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Caveat subscriptor, the consumer-friendly approach: An analysis of *Van Wyk v UPS SCS South Africa (Pty) Ltd*

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Abstract

Prior to the Consumer Protection Act 68 of 2008 ('CPA'), the consumer in South Africa was without substantive protection when concluding contracts with suppliers. This case note explores how the CPA has changed this position by the introduction of information-disclosure requirements in terms of s 49 of the Act ('notice required for certain terms and conditions') and the important link to s 22 of the Act, which affords the consumer the right to information in plain and understandable language. The recent judgment in Van Wyk v UPS SCS (Pty) Ltd [2020] 1 All SA 857 (WCC) is a long-awaited decision that provides clarity on aspects of the disclosure requirements that have been prescribed by the Act.

Consumer Protection Act – notice required for certain terms and conditions – powers of the court – right to information in plain and understandable language – interplay between the Consumer Protection Act and the National Credit Act

Introduction

Prior to the enactment of the Consumer Protection Act 68 of 2008 (the 'CPA' or 'the Act'), the general approach in South African law was that, once you signed a document that contained certain terms and conditions, you were bound by it. The applicable common-law maxim is caveat subscriptor, which means 'let the signer beware'. The maxim determines that a person who signs a contract is presumed to have assented to the terms of the agreement, regardless of whether or not the signer is familiar with the contents, or carefully peruses or understands the provisions of the contract (see *Afrox Healthcare BPK v Strydom*2002 (6) SA 21 (SCA)). In light of the CPA, and in particular s 49 ('notice required for certain terms and conditions'), the formalistic approach to this maxim was revisited by the court in *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC) ('*Van Wyk*').

Section 49 deals with the requirements for certain exemption clauses and gives effect to the consumer's fundamental consumer right to fair, just and reasonable terms and conditions (chap 2, part G of the Act). Since the full implementation of the CPA in 2011, consumer lawyers have been waiting with bated breath for the provisions in the CPA dealing with unfair contract terms and exemption clauses to be interpreted and applied by the courts. The *Van Wyk* decision provides a much-anticipated interpretation of some of the key provisions contemplated in the right to fair, just and reasonable terms and conditions. This right, in effect, moves away from a classical model that has been based on 'freedom and sanctity of contract', party autonomy and human dignity, towards a neo-liberal,

fairness-orientated approach (Luanda Hawthorne 'Public governance: Unpacking the Consumer Protection Act 68 of 2008' (2012) 75 *THRHR* 345 at 345–8).

This case note analyses the decision of the court in *Van Wyk* by first providing a factual background to the matter. It then assesses the interplay between the CPA and the National Credit Act 34 of 2005 ('the NCA') and the court's approach in determining the application of both Acts to this case. Thereafter, it critically assesses the effect of s 49 on consumer contracts and potential pitfalls that accompany the information-disclosure obligation introduced by this section. The case note then examines the link between the disclosure obligation in s 49 and the right to plain language in s 22 ('the right to information in plain and understandable language'), which forms part and parcel of the disclosure requirements that have been imposed on a supplier.

Facts

The plaintiff/consumer, one Van Wyk, trading as Skydive Mossel Bay, operated a skydiving business. During the period from 12 December 2012 to 31 May 2013, Van Wyk required the services of the defendant/supplier, UPS SCS South Africa (Pty) Ltd ('UPS'), for the purposes of transporting an aircraft engine from the United States of America ('the USA') to George, in South Africa. The engine of the aircraft had been sent to the USA in 2007, to be overhauled in preparation for its use in Van Wyk's skydiving business (para 2). Van Wyk reached out to UPS by way of email and enquired inter alia about the process for commencing with the required services. UPS indicated that Van Wyk was required to open an account in order to conduct business with them. This required the completion of a credit application ('the agreement'), regardless of the fact that he would be paying UPS in cash. Van Wyk completed the 'agreement' and submitted it via email to UPS on 22 January 2013 (para 3). On 31 May 2013, UPS indicated that the aircraft engine was scheduled for collection on 1 June 2013. However, the engine never arrived (paras 3 and 6). UPS notified Van Wyk, on 12 June 2013, that the aircraft engine had been damaged in transit in the USA and was a total write-off (para 6).

Following this development, Van Wyk was provided with an insurance claim form for the purpose of initiating an insurance claim. This form was completed and sent back to UPS. However, on 1 October 2013, he was informed that the shipment had not been insured. According to the terms and conditions of the agreement, UPS could only be liable for $500 (R9 291.19) per shipment in respect of ocean freight shipments. This was also the maximum amount that it would be in a position to pay out to Van Wyk in this instance (para 33). It was at this stage that Van Wyk contacted his attorney for legal advice (para 34).

Van Wyk indicated that he had read only the first page of the agreement and never suggested to UPS that he had read the document in full (para 35). Furthermore, Van Wyk indicated that he had completed the agreement solely for the purpose of opening the account with UPS (para 36). He had also wrongly assumed that UPS would have taken out the required insurance (para 37). Most significantly, Van Wyk was of the view that the agreement was governed by the provisions of the CPA, because it was for the supply of a service as contemplated in the Act (para 68).

Van Wyk maintained that the agreement incorporated provisions that purported to limit the risk of liability for both UPS and himself. However, he was never aware of these provisions, and they had not been drawn to his attention by UPS as required by s 49(3)–(5) of the CPA (para 7). Accordingly, Van Wyk sought an order, in terms of s 52(4)*(a)*(ii) of the CPA, for severance of the provisions that intended to limit UPS's risk. In the alternative, Van Wyk sought a declaratory order by the court to the effect that the relevant provisions were of no force or effect in the agreement (para 8).

UPS raised a special plea in respect of the jurisdiction of the court (para 9). This special plea does not fall within the scope of this case note, save to mention that the court found that it did have the relevant jurisdiction to decide on the matter (para 58). In respect of the plea on the merits, some of the important points that were raised by UPS were: (i) that the email correspondence between itself and Van Wyk did not

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create a written agreement between them (para 10); (ii) that UPS concluded the agreement with Van Wyk on 22 January 2013 — this was with reference to the 'credit application' (para 10); (iii) that it could not be held liable for the loss and damage to the aircraft as it was not in its custody (para 11); and (iv) that, in the alternative, if it was found that the aircraft was in the possession of UPS, then it had to be proved that the loss or damage was as a result of its gross negligence (para 12).

Furthermore, UPS generally denied that the provisions of the CPA were applicable to this case and pleaded that Van Wyk, as a businessman and owner of a sky-diving business, had signed the agreement and accordingly bound himself by its terms (para 15). UPS adopted the stance that the terms of the agreement were written in plain language and were sufficiently visible for an ordinarily alert consumer, such as Van Wyk, to notice. Therefore, according to its submission, Van Wyk should have understood the meaning and importance of the terms and conditions of the agreement (with particular regard to those provisions that limited the liability of UPS) (para 16). Lastly, UPS requested that, if the court found that it was indeed liable, its liability should be limited (para 17).

In replication, Van Wyk indicated that the agreement was concluded and submitted as a mere formality and not for purposes of seeking any credit (para 20). He also indicated that he did not reasonably understand

that the second and third pages (which were not initially furnished to him) incorporated terms and conditions that would apply to the carriage contract between the parties. This was also not explained to him by UPS (para 21). Van Wyk was thus unaware of the obligation imposed on him by the agreement to obtain his own insurance. He had assumed that insurance was included in the freight charges. Despite his experience as a businessman, Van Wyk averred that someone ought to have drawn his attention to these terms and conditions of the agreement. This averment was also in light of the fact that he had thought that UPS merely sought to capture his details in order to complete the process. This was not problematic for Van Wyk as his intention was not to have a long-term relationship with UPS (para 38). It is worth highlighting, in this regard, that Van Wyk filled in the amount of R30 000 under the heading 'credit facilities required' and, under the payment terms, he entered the words 'pay upfront' (para 27). This was indicative of his intention to pay in cash and that the agreement, to him, was a mere formality and not a 'credit application' in its true nature (para 20).

In so far as the existence of a contractual agreement was concerned, Van Wyk and UPS ultimately agreed that their contract came into existence through the completion of the 'credit application' (para 67). In this respect, it may be noted that cl 1 of the credit application stated that the agreement was subject to the standard trading terms and conditions of carriage (para 63). The standard trading terms made provision for a limitation of UPS's liability to the lower amount of either: (i) R100 per 1?000kg for any consignments to be transferred by either sea freight or other surface carriage; or (ii) R50 in respect of consignments transferred by airfreight (para 14).

Accordingly, Van Wyk instituted an action against UPS for payment of an amount of R386 140.30. This amount represented the value of an aircraft engine and included interest at the (then) prescribed rate of 15.5 per cent per annum, calculated from 12 June 2013 until the date of payment (para 1).

Court decision and discussion

Introduction

The critical discussion that follows mainly examines: (i) credit agreements in the context of the NCA, consumer agreements in the context of the CPA, the interplay between the two statutes, and the court's finding regarding the application of the CPA; (ii) the application of ss 49 and 52(4)*(a)*(ii) of the CPA, as provisions that fall under the fundamental right to fair, just and reasonable terms and conditions, as provided for in chap 2, part G; and (iii) the importance of the plain language requirement as envisaged in s 22 of the Act (and prescribed in terms of s 49).

Credit agreements, consumer agreements and the interplay between the NCA and the CPA

UPS also raised the issue, during the court proceedings, that the CPA was not applicable in this instance, as the agreement fell within the scope of the NCA. This submission was based on s 5(2)*(d)* of the CPA, which indicates that the CPA is not applicable to transactions that constitute credit agreements under the NCA. However, this subsection includes a proviso that goods or services that are subject to the credit agreement are not excluded from the application of the CPA (para 96). The court found that the agreement that had been concluded was indeed a credit agreement in terms of the NCA. This finding was made on the basis that the completion of the agreement gave rise to a credit facility, as contemplated in s 8(3) of the NCA. In this respect, the court was of the view that it was an agreement in terms of which UPS undertook to supply a service to Van Wyk and the obligation of Van Wyk to pay any part of the cost, in relation to the services, was deferred. However, the court was of the view that the CPA was nevertheless applicable because 'it was a transaction based on an agreement between two parties to supply a service in exchange for a consideration' (para 97). In addition, the court adopted the approach that, in light of the portion of s 5(2)*(d)* that provides that the goods and services that are subject to the credit agreement are not excluded from the ambit of the CPA, the supply of the service by UPS was not excluded from the ambit of the Act (para 98). The court thus found that the liability of UPS fell to be determined by taking into account whether this agreement was in compliance with the relevant CPA provisions (para 70). The interplay between the CPA and the NCA is thus of importance in the context of the court's decision to proceed with the matter within the ambit of the CPA.

Regarding the CPA, s 5 deals with the 'application of the Act'. While s 5(1) sets out the circumstances in which the Act will apply, s 5(2) indicates instances in which the Act does *not* apply (see Jannie M Otto, Corlia M van Heerden & Jacolien Barnard 'Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement' (2014) 26 *SA Merc LJ* 247 at 263). In this regard, the CPA applies to a transaction that occurs in South Africa and where goods and services are supplied in respect of such transaction (s 5(1)*(a)* and *(c)* of the CPA). A 'transaction' is defined broadly to include: (i) an agreement 'for the supply or potential supply of goods or services in exchange for consideration'; (ii) 'the supply of goods to and at the direction of the consumer for consideration'; or (iii) the performance of services 'for or at the direction of, the consumer for consideration' (s 1 of the CPA). In all three instances, the supplier must be acting in the ordinary course of business. Of particular importance to this set of facts is s 5(2)*(d)*, which indicates that the CPA is not applicable to transactions that are credit agreements as contemplated under the NCA, but the goods

and services that flow from that credit agreement are included under the scope and application of the CPA (see also Otto, Van Heerden & Barnard op cit at 263). Melville & Palmer submit that s 5(2)*(d)* is insufficiently clear in its provision that the CPA is not applicable to credit agreements as contemplated in the NCA, but is applicable only to the goods and services that are subject to such credit agreements (Neville Melville & Robin Palmer 'The applicability of the Consumer Protection Act 2008 to credit agreements' (2010) 22 *SA Merc LJ* 272 at 278). The writers observe that various sections in the CPA do not pertain directly to goods and services, but to other matters, such as marketing, with the implication that s 5(2)*(d)* may give rise to absurdities (ibid).

By contrast, the NCA defines a credit agreement as 'an agreement that meets all the criteria set out in section 8'. In this regard, s 8 is a comprehensive provision that sets out what would constitute a credit agreement and caters for credit facilities, credit transactions and credit guarantees (s 8(1) of the NCA). The court in *Van Wyk* was of the view that the agreement constituted a credit facility, and concluded that the obligation of Van Wyk to pay any part of the cost in relation to the services was deferred (para 97). A credit facility is provided for in s 8(3) of the NCA, which states that a credit facility comes into existence where, in the main: (i) there is a supply of goods or services or a payment of an amount of money; (ii) the consumer's obligation to pay is deferred or the consumer is billed periodically; and (iii) any charge, fee or interest is payable in respect of the amounts due in (i) or (ii).

Taking the above exposition into account, it is evident from the facts of the case that there was never an intention on the part of Van Wyk to defer payment in respect of his transaction with UPS. Although Van Wyk had inserted the amount of R30??000 under the heading 'credit

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facilities required', he had entered the words 'pay upfront' to reflect the payment terms (para 27). Van Wyk had indicated that he was going to pay up-front and was therefore reluctant to open an account with UPS. However, he was informed that he did not have an option, as the account number was required in terms of the 'rules and regulations imposed by the US government and customs' (para 27). It is thus clear that the agreement in question was concluded as a formality. It was not established, from the facts set out in the reported judgment, that there was any form of deferred payment, as is required by s 8(3) of the NCA. It therefore appears that the court might have erred in its finding in this respect.

Moreover, the challenge with a misdiagnosis of this nature is that s 5(2)*(d)* specifically indicates that a credit agreement will not be subject to the provisions of the CPA, but that only the goods or services to be supplied in terms thereof will be subject to the Act. This is particularly in light of the fact that the NCA contains its own provisions that regulate consumer credit agreements (see chap 5 of the NCA). Melville & Palmer submit

correctly that, inter alia, ss 49 and 52 are examples of CPA sections that would not apply to an NCA transaction. Therefore, the court could not have proceeded to assess, in terms of the CPA, the *agreement's* provisions, given that the CPA's provisions would only apply to the services, in this case, and not to the agreement itself (if it were indeed a credit facility).

However, the agreement *did* constitute a transaction, as defined in the CPA, warranting the application of the Act. In addition, s 49 of the CPA makes specific reference to a consumer agreement. A 'consumer agreement' refers to an *agreement* between a supplier and a consumer, excluding a franchise agreement (s 1 of the CPA). In this regard, an 'agreement' is 'an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them' (s 1 of the CPA). It is thus submitted that the court was correct in its finding that the agreement was subject to the CPA.

Section 49: 'Notice required for certain terms and conditions'

Section 49 of the CPA is a fundamental consumer right and, as mentioned above, falls under part G of the Act, which enshrines the right to fair, just and reasonable terms and conditions. This fundamental right is the first measure of general fairness that has been introduced into our law of contract (Philip N Stoop 'The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts' (2015) 18 *PER/PELJ* 1091 at 1118). This right regulates unfair, unreasonable or unjust contract terms; notices required for certain terms and conditions; requirements for consumer agreements to be in writing; terms, conditions, agreements and transactions that are prohibited; and the powers of the court to ensure the existence of fair and just conduct, terms and conditions (ss 48–52 of the CPA; Stoop 2015 *PELJ* op cit at 1097). Of particular importance, in the context of the *Van Wyk* case, is s 49 of the CPA, which reads as follows:

'49 Notice required for certain terms and conditions

(1) Any notice to consumers or provision of a consumer agreement that purports to:
- *(a)* limit in any way the risk or liability of the supplier or any other person;
- *(b)* constitute an assumption of risk or liability by the consumer;
- *(c)* impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- *(d)* be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk —
- *(a)* of an unusual character or nature;

- *(b)* the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
- *(c)* that could result in serious injury or death,

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

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer –
- *(a)* in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
- *(b)* before the earlier of the time at which the consumer —
  - (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
  - (ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).'

The court highlighted that it was clear from the wording of s 49(1) that any notice to a consumer, or any provision of a consumer agreement, that intends to either: (i) limit the risk or liability of the supplier in any way; (ii) constitute an assumption of risk or liability on the part of the consumer; (iii) impose an obligation on the consumer to indemnify the supplier or any other person for any reason; or (iv) involve an acknowledgement of any fact by the consumer, must be brought to the consumer's attention in both the manner and form set out in subsecs (3)–(5) (para 76).

In this respect, s 49(3) makes plain language a requirement for a provision contemplated in s 49(1). Furthermore, s 49(4) provides that the fact, nature and effect of the provision concerned should be clearly drawn to the consumer's attention in a manner and form that would be likely to attract the attention of an ordinarily alert consumer. This should be done before the consumer either: (i) enters into the transaction or agreement; or (ii) is required or expected to offer consideration for the transaction or agreement, whichever occurs first (para 77). Lastly, s 49(5) requires that the consumer be given an adequate opportunity in the circumstances to receive and comprehend the provision of the notice concerned (para 78).

Section 49 therefore makes provision for information, or prominence, requirements, when one is dealing with either exemption clauses, clauses that deal with the assumption of risk, indemnity clauses, as well as clauses that concern the acknowledgement of certain facts (Tjakie Naudé 'Part G — Right to fair, just and reasonable terms and conditions' in Tjakie Naudé & Sieg Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service, 2014) 49-2; Stoop 2015 *PELJ* op cit at 1101). It is submitted that the clause in question is an exemption clause as it was intended to limit the liability of UPS. Prior to the enactment of s 49 of the CPA, the courts adopted general guidelines when interpreting exemption clauses of a similar nature. These guidelines included considerations of whether upholding the exemption clause would: (i) be contrary to public policy (see *Johannesburg Country Club v Stott*2004 (5) SA 511 (SCA) ('*Johannesburg Country Club*') para 12; *Swinburne v Newbee Investments (Pty) Ltd*2010 (5) SA 296 SA (KZD) ('*Swinburne*') para 36; see also *Barkhuizen v Napier*2007 (5) SA 323 (CC), in the context of a time-bar clause); (ii) plainly absolve the appellant (supplier) from liability — i e, the exemption clause was required to be clear and unambiguous (see *Johannesburg Country Club* supra para 6; Yeukai Mupangavanhu 'Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel*2012 (6) SA 170 (GSJ)' (2014) 17 *PER/PELJ* 1167 at 1172; *Swinburne* (supra) para 23); (iii) be objectively reasonable, and, if so, enforceable in the circumstances (see *Naidoo v Birchwood Hotel*2012 (6) SA 170 (GSJ) para 58). In the period leading up to the implementation of the CPA, a consumer-rights-based approach started to develop in the courts, with the introduction of an 'information obligation' on persons occupying the position of a supplier (see *Mercurius Motors v Lopez*2008 (3) SA 572 (SCA) ('*Mercurius Motors*') para 33; Luanda Hawthorne '*Mercurius Motors v Lopez*2008 (3) SA 572 (SCA)' 2009 *De Jure* 352 at 360). In this respect, the court, in

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Mercurius Motors (supra) para 33, indicated that

> '[a]n exemption such as that contained in clause 5 of the conditions of contract that undermines the very essence of the contract of deposit, should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form, and not by way of an inconspicuous and barely legible clause that refers to the conditions of the reverse side of the page in question'.

The *Mercurius Motors* decision was handed down shortly before the provisions of the CPA became fully effective and s 49 introduced information disclosure requirements, in this context, as a statutory obligation towards consumers.

In *Van Wyk*, the court decided that the agreement in question was certainly an agreement that was contemplated in s 49(1), owing to the fact that the clause concerned sought to indemnify or limit the exposure of UPS. In interpreting the provisions of s 49, the court's approach was that

the provisions of the CPA ought to be considered against the backdrop of fundamental values such as dignity, equality, human rights and freedom (para 74; see also *Investigating Directorate: SEO v Hyundai Motor Distributors (Pty) Ltd*2001 (1) SA 545 (CC) paras 22–3).

The court also took into account the objectives behind the enactment of s 49 and highlighted that the section is aimed at promoting 'a fair, accessible and sustainable marketplace' for goods and services. The section also aims to provide for improved standards of consumer information in order to prohibit unfair marketing and business practices, as well as to ensure adequate promotion of responsible consumer transactions and agreements. The court was of the view that the interpretation of the section had to take into account the broader provisions of the CPA. Accordingly, the court had regard to the preamble of the CPA, which recognises that South Africa, as a nation, has been burdened with socio-economic problems such as high levels of poverty, illiteracy and other forms of inequality as a result of apartheid and past discriminatory laws (para 79). The context within which the CPA was enacted is indeed a crucial aspect of the interpretation of s 49. The provision ultimately seeks to introduce a component of substantive equality by striving to balance the powers of the consumer and the supplier in the context of consumer agreements.

The court also highlighted that s 49 aims to improve access to quality information. This is necessary in order to allow consumers to make informed choices according to their individual wishes and needs (para 80). The section specifically seeks to ensure that provisions limiting the supplier's liability, or imposing a liability or risk on the consumer, are brought to the consumer's attention. In essence, the section tries to 'temper the unjust and unfair application of the *caveat subscriptor* rule', focusing on protecting consumers who are either illiterate or unsuspecting (para 81). In the past, the South African courts applied the caveat subscriptor maxim in a formalistic and occasionally harsh manner. A party to an agreement could escape the application of the maxim only where she was able to prove that the agreement was signed while labouring under a material and reasonable mistake (see *RPM Bricks (Pty) Ltd v City of Tshwane Metropolitan Municipality* [2007] 3 All SA 423 (T) para 41). Of course, the guidelines established by the courts, as mentioned above, would also find application where relevant. The enactment of the CPA was an attempt to introduce a statutorily enshrined consumer-friendly approach in the context of applying the caveat subscriptor maxim. An obligation is now placed on a supplier of goods or services to ensure that the consumer is aware of the existence of certain provisions in an agreement — including the content, as well as the consequences, of such clauses (para 83). The result is that consumers no longer sign agreements at their own peril. The court was thus of the view that s 49 of the CPA was a necessary and long-overdue provision (para 86).

Stoop submits that, once a consumer is aware of a contractual term, the consumer is able to challenge it or exercise any right under that term (Stoop 2015 *PELJ* op cit at 1094). Furthermore, Stoop correctly submits that the s 49 information-disclosure requirement also ensures that consumers give informed consent with regard to the consumer agreements that they conclude (ibid at 1095). By contrast, it is ironic that s??49 can become somewhat of a 'double-edged sword' in the hands of the consumer. Naudé submits in this regard that the fact that the clause is drawn to the attention of the consumer may be used to 'strengthen the hand of the supplier to argue that they are always fair' (Naudé in Naudé & Eiselen (eds) op cit (Revision Service 1, 2016) 49-5). However, Naudé does mention that the inclusion of a grey list, which sets out terms that are presumed to be unfair or unreasonable, in reg 44 of the Consumer Regulations, may mitigate this potential challenge (ibid). Mupangavanhu also submits that the provision does not afford the consumer sufficient protection, given that service providers are still able to rely on exemption clauses, provided that they alert the consumer to them (Mupangavanhu op cit at 1180). Mupangavanhu further indicates that such awareness may hinder the consumer's capacity to rely on defences such as contractual mistake (ibid). This begs the question whether a consumer in the position of Van Wyk would have lost his or her protection under consumer law, if he or she had been alerted to the clause. In answering this question, one could, as a first step, assess whether the contractual term falls within the scope of s 48 of the CPA. Section 48(2)*(d)*, which is relevant to the facts in *Van Wyk*, reads as follows:

> 'Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if —
>
> . . .
>
> *(d)* the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and —
>
> (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
>
> (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.'

Therefore, even if the clause had been brought to Van Wyk's attention, it is submitted that he would still be afforded the protection under the CPA, if the clause concerned were to be found by the court to be unfair, unreasonable, unjust and unconscionable (s 48(2)*(d)*(i); Mupangavanhu op cit at 1182). This would be a determination for the court to make, in terms of s 52 of the CPA, and would remove the potential prejudice to a consumer in Van Wyk's position. Mupangavanhu correctly submits in this

regard that the fact that the clause was brought to the consumer's attention should not prejudice the consumer as, in most instances, consumers have 'no option but to sign the document' (ibid). This was indeed the position in which Van Wyk had found himself. As a second step, one could assess whether the clause falls under the clauses contemplated in reg 44, as alluded to by Naudé, or those prohibited by s 51 of the Act (Naudé in Naudé & Eiselen (eds) ibid; Tjakie Naudé 'Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008' 2017 *TSAR* 138).

The determination in *Van Wyk* was made by the court in terms of s 52(4)*(a)*(ii). Broadly speaking, s 52, entitled 'powers of the court to ensure fair and just conduct, terms and conditions', provides the courts with remedies in the event of non-compliance with provisions such as s 49. One of the biggest weaknesses in s 52 is the fact that it is drafted within a paradigm that provides exclusive jurisdiction to the courts (Naudé in Naudé & Eiselen (eds) op cit (Revision Service 3, 2018) 52-3). This limitation does not take into account the vulnerability of consumers and the reality that: (i) the court system is not easy to navigate; and (ii) matters are pending before courts for long periods due to backlogs, meaning that a matter will not be resolved efficiently, as is envisaged in s 3(1)*(a)* of the Act. This is certainly a provision that needs to be revisited, in the context of some of the existing bodies that are available within the consumer protection framework, with a view to making access to redress more accessible and efficient.

Judicial exclusivity aside, Sharrock correctly submits that the enforcement provisions of the CPA, as set out primarily in s 69, are another challenge for consumers when seeking recourse in respect of unfair contract terms (Robert D Sharrock 'Judicial control of unfair contract terms: The implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 324). In this regard, s 69*(d)* provides that persons with locus standi in terms of s 4(1) of the CPA may approach a court with jurisdiction only when 'all the other remedies available to that person in terms of national legislation have been exhausted'. Sharrock submits that s 69*(d)* contradicts the purpose of the CPA of affording 'an accessible, effective and efficient system of redress' to consumers, as the section is in conflict with s 52(1)*(b)* (ibid). This provision would be applicable in

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instances where a consumer's attention had been drawn to the provisions of the agreement in question, but the provision was still 'unfair, unreasonable, unjust or unconscionable', as contemplated in s 48(2)*(d)*. Provision is made, in s 52(1)*(b)*, for the court's intervention in instances where there is no other remedy available that is sufficient for the purposes of correcting the unfairness in question. However, Sharrock submits that s 69*(d)* does not envisage this direct-access opportunity envisaged in s 52(1)*(b)* (ibid). He submits that the matter pertaining to when the court may intervene requires clarification on an

urgent basis, and that provision should be made for direct access to the court in instances where other remedies are insufficient, as envisaged in s 52(1)*(b)* (ibid).

On the facts before the court, s 52(4) was applicable. This subsection provides that where it is alleged that, inter alia, there was a failure to satisfy the requirements of s 49, the court may make an order severing the provision from the agreement or declaring it to have no force or effect. However, the concerns raised by the writers above are still applicable, in that the court system is still not efficient or readily accessible, and the s 69*(d)* process, which provides that the court should be the last point of recourse, may impede a consumer's access to redress. It is recommended, in this respect, that the hierarchy of the fora established by s 69 in consumer protection matters should be revisited by the legislature in order to create clarity for consumers.

Nonetheless, the court in *Van Wyk* applied the provisions of s 52(4)*(a)*(ii), with the result that the clause in question was severed and, in the absence of such a clause, UPS was found to be liable for the loss incurred by Van Wyk (para 116).

The important link between section 49 and the plain language requirement in terms of section 22

The court made it clear that s 49(3) of the CPA requires that the notice, provision or condition concerned be written in plain language, as provided for in s 22 (para 77). Barnard submits that the right to information in plain and understandable language has been elevated to a fundamental consumer right that applies to all aspects of dealings, as envisaged in the CPA (Jacolien Barnard 'Where does the vulnerable consumer fit in? A comparative analysis' 2014 *Journal of Consumer & Commercial Law* 3 at 11; see also Mornè Gouws 'A consumer's right to disclosure and information' (2010) 22 *SA Merc LJ* 79 at 85). In this respect, s 22 makes provision for the right to information in plain and understandable language. Of importance is s 22(2), which indicates that, inter alia, a document will be regarded as being in plain language if

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

Four aspects, as set out in s 22(2)*(a)–(d)*, ought to be taken into consideration when determining whether a document, notice or representation is in plain language. These include, in broad terms: (i) context and comprehensiveness; (ii) organisation, form and style; (iii) vocabulary, usage and sentence structure; and (iv) assistive aids

(see also Phillip N Stoop & Chrizell Chürr 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' (2013) 16 *PER/PELJ* 515 at 530).

As mentioned above, the ultimate purpose of better information disclosure is to lead to better decision-making by consumers (Elizabeth de Stadler & Liezl van Zyl 'Plain language contracts: Challenges and opportunities' (2017) 29 *SA Merc LJ* 95 at 99; Gouws op cit at 85). The plain language obligation is specifically mentioned in s??49 as a requirement for any notice or document, as the ultimate purpose is to ensure that consumers understand the information that is disclosed to them, with the view to better influence their choices (see Stoop & Chürr op cit at 528). The first component of what constitutes plain language, in terms of s 22(2), indicates that there is a need to identify the target audience. There are differing views in this regard. One view is that there should be different sets of terms and conditions designed for several target audiences, while the alternative view is that the supplier could cater for the most vulnerable consumer (De Stadler & Van Zyl op cit at 104). De Stadler & Van Zyl argue that challenges exist in so far as identifying the audience is concerned (ibid at 104-111).

Stoop submits that the requirement of plain language seeks to advance procedural fairness in ensuring that the process of contracting between a consumer and a supplier is fair (Philip N Stoop 'Part D — Right to disclosure and information' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Revision Service 3, 2018) 22-2). In this respect, Stoop highlights that procedural fairness is given effect to by s 49 (Stoop 2015 *PELJ* op cit at 1101). Stoop submits further that a key aspect of ensuring procedural fairness, in the context of consumer documents, is transparency, and this speaks to various components including 'prominence given to certain terms, size of print, language and structure of the contract, as well as adequate opportunity for reflection' (Stoop in Naudé & Eiselen (eds) op cit (Revision Service 3, 2018) 22-3).

The court also provided clarity on how the notice should be brought to the attention of a consumer — that is, what it means to have the provision brought to the attention of the consumer in a 'conspicuous manner', or in a form that is inclined to attract the attention of a consumer who is ordinarily alert (s 49(4)*(a)* of the Act). In this regard, the court indicated that a provision contemplated by s 49 could not be concealed in a strange section of an agreement, of which the consumer is unaware, or which would not carry any meaning to the consumer concerned (para 87). The aim is to ensure that the consumer is neither caught off guard nor taken advantage of (para 88). The court also highlighted that, in the circumstances, the two additional pages to the agreement were written in extremely small font, which was difficult even for the court to read (para 89). Furthermore, the court rejected UPS's defence that Van Wyk

was an experienced businessman and it concluded that UPS was not in a position to determine the level of sophistication of the consumer, particularly where they had only communicated via email (para 92). It stated that, in this instance, even an experienced businessperson would have required an explanation of the nature and effect of the clauses in question. Importantly, the court concluded that an absolute obligation is placed on suppliers (para 93).

This outcome is a major shift as the court makes clear that the 'ordinary consumer' is not an expert, or someone with a great deal of exposure to a specific transaction. In fact, it may not even necessarily matter how much exposure the consumer in question might have had. Although UPS tried to motivate that Van Wyk had had similar dealings before, and that he was a businessman, the court indicated that this did not matter, as the obligations that are placed on a supplier in terms of s 49 are absolute (para 93).

De Stadler & Van Zyl also make a compelling argument that information disclosure, in compliance with plain language requirements, will not on its own necessarily lead to consumers making better decisions (De Stadler & Van Zyl op cit at 102). There is a need, in this respect, to have a better understanding of the background and psychological factors that hinder consumers' decision-making, and their capacity to digest information (ibid). This speaks to the reality that the right to have information disclosed in plain language cannot be addressed through legal mechanisms alone, and requires a multidisciplinary approach in order to be effective.

Lastly, the impact of language on compliance with the plain-language requirement cannot be ignored in the South African context, particularly given that we have eleven official languages (Stoop & Chürr op cit at 534). In this regard, Stoop & Chürr question how it would be possible to comply with the plain language requirement if consumers do not understand the language that is used in a document (ibid). The authors also highlight, however, that it would be extremely burdensome if there was a requirement that all documents be translated into all eleven official languages (ibid). It is a possibility, however, that a consumer who does not understand the document in question may expend undue effort in an attempt to understand what is before him or her (ibid). De Stadler & Van Zyl submit that, where the average literacy of a group is attached to a particular language, this should be considered as a factor, by the supplier, to make the necessary communication available in that language (De Stadler & Van Zyl op cit at 108). This appears to be the most viable solution in the South African context, but it will certainly place a further burden on the shoulders of suppliers.

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Concluding remarks

The *Van Wyk* decision is an important judgment in the context of the right to fair, just and reasonable terms and conditions in that it deals with key issues, including the role and interpretation of ss 49 and 52, as well as the inextricable link of the disclosure requirement to the right to have information disclosed in plain language. As mentioned above, although the court was correct in its finding that the CPA applied to the agreement, it erred in its finding that the agreement was also a credit agreement in terms of the NCA. Such a result would lead to duplication, which is not permitted in terms of s 5(2)*(d)* of the CPA. It is submitted, in this regard, that the agreement itself cannot be subject to both the NCA and the CPA. It is clear that the subject of this judgment is the agreement itself, and not the service that was provided by UPS, which is the exception that is catered for in terms of s 5(2)*(d)* of the CPA.

In addition, the information-disclosure requirement that was introduced by s 49 of the CPA has substantially altered the application of the caveat subscriptor maxim. There is now a clear legal duty on the supplier to ensure, in the manner contemplated in s 49, that the consumer is aware of provisions that may be prejudicial to the consumer. However, a consumer who is alerted to provisions, as contemplated in s 49, is not necessarily prejudiced or without further recourse, because terms envisaged by s 49 as being unfair, unjust or unreasonable will fall within the scope of s 48(2)*(d)* and may potentially be declared such by the court, in terms of s 52.

Finally, the plain language requirement that is tied to s 49 is of crucial importance. In this regard, it appears that the court's approach was one which broadened the meaning of an 'ordinary consumer' to cover all consumers, which is in line with the protection of vulnerable consumers, as envisioned in the CPA (see also Barnard op cit at 11). It is submitted that it may be worthwhile to refine the qualifications included in s 22 to cater for the broader consumer market, as opposed to targeted audiences, as the section is currently drafted.

In modern-day transactions where terms and conditions can be accepted by a simple click of the button, suppliers need to be even more alert, in relation to their additional obligations, as prescribed by the CPA, and, in particular, to the consumer-friendly approach that the courts are following in light of the legislative provisions. The *Van Wyk* judgment is thus a welcome decision for the guidance it affords on the interpretation of some of the key provisions contained in part G of the CPA.

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