Testing the balances of rights pertaining to Enforcement clauses in Consumer Contracts

by

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Submitted in fulfillment of the requirements for the degree

LLM (Law of Contract)

In the faculty of Law

University of Pretoria

Date: 14 February 2018

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Summary

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The fundamental consumer rights granted to consumers by consumer legislation would be without meaning if no avenues of redress were available to enforce them.

In this implementation process it happens that there tend to be an unbalanced effect when one can compare consumer rights with these of service providers and credit providers when dealing with enforcement clauses in consumer contracts.

By comparing these rights one may conclude that there is a disproportionate shift of rights to the consumer to the detriment of service providers and credit providers in South Africa. This might have the effect that the South African economy is jeopardized and employment affected.

This leads to the realisation that the South African cornerstone of law of contract namely *pactum sunt servanda* is facing difficulty in the new era of consumer legislation and consumer behavior, yet that it remains important to ensure a sense of security and safety between contracting parties.

Chapter 1

INTRODUCTION

1.1 Background

"There is no decision that we can make that doesn't come with some sort of balance or sacrifice."

– Simon Sinek[1]

The question arose whether it is fair to ask if credit providers and third party service providers need protection from the Consumer Protection Act [2] (hereafter referred to as the CPA) and the National Credit Act[3] (hereinafter referred to as the NCA) against the ideal set in terms of unconscionable conduct and for collection, repayment, surrendering and enforcement of debt. One may ask whether there should not be a balance between the rights of the consumer on the one hand and the credit providers and service providers on the other hand.

1.2 Research question

The two (2) categories of rights that need to be weighed up against one another is the rights of consumers on the one hand and the rights of credit providers and service providers on the other.

The protection of the consumer rights is important in every market, particularly in the South African context. The more vulnerable consumers, the more protection is required. It is important to acknowledge the reality of many South African consumers and the high levels of poverty, illiteracy and other forms of social and economic inequality. Vulnerable consumers include them living in remote or low-density population areas, minors, seniors or other similarly

[1] Professor at Columbia University and leadership guru.
[2] Consumer Protection Act 68 of 2008 (hereinafter CPA).
[3] National Credit Act 34 of 2005 (hereinafter NCA).

vulnerable consumers that has a limited ability to read and comprehend advertisements, agreements, instructions and warnings, as a result of low literacy levels, vision impairment or language impediments.

In the preamble of the CPA it refers to the need to fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers.

Credit is one of the cornerstones of modern capitalism that lubricates the economy and promotes commercial activity and assisting participation of consumers. Credit enables people to spend money they don't have, spend more money than they earn, use credit for ordinary purchases, use credit even when they have cash and use debt to pay off debt. The use of credit and poor money management skills often leads people into a situation of over-indebtedness where they are unable to service credit agreements. This all serves as justification for protectionism, in some cases leading to an over protectionism that while good for the consumer, is to the detriment of the suppliers and service providers targeted by legislation.

The NCA is part of a comprehensive legislation overhaul designed to protect the consumer in the credit market and make credit more accessible. The NCA was introduced to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect the rights of consumers.

The rights of credit providers and service providers especially in light of the Constitution of South Africa (hereinafter referred to as the Constitution)[4] is beautifully explained in *State v Mankwanyane* (hereafter referred to as the *Mankwanyane* case):[5]

The *Mankwanyane* case states that in some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and

[4] The Constitution of South Africa, 1996.
[5] *State v. Mankwanyane* [1995] (3) SA 391 (CC) 1995 (6) BCLR 665 (CC) at 402 to 404.

aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future.

The case further confirms that the South African Constitution is different because it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspiration ally egalitarian ethos expressly articulated in the Constitution. The contrasts between the past, which it repudiates, and the future to which it seeks to commit the nation is stark and dramatic.

Adopted in 1996, the Constitution recognizes a common South African citizenship with equal entitlement to rights and responsibilities. One of these rights that is guaranteed under the Bill of Rights in the Constitution is reflected in section 22 and refers to freedom of trade, occupation and profession. Section 22 states that every citizen has the right to choose their trade, occupation or profession freely although law may regulate the practice of a trade, occupation or profession.

It is important to weigh up the rights created for the credit provider and service providers under section 22 of the Constitution of South Africa against the rights created for consumers in both the CPA and the NCA. We will therefore critically analyze the rights of consumers, which we feel is to the detriment of credit providers and service providers in South Africa and to the South African economy as a whole.

On conclusion this study aims to share more light on which rights take preference. We would further like to test if public policy in South Africa has changed to ultimately answer the question if there is a balance of rights pertaining to enforcement clauses in consumer contracts or is it only another way to enforce consumers rights, regardless of the influence on credit providers and service providers in South Africa, raising a big question in regards to equality.

This study is therefore not the traditional study to show why it is correct to enforce consumer rights by means of enforcement clauses in consumer agreements, but rather a critical analyzes of these enforcement clauses to share some light on the influence it has on the South African economy and to test if the implementation thereof is not taken to far.

In the last few years in South Africa the law of contract changed dramatically, in such a way that serious questions are being asked around the fundamental principles that form part of our law of contract as we always knew it.

It is therefore inevitable to acknowledge the changes in the law of contract but ignore the influence of the rules of interpretation in this regard.

We will also attempt to show in the following chapters what is the influence of the rules of interpretation on the new culture of law of contract and consumer agreements specifically.

1.3 Research Methodology

1.3.1 Literature study

This study will review the relevant South African law dealing with investigative authorities. It will include a review of statutes and other legislation, case law, common law, textbooks and articles as well as electronic material to determine the balance of rights between consumers on the one hand and credit providers and service providers on the other hand.

1.3.2 Comparative historical approach

This study will make use of pre-existing knowledge by using available case law, statutes and articles to show areas of potential reform. This approach will also assist with the human rights field especially when showing changing

behavior towards those building blocks always considered the cornerstone of the South-African law of contract.

1.4 Delimitations

Initially a comparative methodological study with Australian law was considered but decided to exclude it from my findings as it became apparent that the South African law of contract's development is firstly tied to the unique historical development in our country. Furthermore Australia does not have a constitution that impact on these aspects. It is especially true in regards to the legal question I am trying to answer, where the focus was throughout the study on the balance of rights and the Bill of Rights in the Constitution mainly served as the balancing weight.

Chapter 2

DEVELOPMENT OF CONSUMER RIGHTS, LEGISLATION AND THE CONSTITUTION IN SOUTH AFRICA

2.1 Historical development of consumer rights, legislation and the Constitution in South Africa

South Africa successfully held its first democratic elections in April 1994 and the African National Congress (hereafter refer to as the ANC) won with a majority vote to head the government of national unity.

In order to rebuild and transform the economy after years of apartheid regime's economic isolation and financial sanctions which were enforced by the international community, government chose the Reconstruction and Development Programme (hereafter refer to as the RDP) which was part of the election platform of the ANC in the 1994 elections.

The major policy programmes outlined by the White Paper on the RDP (1995) is creating a strong, dynamic and balanced economy; developing human resource capacity of all South Africans; ensuring that no one suffers racial or gender discrimination in hiring, promotion or training situations; developing a prosperous, balanced regional economy in Southern Africa and democratize the state and society.

Government introduced a macroeconomic policy framework called the Growth, Employment and Redistribution (hereafter refer to as GEAR) strategy in 1996 to stimulate faster economic growth, which was required to provide resources to meet social investment needs.

GEAR was supporting the policy programmes of the RDP as stipulated above but also aimed at reducing fiscal deficits, lowering inflation, maintaining

exchange rate stability, decreasing barriers to trade and liberalizing capital flows. Both the RDP and GEAR had to a lesser or greater degree influenced policy development in South Africa.

Although we know that a policy document is not a law, it will often identify new laws needed for government to achieve its goals.[6]

The objects of the South African Law Reform Commission are to do research with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernization or reform of the law.

The Law Reform Commission completed the research on consumer protection measures in commercial contracting in the research papers called the Discussion Paper on Unreasonable Stipulations in Contracts and the Rectification of Contracts 65, Project 47[7] and the Report on the Recognition of Class Actions and Public Interest Actions in South African Law, Project 88.[8]

From these initial studies two important pieces of legislation were developed that are relevant for purposes of this study, namely the CPA and the NCA.

The historical development of these two important pieces of legislation underwent significant developments over the last few years. The biggest problem was the fact that consumers were unable to enforce their rights although they had legislative protection. While trying to rectify the inability to enforce their rights, contractual formalities and commercial contracts developed to fill this gap.

Consumer Protection have existed in industry specific legislation like the Tobacco Products Control Act[9], which banned certain types of advertisements,

[6] see in general Kelly Louw M and Stoop PN (Contributer) *Consumer Credit Regulation in South Africa* (2012) (1st edition) at 3-19.
[7] April 1998.
[8] August 1998.
[9] Tobacco Products Control Act 83 of 1993.

and the Foodstuffs, Cosmetic and Disinfectants Act[10] which regulated the sale, manufacture and importation of foodstuffs, cosmetics and disinfectants.

The Consumer Affairs Act [11] promised to bring consumers protection by introducing the Consumer Affairs Committee who was authorized to investigate suspicious and possibly abusive business practices.

Unfortunately the CPA fell short when it came to implementation, because once a practice was declared unfair and illegal, enforcement was left to the South African Police Service and prosecuting authorities. Due to them being overburdened with more serious matters, there was a lack prosecution in consumer matters.

The NCA was introduced to provide protection to consumers for retail credit products by prescribing formalities for contracts, prohibiting certain terms, regulating certain consequences and providing enforcement mechanisms in a contractual relationship.[12]

Although the enactment of the NCA was a significant step forward, over the years it became apparent that consumer legislation was in need of a comprehensive review to address discriminatory and unfair market practices, coupled with weak and inefficient enforcement measures.

Thereafter the CPA was introduced to promote and advance the general social and economic welfare of consumers in South Africa, by outlining the entitlements of consumers and the responsibilities of suppliers.

The objectives of the CPA include the establishment of a framework for maintaining a fair, accessible and efficient marketplace for consumers, reducing the disadvantages experiencing in assessing goods and services by vulnerable consumers and further protecting consumers from unfair trade practices.

[10] Foodstuffs, Cosmetic and Disinfectants Act 54 of 1972.
[11] Consumer Affairs Act 71 of 1988.
[12] Otto JM *The NCA explained* (2016) (4th ed) at 1-4.

The CPA has created the National Consumers Commission, to address consumer complaint and national Consumer Tribunal to adjudicate violations and transgressions of the NCA.

New laws are considered thoroughly. It is clear that consumer legislation in South Africa was part of a comprehensive development process and the process ensuring that an Act comes into in effect also ensures that the Constitution as the supreme law of our land should as always be taken into consideration in the evaluation of the protection and balance of rights.[13]

A very important aspect in this development process is to take cognizance of the role an function of consumerism. Consumerism is in a nut shell the protection of the rights and interests of the general pool of buyers, or an obsession with buying material goods or items. Laws and rules that protect people who shop and spend are examples of consumerism.

Consumerism is also a theory that is economically attractive as it encourages the attainment of goods and services in ever-increasing amounts. It offers the benefit that it stimulates the economy.

Consumerism is driven by huge sums spent on advertising designed to create both a desire to follow trends, and the resultant personal self-reward system based on acquisition. Materialism and thus in a way welfare is one of the end results of consumerism.

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[13] In South Africa new legislation stems from a discussion called a Green paper that is drafted in the Ministry or department dealing with a particular issue. The Green paper is then published for comment, suggestions or ideas, this leads to a more refined discussions document called the White paper. The relevant department or task team drafts the White paper and the relevant parliamentary committees may propose amendments or other proposals, where after it is sent back to the Ministry for further discussions, input and final decisions. A Bill is then drawn up by the government department under direction of the relevant minister as a draft version of a law. The Cabinet must approve a Bill before being submitted to Parliament. The State law advisors certify a Bill as being consistent with the Constitution and properly drafted. Before a Bill can become a law, it must be considered by both Houses of Parliament (namely the National Assembly and the National Council of Provinces). It is published in the Government Gazette for public comment and then referred to the relevant committee. Lastly if the Bill is passes through both Houses of Parliament it goes to the President for assent (signed into law). Once the President signs it, it becomes an Act of Parliament and a law of the land.

The legislative changes and the role of consumerism had an important effect role on South Africa law of contract.

In this study of enforcement clauses in consumer contracts it is imperative to first compare the balance between consumer rights and constitutional rights.

2.2 Balance of consumer rights and constitutional rights

The South African legal system is guided by the Constitution[14] and more specifically the values and the rights in the Bill of Rights[15] inform the law of contract.

The constitutional value that plays an important role the law of contract is the right to dignity, equality and freedom.[16]

The CPA does not apply to all commercial transactions and therefore the common law remains the reigning law in those transactions where the CPA does not apply.

Transactions that is specifically excluded from the scope of the application of the CPA are the supply or promotion of goods or services to the State, transactions in which the consumer is a juristic person whose asset value or annual turnover at the time of the transaction is more or equal to the threshold value determined by the Minister in terms of section 6 of the CPA, transactions that have been exempted by the Minister, transactions that constitute credit agreements under the NCA, transactions pertaining to services under an employment contract or a collective bargaining agreement.

Further it also includes all advice or related services as regulated by the Financial Advisory and Intermediary Services Act 37 of 2002 or the Long-term Insurance Act 52 of 1998 or the Short-term Insurance Act 53 of 1998.

It is therefore important to understand that the Constitution and its fundamental right to equality and dignity plays an important role in the development of the

[14] Sec 8 and 39.
[15] Chapter 2 of the Constitution.
[16] Sec 9 of the Constitution.

common law that governs commercial transactions that fall outside the ambit of the CPA.

There are scholars who feel that the common law, as rooted in the Roman–Dutch and English legal principles, has, to date not yet transformed enough to truly embrace the constitutional values of dignity, equality and freedom. There is also a general feeling that for the jurisprudence that emerges from the CPA to be coherent, the courts will no longer be able to look at the ground rules upon which the contractual arrangement was made.[17]

2.3 Different schools of thought when balancing consumer rights and constitutional values

There are currently two schools of thought namely autonomy and paternalism.

Autonomy is the liberal idea of the concept of the freedom of contract reigns unchallenged and paternalism feels that the state's judgment supersedes and replaces the individual's contractual autonomy. The CPA en NCA serve as good examples of paternalistic legislation.

These two schools of thought are demonstrated well in the recent Constitutional Court case of *Paulsens and Another v. Slip Knot Investments 777* (hereafter referred to as the *Paulsens* case).[18]

In the *Paulsens* case Winskor 139 Proprietary Limited (hereafter referred to as Winskor) entered into a finance agreement with Slip Knot Investments 777 Proprietary Limited (hereafter referred to as Slip Knot) to borrow R12 million. Mr. and Mrs. Paulsen (hereafter referred to as the Paulsens) bound themselves as sureties in respect of Winskor's liability to Slip Knot. Winskor subsequently defaulted on its obligation to repay the loan, together with a large amount of accrued interest.

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[17] Bauling A Nagtegaal A "Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008" 2015 (Volume 1) *De Jure* 149-171.

[18] Paulsens and Another v. Slip Knot Investments 777 Proprietary Limited (CCT 61/14) (2015) (3) SA 479 (CC) at 519 to 532.

Slip Knot sued the Paulsens in the Western Cape Division, Cape Town (High Court) seeking the capital amount, interest that had accrued to R12 million at the time proceedings were instituted, additional interest that would commence from the date of institution of the proceedings and interest on the judgement debt. The interest had at that stage been capped at R12 000 000.00 (twelve million rand) and capped by the *in duplum* rule.The Paulsens advanced 3 (three) defences namely that Slip Knot was not registered under the NCA as a credit provider ad therefore the agreement was invalid. Secondly the amount of interest was limited to the amount of R12 000 000.00 (twelve million rand) in terms of the *in duplum* rule. Lastly if the operation of the *in duplum* rule was suspended by the institution of legal proceedings, then interest was still limited to R12 000 000.00 (twelve million rand) as no proceedings had been instituted against Winskor as the principal debtor.

Slip Knot was successful in the High Court in all that it had claimed.

The Paulsens appealed to the full court of the High Court. The court confirmed that the Paulsens owed the capital amount, but upheld the Paulsen's last defence. Interest thus had to be capped at R12 million by virtue of the *in duplum* rule.

The Paulsens appealed the finding of liability to the Supreme Court of Appeal. Slip Knot cross-appealed in respect of the disallowed interest. The Supreme Court of Appeal agreed that the Paulsens owed the capital sum and upheld the cross-appeal, thus finding that the *in duplum* rule ceases to operate once litigation commences.

The matter went to the Constitutional Court and the Paulsens persisted with all of the contentions they had raised before the High Court. The Court produced 3 (three) separate judgments.

In the main judgment, judge Madlanga found that where a credit provider only enters into credit agreements exempted from the operation of the NCA, that credit provider do not need not register as a credit provider. These findings were unanimous.

Judge Madlanga went on to hold that the longstanding *in duplum* rule should be applicable during the litigation process. He thus reversed the contrary decision of the Supreme Court of Appeal in *Standard Bank Limited v. Oneanate Investments* (hereafter referred to as the *Oneanate* case) [19] because it ignored debtors' right of access to courts and other valid policy considerations and, in doing so, failed to conduct a proper balancing exercise.

In the majority concurring judgment, judge Moseneke, judge Mogoeng, judge Leeuw, judge Khampepe and judge van der Westhuizen, supported the outcome and reasoning of the main judgment, except where the main judgment disavowed that it developed the common law by overturning *Oneanate* case. They found that the main judgment made a mistake in reasoning that the separation of powers precluded it from adapting the common law in this case, as the *in duplum* rule is a common law norm that has always been under the oversight of the courts and its development thus will not encroach on any exclusive terrain of the legislature.

In a dissenting judgment on one point only, judge Cameron affirmed the interpretation of the common law in the *Oneanate* case. He found that the purpose of the *in duplum* rule is to protect debtors from creditors who allow interest to run without taking steps to recover the debt. However, where a creditor institutes litigation, a debtor will be vindicated by a valid defence, or by paying the debt. As the Paulsens had freely entered into the agreement, there was no reason to interfere with it once litigation had commenced.

It is clear from the judgement in the *Paulsens* case that there are different schools of thought of our jurisprudence when it comes to consumer rights and the constitutional values. The biggest risk of these different views is the risk of inconsistent application of contractual principles by jurisprudence, especially pertaining to enforcement clauses in consumer agreements.

2.4 Influence of the CPA on validity of contracts

The CPA affects the requirements for a valid contract to come into existence in various ways.

[19] *Standard Bank Limited v Oneanate Investments* (1998) (1) SA 811 (SCA) at 832 to 834.

Two requirements that is greatly influenced is the requirement that a contract is void if consensus is improperly obtained and also the requirement of legality, that is both a common law requirement for a valid contract to come into existence.

The CPA deals with improperly obtained consensus in section 40[20] that deals with the right to fair and honest dealings. It also deals with unconscionable conduct and prohibits the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct to conclude an agreement.

Section 40 (as part of Chapter 2 Part F of the CPA and dealing with fair and honest dealings) deals mostly with procedural unfairness, which relates to the manner in which consent was obtained as opposed to substantive unfairness that deals with the content or terms of the contract. The purpose of this section is to promote the social and economical welfare of consumers, protecting consumers from unconscionable, unfair, unreasonable trade practices and lastly confirming the principle of good faith underlying the South African law of contract.

Section 40(2) deals with specific instances of unconscionable behavior. The question arose if section 40(2) also includes inequality of bargaining power as asimilar factor as protected by it?

More important for purposes of this study is to know that section 40(2) is limited to suppliers who knowingly take advantage of a weakness of a consumer, but does not include suppliers who were unaware of such a weakness of a consumer. It should be noted that there is also no obligation on a supplier to expressly enquire if the consumer suffers from a weakness.[21]

[20] Chapter 2 part F.
[21] Jacobs W. Stoop P.N. van Niekerk R. “Fundamental consumer right under the Consumer Protection Act 68 of 2008: a critical overview and analysis” 2010 (Volume 3) *PER* 347.

Weaknesses are also limited in the CPA to the capacity to obtain or process information, namely mental disability, illiteracy, ignorance and inability to understand the language of the agreement.

Legality is addressed in section 49 (as part of Chapter 2 Part G of the CPA and dealing with the right to fair, just and reasonable terms) and prescribes certain formal prominence requirements for the valid inclusion into the contract of certain types of clauses. These clauses are exemption clauses, assumption of risk clauses, indemnity clauses and acknowledgement of fact.

There are three requirements set out in section 49 in relation to these types of terms namely that (a) they need to be in written and plain language, (b) they must be drawn to the attention of the consumer in a conspicuous manner to attract the attention of an ordinarily alerted consumer and lastly (c) the consumer must be given an adequate opportunity to receive and comprehend the term.

It is a problematic situation when it is a prerequisite that specific types of terms be specifically drawn to the attention of the consumer and counter signed or initialed as this might serve as a double–edged sword, which may ultimately work against the consumer.[22]

The common law rules on incorporation of contractual provisions must also be kept in mind in addition to the requirements of Section 49. Under the common law, the party who alleges the contract bears the onus of establishing what the terms of the contract are. Therefore a supplier only needs to proof that they took reasonable steps to bring these terms to the consumer's notice.

Although procedural fairness measures increase transparency and assist with obtaining consensus when dealing with contractual terms, the successful application thereof depends on many external factors such as whether the

[22] Naude T. *"The consumer's rights to fair, reasonable and just terms under the new CPA in comparative perspective"* 2009 (part 3) *SALJ* 510.

consumer study the agreement before signature and familiarizing themselves with the contractual terms.

In the South African context, where many consumers are illiterate and where consumers are often exploited owing to a lack of transparency, procedural fairness on its own can never be used to achieve contractual fairness.

2.5 Development of the strict application of remedies in the CPA against the common law position

The common law position has been amended by the CPA, but because of the application, many agreements fall outside the ambit of the CPA.

In those instances the common law position will remain. The CPA only becomes applicable when sellers either regularly sell property or continually market themselves as sellers of property.

2.5.1 Latent defects

In South Africa there are two types of faults that pertain to property purchases, leased or borrow, namely latent and patent defects. A latent defect is a fault that would not readily be revealed by a reasonable inspection whereas patent defects are defects that are not hidden and should easily be discovered by a reasonable inspection.

If we take the situation where a latent defect is applicable on goods sold and delivered by a credit provider, then prior to the implementation of the CPA the warranty against latent defects could be given *ex lege* (as part of the *naturalia*) of the contract or contractually (as part of the *incidentalia*).

If the CPA is not applicable the purchaser can under the Prescription Act for a period of three years from the date of becoming aware of the defect, or reasonably have become aware, hold the seller liable. The purchaser may

also institute the *actio empti* where there is either an express or tacit warranty given in terms of the agreement that there is no latent or patent defects. When instituting the *actio empti* the purchaser may cancel the agreement and claim damages from the seller. The warranty against latent defects applies automatically by operation of law or *ex lege* and forms part of every contract of sale as a *naturalia*. Where the warranty is given *ex lege* the remedies available to the purchaser will be aedilitian remedies namely *actio quanti minoris* and *actio redhibitoria*.

Aedilitian remedies will be available where there is a breach of warranty against latent defects and no express or tacit guarantee is present in terms of the contract, nor the warranty expressly excluded. It can also be instituted where seller fraudulently conceals the defect.

The *actio quanti minoris* is the prorate reduction in the purchase price and the *actio redhibitori*a is to put the parties in the position they were prior to conclusion of the contract.

The seller on the other hand is protected by the voetstoots clause, this clause protects the seller to a certain degree, unless the seller was aware of a defect and failed to disclose it, in those cases the seller's behavior could constitute fraudulent misrepresentation. The action empty may be excluded and the aedilitian actions by means of a voetstoots clause and will therefore prohibit the purchaser from instituting it.[23]

The reason for the exclusion of voetstoots provisions in contracts which fall within the ambit of the CPA is that voetstoots provisions are considered to be unfair, unreasonable and unjust in terms of the CPA.[24]

Consumers can exploit the definition of the word 'defect' by just insisting that they have an unreasonable expectation of goods and services. It should be

[23] Barnard J. "The influence of the CPA 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages" 2012 (3) *De Jure* 455.
[24] Sec 48.

better if the consumer expectation test is done away with in favor of a general standard of reasonableness.[25]

2.5.2 Right to good quality

If the CPA does apply it specifically grant the purchaser the right to receive goods that are of a good quality, in good working order and free of any defects and that those goods will be useable and durable for a reasonable period of time.[26]

Where the goods fail to meet the standards within six months of purchase, the CPA grants the purchaser the right to return the goods to the supplier and demand either a repair or replacement or the return of the purchase price.

The CPA provides a definition relevant to the right to fair value, good quality and safety.[27] A defect is defined as a defect in goods, which is a material imperfection in the manufacture of goods or components that renders the goods less acceptable, including any characteristics of the goods or components that caused it to be useful, practicable safe, in circumstances that persons, generally, would be reasonably entitled to expect.

The CPA creates 2 major problems of which one is the unreasonable expectation of consumers and secondly the problem if a consumer wants to rely on his remedies when dealing with immovable property.

2.5.3 Usability and durability of products

In certain circumstances for instance when dealing with immovable property the CPA also states that goods must be useable and durable for a reasonable

[25] Loubser M & Reid E. "Liability for products in the Consumer Protection Bill 2006: A Comparative Critique" 2006 (412) *Stellenbosch LR* 427.
[26] Sec 2 Part H.
[27] Sec 53.

period of time, a reasonable period of time will be longer than six months as is the norm with other goods.[28]

If goods do not comply with the requirements and standards contemplated in the CPA, then a consumer may return the goods within six months to the supplier (without a penalty) at the suppliers risk and expense.[29]

2.5.4 Other remedies

There are also other remedies[30] in the CPA that gives more protection to consumers because of a wider interpretation given to them.

In terms of section 56 (as part of Chapter 2 Part H of the CPA) and dealing with the right to fair value, good quality and safety) the consumer has a choice between a refund, replacement or repair of goods if he is not satisfied.

This however creates a practical problem when dealing with immovable property, especially when transfer and registration of a bond to the new purchaser is already affected. The position as it currently stands is that a warranty to goods (including immovable property) supplied in the ordinary cause of business to a consumer for consideration is available to the aggrieved consumer, regardless if the goods is movable or immovable.

2.6 Development of enforcement measures and clauses

It is important to note that the CPA ensure that consumers have access to fast, effective and economical redress for disputes. This is because litigation is generally costly, complex and time-consuming. In most cases parties to the dispute end up becoming frustrated by the whole litigation process.

[28] Sec 55.
[29] Sec 55(2).
[30] Sec 56.

The CPA, therefore, provides consumers with other less costly and cumbersome avenues of redress. By so doing, the Act empowers consumers to be able to enforce their rights.

Choosing the most appropriate dispute resolution mechanism often depends on the circumstances of the particular complaint, namely what is the value of the claim, the level of complexity, the number of consumers involved, the incentive for the parties to find a mutually agreeable solution, whether there was fraud, negligence or just a misunderstanding.

Other factors to be considered is the time, money and effort the consumer or business is willing to spend in resolving the dispute, if any policy elements are involved and lastly if there are any cross-border elements involved. The above factors are vital when choosing an appropriate forum to approach for redress.

Consumers may approach consumer courts through various provisions in the CPA, provided that such a consumer court has been established in the specific province and subject to the law governing that specific consumer court.

The enforcement measure that will be the focal point and concentrated on for purposes of this study is imbedded in section 70 of the CPA that gives an alternative method of resolving a dispute between a consumer and a supplier.[31] A consumer can refer a dispute to an Alternative Dispute Resolution agent (hereafter referred to as a ADR agent). If one investigates to see what an ADR agent is, there is a bit of uncertainty regarding the definition of who or what qualifies as such an ADR agent.

The wording in sections 70(1)(a) to (c) is clearly identified that and ADR agent includes an ombud with jurisdiction, an industry ombud that is accredited and a person or entity providing conciliations, mediation and arbitration, but section 70(1)(d) seems to be open to interpretation. In section 70(1)(d) the impression

[31] Chapter 3 part C.

is created that a consumer court is, for purposes of this section, regarded as an ADT agent.

If it is correctly stated that a consumer court is indeed an ADR agent then the execution of orders is provided for in section 70(3).

The problem herewith is that the enforcement and execution of the orders of a consumer court are the responsibility and the function of the provincial legislation under which the consumer courts are established. In general the CPA does not provide for the enforcement and execution of a consumer court.

If an ADR agent has resolved, or assisted parties in resolving their dispute, the agent may record the resolution of that dispute in the form of an order, and if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order. Here one sees a conflict of legislation. The provincial legislation that established the consumer court does not provide for the execution of its orders, whereas the CPA, which is national legislation, does provide for.

This result places national and provincial legislation in conflict with regard to the execution of the particular order. Section 146 of the Constitution165 regulates such conflict. When applying section 146 of the Constitution, with regard to the execution and enforcement of the consumer courts orders, provincial legislation will prevail, leaving the consumer court unable to have its orders enforced and executed.

The only possibility would be amending the provincial legislation so as to provide for the enforcement and execution of consumer court orders.

The CPA also states that should all remedies in terms of national legislation have been exhausted, a court of law with jurisdiction may be approached. This implies that a court of law may not be approached, unless a consumer has first approached the Tribunal, ombud, provincial consumer court or Commission, or referred the matter to an alternative dispute resolution agent.

Because this LLM degree specifically aims to incorporate the principles and effects of interpretation and drafting on legal issues, each of these is dealt with briefly in separate paragraphs below.

Chapter 3

DEVELOPMENT OF RULES OF INTERPRETATION

3.1 Historical development of rules of interpretation in South Africa

South Africa's roots in terms of rules of interpretation started with the Roman-Dutch purpose orientated approach. The purpose orientated approach holds that the purpose of the legislation should prevail.

After the British occupation of the Cape the English rules of interpretation started to play an ever-increasing role. The Roman-Dutch's purpose orientated approach was replaced by the literal approach of the English law.

In terms of the literal approach, the interpreter should concentrate primarily on the literal meaning of the provision to be interpreted. English legislation was drafted to be as precise and detailed as possible, for the sake of legal certainty. The well-known maxim that the legislator has prescribed everything it wishes to prescribe comes from this approach.

The literal approach was introduced into the South African legal system by a judgment by C.J. De Villiers in the case of *De Villiers v. Cape Divisional Council* (hereafter referred to as the *De Villiers* case)[32] when he interpreted the legal rules in accordance with the English rules of interpretation.

A few years later the literal approach developed to deduce the intention of the legislature from the words used by the legislator in *Union Government v. Mack* (hereafter referred to as the *Union Government* case)[33] and *Farrar's Estate v. CIR* (hereafter referred to as the *Farrar's Estate* case).[34] The courts also held that if the legislator had a specific intention, it would be reflected in the clear

[32] *De Villiers v. Cape Divisional Council* (1875) 5 Buch 50 at 56.
[33] *Union Government v. Mack* 1917 AD 731 at 739.
[34] *Farrar's Estate v. Cape CIR* 1926 TPD 501 at 504.

and unambiguous words of the text in *Ensor v. Rensco Motors (Proprietary) Limited* (hereafter referred to as the *Ensor* case).[35]

As a result of this development in the literal approach, the extraordinary, grammatical meaning of the text determined the intention decisively. The working of the literal approach is when the meaning of the words of text is clear then it must be put into effect, if the meaning of words is ambiguous, vague, misleading or will result in a absurd result, then the courts will look at secondary aids to interpret the text, for example, the headings on chapters. If the secondary aids to interpretation are insufficient to ascertain the intention, then the courts will look at tertiary aids, for example, the common law presumptions

Then came the famous case of *Jaga v. Donges NO and Another* (hereafter referred to as the *Jaga* case),[36] wherein the minority made the first concrete efforts in the South African case law to utilize the wider context and to move beyond the plain grammatical meaning to ascertain the legislative purpose.

After this case a few courts were more prepared to interpret the text of legislation in light of the wider contextual framework for example in the case of *Mjuqu v. Johannesburg City Council* (hereafter referred to as the *Mjuqu* case)[37] where the judge specifically looked at the intention of the legislature and later in *University of Cape Town v. Cape Town Bar Council* (hereafter referred to as the *University of Cape Town* case)[38] the court held that all the contextual factors to determine the intention of the legislature, irrespective of whether the words is clear or unambiguous. The wider contextual theory is always conclusive to the remedy it examines the purpose of the words because the purpose is sometimes used to shed some light on the true intention of the drafter once the plain text meaning has failed.

[35] *Ensor v. Rensco Motors (Proprietary) Limited* 1981 (1) SA 815 (A) at 827.
[36] *Jaga v. Donges NO and Another* 1950 (4) SA 653 (A) at 664 and 665.
[37] *Mjuqu v. Johannesburg City Council* 1973 (3) SA 421 (A) at 441.
[38] University of Cape Town v. Cape Town Bar Council 1986 (4) SA 903 (A) at 941.

It would seem as if the courts in South Africa since the judgement in the *University of Cape Town* case started to adapt a more holistic interpretation approach by applying constitutional values.

3.2 Influence of the constitutional democracy on enforcement clauses in contracts

The traditional South African approach to interpretation of contracts was characterized by a strict devotion to the legislative text and the sovereignty of parliament. Since the Constitution of South Africa came into effect, it is the fundamental law, the yardsticks against which everything should be measured. It is therefore the courts approach to no longer only look at the plain meaning or grammatical interpretation of a contract as the decisive factor in interpretation.

In the case of *Barkhuizen v. Napier* (hereafter referred to as the *Barkhuizen* case)[39] the court stated that, when challenging a contractual term, the question of public policy inevitably arises.

The *Barkhuizen* case further directly states that public policy represents the legal convictions of the community, it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in the Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain, our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.

Lastly the *Barkhuizen* case directly states that the Bill of Rights, as the Constitution proclaims, is a cornerstone of that democracy, it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Therefore a enforcement clause in a contract that is

[39] *Barkhuizen v. Napier* 2007 (5) SA 323 (CC) at 323 at 381.

inimical to the values enshrined in the Constitution is contrary to public policy and is, therefore, unenforceable.

3.3 The CPA and the interpretation of contracts

Section 4(4) of the CPA confirms that the contra preferentem rule of interpretation must be applied in dispute where wording is unclear or ambiguous. It even goes further and giving a wider interpretation of the rule by providing that the tribunal or court must interpret any standard form, contract or other document prepared by a supplier to the benefit of the consumer.

In essence this rule provides that any ambiguity in a contract should be interpreted against the party seeking to rely on it, in other words against the drafter of the contract.[40] Care must be taken when attempting to use this rule as it has the effect where it applies only to ambiguity.

When interpreting a contract to the benefit of the consumer the interpreter must do so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out therein is limited to the extent that a reasonable person would ordinarily contemplate or expect. At the same time the interpreter must have regard to the content of the document, the manner and form in which the document was prepared and presented and lastly the circumstances of the transaction or agreement.[41]

This rule clearly favours the consumer and not the supplier or service provider, which is the topic at hand in this short study.

[40] *Coopers Lybrandt and others v Bryant* 1995 (3) SA 761 (A) at 767 to 768.
[41] Naude T. and Eiselen S. *Commentary on the CPA* (Original Service 2014) Contract – 3 paragraph 10.

Chapter 4

THE NATIONAL CREDIT ACT

4.1 Right to information in an official language[42]

Before the NCA came into operation, many consumers and especially illiterate consumers were easily exploited when they obtained credit. Consumer and credit agreements were fairly complicated and the consumers were most of the time powerless and in an unequal bargaining position.

Initially the Hire Purchase Act,[43] read with the Usury Act,[44] regulated hire purchase agreements. The buyer would, generally, become owner of the article only upon payment of the last installment. The Credit Agreements Act[45] repealed the Hire Purchase Act and its application was broader to also cover rendering of services on credit and some forms of lease. It remained in existence alongside the Credit Agreements Act until the middle of 2006. On the 1st of June 2007 the NCA came into effect.

Chapter IV of the NCA (more specifically sections 60 – 66) provides for different consumer rights like the right to apply for credit, protection against discrimination in respect of credit, right to reasons for credit being refused, right to receive documents, right to protection of consumer rights and then also the right to receive information in an official language and in plain and understandable information.[46] For purposes of this discussion the right to information in one of the many official languages will be examined.

The NCA[47] states that consumers have the right to receive all documentation in the official language of their choice, while factored like usage, practicality,

[42] Kelly Louw M and Stoop PN (Contributer) at 163-167.
[43] The Hire Purchase Act 36 of 1942.
[44] The Usury Act 73 of 1968.
[45] The Credit Agreements Act 75 of 1980.
[46] Otto JM *The NCA* at 64 and 65.
[47] Sec 63.

expense, regional circumstances and balancing the needs of the population ordinarily served, will be considered.

If the producer of a document is a registered credit provider, then it must submit to the National Credit Regulator a proposal for approval of at least 2 (two) official languages in which all documentation will be made available.

If the producer is not a registered credit provider, then the producer must give the consumer a choice between 2 official languages chosen by the producer, taking the abovementioned factors into consideration.

If consensus is not reached between the parties, then that agreement is void. An important cornerstone of South African Law of contract has always been freedom of contract and the fact that parties have equal bargaining powers in regards to contractual terms.

Should the credit and service provider not be in a position to evaluate the translated contract (of which is not his official language) nor understand the language, will true consensus have been reached between the parties if the meaning differ in the translated agreement than what the credit and service provider initially intended?

It is important to take note of the parol evidence rule in the South African law of contract. In terms of this rule the document is the only source and evidence will not be heard in an attempt to clarify the terms of the contract or establish the intention of the parties, unless ambiguity, vagueness or specialized terminology needs clarification.

In general, the parol evidence rule prevents the introduction of evidence of prior or contemporaneous negotiations and agreements that contradict, modify, or vary the contractual terms of a written contract when the written contract is intended to be a complete and final expression of the parties' agreement.[48]

The Constitution brought about a move away from an authoritarian culture to one of openness and transparency, accountability and justification of actions.

[48] Christie RH *The Law of Contract in South Africa* 2016 (7th edition) at 226-239.

Freedom of expression is one of the civil freedoms guaranteed the Constitution.[49]

Freedom of expression includes the freedom to press and other media, freedom of artistic creativity, academic freedom and freedom of scientific research and then importantly the freedom to receive or impart information or ideas.

The right to freedom of expression, viewed as a pillar of democracy enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom of which equality is very important when investigating the balance of rights of enforcement clauses in consumer contracts.

In terms of the Constitution,[50]equality includes the full and equal enjoyment of all freedoms and rights. The State and any person are prohibited to unfairly discriminate on certain recognized grounds.

The right to information in an official language stems from the fundamental right in section 32(1) of the Constitution, provides that everyone has the right of access to records and information held by the State and any information held by another person and that is required for the exercise or protection of any rights.

The importance of the right of expression and equality when examining the balance of rights pertaining to enforcement clauses in consumer contracts is to determine if consensus between the contracting parties still exists and therefore constituting a valid contract or the lack of consensus that stems from the application of the right of expression and equality, having the result of an invalid contract.

[49] Sec 16.
[50] Sec 9(2).

This dissertation will examine several examples of enforcement clauses in agreements in chapter 4 and 5 and address these issues.

4.2. Enforcement clauses in agreements governed by the NCA

4.2.1 Cancellation clauses

The NCA does find application in certain sale of land agreements when the purchase price is paid in installments, better known as installment sale agreements.

If one of the following factors is applicable, then the NCA will not be applicable:

The NCA does not find any application in these sale of land agreements if the consumer is a juristic person with a turnover or asset value above R1 000 000.00 (one million rand), the seller and purchaser are not related nor friends or partners, the credit provider is not from South Africa, the credit provider is the State.

Section 8(4)(f) of the NCA is relevant. It defines a credit agreement to include any other agreement in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the Credit provider in respect of the agreement or the amount that has been deferred.

Section 27(1) of the Alienation of Land Act[51] further provides that if a purchaser of land in installments has already paid 50% or more of the purchase price, then the purchaser may demand that the seller pass transfer to him.

In section 27(3) states that if the seller is unable, fails or refuses to tender transfer within 3 months from receiving the receipt of the demand, then the purchaser may cancel the relevant deed of alienation and seek relieve in section 28(1) of the Alienation of Land Act.

[51] Alienation of Land Act 68 of 1981.

This is analysed in view of a case study found in the case of *Botha and Another v Rich N.O. and Others* (hereafter referred to as the *Rich* case)[52] the parties entered into an installment sale agreement with the following terms:

Immovable property was sold to Mrs. Botha by a Trust for the amount of R240 000.00 (two hundred and forty thousand rand) as part of an installment sale agreement as provided for in the Alienation of Land Act.[53] Mrs. Botha was obliged to pay the purchase price in monthly installments of R4000.00 (four thousand rand) monthly and also to ensure the property against risks and pay the monthly installments thereof. Mrs. Botha was also responsible for payment of municipal rates, taxes and service fees.

The parties agreed in this installment sale agreement that transfer will only be affected once Mrs. Botha had paid the full purchase price and fulfilled all her obligations in terms of the agreement.

The parties agreed that if there were non-payment of the installments on due dates, then Mrs. Botha would need to pay interest on the arrears amount.

The parties further agreed that in the event of breach of contract by Mrs. Botha, the trustees may cancel the agreement and Mrs. Botha will forfeit all payments made to date.

Mrs. Botha breached the agreement in November 2007 due to non-payment of installments. The trustees asked the Magistrates Court successfully for cancellation of the installment sale agreement, eviction and forfeiture of all payments made by Mrs. Botha to date.

Mrs. Botha obtained an interdict and managed to resume occupation of the premises while the appeal was still ongoing.

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[52] *Botha and Another v Rich N.O. and Others* (CCT 89/13) [2014] ZACC 11 2014 (4) SA 124 (CC) 2014 (7) BCLR 741 (CC) (17 April 2014) at 146.
[53] Kelly Louw M and Stoop PN (Contributer) at 540-542.

Mrs. Botha failed to make any payment during this period from November 2007 to January 2009. Mrs. Botha exercised her rights in a letter to the Trust demanding transfer in terms of section 27(1) of the Alienation of Land Act.

The Constitutional Court ordered that the application for cancellation of the contract failed, on the basis of forfeiture would have been a disproportionate penalty for breach, the respondents must sign all necessary documents to effect the registration and to transfer the property. It also ordered the first applicant to pay all arrears owing, outstanding levies and to secure the balance of the purchase price plus interest in terms of the sale agreement.

In comparing this judgment with the objective of the NCA, which promotes a fair and non-discriminatory marketplace for access to consumer credit as stated in the preamble of the Act, or the objective of the Constitution that contracting parties should be treated with equal worth and concern, it is not clear whether these objectives have been reached by this judgment.

The objectives namely fair and non-discriminatory marketplace and to be treated with the necessary worth and concern must be analyzed and the balance of rights of enforcement clauses in consumer contracts investigated.

An important question that was never asked in the *Rich* case was what was the reason for the parties contracting to the following term in the installment sale agreement:

"….i) In the event of breach of the agreement by Ms. Botha, the trustees would be entitled to cancel the agreement, in which event Ms. Botha would forfeit in favor of the Trust all payments effected in terms of the agreement."

The question relates to whether consensus was reached and what the consensus is based on. For purposes of this study, different factors that influence cancellation clauses as dealt with below.

4.2.1.1 The influence of fiduciary responsibilities on consensus in the Rich case

In the event of breach of the agreement by Ms. Botha, the trustees would be entitled to cancel the agreement, in which event Ms. Botha would forfeit in favor of the Trust all payments effected in terms of the agreement.

It is clear from the facts that the seller in this case was a trust. The responsibility of a trust can be described as a relationship in terms of which one person ("the founder") transfers ownership (whether by donation or otherwise) of property to one or more other people ("the trustees or trustees") to use and protect for the benefit of others ("the beneficiaries").

The emphasis must be placed on the part that refers to the benefit of others. The benefit of others that must be protected have to be read against what one may call the common law background.

This fiduciary responsibility of a trust might have been the reason why the Trust included the Cancellation clause to ensure that the purchaser does not unnecessarily expose the Trust to risk due to non-performance.

4.2.1.2 The influence of pre-agreement negotiations on consensus

It is normal practice that prior to parties entering into a final contract there are several pre-agreement negotiations that take place between all the parties.

In a lot of instances the previous drafts might have looked different, but because the parties agreed on other factors in the contract, the parties will sometimes include or exclude other terms of the contract.

If you use as an example the terms as agreed to in the *Rich* case and more specifically the cancellation clause, it might have been that the seller specifically included this clause because they had to ensure quick cancellation of the agreement in the event of non-performance or breach of the contract to ensure that the funds (monthly installment in terms of the installment

agreement) are utilized to the benefit of the trust beneficiaries who might be minors or incapable to attending to their own affairs. The monthly installments could have been used to pay for alternative accommodation or schooling and therefore making the quick cancellation of the contract imperative as well as the forfeiture of the funds.

In most instances the parties would have discussed these matters and agreed on a cancellation clause to ensure the risk of the Seller is limited.

If the seller entered into that agreement, depending on the cancellation clause as had been discussed between the parties as a determining factor for the agreement, are we not removing the foundation for consensus between the parties by not enforcing the agreed cancellation clause?

The question must be asked if we are true to the objective of the NCA to create a fair and non-discriminatory marketplace and treating parties to an contract with equal worth and respect, if we are depriving a contracting party of a right that was agreed between parties while both had equal bargaining powers when the contract was concluded.

4.2.1.3 Influence of "cancellation clauses" on the balance of rights

It is clear that there is a purpose for a cancellation clause in a consumer agreement and frankly it is to enable the parties to cancel an agreement when certain things happen or do not happen, on that basis an agreement is concluded. If the enforcement of a cancellation clause is left up to the judiciary then the rights of credit providers and service providers are jeopardized to enable consumers to mislead a credit provider or a service provider to entering into an agreement.

4.2.2 Example of a problematic "surrendering of goods clause" and an "address for receiving documents clause"

"The consumer may also at any time terminate this agreement and hand the goods purchased back to the credit provider, but in such event and subject to

section 127 of the NCA, the goods will be sold and the consumer shall be liable for payment of the settlement amount, less the proceeds of the sale goods."

"All process documents (including summonses), documents, pleadings and notices relating to this agreement may be served or given to the consumer at the address mentioned in the schedule to the agreement, unless such address has been changed in writing as provided hereunder."

4.2.2.1 Facts of a fictitious scenario

The creditor and the consumer entered into an Installment Sales agreement in March 2015. The consumer nominated 123 Baker Street, Pretoria, 0001 as his domicilium citandi et executandi address. The consumer bought a Volkswagen Polo, from a car dealership in Pretoria, finance for the sale was granted by ABC Bank for the amount of R155 000 (One Hundred and Fifty Five Thousand Rand). The consumer paid his monthly installments, but failed to continue to pay his monthly installments to ABC Bank from January 2016. The creditor dispatched a notice in terms of section 127 (2) to the consumer to his nominated address. The consumer voluntarily surrendered the car to ABC Bank as stipulated in section 127 of the NCA. The consumer damaged the vehicle before surrendering it to the Bank, thinking he will be able to escape liability because the section 127 notice was served by original post. ABC Bank sold the vehicle on a public auction. ABC Bank claimed the shortfall between the amount outstanding and the selling price of the vehicle from the consumer.

4.2.2.2 Legal question

The legal question to be answered is if a valid agreement was constituted between the parties in March 2015 and if consensus was jeopardized when one of the parties acted unreasonably?

4.2.2.3 Application of case law

In the case of *Edwards v. Firstrand Limited trading as Wesbank* (hereafter referred to as the *Edwards* case)[54] the appellant and Wesbank concluded an installment sale agreement for a luxury motor vehicle subject to the NCA. After the appellant had fallen in arrears, the motor vehicle was attached subsequent to the cancellation of the agreement and summary judgement was granted against the appellant. The vehicle was sold and Wesbank claimed the shortfall between the amount outstanding and the selling price of the vehicle.

A notice in terms of section 127 (2) of the NCA was dispatched by ordinary post to the appellant on the 13th of June 2012, using the address he used he furnished in the credit agreement as his domicilium citandi et executandi address. The appellant however knew that there is no street delivery of post at this address.

The appellant's defence was that the bank had failed to comply with section 127 of the NCA and that the vehicle had not been sold for the best price possible.

The court held that this conduct was unreasonable and that the non-receipt of the notices was therefore no defense. He did not receive it, but that was due to his unreasonable conduct in providing an address where such notice would not be delivered.

If one applies the judgment of the Edwards case to our set of facts above, it is clear that a consumer will not be able to hide behind a clause in an agreement if the content of the agreement that was agreed upon constitute unreasonable conduct by the consumer.

If this concept is weighed up against the principle of pactum sunt servanda,[55] it is clear that the strict implementation of this principle would have meant a notice in terms of section 127 of the NCA would have had to be served at the domicilium citandi et executandi address as provided in the agreement.

[54] *Edwards v. Firstrand Limited trading as Wesbank* 2017 (1) SA 316 (SCA) [2016] 4 All SA 692 (SCA) at 330.
[55] Christie RH at 518-521.

Although the deviance from the principle of pactum sunt servanda, may seem more reasonable in this circumstances than the strict adherence to the "wording in the agreement", it is important to note that this deviance from the rule has a very limited application in the sense that knowledge of impossibility must be known to the consumer at the time when he provided such information for contractual purposes.

4.2.2.4 Example of a "surrendering of goods clause" safeguarding a credit provider

"1. The debtor may terminate this agreement by surrendering the goods to the credit provider and pay any remaining amounts due to the credit provider.

2. Where the debtor has given written notice to the credit provider to surrender in terms of this agreement, the debtor may, if the goods are in the Bank's possession, request the credit provider to sell the goods or otherwise return the goods to the credit provider within 5 (five) Business Days after the date of the surrendering notice.

3. The credit provider will within 10 (ten) Business Days after receiving the notice or the goods advise the debtor of the estimated value of the goods and any other information prescribed in terms of the NCA.

4. The debtor may within 10 (ten) Business Days after receipt of the estimated value of the goods (unless in default under this agreement) unconditionally withdraw the notice of surrendering and resume possession of the goods.

5. If the debtor does not withdraw the surrendering notice, then the credit provider will sell the goods as soon as possible for the best reasonably obtainable and credit or debit the debtor's with a payment or charge equivalent to the proceeds of the sale, less any expenses reasonably incurred by the credit provider with the sale of the goods.

6. The credit provider will give the debtor a written notice stating:

6.1 the settlement value of the agreement immediately before the sale;
6.2 the gross amount realized on the sale;

6.3 the net proceeds of the sale after deducting permitted default charges, if applicable and reasonable costs allowed;
6.4 the amount credited or debited to the account.

7. If the amount credited to the account is less than the settlement amount, the credit provider may demand payment of the remaining settlement if the debtor:
7.1 fails to pay an amount demanded by the credit provider within 10 (ten) business days after receipt of the demand, the credit provider may commence proceedings in terms of the Magistrate's Court Act for judgment enforcing this agreement;
7.2 is conducting actions that is not reasonably expected from a debtor in the same position."

4.2.2.5 Example of a "address for receiving documents clause" safeguarding a credit provider

"1. Notwithstanding anything to the contrary contained in this clause a written notice or communication will be deemed adequately sent even though it was not sent to or delivered to the Debtor's domicilium et executandi address, postal address, telefax number or e-mail address if:

1.1 it was indeed received by the debtor;

1.2 if the debtor is guilty of unreasonable conduct."

4.2.2.6 Importance of examining examples of enforcement clauses in consumer agreements

The conclusion after examining examples of several enforcement clauses in consumer agreements is that consensus between parties might be affected by enforcing such clauses.

Consensus is meeting of the minds (also referred to as mutual agreement, mutual assent or consensus ad idem) it is a phrase in contract law used to describe the intentions of the parties forming the contract. In particular, it refers

to the situation where there is a common understanding in the formation of the contract.[56]

The answer to the question is that the NCA has such a big effect on the relationship between the parties, that one can say that the consumer enjoys much more benefits that are disproportional to the rights of the credit providers and service providers in this South Africa.

4.3 Influence of certain common law presumptions on rights created in the NCA for consumers

This discretion of the judiciary to interpret legal text is qualified by the prerequisite that modification of the meaning of the text is only possible if the scope and the purpose of the legal text are absolutely clear.

The application and utilization of the common law presumptions are very important tools in the quest to determine the scope and purpose of the legal text.

4.3.1 Influence on the right to information in an official language[57]

This presumption supports our notion that when credit providers is obliged to translate consumer agreements to official languages as chosen by the producer or by the National Credit Regulator if those chosen languages are not their official languages, such obligation can lead to the lack of consensus between contractual parties, making such agreement void.

In the case of *Blackburn v. Blackburn* (hereafter referred to as the *Blackburn* case)[58] the court said that the legal text in question must be determined by how it is generally understood by people who make use of the word.

[56] Christie RH at 29-31.
[57] Sec 63 of the NCA.
[58] *Blackburn v Blackburn* 1920 CPD 13 at 16 and 17.

Therefore the scope and the purpose of a translated consumer agreement will determined at the hand of people who usually making use and understood the language of the legal text in question.

4.3.2 Influence of the affordability assessment on consumer

This presumption states that because the contracting parties are presumed to have chosen their words carefully, it follows that they have presumably not left out any words that should have been included in the contract.

Section 81(2)(b) of the NCA[59] states:

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such purpose for applying for that credit agreement."

Important aspects to be considered in this section of the NCA is that the credit provider must take reasonable steps to do an affordability assessment test, the credit provider must determine if there is a reasonable basis that the commercial purpose may prove to be successful and lastly the credit provider must determine if the consumer indeed has such purpose for applying for credit.

It is clear that the credit provider has a lot of responsibilities in regards to the credit assessment process and the only defense that the credit provider has, is embedded in section 81(4)(a) of the NCA that provides the credit provider with a complete defense to an allegation that a credit agreement is reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider or a court or Tribunal determines that the consumer failed to provide sufficient information that had an material effect on the credit assessment.

[59] NCA 34 of 2005.

The presumption that nothing must be added or subtracted from the text is in direct conflict with this section 81of the NCA, especially in regards to the fact that the credit provider bears all the responsibility to determine if the person applying for credit in terms of an credit agreement has provided all the necessary information whereon the credit provider must determine on that information the probability of success and the existence of a purpose for such credit.

Some may argue that the mere existence of section 81(4)(a) in the NCA proof that this presumption is still honored, however it is these words as part of section 81(4)(a) of the NCA that makes me doubt:

"…consumer failed to fully and truthfully answer any requests…"

The question arises that what will happen if the credit provider does not specifically request a certain piece of material information?

This creates a loophole for consumers to hide behind the defense that the credit provider did not take reasonable steps to assess the credit application in terms of a credit agreement.

It is therefore clear that the presumption is not honored nor does it find any working in the context of affordability assessment, because the "omissio" of one contracting party, in this instance the consumer, is made the responsibility of the credit provider. Surely the purpose of this presumption was for each contracting party to bear the responsibility of the fact that certain aspects was left out or not specifically mentioned.

4.3.3 The effect of the presumption that the parties intended a reasonable and equitable result

This presumption is in favor of an equitable interpretation is based on the principle of our law that contracts must be *bona fidei* and is therefore presumed

that neither party intended to obtain an unfair or unreasonable advantage over the other.

In the case of *Rich* case the parties entered into an installment sale agreement that contained a cancellation clause that makes provision for forfeiture of all monies already paid if breach of contract occurs. The Constitutional Court ordered that the application for cancellation of the contract failed, on the basis of forfeiture would have been a disproportionate penalty for breach, the respondents must sign all necessary documents to effect the registration and to transfer the property. It also ordered the first applicant to pay all arrears owing, outstanding levies and to secure the balance of the purchase price plus interest in terms of the sale agreement.

It must be borne in mind that the 1996 Constitution is the supreme law of South Africa and that any conduct inconsistent therewith is invalid.

It is therefore clear that by recognizing and applying the presumption in favor of an equitable interpretation is a step in the right direction of promoting equality as a Constitutional value.

If one critically ask ourselves to whom this presumption will have a reasonable result, it seems that if the presumption is interpreted correctly that both parties should be equally treated based on the set of facts that consensus was reached on. However should the argument prevail that the Constitutional Court's judgment is correct in this case, then one at the same time allow an unreasonable advantage for one party over another and thus denying the principle that all contracts are *bona fide* which is an important factor in promoting equality as an Constitutional value.

4.4 The importance of the NCA and the balance of enforcement clauses in consumer contracts

From the discussion in this chapter, there are a few important conclusions that assist us in our investigation to determine the balance of enforcement clauses

in consumer contracts. The NCA was created in South Africa to assist and protect vulnerable consumers, by creating rights to be enforced by consumers.

A very important aspect seems to be climbing to the top of the ladder on each problematic aspect that is investigated in this chapter in regards to the NCA, namely the possibility that by enforcing these enforcement clauses in consumer contracts, might have the effect that true consensus between the parties might be influenced. In most instances the parties reached consensus based on a certain set of facts, but later on that set of facts no longer forms the foundation on which certain consumer rights are being enforced.

The investigation on the right to receive information in an official language, lead to serious questions on whether consensus between the parties still exists that is enforceable as a valid and legal contract.

When investigating a cancellation clause by having a closer look at the *Rich* case, it became apparent that consensus was reached based on a set of facts at that point in time when the agreement was concluded, however when one enforces the rights in terms of the NCA by means of enforcement clauses in contracts, that initial cornerstone of the agreement no longer plays a role.

Chapter 5

THE CONSUMER PROTECTION ACT

5.1 Codification of balance in common law in relation to consumer rights created in the CPA

The CPA created a new era for consumer rights in South Africa. The CPA serves as a "Bill of Rights" for consumers and especially in regards to fair, just and reasonable terms and conditions in consumer agreements.[60]

To determine if the terms of a written agreement is fair, just and reasonable, factors like the fair value of the goods or services, the relationship of the parties to the agreement, the relative capacity of the parties and the bargaining positions of parties, must be considered.

5.1.1 Summary of *Naidoo v. Birchwood Hotel* 2012 6 SA 170 (GSJ) and the influence of the case on consumer agreements

This Chapter will be based on a case study found in the judgment in *Naidoo v. Birchwood Hotel* (hereafter referred to as the *Naidoo* case)[61] and the influence of the case on consumer agreements

The plaintiff is a fleet manager and a couch driver and the defendant is a hotel. When the plaintiff wanted to exit the hotel, he found that one of the entrances was closed. The plaintiff waited in his bus until the security guard came to open the gate, after a while the plaintiff left his bus approaching the gate to see why it is not opening.

While the plaintiff was approaching the entrance, the gate fell on him and caused him serious bodily injuries. The plaintiff instituted action against the defendant in which damages are sought for bodily injuries.

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[60] Sec 48.
[61] *Naidoo v. Birchwood Hotel* 2012 6 SA 170 (GSJ) at 181 and 182.

The defendant relied on disclaimers and exemption clauses on the back of the hotel register. Clause 5 of the registration card stated:

“The guest hereby agrees on behalf of himself and the members of his party that it is a condition of his / their occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft or any cause, and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel.”

The plaintiff’s attention was referred to the reverse side of the hotel register, with these words on the front: “ Please read the terms and conditions on reverse!” The importance of this exemption clause was if it could exclude negligence on behalf of the defendant. The test for negligence is whether the conduct complained of fell short of the standard of care required of a reasonable person.

The defendant will be liable if the diligens paterfamilias in the position of the defendant would have foreseen the reasonable possibility of its conduct could injure the plaintiff and if the defendant failed to take steps to guard against such occurrence.

Unfortunately the CPA could not apply, as it was not yet in effect when the accident occurred on the 15th of October 2008. The court came to the conclusion that in the circumstances of this particular case it would be unfair and unjust to enforce the exemption clause, because the exemption clause limits the plaintiff’s right to a judicial remedy.

The result is therefore that although the doctrine of the sanctity of contract is still recognized, exemption clauses in the future must be subject to reasonableness and fairness.

For the longest period of time the courts was very wary when they decided if a contract or term in a contract, on the principal if it is fair or just. Until the

judgment in the *Naidoo* case it can be construed that the courts was in favour of freedom of contract and the pacta sunt servanda principle over the principles of fairness and reasonableness.

This stance was drastically changed in the *Naidoo* case, the facts is as follows:

To complicate the matter further is that reasonableness and fairness do not qualify as free-standing requirements of our law of contract as was confirmed in *Potgieter v. Potgieter* (hereafter referred to as the *Potgieter* case).[62]

If the CPA had been applicable at the time, the Court would have relied on several clauses in the CPA namely:

5.1.2 Section 48 (1) of the CPA

"48. (1) A supplier must not –

1. (a) offer to supply, supply, or enter into an agreement to supply, any goods or services –

   (i) at a price that is unfair, unreasonable or unjust; or
   (ii) on terms that are unfair, unreasonable or unjust;
   (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust;…"

5.1.2.1 Argument in favour of the Naidoo case

The belief that the court would have argued that the reasonable expectation of a guest of a hotel will not be to expect to be harmed by a broken gate. Therefore the exemption clause might be argued to be unreasonable if this reasonable expectation of the hotel guest is not acknowledged and justify not enforcing the exemption clause.

[62] *Potgieter v. Potgieter* 2012 1 SA 637 (SCA) at 650.

5.1.2.2 Counterargument

One need to ask a further question if such a reasonable expectation must be honored regardless of taking into account the possibility of “normal wear and tear” on products that forms part of the subject of the dispute.

Looking at the facts of the *Naidoo* case it is apparent that the guest was in his bus waiting for the security guard to open the gate, he saw the security guard struggled to open the gate and that it got stuck.

The argument in the case was to determine if the guest assisted to push the gate with the guard or if it fell on him on his way to the gate, trying to determine if the guest had “a hand” in his own injury.

The question that should have been asked was rather if the guest did not have “a hand” in his own injury, because when he saw the gate was stuck, he still decided to get out of his bus, regardless of the reason, when it is common knowledge that the product in dispute, namely the gate, is not a product that has a lifelong guarantee, but is subject to “normal wear and tear”. The guest after having this knowledge still decided to get out of his bus and approach the gate.

Was a reasonable expectation really created at the time of the accident on the side of the guest or a mere afterthought?

5.1.3 Section 49 (1) of the CPA states

“ 49. (1) Any notice to consumers or provision of a consumer agreement that purports to –

1. (a) limit in any way the risk or liability of the supplier or any other person;
2. (b) constitute an assumption of risk or liability by the consumer;

3. (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
4. (d) be an acknowledgement of any fact by the consumer,

must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsection (3) to (5)."

5.1.3.1 Argument in favour of the Naidoo case

The argument could be that the guest's attention was not properly drawn to the terms that limit the risk or the liability of the supplier, because the guest signed the hotel registration card on the front page that contained all the guest's names and room numbers. The one guest did not arrive and the room was given to Mr. Naidoo, he scratched out the name of the other guest and wrote his name in that space and signed next to it. However, at the bottom of the first page in the same print as above, the following was wrote:

"Please read terms and conditions on reversal!"

The guest did not sign next to this print and it might be argued that the guest's attention was not drawn to the exemption clause.

5.1.3.2 Counterargument

For the guest to be able to have known where to scratch out the name of the guest who did not arrive, it can be argued that Mr. Naidoo had to read the whole first page to see where it refers to the guest's name that had to be scratched out. Therefore the exemption clause at the bottom had to be read and taken note of.

5.1.4 Section 49 (2) (3) states

" In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk –

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

the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsection (3) to (5), and the consumer must have assented to that provision or notice by signing or initialing the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision."

5.1.4.1 Argument in favour of the Naidoo case

The argument could once again be that Mr. Naidoo did not sign next to the exemption clause and therefore did not consent to the limitation of the risk or the liability of the supplier.

5.1.4.2 Counterargument

The alternative argument to the view above could be that Mr. Naidoo acted in a manner consistent with acknowledgement of the notice.

The fact that he wrote his name in the place of the guest who did not arrive, proof that he did that to ensure that he adheres to the requirements of the hotel to sign the hotel registration form and to further ensure he is able to gain all the benefits of staying as a guest at the hotel. He was therefore aware that there was rules applicable and acknowledged it by ensuring he sign the hotel registration form.

It is therefore then hard to argue that he could deny the content of the whole hotel registration form, but at the same time wish to receive the benefits that forms the basis of the hotel registration form.

All rights however is accompanied by responsibilities and it could be argued that Mr. Naidoo was properly advised of the terms and conditions on the reversal side of the registration form and that he wished to deny the knowledge

of the content of the exemption clause to suit his current situation and argument.

5.1.5 Conclusion of the discussion in regards to section 48(1), 49(1) and 49(2)(3) of the CPA

In concluding our counterarguments on the abovementioned applicable sections it becomes apparent that although the aim of the consumer Protection is to promote the “holistic approach” that is currently becoming more apparent on all aspects of the Law of Contract as we know it, it is definitely not an easy approach to implement.

The implementation of such a “holistic approach” changes a fundamental concept of our law of contract from an objective measurement to a subjective measurement.

The measurement of reasonableness, the determination of someone’s attention was drawn to a specific term or condition or lastly to determine if a party to an agreement took note of a limitation of rights associated with serious injury or death, is concepts to be determined subjectively and is largely subject to the subjective feeling or circumstances of the person in the determining position (in most cases magistrate’s or judges).

We once again see here that one of the fundamental cornerstones of our Law of Contract namely “Pactum Sunt Servanda” is in serious question, because of the shift from an objective test to a more subjective test.

5.2 Influence of the contra preferentem rule as a doctrine of contractual interpretation on the rights created in the CPA and applied in consumer agreements[63]

[63] Christie RH at 261-263.

Section 4(4)(a) of the CPA states:

"(4) To the extent consistent with advancing the purposes and policies of this Act, 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 this Act to be produced by a supplier, to the benefit of the consumer—

4 (a) so 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; …"

Section 4(4)(a) of the CPA gives statutory authority to the contra proferentum rule of interpretation. Any consumer contract must thus be interpreted to the benefit of the consumer.

At the heart of the contra proferentum rule is a judicial recognition that a disparity in bargaining power generally exists between the contracting parties.

The contra proferentum rule is predicated upon the rationale that the proponent of a particular term is more likely aware of its possible ambiguities, which is especially true when dealing with standard form contracts.

Currently all standard forms, contracts and documents drafted by a supplier must be interpreted in favor of the consumer.

It is interesting that the emphasis shifted from standard form, contracts and documents to rather establishing if there was equal bargaining power.

Because it is clear that in some instances when a consumer signs a standard form, contract or document, it is not always correct to say that there is not equal bargaining powers.

Nothing prohibited Mr. Naidoo in the *Naidoo* case when he signed the standard form to have negotiated a different term or condition set out therein. The hotel manager is normally available to guests and therefore the circumstances is not

the same as for instance when someone is taking up a micro loan at a branch office of a big micro loan company.

Usually then there is no opportunity to negotiate the terms of the agreement with the supplier who is maybe sitting at the head office and it the becomes an situation of you either sign the standard agreement or do not receive the money, that scenario should be the true nature of the situation that the CPA should be protecting.

5.3 Examining a exemption clause in a consumer agreement

5.3.1 Example of a problematic “exemption clause” for a service provider

“The guest shall not have or acquire any claim against the guesthouse, nor shall the guesthouse be liable in contract or delict for any general, special or consequential damages sustained by the guest or any third party flowing directly or indirectly from the contract whether due to acts, omissions or otherwise of the guesthouse or its employees or agents or any other person for whom the guesthouse may be held liable, and the guest hereby indemnifies the guesthouse and holds it harmless against any such claim as aforesaid.”

5.3.1.1 Facts of a fictitious scenario:

Mr. John Doe visits a guesthouse in Cape Town and on his arrival he completes a personal information sheet and on the form the abovementioned exemption clause is included. The guesthouse offered as a favor to assist Mr. John Doe to order Mr. Delivery service for dinner, the guest order from the Mr. Delivery menu in their rooms, the guesthouse pays Mr. Delivery and add the charge to the final bill of the guest. It happens that Mr. John Doe sustain very serious injuries as a direct result of poisonous food received from DEF restaurant. Mr. John Doe institute legal action against the guesthouse for providing him with the poisonous food.

5.3.1.2 Legal question

The legal question to be answered is if the guesthouse is liable for the injuries sustained by Mr. John Doe or are they exempted by the exemption clause in the personal information sheet issued by the guesthouse.

5.3.1.3 Application of *case law*

In the case of *Eskom Holdings Limited v. Halstead–Cleak* (hereafter referred to as the *Halstead* case)[64] the respondent suffered severe electrical burns when he came into contact with a low-hanging live electrical power line while cycling with friends. The power line hung low due to the interference by vandals. The issue before the court was whether the appellant attracted liability in terms of section 61 of the CPA.

The court put emphasis on two factors that needs to be evident to claim the appellant attracts liability namely. The first was that there should be a supplier and consumer relationship between the respondent and the appellant and secondly the respondent had to be a consumer and utilize the electricity in the ordinary course of business.

The court found that the respondent was not a consumer and therefore did not attract liability in terms of section 61 of the CPA.

If one applies the judgment to the set of facts above, it is inevitable to ask if this case is not adding additional requirements on the consumer to be met prior to having a successful claim, other than what was indicated in the *Naidoo* case?

In the *Naidoo* case the focus was on reasonableness and fairness, which is not only a very wide concept but at he same time leaving a lot of room for interpretation by the presiding officer at the time, which may be influenced by his personal circumstances and not adding a lot of legal certainty in the commercial environment.

[64] *Eskom holdings limited v. Halstead – Cleak* 2017 (1) SA 333 (SCA) at 339 and 340.

In our example the court might find that it is fair and reasonable to allow Mr. John Doe to institute legal action against the guesthouse, but he will then also need to show that there was a consumer relationship between him and the guesthouse in regards to the food received from Mr. Delivery and that it that the food that he received from the guesthouse was provided to Mr. John Doe in their ordinary course of business.

5.3.1.4 Example of a "exemption clause" safeguarding a service provider

"The guests attend this guesthouse at their own risk. The guesthouse, it's agent/s and or its employees shall not be liable for any claims of whatever nature including but not limited to theft, injury, loss or damage of whatever nature, whether arising from the guesthouse, it's agent/s and or its employees default, negligence or otherwise.

The guest/s will hereby waive/s and abandon/s any claim of whatever nature against the guesthouse, it's agent/s and or it's employees if the theft, injury, loss or damage of whatever nature was incurred from circumstances not constituting the ordinary business of the guesthouse, it's agent/s and or it's employees nor creating a supplier and consumer relationship between the parties."

5.3.1.5 Influence of an "exemption clause" on the balance of rights

The application of an exemption clause is very risky in the sense that a lot of service providers and in some cases credit providers feel that their rights are sufficiently protected with the inclusion of an exemption clause. If the exemption clause is not enforced, but rather adding an additional responsibility on the service providers and credit providers to cover their risks in regards to all aspects of their business, then the rights of the consumer is disproportionally favored. Concepts like "standard agreements" and "unequal bargaining power" is being used in the market with a blanket approach, which in my opinion is wrong and should be investigated with each matter at hand.

5.4 Examining a "surety clause" in a loan agreement

5.4.1 Example of a problematic "surety clause" for a credit provider

"We jointly and severally guarantee the obligations of the Borrower under this agreement in such form and subject to such terms and conditions as The Lender may reasonably require; which shall continue to constitute security for all the Borrower's obligations to The Lender from time to time including its obligations arising out of this Loan agreement".

5.4.1.1 Facts of a fictitious scenario

The Lender and the Borrower entered into a loan agreement in January 2010. The Borrower in this matter is a legal person called ABC Proprietary Limited, properly registered, but forgot to pay their yearly renewal CIPC fees and was deregistered. The Lender is also a legal entity, properly registered with the National Credit Regulator in South Africa. The Lender borrowed an amount of R100 000 (one hundred thousand rand) to the Borrower. The Borrower agreed to pay the loan back over a 5 (five) year period at an agreed monthly installment. The Lender required that surety needs to be signed on behalf of the Borrower, the Borrower's parents; Mr. and Mrs. Jones acted as sureties in the said agreement on behalf of the Borrower.

5.4.1.2 Legal questions

1. The legal question to be answered is to apply the principle in the *Paulsens* case and other recent case law to determine if the contracting party still have consensus in regards to the agreement?

2. Another legal question to be answered is to apply the judgement in the case of *Thomani and Another v. Seboka NO and Others* (hereafter referred to as the *Thomani* case)[65] to determine what the influence will be on the rights of both contracting parties.

[65] *Thomani and Another v. Seboka NO and Others* 2017 (1) SA 51 (GP) at 70.

5.4.1.3 Application of case law to legal question 1

In the *Paulsens* case the Constitutional Court determined that the in duplum rule should be applicable in the litigation process, therefore if the in duplum cap were reached prior to the litigation process, then a Borrower is free to drag the payment period out by being part of the litigation process.

The question that sprung to mind is if the parties' consensus is jeopardized? When a Creditor in this example the Lender usually does a risk calculation before granting a loan, as part of that calculation the circumstances of non-payment will be considered. It will be fair to assume that when the loan was granted in 2010 the Lender would have considered the risk of non payment and based thereon made a calculated decision if the risk scoring was met to grant the loan. At that point the Creditor would have made his decision based on the law at the time that interest will start running again as soon as the litigation process was started, therefore limiting the risk if a litigation process is timeously started.

Based on the fact that the risk scoring is an material aspect of any loan granting process, it might also raise the concern that by changing the law in regards to the in duplum calculation, the consensus that was reached in 2010 on the facts and law at the time, may also be jeopardized.

5.4.1.4 Application of case law to legal question 2

In the *Thomani* case the parties concluded a home loan agreement, the applicants in this matter acts as sureties in this matter and a mortgage bond was registered over their immovable property. In 2007 Absa and a company concluded a loan, and as security, Absa and the applicants entered into a suretyship. The company was deregistered in 2010. In 2013 Absa summonsed the applicants in terms of the suretyship. Default judgment was granted and the applicants' house was sold in execution as the result. In this

matter the applicants applied for rescission of a default judgement and setting aside of a sale in execution.

The court held that the first bond only covered amounts owing under the home loan. The court pointed out that the relevant clause in the surety agreement pertinently refers to the obligations of the principal debtor. As the principal debtor was deregistered and could not be summonsed the court held further that the sureties could not be sued while the company was deregistered. Default judgement was rescinded and the sale in execution was accordingly set aside.

If one applies the judgement to the facts in the example, we would find that the parties reached consensus when they entered into the loan agreement in 2010. At that point the Lender would have once again made a decision to enter into the loan agreement with the Borrower by considering all risks involved. The Lender limited his risks by requesting a suretyship as a suspensive condition for the loan agreement. When one applies this judgement it is clear that the Lender's rights will not be protected, because he will not be able to institute legal action against the Borrower nor the sureties in case of non-payment.

Further to the inability to institute legal action, it also now becomes the responsibility of the Lender to ensure the Borrower's registration status with the Companies and Intellectual Property Commission (hereafter referred to as the CIPC) is in good standing and stays in good standing for the period of the loan agreement. The rights of the Lender seem to be jeopardized and it raises a further concern if the consensus between the contracting parties is not also jeopardized.

5.4.1.5 Example of a "surety clause" safeguarding a service provider

"1. We jointly and severally guarantee the performers of the Borrower of all its obligations to the Lender.

2. As part of our liability in terms hereof we bind ourselves as aforesaid to pay the amount of all charges and expenses of whatsoever nature, including, but without derogating from the generality of the aforegoing, Attorney and client cost, collection commission and tracing fees incurred by the Lender in securing fulfillment of the obligations.

3. The rights of the Lender under this suretyship shall not be affected or diminished:

3.1 if the Lender at any time obtains additional suretyships, guarantees, co-principal debtorships, securities or indemnities in connection with the obligations;

3.2 if any of the other persons named herein fail and ore refuse and or neglect to sign this document;

3.3 by virtue of the fact that the Lender acquired its claim against the Borrower as a consequence of a cession from any of its holding, subsidiary or associated companies;

3.4 by virtue of the fact that this document is not witnessed;

3.5 if the Borrower is a legal entity and deregistered."

5.4.1.6 Influence of a "surety clause" on the balance of rights

Once again if the application of an surety clause is not enforced due to the fact that certain external factors is not in place, like for instance the lack of registration of a company and the payment of the annual registration fees, then the rights of the consumer is benefitted to the disadvantage of the credit provider and service provider of South Africa. Surely a service provider and a credit provider cannot be responsible for external factors like mentioned above. The only result I see is that credit providers and service providers will be much more reluctant to enter into consumer agreements with consumers and if they do it will come at a very high price.

Chapter 6

CONCLUSION

In examining different pieces of consumer legislation in my process to determine the balance of rights pertaining to enforcement clauses in consumer contracts, it is clear that the legislature try to put the consumer in a better bargaining position as there is still contracts in the credit market which would entail that the consumer either to take it or leave it. Thus there is not always a notion of freedom of contract.

The enforceability and validity of enforcement clauses in consumer contracts is founded on the common law principle of freedom of contract and the philosophy of laissez-faire. The philosophy of laissez-faire means that the law or court will not interfere with the contractual relations of people or play a paternalistic role by imposing anything on the parties which did not form part of their intentions at contracting.

The contractual landscape in South Africa and more specifically standardized contracts raised the need for significant legislative reform. It however remains a controversial issue in both academic and judicial spheres what the influence of the Constitution will be on the enforceability and validity of contractual provisions.[66]

The question to be answered is if the contractual values are compatible with constitutional values and whether growth of the common law requires adaption to portray the values and objects of the Bill of Rights.

In this study I examined several clauses in consumer contracts to proof that these clauses in consumer contracts benefit consumers in such a manner that the credit providers and service providers are prejudiced to such an extent that

[66] Christie RH at18-26.

the South African economy will carry the burden of credit providers and service providers “risk savers” to enable them to do sufficient business.

When examining the “cancellation clause” in consumer agreements it scared me to think that the judiciary are receiving more and more power in regards to decisions if certain clauses in contracts will be enforced, the problem lies therein that there will be no consistency in the application and enforcement of clauses in agreements and create uncertainty.

When examining the “exemption clause” in consumer agreements it became clear that certain keywords like unequal bargaining powers and standard agreements is used in the marketplace as if it is the rule that those two aspects walks hand in hand, in other words when dealing with a standard agreement then it is almost as if it is accepted that there is unequal bargaining powers, this is not the case. Matters should be investigated individually in this regard.

Lastly when examining the “surety clause” in consumer agreements I realized the importance of the fact that all parties entering into an agreement should feel safe and protected and not wonder what surprise might creep up on you. Those kind of surprises, creates a sense of unequal balance of rights between consumers on the one hand and credit providers and service providers on the other. Unfortunately the result is a reluctant to enter into consumer agreements by credit providers and service providers and even if they decide to do so, the cost of credit and services will increase.

The negative consequence is that such compliance comes at a cost and that those costs are most of the time sustained by consumers who ultimately pay for their own consumer protection.

It is therefore my conclusion that there is not an equal balance between consumer rights and the rights of service and credit providers, not prior to implementation of consumer legislation or thereafter as ultimately the costs in regards to consumer protection is passed on to already vulnerable consumers.

It is important that the rights of service and credit providers are also protected to ensure a sustainable economy that is important to create employment and a healthy economy to protect vulnerable consumers.

It is therefore my submission that the cornerstone of the South African Law of Contract namely “pactum sunt servanda” must still be honoured but at the same time apply the values of “ubuntu” reasonably in conjunction thereof, while considering the effect on service and credit providers.

In the dictum of Sir George Jessel in the English case of *Printing and Numerical Company v. Sampson* (hereafter referred to as the *Sampson* case)[67] he stated:

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

[67] *Printing and Numerical Company v. Sampson* (1875) 19 Eq 462 at 462 and 463.

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Declaration:

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Student number: 99288690
Title of the assignment: Testing the balances of rights pertaining to Enforcement clauses in Consumer Contracts

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1. I understand what plagiarism and is aware of the University's policy in this regard.
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14 February 2018