (1991) “Plain Language for Expert or Lay Audiences: Designing Text Using Protocol-Aided Revision” Technical Report No.46 <http://www.nwp.org> (Accessed on 27/08/2014)

In line with the above statement, Louw¹³² points out that plain language is not suitable to all consumer contracts and that trade practice legislation as well as the common law doctrines of unconscionability and reasonableness are more flexible approaches. The writer further submits that the inclusion of plain language in various consumer legislations indicates that plain language is a supplementary aid, rather than an alternative to other consumer protection tools.¹³³

Kimble¹³⁴ states that an old criticism of the PLM was that plain language constitutes “baby talk or a drab” which is the simplest form of English. Moreover, the writer is of the opinion that the use of plain language would make the accurate conveying of complex legal ideas impossible, as precision is incompatible with plain language.¹³⁵ Masson¹³⁶ adds that when dealing with legal documents, complex ideas require complex words, and the use of plain language might create uncertainties.

According to Alberts¹³⁷ supporters of legal language submits that the use of traditional legal language is more precise, short and most intelligible as opposed to the use of plain language which required by the PLM supporters.

A further criticism of the PLM is that there exist no evidence that plain language would improve ordinary consumers’ comprehension of legal documents.¹³⁸ (However, according to Kimble,¹³⁹ a contract in plain language would at least encourage the consumer to read their contracts.) Masson¹⁴⁰ argues that the readability test under plain language provides no guarantee of readability, meaning that the consumer might still struggle with a document written in plain language. In addition, Masson¹⁴¹ compares the PLM with a gospel in need of theology and surmises that calls for plain language are founded on untested assumptions.

Louw¹⁴² states that that another valid criticism of the PLM is that it is too focused on the language of the legal document and the contracting parties and that drafters have to

¹³² Louw (2010) 104.

¹³³ *Ibid.*

¹³⁴ Kimble (1995) 51.

¹³⁵ *Ibid.*

¹³⁶ Masson & Waldron (1994) 68.

¹³⁷ Alberts (2001) 90-91.

¹³⁸ Kimble (1995) 62.

¹³⁹ *Ibid.*

¹⁴⁰ Masson & Waldron (1994) 68.

¹⁴¹ *Ibid.*

¹⁴² Louw (2010) 105.

consider every possible angle and problems. However, the interpreting judiciary and the lawyers who will be involved in drafting the contracts are left out of the equation.¹⁴³

The proponents of legal language are of the view that changing a legal document into a plain language document as envisaged by the PLM is a time-consuming, expensive task which is not cost-effective. ¹⁴⁴ Bivins¹⁴⁵ acknowledges that while legalese is not a perfect way to communicate, it works relatively well within the legal community and if it serves its purpose, many legal professionals feel there is no need to discard it. According to the writer, many legal professional fear that the intended meaning will be lost if a traditional legal document is translated into plain language.¹⁴⁶

3.6 The concept of plain language in contracts (prior to the CPA)

Louw¹⁴⁷ is of the opinion that the primary concern of the South African courts when assessing and interpreting a contract is to ascertain the intention of the parties, and this intention is sought in the words they used to express themselves. The writer further submits that the main elements that make commercial contracts different from others is that the normal “horizontal contract” between two consenting individuals is based on consensus whereas the “vertical contract” between consumers and suppliers is of a nature that the consumers are limited as to what is contained in the contract that is being presented to him/her.¹⁴⁸ The consumers are left with the option to either sign or endeavour to find an alternative supplier.¹⁴⁹

Louw¹⁵⁰ rightfully submits that it is the above unevenness in bargaining power that led many goods, credit and other service providers to have long complicated contracts drafted that protected their interests above and beyond those of the consumers. The writer correctly adds that it is in this area of the law that special protection was needed and more especially to standard-form consumer contracts.¹⁵¹ According to the writer it is an unavoidable result of

¹⁴³ *Ibid.*

¹⁴⁴ Bivins (2005) 128.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Louw (2010) 123.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Louw (2010) 123.

¹⁵¹ *Ibid.*

a growing economy and consumer participation in the modern society that many agreements concluded daily are embodied in standard-form contracts.¹⁵²

Gouws¹⁵³ aptly submits plain language as a language that is very direct and straightforward, which is engineered to deliver its message to readers clearly, effectively and devoid of any fuss or undue effort. Accordingly, plain language intends to avoid any obscurity, extravagant vocabulary and complicated sentence construction. Its prime purpose is for documents to be understood clearly within the first time of reading it.¹⁵⁴

The legalese in a form of Latin terms and archaic English continue to be used in legal documents regardless of the fact that even legal professionals sometimes experience difficulty understanding them.¹⁵⁵ The reasons for the continuation of the use of legalese is that people typically associate them with legal documents. A further reason is that they gives legal documents a distinctive aura and sets them apart from other types of documents.¹⁵⁶

Information submitted in its plainest form is central to consumer law and crucial for the protection of consumers. Omar¹⁵⁷ rightfully submits that illiterate consumers who can neither read nor write have a right to information and such information ought to be presented in a clear and understandable manner.

Moreover, the use of plain language would better serve the relationship between a legal professional, who often acts on behalf of supplier, and the consumer than the use of gobbledygook legal language.¹⁵⁸

The use of plain language would neutralise the negative effects of archaic legal language. This is also one of the main aims of the PLM, to simplify the language of the law which attempted to ensure that consumers can understand legal documents which they are required to sign, such as standard-form contracts and other insurance policies.¹⁵⁹

¹⁵² *Ibid.*

¹⁵³ Gouws (2010) 81.

¹⁵⁴ *Ibid.*

¹⁵⁵ Bivins (2005) 128.

¹⁵⁶ *Ibid.*

¹⁵⁷ Omar (2001) 59.

¹⁵⁸ Alberts (2001) 90.

¹⁵⁹ Schane S "Language and the law" 6 <http://idiom.ucsd.edu/-schane/law/introduction.pdf> (Accessed on 15/08/15).

Moreover, Kimble¹⁶⁰ indicates that most advocates for plain language submit that clear language should be envisioned as a partner to legal writing and not perceived as an enemy. I agree with the writer that the aim of plain language should be to lay bare any ambiguities, uncertainties and conflicts that are normally hidden by traditional legal writing.¹⁶¹

3.7 Chapter conclusion

As was indicated above, the PLM has greatly assisted in the development of the concept of plain language in contracts but also in consumer protection law.¹⁶² It is also apparent that the concept of plain language developed outside of the PLM as well in for example the recognition thereof by the courts.¹⁶³ The development of the concept of plain language also brought the importance thereof to the forefront and it is submitted that it ultimately assisted in the inclusion of a test for plain language within the CPA. (The contents of which will be discussed in the following chapter).

However, the discussion of the criticism to the principles on which the PLM is based must also be taken into account to obtain a balance between overregulation in the case of standard-form consumer contracts and the inadequate regulation thereof. This becomes a very important argument when the provisions of the CPA in this regard are discussed.

Generally speaking, consumers enter into contracts that often have hidden implications which they do not comprehend. According to Omar¹⁶⁴ it is the responsibility of government and legal professionals to simplify documents and to ensure that communication with the public or consumers is carried out in the manner that such parties can comprehend and apply.

Gouws¹⁶⁵ quotes an anonymous poet who once wrote that: "The written word should be clear as a bone, clear as light, firm as a stone, two words are not as good as one." I concur with Gouws¹⁶⁶ that plain language is the same and should be direct and straightforward, designed to deliver its message to its intended readers clearly, effectively and without fuss or undue effort.

¹⁶⁰ Kimble (1995) 55

¹⁶¹ *Ibid.*

¹⁶² See 3.2 above.

¹⁶³ See 3.4 above.

¹⁶⁴ Omar (2001) 60.

¹⁶⁵ Gouws (2010) 81.

¹⁶⁶ *Ibid.*

CHAPTER 4 THE INFLUENCE OF THE CONSUMER PROTECTION ACT 68 OF 2008 ON STANDARD-FORM CONTRACTS AND PLAIN LANGUAGE

4.1 Introduction

The background, the application and the interpretation of the CPA will be addressed in this section. This chapter will further critically look at how the relevant requirements of plain language are brought about by section 22 of the CPA. The inadequacies of The CPA and the challenges still faced by ordinary consumer will be explored.

The chapter will briefly discuss the fact that consumer protection was present in SA law prior to the CPA in the form of legislation. The implementation of the CPA will also be discussed.

According to Williams¹⁶⁷ there has been a growth of the PLM in recent decades in all major English-speaking countries, however, calls for radical changes in legal English have become increasingly widespread, and cases of enacted legislative texts following the principles of plain language can already be found in several countries, e.g. South Africa, Australia and Canada.

To render assistance to average consumers and to curb the practice of unfair contracts, the CPA was signed into law on 24 April 2009 and came into effect on 31 March 2011. The CPA currently co-exists and coincides with the National Credit Act¹⁶⁸ and the electronic Communication and Transaction Act¹⁶⁹. The latter Acts do not only confer further right and protection to consumer, but also places obligations.

In addition, the chapter will delve into the relevant requirements of plain language as provided by section 64 of the NCA. The overlap between section 22 of the CPA and section 64 of the NCA will be analysed as both the sections deal with the provisions of plain language.

¹⁶⁷ William (2004) 111.

¹⁶⁸ Act 34 of 2005. Hereinafter referred to as the NCA.

¹⁶⁹ Act 25 of 2002. Hereinafter referred to as the ECTA.

4.2 Background of consumer protection in South Africa and the implementation of CPA

The protection of consumer with regards to contractual obligations has always been a burning issue throughout the world. In South Africa, for instance, black consumers banded together to use consumer boycotts successfully against white businesses as a powerful political weapon to confront the apartheid regime.¹⁷⁰ The need for protection led to the formation of various private organisations.¹⁷¹

In 1994 The South African Law Commission published a working paper suggesting the introduction of an Act which would allow court to review unfair contracts terms. Following further discussion another document was published in 1996.¹⁷²

Van Eeden¹⁷³ submits that subsequent to the World War II, it became increasingly evident, there was an expanding body of legal scholarship internationally which pointed out, that the laws and the legal systems of the twentieth century seemed to have become detached from the reality. Businesses and consumers, particularly low income consumer engaged in contractual transactions, however, the legal doctrines and judicial pronouncements were clearly unfair and unjustifiable towards the consumers. The consumers were ill-informed of their legal rights, and often had no information regarding the quality or performance of products.¹⁷⁴

In essence, rights of consumers to contract were merely theoretical and derisory. Only the rights and benefits of suppliers were viable. Laws had ample shortcomings with regards to the protection of consumer rights. To this effect, Parish¹⁷⁵ states that a number of scepticisms have been levelled against governments' aptitude to intervene in favour of consumer interests.

Van Eeden¹⁷⁶ concurs with the above and submits that the realisation that justice and redress is often out of reach for consumers is not a new concept, and in many instance, consumer cases rarely reached courts.

¹⁷⁰ Mcquoid-Masson (1997) 352.

¹⁷¹ The formation of organisation is not relevant for this dissertation. For further information see Consumer Law is South Africa *supra*.

¹⁷² Mcquoid-Masson (1997) 26.

¹⁷³ Van Eeden (2013) 21-22.

¹⁷⁴ *Ibid.*

¹⁷⁵ Parish (1980) 233.

¹⁷⁶ Van Eeden 21.

According to Aronstam,¹⁷⁷ South African common law lacked the necessary ability to protect ordinary consumers who suffered abuse and exploitation at the hands of stronger suppliers when contracting with them. The concept of consumer law is relatively new as previously there was no comprehensive and systematic body of law which covered consumer protection holistically.¹⁷⁸

The writers Woodroffe and Lowe¹⁷⁹ rightfully submit that the roots of consumer protection law are ancient. They maintain however that the codification of the said consumer protection law only became prominent in the late 20th century.¹⁸⁰

Hutchison¹⁸¹ submits that in the United Kingdom subsequent to the coming into effect of the Unfair Contract Terms Act, there were calls made to produce a parallel legislation in South Africa, which should address unfairness of contractual terms as well as to provide consumers with knowledge that the courts have inherent discretionary powers to regulate unjust contractual terms.¹⁸²

The inadequacies of the traditional principles of contract are particularly exposed as a result of standard-term contracts, because these are usually offered on a take-it-or-leave-it basis, and free choice has little or nothing to do with the contracts.¹⁸³ These terms can either take the form of a written contract, terms and conditions on the back of a ticket, or disclaimer in a form of signs. The utility of standard-form contracts is undeniable however it is open to abuse, as it is easy for the suppliers to insert unreasonable terms in the fine print.¹⁸⁴ Traditionally, this problem is solved by legislation, of which CPA is an example.¹⁸⁵

Louw¹⁸⁶ rightfully states that in South Africa the need for plain language has become critical. With the new democracy, many people in government are committed to making the Constitution and other laws understandable. The writer further states that there are eleven official languages, and many South Africans speak English as a second language, so clarity

¹⁷⁷ Aronstam (1979) 47.

¹⁷⁸ Woker (2010) 218.

¹⁷⁹ Woodroffe & Lowe (2013) 1.

¹⁸⁰ *Ibid.*

¹⁸¹ Act 1977.

¹⁸² Hutchison (2009) 26.

¹⁸³ De Stadler (2013) 102.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Louw 129.

in English is critical.¹⁸⁷ According to the writer, new legislation such as the National Credit Act¹⁸⁸ and the new Consumer Protection Act¹⁸⁹ make special provision for consumer contracts to be drafted in plain and understandable language.¹⁹⁰

According to Melville¹⁹¹, the legislature created the CPA in the wake of the government's dedication to the development of the international consumer rights as well as unbearable pressure from the consumer bodies expecting the government to protect ordinary consumers from prevalent power abuse by suppliers.

De Stadler¹⁹² states that consumer law is relatively a new distinctive field of the law in South Africa and is currently being developed by the CPA which has transformed the consumer law landscape altogether. The CPA was signed by the President of the Republic of South Africa on 29 April 2009 and published in the *Government Gazette* on 29 April 2009.¹⁹³ According to Luterek,¹⁹⁴ parts of the CPA came in to effect on 24 April 2010. However, the CPA finally came into full operation on 31 March 2011.¹⁹⁵

4.3 General application of the CPA, interpretation and purpose

Though the opinion is that the introduction of the new legislation, the CPA will permanently damage the fundamental principles of law of contract, namely certainty and contractual freedom, its clear intention is to safeguard the rights of consumers against the behaviour of unscrupulous supplier, this intention is undeniable.¹⁹⁶ This portion of the dissertation deals with the purpose, the application and the interpretation of the CPA.

The purpose of the CPA as set out in its preamble is as follows:

“To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework

¹⁸⁷ *Ibid.*

¹⁸⁸ Act 34 of 2005.

¹⁸⁹ Act 68 of 2008.

¹⁹⁰ Louw 129.

¹⁹¹ Melville (2010) 1.

¹⁹² De Stadler (2013) 1.

¹⁹³ Stoop (2010) 302.

¹⁹⁴ Luterek “Relevance of the Consumer Protection Act of 2008 to Dairy Industry” 1. www.hahnlaw.co.za/consumer-protection-act-snack-foods.htm (Accessed on 16/02/2014).

¹⁹⁵ De Stadler (2013) 1.

¹⁹⁶ Fritz (2014) 45.

relating to consumer transactions and agreements, to establish the National Consumer Commission, to repeal sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), the Business Names Act, 1960 (Act No. 27 of 1960), the Price Control Act, 1964 (Act No.25 of 1964), the Sales and Service Matters Act, 1964 (Act No. 25 of 1964), the Trade Practices Act, 1976 (Act No. 76 of 1976), the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), and to make consequential amendments to various other Acts; and to provide for related incidental matters.”

Deducing from the preamble it is clear that while South Africa has previously had consumer protection laws, the CPA is much wider in scope and application. The Act seeks to consolidate consumer law in South Africa. It has repealed in part or as a whole a number of pre-existing Acts, including the following legislation:¹⁹⁷

- The Business Names Act
- Price Control Act
- Consumer Affairs (Unfair Business Practices) Act
- The Merchandise Marks Act (In part)
- The Sale and Service Matters Act
- The Trade Practices Act

The aims of the CPA plays a significant role in its interpretation.¹⁹⁸ Section 2 provides that the Act must be interpreted in a manner that gives effect to its aims. The CPA further provides in terms of section 4(3) that, if a provision of the CPA can have more than one meaning, the meaning that best promotes the spirit and purpose of the CPA, and will best improve the realisation and enjoyment of the consumer rights generally, and in particular by persons contemplated in section 3(1)(b) must be preferred.¹⁹⁹

The supplying of goods and services in South Africa, including the transactions entered into by the suppliers and the consumers within the Republic of South Africa is be governed by the CPA.²⁰⁰ The preamble to the CPA identifies the need to ensure accessible, transparent

¹⁹⁷ <http://www.labourguide.co.za/consumer-protection/1171-the-consumer-protection-act-introduction> (accessed on 15/10/2015);

¹⁹⁸ De Stadler (2013) 3.

¹⁹⁹ *Ibid.*

²⁰⁰ Section 5; this section deal with the application of the CPA in relation to transactions it governs within the Republic of South Africa. The section further lists excluded transactions which are contained under sub-section 2. The application incorporates the promotion of goods or services and is also applied to the supplier of any goods or services unless exempted.

and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace. The primary purpose on the CPA is to “promote advance the social and economic welfare of consumers”.²⁰¹ The CPA intends to do that by:²⁰²

- Establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- Reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
 - (i) who are low-income persons or persons comprising low-income communities;
 - (ii) who live in remote, isolated or low-density population areas or communities;
 - (iii) who are minors, seniors or other similarly vulnerable consumers; or
 - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
- Promoting fair business practices;
- Protecting consumers from—
 - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
 - (ii) deceptive, misleading, unfair or fraudulent conduct;
- Improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
- Promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
- Providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- Providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

Section 1 of the CPA, containing definitions, sets out what is meant by consumer, which *inter alia* means a person to whom goods or services are marketed in the ordinary course of business, a person who has entered into a transaction with a supplier (a person who markets any goods or services) in the ordinary course of business and someone who is a

²⁰¹ De Stadler (2013) 3.

²⁰² Section 3(1). See De Stadler (2013) 3.

user, recipient or beneficiary of those particular services. When dealing with the CPA it is of the utmost importance to constantly refer back to the definitions as various terms used throughout the CPA have been specifically defined. Other important definitions that should be taken note of are the meanings attached to transaction, goods and services.

“clearly”, is defined as, in relation to the quality of any text, notice or visual representation to be produced, published or displayed to a consumer, means in a form that satisfies the requirements of section 22.

Common law forms an important basis for the South African consumer protection, and to this end the CPA was formulated to give consumers easy access to consumer protection laws which ordinarily affects them.²⁰³ Most importantly in relation to common law, section 2(10) of the CPA provides that no provision of the CPA must be interpreted so as to prevent consumers from exercising any of the right conferred to them in term of the common law.²⁰⁴ It therefore entails that any interpretation of consumer agreements must be given to the extent that it favours common law right of ordinary consumers.

Melville²⁰⁵ correctly adds that section 2(10) makes it abundantly clear that common law in “not replaced” by the CPA where its application is essential. Newman confirms that section 2(10) provides that the CPA has no intentions to deny the consumers any opportunity to call upon any common law rights which already exist to protect consumers.²⁰⁶ In terms of the subsection, the common law should be developed to provide consumers with the opportunity to escape contractual liability where there agreement is founded on misrepresentations or mistakes.²⁰⁷

The CPA further provides for eight core fundamental consumer rights in Chapter 2 of the Act which are set out as follows:

- Right of equality in consumer market;
- Right to privacy;
- Right to choose;
- Right to disclosure of information;
- Right to fair and responsible marketing;

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Melville (2010) 22.

²⁰⁶ Newman (2012) 648.

²⁰⁷ *Ibid.*

- Right to fair and honest dealing;
- Right to fair, just and reasonable terms and conditions; and
- Right to fair value, good quality and safety.

It should be mentioned that the will affect all businesses within the Republic of South Africa, especially retailers, restaurants, farmers and any contracts in which any items or services are sold to a consumer, except those that are specifically exempted in terms of the Act.

The CPA further aims to level the business transacting playing field and to ensure that consumers enter into contracts whose terms they fully understand, and where they do not comprehend, are not intimidated to request clarity and further information.²⁰⁸

4.4 The plain language requirements in terms of section 22 and its role throughout the CPA

4.4.1 Section 22: The right to plain language

As allude above, the CPA provides for eight core fundamental consumer rights in Chapter 2. The consumer's right to disclosure and information (Part D) includes section 22 which provides that consumers have the right to information in plain and understandable language.²⁰⁹ It is perceptible from this that the legislature envisions the plainness of language in contracts (including standard-form contracts) and other legal documents as means to redress imbalances between suppliers and consumers. The writers Monty and Hurwitz rightfully submit that section 22 places an obligation on suppliers to provide consumers with notices, documents or visual representations that are in plain, clear and understandable language.²¹⁰

In terms of section 22 the producer of a notice, document or visual representation that is required, in terms of the CPA or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of the CPA or any other legislation, if any, for that notice, document or visual representation,²¹¹ or in plain language, if no form has been prescribed for that notice, document or visual representation.²¹²

²⁰⁸ Zvomuya F (2011) 7.

²⁰⁹ Act No. 68 of 2008.

²¹⁰ *supra* n29.

²¹¹ Section 22(1)(a).

²¹² Section 22(1)(b).

It is justifiably submitted by Gouws²¹³ that section 22(1)(b) seeks to ensure that consumers understand the terms and conditions of the transactions or agreements they enter into and that they are able to make informed choices about the products and services they consume. I support the writer's submission that section 22 does much more than merely requiring the use of plain and understandable language, it elevates the plain language requirement to a fundamental consumer right.²¹⁴

Section 22 (2) further provides as follows:

“22(2) For the purpose of the 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, having regard to—

- (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.”*

Gouws²¹⁵ correctly submits that section 22(2) provides that an agreement, including a standard-form agreement, would be in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the agreement 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 agreement without undue effort.²¹⁶

²¹³ Gouws (2010) 85.

²¹⁴ *Ibid.*

²¹⁵ Gouws (2010) 82.

²¹⁶ *Idem* 83. See also Monty & Hurwitz 58.

Contrary to the previous requirement that it is unnecessary to prove that the reader of a document in a ticket case actually understood the contents of the document, it will suffice to bind the consumer to the document if it is proved that the consumer read the document,²¹⁷ the plain language requirement in section 22(2) of the Act requires that a consumer must, in addition to reading the agreement, be able to understand its contents, import and significance.²¹⁸

Even though it is clear that the plain language provision of the CPA may be interpreted in various ways, such interpretations will not be restricted merely to the wording and grammar used in such provisions.²¹⁹ Consequently the plain language provisions will include aspects such as contents, structure and layout of the document and may even take into account elements pertaining to the documents design.²²⁰

Moreover, to identify the reader, one must consider section 22(2) of the CPA. A reading of this subsection makes it clear that the Act envisages an ordinary consumer.²²¹ The preamble to the CPA acknowledges the variations among consumers because of illiteracy and other forms of social and financial inequalities. Gouws²²² submit that it is against this backdrop that it must be determined when a consumer will be regarded as 'ordinary'. Gouws²²³ states that once it is established that a consumer is 'ordinary', one will have to determine whether it is reasonable to conclude that that consumer can be expected to understand the 'content, significance and import of the agreement without undue effort.

From a reading of s 50(2)(b)(i) of the CPA, it is evident that section 22 will apply to every written agreement (including standard-form contracts) entered into between a consumer and a supplier, whether a written agreement is required by the CPA, or whether the parties freely entered into the agreement.²²⁴ It can be deduced that the consequence of non-compliance with section 22, on the part of the supplier, may leave the supplier unable to enforce any of the rights he might have in terms of the agreement.

²¹⁷ Gouws (2010) 86.

²¹⁸ *Ibid.*

²¹⁹ Melville (2011) 158.

²²⁰ *Ibid.*

²²¹ Gouws (2010) 87.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Gouws (2010) 85.

Frank²²⁵ correctly points out that section 22 has a number of challenges which includes the definition of what is an 'ordinary consumer', how can one define an average literacy skills, how much experience is 'minimal experience'. According to the writer, the lack of clarity of section 22 serves to highlight the conundrum that many in the legal profession now find themselves in when it comes to plain language drafting.²²⁶

Gouws²²⁷ correctly adds that the distinction presupposes different classes of ordinary consumers, the extent of which is limited only by the number of different types of agreements which a supplier and a consumer may conclude. In addition, the distinction further presupposes ascribing an average literacy to the ordinary consumer belonging to a particular class of consumers, which in all likelihood will vary from class to class, and that cannot be correct.²²⁸

Although the above statements present a concerns, it is undeniable that the two main reasons the CPA requires consumer agreements to be drafted in plain language is firstly, because most of the consumer agreements are written in a technical language not easily understood by ordinary consumers and secondly, they are one-sided, non-negotiable, adhesion contracts which are constantly in favour of the suppliers.²²⁹ Furthermore, the CPA empowers the NCC to publish guidelines for methods of assessing whether a notice, document or visual representation is in plain language.²³⁰

Despite the challenges faced by the CPA, in particular the interpretation of some of the phrases utilised in section 22 of the Act, I agree with Gouws²³¹ that although the terms of consumer agreements (including standard-form agreements) may not be negotiable, consumers will at least be able to understand the import of those terms if they are written in plain language.²³²

²²⁵ Frank (2012) 44.

²²⁶ *Ibid.*

²²⁷ Gouws (2010) 88.

²²⁸ *Ibid.*

²²⁹ Gouws (2010) 81.

²³⁰ Section 22(3).

²³¹ Gouws (2010) 82.

²³² *Ibid.*

4.4.2 The role of plain language requirement in terms of section 22 throughout the CPA

It is prudent to take into cognisance the fact that section 22 is sort of a “sound wave” or “golden thread” that has to be taken into account wherever we deal with other provisions or sections of the CPA.

In terms of section 7 which governs the formal requirements of a franchise agreements, it is specifically provided that a franchise agreement must be in writing and comply with the provisions of section 22.²³³

Section 16 read together with section 32 provides that a supplier must inform a consumer of his cooling-off right in the case of direct marketing in the prescribed manner and form which includes plain language.

Section 49(3) exemption clauses must also comply with section 22. Section 49 purports to set formal requirements for incorporation of certain types of terms, such as a requirement that certain types of terms must be signed or initialled or the consumer must have otherwise acted in a manner consistent with acknowledgment of such terms.²³⁴ Furthermore, Section 49 provides that certain types of terms or notices must be drawn to the attention of the consumer in a prescribed manner and form.²³⁵

According to Naude,²³⁶ The four types of terms in question are, first, exemption clauses (that is, clauses limiting in any way the risk or liability of the supplier or another person), secondly, clauses by which the consumer assumes a risk or liability, thirdly, indemnity clauses (requiring the consumer to indemnify the supplier or any other person for any cause), and finally, acknowledgments of any fact by the consumer.²³⁷ The writer further submits that in dealing with these types of terms, firstly the terms must be written in plain language. Secondly, their existence, nature and effect must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer.²³⁸

²³³ Section 7(1)(c).

²³⁴ Naude (2009) 506.

²³⁵ *Idem* 508.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

Unfortunately for the consumer Section 49 does not spell out the consequences of non-compliance with its requirements.²³⁹ For this, one has to consider section 52 on the powers of a court to ensure fair terms. Section 52(4) provides that if a term or notice failed to satisfy the requirements of section 49, the court may make an order severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction.²⁴⁰ The court may also make any further order that is just and reasonable in the circumstances.²⁴¹

Part G of chapter 2 of the CPA deals with a consumer's right to fair, just and reasonable terms and conditions, and section 50 requires that written consumer agreements be written in plain and understandable language.²⁴² Section 50(2) read together with section 50(2)(b)(i) is peremptory, and provides that a written consumer agreement between a supplier and a consumer must satisfy the plain language requirements set out in section 22.²⁴³ In addition, If an agreement is not written in plain and understandable language as required by section 50(2)(b)(i), the agreement, provision, term or condition of the agreement is void.²⁴⁴

If a consumer agreement between a supplier and a consumer is in writing, whether as required by the CPA or voluntarily, it applies irrespective of whether or not the consumer signs the agreement and the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement.²⁴⁵

Section 50(2) of the CPA provides that a written agreement between the supplier and consumer must comply with the provisions of section 22 and plain language.²⁴⁶ Barnard argues that section 22 will apply only to an agreement signed by both the consumer and the supplier, an agreement not signed by the consumer by virtue of section 50(2)(a) (provided that the agreement is still signed by the supplier) and an agreement not signed by the supplier, provided that it is still signed by the consumer.²⁴⁷

Section 52(2)(g) one of the factors that a court, the NCC and the NCT need to take into account to determine whether or not a contract terms is unfair, unreasonable or unjust is to

²³⁹ Naude 2009 (Part 2) 509.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Gouws (2010) 84.

²⁴³ *Ibid.*

²⁴⁴ Gouws (2010) 90.

²⁴⁵ Barnard (2013) 184.

²⁴⁶ *Idem* 199.

²⁴⁷ *Ibid.*

determine whether it complied with section 22. Although situated in Part G on the consumer's right to fair contract terms, section 52 applies not only to unfair contract terms, but also to contraventions of section 40 on 'unconscionable conduct' and section 41 on misrepresentations (both of which appear in Part F).²⁴⁸ Naude states that this peculiar situation is a remnant of the first two published drafts of the Bill, dating from before its introduction into Parliament, in which these provisions were all set out in one Part under the heading 'Right to honest dealing and fair agreements'.²⁴⁹

In addition, section 52 grants courts the power to declare agreements, in whole or in part, unfair or unconscionable.²⁵⁰ A court may also make any further order it considers just and reasonable, including, but not limited to, an order to restore money or property to the consumer, to compensate the consumer for losses or expenses and requiring the supplier to cease any practice or alter any practice, form or document, to avoid repetition of the supplier's conduct.²⁵¹

Lastly section 58 deals with warning concerning fact and nature of risk. Section 58(2) stipulates that a person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 22, and any other applicable standards, providing the consumer with adequate instructions for the safe handling and use of those goods.

5. Plain language in term of the NCA and the overlap of the NCA and the CPA

In South Africa plain language is actually fragmented as it is contained in two different statutes. However, both the statutes serve one common purpose that is to provide for efficient and effective consumer protection principles that ensures protection of ordinary consumers. Plain language is contained in section 22 of the CPA as well as section 64 of the NCA. I support Maxwell's view that consumers must be alerted to all terms of the contract where responsibility is assumed and the provisions must be expressed in plain language.²⁵²

To curb injustices experienced by ordinary consumer when dealing with suppliers in South Africa, the legislature created the NCA which was trailed by the CPA. Both the Acts contain consumer protection rights with the sole intention to protect consumers however the NCA

²⁴⁸ Naude 2009 (Part 2) 524.

²⁴⁹ *Ibid.*

²⁵⁰ Naude 2009 (Part 2) 525.

²⁵¹ *Ibid.*

²⁵² Maxwell (2009) 239.

has a narrow scope in comparison to the CPA.²⁵³ The NCA is applicable where consumers engage into credit agreement with suppliers and on the other hand, the CPA will apply where goods are purchased by consumer.²⁵⁴

In similar vein, writer Otto²⁵⁵ submits that the NCA's purpose is to create an environment that prompt courts to make special orders that satisfactorily and justly protect consumers.

The dilemma subsequent to the inception of the CPA was with regards to its functionality alongside the already established NCA in relation to matters which fell within the ambit of both Acts.²⁵⁶ Another problem envisioned had to do with the fact that should the Acts co-existing then it would lead to a duplication of regulations.²⁵⁷

However, according to writers Otto and Otto the CPA will not apply to transactions which are credit agreements and consequently fall within the ambit of the NCA.²⁵⁸ But that does not prevent the CPA's interference in credit agreements that deal with goods and services.²⁵⁹ The writers further aver that even though the overlap between the two Acts is inescapable, the confusion that would be created in applying both Acts is inevitable.²⁶⁰

Section 3 of the NCA provides that in addressing and correcting imbalances in negotiating powers between consumers and credit providers, amongst others, the consumers must, firstly, be provided with education about credit and consumer rights,²⁶¹ secondly, the consumer must be provided with adequate disclosure of standardised information²⁶² and thirdly, the consumer must provide with protection from deceptive, unfair and fraudulent conduct of credit providers.²⁶³

The challenge in applying the NCA in the above transactions, in the wake of the CPA, was that they would have be excluded from the broader protection afforded by the CPA, which

²⁵³ Melville (2011) 3.

²⁵⁴ Jacobs (2010) 304.

²⁵⁵ Otto & Otto (2013) 7.

²⁵⁶ Melville (2011) 12.

²⁵⁷ *Ibid.*

²⁵⁸ Otto & Otto (2013) 144.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ Section 3(e)(i).

²⁶² Section 3(e)(ii).

²⁶³ Section 3(e)(iii).

includes but not limited to the imposition of strict liability upon suppliers for any damages experienced by the consumers as the results of defects in products.²⁶⁴

Since the CPA broadly applies to consumer transaction, I support Melville's²⁶⁵ notion that were there exists two separates parts to the consumer transaction, the CPA must take preference to the entire transaction, with the exception of credit related components.

In terms of section 5 of the CPA, the CPA applies to every transaction occurring within the republic, unless exempted.²⁶⁶ The CPA further applies to the promotion of goods and services as well as the actual supply of goods and services.²⁶⁷ On the other hand, section 4 provides that the NCA is applicable to every credit agreement between parties dealing at arm's length and made within, or having an effect within, South Africa.²⁶⁸ However, the NCA provides a number of exemptions to be taken into cognisance.²⁶⁹

In enforcing consumer right, the CPA also presents consumer with the followings platforms:

- i) Consumers may refer the matter to the Tribunal;²⁷⁰
- ii) Where the supplier is subjected to the jurisdiction the ombudsman, then the matter may be referred to that ombudsman;²⁷¹
- iii) Should that not be the case, the matter may be referred to a provincial consumer court, if one is so created;²⁷²
- iv) Alternative Dispute Resolution (ADR) may also be resorted to;²⁷³
- v) A complaint may be lodged with the National Consumer Commission; and²⁷⁴
- vi) If all fails, the consumer may approach any court of law with jurisdiction to hear the matter.²⁷⁵

Previously, when it came to consumer agreements, the courts only had powers to set aside clauses where the said clauses were contrary to public policy. However, under the CPA, the

²⁶⁴ Melville (2011) 6.

²⁶⁵ Melville (2011) 14.

²⁶⁶ Section 5(1)(a).

²⁶⁷ Section 5(1)(b).

²⁶⁸ Section 4(1).

²⁶⁹ Section 4(1)(a) to 4(1)(d).

²⁷⁰ Section 69(1)(a).

²⁷¹ Section 69(1)(b).

²⁷² Section 69(1)(c)(ii).

²⁷³ Section 69(1)(c)(iii).

²⁷⁴ Section 69(1)(c)(iv).

²⁷⁵ Section 69(1)(d).

courts are conferred with wider powers which include the review of contracts as well as making an order to amend consumer contracts to the extent that they are just and equitable. Furthermore, where there is existence of any ambiguity, the courts must interpret standard-form contracts to the benefit of consumers.²⁷⁶

According to writers Jacobs, Stoop and Van Niekerk²⁷⁷ the NCA has by far defended the rights of consumers in respect of credit transactions and the CPA has the colossal task to follow accordingly by ensuring that consumers are protected in all consumer transactions.

It is appropriate to note that the NCA not only protects the rights of consumer but also provides obligations to consumers. The NCA is not only favourable to consumers, but grants protection to credit providers in just and appropriate circumstances.²⁷⁸

The NCA applies to credit agreements between credit providers and consumers while the CPA applies to every transaction occurring within South Africa for the supply of promotion of goods and services, unless the transaction is exempt under the CPA.²⁷⁹ The two Acts share a range of similarities as their best purpose amongst other is to improve the standard on consumer information as well as protecting the consumers.²⁸⁰

Under section 64(3) of the NCA and section 22(3) of the CPA provision is made for the publishing of guidelines (by the National Credit Regulator in the case of the NCA and the Commission in the case of the CPA) for methods of assessing whether a document, notice of visual representation satisfies the requirements of subsection 1(b), although no such guidelines have been published.²⁸¹ However, should guidelines be published by both Act, confusions might be created on the applicability, meaning which will surpass the other as the authority, of guidelines.²⁸²

Melville²⁸³ writes that section 22 of the CPA, which deals with the provisions of the international phenomenon called plain language purely apply to consumer agreements or documents that were provided to consumer on or before 25 October 2010.

²⁷⁶ Posthumus (2011) 25.

²⁷⁷ Stoop (2010) 304.

²⁷⁸ Otto & Otto (2013) 8.

²⁷⁹ Sarah-lynn Tennant: The National Credit Act and Consumer Protection Act, A Guide for Credit Providers and Suppliers.

²⁸⁰ Own emphasis.

²⁸¹ Newman 737.

²⁸² Own emphasis.

²⁸³ Melville (2011) 16.

Frank²⁸⁴ points out that in terms of section 64, plain language refer to a document or agreement which is reasonable to determine that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort.

Chapter conclusion

From the above it is apparent that consumer protection law in South Africa is not an unknown concept. The concept of consumer protection was however fragmented and contained in various Act, and this made it difficult for consumers to fully appreciate their rights.

The South African common law dealt with consumer protection, but lacked the necessary ability to protect ordinary consumers who suffered abuse and exploitation at the hands of stronger suppliers when contracting with them. For this reason the legislature established the CPA, and the CPA seeks to consolidate consumer law in South Africa.²⁸⁵

In light of the above, to the extent consistent with advancing the purposes and policies of the CPA, the Tribunal or court must interpret any standard-form, contract or other document prepared or published by or on behalf of a supplier, or required by the CPA to be produced by a supplier, to the benefit of the consumer in such a manner that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer.²⁸⁶

Section 22 of the CPA seeks to ensure that consumers understand the terms and conditions of their agreements. Moreover, Section 22 does more than merely requiring the use of plain language, it elevates plain language requirement to become a fundamental consumer right. Furthermore, the CPA empowers courts to declare contracts void where they are inconsistent with the requirements of plain language.

Section 22 is however without criticism, Gouws²⁸⁷ argues with merit that what is plain for one consumer is not necessarily plain for another consumer, and a distinction between classes

²⁸⁴ Frank (2012) 45. See also Barnard (2013) 179.

²⁸⁵ Melville (2011) 3.

²⁸⁶ Barnard (2013) 181.

²⁸⁷ Gouws (2010) 88.

of consumers based on literacy would not support this. The writer takes the argument further by stating that a distinction between different classes of consumers is also contrary to what is envisaged in the preamble to the CPA, namely, eradicating the indifferences of consumers based on illiteracy and other forms of social and financial inequalities.²⁸⁸

On the other hand, it might be argued that in the absence of any class distinction, a situation may arise where a consumer with literacy skills that exceeds the average level of literacy of an ordinary consumer may escape contractual liability based on noncompliance with the plain language requirement.²⁸⁹ Gouws²⁹⁰ argues that this might be the case, especially because an agreement might be declared void for non-compliance with the plain language requirement in terms of section 52 of the CPA, and it remains to be seen how the courts and different forums will address this issue.

Although I agree that the above concerns should be addressed and that any vagueness relating to the interpretation of section 22 be cleared by the legislature for the benefit of ordinary consumers as well as suppliers, it is undeniable that the CPA is a necessary tool which seeks to align with international requirements of plain language to render maximum protection to ordinary consumer against unscrupulous suppliers who use incomprehensible legal language to deceive them.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

CHAPTER 5 CONSUMER PROTECTION LAW PERTAINING TO PLAIN LANGUAGE IN CONTRACTS IN AUSTRALIAN CONSUMER LAW

5.1 Introduction

The focus of this chapter is on foreign law which is critical in assisting the South African law to further develop, particularly in the area of consumer protection. According to Barnard,²⁹¹ section 2(2) of the CPA deals substantively with the significance of a comparative investigation which requires a person, the Tribunal, Commission or the courts to have regards any appropriate foreign and international law when interpreting the provisions of the CPA.

The re-harmonisation of consumer law in Australia came into effect on 1 January 2011 in a form of the Australian consumer law. The Australian consumer law is contained in scheduled 2 of the Competition and Consumer Act 2010²⁹² ending the much prolonged need for a suitable consumer protection law in Australia.²⁹³ Conversely, the South African version, the CPA came into effect on 31 March 2011 to become the first comprehensive legislature purely focused at protecting consumers.²⁹⁴

Stoop states that the purpose of the Australian consumer law is to protect and safeguard the interests of ordinary consumers as well as to provide for fair trading in Australia.²⁹⁵ According to Louw a number of Australian statutes prescribe plain language in certain areas and this is especially prevalent in the realm of consumer related arenas.²⁹⁶

As regards to South Africa, the CPA was established to give protection to ordinary consumers. The CPA further prescribes that most consumer agreement be drafted in plain language. As was confirmed in Chapter 4, Louw²⁹⁷ rightfully adds that in South Africa there have also been major changes with regards to consumer protection, especially in the arena of credit agreements, where plain language has now become a prerequisite in consumer contracts.

²⁹¹ Barnard (2013) 482.

²⁹² Act no 51 of 1974. Hereinafter referred to as the CCA.

²⁹³ Malbon & Nottage (2013) 1.

²⁹⁴ De Stadler (2013) 1.

²⁹⁵ Stoop & Chürr (2013) 522.

²⁹⁶ Louw (2010) 113.

²⁹⁷ *Idem* 115.

In view of the above, the reason for selecting Australia is because their Act or the codification of the consumer protection law is fairly new, similar to the CPA. In addition, the CCA also places emphasis on plain language and the protection of consumers against unscrupulous suppliers. Furthermore, unlike the CPA, the CCA is more robust with regards to dealing with standard-form contracts.

This chapter aims to comparatively discuss consumer protection principles provided by the CCA as well as its South African counterpart, the CPA. The formal conceptualisation of consumer protection laws is relatively new in both countries. Similarities between the Australian consumer law and the South African consumer law will be highlighted. The chapter will also cover the meaning of the consumer and establish whether, like the CPA, the CCA contains any ambiguities. In addition, the chapter aims to ascertain the effects of plain language on contracts, particularly standard-form contracts in Australia.

5.2 Relevant legislation in terms of Australian consumer law and its effect on contracts

5.2.1 Definition of the consumer

The protection of consumers is essential in both countries, for this reason both legislatures to cover the concepts of fair, reasonable and just contracts as well as the need for plain language in consumer contracts in their respective legislations.²⁹⁸ The formation of platforms where ordinary consumers can rely on the judiciary or other bodies with powers to address or regulate their consumer right and contracts is a major *coup* for both sets of legislatures.²⁹⁹

It is important reiterate that prior to the formation of the Schedule 2 of the CCA, which is the Australian Consumer Law, the Australian law already had laws governing the area of consumer protection law. The Australian Consumer Law was enacted to amend the Trade Practice Act of 1974 (which previously governed the consumer protection law in Australia), to establish and apply the Australian Consumer Law and to introduce new penalties, enforcement powers and consumer redress options.³⁰⁰

²⁹⁸ See De Stadler (2013) 7-8 and also Paterson (2012) 85.

²⁹⁹ Paterson (2012) 15.

³⁰⁰ Louw (2010) 138.

To render optimum protection to consumers as is the fundamental purpose of the CCA, it was important for the CCA to properly clarify who are the consumers it seeks to protect. In terms of the CCA, a consumer is defined to mean:³⁰¹

“When acquiring goods as a consumer

- (1) A person is taken to have acquired particular goods as a consumer if, and only if:*
 - (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:*
 - (i) \$40,000; or*
 - (ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or*
 - (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or*
 - (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.*
- (2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:*
 - (a) for the purpose of re-supply; or*
 - (b) for the purpose of using them up or transforming them, in trade or commerce:*
 - (i) in the course of a process of production or manufacture; or*
 - (ii) in the course of repairing or treating other goods or fixtures on land.*

When acquiring services as a consumer

- (3) A person is taken to have acquired particular services as a consumer if, and only if:*
 - (a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:*
 - (i) \$40,000; or*
 - (ii) if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or*
 - (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.”*

In view of the above, it is clear that the CCA’s definition of a consumer is not restrict it to natural persons only, legal person will enjoy the same right as natural persons to the extent that the amount of goods or services purchased does not exceed \$40,000 or a greater

³⁰¹ Section 3 of schedule 2 of the CCA.

amount prescribed. Moreover, the CCA stipulates that the goods have to be acquired for personal, domestic or household use or consumption and not for the purpose of re-supplying.³⁰² I am of the opinion that this would disadvantage ordinary indigent consumers whose sole source of income is reselling goods.

I agree with writers Freilich and Griggs in that defining consumer protection by exclusively relying on monetary threshold creates an enormous problem whereby ordinary consumers, who purchase goods which exceeds the limit, even if by 1, 00 Australian dollar, are precluded from relying on the AUSTRALIAN CONSUMER LAW.³⁰³ This in effect will mean that consumers are ostracised by the very own Act which intends to serve and protect them.³⁰⁴

Although it appears that the CCA is unambiguous as to who it regards as the consumer, as opposed to the CPA which assumes that there are different kinds of consumers, it also has its own challenges. However, it has to be appreciated that the reason for the South African legislature to assume that there would be different levels or classes of consumer had to do with the country's previous struggles and the statistical believe that the majority of consumers are illiterate.

5.2.2 Plain language

The Australian legislator, in ensuring that consumers are protected against contracts that are presented in an incomprehensible language, directs the court in terms of section 24(2)(a)³⁰⁵ to consider the extent to which the term is transparent.³⁰⁶

Section 24(3) goes further by explaining what the legislator envisaged by its requirement of transparency.³⁰⁷ According to schedule 2 of the CCA a term would be transparent if:³⁰⁸

- i) It is expressed in reasonably plain language;
- ii) It is legible;
- iii) It is presented clearly; and
- iv) It is readily available to any party affected by the term.

³⁰² Freilich & Griggs (2013) 40.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ Schedule 2 of the CCA.

³⁰⁶ *Ibid.*

³⁰⁷ Section 24(3) of schedule 2 of the CCA.

³⁰⁸ *Ibid.*

Patterson³⁰⁹ correctly submits that the aforementioned elements as set out in the CCA, are in accordance with the international principles of the plain language English drafting movement which endeavours to provide ordinary consumer with easy comprehension of legal documents. The writer correctly argues that a contract would be transparent if consumers find it easy to read and comprehend their contractual rights and obligations therein.³¹⁰

The first element listed is important for compliance with the definition of transparency for the reason that a term must be “expressed in a reasonably plain language”.³¹¹ In view of this, care must be taken by suppliers to ensure that traditional legal terminology is avoided at all cost.³¹² However, Paterson³¹³ is of the opinion that, although it is important to express terms in “reasonably plain language”, at times certain complex topics require more complex explanations.

Stoop³¹⁴ is however of the opinion that the first element which is “reasonably plain language” is unclear and subject to scrutiny. According to the writer, unambiguous provision must be made regarding the term “reasonably plain language” as envisaged by the AUSTRALIAN CONSUMER LAW.³¹⁵ I agree the writer’s contention that the phrase should be simplified and defined to mean consumer contracts which are easily legible and clearly expressed.³¹⁶

In South Africa, De Stadler³¹⁷ rightfully submits that in terms of section 40(2) of the CPA, the suppliers are prohibited from consciously and intentionally entering into contracts that disadvantage consumers by virtue of their ignorance, illiteracy, mental disability or their inability to read and comprehend those contracts. Section 22 of the CPA goes further by providing measures that renders protection to illiterate consumers, who under normal circumstances would struggle to understand contracts that are not written in plain language.³¹⁸ This is as the result of the legislature placing emphasis on the courts to take plain language into account when deliberating on disputes.

³⁰⁹ Patterson (2012) 86.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ Stoop & Chürr (2013) 523.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ De Stadler (2013) 45.

³¹⁸ *Ibid.* Also see section 3(1)(b) which confirm that the purpose of the CPA, *inter alia*, is to give protection to illiterate consumers against incomprehensive agreements.

5.2.3 Standard-form Contracts

According to Patterson³¹⁹ standard-form contracts are usually drafted in a manner that makes them complicated to read and their terms are often obscure and legalistic, and renders them incomprehensible to consumers. The predicament is not only faced by consumers, but many contracts are usually drafted in a manner that even judges and accomplished lawyers have trouble understanding.³²⁰

In terms of the CCA a term of a consumer contract is void if:³²¹

- (a) the term is unfair; and
- (b) the contract is a standard form contract.

In view of section 23 above, it is clear that the CCA has taken a firm stance against standard-form contracts which are, in most instances, drafted to the detriment of consumers.

To clarify the legislature's intention, Patterson³²² submits that an unfair term in a standard-form contract is not a contravention of the CCA *per se*. According to the writer, the unfair term will only become a contravention in the event that the supplier intends to rely on it to the detriment of the consumer.³²³

In assisting the consumer and courts, the CCA does not stop at declaring that consumer contracts will be void if they are in a form of a standard-form contract, it goes further by setting who has the burden of proof and what should be taken in to account in determining that a contract is a standard-form contract which are set as follows:³²⁴

- “(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.*
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:*
 - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;*

³¹⁹ Patterson (2012) 85.

³²⁰ *Idem* 86.

³²¹ Section 23(1) of schedule 2 of the CCA.

³²² Patterson (2012) 102 – 103.

³²³ *Ibid.*

³²⁴ Section 27 of schedule 2 of the CCA.

- (b) *whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;*
- (c) *whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;*
- (d) *whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);*
- (e) *whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;*
- (f) *any other matter prescribed by the regulations.”*

Notwithstanding the above, in Australia, a supplier who ordinarily contracts with a particular group of sophisticated consumers, using a particular standard-form contract, may use the same standard-form to contract with an ordinary consumer and not fail the transparency requirement, on condition that he was not aware that the ordinary consumer was a member of the particular group (not a member of the sophisticated group).³²⁵

The ordinary consumer in Australia would however still have powers to challenge the contract that does not comply with his level of comprehension as involving unconscionable conduct, where the supplier was aware of the existence of such ordinary consumer within the sophisticated consumers group.³²⁶

5.3 Chapter conclusion

The CPA and its Australian counterparts, the CCA have many similarities which endeavour to render optimum protection to ordinary consumers as well as any other juristic consumers protected within their ambits. This is essentially because both legislations are influenced, to some extent, by the introduction of international unfair contract terms provisions as well as the international thrust towards the full blown use of plain language.³²⁷

If measured by the concepts and rights conferred and contained within the legislation, it appears that the CPA is on par, if it does not surpass the CCA, in relation to consumer

³²⁵ Patterson (2012) 93.

³²⁶ *Ibid.*

³²⁷ See *Idem* 4; Williams “ESP Across Culture 1 Legal English and Plain Language: An Introduction” (2004) (n38) 117; Gouws (2010) 79-80; Frank (2012) 44; Melville (2011) 1; Stoop and Chürr (2013) 524.

protection law. The challenge for the CPA is whether its provisions are accessible, known and understood by the general public.

It should be noted however that the CCA is more robust when it comes to dealing with unfairness which may be caused by standard-form contracts. The CCA empowers the courts to declare standard-form contract as void³²⁸ in instances where the suppliers move to rely on unfair terms to the detriment of consumers. On the other hand, the CPA does not give clear guide to courts on how to deal with standard-form contracts.

According to Louw,³²⁹ Australian case law indicates that courts have begun to look closely at the language in which contracts are couched, and particularly take into account the impediments to understanding posed by documents drafted in the traditional style.

In view of the above, it is apparent that the CPA endeavours to take an extra mile in an effort to render effective protection to consumers. Notwithstanding the latter, a lot has to be done to ensure that ordinary consumers are made aware of their rights in respect of their respective consumer transactions.

³²⁸ Section 23(1) of schedule 2 of the CCA.

³²⁹ Louw (2010) 113.

CHAPTER 6 CONCLUSION

6.1 Introduction

The purpose of this dissertation and the research contained therein was to discuss and investigate the influence of the CPA on concept of plain language in standard-form consumer contracts.

In an attempt to properly achieve the purpose of the dissertation, it was necessary to discuss the historic background of the law of contract as well as the position where the CPA was not applicable. This refers to a position where common law principles determined the law of contract (including standard-form contracts).

In addition, it was important to delve into the concept of plain language and the influence of the PLM leading up to the implementation of the CPA. The research further dealt with the introduction of the CPA in the South African consumer law as well as the overlap between the provisions of the CPA and the NCA. In concluding the research, a brief comparative analysis was made with Australian consumer law.

It is clear from the research that the main source of the South African legal system as a mixed legal system is our common law. Common law is described as a body of rules that are not contained in legislation and at times are referred to as “unwritten” law. In South Africa the majority of legal rules were formed by common law. Largely, the South African common law of contracts was *inter alia* formed on two important principles, which are the freedom of contract as well as the *maxim pacta sunt servanda*. Freedom of contract entails that parties enter into contracts at free will and without external interference and that the courts will uphold and enforce contracts when satisfied that contracts are not immoral, illegal or contrary to public policy.

In many instances contracts (including standard-form contracts) contain *unfair terms* which are contrary to the requirement of good faith and public policy. The wording of contract terms were not in plain language it was unfair if the intention of wording terms in such a way was to deceive the other contracting party or causes unequal bargaining positions which in turn would be against public policy. For this reasons freedom of contract, with regards to standard-form contracts, was always going to be to the detriment of consumers.

Though the South African law contract is founded on the principle of freedom of contract, it is still imperative for the state to safeguard the rights of its citizens, therefore if calling for plain language would assist to redress the hardship of consumers, then the state (through legislation) is vindicated for promulgating the CPA, though the CPA has its own challenges. In addition, though the CPA drastically affects and changes the principle of freedom of contract and other common law principles, section 2(10) still makes provision to preserve common law.

Gouws³³⁰ rightfully submits that various courts and the legislature have recognised the unfairness associated with the enforcement of unreadable, incomprehensible and standard-form non-negotiable agreements without providing a comprehensive solution. To this end, many countries have enacted plain language legislation to assist curtail undue challenges faced by consumer when dealing with legal instruments.³³¹

6.2 Plain language in standard-form consumer contracts in terms of the CPA

The use of legal terminology has always been the cornerstone in the formulation of legal documents. The major criticism of the use of legal language in contracts (including standard-form contracts) is its difficulty to be understood by consumers. De Stadler³³² correctly submits that the problem with legal contracts is that significant terms are often not readily evident or easily spotted.

Nonetheless, the introduction of the PLM calls for a clearer and effective communication and nothing else. The increasing need for the use of plain language in various jurisdictions is proof that the traditional legal writing has nearly reached its sell by date. Additionally, It should be noted that the use of plain language does not in any way negate the use of flavour and own style when drafting a contract.

Although the application of plain language in legal instrument does not guarantee that the comprehension by ordinary consumers will improve, it is still advisable to use plain language in contract as a base to assist consumers to understand the legal rights available to them as well as obligations that they bind themselves to. According to De Stadler,³³³ consumers,

³³⁰ Gouws (2010) 79-80.

³³¹ *Ibid.*

³³² De Stadler (2013) 106.

³³³ De Stadler (2013) 106.

while not detached from the responsibility to read their contracts, they must do so devoid of any undue effort.

The introduction of CPA endorses the PLM, hence the inclusion of section 22, which endeavours to simplify contractual drafting. The problem, however, was whether consumers are *au fait* with their rights as conferred by the CPA and whether the suppliers would implement the requirements of CPA without attempting to take advantage or limiting the right of consumers because of their ignorance.³³⁴

From the research it is apparent that the CPA aims to shift the bargaining powers from the suppliers to the consumers. Moreover, the CPA aims to curtail any unconscionable terms in standard-form contracts which are normally presented to consumers by unscrupulous suppliers.³³⁵ According to Gouws³³⁶ contracts are the “lifeblood” of the economy, therefore suggests that the protection of consumers who contract with suppliers is of optimum importance to boosting the economy.

I concur with Gouws³³⁷ sentiment that in order for the requirements of section 22 to be efficient, when it comes to rendering consumer agreements comprehensible, the legislation, on plain language, must address the following issues:

- i) Coverage (meaning the scope of application of a statute);
- ii) The standards by which plain language is defined; and
- iii) The enforcement mechanisms.

In essence, the standard-form contract would be regarded as being in plain language, where the language employed is semantically clear, coherent and contains at least some of the features listed in the CPA, resulting in the agreement being legible.³³⁸

Clearly there is a need for simple and plain language in consumer contracts and this will be a challenge in terms of the application of the CPA in achieving its objectives.³³⁹ Further according to Gouws,³⁴⁰ section 3 of the CPA is enacted to promote and advance the social

³³⁴ *Idem* 25.

³³⁵ B Frank (2012) at 44.

³³⁶ Gouws (2010) 94.

³³⁷ *Idem* 82.

³³⁸ *Idem* 87.

³³⁹ See the Preamble to the CPA and section 3, the purpose and policy of the CPA.

³⁴⁰ Gouws (2010) 82.

and economic welfare of consumers in South Africa, and for the purpose of plain language, he views section 3(1)(b)(iv) as the most essential amongst the other objectives.

I support Naude's³⁴¹ submission that the path of a consumer complaint should be clear and easy to understand. The confusion in the South African legislation on which courts or tribunals may be approached, and when, should be cleared up as soon as possible. Possible orders that a court may make to increase the effectiveness of an interdict against unfair terms should be listed in the legislation, including the possibility of an order that the business publish the court order in a particular manner or an order which provides for a phase-in period for compliance with the court order, after which penalties are payable per prohibited clause used per contract.

Moreover, the only effective way for the consumers to properly safeguard their consumer law right, is when they properly understand their rights and the plainest form of language is the easiest to understand.

6.3 Conclusion taking into account comparative discussion

According to Stoop³⁴² the Parliament of Australia approved legislation implementing the Australian consumer law. This legislation regulates, among other things, unfair terms in standard-form consumer contracts as well as the unfair contract terms law. The main objective of the AUSTRALIAN CONSUMER LAW is to protect and safeguard consumers and to ensure fair trading in Australia.

Similarly, Melville³⁴³ in South Africa the CPA brings about several fundamental changes to the existing law, which will forever alter the relationship between businesses and their customers, or consumers as the Act of course calls them. Consumers will be to a greater extent protected from exploitation and harm.³⁴⁴

The CPA and the CCA endeavours to render optimum protection to ordinary consumers as well as any other juristic consumers protected within their ambits. Both legislations are influenced by the introduction of international unfair contract terms provisions and the international move towards the use of plain language.

³⁴¹ Naude 2009 (Part1) 547.

³⁴² Stoop & Chürr (2013) 519.

³⁴³ Melville (2011) 2.

³⁴⁴ *Ibid.*

If measured by the concepts and rights conferred and contained within the legislation, it appears that the CPA is on par if it does not surpass the CCA in relation to consumer protection law. The challenge for the CPA is whether its provisions are accessible, known and understood by the general public.

It should be noted however that the CCA is more robust when it comes to dealing with unfairness which may be caused by standard-form contracts. The CCA empowers the courts to declare standard-form contract as void, in instances where the suppliers move to rely on unfair terms to the detriment of consumers. On the other hand, the CPA does not give clear guide to courts on how to deal with standard-form contracts.

In view of the above, it is apparent that the CPA endeavours to take an extra mile in an effort to render effective protection to consumers. Notwithstanding the latter, a lot has to be done to ensure that ordinary consumers are made aware of their rights in respect of their respective consumer transactions.

In the light of the above, I reiterate that in order for ordinary consumers to be alleviated from the challenges of pompous incomprehensible archaic legal documents, the PLM must urgently produce more knowledgeable proponents, teachers, researchers as well as plain language institutes and centres. In addition, law schools must develop comprehensive plain language writing courses as a compulsory subject.³⁴⁵ Secondly, country-wide road shows must be held in order to disseminate information to the public. Lastly, workshops must be held with all relevant stakeholders, including the National Prosecution Authority and judiciary with the aims of providing guidance and training.

It should be borne in mind that although the legislature, when drafting the CPA, had clear intentions to protect the rights of ordinary consumers. Taking into account all the changes that the CPA will bring, it is unsurprising that the Act was going to be without any critique. The Act empowers court to a greater extent, and therefore the courts should play a major role in giving clear interpretation to complex phrases.

In the words of Gouws³⁴⁶ "Plain language is here to stay, and practitioners [sellers] should acquaint themselves with it."

³⁴⁵ Own emphasis.

³⁴⁶ Gouws (2010) 94.

In conclusion, I again refer to the statement by the former British Prime Minister Winston Churchill regarding plain language:

“Out of intense complexities intense simplicities emerge. Broadly speaking, the short words are the best, and the old words when short are best of all.”³⁴⁷

The above statement should be the premise from which any consumer contract should be assessed. Writers such as Hawthorne argue that at its core a consumer contract always suggests unequal bargaining positions between the parties. The writer argues that the consumer is often the unwilling, unwitting contracting party in dealings with multi-national producers and distributors who outstrip the consumer in knowledge, power and resources. It is for exactly this reason that simplified consumer contracts in plain language are key to bring the parties to such a contract on equal bargaining positions. Where the parties conclude a consumer contract in terms of a standard-form contract drafted by lawyers in favour of producers or distributors (as mentioned above), plain language becomes even more paramount.

³⁴⁷ Churchill W <http://1.usa.gov/1LHG75A> accessed on 21/09/2015.

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