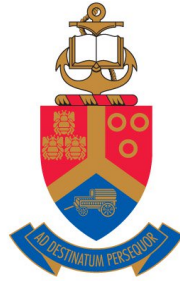


# Formalities in the law of contract and their impact on visually impaired consumers



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by

**Michal Danielle van den Berg**

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**Supervisor: Professor J. Barnard**

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Full names of student: Michal Danielle van den Berg  
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## SUMMARY OF MINI-DISSERTATION

The problem identified concerns the lack of the South African law to reasonably accommodate visually impaired persons, with specific reference to the law of contract, as found in the common law and consumer protection legislation. This jurisprudential lack of reasonable accommodation is limited to the formality requirement of 'in writing'.

The aim of this mini-dissertation will be to analyse the current legal position in such a manner so as to identify where the common law and relevant consumer protection laws fail to accommodate, discriminate against, show a disregard for and neglect the interests of visually impaired persons. In addition, I will provide an exposition of what the legal position *vis-à-vis* visually impaired persons ought to be in the context of the problem as already identified above.

Consequently, the following normative question will be answered: 'How ought the principle of reasonable accommodation influence the formality requirement of 'in writing', in both consumer legislation and the common law?'

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## CHAPTER 1: INTRODUCTION

The pressing problem that will be identified for this mini-dissertation concerns the failure on the part of the South African law to reasonably accommodate visually impaired persons with specific reference to the law of contract as found in the common law and influenced by consumer protection legislation.<sup>1</sup> This lack of reasonable accommodation will be limited to the formalities requirement for the conclusion of a valid contract, which includes the so-called ‘in writing’ requirement, and other formalities, whether *ex lege* or *ex contractu*, required for the exercise of contractual rights and enforcement of contractual duties, by contracting parties.

For a valid contract<sup>2</sup> to be concluded between two or more parties, such parties must comply with certain requirements and, if it is found that even one of the requirements are not complied with, it would either render the contract unenforceable or null and void *ab initio*, depending on the circumstances of the case. Formalities, as a requirement, applies to those circumstances when an agreement is required to be concluded in a specific manner or in a specific form.

Generally, when formalities are required for the conclusion of a valid contract, such formalities are required either in terms of the common law by prescription of the parties to the (proposed) contract or by virtue of dictation by statute.<sup>3</sup> There are a vast number of formalities<sup>4</sup>, especially when in the discretion of the contracting parties, but the only formality to be discussed is the one requiring an agreement to be ‘in writing’.

A contract contains the rights and obligations of all contracting parties and, aside from formalities required to bring about a valid contract, there might be formalities that have to be complied with before a party can exercise their contractual rights or comply with their contractual obligations. These formalities, though never an *ex lege* prescription in the common law,<sup>5</sup> are a common feature of consumer legislation and regulations thereto. For example, section 22(1) of the CPA, entitled “right to information in plain and understandable language”, provides that the producer has a *statutory obligation* to provide the consumer with a notice, document, or visual representation in the *prescribed form or in plain language*. The subsection therefore

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<sup>1</sup> Referring to the Alienation of Land Act, No. 68 of 1981 (hereafter referred to as the "ALA") and the Consumer Protection Act, No. 68 of 2008 (hereafter referred to as the "CPA").

<sup>2</sup> A contract can be defined as an agreement, recognised by law, entered into by two or more parties with the intention of creating a legal obligation. In the words of Kerr in Kerr, A. J. *The Principles of The Law of Contract* (2002) at 3 (hereafter referred to as "Kerr (2002)": “The legal bond, the *iuris vinculum*, is formed by the parties themselves, and, within the limits laid down by law, the nature of the obligations is determinable by them”.

<sup>3</sup> Hutchison, D. *Nature and Basis of Contract* in Hutchison, D. & Pretorius, C. J. (Eds.) *The Law of Contract in South Africa* (2009) at 6 (hereafter referred to as "Hutchinson (2009)").

<sup>4</sup> For example, signature by all contracting parties, signature of witnesses in front of all contracting parties, notarial execution, specific format and style of contract required, attestation and registration.

<sup>5</sup> A *lex commissoria* is an example of an *incidentalia* clause in terms of which parties can agree to the stipulation that the cancellation of the contract must be reduced to writing and delivered to the other contracting party.

provides for statutorily imposed formality requirement. The formalities prescribed in this specific subsection do not directly relate to the formality requirements of bringing about a valid contract, but rather relate to the compliance with formality requirements contained in the CPA to exercise a contractual right or to comply with a contractual obligation. Therefore, should the producer not comply with the formality requirement set out in section 22(1) of the CPA, the producer will have failed to comply with the CPA prescribing, a formality for the compliance with a contractual obligation.

The difference between the non-compliance of the formality requirement of bringing about a valid contract and the formality requirement to comply with a specific section in an Act in order to exercise a right or comply with an obligation is that the latter does not render the contract unenforceable or null and void *ab initio*.

It is trite that if legislation does not regulate an area of law, a specific set of facts, or circumstances one must turn to the common law in order to determine what the legal position is. In this regard, it bears mentioning that the common law did not and does not accommodate the disability of visually impaired persons. Furthermore, the statutorily imposed formality of ‘in writing’ and other statutory imposed formalities do not take into account that certain persons are visually impaired and, therefore, physically unable to comply with such formalities.

The Constitution of the Republic of South Africa, 1996<sup>6</sup> emphatically declares, in section 9(1), that “everyone is equal before the law and has the right to equal protection and benefit of the law”. Furthermore, section 9(3) puts it beyond doubt that the State “may not unfairly discriminate directly or indirectly against anyone on ... [the ground of] ... disability”. Therefore, visually impaired persons, constitutionally considered, are being discriminated against, although indirectly, since none of the above-identified consumer legislation provides for an alternative or an adjustment to the formality of ‘in writing’ or other formalities nor does such legislation treat visually impaired persons differently in cases of their non-compliance with such requirement or other formalities.<sup>7</sup>

The aim of this mini-dissertation will be to analyse the current legal position in such a manner so as to identify where the law fails to accommodate, discriminate against, and shows a disregard for and neglects the interests of visually impaired persons. In addition, I will provide an exposition of what the legal position *vis-à-vis* visually impaired persons ought to be in the context of the problem as already identified above.

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<sup>6</sup> The Constitution of the Republic of South Africa, 1996, (hereafter the "Constitution").

<sup>7</sup> Section 16(3) of the CPA provides that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, which may assist visually impaired persons but because the legislature omitted to include a definition as to what ‘any other recorded form’ means, the position remains uncertain and open for further discussion in Chapter 3 of this mini-dissertation.

At this juncture a clear understanding of ‘visually impaired persons’<sup>8</sup> must be provided to the reader. Whilst accepting that visually impaired includes being partially or completely blind,<sup>9</sup> it will become patently clear that the wording of ‘visually impaired’ is used in this study to mean and must be understood to mean being completely blind.

In the same context, to hold the opinion that this study is premised on the assumption that every person who is blind solely relies on braille is fallacious. Also, other methods of rendering text ‘legible’ for visually impaired persons, such as, for example, computer software, will not be discussed simply because in this study an argument is formulated for the development of a broader interpretation of the requirement of ‘in writing’ on the basis of the right to equality and the doctrine of reasonable accommodation. The argument that such other methods warrant discussion is easily dispensed with because once it is accepted that a visually impaired person that cannot or chooses not to read braille and has access to any such other methods will not be disadvantaged by the proposed broader interpretation of ‘in writing’. However, a visually impaired person who can read braille and who does not have access to any such other methods *is and will remain to be* disadvantaged by the current narrow definition of ‘in writing’. Even more troublesome is rejecting a broader interpretation of ‘in writing’ on the basis that it is open to a visually impaired person to have recourse to and make use of such other methods.

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<sup>8</sup> I am aware that the literal proverbial placement of the person before the disability or impairment (that is, speaking of ‘person with disability’ or ‘person with visual impairment’) can be interpreted to mean the person is not defined by the disability or impairment. However, my conceptual understanding of disability and the right to equality, including equality jurisprudence, is far more nuanced and transcends any syntactical pedanticism.

<sup>9</sup> Blind means the inability to see. Vision function is classified in four broad categories, according to the International Classification of Diseases (Update and Revision, 2006): (i) normal vision; (ii) moderate vision impairment (iii) severe vision impairment; and (iv) blindness (World Health Organisation *Vision Impairment and Blindness Fact Sheet* (Oct., 2017), <http://www.who.int/mediacentre/factsheets/fs282/en/> - accessed on 5 February 2018).



## 1. RESEARCH OBJECTIVES AND QUESTIONS

This mini-dissertation will endeavour to, *inter alia*, investigate the current interpretation of and meaning attached to ‘in writing’, whether in common law or statute. It will further aim to determine what the impact of the current meaning attached thereto is on a visually impaired person, in respect of the conclusion of a valid contract or for the enforcement of a contractual right or the compliance with a contractual obligation.

After the positive law’s influence on visually impaired persons are identified; in other words, the lack of reasonable accommodation on the part of the law for the needs of and circumstances in which visually impaired persons find themselves, the following normative question will be answered: How ought formalities, in its different senses as used above, be influenced by the constitutional notions of, values of, and rights to equality? In addition, how ought the principle of reasonable accommodation influence formalities, and in specific, the meaning attached to ‘in writing’, whether in statute and common law?

In the instance that the meaning attached to ‘in writing’, is developed in light of the principle of reasonable accommodation, whether in common law or in statute, it will be investigated what the influence will be on the operation of common law and consumer protection legislation, in respect of visually impaired persons.

## 2. METHODOLOGY

This study is aimed at conducting a conceptual analysis of relevant terms, phrases, doctrines, conceptions and interpretations. Conceptual analysis must be understood as a non-empirical approach in terms of which concepts or words are analysed by virtue of clarifying and elaborating on the different dimensions of meaning. Both primary sources and secondary sources up to September 2017, are reviewed; namely legislation, reported cases, books, journal articles, and discussion papers. The study will be, firstly, positive in nature. It will, in the first instance, determine what the current legal position is. In that sense, it will be descriptive, rather than prescriptive.<sup>10</sup>

Only after the current legal position is authoritatively established, will normative statements be investigated; such as to what extent ought visually impaired persons be accommodated in the context of formalities, as discussed above. This question will be elucidated against the backdrop of transformative imperatives, founded in the Constitution in the value achievement of equality, as opposed to only the fashionable “transformative constitutionalism”.<sup>11</sup> In other words, I accept and follow the transformative nature and imperatives of the Constitution, but do not subscribe to transformative constitutionalism as such.

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<sup>10</sup> See Forsyth, C. and Schiller, J. *The Judicial Process, Positivism and Civil Liberty II* 1981 Vol. 98(2) *South African Law Journal* 218-230 at 219 where the authors argue, and with which I am in agreement, that positivism is a theory of knowledge more than a theory of law *per se*.

<sup>11</sup> See in general Klare, K. E. *Legal Culture and Transformative Constitutionalism* 1998 Vol. 14(1) *South African Journal on Human Rights* 146-188; Langa, P. *Transformative Constitutionalism* 2006 Vol. 17(3) *Stellenbosch Law Review* 351-360.

### 3. DELINEATIONS AND LIMITATIONS

The concept of formalities forms part of many topics and is found in various pieces of overlapping legislation, apart from the common law. In order to ensure that this dissertation remains focused on the research aim, a delimitation of the exact corners of this dissertation will be outlined. The following must be noted in this regard:

#### 3.1.EQUALITY JURISPRUDENCE

- 3.1.1. Even though the study will discuss the equal treatment of persons with disabilities in a consumer law context concerning disability rights and reasonable accommodation in light of the Constitution, it will by no means be a dissertation with a purpose of discussing solely equality and matters related to it.
- 3.1.2. The purpose of this dissertation is founded in the equal treatment and protection of vulnerable visually impaired persons in consumer protection law and the common law principles relevant thereto.

#### 3.2.OTHER RELEVANT LEGISLATION

- 3.2.1. There are certain statutes that may find application to the content of this mini-dissertation as it sets out certain 'in writing' formalities, but will not be discussed herein, as it does not fall within the scope of the consumer protection subject.
- 3.2.2. It will not be a discussion of any insurance laws, employment laws, suretyship agreements, laws relating to banking and financial institutions (except where the CPA finds applicability), laws relating to trusts, marital and family laws or laws dictating wills and estates. Even though these laws have formality requirements to the disadvantage of visually impaired persons, it would constitute a study on its own to discuss each one in depth.
- 3.2.3. An in-depth discussion of the National Credit Act<sup>12</sup> falls outside of the scope of this study as it warrants an investigation on its own. A noteworthy mention of how the findings of this investigation might find applicability to the NCA will be discussed in the concluding chapter of this study.

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<sup>12</sup> No. 34 of 2005 (hereafter the "NCA").

### 3.3.CONSUMER PROTECTION ACT NO.68 OF 2008 AND ALIENATION OF LAND ACT NO.68 OF 1981

- 3.3.1. Only Chapter 1 (interpretation, purpose and application) and Chapter 2 (fundamental consumer rights) of the CPA and the regulations published in addition thereto, are relevant for purposes of this thesis, and a discussion of the remaining parts of the CPA falls outside the scope of the investigation.
- 3.3.2. A comprehensive discussion of the entirety of the ALA is excluded from the scope of this thesis as the focus is solely on provisions that impose formalities and provisions indicating the consequences of non-compliance with the formalities imposed.
- 3.3.3. There are a vast number of formalities, especially when in the discretion of the contracting parties, but the only formality to be discussed is the one requiring an agreement to be 'in writing'.
- 3.3.4. The requirements for the applicability of the CPA and the ALA will be briefly mentioned and not be discussed in detail as it will be assumed applicable for the sake of convenience.
- 3.3.5. It should be noted that this investigation will comprise solely of the discussion surrounding visually impaired consumers and not consumers who are merely illiterate.

### 3.4.COMMON LAW AS FOUND IN THE SOUTH AFRICAN LAW OF CONTRACT

- 3.4.1. Only the requirement of formalities for the conclusion of a valid contract will be discussed and the other requirements will fall outside the scope of this investigation.
- 3.4.2. The consequences of non-compliance with formalities will be identified, however, an in-depth discussion of what each consequence entails will briefly be mentioned.
- 3.4.3. Only the common law principles of *pacta sunt servanda*, the parol evidence rule and *caveat subscriptor* as it is directly influenced by the meaning attached to 'in writing', will be considered. Other common law principles relevant to the Law of Contract will fall outside the ambit of the investigation.

#### 4. REFERENCE TECHNIQUES

4.1. For the sake of convenience, the masculine form is used throughout this study to refer to a natural person.

4.2. Certain words are used interchangeably throughout this study. Unless otherwise indicated, these include:

4.2.1. “transaction”, “agreement”, “deed of sale”, “deed of alienation” and “contract”.

4.2.2. “in writing”, “writing” and “written”.

4.2.3. “seller”, “vendor”, “supplier”, “business”, “trader”. “producer” and “alienator”.

4.2.4. “consumer”, “purchaser”, “alienee”, “visually impaired person” and “visually impaired consumer”.

4.2.5. “*merx*”, “thing sold”, “goods” and “products”.

4.2.6. “mini-dissertation” and “study”.

4.2.7. “doctrine”, “principle” and “rule”.

4.2.8. “project”, “mini-dissertation” and “investigation”.

4.2.9. “legislation” and “statute”.

4.2.10. “oral” and “verbal”.

4.3. The law as stated in this study reflects the position as at 31 October 2017.

4.4. Reference to the Minister is reference to the Minister of Trade and Industry in South Africa.

## 5. EXPOSITION OF CHAPTERS

### 5.1.CHAPTER 1: INTRODUCTION

The pressing problem that will be identified in this study concerns the lack on the part of the South African law to reasonably accommodate visually impaired persons with specific reference to the Law of Contract as found in the common law and influenced by consumer protection legislation.<sup>13</sup> This lack of reasonable accommodation will be limited to the formalities requirement for the conclusion of a valid contract, which includes the so-called ‘in writing’ requirement, and statutorily imposed formalities requirement for the exercise of contractual rights and the enforcement of contractual duties, by the contracting parties.

### 5.2.CHAPTER 2: THE COMMON LAW PRINCIPLES OF FORMALITIES AND THE IMPACT THEREOF ON VISUALLY IMPAIRED PERSONS

This chapter will firstly focus on; the analysis of the common law as to distil what formalities are required for the conclusion of a contract as well as the consequence of non-compliance in addition to that and the impact thereof on visually impaired persons.

Secondly, what formalities must be complied with, subsequent to entering into and already having complied with formalities prescribed by the contracting parties, if any, in order to act in terms of and exercise rights flowing forth from the contract, by discussing the non-variation clause in a contract as an example to illustrate the aforementioned.<sup>14</sup>

The formality of relevance to this project is the formality of ‘in writing’, therefore, an in-depth investigation will follow as to the interpretation of the current meaning attached to ‘in writing’ as determined by the interpretation by our courts and academia and how this current meaning is prejudicial to a visually impaired person. Lastly, relevant common law principles such as *caveat subscriptor*<sup>15</sup>, the parol evidence rule as well, *pacta sunt servanda* will be discussed.<sup>16</sup> These principles will be discussed and set out as it currently operates

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<sup>13</sup> Referring to the Alienation of Land Act, No. 68 of 1981 (hereafter the "ALA") and the Consumer Protection Act, No. 68 of 2008 (hereafter the "CPA").

<sup>14</sup> Floyd (2009) at 162-165.

<sup>15</sup> That is, as expressed in *Burger v Central South African Railways* 1903 571 at 578, “[i]t is a sound principle in law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature”. See Kerr (2002) at 102.

<sup>16</sup> The Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 232 (CC) at para. [57] expressly accepted that the maxim *pacta sunt servanda* gives effect to central constitutional values of freedom and dignity and therefore, in this regard, endorsed the approach of the Supreme Court of Appeal in *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at para. [32]. For critique of this maxim see Bauling, A. and Nagtegaal, A. *Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008* 2015 Vol. 48(1) *De Jure* 149-171 at 155-157.

within the South African Law of Contract due to the direct influence the current meaning of 'in writing' has on these principles.

### 5.3.CHAPTER 3: CONSUMER PROTECTION LEGISLATION: AN ANALYSIS OF STATUTORY IMPOSED FORMALITIES AND THE UNJUST CONSEQUENCE FLOWING FROM NON-COMPLIANCE

This chapter will focus on the identified statutes, being the CPA and the ALA, that will be analysed to distil what formalities are imposed by these Acts. As has been done in relation to the common law position, formalities required for the conclusion of a valid contract will be discussed, and thereafter formalities to exercise contractual rights and enforce contractual duties in terms of contract will be addressed.

As in the case of the common law, this chapter, will investigate to what extent visually impaired persons ought to be accommodated in the context of the formalities requirement found in the CPA and the ALA.

### 5.4.CHAPTER 4: THE INFLUENCE AND NEEDED EFFECT OF THE NOTION OF REASONABLE ACCOMMODATION ON THE CURRENT POSITIVE LAW IN SOUTH AFRICA

This chapter will be directed towards an exposition of disability rights in South Africa, the notion of reasonable accommodation, and the effect thereof, or what effect it *ought* to have, on the common law and the consumer legislation identified and discussed above, in light of our constitutional equality jurisprudence and section 9(c) of PEPUDA.

Without excessive deliberation into the highly contentious realm of equality jurisprudence, this project will investigate the role that the constitutional values and rights to equality, human dignity, and freedom ought to possess, and therefore, can fulfil in order to aid visually impaired persons in their plight for equal enjoyment of rights and freedoms.

Against the latter cursory overview of equality jurisprudence and disability rights this study will investigate to what extent can the justifiable needs of disabled persons be accommodated in the context of formalities, as discussed above, in order to assist disabled persons in their plight for equal enjoyment of rights and freedom.

## 5.5.CHAPTER 5: CONCLUSION

In Chapter 5, recommendations will be presented in respect of the interpretations of and the meanings attached to the formality requirement of 'in writing', as found both in the common law and the identified statutes, respectively. These recommendations will include the development of the common law and amendments to the identified statutes for judicial interpretation.



## CHAPTER 2: THE COMMON LAW, FORMALITIES AND THE IMPACT THEREOF ON VISUALLY IMPAIRED PERSONS

### 1. INTRODUCTION

The foregoing chapter introduced the scope, questions, and research objectives relevant to the study. The methodology for the study was discussed providing an overview of the primary and secondary sources to be considered. Moreover, the delimitations and limitations were considered providing the boundaries for the jurisprudence, legislation and relevant acts to be considered.

The purpose of this chapter, as alluded to in Chapter 1, is to provide a well-researched position of the common law requirement of formalities, specifically the formality of 'in writing'. To achieve this purpose, the chapter will focus on firstly, the analysis of the common law as to distil what formalities are required for the conclusion of a contract, with reference to consensus is discussed against the wider background of the general and widely accepted principle *pacta sunt servanda* as an incidence of public policy. Secondly, what formalities must be complied with, subsequent to entering into and already having complied with formalities prescribed by the contracting parties, if any, in order to act in terms of the exercise rights flowing forth from the contract, or to comply with an obligation imposed by such a contract. A brief discussion of the consequence of non-compliance with the formalities by visually impaired persons will be explored therein.

Thereafter, the formality requirement of 'in writing' is canvassed together with an excursus into the meaning and interpretation of 'in writing', in terms of current positive law, so as to determine what the effect of the meaning and interpretation has on visually impaired persons; this discussion will be the introduction into the question as to whether the common law should be developed to accommodate visually impaired persons, through modifying and improving the meaning and consequence attached to 'in writing'?

Finally, several questions will be put forward in the construction of an abstract example to determine the extent that the current positive law interpretation and subsequent impact of the parol evidence rule and the *caveat subscriptor* doctrine affect visually impaired persons, due to its operation relating to agreements are concluded in writing. This chapter is concluded with a brief consideration of consumer legislation that potentially influences the positive law and its impact on visually impaired persons, as it is to be hoped that consumer legislation will become part of contract law and not remain isolated-

## 2. CONTRACTS, CONSENSUS AND *PACTA SUNT SERVANDA*

The issue of freedom of contract is often described with reference to juxtapositions such as freedom of contract as against fairness, or individualism as against paternalism.<sup>1</sup> Endeavouring to understand what the concept of fairness or individualism entails, one has to understand its philosophical context. The “[g]reat grandfather of all doctrines of human rights” – the theory of social contract.<sup>2</sup> The doctrine entails that in the state of nature, man was not only free but utterly and absolutely free to the extent that his own might and cleverness could prevail.<sup>3</sup> It, therefore, follows that traditionally, individualism underpins the law of contract.<sup>4</sup>

Individualism entails recognition of negative freedom as a fundamental right and, in a political<sup>5</sup> context, individualism conceives reality as a world replete with agents that are vested with exclusive control over their private domain of autonomy in which the role of state intervention is limited.<sup>6</sup> Two dominant ideas of individualism are associated with individual autonomy and self-reliance.<sup>7</sup> It has been opined that individualism manifested in the traditional South African law of contract through the notion freedom of contract, entails that contracting parties are free to decide as to whether they will enter into a contract, the terms on which such contract will be concluded and with whom they wish to contract, if at all – with little to no judicial interference being the general rule rather than the exception.<sup>8</sup> However, in South Africa, the introduction of democracy introduced new beginnings for the South African legal system but the realisation of the constitutional transformative imperative to bring about substantive justice has been extremely slow within the law of contract.<sup>9</sup> Thus, the law of contract currently swings between a freedom-orientated approach which is indicative of subordination to liberalism and a fairness-orientated approach which qualifies as progressive.<sup>10</sup>

A contract is a bi-lateral<sup>11</sup> or multi-lateral legal act in respect of which the law gives effect to the intention of the legal subjects, having a serious intention to create a legal obligation or obligations (*animus*

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<sup>1</sup> Barnard, A.J. “*A Critical Legal Argument for Contractual Justice in the South African Law of Contract*” (LLD thesis: University of Pretoria, 2005) at 65-67; Stoop, P.N. “*The Concept of ‘Fairness’ in the Regulation of Contracts under the Consumer Protection Act 68 of 2008*” (LLD thesis: University of South Africa, 2012) at 5 -7 (hereafter referred to as “Stoop (2012)”).

<sup>2</sup> Maxey, C. C. *Political Philosophies* (1949) at 203.

<sup>3</sup> *Ibid.*

<sup>4</sup> Stoop (2012) at 5.

<sup>5</sup> “Bunnin, N. and Yu, J. *The Blackwell Dictionary of Western Philosophy* (2004) In political philosophy, as an essential feature of political liberalism, individualism claims that the individual is viewed as the bearer of rights, that a government can be legitimately formed only on the basis of the consent of individuals, and that political representation is the representation of individual interests. Society is a logical construction whose aim is to enable its individual members to pursue their respective inter-ests without interference”.

<sup>6</sup> Stoop (2012) at 5.

<sup>7</sup> Stoop, P. N. *Background to the Regulation of Fairness in Consumer Contracts* 2015 Vol. 27(2) *South African Mercantile Law Journal* 191-217 at 191-192.

<sup>8</sup> *Ibid.*

<sup>9</sup> Hawthorne, L. *Public governance: Unpacking the Consumer Protection Act 68 of 2008* 2012 Vol. 75(3) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 343 – 370 at 345.

<sup>10</sup> *Ibid.*

<sup>11</sup> See *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal (Centre for Child Law as amicus curiae)* 2013 (4) SA 262 (CC) at para. [35] (hereafter referred to as the “KwaZulu-Natal Joint Liaison

*contrabendi*),<sup>12</sup> party to such legal act, provided that certain requirements be adhered to.<sup>13</sup> As such, a contract is a legal act in terms of which legal subjects agree upon a performance, whether reciprocal or not, and such agreement will give rise to a *iuris vinculum*.<sup>14</sup> One of the requirements that possibly need be complied with is that parties must comply with certain formalities to which a specific contract might be subjected to for such contract to be validly concluded.<sup>15</sup>

It is understood and accepted that, in terms of freedom of and the sanctity of contract, as manifested through the principle of *pacta sunt servanda*,<sup>16</sup>

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.”<sup>17</sup>

In other words, legal subjects are *free* to enter into contractual arrangements and, consequently, free to bind themselves to the terms, conditions, and stipulations freely and voluntarily agreed to. As influenced by the Constitution, public policy, even today, requires, in general, that parties must comply with contractual obligations freely and voluntarily undertaken.<sup>18</sup> This public policy consideration is expressed in the maxim *pacta sunt servanda*, which gives effect to the central constitutional values of freedom and dignity.<sup>19</sup> “Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity”.<sup>20</sup>

The maxim is derived from Codex 2.3.7, where two Emperors said that “*pacti conventionisque fides servanda est*”, and in Codex 2.3.6 one finds a self-evident principle, which is even true to this day, that contracts

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Committee Jmnt. 2013 (CC)”) where Cameron, J. referred to an undertaking forming part of a bilaterally binding agreement as the “hallmark of contractually enforceable obligations”.

<sup>12</sup> *Ibid.* at para. [94], in the words of Froneman, J. “Our law of contract, unlike English law, enforces promises seriously made, not bargains”; see also *Conradie v Rossouw* 1919 AD 279 at 324 where Wessels, A.J.A. held that only promises made “seriously and deliberately and with the intention that a lawful obligation should be established” are enforced by law.

<sup>13</sup> See Hutchison, D. *Nature and Basis of Contract* in Hutchison, D. & Pretorius, C. J. (Eds.) *The Law of Contract in South Africa* (2009), at 6-10 (hereafter referred to as “Hutchinson (2009)”); *KvaZulu-Natal Joint Liaison Committee* 2013 (CC) at paras. [94]-[97].

<sup>14</sup> Kerr, A. J. *The Principles of The Law of Contract* (2002) at 1 (hereafter referred to as “Kerr (2002)”).

<sup>15</sup> Floyd, T. *Formalities* in Hutchison, D. & Pretorius, C. J. (Eds.) *The Law of Contract in South Africa* (2009), at 157 (hereafter referred to as “Floyd (2009)”); Kerr (2002) at 139.

<sup>16</sup> See Christie, R. H. and Bradfield, G. *Christie’s Law of Contract in South Africa* (2016) at 18-23 and the authorities cited and discussed regarding freedom of contract, public policy, and the The Constitution of the Republic of South Africa, 1996, (hereafter referred to as the “Constitution”).

<sup>17</sup> *Wells v South African Alumenite Company* 1927 AD 69 at 73, Innes C.J. quoting Jessel, M.R., an English Judge, in *Printing Registering Co. v Sampson*, L.R. 19 Eq at 465.

<sup>18</sup> *Barkhuizen v Napier* 2007 (5) SA 232 (CC) at para. [57].

<sup>19</sup> *Ibid.* The Constitutional Court endorsed the approach adopted by the Supreme Court of Appeal in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at para. [32]. For critique, rather well argued, see Bauling, A. and Nagtegaal, A. *Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008* 2015 Vol. 48(1) *De Jure* 149-171 where the authors argue that there is no *real* freedom, because of disparate difference in socio-economic circumstances of contracting parties to the extent that one of the parties, considered *de facto*, does agree, but, in a substantive and contextual sense such party merely accepts his circumstances and submits to the power of the other in order to obtain necessities of life; such as for example, health care (*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)), housing (*Brisley* 2002 (SCA)), Insurance (*Napier* 2007 (CC)).

<sup>20</sup> *Napier* 2007 (CC) at para. [57].

(*pacta*) concluded contrary to laws, broadly understood as legislation, or the *boni mores* are of no force or effect.<sup>21</sup> It has become trite that no contract contrary to public policy is enforceable.

The Supreme Court of Appeal reaffirmed, in its own words “the obvious” as made patent in *Sasfin (Pty) Ltd v Beukes*;<sup>22</sup> namely, that our common law does not recognise agreements that are contrary to public policy.<sup>23</sup> Furthermore, no person can deny or argue contrary to the incontrovertible fact that public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values.<sup>24</sup>

“What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.”<sup>25</sup>

If parties are free to enter into a contract, the law will only give effect and enforce their common intention for in so far as it is not contrary to any rule of law or *contra bonos mores*. As will be seen hereunder, contracting parties are free to agree to certain formalities to be complied with for their contract to come into being. One of these formalities, as alluded to in Chapter 1, is that their agreement must be reduced to writing. In the context of visually impaired persons, the question arises as to whether such formality requirement for the validity of a contract is congruent with the public policy. Phrased differently, does the law allow parties, where one is a visually impaired person, to agree that their agreement must be reduced to writing?

The posed question also leads to another highly important question; namely, what is the meaning of ‘in writing’ and what is the influence thereof on the former question? It is by virtue of these two questions that a well-researched position of the common law is provided thereby leading to the normative question, addressed in Chapter 4; namely, what the effect of visually impaired persons *ought* to be on the common law?

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<sup>21</sup> *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para. [37].

<sup>22</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A) at 71-9H.

<sup>23</sup> *Bredenkamp* 2010 (SCA) at para. [38]; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours* CC 2011 (3) SA 511 (SCA) at para. [16].

<sup>24</sup> *Bredenkamp* 2010 (SCA) at para. [39]; *African Dawn Properties* 2011 (SCA) at para. [22].

<sup>25</sup> *Napier* 2007 (CC) at para. [29].

### 3. FORMALITIES: CONCLUSION OF CONTRACT

It is to the question as to whether the law allows parties, where one is a visually impaired person, to agree that their agreement must be reduced to writing and the meaning of writing to which is now turn to. The question as to whether the law allows parties, where one is a visually impaired person, to agree that their agreement must be reduced to writing and the meaning of writing will at this moment be emphasised.

#### 3.1. REDUCTION OF AGREEMENT TO WRITING

As Kerr authoritatively referenced, in terms of the common law,<sup>26</sup> the general rule is that “any contract may be [orally] entered into; writing is not essential to contractual validity”.<sup>27</sup> However, if either of the parties express the intention or if statute (as opposed to the common law) renders writing and, or signature a requirement, such requirement must be complied with, lest parties be left with a contract that is void *ab initio*.<sup>28</sup>

In the circumstances where parties agree to certain formalities, in the absence of statutorily imposed formalities, the intention of the parties must be examined with great care, since the parties could have intended one of two constructions to be applicable to their contract.

##### 3.1.1. REQUIREMENT FOR VALIDITY OF THE CONTRACT

Firstly, the intention of the parties can be that the validity of the agreement is subject to compliance with the intended formality, which has as a consequence that the contract will only come into being as soon as the formality has been complied with.<sup>29</sup> As a rule, parties who specifically meet, discuss the matter, bargain the terms will eventually come to an agreement. If then they intend that the agreement should be put in writing, it is the written document embodying the verbal agreement which constitutes the contract.<sup>30</sup> The construction intended by the parties is succinctly summarised by the words of Innes C.J.: “there will be no binding obligation until the terms have been reduced to writing and signed”.<sup>31</sup>

<sup>26</sup> For a historical exposition of both ‘in writing’ and ‘signature’ as formalities see Cornelius, S. J. *Handtekening as Vereiste vir die Geldigheid van ‘n Kontrak* 2012 Vol. 26(2) *De Jure* 379-387 at 379-383.

<sup>27</sup> Kerr (2002) at 139 citing *Goldblatt v Fremantle* 1920 AD 123 at 128, per Innes C.J., followed in *Menelaou v Gerber* 1988 (3) SA 342 (T) at 346B and in *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) at 995E-F. See Floyd (2009) at 157. See also, in general, Cornelius (2012) *De Jure* at 383-385.

<sup>28</sup> Kerr (2002) at 139; Floyd (2009) at 157.

<sup>29</sup> Kerr (2002) at 139-140; Floyd (2009) at 162.

<sup>30</sup> *Poole and McLennan v Nourse* 1918 AD 404 at 416.

<sup>31</sup> *Goldblatt* 1920 at 593.

### 3.1.2. REQUIRED TO SERVE AS MERE PROOF OF AN EXISTING CONTRACT

Secondly, parties can intend that the formalities will only serve as proof of an existing contract between them, in which case a valid contract will come into actuality before any formalities have to be complied with. In this construction, the verbal agreement will be binding and enforceable between the parties even if it is never reduced to writing.<sup>32</sup>

### 3.1.3. INTENTION OF THE PARTIES AND THE PRESUMPTION IN FAVOUR OF MERE PROOF

To determine which of the two constructions, alluded to above, the contracting parties may have intended is a question of fact, but, in the absence of contrary evidence, there is a legal presumption to the effect that the intention of the parties in requiring the terms to be reduced to writing was merely to facilitate proof of the contract.<sup>33</sup> In the case of *Woods v Walters*, Innes C.J. held:

“Where the parties are shown to have been *ad item* as to the material conditions of the contract, the *onus* of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it.”<sup>34</sup>

Thus, to summarise the two possible constructions:

“Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (*Grotius* 3.14.26 etc.) At the same time it is always open to parties to agree that the contract shall be a written one (see *Voet* 5.1.73. *V. Leenwen* 4.2., sec. 2, *Decker's* note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed.”<sup>35</sup>

Currently, as the positive law is understood, parties are free to agree upon the formality requirement of ‘in writing’. Parties, both of which are blind, are in principle free to agree to the requirement of ‘in writing’ even if it is to their own detriment, unless such stipulation would run contrary to public policy. The question to be put before a Court is whether such a contract is valid and congruent with public policy. Until this question is answered in the negative by a Court of law, it must be accepted that to reduce a contract to writing which is not in braille will bring about a valid contract, which is not against public policy.

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<sup>32</sup> *Pillay v Shaik* 2009 (4) SA 74 (SCA) at para. [44].

<sup>33</sup> *Goldblatt* 1920 at 128-129.

<sup>34</sup> *Woods v Walters* 1921 AD 303 at 305-306.

<sup>35</sup> *Shaik* 2009 (SCA) at para. [44].

### 3.2. FORMALITIES: EXERCISE OF A CONTRACTUAL RIGHT OR COMPLIANCE WITH A CONTRACTUAL OBLIGATION

In addition to the general rule of formalities discussed above, parties may agree that certain formalities must be complied with, subsequent to entering into and already having complied with formalities prescribed by the contracting parties, if any, in order to act in terms of and exercise rights flowing forth from the contract or to comply with any contractual obligations imposed by such a contract. A non-variation clause contained in the agreement is an illustration of how a clause in an agreement may only be amended if it is reduced to writing and signed by all the contracting parties.

Non-variation clauses provide commercial certainty, and the application thereof has been reaffirmed in our courts. In the case of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren*,<sup>36</sup> the court held that where the contractual parties insert a non-variation clause in their contract, there is no good reason not to hold the parties bound to the non-variation clause to which they both agreed. The court held further that the clear goal in inserting such a clause was to prevent disputes and the difficulties associated with proving oral agreements. Non-variation clauses thereby ensure certainty in contractual dealings, and such clauses operate in favour of both parties unless one or both of the parties are visually impaired. A non-variation clause which requires oral variations of the contract to be reduced to writing would still allow parties to do so, as long as the formality of reduction to writing is adhered to.

When the parties conclude a valid contract with prescribed formalities, it is accepted that if the visually impaired person agreed to be bound by the contract, he would consequently be bound to comply with the formalities contained in certain clauses, such as the non-variation clause, in order to be able to exercise his rights in terms of the contract. If the visually impaired person wishes to exercise his right of varying a certain part of the contract, he may only do so on condition that it is reduced to writing, a task physically impossible for such a person. It is in such a scenario where one would question whether public policy would determine it as fair and constitutional to allow such a clause to be enforced all the while taking into consideration the principle of *pacta sunt servanda*. Should a court allow the clause to be enforced, then it would be extremely difficult for a visually impaired person to comply with the prescribed formalities, in order to be able to exercise his right regarding the contract.

A significant milestone was reached when the Constitutional Court was faced with the tension between contractual freedom and the Bill of Rights in the case of *Barkhuizen v Napier* case. The Constitutional Court found that agreements cannot be honoured if the application thereof is ‘so manifestly unreasonable’ that it violates public policy.<sup>37</sup>

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<sup>36</sup> 1964 (4) SA 760 (A).

<sup>37</sup> *Napier* 2007 (CC) at para. [62].

“Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, is the general sense of justice of the community, the *boni mores*, manifested in public opinion.”<sup>38</sup>

The judge, Ngcobo J, held that the proper approach of constitutional challenges to contractual terms of private parties is a determination whether the challenged term is contrary to public policy. The court then reduced public policy to the question whether the challenged term is fair and reasonable.<sup>39</sup>

The determination of fairness takes place in two steps: First, the question is asked whether the term itself is reasonable or not, and secondly, if the term is found to be reasonable, whether it should be enforced taking into account the circumstances which prevented compliance with the term.<sup>40</sup> In this instance, the physical disability of the person would be the circumstance preventing compliance.

It is difficult to envisage a contract without a non-variation clause as these ensure certainty in contractual dealings and operates in favour of both parties, *in most instances*, but the difficulty should no longer proceed unnoticed as it is not only with regard to the conclusion of a contract that visually impaired persons are disadvantaged but also in respect of the formalities imposed to comply with certain clauses in the written contract. Even though striking the balance between the principle of *pacta sunt servanda* and what public policy requires as being fair and constitutional is a difficult exercise, in light of the nature of the disability of the visually impaired person. It is profound to think that a court would be unwilling to enforce a contract in which the visually impaired person could not comply with based on the notions of fairness, justice and reasonableness.

However, as determined by current positive law, if a contract provides that any subsequent variation of its terms should be in writing and that a verbal variation will be of no force or effect such a provision is valid, and a purported verbal variation will be void.<sup>41</sup>

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<sup>38</sup> *Napier* 2007 (CC) at para. [73].

<sup>39</sup> Hawthorne (2012) at 350.

<sup>40</sup> Hawthorne (2012) at 351.

<sup>41</sup> Gibson, J.T.R. “*Gibson: South African Mercantile and Company Law*” (2008) (8<sup>th</sup> Ed.) at 57.



#### 4. THE MEANING OF ‘WRITING’

In the words of Maasdorp, J., in the case of *Richmond v Crofton*<sup>42</sup>, a contract “cannot be said to have been fully executed until the consent of the parties has been expressed by the signature upon the document or documents constituting the written contract”<sup>43</sup> After thorough research no case law could be located in which a Court authoritatively defined the meaning of ‘writing’ in a contract as opposed to merely accepting (in a sense, taking judicial notice) that writing means reducing the terms of an agreement to paper or other documentary form<sup>44</sup> thereby constituting the agreement as a written contract.

Be that as it may, the words “consent in writing”; in other words, agreement in writing, has been held, although in the context of a statutory provision, to mean “an express agreement in writing executed by the parties[,] ... not an agreement by construction of law”.<sup>45</sup> The latter interpretation has been reaffirmed in *Hall v Jackson* where the Court held that when “the Legislature used the words ‘in writing,’ it must be taken to have intended an express agreement in writing executed by the parties[,] ... not an agreement by construction of law”.<sup>46</sup> The Court continued and made it plain that “it is difficult to see how the Legislature came to use the words ‘in writing’ if it did not intend that effect should be given to their *natural* meaning” [own emphasis].<sup>47</sup>

The divide between the interpretation<sup>48</sup> of contracts and legislation has been transcended,<sup>49</sup> and it is now settled and has become trite that written documents “must be read as a whole, having regard to its context and background facts to determine its meaning and purpose”.<sup>50</sup> In *Jaga v Dönges NO; Bhana v Dönges NO*,<sup>51</sup> Schreiner J.A., distinguished between two ‘schools of thought’ on interpretation. The first maintains that context, in the wide sense as described by Schreiner J.A., must – as part of the process of ascertaining the grammatical and *ordinary* meaning of the words – be taken into account.<sup>52</sup> The second maintains that, in the first instance and to the exclusion of context as described by Schreiner J.A., the grammatical and ordinary meaning should be ascertained and recourse may only be had to the context to decide, if necessary, whether some other meaning ought to be preferred.<sup>53</sup> Briefly put, it is now accepted that interpretation – which is,

<sup>42</sup> 1898 15 SC 183.

<sup>43</sup> Cited by *Goldblatt* 1920 at 128.

<sup>44</sup> In *Jaftha v Ezenvelo KZN Wildlife* 2008 (10) BLLR 954 (LC) at para. [71] the court specifically referred to “*paper based concepts* such as ‘writing’, ‘signature’ and ‘original’.

<sup>45</sup> *Dyster & Tiran v Vorster, N.O.* 1922 OPD 218 at 222, it must be recognized that I do take note of the fact that the Court interpreted s. 43 of the now repealed Act 32 of 1917.

<sup>46</sup> *Hall v Jackson* 1930 CPD 183 at 188.

<sup>47</sup> *Ibid.*

<sup>48</sup> Recourse is had to the principles of interpretation for the simple reason that parties will *agree in a term that is included in a contract* that the contract must be ‘reduced in writing’ and, as such, the words *contained in a contract* must be interpreted.

<sup>49</sup> See *KwaZulu-Natal Joint Liaison Committee* 2013 (CC) at para. [129] where the Constitutional Court quotes, with approval, the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para. [18].

<sup>50</sup> *KwaZulu-Natal Joint Liaison Committee* 2013 (CC) at para. [128].

<sup>51</sup> *Jaga v Dönges NO; Bhana v Dönges NO* 1950 (4) SA 653 (A) at 662–664.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

the process of attributing meaning to the words used in a document containing legislation, other statutory instruments, or a contract) – must have regard to context.<sup>54</sup>

Irrespective of the nature of the relevant document, the interpreter must give due consideration to the language used in the light of every one of the following factors: the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production.<sup>55</sup> In the circumstance where more than one meaning is possible, each possibility must be weighed in the light of all these factors.<sup>56</sup>

“A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made.”<sup>57</sup>

Against this background, writing can be defined as any sequence of letters, words, or symbols marked on a surface, but for our purposes, usually paper,<sup>58</sup> and, most contemporaneously, if the document or information is contained in a data message it is also considered to be in writing.<sup>59</sup> In the most general sense of the word, ‘writing’ denotes a document, whether manuscript or printed, as opposed to mere spoken words. However, the current meaning attached to writing seems to *not* include braille, and the latter conclusion is buttressed by the fact that no reference is made thereof in any relevant authoritative textbook, case law, or journal articles. It seems that the common law, in specific, is silent on the meaning of writing when one or more of the contracting parties is or are visually impaired. To date, writing, in its ‘natural meaning’ is understood as *not*, in its ‘usual accepted sense’, referring to a document or text written in braille.

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<sup>54</sup> *Endumeni Municipality* 2012 (SCA) at para. [18].

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> See *Jafja* 2008 (LC) at para. [71].

<sup>59</sup> In writing, is defined as including any electronic means recognised by ECTA R. 1 of the Consumer Protection Act Regulations (2011) GNR.293 of 1 April 2011: Regulations (Government Gazette No. 34180).

## 5. ABSTRACT EXAMPLE

In modern times, almost all contracts are drafted and recorded in writing, to facilitate proof of the agreement and to stipulate the *essensialia*.<sup>60</sup> It is commonly advised that all contracts be reduced to writing as the party seeking to enforce a verbal agreement, bears the *onus* in this regard.<sup>61</sup> It is, therefore, not in the best interest of a person with a visual impediment to conclude a verbal agreement, as the *onus* to prove the content of the terms of the verbal agreement is difficult to discharge, especially if the dispute surrounds the intention of the parties to the agreement. If a verbal agreement was concluded it is very enigmatic for a Court to determine, with certainty, if it is at all possible, what the intention of the parties was at the time of conclusion of the agreement.

Should a dispute arise regarding the validity of the agreement, based on the non-compliance with formalities, a Court usually seeks guidance, if applicable, from the written provisions of a contract. Whether the agreement is verbal or written, a visually impaired person remains the vulnerable party. Firstly, should the parties conclude a verbal agreement, the visually impaired person runs a serious risk of failing to discharge the *onus* of proof when attempting to enforce the contract if required to so, by virtue of his disability alone. The following simple example will suffice, is the *merx* purchased by the visually impaired person the young steed (black) or the old steed (brown)? Although the visually impaired person had the young steed in mind, one could agree that he can never argue that he saw the horse that he bought in the first place.<sup>62</sup>

Secondly, in the event that parties conclude a written contract, the visually impaired person is vulnerable as he cannot confirm or substantiate what has been reduced to writing and can, therefore, be subjected to the fraudulent and dishonest conduct by the other contracting party or otherwise be disadvantaged by doctrines such as *pacta sunt servanda*, the parol evidence rule and *caveat subscriptor*.

In order to determine the current positive law interpretation of the parol evidence rule and the *caveat subscriptor* doctrine and the disadvantaged impact it has on a visually impaired person, the following example must be considered: one of the two parties to a contract is visually impaired, and the contract includes a clause to the effect that the written contract constitutes the entire agreement between the parties and that, until such time as both parties have signed the written contract, no contract will have come into being between them. We assume for the purposes of this abstract example the contract is not in braille.

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<sup>60</sup> Floyd (2009) at 163.

<sup>61</sup> Floyd (2009) at 157.

<sup>62</sup> A side note, *traditio longa manu* cannot constitute delivery when the party intending to become the owner of the *merx* is a visually impaired person.

### 5.1. IS THE CONTRACT VALIDLY CONCLUDED?

Suppose that both parties do sign the contract. An over-arching question, relating to the meaning of ‘in writing’: will the contract, in the legal sense, be reduced to writing if such contract is not in braille?

The answer to this question relates to compliance with a formality requirement agreed upon between parties and the meaning that the law attaches to such requirement. The meaning of writing has been dealt with above, and the conclusion to what has been said above is this. Currently, as the positive law is understood, parties are free to agree upon the requirement of ‘in writing’, and it is accepted, in the author’s opinion, such acceptance is nothing else than judicial notice, that ‘writing’ is a paper-based concept<sup>63</sup> conceptualised as exclusive of writing in braille. Parties, both of which are blind, are in principle free to agree to the requirement ‘in writing’ even if it is to their own detriment unless such stipulation would run contrary to public policy.<sup>64</sup>

The question to be put before a Court is whether the contract, as discussed in the above example, is valid and congruent with public policy. Until this question is answered in the negative by a Court of law, it must be accepted that, first, writing does not include braille and, second, to reduce a contract to writing which is not in braille will bring about a valid contract. However, this question will be considered in greater depth in Chapter 4 and Chapter 5.

### 5.2. THE PAROL EVIDENCE RULE AND THE DOCTRINE OF *CAVEAT SUBSCRIPTOR*

Suppose that the contract is signed by both parties and it is validly concluded we need to determine, firstly, what the current positive law interpretation of the parol evidence rule and the *caveat subscriptor* doctrine is. Secondly, what the impact of the parol evidence rule and the *caveat subscriptor* doctrine is on the visually impaired party.

#### 5.2.1. PAROL EVIDENCE RULE

One of the aspects, parts, or rules of the parol evidence rule is “... where a written instrument is or was intended to be the exclusive memorial of the whole of the agreement between the parties”,<sup>65</sup> and is therefore reduced to writing, “the writing is regarded as the exclusive embodiment or memorial of the transaction

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<sup>63</sup> Jafra 2008 (LC) at para. [71].

<sup>64</sup> Napier 2007 (CC) at para. [57].

<sup>65</sup> Botha, J.A. in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (AD) at 26 following the Court in *Capital Building Society v De Jager* 1963 (3) SA 381 (T) at 382-383.

and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract” [own emphasis].<sup>66</sup> This aspect, part or rule is known as the integration rule.<sup>67</sup>

However, the parol evidence rule, or more specifically the integration rule, does not preclude a Court from inquiring into the true contents of the transaction in order to determine the validity thereof<sup>68</sup> and it is concerned with agreements reduced to writing and signed<sup>69</sup> by both parties only. Thus, oral evidence is admissible to show that the contract is void or unenforceable for fraud, or mistake, or illegality, or impossibility, or lack of consensus.<sup>70</sup> The parol evidence rule will not be applicable where the visually impaired person does not sign the contract.

A troublesome situation arises when a visually impaired person attempts to contradict, alter, add to, or vary a written contract which he did indeed sign, but could never have read in the first place. This rule can, therefore, operate to restrict and bind a visually impaired person to the express terms of a written contract that he cannot read, interpret, or understand for himself. None of the exceptions to the integration rule is applicable *merely* because a contracting party is a visually impaired person. Thus, being a visually impaired person will not preclude the integration rule from applying to such person. The impact that the integration rule has or can have is, therefore, quite disproportionately harsh and a-contextual in respect of visually impaired persons.

It is recognised, as above, that an argument can be constructed that it would be contrary to public policy if one were to allow the contract to be valid, even though it is signed by the visually impaired person, where it is not reduced to writing in braille. However, as the law currently stands, no such finding has been made and such argument merely points at possible legal reform. In addition, as is more fully discussed in Chapter 4, to allow such a contract to be valid or would disregard substantive equality, since such validity would be an embodiment of a clear lack of substantively mandated differentiation and therefore reasonable accommodation.

The applicability of the integration rule to visually impaired persons is *prima facie* congruent with both *pacta sunt servanda* and *caveat subscriptor*. When parties enter into an agreement, parties require certainty regarding, one, what has been agreed upon or what is required in terms of the contract and, two, that the contract will be executed accordingly. The parol evidence rule and the *caveat subscriptor* doctrine provides for the former and *pacta sunt servanda* for the latter.

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<sup>66</sup> *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47, this quote of Watermeyer, J.A. being quoted with approval in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (AD) at 26 and is followed by Corbett, J.A. in *Johnston v Leal* 1980 (3) SA 927 (AD) at 938 (hereafter referred to as "Johnston (1980)"). See also Maxwell, C. *Interpretation of Contracts* in Hutchison, D. & Pretorius, C. J. (Eds.) *The Law of Contract in South Africa* (2009), at 255; Kerr (2002) at 348.

<sup>67</sup> Kerr (2002) at 348.

<sup>68</sup> *Johnston* 1980 (AD) at 946. See Kerr (2002) at 353.

<sup>69</sup> Maxwell (2009) 269.

<sup>70</sup> *Kok v Osborne* 1993 (4) SA 788 (SE) at 796; *Johnston* 1980 (AD) at 945.

The principle of *pacta sunt servanda* is one of the tools enabling contracting parties to rely on the certainty that contractual duties will be complied with. It is by now a universally accepted truth that one of the important aims of *pacta sunt servanda* is legal certainty and the honouring of obligations by the contractual parties.

“*Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy.”<sup>71</sup>

Therefore, a party could have signed a contract thereby enabling the applicability of both the parole evidence rule as well as the *caveat subscriptor* doctrine. However, if found that to enforce an agreement signed by a visually impaired person that is not in braille would be against public policy, there is no kind of certainty that would render such an agreement valid and enforceable. Substance would then reign supreme over form.

## 5.2.2. CAVEAT SUBSCRIPTOR DOCTRINE

*Pacta sunt servanda* relates closely to the *caveat subscriptor* doctrine. The latter is, essentially, a rule whereby a willing contracting party is presumed to have read the content of the agreement and had the intention of entering into the agreement on his own volition (in other words, it is presumed that he wanted to enter into the contract). *Burger v Central South Railways*,<sup>72</sup> Innes, C.J., expounded rule as follows:

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.”

The rule has the effect that the signatory is bound to the terms and conditions of the agreement after signature thereof since he created an impression that he has the intention of being bound to the written agreement and should accordingly honour their obligations after entering into the agreement.<sup>73</sup>

“From a contractual perspective, and in simplified terms, the *caveat subscriptor* rule essentially entails that a party who has signs a contractual document will be bound to all terms contained in that document, regardless of whether or not he has read them or was subjectively willing to consent to them.”<sup>74</sup>

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<sup>71</sup> *Napier* 2007 (CC) at para. [87].

<sup>72</sup> *Burger v Central South African Railways* 1903 TS 571.

<sup>73</sup> See *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (WLD) at 575H: “There is a strong *praesumptio hominis* (popular presumption or presumption common among persons) that anyone who has signed a document had the animus (intention) to enter into the transaction contained in it, and she is burdened with the onus of convincing the Court that she in fact had not entered into the transaction by virtue of the maxim *caveat subscriptor* (a person who signs must be careful).”

<sup>74</sup> Christie and Bradfield (2016) at 174.

In the alternative, suppose that the visually impaired party did not sign the contract, but the other party did. In this context, what is the impact of the parol evidence rule and the *caveat subscriptor* doctrine on the visually impaired party and *vice versa*? The *caveat subscriptor* doctrine will not be applicable where the visually impaired person does not sign the contract. In the same breath of what has been argued with regard to the parol evidence rule, as the law currently stands, a visually impaired person will find himself bound to the express terms of a written agreement by virtue of appending his signature to a written contract, even though such contract is not in braille.

## 6. CONCLUSION

In this chapter, a well-researched position of the common law requirement of formalities, specifically the formality of 'in writing' was set out. It is the author's opinion that the researched position of the common law as a reflection of the current positive law is, rather, unfortunately, not congruent with public policy since mandatory consumer protection law, as will be shown in Chapter 3, is introducing a fairness-based approach to contract law which will lead to increasing materialisation and differentiation of contract law; along with the Constitution, as will be shown in Chapter 4, requires reasonable accommodation of the needs of visually impaired persons as opposed to perpetualisation of systemic disadvantage and systemic unfair discrimination.

Furthermore, the formality requirement 'in writing' was canvassed together with an excursus into the meaning and interpretation of 'writing', so as to determine, what the effect the current meaning of 'in writing' has on visually impaired persons. The conclusion is that the common law definition of 'in writing' as excluding braille in circumstances where it would be reasonable to accommodate the needs of visually impaired persons stands, in my opinion, to be developed. Should it be developed, the current positive law interpretation, operation and impact of the parol evidence rule and the *caveat subscriptor* doctrine on visually impaired persons, will completely be changed.

In Chapter 4 such argument is formulated and presented, but for now, it is to be noted that to an extent, consumer protection laws have levelled the playing field. The traditional law of contract, as alluded to above, is clearly a-contextual and ignorant to the needs of visually impaired persons.

The subsequent chapter will discuss the Consumer Protection Act No. 68 of 2008 and the Alienation of Land Act No.68 of 1981, that will aid in laying the foundational ideas towards establishing the grounds for the extent to which visually impaired persons ought to be accommodated in the context of the formalities requirement found in the identified statutes.



## CHAPTER 3: VISUALLY IMPAIRED CONSUMERS: THE CONSUMER PROTECTION ACT AND THE ALIENATION OF LAND ACT

### 1. INTRODUCTION

In the previous chapter, a well-researched position of the common law requirement of formalities, specifically the formality of 'in writing' was set out. Furthermore, the formality requirement 'in writing' was canvassed together with an excursus into the meaning and interpretation of 'writing', so as to determine, what the effect the current meaning of 'in writing' has on visually impaired persons. The conclusion is that the common law definition of 'in writing' as excluding braille in circumstances where it would be reasonable to accommodate the needs of visually impaired persons stands, in my opinion, to be developed.

In principle, the Consumer Protection Act<sup>1</sup> is sensitive to and takes context into account,<sup>2</sup> and it is the overwhelming opinion of academia that the CPA is an attempt by the legislature to penetrate traditional law of contract with, at the very least, the notion of fairness.<sup>3</sup> The reason for the move from 'absolute freedom' to fairness stems from the fact that, in liberal thought, which includes individualism that permeates traditional contract law, the community is conceptualised as comprising of abstract agents, vested with personal (negative) freedom, who act in accordance with the notion of self-interest with minimum to no external influence from others, including the State.

Keeping the latter juxtaposition of traditional law of contract and the CPA in mind, in this chapter it is argued that, in terms of the CPA, 'in writing', where the consumer is visually impaired, ought to include braille since such an interpretation gives effect to the CPA's purpose and promotes fairness between contracting parties, which the CPA, in principle, seeks to procure. Therefore, in this chapter, the formalities, as understood and explained in Chapter 1 and Chapter 2, is discussed within the context of the CPA.

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<sup>1</sup> Consumer Protection Act, No. 68 of 2008 (hereafter referred to as "CPA"). In terms of s. 3 of the CPA the over-arching purpose of the CPA is, *inter alia*, to "promote and advance the social and economic welfare of consumers in South Africa ...".

<sup>2</sup> See the Preamble, ss. 3 and 48(2)(a)-(b) of the CPA. In terms of s. 3 of the CPA the over-arching purpose of the CPA is, *inter alia*, to "promote and advance the social and economic welfare of consumers in South Africa ...". See also Stoop, P. N. *Background to the Regulation of Fairness in Consumer Contracts* 2015 Vol. 27(2) *South African Mercantile Law Journal* 191-217 at 214; Stoop, P. N. *The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts* 2015 Vol. 18(4) *Potchefstroom Electronic Law Journal* 1091-1124 at 1091; Mupangavanhu, Y. *Fairness a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008* 2015 Vol. 48(1) *De Jure* 116-135 at 129. See Woker, T. *Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act 2010* Vol. 31(2) *Obiter* 217-231 where Woker, rather convincingly, relied on pragmatism (the historical exploitation of consumers) as justification for fairness entering the realm of contract.

<sup>3</sup> Stoop (2015) *South African Mercantile Law Journal* at 211-212; Stoop (2015) *Potchefstroom Electronic Law Journal* at 1091; Mupangavanhu (2015) *De Jure* at 130-133; Bauling, A. and Nagtegaal, A. *Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008* 2015 Vol. 48(1) *De Jure* 149-171 at 166 - 169; Delpont, H. *Problematic Aspects of the Consumer Protection Act 28 of 2008 in Relation to Property Transactions: Linked Transactions, Fixed-term Contracts and Unsigned Sale Agreements* 2014 Vol. 35(1) *Obiter* 60-80 at 68; Jacobs, W., *et al. Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis* 2010 Vol. 13(3) *Potchefstroom Electronic Law Journal* 301-406 at 353-357.

However, attention is also afforded to the Alienation of Land Act,<sup>4</sup> because of the importance of immovable property for any natural person (consumer) and even juristic persons.

With regard to the CPA, an investigation will be conducted as to the purpose of the CPA is and the relationship between such purpose and visually impaired consumers. Thereafter, sections in the CPA that prescribe formalities for the conclusion of a valid contract and sections that prescribe formalities to exercise contractual rights and comply with contractual obligations are analysed in the context of the argument raised that the formality of 'in writing' ought to be interpreted in such a manner that it includes braille.

Taking into account the ALA, section 2(1) and, among other things, its purpose will be addressed where after such purpose is placed within the context of vulnerable visually impaired persons with the purpose of advocating for a contextual interpretation and understanding of "deed of alienation", as defined in section 1 of the ALA, so as to include braille in every alienation of immovable property where either (or both) the seller or (and) the purchaser is (are) a visually impaired person(s).

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<sup>4</sup> Alienation of Land Act, No. 68 of 1981 (hereafter referred to as the "ALA").

## 2. THE CONSUMER PROTECTION ACT

Traditional law of contract provides an a-contextual framework within which emphasis is almost exclusively placed on the enforcement of contracts.<sup>5</sup> Woker convincingly revealed the adverse effect of a-contextual liberal jurisprudence on consumers.<sup>6</sup> Consequently, consumer protection legislation is adopted in an attempt at addressing these adverse consequences by focussing on the unequal bargaining power, by introducing fairness into the law of contract.<sup>7</sup> This leads to increasing materialisation and differentiation of contract law, but consumer protection law constitutes a progressive form of law which affects procedural and substantive fairness.<sup>8</sup> Analyses of the CPA within a theoretical perspective will be performed in order to facilitate absorption of the newly-created law within the wider law of contract. The author, therefore, agrees with Stoop in that “[t]he starting point for consumer protection [legislation] is the imbalance” and how best to address such imbalance from both a “legal and economic perspective”.<sup>9</sup>

In addressing the imbalance between consumers and suppliers, fairness occupies a position of central importance. It has been held that the CPA is legislation aimed at protecting consumers against unfairness in the commercial world.<sup>10</sup> The CPA introduces fairness to the entire contracting dynamic, that is, first to the pre-contractual stage which deals with the breakdown of negotiations; secondly to the procedural stage which involves fairness leading up to the conclusion of the contract and thirdly provides guidelines for substantive fairness which involves fairness relating to the distribution of substantive rights and obligations in the agreement.<sup>11</sup>

Fairness stands on two pillars, as mentioned in Chapter 2. The first pillar is that of procedural fairness, which concerns itself with the pre-contractual sphere; that is the negotiation process and the *de facto* entering into the contract.<sup>12</sup> The second pillar provides for fairness beyond mere process. The second pillar must, therefore, encompass the notion of substantive fairness, which is aimed at the *outcome* of the contractual relationship *vis-à-vis* the contracting parties;<sup>13</sup> in other words, it is focused on the impact of the contract (its provisions and rights provided for and obligations placed on the parties) on the contracting parties. It must be emphasised that this work concerns itself with procedural fairness only, since the position of visually impaired consumers is considered with regard to formalities, and more specifically, ‘in writing’.

<sup>5</sup> Stoop (2015) *Potchefstroom Electronic Law Journal* at 1092.

<sup>6</sup> *Vide* Woker (2010) *Obiter* at 224, n. 33 and 226 where the author refers to life-long health (gym) contracts or 10 year contracts and the abuse of credit cards by suppliers as well as the sale of a lounge suite for R5 000 on credit with repayment over 24 months totaling R32 000.

<sup>7</sup> Stoop (2015) *Potchefstroom Electronic Law Journal* at 1092; Woker (2010) *Obiter* at 227.

<sup>8</sup> Hawthorne, L. *Public governance: Unpacking the Consumer Protection Act 68 of 2008* 2012 Vol. 75(3) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 343 – 370 at 345 (hereafter referred to as “Hawthorne (2012)”).

<sup>9</sup> Stoop (2015) *Potchefstroom Electronic Law Journal* at 1092.

<sup>10</sup> *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government* [2016] (3) All SA 794 (FB) at [1].

<sup>11</sup> Hawthorne (2012) at 353.

<sup>12</sup> Stoop (2015) *Potchefstroom Electronic Law Journal* at 1093; Stoop (2015) *South African Mercantile Law Journal* at 207-208.

<sup>13</sup> Stoop (2015) *Potchefstroom Electronic Law Journal* at 1093-1094.

The CPA applies to every transaction and the promotion of any goods or services, or of the supply of any goods or services in the ordinary course of business, within South Africa, unless exempted. For example, the CPA does not apply to transactions in terms of which goods or services are promoted or supplied to the state;<sup>14</sup> where a consumer is a juristic person with an annual turnover or asset value of more than R2 million;<sup>15</sup> or if the agreement is a credit agreement under the National Credit Act.<sup>16</sup> A Consumer is defined as a person to whom goods or services are marketed in the ordinary course of the supplier's business. Thus juristic persons are considered consumers and clubs and trade unions are deemed to be suppliers. The CPA applies to the State, provinces and municipalities as suppliers but not as consumers although the exemptions granted have severely limited the practical impact of the CPA.<sup>17</sup>

It should be noted that this study does not serve as an in-depth analysis the application of the CPA as it would, in turn, warrant a dissertation on its own. Rather, it is assumed, for the purposes of this study, that the CPA is applicable.

## 2.1. THE PURPOSE OF THE CONSUMER PROTECTION ACT

Before focussing on the critical analyses of the CPA, it is imperative to outline the purpose of the Act. A proper understanding of the purpose of the Act plays a central role in the questions of 'ought these statutory imposed formalities be applicable to the visually impaired consumer' or 'should the current meaning attached to 'in writing' be amended as to include braille in light of the purpose of the Act and the notion of reasonable accommodation.'

Former consumer protection legislative measures were outdated, and the consumer protection framework had to be amended.<sup>18</sup> The CPA now provides an extensive framework for consumer protection and aims to develop, enhance and protect the right of consumers, especially vulnerable consumers, and to eliminate unethical suppliers or business practices.<sup>19</sup> Therefore, the purpose of the CPA can be summarised as the promotion and advancement of the social and economic welfare of the consumers in South Africa and the means by which this is achieved are manifold: establishing a legal framework for the achievement and maintenance of a fair, accessible, efficient, sustainable and responsible consumer market; furthering the position of disadvantaged and vulnerable consumers; promotion of fair business practices, an accessible

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<sup>14</sup> S. 5(2)(a) of the CPA.

<sup>15</sup> S. 5(2)(b) of the CPA.

<sup>16</sup> No. 34 of 2005 (hereafter referred to as "NCA"); S. 5(2)(a) of the CPA.

<sup>17</sup> Hawthorne (2012) at 354.

<sup>18</sup> Jacobs, *et al.* (2010) *Potchefstroom Electronic Law Journal* at 303 (see also n. 3 on p. 303). See specifically Woker (2010) *Obiter* at 218-223; also see Barnard, J. "The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale" (LLD Thesis, University of Pretoria, 2013) at 17-23 and the authorities cited for a succinct historical overview of consumer protection law in South Africa.

<sup>19</sup> Jacobs, *et al.* (2010) *Potchefstroom Electronic Law Journal* at 303; Delpport (2014) *Obiter* at 68.

and sustainable marketplace and protection of consumers from unfair business practices; consumer education; and providing an accessible and efficient system of dispute resolution and redress for consumers.<sup>20</sup>

The purpose of the CPA is found in section 3 of the CPA and is expounded upon with great detail. Without undue effort having to be exerted, it is rather patent that the purpose of the CPA is to protect and develop the social and economic welfare of consumers and, in particular, vulnerable consumers. Section 3(1)(a) of the CPA reads:

“The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is *fair*, accessible, efficient, sustainable and responsible for the *benefit of consumers* generally”. [own emphasis]

Accordingly, in the first instance, the CPA seeks to establish a *consumer* market that is *fair* and for the *benefit of consumers*. CPA further provides in section 3(1)(b)(iv) that:

“The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by

- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers:
  - (iv) whose *ability to read and comprehend* any advertisement, *agreement*, mark, instruction, label, warning, notice or other visual representation is *limited* by reason of low literacy, *vision impairment* or limited fluency in the language in which the representation is produced, published or presented”. [own emphasis]

Section 3, read together with section 8 and 9 of the should be read in conjunction with one another.<sup>21</sup> Section 8 of the CPA governs protection against discriminatory marketing.<sup>22</sup> This may not be unfairly done on the basis of one or more of the grounds contemplated in section 9 of the Constitution<sup>23</sup> or Chapter 2 of PEPUDA.<sup>24</sup> Section 8 of the CPA is important in South Africa’s new constitutional dispensation, in which the state is committed to the goal of achieving equality.<sup>25</sup>

There are two different types of discriminatory conduct involving consumers and suppliers contemplated in the CPA.<sup>26</sup> The first type of discriminatory conduct is governed by section 8 and section 9 of the CPA

<sup>20</sup> Hawthorne (2012) at 354.

<sup>21</sup> Barnard, J. and Kok, A. *A consumer’s fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act* 2015 Vol. 78(1) *Die Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 1-24 at 2 (hereafter referred to as “Barnard, J. and Kok, A. (2015)”).

<sup>22</sup> *Ibid.*

<sup>23</sup> The Constitution of the Republic of South Africa, 1996 (hereafter referred to as “Constitution”).

<sup>24</sup> Promotion of Equality and Protection of Unfair Discrimination Act No. 4 of 2000 (hereafter referred to as “PEPUDA”).

<sup>25</sup> Barnard, J. and Kok, A. (2015) at 6.

<sup>26</sup> *Ibid.*

and deals with the consumer's fundamental consumer right to equality in the consumer market.<sup>27</sup> The second type of discriminatory conduct refers to conduct on the grounds of discrimination other than the grounds established by section 9 of the Constitution, Chapter 2 of PEPUDA or sections 8 and 9 of the CPA.<sup>28</sup> The reduction and amelioration of any disadvantage experienced, whether within the ambit of section 8 subject to section 9 or otherwise, by consumers whose ability to read and comprehend any agreement is limited by reason of vision impairment is an incidence of the *purpose* of the CPA. The purpose being the promotion and advancement of the social and economic welfare of consumers in South Africa.

Accordingly, the interpretation of any section of the CPA must be informed by and promote the purpose as elucidated above, since the interpretation of the CPA must be purposive<sup>29</sup> and, in addition, when interpreting any Act the starting point is the Constitution and, therefore, the interpreter must give effect to at least one constitutional value.<sup>30</sup>

As will be examined in Chapter 4, an interpretation including braille within the meaning of 'in writing' gives effect to the right to equality found in section 9 of the Constitution. Accordingly, the interpretation advocated for not only gives effect to the purpose of the CPA it also gives effect to a founding value of our constitutional democracy.

## 2.2. FORMALITIES PRESCRIBED BY THE CONSUMER PROTECTION ACT

### 2.2.1. CONCLUSION OF A VALID CONTRACT

As alluded to above, the CPA's positive innovations are directed to infuse traditional law of contract with both substantive and procedural fairness. Substantive fairness refers to the fair distribution of substantive rights and obligations in terms of the contract, often also referred to as the "fairness" or "unfairness" of the terms. Substantive fairness is primarily concerned with concrete situations that aim to promote and

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para. [90] "[t]he emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous". See Delpont (2014) *Obiter* at 67 where the author concludes that the CPA must be purposively interpreted. With regard to purposive interpretation and context see *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para. [12], *Jaga v Dönges NO*; *Bhana v Dönges NO* 1950 (4) SA 653 (A) at 662G-663A.

<sup>30</sup> In *Bato Star Jmnt.* 2004 (CC) at para. [71] Ngcogo, J, as he was then, authoritatively stated that "[t]he Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights "is a cornerstone of [our constitutional] democracy" [footnotes omitted].

advance social justice and the economic welfare of consumers.<sup>31</sup> Procedural fairness endeavours to set the scene for the conclusion of the contract in circumstances which are fair since these circumstances determine the extent to which the parties are able to protect their interests relative to the substance of the agreement.<sup>32</sup> By promoting transparency and taking other factors, which negatively affect the consumer's ability to protect her interests into consideration, these provisions attempt to balance the interests of both parties.<sup>33</sup>

The focus of this chapter is procedural fairness, with emphasis on formalities. Procedural fairness, which is positioned at regulating bargaining process because of the unequal bargaining power, seeks to address the lack of transparency created by standard-form contracts existing because of the aforementioned unequal bargaining power.<sup>34</sup> Stoop opines that transparency is two-pronged, where transparency relates to (i) transparency regarding the terms of the contract, and (ii) transparency affected by the absence of being positively misled, pre-contractually or during the subsistence of the contract, in relation to the material aspects of the contract, such as, the goods, service, and, or price.<sup>35</sup>

“Transparency in relation to the terms of a contract refers to whether the contract terms are accessible, in clear language, well-structured and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights. Procedural fairness measures usually enable consumers to protect themselves against substantive unfairness.”<sup>36</sup>

Against this background, it must be noted that, as a general rule, the CPA does not require a consumer contract to be formalised in order for it to be valid.<sup>37</sup> However, there are two exceptions specifically mentioned in the Act.

Regarding the first exception, the Minister of Trade and Industry may, in terms of section 50(1) of the CPA, prescribe categories of contracts that should be in writing.<sup>38</sup> Section 50(2)(a) of the CPA provides further that if any contract between a supplier and a consumer is reduced to writing, whether voluntarily or as required by the Minister, the contract will be enforceable *irrespective of whether the consumer signed the agreement*. It is quite strange to hold that a consumer will *always* be bound to a written contract that he did not even sign considering the purpose of the Act is to protect consumers against, *inter alia*, exploitation, unfair treatment and unscrupulous business practices.<sup>39</sup> By virtue of section 4(3) of the CPA, an interpretation of section 50(2)(a) to the effect that a consumer *can* be bound to an agreement reduced to writing, even though such consumer did not sign the agreement, is to be preferred. Whether the consumer ought to be bound must be determined by the facts and circumstances of each case keeping in mind the purpose of the CPA.

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<sup>31</sup> Hawthorne (2012) at 361.

<sup>32</sup> Hawthorne (2012) at 356.

<sup>33</sup> *Ibid.*

<sup>34</sup> Stoop (2015) *South African Mercantile Law Journal* at 193-194 and 215.

<sup>35</sup> *Ibid.* at 215.

<sup>36</sup> *Ibid.*

<sup>37</sup> Glover, G. *Kerr's The Law of Sale and Lease* (2014) at 125.

<sup>38</sup> To date, the Minister is yet to prescribe such a category and will therefore not be elaborated on.

<sup>39</sup> See Delpont (2014) *Obiter* at 68.

Focussing on the second exception, section 7 of the CPA prescribes certain requirements for the validity of a franchise agreement. These requirements include, *inter alia*, that the agreement must be in writing, the format and language of the agreement etc. Be that as it may, our focus is squarely on the formality requirement relating to a contract required to be ‘in writing’, whether required by section 7, the Minister, or the parties (in terms of the Common Law).

Section 50(2)(b)(i) of the CPA provides that if an agreement is reduced to writing such agreement must comply with section 22 of the CPA. Section 22(1)(a) and (b) provides that latter if the CPA or any other law prescribe the form of the agreement, such prescription must be complied with and, in the absence of any specific prescription, the form that the agreement must adopt is “plain language”.<sup>40</sup> Consequently, reading section 50(2)(b)(i) *in tandem* with section 22(1)(a) of the CPA, the conclusion is that any written agreement to which the CPA applies must comply with section 22 of the CPA; that is, the agreement must be “in plain language”.

“The concept ‘plain and understandable language’ will itself become clear and understandable only when the structure and purpose of section 22; the documents required to be in plain language; the definition of plain language; and the use of official languages in consumer contracts and guidelines pertaining to plain language contracts are fully unpacked and discussed.”<sup>41</sup>

Section 22(2) determines that, for the purposes of the CPA, a written agreement is in plain language if it is *reasonable* to conclude that an *ordinary consumer* of the *class of persons* for whom the agreement is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the agreement *without undue effort*, having regard to –

- i. the context, comprehensiveness and consistency of the agreement;
- ii. the organisation, *form and style* of the agreement;
- iii. the vocabulary, usage and sentence structure of the agreement; and
- iv. the use of any illustrations, examples, headings or other aids to reading and understanding.

Much has been said on the topic of plain language in the context of section 22 of the CPA,<sup>42</sup> but not one author has specifically addressed plain language in the context of visually impaired consumers.

An agreement reduced to writing will be in plain language if it is reasonable to conclude that an ordinary consumer of the class ‘visually impaired consumers’ could be expected to understand the content,

<sup>40</sup> S. 22(1)(a) and (b) of the CPA.

<sup>41</sup> Stoop, P. N. and Churr, C. *Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008* 2013 Vol. 16(5) *Potchefstroom Electronic Law Journal* 514-553 at 516.

<sup>42</sup> See Gouws, M. *A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act 2010* Vol. 22(1) *South African Mercantile Law Journal* 79-94; Newman, S. *The Application of the Plain and Understandable Language Requirement in terms of the Consumer Protection Act: Can We Learn from Past Precedent?* 2012 Vol. 33(3) *Obiter* 637-648; Stoop and Churr (2013) *Potchefstroom Electronic Law Journal*; Barnard (LLD Thesis, 2013) at 193-200.



significance and import of the agreement without undue effort, having regard to the context of the agreement and the form and style of the agreement. The context of the agreement must be influenced by the identities and circumstances of the contracting parties. Furthermore, the form and style of the agreement must adapt to the context of the agreement.

As such, the fact that a consumer is visually impaired forms part of the context within which the agreement is to be negotiated, concluded, and performed and must inform and have an influence on the form and style of the agreement. The context of the agreement and its influence on the form and style of the agreement will, in the context of visually impaired persons and upon a purposive reading of section 22 of the CPA, require that an agreement intended or required to be reduced to writing, be presented to the visually impaired consumer in braille.

To summarise, section 52(1)(b) of the CPA requires that written agreement comply with section 22 of the CPA, which, in turn, requires such agreement to be in “plain languages”. Plain language is to be interpreted to mean that, in the context of visually impaired consumers, the contract must be provided to the visually impaired consumer *in braille*, since the purpose of the CPA is, *inter alia*, to reduce and ameliorate the disadvantage suffered by consumers whose ability to read and comprehend any agreement is limited by reason of vision impairment. The interpretation advocated for is buttressed by section 40(2) since it is “it is unconscionable for a supplier [to] knowingly ... take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical ... disability, ..., inability to understand the language of an agreement, or any other similar factor...”.

The effect of a term or an agreement not being in plain and understandable language is not clear<sup>43</sup> since there has been no judicial interpretation in this regard. It is arguable that, if a written contract, provision, term, or condition thereof is not in plain and understandable language, as required in terms of section 50(2)(b)(i) of the CPA, the contract, provision, term, or condition will be void in terms of section 51(3) of the CPA.<sup>44</sup> The converse may also be arguable, which is that non-compliance with section 22 of the CPA can be severed, to the extent that it is possible to sever that part of the agreement that is not in plain and understandable language.<sup>45</sup> Furthermore, it can also only be a factor that is to be taken into account in terms of section 48 of the CPA; whether a term or an agreement is unfair.<sup>46</sup>

In *Kubne and Nagel (Pty) Ltd v Elias*<sup>47</sup> the following passage from Boshoff, A.J.P., is instructive:

“The use of the word ‘shall’ [or ‘must’] ... is a strong indication, in the absence of considerations pointing to another conclusion, that the Legislature is issuing a statutory command and intends disobedience to be visited with nullity.”

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<sup>43</sup> Stoop and Churr (2013) *Potchefstroom Electronic Law Journal* at 517.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Kubne and Nagel (Pty) Ltd v Elias* 1979 (1) SA 131 (T) at 133.

In *Sutter v Scheepers*<sup>48</sup> Wessels, J.A., provided certain useful guides, which were not intended to be exhaustive, to test whether provisions are peremptory or directory:

“If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate, but this is not conclusive.

If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

If, on a consideration of the scope and objects of the provision, it is found that its terms would, if strictly carried out, lead to injustice, and even fraud, and if there is no explicit statement that the act is to be void if the terms are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.”

Even if section 51(3) of the CPA is not applicable, the quoted passages of the immediately preceding cases above, considered together with section 40(2) of the CPA, will render any written agreement *not* provided in braille, where the consumer is visually impaired, null and void *ab initio* unless the purpose of the CPA would be frustrated, or a grave injustice would be done.

In order to take the issue further, in the circumstances that it is not *reasonable* to require a supplier to provide a written agreement in braille it will *not* constitute *unfair* discrimination for such a supplier to refuse to enter into an agreement with a visually impaired consumer. For example, it cannot be required from a small sole proprietor to have all its written agreements also written in braille.<sup>49</sup>

## 2.2.2. INVOKING RIGHTS AND FULFILLING OBLIGATIONS

From all the fundamental consumer rights and obligations, only a few sections will be subject to scrutiny as only those sections imposing certain formalities to exercise contractual rights and enforce contractual duties are relevant.<sup>50</sup>

### 2.2.2.1. SECTION 14: EXPIRY AND RENEWAL OF FIXED-TERM AGREEMENTS

In terms of this section, a consumer may cancel a fixed-term agreement on the expiry of its fixed term without penalty or charge. However, the consumer will still be liable for any amount owed in terms of the agreement up to the date of cancellation. Alternatively, a consumer may cancel a fixed-term agreement before the expiry date of its fixed term by giving twenty business days' notice. This notice must be given in writing or any other recorded manner.<sup>51</sup> Even though the legislator omitted to provide a definition of what ‘any other recorded form’ entails, it is submitted that ‘in writing’ must be interpreted, where reasonable, as

<sup>48</sup> *Sutter v Scheepers* 1932 AD 165 at 173.

<sup>49</sup> In this regard see Chapter 4.

<sup>50</sup> See ss. 5, 14, 15(2), 16, 22, 23(5), 26(2), 35, 40, 46 and 49(3) of the CPA.

<sup>51</sup> Jacobs, *et al.* (2010) at 323.

including braille or ‘any other recorded manner’ must include a method of conveyance of intention to cancel that is reasonably accommodative of the visually impaired consumer’s needs.

#### 2.2.2.2. SECTION 16: COOLING-OFF RIGHT

Section 16(3) provides that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, *or another recorded manner and form*, within five business days after the later of the date on which the transaction or agreement was concluded; or the goods that were the subject of the transaction were delivered to the consumer. Once again, a purposive interpretation must provide a definitive meaning to ‘in writing’ should include braille, where reasonable, or ‘any other recorded manner’ must include a method of conveyance of intention to cancel that is reasonably accommodative of the visually impaired consumer’s needs.

#### 2.2.2.3. SECTION 23: DISCLOSURE OF PRICE OF GOODS OR SERVICES

Section 23 regulates the pricing of goods or services. Retailers are prohibited from displaying any goods for sale without showing the price of these goods. Section 23(5) prescribes the manner in which a price is to be displayed so as to qualify as adequate display. However, section 25(3) of the CPA is silent on whether the display of a price should be available in a manner possible for visually impaired persons in order to enable such persons also ‘see’ the price of the article to be purchased.

Considering the provisions of section 25(3), requiring a “written display”, and section 40(2)<sup>52</sup> of the CPA, there is seems to be a positive duty placed on suppliers to reasonably accommodate visually impaired consumers in their visual pricing policy, which corresponds to the purpose of the CPA as specifically contained in section 3(1)(b)(iv) of the CPA, section 9(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>53</sup> as well as substantive equality jurisprudence in general.

The reasonableness of the accommodation of visually impaired consumers through a braille friendly visual pricing policy must be determined by factors such as the nature of the supplier (small, medium or large enterprise), the goods and services of the supplier (general or specialised, expensive or low value) as well as practical and economic considerations (the amount or products supplied by a supplier, the product turnover ratio).<sup>54</sup>

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<sup>52</sup> S. 40(2) of the CPA indicates that *unconscionable conduct* will be present when a supplier knowingly takes advantage of a consumer because a consumer was unable to protect his own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any similar factor. This provision therefore, in effect, places a heavy burden on suppliers to ensure that consumers understand agreements.

<sup>53</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000.

<sup>54</sup> See Chapter 4 with regard to reasonable accommodation.

#### 2.2.2.4. SECTION 26: SALES RECORDS

Section 26 provides that a written record of each transaction must be given to the consumer. The section further provides for the type of information that should be included in the written record, for example, the supplier's full name or registered business name and VAT registration number.<sup>55</sup> Again, these records should be provided to visually impaired consumers in writing, which includes braille. However, what has been said with regard to section 23 above in respect of reasonable accommodation applies *mutatis mutandis*.

#### 2.2.2.5. SECTION 35: CUSTOMER LOYALTY PROGRAMMES

A loyalty programme is any arrangement or scheme in the ordinary course of business in terms of which a supplier or an association of suppliers or any person on behalf of a supplier or association of supplier's grants or offers loyalty awards or credit in connection with an agreement or transaction.<sup>56</sup> Before joining a loyalty programme, a documented offer of the programme must disclose sufficient information to the consumer.<sup>57</sup>

Furthermore, the availability of goods or services under a loyalty programme may only be restricted by a supplier should the programme consumers have received written notice of that restriction at least twenty business days before the restriction begins, and the total period of that restriction must not exceed ninety days per year.<sup>58</sup> "[W]ritten notice of restriction" includes braille, where reasonable, but, again, what has been said with regard to section 23 above in respect of reasonable accommodation applies *mutatis mutandis*.

#### 2.2.2.6. SECTION 49 READ WITH SECTION 58: NOTICE REQUIRED FOR CERTAIN TERMS AND CONDITIONS

This section prevents a consumer from entering into an agreement that contains provisions that could affect his rights or that could be unexpected, should the consumer not be aware of its existence. Therefore, should an agreement fall within the precepts of section 49(1)(a)-(d) of the CPA, it must be brought to the attention of the consumer in the prescribed form and manner as prescribed in section 49(3)-(5) of the CPA.

With regard to the prescribed manner, the notice must be given at the earliest of the following times: prior to entering into the agreement or transaction, prior to the consumer entering into the facility or engaging in the activity, or prior to the consumer tendering consideration.<sup>59</sup> With regard to the prescribed form, the notice must comply with the requirements of section 22 of the CPA.<sup>60</sup> The notice must be of such a nature that it would be likely to attract the attention of an ordinarily attentive customer. The consumer must be given a reasonable opportunity to receive and comprehend the notice and must assent to the notice by

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<sup>55</sup> See s. 26(3)(a)-(j).

<sup>56</sup> S. 1 of the CPA. See Jacobs, *et al.* (2010) *Potchefstroom Electronic Law Journal* at 341.

<sup>57</sup> S. 35(3)(a)-(d) of the CPA stipulates what such information is.

<sup>58</sup> S. 35(5) of the CPA.

<sup>59</sup> S. 49(4)(b)(i)-(ii) of the CPA.

<sup>60</sup> S. 49(3) of the CPA.

signature, initialling, or by otherwise acting in a manner that acknowledges receipt of the notice, awareness of the risk and acceptance of the risk. Warnings concerning facts and nature of risks provided for under section 58(1) of the CPA, must comply with section 49 of the CPA.

Once again, these formalities imposed on a notice places a positive duty on any supplier to reasonably accommodate a visually impaired consumer.

As mentioned in above, the CPA established a legal framework for the achievement and maintenance of a fair and accessible consumer market. As already discussed, fairness stands on two pillars. An interpretation including braille within the meaning of 'in writing' or 'any other recorded form' gives effect to the second pillar of fairness, as the outcome or the impact of the contracting parties would be far less prejudicial towards visually impaired consumers as currently envisaged by the above-scrutinised sections.

### 3. THE ALIENATION OF LAND ACT

#### 3.1. THE PURPOSE OF THE ALIENATION OF LAND ACT

The general rule regarding formalities in respect of the conclusion of a contract is that a contract may be entered into verbally, unless a statute or the parties, or one of them, requires one or the other formality, such as writing or signature. The ALA is perhaps the most controversial piece of legislation when it comes to formality requirements for the conclusion of a valid contract. At this juncture, we are concerned with the ALA prescribing ‘in writing’ and signature by the parties as a validity requirement for the alienation of land.

The infamous section 2(1) of the ALA provides:

“No alienation of land ... shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

The most important requirement for the validity of the contract, in terms of section 2(1) of the ALA, is that the parties are required to reduce the provisions of their contract to writing and sign the written agreement.<sup>61</sup>

The Appellate Division, now the Supreme Court of Appeal, has held that the purpose of section 2(1) of the ALA is directed against “uncertainty, disputes[,] and possible malpractices”.<sup>62</sup> This section, therefore, attempts to ensure that parties have – before them in black and white – the provisions of their contract,<sup>63</sup> for their consideration, to read and understand. Reducing the agreement to writing and signing such agreement as formalities for land purchase contracts is required in the public interest and not required for individual interest.<sup>64</sup> Consequently, these statutory formalities cannot be waived *inter partes*.<sup>65</sup>

What Parliament had in mind when it spoke of limiting disputes and uncertainty was a desire to attain certainty concerning the provisions of the contract. In the case of *Ferreira v SAPDC (Trading) Ltd*,<sup>66</sup> it was held that:

“[The] certainty which the Legislature has as its objective to achieve by means of enactments of the kind under consideration by means of enactments of this kind under consideration is directly related to the terms of the contract in question. ... Hence, the disputes, the possibility of which the Legislature seeks to avoid or to minimize, are disputes concerning the terms of the contract in question.”

<sup>61</sup> See Glover (2014) at 8.

<sup>62</sup> *Clements v Simpson* 1971 (3) SA 1 (A) at 6H-7A, it is to be noted that the Court decided the case in terms of s. 1(1) of the General Law Amendment Act, No. 68 of 1957. A similar position is followed in *Neethling v Klopper* 1967 (4) SA 459 (AD) at 464E. See Glover (2014) at 101.

<sup>63</sup> Glover (2014) at 101.

<sup>64</sup> Lötze, D.J. and Renke, S. *Formaliteit: Die Wet op Verreëmding van Grond word Mondig* 2004 Vol. 67(4) *Die Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 595 – 613 at 598.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ferreira v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A) at 245H-246A.

It seems that the problems surrounding section 2(1) of the ALA are immense. Over the last few years, numerous cases dealing with section 2(1) were reported. From the numerous cases reported, it is clear that section 2(1) is a disappointment as far as the legislature's aim with this provision, that is, to prevent litigation, perjury and fraud, is far from fulfilled. On the contrary, it seems that section 2(1) actually provokes litigation which is often unnecessary and sometimes even a hardship.

In the *Pine Villa Estates (Pty) Ltd v J R 209 Investments (Pty) Ltd* case,<sup>67</sup> section 2(1) raised its head in the context of an inadequate description of the *res vendita* in the deed of sale which may render it null and void. The court held that the purchaser had complied with "all obligations" in terms of the agreement. The court further held that the shape and exact configuration of the property were left entirely to the purchaser's discretion, depending on the layout of the township, did not invalidate the agreement. Hence the contract was valid and in compliance with section 2(1).<sup>68</sup>

For the *res vendita* to be described adequately in order to comply with statutory formalities, the contract has to contain an indication as to how the configuration of the *res vendita* was to be determined. If not, the agreement will be legally ineffective. It is clear that the SCA's approach is one of substance over form and it would rather be the exception than the rule that a deed of alienation would be deemed null and void because of technicalities [own emphasis], such as evident in the following cases:

In the *Scheepers v Strydom*<sup>69</sup> case, the Appellate Division held that all the essential terms of a contract for the sale of land, including the identities and capacities of the parties, have to be described adequately in the deed of alienation. The contract was declared valid even though the purchaser could not be identified *ex facie* the document in addition to the parties being adequately described, the court held in *Herselman v Orpen*<sup>70</sup> that all the essential terms agreed upon have to be reduced in writing. According to the court, the minimum aspects that should be reduced to writing are the parties, the *merx* and the purchase price. The court held that the minimum aspects were reduced in writing, albeit cryptically done.

Public policy considerations together with the SCA's approach of substance over form should be investigated. The following remarks of Ngcobo, J., in *Barkhuizen v Napier*,<sup>71</sup> offer some guidance:

"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 our Constitution and the values that underlie it. Indeed, the foundation provisions of our Constitution make it plain: our Constitutional democracy is founded

<sup>67</sup> [2009] 3 All SA 32 (SCA) at para. [14].

<sup>68</sup> *Ibid.* at para [19].

<sup>69</sup> 1994 3 SA 101 AD.

<sup>70</sup> 1989 4 SA 1000 (SE).

<sup>71</sup> 2007 5 SA 323 (CC).

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.”<sup>72</sup>

Moseneke, D.C.J., in the same case, as part of the minority judgment, went even further in asserting the importance of the public-policy threshold and held as follows:

“Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy.”<sup>73</sup>

Thus, in light of public policy and the SCA’s approach regarding section 2(1) formalities, one may only pose the question as to how the malpractices sought to be prevented by section 2(1) of the ALA will be prevented when there is, for instance, no positive duty placed on the seller to reduce the contract in writing, which would mean for a visually impaired person in braille.

Limiting possible uncertainties and disputes is not the only purpose of the ALA. Subject to numerous qualifications, section 29A(1) of the ALA, gives the purchaser or prospective purchaser a right to revoke the offer or terminate the deed of alienation within 5 days after signature by him or an agent acting on behalf of him *by written notice* delivered to the seller or his agent within that period. The most important qualifications are that this right only applies to property used for residential purposes<sup>74</sup> of which the purchase price of the property is R250 000.00 or less.<sup>75</sup> The latter qualifications indicate that the purpose of this section was to specifically benefit and protect vulnerable persons who form part of the lower income bracket.

In terms of section 2(2A) of the ALA, every deed of alienation must refer to and contain the right of a purchaser or prospective purchaser in terms of section 29A. In the *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC*<sup>76</sup> case, the consequences of non-compliance with section 2(2A) of the ALA was decided. The question before the SCA was whether a deed of alienation which does not reflect the right to revoke or terminate was void or voidable at the instance of the purchaser? The SCA held that a deed of alienation which does not reflect the right to revoke or terminate, as required by section 2(2A), is not *ipso facto* void, but voidable at the instance of the purchaser.<sup>77</sup>

<sup>72</sup> *Ibid.* at paras. [28]-[30].

<sup>73</sup> *Ibid.* at paras. [98]-[104].

<sup>74</sup> S. 1 of the ALA, definition of “land” in relation to s. 29A.

<sup>75</sup> S. 29A(5)(a) of the ALA. Regarding the “purchasers which the Legislature had in mind” in the context of s. 29A of the ALA see *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC* 2007 (3) SA (SCA) at para. [9].

<sup>76</sup> 2007 (3) SA (SCA) at para. [1].

<sup>77</sup> *Ibid.* at para. [19].



From a buyer point of view, there is not much fault with Acting Judge Olsen's ruling.<sup>78</sup> The purpose of the cooling-off right is to protect the buyer and therefore it is contrary to the sense of law that a seller is allowed to appeal to him for failure to comply with section 2(2A) of the ALA, despite knowledge or ignorance regarding section 29A's protection.<sup>79</sup> The authors of this article, Lötzt, D, J., and Nagel, C, J., proposed the following amendment to the findings of the SCA case as follows:

"The deed of alienation shall include the right of a buyer or prospective buyer to rescind the offer or terminate the sale act in terms of section 29A and, in the absence thereof, the agreement is at the option of the buyer or prospective buyer as contemplated in section 29A voidable."<sup>80</sup>

However, once again, in this instance, it is required, in terms of section 29A(1) of the ALA, that *written* notice be given to the seller in order to avoid any disputes regarding the intention of the purchaser.

With these two sections considered it seems that the ALA attempts to prevent uncertainty, disputes, and possible malpractices and protect vulnerable purchasers against hastily made discussions. Unlike the CPA or the NCA, the ALA does not contain the specific purpose of promoting and protecting the economic welfare of vulnerable consumers, even though the ALA does provide some protection to vulnerable purchasers. However, the meaning of “deed of alienation”, which is defined as a “document or documents under which land is alienated”, is to be interpreted as including a document in braille. It is submitted that such interpretation is enjoined upon the interpreter by reason of section 39(2) of the Constitution and the founding value achievement of equality and the justiciable right to equality, which, in this context, specifically enjoins reasonable accommodation.<sup>81</sup>

### 3.2. FORMALITIES, AS REQUIRED BY THE ALIENATION OF LAND ACT, AND THE CONSEQUENCES OF NON-COMPLIANCE

Non-compliance with section 2(1) is met with harsh consequence; namely, that the deed of alienation is of no force and effect – it is null and void *ab initio*. Accordingly, the *de facto* agreement has never obtained the *de jure* status of a legal act in the form of a contract and, as such, no cause action, *ex contractu*, can be maintained by virtue thereof since *de jure* no contract has come into being.

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<sup>78</sup> Lötzt, D.J. and Nagel, C.J. *Nie-nakoming van Artikel 2(2A) van die Wet op Verreemding van Grond 68 van 1981 en die effek daarvan op die geldigheid van 'n verreemdingsakte* 2006 Vol. 69(3) *Die Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 501 – 510 at 509.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> This argument is expounded upon in Chapter 4.

These adverse consequences are ameliorated, to a certain extent, by section 28 of the ALA. Section 28(1) provides that, subject to the provisions of section 28(2), any person who has performed partially or in full in terms of a deed of alienation which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under the ALA, is entitled to recover from the other party, *inter alia*, that which he has performed under the alienation or contract. If section 28(1) of the ALA applies to a given situation, the common law rules of the law of purchase and sale are inoperative as the relevant 'contract of sale' is invalid and no legal obligation exists. The *ex lege* rules regarding latent defects, warranty against eviction, transfer of ownership and passing of the risk are wholly inoperative. In addition, Section 28(1) applies to all contracts for the sale of land, irrespective of the date of the conclusion of the contract. If section 28(2) of the ALA applies.

The question then arises whether the purchaser, being the visually impaired person, can rely on section 28(1) by stating that the deed of alienation did not comply with section 2(1) as it was not in writing, i.e., braille. If not, such state of affairs already disadvantages the visually impaired purchaser. It will be argued in Chapter 4 that "deed of alienation", as defined in section 1 of the ALA, can be interpreted, in congruence with the notion of reasonable accommodation, to include a written document in braille as a compulsory requirement when dealing with visually impaired purchasers and (or) sellers.

#### 4. CONCLUSION

It is clear that section 2(1), as read with section 28, is a disappointment as far as the legislature's aim with this provision, that is, to prevent litigation, perjury and fraud, is far from fulfilled. On the contrary, it seems that section 2(1) actually provokes litigation which is often unnecessary and sometimes even a hardship. For this reason, the following possible scenarios to amend section 2(1) read with section 28 are briefly suggested, to be argued in the following chapter that no formalities are required; or that the formality of 'in writing' be amended to include a written document in braille as a compulsory requirement when dealing with visually impaired purchasers and (or) sellers.

It has been held that the CPA is legislation aimed at protecting consumers against unfairness in the commercial world.<sup>82</sup> The purpose of the CPA as found in section 3 is to protect and develop the social and economic welfare of consumers and, in particular, vulnerable consumers. The reduction of any disadvantage experienced by consumers whose ability to read and comprehend any agreement is limited by reason of vision impairment is an incidence of the *purpose* of the CPA. Accordingly, the interpretation of any section of the CPA must be informed by and promote the purpose as elucidated above, since the interpretation of the CPA must be purposive<sup>83</sup> and, in addition, when interpreting any Act the starting point is the Constitution and, therefore, the interpreter must give effect to at least one constitutional value.<sup>84</sup>

As will be seen in the following chapter, an interpretation including braille within the meaning of 'in writing' gives effect to the right to equality found in section 9 of the Constitution. Accordingly, the interpretation advocated for not only gives effect to the purpose of the CPA it also gives effect to a founding value of our constitutional democracy.

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<sup>82</sup> *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government* [2016] (3) All SA 794 (FB) at [1].

<sup>83</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para. [90] "[t]he emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous". See Delpont (2014) *Obiter* at 67 where the author concludes that the CPA must be purposively interpreted. With regard to purposive interpretation and context see *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para. [12], *Jaga v Dönges NO*; *Bhana v Dönges NO* 1950 (4) SA 653 (A) at 662G-663A.

<sup>84</sup> In *Bato Star Jmnt.* 2004 (CC) at para. [71] Ngcogo, J, as he was then, authoritatively stated that "[t]he Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights "is a cornerstone of [our constitutional] democracy" [footnotes omitted].

CHAPTER 4:  
FORMALITIES: CONSTITUTIONALLY IMPOSED REASONABLE  
ACCOMMODATION OF VISUALLY IMPAIRED PERSONS

1. INTRODUCTION

The previous chapter focused on the formalities required for the conclusion of a valid contract and the formalities to exercise contractual rights and enforce contractual duties in terms of contract in terms fo the CPA and the ALA. It was concluded that in respect of both these Acts, the formality of ‘in writing’ ought to be amended to include braille when dealing with visually impaired persons.

Without venturing too far into the highly contentious realm of equality jurisprudence, this chapter investigates the role that the constitutional value and right to equality ought to, and therefore, can fulfil in to aid visually impaired persons in their plight for equal enjoyment of rights and freedoms. Chapter 4 affirms its inception with a brief exposition of the founding value and the right to equality, during which the different conceptions of disability are alluded to. Most importantly, following thereon, the doctrine of reasonable accommodation is discussed and analysed where after the reader is introduced to and made aware of the positive duty to accommodate.

Thereafter, the entire dissertation is put under discussion against the constitutional equality jurisprudential background sketched in the previous sections of this chapter by addressing the constitutional dimension contained within Chapter 2 (the Common Law) and Chapter 3 (the Consumer Protection Act<sup>1</sup> and the Alienation of Land Act<sup>2</sup>).

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<sup>1</sup> The Consumer Protection Act, No. 68 of 2008 (hereafter referred to as the "CPA").

<sup>2</sup> Alienation of Land Act, No. 68 of 1981 (hereafter referred to as the "ALA").

## 2. THE FOUNDING VALUE AND THE RIGHT TO EQUALITY

### 2.1. THE ACHIEVEMENT OF EQUALITY

The Constitution of the Republic of South Africa, 1996<sup>3</sup> not only embraces equality, as a value, but it adopts equality as an organising principle<sup>4</sup> resonating from its centre as a standard that permeates and, therefore, informs the entirety of the South African positive law<sup>5</sup> with the consequence that equality not only finds itself at the heart of the Constitution, but the heart of our entire constitutional order. As an egalitarian constitution,<sup>6</sup> equality defines the ethos on which the Constitution is premised.<sup>7</sup>

The influence of equality considerations, substantive and formal, ought and must, accordingly, be far-reaching in its effect on formalities, in both senses, as discussed in the previous chapters. The latter is even truer because it has become trite, rather irrefutable, that the Constitution is a transformative constitution,<sup>8</sup> which provides for not only a formal conception of equality, but also a substantive conception of equality.<sup>9</sup>

### 2.2. THE RIGHT TO EQUALITY AND THE PROHIBITION OF UNFAIR DISCRIMINATION

Section 9(1) of the Constitution determines that “everyone is equal before the law and has the right to equal protection and benefit of the law” and, in terms of section 9(3) of the Constitution, the State “may not unfairly discriminate directly or indirectly against anyone on ... [the ground of] ... disability”. Section 9(4) provides for the same prohibition, but only *vis-à-vis* ‘private’ persons; that is, it prohibits unfair discrimination between private individuals on a horizontal level of constitutional application. Section 9(4) also enjoins the State to enact national legislation to prevent or prohibit unfair discrimination.

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<sup>3</sup> The Constitution of the Republic of South Africa, 1996, of (hereafter referred to as “the Constitution”).

<sup>4</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para. [74] (hereafter referred to as “Hugo”).

<sup>5</sup> *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) at para. [22].

<sup>6</sup> *Hugo* at para. [74].

<sup>7</sup> *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) at para. [20].

<sup>8</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at paras. [29] and [78 (hereafter referred to as “Barnard”)]; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para. [76]; *Van Heerden Jmt.* 2004 (CC) at para. [25]; *Bel Porto School Governing Body Premier, Western Cape* 2002 (3) SA 265 (CC) at para. [7]; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para. [157]; *S v Makwanyane* 1995 (3) SA 391 (CC) at para. [262].

<sup>9</sup> *Barnard* at para. [174].

### 2.3. FORMAL AND SUBSTANTIVE EQUALITY

Discussions on equality usually commence with the notion of treating or dealing with those who find themselves in the same legal position or situation the same, alike, or similarly.<sup>10</sup> The latter can be associated with an Aristotelian understanding of equality entailing that “equals ought to be treated equally and unequal’s treated unequally in proportion to their inequality”.<sup>11</sup> The author will, as a matter of convenience, promptly reject this approach of discussion on the basis that the reduction of equality to an essentialist understanding of treating “like” “alike” cannot be justified in a Post-Apartheid constitutional democracy and equality as “sameness in treatment” is contrary to the values of equality<sup>12</sup> and dignity. Accordingly, it is no surprise that the Constitutional Court, by referring to Dworkin, held that the “right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment”.<sup>13</sup>

Strongly agreeing with Frank Michelman who explored the different meanings of equality posed the following question in the form of a heading: “[i]s [e]quality Egalitarian? ‘Formal’ (Legal) vs. ‘Substantive’ (Social) [e]quality?”.<sup>14</sup> Michelman’s literature accordingly contrasted formal and substantive equality and the ensuing discussion will be guided thereby.

Before formal equality is discussed, rule formalism, as something that precedes formal equality, need be addressed. Rule formalism requires that any *case* that is regulated by a valid rule of law to be regulated in accordance with that rule.<sup>15</sup> An example, to illustrate rule formalism is one where a rule states that “any natural person may marry any other natural person”. The rule itself provides for the possibility of homosexual marriage. However, if the rule were to provide that “any man may marry any woman”, the rule provides only for heterosexual marriages. One can deduce that where the rule itself does not provide for equal (same) treatment,<sup>16</sup> “equality” is divorced from the rule itself. The rule is an abstraction, divorced from even the legal subjects in respect of whom it finds an application and for as long as the legal rule is valid (formally) rule formalism only requires that the applicable *cases* be dealt with in accordance with the rule. Rule formalism is all too indicative of our former dispensation based on parliamentary sovereignty.

<sup>10</sup> Hahlo, H. and Kahn, E. *The South African Legal System and its Background* (1968) at 34-35; Currie, I. and De Waal, J. *Equality* in Currie, I. & De Waal, J. (Eds.) *The Bill of Rights Handbook* (2013), at 210. Currie & De Waal *The Bill of Rights Handbook* (2014) 210.

<sup>11</sup> Ackermann, L. W. H. *Equality and Non-Discrimination: Some Analytical Thoughts* 2006 Vol. 22(4) *South African Journal on Human Rights* 597-612 at 600.

<sup>12</sup> *Van Heerden Jmt.* 2004 (CC) at para. [25], Moseneke, J., as he then was, affirming that the Constitution has a “conception of equality that goes beyond mere formal equality and the mere non-discrimination which requires identical treatment, whatever the starting point or impact”; *Bato Star Jmt.* 2004 (CC) at para. [74], Ngcobo, J., as he then was, observed that “[i]n this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in doing so entrench existing inequalities”; *vide* Currie and De Waal (2013) at 213-215.

<sup>13</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. [32].

<sup>14</sup> Michelman, F. *The Meanings of Legal Equality* 1986 Vol. 24(3) *Harvard Blackletter Journal* 24-37 at 25.

<sup>15</sup> *Ibid.*

<sup>16</sup> It is reiterated that equal treatment does not connote treatment as equals as such.

Formal equality prescribes same treatment irrespective of race, religion, ethnic origin, gender, sexual orientation, status etc. The focus thus shifted from treatment of cases in accordance with a valid rule of law to the treatment of individuals on a basis completely divorced of their social, economic and political position within a society. It is clear that formal equality is contextually barren, appropriately formulated for the narrow-minded and devastatingly effective at reinforcing the *status quo*. Formal equality cannot tolerate difference and conceives inequality as irrational and arbitrary as this conception is premised on the assumption that everyone is equal with the consequence that differential treatment on basis of “arbitrary” grounds (race, religion, ethnic origin, gender, sexual orientation, status etc.) is irrational.<sup>17</sup>

This conception of equality is primarily based on the anti-discrimination principle or then equality of opportunity. In accordance with the anti-discrimination principle trepidation is called for when “individuals are treated relatively disadvantageously” because of their specific group-membership.<sup>18</sup> Equality of opportunity requires insistence on a meritocratic ideal (success of a job-application is determined solely by an applicant’s productive capabilities and qualifications).<sup>19</sup>

Substantive equality, on the other hand, is context sensitive. The actual or material position of an individual is important and taken into consideration. Substantive equality, in the author’s opinion, prescribes treatment of individuals as *equals* having regard to race, religion, ethnic origin, gender, sexual orientation, status etc. Thus, substantive equality is not only accommodating of difference but insist on the recognition of difference and celebration thereof. Substantive equality will be discussed thoroughly throughout this chapter.

#### 2.4. DOCTRINAL EXPOSITION OF SECTION 9 OF THE CONSTITUTION

Differentiation lies at the heart of section 9, our equality provision.<sup>20</sup> Thus, where a rule or conduct differentiates between people or categories of people, the first question to ask, in the context of section 9(1), is whether such “mere differentiation” is rational.<sup>21</sup> If the differentiation is irrational, one must move to section 36 of the Constitution and engage in the proportionality analysis. If it is rational, one moves to

<sup>17</sup> *Vide* Currie and De Waal (2013) at 213-214; Michelman (1986) *Harvard Blackletter Journal* at 25; Fredman, S. *Redistribution and Recognition: Reconciling Inequalities* 2007 Vol. 23(2) *South African Journal on Human Rights* 214-234 at 216.

<sup>18</sup> Michelman (1986) *Harvard Blackletter Journal* at 28.

<sup>19</sup> Meyerson, D. *How Useful Is the Concept of Racial Discrimination* 1993 Vol. 110(3) *South African Law Journal* 575-580 at 575.

<sup>20</sup> *Prinsloo Jmnt.* 1997 (CC) at para. [23], the Constitutional Court emphatically stated that s. 8 of The Constitution of the Republic of South Africa, Act No. 200 of 1993 (hereafter the “Interim Constitution”) (now s. 9 of the Constitution) deals with differentiation in two ways, namely “differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination”. *Prinsloo* was decided under s. 8 of the Interim Constitution, but it must be noted that the interpretation of s. 8 of the Interim Constitution equally applies to s. 9 of the Constitution – *vide National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para. [15] (hereafter “*National Coalition*”); Currie and De Waal (2013) at 215.

<sup>21</sup> *Prinsloo Jmnt.* 1997 (CC) at para. [25].

section 9(3) – section 9(5) of the Constitution.<sup>22</sup> In this context the question is whether the ground(s) of the differentiation is on one or more of the specified ground(s) in section 9(3) of the Constitution. If so, such differentiation constitutes discrimination and is *prima facie* unfair.<sup>23</sup> If the ground(s) of the differentiation is not one of the specified grounds, there “will be discrimination on an unspecified ground if the ... [differentiation] is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner”.<sup>24</sup>

In *Harksen* the Constitutional Court ‘tabulated’ the stages of enquiry which become necessary where an attack is made in reliance on section 8 of the Interim Constitution. They are:

“(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two- stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).”

In assessing the fairness of the discrimination in question the impact of the discrimination on its victims is decisive.<sup>25</sup> Therefore, if the impact of the discrimination is unfair it will constitute unfair discrimination and infringe the right against unfair discrimination. If the differentiation is based on an enumerated ground unfairness is presumed, but if it is an analogous ground the complainant must establish such unfairness.<sup>26</sup>

<sup>22</sup> *Harksen v Lane* 1998 (1) SA 300 (CC) at para. [54].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at para. [47]

<sup>25</sup> *Ibid.* at para. [50] and [53]; *Hugo* at para. [41].

<sup>26</sup> *Harksen Jmt.* 1998 (CC) at para. [45].



This discussion will be completed by this rather lengthy quote of the judgment in *Harksen* concerning the assessment of impact:

“[I]n order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

- (a) the position of the complainants in society and whether they have suffered in the past from *patterns of disadvantage*, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have *in fact* suffered the impairment in question.
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an *impairment of their fundamental human dignity* or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving “precision and elaboration” to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop... [I]t is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.”<sup>27</sup> [own emphasis]

#### 2.4.1. INDIRECT DISCRIMINATION

Section 9(3) and section 9(4) of the Constitution prohibit unfair discrimination which takes place “directly or indirectly”. In *Pretoria City Council v Walker*<sup>28</sup> the Constitutional Court had to consider, for the first time, the difference between direct and indirect discrimination and whether such difference has any bearing on section 9 as set out above.

The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 9(3) and section 9(4) of the Constitution evinces a concern for the *consequences* rather than the form of conduct.<sup>29</sup> The Constitutional conception of substantive equality recognises that conduct, which may appear to be neutral and non-discriminatory, on the face of it, may nonetheless *result* in discrimination and, if it does, it falls within the purview of section 9(3) or section 9(4) of the Constitution.<sup>30</sup>

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<sup>27</sup> *Ibid.* at para. [51].

<sup>28</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para. [30].

<sup>29</sup> *Ibid.* at para. [31].

<sup>30</sup> *Ibid.*

#### 2.4.1.1. THE INTENTION TO DISCRIMINATE

The purpose of the anti-discrimination clauses, section 9(2) and section 9(4), is to protect persons against treatment which amounts to unfair discrimination.

“[I]n many cases, [especially] those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken.”<sup>31</sup>

The Constitutional Court has accordingly held that the intention to discriminate is not an essential element of unfair discrimination, whether in respect of direct or indirect discrimination.<sup>32</sup>

#### 2.5. PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

The preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>33</sup> informs the reader thereof that PEPUDA is the product of section 9(4) of the Constitution. Of relevance is section 9 of PEPUDA which reads:

“9 Prohibition of unfair discrimination on the ground of disability

Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including-

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- (c) failing to *eliminate obstacles* that unfairly limit or restrict persons with disabilities from enjoying *equal opportunities* or failing to take steps to *reasonably accommodate* the needs of such persons.”

Any “person”, in terms of section 9(c) of PEPUDA, is *positively* obliged to (i) eliminate obstacles unfairly limiting or restricting disabled persons’ enjoyment of equal opportunities and (ii) reasonably accommodate the needs of persons with disabilities. The extent to which aforementioned two positive duties can be

<sup>31</sup> *Ibid.* at para. [43].

<sup>32</sup> *Ibid.*

<sup>33</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 (hereafter "PEPUDA"), the preamble reads: “s[.] 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality”.

enforced in a court of law remains to be seen, but what is clear is that there exists constitutional justification for the imposition, to a certain extent, of such duties, since disabled persons generally do not have access to or cannot participate in, whether at all or in a meaningful manner, public or private life because the means to do so are intended and designed for use, enjoyment, and exploitation by able-bodied persons.<sup>34</sup> Therefore, without positive action, disabled persons will be relegated to the periphery of society.<sup>35</sup>

## 2.6. DISABLED PERSONS

In identifying and understanding the disadvantage suffered by disabled persons the Constitutional Court sought some guidance from the Supreme Court of Canada in *Pillay* and quoted, with approval, the following passage:

“Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the *failure* to make reasonable accommodation, to [adapt] society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.”<sup>36</sup> [own emphasis]

Since both duties imposed by section 9(*e*) of PEPUDA are positioned in relation to disabled persons, it cannot be gainsaid that such obligations can only be met if the meaning of disabled is delineated, although never in a final sense.

### 2.6.1. THE MEANING OF DISABILITY

Two models of disability, in terms of which disability is conceptualised, have seen the light of day.<sup>37</sup> The medical model is the conventional approach to conceptualise disability in terms of which the limitations with which a disabled person are saddled with are the result of a medical condition inherent to that person.<sup>38</sup> This model is constructed to identify physical, cognitive, or sensory defects that prevent disabled persons from participating in normal social life.<sup>39</sup> This model perceives disabled persons as humans vested with

<sup>34</sup> *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para. [74]; *vide* Currie and De Waal (2013) at 234-235.

<sup>35</sup> *Pillay Jmnt.* 2008 (CC) at para. [74].

<sup>36</sup> *Eaton v Brant County Board of Education* 1997 (1) S.C.R. 241 at para. [67] as quoted in *Pillay Jmnt.* 2008 (CC) at para. [74].

<sup>37</sup> Bhabha, F. *Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative* 2009 Vol. 25(2) *South African Journal on Human Rights* 218-245 at 223-224.

<sup>38</sup> *Ibid.* at 223.

<sup>39</sup> *Ibid.* See authorities cited by the author.

deficiencies, which must be diagnosed, treated, and, if possible, cured.<sup>40</sup> In terms of this model disabled persons are defective human beings as opposed to human beings that are different from able-bodied human beings.

Regarding the social model disability is perceived and conceptualised as a social and cultural construct.<sup>41</sup> The problem is said to lie with society – not the ‘affected’ individual – as opposed to the medical model that identifies the source of disability in medically diagnosable conditions or biological factors.<sup>42</sup> The felt and experienced limitations of a disabled person is not caused by such person’s inability to function in society, but rather the society’s inability to function inclusively of everyone.<sup>43</sup>

The social model is broader since it adopts an additional group dimension in its conception of disability.<sup>44</sup> Society's failure to account for the needs of people with disabilities affect disabled persons not only as individuals, but as a class, since the entirety of the society’s structures is premised on the assumptions, needs, and experiences of able-bodied persons. This macro-scale social exclusion is systemic and institutionalised, irrespective of the fact that its impact is experienced differently by individual disabled persons.<sup>45</sup>

## 2.6.2. ACCEPTANCE AND CELEBRATION OF DIFFERENCE

It must be cautioned that in merely ‘blindly’, no pun intended, accepting the social model and perceiving disability as a social or cultural construct, without acknowledging the patent difference between, on the one hand, a so-called social construct (society’s prejudicial conception of disability and disabled persons and its concomitant prejudicial, exclusionary, discriminatory attitude and approach towards disabled persons), and, on the other hand, the objectively<sup>46</sup> identifiable difference between able-bodied and disabled persons within a society that ought to be accommodated, one will be operating against an important aspect of substantive equality: the acceptance and celebration of difference.<sup>47</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* at 224.

<sup>46</sup> Objective in this sense does not merely denote factual or positive objectivity but rather constitutional objectivity. South Africa is vested with an objective normative value system (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras. [54]-[56]; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para. [48]) and any observable difference between able-bodied persons and disabled persons must be identified and dealt with in the constitutional matrix established by the values contained in s. 1 of the Constitution. The term ‘objective’ indicates that the objective normative order stands independent from the subjective interests of legal subjects. The legal order is then, in this sense, objectively rooted in something outside the interests of the existential being; that is the values contained in section 1 of the Constitution.

<sup>47</sup> See in general Ngwenya, C. and Pretorius, L. *Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2012 Vol. 28(1) *South African Journal on Human Rights* 81-115 with regard to the relationship between difference and disability.

The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, *accommodate* and accept the largest spread of *difference*.<sup>48</sup> [own emphasis]

It cannot be denied that the perspective of able-bodied persons is privileged as one need not look further than your immediate surroundings to discern that it is the able-bodied persons' being in the world that determines how every aspect of society is to be imagined, designed, and experienced where after the being in the world of a disabled person is the afterthought of the able-bodied architect or engineer designing a building, politician advocating for material change, and an attorney drafting an agreement. The disadvantage felt in the lived experiences of disabled persons' being in able-bodied persons' experience of humanity is not intentional, but rather flows from the fact that only an estimated five to ten per cent of the South African population is classified as disabled.<sup>49</sup> The majority of the South African population is able-bodied, which leads to the unfortunate, but unchangeable reality, that the society can accommodate, as is constitutionally required, but will never prioritise disabled persons, since they are the political, social, and economic minority.

Cogent economic reasons justify reasonable accommodation, since there is simply not a sufficient need to justify an entire society prioritising the needs of disabled persons above the needs of able-bodied persons. Morally, without question, if a utilitarian perspective is adopted, one is also inclined to support the statement that the needs of disabled persons (minority) cannot be preferred above and be satisfied at the cost of able-bodied persons (majority). There is no moral justification for preferential treatment and deferment of satisfying needs in favour of disabled persons to the extent that the entire society is materially defined and structurally organised by the needs of disabled persons.

Disabled persons' needs can be accommodated for in so far as their difference can serve as moral and legal justification to transform our society to be (more) accepting and accommodative of disabled persons' being in the world and, accordingly, to be engaged in a never-ending process of becoming a more socially inclusive society. It is, therefore, up to society to realise and accept the impossibility of fully addressing the needs of disabled persons, but none the less take reality and inequality to task and actively attempt to transform society so as to, as far as humanly possible, adapt and restructure the social reality in an attempt to include disabled persons as full human beings in our society through reasonable accommodation of disabled persons' needs thereby affording them equal concern and respect as human beings in the world.

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<sup>48</sup> *Sodomy Jmnt.* 1999 (CC) at para. [134].

<sup>49</sup> Office of the Deputy President *Integrated National Disability Strategy White Paper* (1997) <<http://www.info.gov.za/whitepapers/1997/disability.htm>> (National Strategy).

Against the latter cursory overview of equality jurisprudence and disability rights this study investigates to what extent do the needs of disabled persons can justifiably be accommodated in the context of formalities, as discussed above, with the intention of assisting disabled persons in their plight for equal enjoyment of rights and freedom.

### 3. THE NOTION OF REASONABLE ACCOMMODATION

“Diverse societies face two choices. They can choose the route of no accommodation where those with power set the agenda and the majority rules prevail. The result is the exclusion of some people from useful endeavours on irrelevant, stereotypical grounds and a denial of human dignity and worth ... The other route is the route of reasonable accommodation. It starts from the premise of each individual’s worth and dignity and entitlement to equal treatment and benefit.”<sup>50</sup>

Considering the central role fulfilled by dignity in South African equality jurisprudence, reasonable accommodation, as contemplated in the above quoted passage, corresponds and is congruent with substantive equality as understood, formulated, and developed by the Constitutional Court. In South Africa, as in Canada, reasonable accommodation has been developed into a principle through which unfair discrimination is eliminated and substantive equality is sought to be achieved<sup>51</sup> by taking cognisance of the fact that in a diverse society, reasonable accommodation is a mechanism for celebrating difference and accepting the variability of people as they are by accommodating difference.<sup>52</sup>

Reasonable accommodation, as a doctrinal construct, gives effect to a necessary element of an individual’s freedom and dignity: “an entitlement to respect for the unique set of ends that an individual pursues”.<sup>53</sup> The latter is based on the Constitution’s commitment of affirming diversity and the affirmation of diversity, in turn, accords with and strengthens the Constitution’s underlying, organising, and monumental declaration: the Constitution is an and enjoins a decisive break from our history of intolerance and exclusion.<sup>54</sup>

The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.<sup>55</sup>

The previous few paragraphs explicitly provides a basis for arguing that reasonable accommodation has a place to fulfil in South African equality jurisprudence. However, what is reasonable accommodation? Under Canadian law reasonable accommodation has been defined as:

“reasonable *positive measures* to meet the special needs of those who, by reason of disability, religious affiliation,

<sup>50</sup> Extrajudicial statement by Madame Justice Beverly McLachlin as quoted in Ngwena, C. *Equality for People with Disabilities in the Workplace: An Overview of the Emergence of Disability as a Human Rights Issue* 2004 Vol. 29(2) *Journal for Juridical Science* 167-197 at 178-179.

<sup>51</sup> Ngwena, C. *Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part II: Reasonable Accommodation* 2005 Vol. 16(3) *Stellenbosch Law Review* 534-561 at 544.

<sup>52</sup> See Ngwena (2004) *Journal for Juridical Science* at 182.

<sup>53</sup> *Pillay Jmnt.* 2008 (CC) at para. [64].

<sup>54</sup> *Ibid.* at para. [75].

<sup>55</sup> *Minister of Home Affairs v Fourie (Doctors for Life International as amici curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at para. [60].

or other protected characteristic, cannot be adequately served by accommodations or arrangements suitable for the majority”.<sup>56</sup> [own emphasis]

Article 2 of the Convention on the Rights of Persons with Disabilities defines reasonable accommodation, in the context of disability rights, as:

“necessary and appropriate *modification[s]* and *adjustments* not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.<sup>57</sup> [own emphasis]

Our conception of reasonable accommodation is quite similar. Through a positive duty to accommodate, placed on society, the principle prohibits relegation of people to the periphery of society for their failure or refusal to conform to certain majoritarian or dominant social norms.<sup>58</sup> Without defining reasonable accommodation in a definite and final sense, reasonable accommodation, under South African law, entails the existence of a positive duty on a specific person or institution within society (for example, the State, an employer,<sup>59</sup> a school,<sup>60</sup> or a supplier<sup>61</sup>) to enable and allow equal participation within society and equal enjoyment of rights by those who do not or cannot conform to certain majoritarian or dominant societal norms.<sup>62</sup>

The Constitutional Court has only dealt with reasonable accommodation in the context of religious and cultural beliefs.<sup>63</sup> On each occasion the Constitutional Court had to decide whether a particular party should be exempted from complying with a rule of general application in order to accommodate that party’s religious beliefs or culture.<sup>64</sup> In these cases reasonable accommodation provided for inclusion, acceptance, and integration through exemption from the application of legal rules. However, what is sought to be drawn from reasonable accommodation in this dissertation is inclusion, acceptance, and integration by either acknowledging or developing the equal protection that ought to be afforded and benefit that ought to be accorded by the law to visually impaired consumers.

The right to equality envisages both the limitation of rules of law or their applicability as well as the

<sup>56</sup> Ngwena (2005) *Stellenbosch Law Review* at 544-545. See also authorities cited in n. 45.

<sup>57</sup> Convention on the Rights of Persons with Disabilities, of 2006. See Grobbelaar-Du Plessis, I. and Nienaber, A. *Disability and Reasonable Accommodation: HM v Sweden Communication 3/2011 (Committee on the Rights of Persons with Disabilities)* 2014 Vol. 30(2) *South African Journal on Human Rights* 366-379 at 371.

<sup>58</sup> *Pillay Jmnt.* 2008 (CC) at para. [73].

<sup>59</sup> S. 1 of the Employment Equity Act, No. 55 of 1998 defines reasonable accommodation as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment”.

<sup>60</sup> An example is the *Pillay Jmnt.* 2008 (CC) where the decision of the governing body of Durban Girls' High School to refuse Sunali Pillay an exemption from its code of conduct to allow her to wear a nose-stud, discriminated unfairly against her based on religion.

<sup>61</sup> S. 3(1)(b)(iv) of the CPA.

<sup>62</sup> *Pillay Jmnt.* 2008 (CC) at para. [73].

<sup>63</sup> Bonthuys, E. *Reasonable Accommodation as a Mechanism to Balance Equality Rights and Rights to Religion in Family Law* 2010 Vol. 25(2) *Southern African Public Law* 666-681 at 671. These cases are *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), and *Pillay Jmnt.* 2008 (CC).

<sup>64</sup> Bonthuys (2010) *Southern African Public Law* at 671.



extension of protection afforded and benefit accorded. In other words, limitation, on the one hand, and extension or development, on the other, both facilitated in an attempt to achieve equality, are different edges of the same sword.

### 3.1. THE DUTY TO ACCOMMODATE

While the extent of the exclusion from mainstream society<sup>65</sup> by human agency (in other words, conduct and the structure of society itself) is especially felt by the disabled, a failure by legal rules to accommodate those who depart from the norm inflicts the same exclusion and disadvantage.<sup>66</sup> Since our society, as a post-apartheid constitutional dispensation, values dignity, equality, and freedom, people are enjoined to act positively to accommodate diversity:<sup>67</sup>

“Steps to accommodate diversity might be as simple as granting and regulating an exemption from a general rule or such steps might require the amendment of rules or practices or even that buildings be altered or monetary loss incurred.”<sup>68</sup>

The duty to accommodate would arise in the circumstances where a lack or failure to accommodate would constitute unfair discrimination. As such, for the duty to arise, two requirements must be met; namely, (i) differentiation between persons or categories of persons must constitute discrimination, and (ii) fairness must require accommodation. Thus, for current purposes the first requirement envisions differentiation between categories of consumers; namely, visually impaired and non-visually impaired consumers. Since visual impairment is a disability and differentiation based on disability is presumed to be *prima facie* unfair discrimination, the first requirement is met. However, even if the differentiation constitutes *prima facie* unfair discrimination, fairness in and of itself must enjoin accommodation of the visually impaired consumer’s needs.<sup>69</sup> Fairness must, therefore, require the reduction of a written contract to braille, for example.

A point of utmost importance must be expressed at this point. The statement that “fairness must require reasonable accommodation” is derived from the Constitutional Court’s interpretation of section 9 read with section 14 of PEPUDA. The Constitutional Court had its reservations as to the correctness of section 14 in that it conflates limitation analysis under section 36 with the notion of fairness or then the *impact* or *consequence* of the act of discrimination. It is in light of this conflation that it is now accepted that Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.<sup>70</sup>

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<sup>65</sup> *Vide* n. 36 *supra*.

<sup>66</sup> *Pillay Jmnt.* 2008 (CC) at para. [75].

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* at para. [78].

<sup>70</sup> *Ibid.*

However, *Pillay* was decided on section 14 of PEPUDA as it currently reads; that is fairness under PEPUDA is wider than fairness under the Constitutional Court's equality jurisprudence. One of the factors in section 14 of PEPUDA determining whether the discrimination was fair is whether reasonable steps were taken to accommodate diversity.<sup>71</sup> It is clear that the Constitutional Court relied upon this factor to formulate the requirement that fairness in and of itself must enjoin accommodation. On the other hand, one would err to reduce the test for fairness to a test for reasonable accommodation, particularly because the factors relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.<sup>72</sup>

It is clear that once a duty to accommodate is present a supplier must take positive measures and possibly incur additional hardship or expense to enable and allow equal participation within the consumer market and equal enjoyment of rights by disabled consumers.

### 3.2. COMPLYING WITH THE DUTY TO ACCOMMODATE

It is irrefutable then that positive steps must be taken, but to what extent must society be required to accommodate so to enable those outside the 'mainstream' to swim freely in its waters?<sup>73</sup> The Constitutional Court<sup>74</sup> and others abroad have considered the aforementioned question. Both the United States and Canada employ the phrase "undue hardship" as the *test for reasonable accommodation*. However, the meaning attached by the respective jurisdictions to the phrase differs drastically. The United States Supreme Court has held that *employers* need only incur "a *de minimis* cost" to accommodate an individual's religion.<sup>75</sup> The Canadian Supreme Court, on the other hand, declined to adopt that standard and stressed that "more than mere negligible effort is required to satisfy the duty to accommodate".<sup>76</sup> The Constitutional Court noted that, since our constitutional project which affirms diversity, the approach of the Canadian Supreme Court is more in line with the spirit of our constitutional project.<sup>77</sup> The question of whether someone has complied with the duty to accommodate is a contextual one dependent on the values and principles underlying the Constitution. Reasonable accommodation is, in a sense, an *exercise in proportionality* that will depend intimately on the facts.<sup>78</sup>

For guidance on what reasonable accommodation entails an investigation of the EEA's Code of Good

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<sup>71</sup> S. 14(3)(j)(ii) of PEPUDA.

<sup>72</sup> *Pillay Jmnt.* 2008 (CC) at para. [77]. See Bonthuys (2010) *Southern African Public Law* at 672-673.

<sup>73</sup> *Pillay Jmnt.* 2008 (CC) at para. [76].

<sup>74</sup> *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

<sup>75</sup> *Trans World Airlines Inc v Hardison* 1977 (63) 432 (US) at 84.

<sup>76</sup> *Central Okanagan School District No. 23 v Renaud* 1992 (2) 970 (SCR) at 983G-985A. See Ngwena (2005) *Stellenbosch Law Review* at 544-548; Ngwena (2004) *Journal for Juridical Science* at 181-184.

<sup>77</sup> *Pillay Jmnt.* 2008 (CC) at para. [76].

<sup>78</sup> *Ibid.*

Practice: Key Aspects of Employment with People of Disabilities.<sup>79</sup> Regulation 6.4 of the Code determines that the obligation to accommodate may arise when an applicant or employee voluntarily discloses a disability related accommodation need or when such a need is reasonably self-evident to the employer. The Code continues, in Regulation 6.7, and provides that each particular duty to accommodate will depend on the individual, the degree and nature of impairment and its effect on the person, as well as on the working environment.

With reference to “undue hardship”, as referred to above, in terms of Regulation 6.11 of the Code there is no duty on an employer to accommodate a qualified applicant or an employee with a disability if it would impose an *unjustifiable hardship* on the *business* of the employer. Regulation 6.12 of the Code describes unjustifiable hardship as “action that requires significant or considerable difficulty or expense”. To determine whether an action requires significant or considerable difficulty or expense one considers, amongst other things, the effectiveness of the accommodation and the extent to which it would severely disrupt the operation of the business.

### 3.3. ROLE OF REASONABLE ACCOMMODATION IN THE CONTEXT OF PEPUDA

Section 9 of PEPUDA prohibits unfair discrimination on the ground of disability and section 9(a) of PEPUDA provides the minimum standard of necessary supporting or enabling facilities in that any denial or removal of a supporting or enabling facility from a disabled person that is necessary for his functioning in society is considered unfair discrimination in terms of section 9(a) of PEPUDA.

Section 9(e) of PEPUDA builds on this minimum standard by determining that either one of the following failures to act positively constitute *prima facie* unfair discrimination:

1. the failure to eliminate obstacles that unfairly limit or restrict disabled persons from enjoying equal opportunities; or
2. the failure to take steps to reasonably accommodate the needs of disabled persons.

There is a conceptual difference between the elimination of obstacles and the steps to reasonably accommodate needs. Elimination of an obstacle presupposes the presence or existence of an obstacle. In contrast herewith, the purpose for this study is found upon a lack, on the part of both society in general and the law, of accommodating the needs of visually impaired consumers. Neither practice nor any rule of law prohibits any person or institution from reducing any written agreement to braille. However, in the

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<sup>79</sup> Code of Good Practice: Key Aspects on the Employment of People with Disabilities, GNR.1345 of 2002 (hereafter referred to as “the Code”).

same breath, neither practice nor any rule of law enjoins any person or institution from reducing any written agreement to braille.

“We need, therefore, to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.”<sup>80</sup>

The Constitution is different from constitutions found in other countries as it does not assume that everyone is equal, because had it done so it would have entrenched existing inequalities.<sup>81</sup> Our Constitution is premised on the recognition that entrenched systematic disadvantage cannot be eliminated without positive action being taken to achieve that result.<sup>82</sup> The consequence of decades systemic discrimination will continue indefinitely, unless there are a concerted effort and positive commitment to end it.<sup>83</sup>

Furthermore, the reader is also referred to section 14(2) of PEPUDA:

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to -
  - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

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<sup>80</sup> *Hugo* at para. [41].

<sup>81</sup> *Bato Star Jmnt.* 2004 (CC) at para. [74].

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

(ii) accommodate diversity.

It is important to note that the reasonable accommodation is mentioned, *verbatim*, on several of occasions in PEPUDA. Section 14(3)(i)(ii) of PEPUDA is vital - considering the doctrinal structure of constitutional equality jurisprudence established by the Constitutional Court - and states that taking reasonable steps to accommodate diversity is a factor in determining the fairness of discrimination.<sup>84</sup> As such, reasonable accommodation will always be an important factor in the determination of the fairness of discrimination.<sup>85</sup> However, reduction of test for fairness to a test for reasonable accommodation would be a fallacy, since the *various* factors relevant to the determination of fairness have been carefully articulated by the legislature in section 14(3)(a)-(i) of PEPUDA.

Fairness, in some circumstances, may require reasonable accommodation, while in other circumstances it may require more or less, or something completely different.<sup>86</sup> Whether fairness requires reasonable accommodation will depend on

- (i) the *nature* of the *case* (direct or indirect discrimination); and
- (ii) the *nature* of the *interests* involved.<sup>87</sup>

Two factors are particularly relevant:

1. “[R]easonable accommodation is *most* appropriate where discrimination arises from a rule or practice that is *neutral* on its *face* and is *designed to serve a valuable purpose*, but which nevertheless has a *marginalising effect* on *certain portions* of society.]; in other words, in cases of indirect discrimination]”<sup>88</sup> [own emphasis]
2. “...[Reasonable accommodation] is particularly appropriate in specific *localised contexts*, such as an *individual workplace* or school, where a reasonable balance between *conflicting interests* may more easily be struck.”<sup>89</sup> [own emphasis]

Fairness may require reasonable accommodation, but such requirement does not render the other factors listed in section 14 of PEPUDA nugatory. Reasonable accommodation is but one factor in determining the unfairness of discrimination. In other words, quite paradoxically, one may end up in a situation where fairness enjoined reasonable accommodation but other factors in determining the unfairness of discrimination determined that, although there was a lack of reasonable accommodation, the discrimination did not constitute unfair discrimination. An example worth mentioning are fathers of a new-born. The mother of a new-born is provided with maternity leave, although unpaid. It can be argued that the needs of a father must be accommodated and he ought to be allowed to stay at home since the new-born is as much his child as he or she is the child of the mother. The mother’s absence from work correlates with the new-born’s presence at her home, but her absence from work is caused by the adverse consequence of

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<sup>84</sup> *Pillay Jmnt.* 2008 (CC) at para. [77].

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at para. [78].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

giving birth.

The impact of the *prima facie* discrimination against men is justified since a father cannot give birth. The differentiation, as set out in this paragraph, quite definitely does not have the potential to infringe a father's dignity since no man can give birth. The capacity to give birth has never been that of man and, as such never formed part of its being. Since the capacity never formed part of man, its non-recognition cannot infringe his dignity since his dignity never involved this capacity.

#### 4. CONCLUSION

In this chapter the study alluded to the South African post-apartheid equality jurisprudence for the simple reason of answering the questions posed throughout this dissertation. Chapter 5 will be devoted to these questions and, most certainly, to the most general but of utmost important question as to whether the substantive equality, by virtue of the doctrine of reasonable accommodation, require the reduction of a written agreement to braille where one or more of the consumers is or are visually impaired.

What this chapter has presented is that South Africa, through section 1(c) and section 9 of the Constitution, adopted a substantive conception of equality that is context sensitive, has transformation as its mast and actively seeks the winds of dignity to act as its lodestar to equality. Equality jurisprudence entails submergence in context, both the present and the past, since the former is informed and formed by the latter. Substantive equality entails being open towards and inviting of the reality and materiality of the legal subject's existence. It entails the acceptance and celebration of the difference between legal subjects; that is, substantive equality encompass both understanding and appreciation of the variabilities inherent within human kind.

Having the achievement of equality as an organising principle and being possessed of a substantive conception of equality influenced and infused by, among other values, dignity, reasonable accommodation is a principle prohibiting unfair discrimination and ultimately seeks to achieve equality. In addition, substantive equality is poised at achieving, among other things, equality of outcome and reasonable accommodation enjoining positive steps to achieve equality is primarily a mechanism that seeks to provide an equality outcome. The principle of reasonable accommodation is fundamentally against sameness in treatment and is, therefore, an appropriate basis upon which differential treatment of visually impaired consumers as opposed to non-visually impaired consumers can be justifiably argued for.

The following chapter will conclude the entire dissertation under discussion against the constitutional equality jurisprudential background sketched in this chapter.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 1. INTRODUCTION

This chapter will conclude and develop recommendations according to discussions concerning the constitutional equality jurisprudential background sketched in Chapter 4 by addressing the constitutional dimension contained within Chapter 2 (the Common Law) and Chapter 3 (the Consumer Protection Act<sup>1</sup> and the Alienation of Land Act<sup>2</sup>).

The primary question of this study, which is: to what extent, if any, ought visually impaired consumers be reasonably accommodated when considering the requirement of formalities, as rigorously examined in Chapter 1. Moreover, the same question was considered from the common law perspective as discussed in Chapter 2.

After a brief conclusory discussion on the common law and questions posed in Chapter 2, recommendations will be constructed. The same brief conclusory discussion will be done in respect of the Chapter 3 discussion on both the CPA and the ALA, after which the necessary recommendations will be constructed.

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<sup>1</sup> The Consumer Protection Act, No. 68 of 2008 (hereafter referred to as the "CPA").

<sup>2</sup> Alienation of Land Act, No. 68 of 1981 (hereafter referred to as the "ALA").



## 2. THE COMMON LAW

It was mentioned in Chapter 2 that in the final chapter, the abstract example and the concerns arising therefrom will be addressed. The example used in Chapter 2 illustrated a practical example where one of the two parties to a contract is visually impaired, and the contract includes a clause to the effect that the written contract constituted the entire agreement between the parties and that, until such time as both parties have signed the written agreement, no contract will have come into being between them. The agreement reduced to writing is not in braille.

### 2.1. IS THE CONTRACT VALIDLY CONCLUDED?

Currently, as the positive law is interpreted, parties are free to agree upon the requirement of ‘in writing’ and it is accepted, in the author’s strong opinion that such acceptance is nothing more than judicial notice, that ‘writing’ is a paper based concept<sup>3</sup> conceptualised as exclusive of writing in braille. Parties, even if both are blind, are in principle free to agree to the requirement ‘in writing’ even if it is to their detriment, unless such stipulation would run contrary to public policy.<sup>4</sup> The question to be put before a Court is whether the contract, as discussed in the above example, is valid and congruent with public policy.

It is trite that public policy is now deeply rooted in the Constitution and is, therefore, influenced by the constitutional values.<sup>5</sup> The achievement of equality is, as indicated above, a fundamental and founding value of our constitutional dispensation. In addition, as indicated above, there is a positive duty on the collective agency in South Africa to work towards and give effect to the Constitution’s aspirational end of a socially just society in which a multiplicity of diversities is both accepted and celebrated.

It, therefore, follows that there is a positive duty to reasonably accommodate visually impaired people. Upon recognising the positive duty of the collective agency of South Africa, one must recognise the performative possibilities contained within the law itself. The latter entails the proverbial directive contained within a legal rule providing institutional justification for a belief, ideal, and practice. In other words, if the contract in our example were held to be valid irrespective of the identity of the contracting parties the law itself would adopt a formal approach to equality in those circumstances.

Thus, if the contract is legally valid, the performative effect thereof is a constitutional nod of acceptance that the needs of visually impaired persons is not as important as able-bodied persons’ needs. The law does

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<sup>3</sup> *Jafta v Ezemvelo KZN Wildlife* 2008 (10) BLLR 954 (LC) at para. [71].

<sup>4</sup> *Barkhuizen v Napier* 2007 (5) SA 232 (CC) at para. [57].

<sup>5</sup> *Ibid.* at para. [28]; *vide* *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para. [93] referring to *Carmichele Jmnt.* 2001 (CC) at para. [56]. *Vide* also Christie, R. H. and Bradfield, G. *Christie's Law of Contract in South Africa* (2016) at 18-19.

not afford, institutionally considered, equal concern and respect to visually impaired persons, which then translates into a justification for society not to afford, on a social level, equal concern and respect to visually impaired persons.<sup>6</sup>

Thus considered, South Africa has adopted a substantive conception of equality that recognises both direct and indirect discrimination. Furthermore, reasonable accommodation is especially relevant in circumstances of indirect discrimination, which the definition of ‘in writing’ constitutes since the consequence of such definition is the exclusion and disadvantaging of visually impaired persons by virtue of being visually impaired although the definition is not purposefully aimed at such outcome.

The duty to accommodate, being a proportionality exercise, ought to have an influence on the definition of ‘in writing’, but such impact is to be judicially decided based on the specific facts at hand, since the development of the common law in terms of section 39(2) of the Constitution is an incremental exercise. However, it is the author’s opinion that without developing the common law definition of ‘in writing’ so as to include, when reasonable, braille in the event one or both of the contracting parties is or are visually impaired would fly in the face of substantive equality, be contrary to section 9(c) of PEPUDA, and perpetuate the systemic disadvantage experienced by visually impaired people.

## 2.2. RECOMMENDATION

The definition of ‘in writing’ should be developed to the effect that it includes braille unless it would no longer be reasonable to recognise a duty to accommodate the visually impaired in the specific circumstances. In other words, if the common law is so developed, writing will include braille unless the decision not to accommodate the visually impaired is not unfair discrimination in the circumstances.

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<sup>6</sup> *Vide*, for example, *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para. [55] where the Constitutional Court held, in the context of criminalising sexual intercourse between adolescents, that: “If one’s consensual sexual choices are not respected by society, but are criminalised, one’s innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their *symbolic* impact has a severe effect on the social lives and dignity of those targeted” [own emphasis and footnotes omitted]. *Vide* also *Sodomy Jmt.* 1999 (CC) at para. [28] where the Constitutional Court held that “The common-law prohibition on sodomy criminalises all sexual intercourse *per anum* between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its *symbolic effect* is to state that in the eyes of our legal system all gay men are criminals” [own emphasis].

### 3. THE CONSUMER PROTECTION ACT

Chapter 3 addressed the definition of ‘in writing’ within the context of the CPA, but influenced by constitutional considerations. It was highlighted that the purpose of the CPA is to protect and develop the social and economic welfare of consumers and, in particular, vulnerable consumers.<sup>7</sup> Moreover, Chapter 3 directed the reader’s attention to section 3(1)(b)(iv) of the CPA substantiating that the CPA is to promote and advance the social and economic welfare of consumers in South Africa by, *inter alia*, reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers whose ability to read and comprehend any agreement or other visual representation is limited by reason of vision impairment.

The consequence of not accommodating the needs of visually impaired consumers where it is reasonable to do so by not reducing the written agreement to braille runs contrary to the purpose of the CPA and will constitute an infringement of one or more of the paragraphs of section 8 of the CPA<sup>8</sup> in that such lack of accommodation will, as a consequence,

- (i) exclude visually impaired persons (as a category of persons) from accessing the relevant goods or services;
- (ii) grant able bodied persons (as a category of persons) exclusive access to the relevant goods or services;
- (iii) assign priority of supply of the relevant goods or services to able bodies persons; and, or
- (iv) constitute a supply of a different quality of goods or services to visually impaired persons.

It shall be remembered that to differentiate between visually impaired persons and able bodied persons on the basis of such disability constitutes discrimination and is *prima facie* unfair, since disability is an enumerated ground in section 9(3) of the Constitution. For a supplier to rebut the presumption of unfairness, he must prove whether and to what extent he it has taken such steps as being reasonable in the circumstances to (i) address the disadvantage which arises from or is related to disability, as one of the enumerated grounds, or (ii) accommodate diversity.<sup>9</sup>

Accordingly, if it is reasonable to accommodate a visually impaired consumer, the failure or refusal by the supplier will militate against any attempt at proving that the discrimination is not unfair, since such failure or refusal does not address the disadvantage arising from his disability, as it ought to have considering section 14(3)(i)(i) of PEPUDA, and runs contrary to the purpose of the CPA, as contained in section 3(1)(b)(iv) of the CPA, that includes the reduction and amelioration of any disadvantage experienced in accessing any supply of goods or services by visually impaired consumers whose ability to read and

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<sup>7</sup> S. 3(1) of the CPA.

<sup>8</sup> That is one or more of paras. (a)-(d) of section 8.

<sup>9</sup> S. 14(3)(i)(i)-(ii) of PEPUDA.

comprehend any agreement or other visual representation is limited by reason of vision impairment. The lack to accommodate diversity, where it is reasonable, would also militate against any proof of fairness, since section 14(3)(i)(ii) of PEPUDA requires accommodation of diversity in assessing fairness of discrimination and, in addition, part and parcel of substantive equality is the recognition and celebration of difference. In discussing the right to be different, Sachs, J., held that

“The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. ... [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society ... Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'.”<sup>10</sup>

### 3.1. RECOMMENDATION

Academia ought to take the torch and light the way in supplementing existing literature on the CPA so as to make it patent to practitioners, the judiciary, the executive, and students alike that the CPA in fact enjoins written agreements to be reduced to braille, were reasonable and appropriate. Such interpretation is congruent with the purpose of the CPA and is both required and confirmed by section 8 and section 22 read with section 52(1)(b), and put beyond doubt by section 40(2) of the CPA.

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<sup>10</sup> *Fourie Jmnt.* 2006 (CC) at paras. [60]-[61].

#### 4. THE ALIENATION OF LAND ACT

In Chapter 3, it was argued as to why a deed of alienation, as defined in terms of the ALA, should be interpreted to include braille in every alienation of land where either the seller or the purchaser is a visually impaired person. It is submitted that such interpretation is enjoined upon the interpreter by reason of section 39(2) of the Constitution and the founding value achievement of equality and the justiciable right to equality, which, in this context, specifically enjoins reasonable accommodation.

“[t]he Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court “must promote the spirit, purport and objects of the Bill of Rights” when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights “is a cornerstone of [our constitutional] democracy.”<sup>11</sup>

In the context of accommodating the needs of visually impaired persons, any interpretation of the ALA, specifically the definition of “deed of alienation” must advance the value ‘achievement of equality’. In addition, it is submitted that “deed of alienation” is reasonably capable of being interpreted as including braille in every alienation of land where either the seller or the purchaser is a visually impaired person. The basis of the latter submission is found in the general object of the ALA, and specifically section 2(1) of the ALA, which is, to protect contracting parties against uncertainty, disputes, and possible malpractices.<sup>12</sup>

One can only ponder on the nature of certainty obtained from a contract reduced to writing, but not to braille, by a visually impaired person who is unable to ‘read’ the document, for obvious reasons. Furthermore, one need not have recourse to imaginative and wishful thinking in order to conclude that a visually impaired person is even more vulnerable to exactly those malpractices which section 2(1) of the ALA seeks to protect him or her against.

By taking into account the duty to accommodate and the importance of immovable property to any natural and, even some, juristic persons, it is submitted that any other interpretation of “deed of alienation” would perpetuate the systemic disadvantage suffered by visually impaired persons and be incongruent with the constitutional commitment to the recognition, acceptance, and celebration of difference and constitute an infringement of the right to be different, and in consequence, the right to equality. In conclusion, any other interpretation would constitute, in addition to an infringement of the right to equality contained in section 9(1) of the Constitution, unfair discrimination in terms of section 9(3) read with section 9(5) of the Constitution.

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<sup>11</sup> *Bato Star* 2004 (CC) at para. [71].

<sup>12</sup> See Chapter 3.

#### 4.1. RECOMMENDATION

As in the case of the CPA, academia ought to take the first step in supplementing existing literature on the ALA so as to make it patent to practitioners, the judiciary, the executive, and students alike that an interpretation of “deed of alienation” is to include braille in every alienation of land where either the seller or the purchaser is a visually impaired person.

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