UNREASONABLE, UNCONSCIONABLE AND OPPRESSIVE CONTRACT TERMS IN SOUTH AFRICAN AND WESTERN AUSTRALIAN CONSUMER LAW

by

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ABSTRACT

Unreasonable, unconscionable and oppressive contract terms have for a long time been a subject of concern. In South Africa, the matter enjoyed the attention of the South African Law Commission and their recommendations regarding unreasonable, unconscionable and oppressive contract terms had the potential to adddress some of the concerns associated with these terms. However, instead of implementing the recommendations of the Commission *in toto*, the Consumer Protection Act 68 of 2008 was implemented in April 2011 and addressed only a number of concerns raised by the Law Commission.

Against this background, this dissertation outlines the developments of the South African Consumer Protection Act in comparison with the Ausralian Consumer and Competition Act specifically in respect of unreasonable, unconscionable and oppressive contract terms. The dissertation compares the South African Law Commission's recommendations with the Australian Productivity Commission's recommendations, (both Commissions compiled reports regarding their respective country's consumer law and focused on unfair terms) and investigates how these recommendations were accepted and implemented by each country's legislatures. It is argued that the South African Consumer Protection Act should have considered including more of the recommendations made by the South African Law Commission than it did.

Fundamental aspects pertaining to any debate on unreasonable, unconscionable and oppressive contract terms is fairness and the Constitution of the Republic of South Africa, 1996. There is a body of academic work dedicated to the role of the Constitution in law of contract and how it should be used to infuse fairness into contracts. Ultimately, the reluctance of the courts to apply the Constitution in the realm of contract law re-iterates the need to have dedicated legislation that addresses recurring issues pertaining to unreasonable, unconscionable and oppressive contract terms. There is a great deal of emphasis placed by both countries' Commissions on the need for substantive fairness and not merely procedural fairness and this aspect is elaborated on in this disseration.

In the final instance, this dissertation discusses South Africa's more conservative approach to unfair terms in consumer law in comparison to Australia's approach and concludes with a thought on whether the South African legislature could have prevented some of the current *lacunae* pertaining to unfair contract terms. In comparison with Australian law, it is submitted that there were in fact ways in which the South African

legislature could have dealt with these problematic terms and examples of these solutions are postulated in the dissertation.

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LIST OF ABBREVIATIONS

CPA Consumer Protection Act 68 of 2008.

ACCC Australian Competition and Consumer Commission.

ACL Australian Competition and Consumer Act 51 of 1974, as amended, taking into account amendments up to Act No. 148 of 2010 or referred to as Competition and Consumer Act 2010.

DTI Department of Trade and Industry

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CHAPTER ONE: INTRODUCTION AND PROBLEM STATEMENT

Unreasonable, unconscionable and oppressive contract terms have been the subject of debate for some time. Case law reveals that there is tension between the trite principle of *pacta sunt servanda* and considerations of fairness that aim to temper the harsh effects of oppressive terms.[1] The first attempt at legislative intervention was preceded by an investigation by the South African Law Commission on unreasonable stipulations in contracts and the rectification of contracts.[2] Unfortunately, only some of the Law Commission's recommendations have been incorporated in the South African Consumer Protection Act.[3] The report created by the Law Commission presented suggestions on how unfair contract terms should be dealt with by the new CPA that was in the pipelines. However, despite these suggestions the legislature appears to rather have elected to attempt to outlaw a number of "typical" unfair contract terms with the CPA, instead of providing specific clarity through the legislation on how to recognise such terms and deal with them.

Although the CPA has brought long overdue consumer legislation to South Africa and goes a long way in addressing issues relating to unfair contract terms, there are still many transactions that fall outside the ambit of the CPA, and thus there are still many instances where unfair terms are problematic. The South African courts and the Consumer Commission, due to the legislature's omitting of some of the recommendations as set out in the Law Commission's report, are now saddled with the task of unpacking the CPA in respect of these kinds of terms. On the whole, unfair, unconscionable and oppressive contract terms have not been "eradicated" (for lack of a better word) *in toto*.

By way of comparison, the Australian Competition and Consumer Act[4] came into operation three decades ago and has since been amended by Act No. 148 of 2010.[5] Unlike the CPA, the amended Act specifically incorporates definitions for both unconscionable terms[6] and unfair terms.[7] In addition, it describes the consequences of the inclusion of such terms in contracts. Moreover, in 2013, the Australian Competition and Consumer Commission

[1] *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).
[2] The South African Law Commission "Report on unreasonable stipulations in contracts and the rectification of contracts" Project 47 (1998).
3 The Consumer Protection Act 68 of 2008 ("CPA").
[4] Australian Competition and Consumer Act 51 of 1974, as amended, taking into account amendments up to Act No. 148 of 2010 ("ACL" or "Australian consumer law" or "the amended Act").
[5] ACL (n 4).
[6] ACL (n 4) schedule 2 Chapter 2.
[7] ACL (n 4) schedule 2 Chapter 2-3.

("ACCC") also published a report on unfair contract terms and provided a review of the industry outcomes to evaluate the general compliance with the Australian consumer law.[8]

This dissertation seeks to compare South African and Australian consumer law,[9] specifically in respect of unfair, unconscionable and unreasonable contract terms. It is argued that the South African Law Commission's recommendations should have been implemented in order to create more certainty regarding these types of terms, especially in light of the recommendations bearing a close resemblance to the changes that the Australian consumer law underwent in its progression to reach the point it is at today.

[8] The Australian Competition and Consumer Commission "Unfair Contract Terms: Industry Review Outcomes" Report (March 2013) ("ACCC's Report").

[9] Consumer law in this dissertation does not include credit transactions and financial products.

CHAPTER TWO: SOUTH AFRICAN LAW COMMISSION'S REPORT ON UNREASONABLE STIPULATIONS IN CONTRACTS AND THE RECTIFICATION OF CONTRACTS

2.1 Discourse on fairness in South Africa

This chapter sketches a background as to what prompted the government to initially appoint the Law Commission and have the Law Commission consider the issues surrounding unfair terms. This is in fact an age-old and much-debated issue in the consumer-law realm. This chapter sets out parts of the the history and development of the CPA, because the Law Commission's investigations into the consumer issues on unfair terms and their recommendations all form an essential part of why the CPA was eventually developed.

As a point of departure, it is important to point out that the Law Commission was mandated to create a community-orientated body that would be viewed by the public as a public body that is concerned about, and driven by, their needs and to be seen as a bridge between the people and the law.[10] The South African Law Commission Act,[11] in section 4, sets out the main objectives of the Law Commission, namely to "do research with reference to all branches of the law of the Republic and to study and investigate all such branches in order to make recommendations for the development, improvement, modernisation and reform thereof…".[12]

In order for the Law Commission to fulfil its duties and remain relevant to the community and the government, it needs to provide the government with logical advice which must be backed by extensive research and effective public consultations.[13] The public consultations are necessary to ensure that participatory democracy is utilised so that the public is consulted regarding the law that influences them and it also ensures that the law develops together with society.[14] The advantage of this methodology is that laws that are developed in such a manner are more likely to have efficiency and be accepted by the society in question.[15]

The Law Commission sometimes invites consultation by issuing discussion papers before the publication of their report. A discussion paper is a public document, as it is

[10] South African Law Commission *24th Annual Report* (1996) 1.
[11] The South African Law Commission Act 19 of 1973.
[12] Annual Report (n 10) 5; South African Law Commission Act (n 11) section 4.
[13] Annual Report (n 10) 1.
[14] *Ibid*.
[15] *Ibid*.

published with a view to receiving comments. In addition, it serves as evidence that the Law Commission has given consideration to the issue at hand and has investigated it thoroughly.[16] It is then customary to issue a report after a discussion paper. Furthermore, the South African Law Commission Act requires the Law Commission to provide a report on any matter investigated by it and the Commission must then submit draft legislation, if any, together with the report to the Minister for consideration.[17]

Unfair terms in contracts have been problematic for some time. There was a discussion paper ("discussion paper 65"), which preceded the Law Commission's report, and which was published by the Law Commission in July 1996.[18] This report aimed to inform the general South African public of the Law Commission's concerns, views and suggestions, with the aim of utilising the received feedback to eventually formulate South African consumer law. More specifically, the aim of the investigation that was undertaken was "to determine to what extent adequate measures exist in South African law to restrict unreasonable stiulations and practices in contracts and whether those measures meet the needs of a modern South African society."[19] Discussion paper 65 was published for comment and general information, and it was decided that more discussion was necessary and that legislation had to be drafted.[20] This all showed that there was a definitive need for the implementation of dedicated consumer law legislation.[21]

Briefly, (and this will be discussed in further detail below) the discussion paper investigated whether contracts, entered into on a daily basis by parties, satisfied the parties' needs, especially when the terms in the contract were subsequently found to be unconscionable or unfair and in addition, what action the courts could take in granting relief in this type of situation.[22] The unconscionability and good faith criteria were considered in this discussion paper, as well as whether the courts would require guidelines to outline the ambit of the proposed legislation.[23] This served as the basis of Project 47, which is the report submitted on the investigated topic by the Law Commission, which stems from discussion paper 65's results.[24]

[16] Annual Report (n 10) 2.
[17] *Ibid* 16.
[18] Law Commission Report (n 2) 5 and Annual Report (n 10).
[19] Annual Report (n 10) 36.
[20] *Ibid*.
[21] *Ibid* 35.
[22] Annual Report (n 10) 37.
[23] *Ibid*.
[24] Law Commission Report (n 2) 3.

It is not possible in South Africa to discuss fairness without taking the Constitution into account. Not much time will be spent on this aspect. However, it will be addressed in the following chapter. It will further be considered whether the CPA has the Consitution manifested within it.

2.2 Comprehensive discussion of a number of issues raised in the law report

The Law Commision's report brings to light that there has been a demand for recognition of fairness in contracts, but that there is also a need for the implementation of a recognised method to regulate unfair contracts.[25]

This stems not only from a South African standpoint but also from a foreign one, as foreign jurisdictions have recently been adopting measures to address unfair terms, or have been extending their legislative procedures by amending relevant Acts which recognise the need for unfair contracts to be regulated.[26] The South African Law Commission's report sets out two clear annexures: A recommended "Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms"[27] and "the Working Committee's Proposed Unfair Contractual Terms Bill".[28] The focus of this discussion will be on the proposed "Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms"[29] annexure and the discussion in respect of same by the Law Commission where necesssary.

The Law Commission recommended that annexure A be passed as an Act on its own. However, this recommendation was not implemented as its own Act.[30] That said, annexure A was largely incorporated into the CPA, although it was not done so in its entirity and this has led to the *lacuna* alluded to in the introduction regarding the need that exists for the South African courts and the Consumer Commission to further unpack what constitutes an "unfair term", especially in light of the fact that the suggested bill on unfair contractual terms is not included at all.

It is interesting to note that the Law Commission's report included provisions on how to deal with the control of unfair terms and even went a step further and provided a draft concept on what a separate act governing just this element of unfair terms should look like (as

[25] *Ibid* xiv.
[26] *Ibid*.
[27] *Ibid* 218, Annexure A.
[28] *Ibid* 219-220, Annexure B.
[29] *Ibid* 208-218, Annexure A.
[30] Sharrock "Judicial control of unfair contract terms: the implications of consumer Protection Act" 2010 *SA Merc LJ* 298.

mentioned above). The Department of Trade and Industry[31] also initially included provisions dealing with the control of unfair terms in the draft consumer protection bill.[32] However, in both cases this aspect did not seem to make it into the final version of the CPA.[33]

i. Powers of the courts

A very real concern is raised in the report regarding the possibility of foreign contracting parties being dissuaded from concluding contracts in South Africa, thus inhibiting the South African investment market. This concern is based on the premise that South African courts have the power to review their contracts in order to ascertain whether the contracts comply with the principles of contractual fairness.

It is suggested that an introduction of measures against unfair or unconscionable terms be brought about in South Africa in order to be in line with the foreign jurisdictions that recognise and require compliance with the principle of good faith in contracts.[34]

A critisism, by the minority, was acknowedged in the Law Commission's report and this critisism was that the general power of review that the courts would be empowered with in terms of the Consumer Protection Bill 2006,[35] was already sufficiently dealt with by the already standing common-law principles of South Africa.[36] This is, however, the minority opinion and the majority opinion remained that there was a need for legislation in this area and hence the process of legislating the South African consumer law began.[37] The development of the CPA is not merely a codification of the common-law, but in fact advances consumer law in South Africa, even though the change has not been as radical as some might have hoped.

ii. Fairness criterion and guidelines

The Law Commission's report, in annexure A, contains many factors that concern substantive fairness in their list of guidelines[38] and the reason for this is because the Law Commission's report raises many issues which led to the suggested development that the new proposed

[31] The Department of Trade and Industry of the Republic of South Africa ("DTI").
[32] Naudé "Unfair contract terms legislation: The implications of why we need it for its formulation and application" 2006 *Stell LR* 362.
[33] Law Commission Report (n 2) 208-218, Annexure A.
[34] *Ibid* xiv.
[35] The Consumer Protection Bill, 2006; Government Gazette number 28629, Notice 418, date of Gazette 2006-03-15 ("Consumer Protection Bill" or "the Bill").
[36] Law Commission Report (n 2) 35.
[37] Naudé 2006 *Stell LR* (n 32) 362.
[38] Naudé 2006 *Stell LR* (n 32) 374.

consumer law must take cognisance of what constitutes "substantive unfairness" and not only what constitutes "procedural unfairness".

These were issues such as it being extremely common that consumers do not get to read all of the terms in contracts and often there are "standard terms" that a supplier places into a contract, often to protect themselves, which can be, and often are, either unfair or non-negotiable with the consumer.[39] A phrase which expresses the reality of this problem extremely well is that a "proper evaluation and balancing of [all] the consequences of a transaction does not normally occur"[40] in a contractual relationship. It is for this reason that the legislature needed to get involved and assist the consumer in order to protect the freedom of contract.[41]

Often a consumer is faced with a situation where a supplier is not prepared to negotiate their terms or even if the supplier is prepared to negotiate their terms, it would take the consumer too long to go through a complex list of terms and attempt to understand the full consequences of these terms every time he or she entered into a transaction. This is why focusing on the core terms, having legislation to control terms, and ensure fairer terms are placed into standard-form contracts or general contracts was a desirable product and understandably justifiable.[42]

This ties in with the principles of good faith and public policy as well, as a consumer is often the weaker bargaining power in the contracting relationship and as such it is in the public's interest to curb this kind of contractual abuse.[43]

In Chapter Four: below on the development of the CPA, the guidelines that the Law Commission set out are mentioned and compared with their suggestion of creating a legislated list of suspect terms or prohibited terms which they then did not actually include in their report *per se*, but rather in the form of guidelines. In essence, the Law Commission's recommended view was that there was a need to implement legislation that would essentially legislate against unfair, unreasonable and unconscionable contract terms and this was justified on the premise that such legislation would need to have a "fairness criterion [which would need] to be applied"[44] and that "the powers of the courts"[45] would be clearly set out

[39] *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA).
[40] Naudé 2006 *Stell LR* (n 32) 366.
[41] *Ibid* 366.
[42] *Ibid* 367.
[43] *Ibid* 371.
[44] Law Commission Report (n 2) 35.
[45] *Ibid*.

along with an implementation of "guidelines guiding the courts and administrative tribunals"[46] and that all of this would result in effective consumer law being brought about.

[46] *Ibid*.

CHAPTER THREE: THE SOUTH AFRICAN CONSTITUTION AND FAIRNESS OF CONTRACT TERMS

3.1. Introduction

This chapter discusses the link between the bill of rights and its horizontal application, and the concept of good faith, public policy and fairness. This dissertation will not place much focus on this aspect nor dedicate abundant discussion to this topic. However, in South Africa, the importance of considering the Constitution and how it will affect matters regarding fairness cannot be disregarded and a brief background needs to be sketched to place the link between the Constitution and fairness into context.

The bill of rights did not only affect constitutional law. Rather, it has played a part in affecting other areas of law in various ways, contractual law being but one of the areas of affected law.[47] There is of course the overall question of whether the constitution should at all be invoked when it comes to law of contract. Although this topic is far too wide to be argued here, it is submitted that those who rely on the Constitution to infuse fairness into their contracts, often fail to make a case that *all* cases that are alike should in future be treated in the same manner, or simply, whether the court's interference or changing of common law to align it with the constitution is warranted because parties to similair contractual disputes will henceforth benefit from a fairer dispensation. This approach is in fact the result of the abolition as a so-called abstract value was transported into contract law by the Roman- law defence of bad faith or the *exceptio doli.*[48] Courts used this defence "to introduce various equitable doctrines, mostly originating from English law but unknown to Roman-Dutch law – such as fictitious fulfilment of conditions, rectification and estoppel into our contract law."[49]

Much to the disappointment of the proponents of good faith, in his majority judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas*,[50] Joubert JA pronounced the *exceptio doli* a "superfluous defunct anachronism", effectively abolishing the principle. In the wake of this judgment many called for legislative intervention and others debated the possibility of using public policy as an alternative concept to introduce fairness and good faith into contract

[47] Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* (2007) 73.
[48] Brand "The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution" 2009 *SALJ* 71 73.
[49] *Ibid*.
[50] *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A). See Hawthorne "The end of bona fides" 2003 *SA Merc LJ* 271 272.

law.[51] What is therefore clear is that the abolition of the *exceptio doli*, combined with the subsequent, repetitive call for legislative intervention and several (failed) attempts at enacting proper legislation often prompt litigants to resort to the Constitution as a means to infuse fairness into contracts. This chapter briefly discusses the application of the Constitution in the sphere of contract.

3.2.Horizontal application of the Constitution

The traditional approach that the Constitution only has application between the state and private entities is deteriorating, or rather has fused into a more modern law where public law and private law mesh.[52] There have been conflicting decisions in South African courts[53] in respect of determining the extent of the horizontal application of the bill of rights in private law.[54] The reason why this is mentioned is due to the connection that fundamental rights in the Constitution have with the common law, especially when one is considering the resolution of private law disputes,[55] and also due to the fact that the CPA is an attempt to legislate the common-law position of consumer law and further enhance consumer law with public policy and the principles of good faith kept in mind.

In the case *Du Plessis v De Klerk*,[56] the Constitutional Court judged on the interim constitution that "a court shall have due regard to the spirit, purport and objects of this Chapter [ie the Bill of Rights]"[57] and the court gave a number of factors for when one could consider the horizontal application of the bill of rights. This only changed slightly with the Consitution of 1996,[58] but only insofar as there were fewer instances in which the bill of rights could apply horizontally.[59]

The sections in the Constitution which are the most relevant to bring to light are section 8(3) and section 39(2). In short, section 8(3) states that when the "Bill of Rights [is being applied] to a natural person or juristic person […] [and the court needs] to give effect to a right in the Bill, [it] must apply or, if necessary delevop, the common law to the extent that

[51] Brand (n 48) 74. In general, see Lewis "The demise of the *exceptio doli*: Is there another route to contractual equity?" 1990 *SALJ* 26 at 30. See also Millard "Through the looking glass: Fairness in insurance contracts – a caucus race?" 2014 *THRHR* 1 5 – 6.
[52] Van Aswegen "The implications of a Bill of Rights for the law of contract and delict" 1995 *SAJHR* 50 51.
[53] The Supreme Court of Appeal and the Constitutional Court.
[54] Van Der Walt "Progressive indirect horizontal application of the bill of rights: Towards a co-operative relation between common-law and constitutional jurisprudence" 2001 *SAJHR* 342.
[55] *Ibid*.
[56] *Du Plessis v De Klerk* 1996 3 SA 850 (CC).
[57] Van Der Walt 2001 *SAJHR* (n 54) 344.
[58] The Constitution of the Republic of South Africa, 1996 ("the Constitution").
[59] Van Der Walt 2001 *SAJHR* (n 54) 346.

the legislation does not give effect to that right".[60] Section 39(2) states that "when interpreting any legislation and when developing any law […] every court, […] must promote the spirit, purport and objects of the Bill of Rights".[61] Thus the quandary of when the horizontal application of fundamental rights (whether indirectly or directly) will be applicable in private-law circumstances is partially solved in that it applies when the common-law rules governing the private law do not have statutory private law rules already governing them.[62] When there is a statutory law governing the private law rules, the Constitution can still apply in relation to section 8(3) as mentioned above or where the case deals with some form of constitutional review.[63] In terms of section 8(3) mentioned above, the door is open for the courts to mould the law, including private law governing private contracts.[64] This is because the bill of rights and the common law are complementary to each other and as such a rule in common law of general application must be equal to all and not arbitrary.[65]

Indirect horizontal application of the bill of rights is when the bill of rights has a radiating effect on the common law and this is seen when the common law is interpreted and the broad principles of the law are applied (such as public policy and good faith).[66] For example, "[i]n *Neugebauer and Co Ltd v Hermann*,[67] Innes CJ indicated that [t]he principle is fundamental that *bona fides* is required by both parties to a contract."[68]

This broadly shows how the application of the Constitution has moved into the horizontal sphere and that it needs to be taken into account when considering the development of the common law.

3.3.Good faith, the Constitution and the CPA

While considering the element of good faith, it is worth noting that there is a "tension between clear-cut rules and open-ended principles, such as reasonableness and good faith, which [are] central to common-law institutions".[69] However, it has been pointed out that the notion of contract law is premised on these very principles.[70]

[60] Van Der Walt 2001 *SAJHR* (n 54) 346. See section 8(3) of the Constitution.
[61] Van Der Walt 2001 *SAJHR* (n 54) 346. See section 39(2) of the Constitution.
[62] Van Der Walt 2001 *SAJHR* (n 54) 346-347.
[63] *Ibid* 346-347.
[64] Cornelius (n 47) 80.
[65] *Ibid*.
[66] Van Der Walt 2001 *SAJHR* (n 54) 352.
[67] *Neugebauer and Co Ltd v Hermann* 1923 AD 564.
[68] Cornelius (n 47) 85.
[69] Van Der Walt 2001 *SAJHR* (n 54) 360.
[70] Van Aswegen 1995 *SAJHR* (n 52) 67-68.

A good example of this overlap would be where the court has held that a term that is contrary to public policy and is unfair and causes injustices between men, is illegal.[71] The Constitution, except in certain instances as per its limitation clause, prohibits fundamental rights being limited whether by legislation or by common-law rules.[72]

There is a general principle which has developed in common law regarding contracts, which says that a contract will be illegal when it is contrary to public policy.[73] This allows for a wide interpretation when dealing with contracts and their terms and determining whether particular terms are "unfair" or "unconscionable".

This is also where the new developments in the consumer law legislation tie in to the common law, and also where the slight meshing of the Constitution and concept of good faith attempt to come together. This approach of using the Constitution or the principle of good faith when interpreting contracts and contractual terms, has been recognised in South African case law which comprises the common-law position.

In the leading case of *Barkhuizen v Napier*[74] the court had to consider what to do when contractual terms are incompatible with constitutional principles due to the terms being contrary to public policy. The court held "that public policy had to be determined with reference to the Constitution, so that a contractual term that violated the Constitution [would be] by definition contrary to public policy and therefore unenforceable."[75] The court further held that it is important to recognise the principle of *pacta sunt servanda* (the principle that agreements between parties should be kept),[76] but decided that if the enforcement of the term would result in unfairness, the court could decline to enforce the term.[77] The court placed the requirement of fairness into the equation when making this ruling and held that a two-part test must be applied. This entails that, firstly, the clause/term must be considered as to whether it is unreasonable or not, and secondly, whether in light of the circumstances the clause/term should be enforced.[78] This explains the need for terms to be justifiable in a democratic society based on principles of fairness, freedom and equality.[79]

[71] Van Aswegen 1995 *SAJHR* (n 52) 67-68; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); and *Magna Alloys and Research (SA) (Pty) td v Ellis* 1984 4 SA 874 (A) 891 G-H.
[72] Van Aswegen 1995 *SAJHR* (n 52) 54.
[73] *Ibid* 66.
[74] *Barkhuizen v Napier* 2007 5 SA 323 (SCA).
[75] *Ibid* at paragraph [29] at 333E-F.
[76] "*Pacta sunt servanda"* is the principle in contract law that the agreement between the parties must be kept.
[77] *Barkhuizen v Napier* (n 74) 324.
[78] *Ibid* at paragraph [52] and [54] at 339F and 340E-F.
[79] Cornelius (n 47) 81.

However, the decisions in the following two cases, which preceded the ruling of *Barkhuizen v Napier*,[80] are worth mentioning briefly at this stage. In the case of *Sasfin (Pty) Ltd v Beukes*[81] the court held that "terms […] can be contrary to public policy and therefore illegal if they do not meet the demands of simple justice between man and man".[82] In the case of *Rand Rietfontein Estates Ltd v Cohn*[83] the court held that "in cases of ambiguity in the interpretation of contracts, the principle of *bona fides* requires an equitable interpretation".[84]

The aforementioned common-law cases depict the overlapping of the Constitution, the bill of rights, fairness and good faith in the light of contract terms; and the need for fairness and a fair interpretation or method to determine fairness, in light of the abuses in the consumer-law realm that have been mentioned in chapter two above and will be further elaborated on in Chapter Four: of this dissertation.

3.4.Conclusion

From the above it is clear that there is a definitive overlap between the Constitution and the fairness of contract terms. This should be recognised in consumer law.

[80] *Barkhuizen v Napier* (n 74).
[81] *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).
[82] Van Aswegen 1995 *SAJHR* (n 52) 68.
[83] *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317.
[84] Van Aswegen 1995 *SAJHR* (n 52) 68.

CHAPTER FOUR: SOUTH AFRICA

4.2.Consumer Protection Act 68 of 2008

4.2.1. Background and historical development

The consumer protection bill, the common law and the Law Commission's report are all significant when discussing the history and development of the Consumer Protection Act ("CPA"), as they are key factors in the forming of the legislation known as the CPA.

As pointed out in chapter two above, the starting point in the history of the CPA would naturally be the common-law stance mixed with the principles of good faith and public policy. South Africa already has sector-specific legislation which addresses instances of unfair terms and already in those sector-specific arenas there is an imposition of control inserted to handle such terms. One such an example is the Rental Housing Act[85] and its regulations. Consumer goods and services is another sector that has now been legislated. These sector-specific groupings have proved that under a legislatively controlled environment there has been an improvement in the contracts in that sector, but, despite the few areas that have sector-specific legislation, there is still a *lacuna* when it comes to dealing with unfair terms in general or in contracts that fall outside the CPA's ambit.[86]

It is evident that unfair contract terms have not been fully incorporated into the CPA and that is what is disappointing, as it was widely felt that proper legislative control on the issue, and a clear goal of what the legislation aimed to achieve, would have gone a long way to provide a clear understanding of the proper interpretation and application of the future consumer legislation and that properly casing this would not have amounted to over-legislating this area of law.[87] The CPA has been a great development but it does not deal with the issues around unfair terms sufficiently and this will be further illustrated through this dissertation.

Consumer law in South Africa, specifically with regard to unfair terms, needed to be developed to a great extent especially when dealing with the types of terms that a contracting party could include in the agreement. Unfortunately, some of the legislated sections, very possibly unintentionally, create unforeseen risks for the consumer instead of protecting them, despite being a crystallisation of the common-law.

[85] Rental Housing Act 50 of 1999.
[86] Naudé 2006 *Stell LR* (n 32) 362.
[87] *Ibid* 362.

An example to try and illustrate this point is that the common law prescribes that if a term is a surprising term, it should be pointed out to the signatory of the agreement prior to them signing that part of the contract.[88] The DTI proposed that a formal requirement be legislated for this sort of term, which was subsequently done by requiring a signature next to such a surprising term which would infer express agreement to that term by the consumer.[89] This is irrespective of many of the factors that the Law Commission's report mentioned as discussed above at when discussing the fairness criterion and guidelines in Chapter Two: at 2.2.*ii*.

This need for recognizing the substantial fairness in a matter and not merely a formal requirement was thus evident and it was a suggested development that the new proposed consumer law takes cognisance of what constitutes "substantive unfairness" and not only of what constitutes "procedural unfairness". The DTI unfortunately did not include this entirely in the consumer protection bill. However, the Law Commission's report in annexure A, did consider many factors that could be considered when determining substantive fairness in their list of guidelines.[90] The Law Commission's report included, *inter alia*, the following factors:

> "(m) whether a term is unduly difficult to fulfil, or imposes obligations or liabilities on a party which are not reasonably necessary to protect the other party; (n) whether the contract or term excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his or her interests; (o) whether there is a lack of reciprocity in an otherwise reciprocal contract; "…" (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled…".[91]

This list of factors was intended to help guide the suppliers and consumers on terms they are including in their agreements, as well as to guide the courts if the matters reach the courts in order for the court to then weigh all factors, whether substantive or procedural, when considering whether a clause is unfair, instead of the consideration of substantive factors only being an alternative consideration if the procedural aspect is not immediately proven to exist.[92]

An example that depicts the reason why this was a suggested development for the consumer law is the following. Although a procedural aspect of the CPA is that a term must

[88] Naudé 2006 *Stell LR* (n 32) 364. See also *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA).
[89] Naudé 2006 *Stell LR* (n 32) 365.
[90] *Ibid* 374.
[91] Law Commission Report (n 2) 208-218.
[92] Naudé 2006 *Stell LR* (n 32) 373-375.

be written in plain language, many contracts have legible and plain terms placed into contracts but then such contracts are only given to the consumer at the last minute and the consumer does not have the opportunity to make an informed decision. The same goes for the instance where just because a term is expressly pointed out to the consumer it does not necessarily make the term a fair term.[93] It is due to these sorts of examples that a development in the consumer law to consider the substantive factors was recommended.

As mentioned earlier, the Law Commission suggested that creating a legislated list of suspect or prohibited terms,[94] which would not be an exhaustive list, would move consumer law into a realm of greater predictability[95] and lessen the instances of reactive control[96] when dealing with unfair terms, as well as create the higher likelihood that greater compliance would be achieved as there would be greater public certainty as to what constitutes an "unfair" or "unconscionable" term. Despite the recommendation, the Law Commission did not actually include such a separate list into their report *per se* but rather included the concept in the form of a more comprehensive list of guidelines, some of these guidelines being reminiscent of a grey list,[97] which are to be taken into consideration when assessing "unreasonableness, oppressiveness or unconscionability".[98] So while the DTI's consumer protection bill contained a "prohibited terms" list it failed to have any sort of "suspect terms" list in the bill.[99]

Just having a prohibited list of terms was a step in the right direction in the development of South African consumer law. However, it is arguable whether the steps taken are sufficient.[100]

In other jurisdictions these types of lists are termed "black lists" for the prohibited terms list and "grey lists" for the suspect terms list.[101] A black list cannot cover all unfair or potentially unfair provisions and that is where a non-exhaustive grey list becomes a useful tool.[102] A grey list is encouraged as it allows suppliers to be informed as to what provisions may be potentially considered unfair unless good reason is shown for their inclusion. This in

[93] *Ibid* 378.
[94] Law Commission Report (n 2) 169.
[95] Naudé "The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective" 2007 *SALJ* 131.
[96] Reactive control, for example, is when one only acknowledges a factor after a court decision on it or acts in a reactive way to a problem instead of in a preventative manner.
[97] Naudé 2007 *SALJ* (n 95) 134.
[98] Naudé 2006 *Stell LR* (n 32) 379-383 and Law Commission Report (n 2) 168-169 and 210-213.
[99] Law Commission Report (n 2) 383.
[100] Naudé 2007 *SALJ* (n 95) 128.
[101] *Ibid* 128-130.
[102] Sharrock 2010 *SA Merc LJ* (n 30) 321.

turn would encourage suppliers to think twice before just including certain types of terms into their standard contracts,[103] thus creating a form of self-imposed control.[104] It would also assist judges, on the other hand, when it comes to reaching decisions on what terms are generally unfair or not.[105] Usually a grey listed term would bear a reverse onus where the term is deemed to be unfair if it is included into a contract, unless it is shown to otherwise be fair.[106] This is unlike a black listed term, as a black listed term is invalid under all circumstances.[107]

It is important to note these recommendations because when considering the following sub-heading which discusses the overview and scope of the CPA, the differences between the recommendations and the actual promulgated CPA will be revealed.

4.2.2. Overview and scope of the South African CPA with examples of how the CPA "outlaws" or changes unfair contract terms

The CPA came into force in April 2011, a full two years after the president assented to the bill, and the legislation was welcomed in the consumer-law realm, amidst a great deal of speculation on how and if it would function in the way it was intended in South Africa.

To begin the discussion on the overview and scope of the CPA, it would be useful to bear in mind particular definitions that pertain to the topic. All the relevant definitions will not be listed here, and the scope of the CPA will rather be explained with just an explanation. However, definitions that are pertinent will be set out throughout the discussion.

The South African CPA's objective, in a quick summary and as set out in its preamble and section 3,[108] to promote and advance the social and economic welfare of consumers in South Africa by "protecting the interests of all consumers, by ensuring accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace".[109] These purposes have a logical flow from the discussion in the above sub-heading regarding the development of the CPA and the concepts that were being considered in the development phase of consumer law in South Africa; and one can see that the legislature did attempt to capture the essence of the concerns raised in the Law Commission's report.

[103] *Ibid*.
[104] Naudé 2007 *SALJ* (n 95) 137.
[105] Sharrock 2010 *SA Merc LJ* (n 30) 321.
[106] Kötz "Controlling unfair contract terms: Options for legislative reform" 1986 *SALJ* 415.
[107] Naudé 2007 *SALJ* (n 95) 130.
[108] Section 3 of the CPA.
[109] Preamble to the CPA.

The scope of the CPA requires a far broader discussion than the overview, as within the scope lies the crux of whether the CPA's ability to adequately deal with unfair, unconscionable and oppressive terms is, in fact, sufficient. The CPA does not provide a definition for "unfair" or "oppressive" terms, which will be mentioned again later and in more depth, but only provides a definition for what constitutes "unconscionable" conduct. The focus of this discussion is not on unconscionable conduct *per se*. However, one will note from the definition to come that the way that the legislature worded the definition, it in fact encompasses some of the Law Commission's recommendations around the principles of outlawing unfairness and stems from the reasons why such development in consumer law was required and therefore if falls under the discussion regarding fairness. This definition falls into part F of the South African CPA under the right to fair dealing and not part G which is the right to fair, just and reasonable terms and conditions.[110] It almost appears to have been disjointed from where it should belong given its wording and aims.[111]

The term "unconscionable" is defined as follows in the CPA is: "(a) *having a character* contemplated in section 40; or (b) otherwise *unethical or improper* to a degree that would *shock* the *conscience of a reasonable person*" (emphasis added).[112] For completion sake, section 40 then further defines unconscionable conduct as the following:

> **"40. Unconscionable conduct**
>
> (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, *unfair tactics* or any other similar conduct, in connection with any— […]
>
> (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; […]
>
> (2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier *knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests* because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor." (Emphasis added.)

One can note just from the above definition that unconscionable conduct in the context of the CPA is very much a mix that incorporates the concept of fairness, or rather the attempt at out-

[110] Part F and Part G of the CPA.
[111] Naudé "The consumer's 'right to fair, reasonable and just terms' under the new consumer protection act in comparative perspective" 2009 *SALJ* 507-508.
[112] Section 1 "Definitions" of the CPA.

ruling unfair "tactics", by bringing about an atmosphere that public policy and/or good faith should be considered through the use of the reasonable person theme having been incorporated into the wording of the section. This discussion will only view the "unconscionable conduct" aspect in perspective of the above quoted definition and in light of the way the terms of an agreement are arrived at. It is important to note that the legislature appears to attempt to address a handful of considerations (i.e. understanding the language of agreement) in their attempt to define a type of unfair conduct. Notwithstanding this, it is still debatable whether this definition and section sufficiently canvasses the concerns raised in the Law Commission's report as, on the face value of the definition and section above, there are many elements such as unequal bargaining powers between the contracting parties; the costs of pursuing litigation; the non-binding precedent of settlement agreements; or ombud decisions that appear to be forgotten in trying to create consumer legislation that is pro-active rather than reactive in preventing unfair terms being used in contracts.[113] Although it is clearly stated that a certain type of behaviour will be deemed unconscionable, it is still apparent that the legislature has used wording that has created very subjective elements (i.e. how does the court determine whether it is "excessively" one sided as opposed to just hard bargaining) which are required in proving that the behaviour in question would in fact be deemed as unconscionable under the CPA,[114] and further to this, despite these behaviours being contained in the CPA, it still fails to actually define an "unfair tactic" clearly or provide any guidance as to what might constitute such a tactic. Instead, the legislature adopted a cumbersome triad of words (unfair, unreasonable or unjust), a triad for which the definitions to follow, taken from the Oxford English Dictionary, will show that, despite these words being different, they are all linked to unfairness as a whole. The argument is that had the legislature used just the word "unfair" and provided a sufficient definition for it, it would have gone much further in creating the much needed clarity when determining the fairness standard arising from the CPA.[115] The current position is that the consumer has to first prove that the conduct is "unconscionable" before there is a reaction on how to deal with the term, instead of a reluctance by the supplier to even act in an unconscionable manner.[116] This will be elaborated on again when dealing with the powers of the court when dealing with unfair terms.

[113] Naudé 2009 *SALJ* (n 111) 507-508, 527 and Sharrock 2010 *SA Merc LJ* (n 30) 296-297, 307-308.
[114] Sharrock 2010 *SA Merc LJ* (n 30) 308-309.
[115] Sharrock 2010 *SA Merc LJ* (n 30) 296-297, 307.
[116] Naudé 2009 *SALJ* (n 111) 507-508 and Sharrock 2010 *SA Merc LJ* (n 30) 308-309.

In order to canvass the topic more broadly, but starting from a basic level, due to the complete lack of definitions being set-out in the CPA besides that of "unconscionable conduct" which arguably is insufficient, the relevant definitions for the words "unreasonable", "unconscionable" and "oppressive" should be taken into account from the Oxford English Dictionary. This is so because these three words were the specifically chosen words used in the Law Commission's report which attempted to deal with unfair terms in light of how the CPA would ultimately handle such terms. Another reason is that these three terms all allude to an inference that if a term is unreasonable, unconscionable and oppressive, then the term is unfair in an overall sense. The definitions below are paramount in understanding what constitutes an unreasonable, unconscionable and oppressive term.

The Oxford English Dictionary defines "unreasonable" as follows: to "[n]ot [be] acting in accordance with reason or good sense; [or] not reasonable in conduct, demands, expectations, etc."; "[n]ot in accordance with reason; [or] not based upon sound reason or good sense" and finally as behaviour that is "[i]nequitable, unfair; unjustifiable".[117] The relevant definitions for the word "unconscionable" as taken from the Oxford English Dictionary are "actions, behaviour, etc.: showing no regard for conscience; not in accordance with what is right or reasonable"; "grossly unfair, [especially] to a weaker party, and therefore liable to be set aside or modified by a court."[118] And finally the relevant definition for the word "oppressive" as taken from the Oxford English Dictionary is "an action, policy, etc.: [to be] involving or of the nature of oppression […] [and to be] merciless; harsh; exploitative; repressive".[119]

The reason for linking these definitions to unfairness and unreasonable terms is because the CPA specifically in Part G, sections 48 to 52, deals with unfair, unreasonable or unjust contract terms and unconscionable conduct and how the court may deal with these terms. Below is a quotation from section 48 of the CPA that sets out the CPA's stance on unfair contract terms:

> "48. **Unfair, unreasonable or unjust contract terms**
> (1) A supplier must not—
> (a) offer to supply, supply, or *enter into an agreement* to supply, any goods or services— […]
> (ii) *on terms that are unfair, unreasonable or unjust*;
> […]

[117] Hornby *Oxford Advanced Learner's Dictionary of Current English* (2005) 1618.
[118] *Ibid* 1602.
[119] *Ibid* 1025.

(2) 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*—

(a) it is *excessively one-sided* in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) the terms of the transaction or agreement are *so adverse* to the consumer as to be *inequitable*;

[…]

(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." (Emphasis added.)

Section 49 of the CPA deals with notice for certain terms and conditions. However it only refers to limitations of liability, waivers of risk, terms that are an acknowledgement of certain facts or a term that imposes a duty to indemnify the supplier. It further goes on to state that notice must be provided if a term is an unexpected term in the agreement or has an unusual character or nature to it. The problem with this is that there are no further definitions to provide for what would constitute "unusual nature" or whether the term is in fact unfair to one of the parties in the agreement. This section then goes on to prescribe procedural requirements (such as mentioned in an example above, where an initial or a signature is required next to such a term) but yet it does not provide for any subjective requirements to determine whether there was equal bargaining power or whether the term itself was unfair to begin with.[120] Section 49 has been subject to criticism in that by signing next to such a term, the consumer has deemed the term to be fair. This in essence acts as a double-edged sword and perhaps it also brings forward a tie to the constitutional elements, for example where such a contract includes a consumer's right to integrity and bodily integrity and life, one should not by merely signing next to the term conclude that this is a fair term.[121] In *Constantia Insurance Co v Compusource*[122] the court confirmed the common-law position that "an adhering party would not be bound by a contract term to which it did not and could

[120] Naudé 2009 *SALJ* (n 111) 508-512.

[121] *Ibid* 510.

[122] *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA).

not reasonably have been thought to agree".[123] But this stance is not easily seen to come through in the wording of section 49 and unfortunately it rather appears that the procedural enforcements in section 49 create a harder time for the consumer to show he or she would not have reasonably agreed to the term because, on the face value of it, the appearance of their signature next to the term appears to constitute acceptance of, and an agreement to, the term.[124] This is foreseeably problematic and one needs to question whether an adequate definition for what constitutes an unfair term would prevent this kind of problem and whether this issue would still be so pronounced. This discussion will pull through further into the discussion on section 51 below.

Section 50 of the CPA, although categorised under the CPA's part G as dealing with the right to fair, just and reasonable contract terms, does not provide any value to this discussion and as such will be left out as it deals with whether an agreement is recorded in writing or not.

Section 51 of the CPA deals with prohibited transactions, agreements, terms and conditions, which will be discussed also in relation to regulation 44 and thereafter section 52 of the CPA, which deals with the courts' powers to ensure fair and just conduct, terms and conditions. These sections will be discussed in more detail herein but will not be quoted in full.

Section 51 of the CPA states that a supplier must not enter into an agreement that has a term or condition that defeats the purpose of the CPA and the section further indirectly mentions some limitations on specific provisions that are considered to be unfair and are thus prohibited.[125] In the chapter discussing the development of the CPA there was a brief mentioning of grey lists and black lists in terms of rebuttable unfair provisions versus prohibited unfair terms.[126] This aspect of the CPA is yet another point where the legislature appeared reluctant to include a too detailed or specific restrictive list even though the arguments made by the Law Commission's report for such lists were sound and depicted how such lists would create greater overall legal certainty for contracting parties on what terms are acceptable. This in turn creates an ease for suppliers to amend their documentation once instead of every time a term is deemed unfair,[127] as well as help create a pro-active attitude

[123] *Ibid* 21 at para 23.
[124] Sharrock 2010 *SA Merc LJ* (n 30) 309-313; Naudé 2009 *SALJ* (n 111) 512.
[125] Sharrock 2010 *SA Merc LJ* (n 30) 316-323.
[126] Sharrock 2010 *SA Merc LJ* (n 30) 316-323; Naudé 2007 *SALJ* (n 95) 134.
[127] Sharrock 2010 *SA Merc LJ* (n 30) 317.

towards not including adverse/unfair terms in the contracts in the first place.[128] The legislature unfortunately did not include such a grey list into the CPA itself or a schedule to the CPA, but rather did so in terms of a regulation. This is unfortunate as the fear that they had was that by doing so parliament would be falling foul of the principle not to bestow its powers onto the executive to amend the act itself.[129] However, this was not accurate[130] and this kind of grey list would have created much needed legal certainty. It would also have made it easier for judges to reach decisions on what constitutes an unfair term and would have provided administrative bodies for the CPA with guidance on interpreting unfair terms.[131] The DTI had a grey list introduced by way of regulation 44 to the CPA,[132] although this was a start, it is less prominent than if the list had been incorporated into the legislation itself, since incorporating it as part of the legislation would make it more easily accessible and less confusing to the ordinary lay-person, as the ordinary lay-person may not think or know when, where or how to look for regulations.[133] The idea behind having these lists is to expedite development in the area as the courts will take a long time to develop the predictability of what is unfair, especially in light of the fact that many matters are settled or never brought to court by the consumer due to the expense of litigation, as well as the non-recorded rulings made by the Consumer Commission or ombud.[134]

The CPA included prohibited terms in section 51 and presumed "unfair" terms in regulation 44. However, although this was a good start for indicating terms that are presumed unfair, it has still left the larger issue that these prohibited terms and presumed terms face unaddressed. This issue relates to the problem that "unfair" is not actually defined in the CPA and thus it creates a somewhat greater circular problem where the subjective factors surrounding the conclusion of the agreement actually require consideration, as discussed earlier. This issue is not addressed in section 49. Nonetheless, the grey list in regulation 44, although useful to recognise particular instances where a type of term may be deemed unfair, still does not solve the problem of whether the term is in fact unfair, as the CPA itself only provides for procedural factors to be considered when determining this. Curiously, it is only under section 52 where it deals with the courts' powers to ensure fair terms that there is a

[128] Sharrock 2010 *SA Merc LJ* (n 30) 316-323 and Naudé 2007 *SALJ* (n 95) 134.
[129] Naudé 2009 *SALJ* (n 111) 521-522. This principle comes from *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 4 SA 877 (CC) 51-62.
[130] Naudé 2009 *SALJ* (n 111) 521-522.
[131] Sharrock 2010 *SA Merc LJ* (n 30) 321 and Naudé 2009 *SALJ* (n 111) 520-522.
[132] The Consumer Protection Act 68 of 2008, Regulations; Government Gazette number 34180, Notice 293, date of Gazette 2011-04-11. Regulation 44.
[133] Naudé 2009 *SALJ* (n 111) 521.
[134] Naudé 2007 *SALJ* (n 95) 132.

mentioning of a handful of substantive factors that should be considered when determining whether a term is fair or not. Even though all is not lost, and despite the strange layout of the CPA, there are some of the subjective factors suggested by the Law Commission for the courts to take into account when determining whether a term is unfair (i.e. bargaining strength of the parties; whether negotiations took place prior to entering the agreement; if one sided limitations were imposed; prejudicial time periods; etc.)[135] that were encapsulated by the CPA. However a whole new quandary is raised on whether then the ombud with jurisdiction or the Consumer Commission should consider these factors as the subjective factors are scattered among different sections of the Act. Furthermore, the CPA specifically refers to a "court" and the CPA specifically has differing definitions for a court from that of the "ombud with jurisdiction"[136] or a "consumer court"[137] or the commission and the definition used for a court is one that "does not include a consumer court".[138] Under the usual rules of interpretation, when there are specific definitions set out, then that specific definition applies and not the generic meaning of the word.[139] This in itself is its own topic and is merely being noted here, since there could very well be a *lacuna* whereby the substantive factors are only to be considered by a court when the matter reaches a court and are not actually available to the consumer courts or ombuds with jurisdiction, although that could not be fathomed to be the intention of the legislature and it leaves a shadow of doubt regarding whether the CPA does include substantive factors in their entirety as something to be considered when determining whether a term is fair or not. Section 52 will briefly be discussed hereunder to bring the discussion on the scope of the CPA to a close.

Section 52 deals with the courts' powers to ensure fair and just conduct, terms and conditions. Once again this section is burdened with the lack of a definition for what constitutes an unfair term but provides the following:

> "(3) If the court determines that a transaction or agreement was, in whole or in part, *unconscionable, unjust, unreasonable or unfair*, the court may—
>
> (a) make a *declaration to that effect*; and
>
> (b) make *any further order* the court considers just and reasonable in the circumstances,
>
> [. . .]

[135] Law Commission Report (n 2) 210-213.
[136] CPA (n 3) chapter 1 part A section 1.
[137] CPA (n 3) chapter 1 part A section 1.
[138] CPA (n 3) chapter 1 part A section 1.
[139] Du Plessis *Re-Interpretation of Statutes* (2002) 111-204.

(4) If, in any proceedings before a court concerning a transaction or agreement between […] a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable requirements set out in section 49, the court may—

(a) make an order—

(i) in the case of a provision or notice that is void in terms of any provision of this Act—

(aa) *severing any part of the relevant agreement*, provision or notice, or *alter it to the extent required* to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole; or

(bb) *declaring the entire agreement*, *provision* or notice *void* as from the date that it purportedly took effect". (Emphasis added.)

This section of the CPA is noteworthy as it makes provision for the court to directly amend or consider a contract between parties on the basis of reasonableness, fairness and conscionability – concepts that are difficult to assess without looking into the parties intentions and with the concepts being hinged on good faith when negotiating, and largely the element of fairness playing a role in all of these different grounds. This emphasises why there is such great concern about the fact that the CPA does not provide an actual definition for what constitutes an "unfair term" or provide any clarity in this regard.

Therefore the CPA's history, development and scope, specifically with a focus on unreasonable, unconscionable or unfair terms, has been a significant development for South African consumer law as a whole. However, it is the degree to which unfair terms is addressed that appears to not have reached the desirable point of certainty one would have hoped for.

CHAPTER FIVE: WESTERN AUSTRALIA

5.2.Competition and Consumer Act 2010

5.2.1. Background and historical development

Australia has had a consumer-law framework in place since 1974, through the Trade Practices Act,[140] as the Australian legislature has always had the stance that consumer protection should be increased.[141] This stance, together with the international movement to regulate unfair contract terms in general, made the development of the consumer law in Australia inevitable.[142] Unfair contract terms are not a simple aspect to develop in law, especially in Australia's setting, as there were already a number of standard form contracts in place that might have included such unfair terms, but when it came to the point of evidencing the terms unfairness/harm, it was not a simple task.[143] It was in 2010 that Australia, through the Australian consumer law, finally took the step in terms of regulating unfair contract terms.[144] This was initiated as an amendment to the Trade Practices Act and the ACL[145] bill proposed major reforms to the Australian consumer law, one of which was the introduction of a general regime to deal with unfair contract terms.[146]

i. Productivity Commission Report by the Law Council of Australia

A Productivity Commission Report was published in 2008[147] and was compiled by the Law Council of Australia which is the peak national body that represents the legal profession in Australia.[148] The aim behind the Productivity Commission Report was to provide recommendations to enhance consumer protection, to create legal certainty and to also create a more cost effective way for compliance with consumer law.[149] This is very similar to the set-up of the South African Law Commission and what the South African Law Commission's report aimed to achieve with some of its recommendations towards the CPA, however, with the stark difference being that Australia already had consumer legislation in place prior to

[140] Trade Practices Act, 1974 (Cth).
[141] Sims "Unfair Contract Terms: A New Dawn in Australia and New Zealand" 2012-2013 *Monash UL Rev.* 747.
[142] Sims 2012-2013 *Monash UL Rev.* (n 141) 739-740.
[143] *Ibid*.
[144] *Ibid* 740.
[145] (n 4).
[146] Gray "Unfair Contracts and the Consumer Law Bill" 2009 9 *Queensland University Tech. L. & Just. J.* 155.
[147] Review of Australia's Consumer Policy Framework (2008) ("Productivity Commission Report").
[148] *Ibid.*
[149] http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=15722 (01-08-2015).

their report being released, whereas South Africa only had common law consumer law prior to the South African Law Commission's report.

Briefly, the Productivity Commission Report suggested a harmonisation of the laws between the different States and Territories in Australia as the existing model prior to this was a federal and State legislation framework.[150] The focus will not be on this aspect of the Productivity Commission's Report but rather on their recommendations and comments regarding the fairness of contract terms and the regulation of these terms.[151] It is interesting to reflect on the purpose of the provisions of the ACL regarding unfair contract terms, as the Australian Explanatory Memorandum does not specifically state a purpose and merely states that "it is based on the recommendations made by the Productivity commission"[152]. The Productivity Commission made the argument that the need for regulation on these grounds is merely to extend ethical principles of fairness in contracts in order to cover substantive terms that seem to appear in most circumstances.[153]

In Australia, due to the fact that there was already statutory law regarding consumer law, their Productivity Commission Report did not receive the same criticisms that the South African Law Commission's report received in respect of the argument that there should have been sufficient common-law provisions to adequately deal with how unfairness is handled in respect of contracts, whereas in Australia there were rather calls for the statutory intervention in this area of the law.[154] That being said, the Australian common law does contain a doctrine of unconscionable conduct that requires that proof be shown that one of the contracting parties suffered from a special disadvantage.[155] A special disadvantage was held to be anything from illness, ignorance, inexperience to illiteracy etc.[156] Despite that definition, there still remains different views between the judges on a precise meaning of "special disadvantage" and it has been held by some judges that this might even reach as far as unequal bargaining power or a diminished ability due to the lack of bargaining power, but then not to consider bargaining power by others.[157] This has resulted in a difficulty regarding how and when judges apply substantive fairness, as the courts in Australia distinguished between procedural and substantive fairness too, yet did not have set standards of how and

[150] Gray 2009 *Queensland University Tech. L. & Just. J.* (146) 158.
[151] See (n 149).
[152] Sims 2012-2013 *Monash UL Rev* (n 141) 743.
[153] *Ibid*.
[154] Gray 2009 *Queensland University Tech. L. & Just. J.* (n 146) 158.
[155] *Ibid* 159.
[156] *Blomley v Ryan* (1956) 99 CLR 362 415.
[157] *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

when to apply these standards.[158] The stance of the Australian common law and specifically with regard to the doctrine of unconscionability lead to another problem which is the same as South Africa experienced, namely where the consumer was essentially exploited because the supplier would take the opportunity to include the unfair terms and "roll the dice" on whether the consumer would enforce the invalidity of the unfair term or not, as the consumer would be faced with high litigation expenses to challenge the issue.[159]

ii. Analysis

A difference between Australia and South Africa, as mentioned before, is that Australia for a very long time had statutes on consumer law. The Trade Practices Act, however, was questioned on whether it improved the common-law provisions despite it mentioning a brief section that prohibited unconscionable conduct.[160] However, despite the fact that consumer law in Australia is older, one cannot help but wonder whether the initial challenge of codifying the law in Australia did not also leave a *lacuna* in the legislation that actually created other difficulties.

Thus, this being similar to South Africa's first attempt now to create a piece of legislation (the CPA) that takes the common law and places it into a statute, and when comparing it to Australia's development and their recent developments in further defining unfair terms specifically in the ACL, one considers whether South Africa should have possibly taken this international experience into account initially to avoid the uncertainty mentioned in the discussion on the scope of the CPA above.[161] The reason for saying this is because many of the issues faced by the Australian courts regarding substantial fairness and procedural fairness are the issues that one expects the South African courts to be saddled with because of the undefined term "unfair contract terms".

iii. Powers of the courts

This is just a brief mention of the powers that were provided to the courts in order to enforce the provisions regarding unfair terms, and this will be elaborated on further in the sub-heading dealing with the scope of the ACL. The biggest development with regard to the ACL in this aspect was the enabling of the regulating body (the Australian Consumer and

[158] Gray 2009 *Queensland University Tech. L. & Just. J.* (n 146) 159.
[159] *Ibid* 161.
[160] *Ibid.*
[161] *Ibid.*

Competition Commission ("ACCC"))[162] to bring injunction proceedings that also seek further orders, even against a party that was not one of the direct parties to the agreement (i.e. a party that uses these sorts of terms in their agreements frequently). This was never a power that was bestowed upon the ACCC and it was a welcome development compared to how previously only the parties were bound by the orders.[163]

iv. Fairness criterion and guidelines

In Australia the courts also initially focused on procedural fairness as opposed to substantive fairness,[164] and Corones and Christensen, two professors who wrote on a comparison of generic consumer protection legislation, conclude that "while courts are able to consider substantive unconscionability under the Act, they rarely do so without also considering the impact of procedural unconscionability. The reliance upon procedural unconscionability severely limits the ability of the Act to deal directly with unfair terms in consumer contracts".[165] The ACL bill focused primarily on unfair terms but did try to create a sense of both substantive and procedural fairness considerations.[166]

It is worth also noting that the Australian Fair Trading Act 1999[167] included an unfair contract "administration", it will not be quoted here, but it is very similar to that of the CPA's section 49 in that it provided a list of prohibited types of terms (i.e. terms permitting the supplier to avoid or limit their performance in the contract or excluding the supplier from vicarious liability or waiving certain rights a consumer would ordinarily have unjustly).[168] It is further interesting to note that there was once a reference to "good faith" in the legislation. However, this was deleted and was never re-inserted. Although it still remains a consideration at their common-law level, "good faith" is not considered in the new ACL in the statutory sense[169] (very much like South Africa's position) and so it will not be discussed any further herein.[170] Essentially, what the Australian legislature was hoping to achieve with the development of the ACL was to bridge the gap that clearly existed between the pre-law

[162] Australian Consumer and Competition Commission https://www.accc.gov.au/ (06-10-2015).
[163] Nottage "Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism" 2009 9 *Queensland U. Tech. L. & Just. J.* 125.
[164] Gray 2009 *Queensland University Tech. L. & Just. J.* (n 146) 163.
[165] Corones and Christensen "Comparison of generic consumer protection legislation" 2007 *Queensland University of Technology* 128 and Gray (n 146) 163-164.
[166] Nottage "Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism" 2009 9 *Queensland U. Tech. L. & Just. J.* 124.
[167] Fair Trading Act (Vic) 1999.
[168] Gray 2009 *Queensland University Tech. L. & Just. J.* (n 146) 164 and Fair Trading Act (n 170) Part 2B.
[169] Nottage 2009 *Queensland U. Tech. L. & Just. J.* (n 166) 125.
[170] Gray 2009 *Queensland University Tech. L. & Just. J.* (n 146) 164.

and the new ACL in terms of substantive fairness and that was being caused by such broad provisions dealing with the aspects of fairness in the governing statutes. The ACL has added the long over-due missing link of providing protection in respect to unfair contract terms.[171] Whether the Australian legislature achieved such a goal will become apparent from the following discussion on the overview and scope of the ACL.

5.2.2. Overview and scope of the ACL with examples of how the ACL "outlaws or changes unfair contract terms"

The overview of the ACL will be broadly stated as it is fairly well described above. For the purposes of this discussion, the development of the ACL is what finally took the step in regulating unfair contract terms in the Australian consumer-law realm.[172] However, the scope of the ACL will be discussed in more detail in order to be able to draw the necessary comparisons with the CPA.

The ACL gives a clear indication as to what constitutes an unfair term and has set out a "grey list"[173] of terms to provide examples of terms that may be deemed unfair. These grey list terms can be found in section 25(1)(a) – (m). Examples of the grey listed terms are terms that affect or have the effect of permitting one of the parties to avoid or limit performance[174] or to assign the contract to the detriment of another party without that party's consent.[175] The Australian consumer law allows for new grey listed terms to be added by way of regulation.[176] One of the major differences between the ACL and the CPA is that the consumer in the ACL does not need to prove that the term is unfair and the onus rests with the trader/supplier to prove that the term is fair.[177] This is the opposite in the CPA where the consumer has to first have the term declared unfair before the next step can be followed. The approach in the ACL goes a long way in dissuading the trader/supplier from putting these unfair terms into their contracts to begin with and creates a pro-active control against unfair contract terms instead of a reactive response.[178]

[171] Nottage 2009 *Queensland U. Tech. L. & Just. J.* (n 166) 125.
[172] Sims 2012-2013 *Monash UL Rev.* (n 141) 741.
[173] See the above discussion regarding grey list terms for an explanation of what a grey list term is.
[174] Section 25(1)(a) of the ACL.
[175] Section 25(1)(j) of the ACL.
[176] Sims 2012-2013 *Monash UL Rev.* (n 141) 744.
[177] *Ibid*.
[178] Sims 2012-2013 *Monash UL Rev* (n 141) 744.

In the Australian consumer law, the consumer contract in question must be a standard form contract. There is a rebuttable presumption, however, that the contract is a standard form contract and the trader/supplier would need to prove otherwise.[179]

Section 24 of Part 3 of the ACL sets out whether a term is unfair or not. The section is quoted below to show the specific wording and section provided to define "unfair". Own emphasis added)

"**24 Meaning of unfair**

(1) A term of a consumer contract is *unfair if*:

(a) it would cause a *significant imbalance* in the parties' rights and obligations arising under the contract; and

(b) it is *not reasonably necessary* in order to *protect the legitimate interests* of the party who would be advantaged by the term; and

(c) it would *cause detriment* (whether financial or otherwise) to a party if it were to be *applied or relied on*.

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a *court may take into account such matters as it thinks relevant*, but *must* take into account the following:

(a) the extent to which the term is *transparent;*

(b) the contract as a whole.

(3) A term is transparent if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise." (Emphasis added.)

This section needs to be read with section 25 which continues and provides the grey list as mentioned earlier above. The wording chosen in the Australian consumer law is thus explicit on how you determine an unfair term and who bears the onus to prove that such a term is not unfair. There has been discussion on section 24(1)(a) – (c) and how this section must be

[179] Sims 2012-2013 *Monash UL Rev.* (n 141) 758.

interpreted. However, this discussion will not go deeply into this aspect as, although it bears relevance to the overall topic, it will unnecessarily weigh down the discussion and it should suffice to point out that the general interpretation of all these elements is that they are required to be interpreted to the benefit of the consumer and the supplier/trader is the party that should be weary of the term being interpreted against them.[180] This is juxtaposed to the CPA in South Africa. The CPA does not contain such a strong definition and although there are some provisions that have a slight resemblance to the provisions that are contained in the ACL, the CPA is a long way off in providing the same legal clarity on unfair terms and appears to be more reminiscent of the Australian consumer law prior to the new ACL of 2010.

The effect of when a term is found to be unfair in the ACL is the same as the CPA in the sense that that term will be deemed void.[181] The CPA provides that the court can then sever the term or amend the term and this is where some controversy exists with the CPA. The ACL does not provide for the court to amend the term and thus it avoids the controversy regarding *pacta sunt servanda* and in terms of the ACL the remainder of the contract will remain valid. The ACL also provides for the opportunity of a declaration to be requested (at a cost) by the consumer or the regulator, which is something that the CPA lacks, in order for a non-party to be bound by the same term being unfair in their contracts.[182] This is an extremely useful tool and South Africa would have greatly benefitted from incorporating a similar feature as it would provide for a more certain legal environment where parties become aware of the cases that do get brought to the courts instead of being faced with the situation where the ombudsman's decision is not reported or the parties settle due to the costs of legal action and the consumer-law field does not develop as speedily as one would like to protect the consumer.

Therefore the ACL's history, development and scope, specifically with the focus placed on unfair terms, has also been a significant development for Australian consumer law as a whole and it appears that the ACL's development and progression to further define unfair terms and what constitutes an unfair term is a large step forward form the previous consumer law in Australia and a lesson on growth from the legislature's perspective.

[180] Sims 2012-2013 *Monash UL Rev.* (n 141) 764-772.
[181] Section 23(1) of the ACL.
[182] Sims 2012-2013 *Monash UL Rev.* (n 141) 772-773.

CHAPTER SIX: CONCLUSION

6.2.Overall recommendations for South African consumer law

In view of the above discussion and the developments set out in both the South African and Australian consumer law realms, a definitive similarity can be drawn between the two countries' consumer law and approaches to the development of the consumer-law realm.

It is apparent, however, that South Africa has been slower to develop the consumer legislation into a statutory format and as such it could be argued that the legislature might have been able to produce a better CPA with more legal certainty flowing from it had it considered the international practices with possibly more regard and acknowledgment of the need for a definitive definition for what constitutes unfair terms as this is a crucial point in consumer protection. The history, development and scope of the CPA, specifically with a focus on unreasonable, unconscionable or unfair terms as discussed in this dissertation, has been a significant development for South African consumer law as a whole. However, it is the degree to which unfair terms are addressed that appears to not have reached the desirable point of certainty one would have hoped for, especially in light of the comparison of Australia's consumer law which has already been further amended to incorporate and cover "unfairness".

That said, the approach followed by South Africa is somewhat more of a conservative approach than that of Australia, but only because Australia begun the development of their consumer law many years prior to South Africa. It is disappointing because South Africa had the opportunity to learn from and consider international experiences, such as that of Australia, when legislating the CPA. The CPA does not appear to be a far stretch from the Australian consumer law's starting point so many years ago and with some time for development, the CPA might possibly blossom or alternatively be amended to provide the clarity on the missing small, yet key, points such as "fairness".

Therefore, in conclusion, by comparing South African and Australian consumer law[183] in respect of unfair, unconscionable and unreasonable contract terms, this dissertation has argued that in light of the recommendations bearing a close resemblance to the changes that the Australian consumer law underwent in its progression to reach the point it is at today, the South African Law Commission's recommendations should have been implemented in order to create more certainty regarding these types of terms and by doing so there would

[183] Consumer law in this dissertation does not include credit transactions and financial products.

have been a greater sense of certainty created by the CPA. Furthermore, the *lacuna* referred to in respect of unfair, unconscionable and oppressive contract terms might have been "eradicated" (for lack of a better word) *in toto*.

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