

**The plain language requirement in terms of section 22 of the Consumer Protection Act  
68 of 2008 as applied to consumer contracts**

Submitted in partial fulfilment of the requirements for the degree

Magister Legum

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## **SUMMARY**

The Consumer Protection aims to protect the rights of the consumers. Through the protection of the rights of the consumer, there is a balance being created between the supplier and consumer. The introduction of the plain language requirement by the Consumer Protection Act 68 of 2008 has brought about a new dimension in the relationship between consumers and suppliers when concluding consumer contracts. The plain language requirement places a duty on suppliers to ensure that the consumers understand the contents of the consumer contract clearly. Therefore, the plain language requirement requires the suppliers to ensure that the provisions of section 22 of the Consumer Protection Act 68 of 2008 are fulfilled.

The purpose of this study is to investigate the provisions section 22 of the Consumer Protection Act 68 of 2008. The investigation involves the assessment of benefits and challenges of the plain language requirement to consumers and suppliers in consumer contracts. The investigation reveals that the satisfaction of the plain language requirement as applied to consumer contracts poses a burden on suppliers. The outcomes of this study reveal there is need to have guidelines in place for suppliers. These guidelines will enable the suppliers to determine whether they have satisfied the plain language requirement when concluding consumer contracts with consumers.

## CHAPTER 1: INTRODUCTION

### 1.1 Background

The Consumer Protection Act<sup>1</sup> was enacted in 2008 but was only implemented in 2010.<sup>2</sup> In its preamble, the CPA provides that it aims to, *inter alia*, “improve access to, and the quality of, information that is necessary to enable consumers to make informed decisions.”<sup>3</sup> Furthermore, the CPA strives to “promote and advance the social and economic welfare of consumers in South Africa by, *inter alia*, establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.”<sup>4</sup>

Schimmel contends that in every commercial transaction, plain language is an imperative element as it contains a specific set of steps and a specific structure.<sup>5</sup> According to Gouws, plain language is defined as “language that is direct and straightforward, designed to deliver its message to its intended audience clearly, effectively and without undue effort.”<sup>6</sup> The CPA accords protection to the fundamental consumer rights in its Chapter 2, Part D, more

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<sup>1</sup> Consumer Protection Act 68 of 2008 – hereafter “CPA”.

<sup>2</sup> S 61 which pertains to the liability of suppliers with regards to the harm caused by defective goods came into effect on 24 April 2010 and the Act came fully into force on 1 April 2011; see Hutchison and Pretorius (ed) *The Law of Contract in South Africa* (2017) 444; Government Gazette 32186 of 29 April 2009.

<sup>3</sup> Preamble of the CPA.

<sup>4</sup> S 3.

<sup>5</sup> Schimmel “Plain language is plain necessary” *Without Prejudice* 2016 24.

<sup>6</sup> Gouws “A consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act” 2010 *SA Merc LJ* 81.



specifically in section 22, it seeks to ensure that the consumer is not only provided with information but is provided with information that is in “plain language and understandable”.<sup>7</sup>

## **1 2 Research question**

The purpose of this study is to investigate the regulation of plain language in the provisions of Chapter 2, Part D; in particular section 22 of the CPA, to determine the application of the plain language requirement to consumer contracts. Furthermore, to determine whether the plain language requirement in terms of section 22 of the CPA is more beneficial to consumers, consequently whether the provisions of section 22 are burdensome on the supplier.

To determine the following:

1. What are the plain language requirements in terms of section 22?
2. How are they beneficial to both consumers and suppliers?
3. What are the challenges for the successful implementation of the plain language requirement?
4. What recommendations can be made to address these challenges for the successful implementation of the plain language requirement?

## **1 3 Methodology**

This study investigates the regulation of the plain language requirement in terms of the CPA. Primary sources and secondary sources will be utilised to conduct the investigation of the use of the plain language requirement. The qualitative method will be used in this proposed study to collect and analyse sources to understand the investigation. Compliance with *THRHR*

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<sup>7</sup> Naudé and Eislen (eds) *Commentary on the Consumer Protection Act* (2014) 22-1.

referencing style will be adhered to, as such, all the sources used will be acknowledged accordingly and this study will avoid plagiarism.

#### **1 4 Overview of the chapters**

- Chapter 1: Introduction

Background of the CPA, introducing the problem and the portrayal of the proposed study.

- Chapter 2: Requirements of the plain language requirement in terms of section 22 of the CPA

Discussion of the plain language requirements and the analysing various opinions regarding the plain language requirement.

- Chapter 3: Assessment of the benefits and challenges of the plain language requirements

Discussion of the assessment of how the plain language requirements are beneficial to both consumers and suppliers, and the analysis of the challenges incurred by suppliers in the successful implementation of the plain language requirement.

- Chapter 4: Conclusion

Recommendations to address the challenges incurred in the successful implementation of the plain language requirement.

#### **1 5 Delineations and limitations**

This study is an academic study which is only confined to the provisions of the CPA. It does not consider foreign jurisdictions as well as other related legislation.

## CHAPTER 2: REQUIREMENTS OF THE PLAIN LANGUAGE REQUIREMENT IN TERMS OF SECTION 22 OF THE CONSUMER PROTECTION ACT

### 2 1 Introduction

The Consumer Protection Act<sup>8</sup> aims to regulate the relationship between consumers and suppliers. De Stadler and Van Zyl submit that it entitles consumers in South Africa to the right to plain language.<sup>9</sup> Stoop submits that “the right to information in plain and understandable language is embedded under the umbrella **right of information and disclosure** in the Act”.<sup>10</sup> The CPA in section 22 sets out the elements to be complied with to ensure that consumer contracts, notices, document, visual representation do fulfil with the plain language requirement. Thus, a written consumer contract must comply with the requirements of section 22 of the CPA.<sup>11</sup> In this chapter the requirements of plain language in terms of section 22 of the CPA will be discussed.

### 2 2 Background of the Consumer Protection Act

The preamble of the CPA stipulates that it aims to ensure that

“The people of South Africa recognise—

That apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality;

That it is necessary to develop and employ innovative means to—

(a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;

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<sup>8</sup> Consumer Protection Act 68 of 2008 – hereafter “CPA”.

<sup>9</sup> De Stadler and Van Zyl “Plain-language contracts: Challenges and opportunities” 2017 *SA Merc LJ* 95.

<sup>10</sup> Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 22-2.

<sup>11</sup> S 50(2)(i).

(b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and

(c) to give effect to internationally recognised customer rights;

That recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa; and

That it is desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance.

For the reasons set out above, and to give effect to the international law obligations of the Republic, a law is to be enacted in order to—

- promote and protect the economic interests of consumers;
- improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
- protect consumers from hazards to their well-being and safety;
- develop effective means of redress for consumers;
- promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
- facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers”.<sup>12</sup>

It is clear from the preamble that the CPA aims to promote the language requirement in order for consumers to conclude consumer contracts with a clear understanding and to fully establish consumer contracts that satisfy their needs.

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<sup>12</sup> Preamble of CPA.

## 2 2 1 Implementation of the CPA

Stoop and Chürr provide that the CPA was enacted in 2008 but only came in effect on the 1<sup>st</sup> of April 2011.<sup>13</sup> The promulgation of the CPA was not to completely remove the applicability of the common law in commercial transaction, however, the CPA serves as a mere tool that not only regulates the common law but amends certain parts in the protection of consumer rights.<sup>14</sup>

The implementation of the CPA is viewed through the rights of consumers and responsibilities of suppliers that are clearly stipulated in the Act.<sup>15</sup> The intervention of the CPA has established a more protective tool to the rights of consumers. Furthermore, Barnard contends that the Act provides eight core fundamental consumer rights.<sup>16</sup>

The scope of implementation of the Act is, however, limited to consumers and suppliers as defined by the Act, excluding juristic persons that exceed the threshold as determined by the Minister from time to time.<sup>17</sup> Section 6 of the CPA provides that,

“(1) On the early effective date as determined in accordance with item 2 of Schedule 2, and subsequently at intervals of not more than five years, the Minister, by notice in the *Gazette*, must determine a monetary threshold applicable to the size of the juristic person for the purposes of section 5(2)(b).

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<sup>13</sup> Government Gazette 32186 of 29 April 2009; see Stoop and Chürr “Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008” 2013 *PER / PELJ* 515.

<sup>14</sup> Van Eeden and Barnard *Consumer protection law in South Africa* (2017) 31.

<sup>15</sup> Davey “A Summary of the Consumer Protection Act 68 of 2008” <http://www.meumannwhite.co.za/news-details/25/> (accessed 12-05-2017).

<sup>16</sup> Barnard “The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages” 2012 *De Jure* 455.

<sup>17</sup> S 6.

(2) The initial threshold determined by the Minister in terms of this section takes effect on the general effective date as determined in accordance with item 2 of Schedule 2, and each subsequent threshold takes effect six months after the date on which it is published in the *Gazette*".<sup>18</sup>

The threshold as determined by the Minister is currently R2 million. Therefore, the CPA does not apply to a transaction where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction equals or exceeds the threshold value of R2 million.<sup>19</sup>

The CPA has a 'rights-based approach' towards consumer protection because it entrenches certain consumer rights.<sup>20</sup> Accordingly, Du Preez<sup>21</sup> submits that the Bill (the CPA) focuses exclusively on consumer protection. Furthermore, the CPA provides that it aims to:

“promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission”.<sup>22</sup>

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<sup>18</sup> S 6.

<sup>19</sup> Government Gazette 34181 of 1 April 2011.

<sup>20</sup> Dlamini *Consumer protection in Swaziland: A comparative analysis of the law in South Africa and the United Kingdom* (LLM-thesis, UKZN, 2012) 139.

<sup>21</sup> Du Preez “The Consumer Protection Bill: A few preliminary comments” 2009 *TSAR* 59.

<sup>22</sup> Long title of the CPA.

Woker provides that the CPA “is a comprehensive statute which introduces substantial consumer protection measures”.<sup>23</sup> However, in contrast Hutchison and Pretorius<sup>24</sup> argues that the Act has many contradictions and unclear provisions, creating difficulty when one has to interpret it. I submit that the CPA does afford protection to consumer rights.

## **2 2 2 Interpretation of the CPA**

The interpretation clause of the CPA is enshrined in its section 2(1). Section 2 of the CPA provides that

“(1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.

(2) When interpreting or applying this Act, a person, court or Tribunal or the Commission may consider—

(a) appropriate foreign and international law;

(b) appropriate international conventions, declarations or protocols relating to consumer protection; and

(c) any decision of a consumer court, ombud or arbitrator in terms of this Act, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court.

(3) If a provision of this Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including by use of—

(a) an advanced electronic signature, as defined in the Electronic Communications and Transactions Act; or

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<sup>23</sup> Woker “Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the national credit act and the Consumer Protection Act” 2010 *Obiter* 217.

<sup>24</sup> Hutchison and Pretorius (ed) *The law of contract in South Africa* (2013) 432.

- (b) an electronic signature, as defined in the Electronic Communications and Transactions Act.
- (4) The supplier must take reasonable measures to prevent the use of a consumer's electronic signature for any purpose other than the signing or initialling of the particular document that the consumer intended to sign or initial.
- (5) Despite the periods of time set out in section 6, each successive threshold determined by the Minister in terms of that section continues in effect until a subsequent threshold in terms of that section takes effect.
- (6) When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by—
- (a) excluding the day on which the first such event occurs;
  - (b) including the day on or by which the second event is to occur; and
  - (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.
- (7) Unless the context indicates otherwise, any use of the word “includes” or “including” in relation to a defined or generic word or expression, on the one hand, and one or more enumerated examples or specific items, on the other, is not to be construed as limiting the defined or generic expression to the examples or items so enumerated.
- (8) If there is an inconsistency between any provision of Chapter 5 of this Act and a provision of the Public Finance Management Act, 1999 (Act No. 1 of 1999), or the Public Service Act, 1994 (Proclamation No. 103 of 1994), the provisions of the Public Finance Management Act, 1999, or of the Public Service Act, 1994, as the case may be, prevail.
- (9) If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8)—
- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
  - (b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision, provided that in the case of



hazardous chemical products only the provisions of this Act relating to consumer redress will apply.

(10) No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law”.<sup>25</sup>

In the interpretation of the CPA, emphasis is given to the fact that the purpose, as contemplated in section 3 of the CPA, must be given effect to.<sup>26</sup> The promotion of common law consumer rights are also portrayed in section 2(10) where it is stated that “No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law”.<sup>27</sup> The provisions of section 2, therefore, require the consideration of the purpose of the CPA together with effect being given to consumer rights when interpreting the provisions of the CPA. In *Eskom Holdings Limited v Halstead-Cleak*<sup>28</sup> the court held that

“In terms of the provisions of s 2(1), the Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in s 3. That purpose is to promote and advance the social and economic welfare of consumers, in particular vulnerable consumers, in South Africa.<sup>5</sup> If there is an inconsistency between the Act and any other legislation both Acts apply concurrently, to the extent that it is possible. If it is not possible, the provisions that extend the greater protection to a consumer prevail over the alternative provision”.<sup>29</sup>

I will now provide definitions, as contemplated in the CPA, of the terms that I will refer to throughout that this paper. The meaning of a consumer in respect of goods and services in terms CPA is contemplated as

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<sup>25</sup> S 2.

<sup>26</sup> S 2(1).

<sup>27</sup> S 2(10).

<sup>28</sup> *Eskom Holdings Limited v Halstead-Cleak* 2016 ZASCA 150.

<sup>29</sup> *Eskom Holdings Limited v Halstead-Cleak* 2016 ZASCA 150 para 12.

“(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);

(c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)”.<sup>30</sup>

The CPA provides a broad definition of a consumer in order to accord protection at a wider scope of transaction. Furthermore, in *Eskom Holdings Limited v Halstead-Cleak*<sup>31</sup> the court held that

“The definition of ‘consumer’ in s 1 is a person to whom goods or services are marketed in the ordinary course of a supplier’s business, or who has entered into a transaction with a supplier in the ordinary course of a supplier’s business. The definition includes a person who is a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act. The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction”.<sup>32</sup>

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<sup>30</sup> S 1.

<sup>31</sup> *Eskom Holdings Limited v Halstead-Cleak* 2016 ZASCA 150.

<sup>32</sup> *Eskom Holdings Limited v Halstead-Cleak* 2016 ZASCA 150 para 15.

However, the definition of supplier is not as broad as that of the consumer. Accordingly, the CPA provides that a supplier is “a person who promotes, supplies or offers to supply any service”.<sup>33</sup> In my opinion, the CPA has aimed to ensure that the supplier does not simply escape liability on the basis that there was no actual transaction, hence it includes the promotion together with the offer to supply service.

Although the topic of this paper pertains to “consumer contracts”, I submit that the CPA does not stipulate the meaning of contract. Instead the terms “contract” and “agreement” are utilised simultaneously without any inferences. Therefore, the CPA defines an agreement as, “an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them”.<sup>34</sup> It further defines consumer agreement as “an agreement between a supplier and a consumer other than a franchise agreement”.<sup>35</sup> For the purposes of this paper, I will refer to consumer contract instead of consumer agreement.

### **2 2 3 Purpose of the CPA**

The CPA affords consumers protection when concluding consumer contracts, thus, promotes the rights of consumers and protects them against unfair commercial practices.<sup>36</sup> Jacobs *et al* submit that “the Act provides an extensive framework for consumer protection and aims to develop, enhance and protect the rights of the consumer and to eliminate unethical suppliers and improper business practices”.<sup>37</sup>

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<sup>33</sup> S 1.

<sup>34</sup> *Ibid.*

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

<sup>36</sup> S 3(1).

<sup>37</sup> Jacobs, Stoop and Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 *PER/PELJ* 303.

The aim of the CPA is clearly portrayed in its provisions of section 3. Du Preez correctly states that the CPA “focuses exclusively on consumer protection by aiming to ‘promote a fair, accessible and sustainable marketplace for consumer products and services and, for that purpose, to establish national norms and standards relating to consumer protection’”.<sup>38</sup> The purpose of the CPA is, therefore, contemplated as follows:

“to promote and advance the social and economic welfare of consumers in South Africa by— (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers— (i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented; (c) promoting fair business practices; (d) protecting consumers from— (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) deceptive, misleading, unfair or fraudulent conduct; (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour; (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer

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<sup>38</sup> Du Preez 2009 *TSAR* 59.

transactions; and (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers”.<sup>39</sup>

The significance of the purpose of the CPA is portrayed through its reiteration of ensuring that the interpretation of the CPA be made with the consideration of the provisions of the aforementioned section 3.<sup>40</sup> Furthermore, Stoop and Chürr submit that the “purpose of this Act is, among other things, to promote fairness, openness and respectable business practice between the suppliers of goods or services and the consumers of such good and services”.<sup>41</sup> Van Eeden and Barnard correctly submit that “Section 3(1) employs both the concepts of unconscionability and unfairness in relation to conduct that may be prohibited”.<sup>42</sup>

#### **2 2 4 Application of the CPA**

The application clause of the CPA is contemplated in section 5 of the CPA. Section 5 of the CPA provides that

“(1) This Act applies to—

(a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);

(b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless—

(i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or

(ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);

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<sup>39</sup> S 3(1).

<sup>40</sup> S 4(3).

<sup>41</sup> Stoop and Chürr 2013 *PER/PERJ* 515.

<sup>42</sup> Van Eeden and Barnard 30.

(c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and

(d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).

(2) This Act does not apply to any transaction—

(a) in terms of which goods or services are promoted or supplied to the State;

(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;

(c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);

(d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;

(e) pertaining to services to be supplied under an employment contract;

(f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or

(g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

(3) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of—

(a) any other national legislation; or

(b) any treaty, international law, convention or protocol.

(4) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (3)—

(a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and

(b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

(5) If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61.

(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:

(a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;

(b) a solicitation of offers to enter into a franchise agreement;

(c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;

(d) a franchise agreement or an agreement supplementary to a franchise agreement; and

(e) the supply of any goods or services to a franchisee in terms of a franchise agreement.

(7) Despite subsection (2)(b), this Act applies to a transaction contemplated in subsection (6)(b) to (e) irrespective of whether the size of the juristic person falls above or below the threshold determined in terms of section 6.

(8) The application of this Act in terms of subsections (1) to (7) extends to a matter irrespective of whether the supplier—

(a) resides or has its principal office within or outside the Republic;

(b) operates on a for-profit basis or otherwise; or

(c) is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or

(d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public”.<sup>43</sup>

The application clause provides the CPA with a broader ability to cover a vast amount of interactions with the consumer and the supplier. Van Eeden and Barnard<sup>44</sup> submit that the CPA “materially affects relationships between consumers and businesses, under the banner of what may generally be termed the ‘consumer interest’.” Thus, the CPA regulates its usage. It determines how, when and to which commercial transactions should the CPA be used. Furthermore, the CPA provides measures that are to be exercised on the relationship between the consumer and the supplier.

The CPA has been criticised for being ambiguous and leaving a lot of loop holes unattended,<sup>45</sup> however, one should be bear in mind that the intention of the CPA is to cover a wider range of commercial transactions. Thus, the CPA intends to afford consumers as much protection as possible.

### **2 3 Introduction of plain language in terms of the CPA**

Plain language ought to be “direct and straightforward, designed to deliver its message to its intended readers clearly, effectively and without fuss or undue effort.”<sup>46</sup> According to Schimmel, “Plain language is a set of specific steps, involves a specific structure, and most importantly includes certain specific language changes.”<sup>47</sup>

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<sup>43</sup> S 5.

<sup>44</sup> Van Eeden and Barnard 25.

<sup>45</sup> Woker 2010 *Obiter* 217.

<sup>46</sup> Gouws “A consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act” 2010 *SA Merc LJ* 81.

<sup>47</sup> Schimmel “Plain language is plain necessary” 2016 *Without Prejudice* 24.



The introduction of the plain language requirement by the CPA in its section 22 is an attempt to bring both contracting parties onto a level playing field.<sup>48</sup> Section 22 of the CPA reads as follows:

“(1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—

(a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or

(b) in plain language, if no form has been prescribed for that notice, document or visual representation.

(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;

(b) the organisation, form and style of the notice, document or visual representation;

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

(d) the use of any illustrations, examples, headings or other aids to reading and understanding.

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<sup>48</sup> Van Eeden and Barnard 311.

(3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).

(4) Guidelines published in terms of subsection (3) may be published for public comment”.<sup>49</sup>

The right to information in plain and understandable language is entrenched in section 22 of the CPA.<sup>50</sup> For the purposes of this study, I will only focus on section 22(1) and (2) of the CPA, in order to critical assess the benefits and challenges posed to both consumers and suppliers.

In *Standard Bank of South Africa v Dlamini*<sup>51</sup> the court addressed the plain language requirement and held that the supplier bore the onus to prove that reasonable measures to inform the consumer of the material terms of the agreement were taken by such supplier.<sup>52</sup> Although the case of *Dlamini*<sup>53</sup> dealt with the plain language requirement in the National Credit Act 34 of 2005, It is my submission that the plain language requirements in section 64 of the National Credit Act 34 of 2005 and section 22 of the CPA are similar.<sup>54</sup>

Plain language is, therefore, defined as avoiding elements such as “obscurity, inflated vocabulary, convoluted sentence construction and using only as many words as are necessary”.<sup>55</sup> Concurrently, Gordon and Burt argue that plain language in terms of section 22 does not only refer to grammar and wording but refers to content, structure, design and style

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<sup>49</sup> S 22.

<sup>50</sup> Hutchison and Pretorius 457.

<sup>51</sup> 2013 1 SA 219 (KZD).

<sup>52</sup> Naudé and Eiselen 22-4.

<sup>53</sup> 2013 1 SA 219 (KZD).

<sup>54</sup> Naudé and Eiselen 22-4.

<sup>55</sup> Gouws 2010 *SA Merc LJ* 81; Barnard “In search of the ordinary consumer and plain language in South Africa” 2014 *Journal of Texas Consumer and Commercial Law* 4.

of the document.<sup>56</sup> Melville concurs to the submission of Gordon and Burt, by submitting that the interpretation of plain language is not limited to merely grammar and wording, it includes aspects of ‘the content of the document, the document’s structure and layout, and even design elements’.<sup>57</sup> In *Office of Fair Trading v Abbey National Plc & 7 Others*<sup>58</sup> it was held that terms in consumer contracts that are not in plain language should be construed to be unfair.

Melville argues that plain language is ‘reader-focused writing’, that the plainness of the consumer contract is dependent on its audience.<sup>59</sup> As such, the definition of plain language in consumer contracts would vary from consumer-to-consumer and from supplier-to-supplier. It is submitted that “the use of plain language is, therefore, in fact required in all transactions with consumers”.<sup>60</sup> Furthermore, Newman contends that “there may be a variety of opinions on what exactly plain language comprises, there is some uniformity as to a basic approach, which is to simplify the language and structure of contracts”.<sup>61</sup>

The CPA contains its definition of plain language. I, therefore, reiterate that section 22(2) of the CPA provides that,

“For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand

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<sup>56</sup> Gordon and Burt “Plain language” 2010 *Without Prejudice* 60.

<sup>57</sup> Melville, Gordon and Burt *Consumer Protection Act made easy* 158.

<sup>58</sup> 2008 All ER 625 (Comm) para 110.

<sup>59</sup> Melville, Gordon and Burt 158.

<sup>60</sup> Hutchison and Pretorius 458.

<sup>61</sup> Newman “The application of the plain and understandable language requirement in terms of the Consumer Protection Act – Can we learn from past precedent?” 2012 *Obiter* 638.

the content, significance and import of the notice, document or visual representation without undue effort, having regard to-

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;

(b) the organisation, form and style of the notice, document or visual representation;

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

(d) the use of any illustrations, examples, headings or other aids of hearing and understanding”.<sup>62</sup>

Gouws<sup>63</sup> states that section 22(2) of the CPA

“provides that an agreement would be in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the agreement is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the agreement without undue effort”.

In *Mercurius Motors v Lopez*<sup>64</sup> the court, in its interpretation of an agreement took cognisance of not the grammar but also the font and way the context appeared to the consumer. As such, the court took all the factors in terms of section 22(2) into consideration.<sup>65</sup>

The provisions of section 22(2) of the CPA have been criticised. Barnard criticises that the application of the requirements set by section 22(2) of the CPA are complex as there is no legal

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<sup>62</sup> S 22(2).

<sup>63</sup> Gouws 2010 *SA Merc LJ* 82.

<sup>64</sup> *Mercurius Motors v Lopez* 2008 3 SA 572 para 575C.

<sup>65</sup> Newman 2012 *Obiter* 643.

definition to determine when a certain notice, document or visual representation would meet such requirements of section 22(2).<sup>66</sup> In addition, Cornelius argues that the requirements of plain language do not provide guidance on how multilingualism and multiculturalism should be addressed in the South African consumer industry.<sup>67</sup>

It is provided that ‘a clear, logical structure will increase the readability of a document and increase the comprehension of the reader’.<sup>68</sup> In *Motowest Bikes and ATVS v Calvern Financial Services*<sup>69</sup> the court stated that

“An owner’s risk clause undermines the very essence of a contract of deposit and should therefore be pertinently brought to a customer’s attention – *Mercurius Motors v Lopez*, supra at para 33; see also: *Durban’s Water Wonderland (Pty) Ltd v Botha & another* 1999 (1) SA 982 (SCA) at 991D-J. The trial court correctly found that the evidence had failed to establish that an owner’s risk clause was a term of the agreement. In any event on the appellant’s version the notice to this effect was placed at an obscure spot on a table in the car wash office, instead of being prominently displayed, for example, on the wall. Venter testified that he had never entered that office and that his attention had never been drawn to it, while Leibbrandt testified to the contrary. The trial judge preferred Venter’s testimony to that of Leibbrandt on the basis of credibility and the probabilities. Again, this finding cannot be faulted in my view. It should perhaps be added that the notion that vehicles would be left at the risk of their owners is not entirely compatible with the other evidence that it was the policy of the car wash that owners were to be in attendance throughout whilst their vehicles were being washed”.<sup>70</sup>

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<sup>66</sup> Barnard 2014 *Journal of Texas Consumer and Commercial law* 4-5.

<sup>67</sup> Cornelius “Defining ‘plain language’ in contemporary South Africa” 2015 *Stellenbosch Papers in Linguistics* 13.

<sup>68</sup> De Stadler and Van Zyl 2017 *SA Merc LJ* 115.

<sup>69</sup> *Motowest Bikes and ATVS v Calvern Financial Services* [2014] JOL 32385 (SCA).

<sup>70</sup> *Motowest Bikes and ATVS v Calvern Financial Services* [2014] JOL 32385 (SCA) para 10.

Therefore, this in essence means that the essential terms of a consumer contract need to be brought to the attention of the consumer.<sup>71</sup>

## **2.5 Consumer within the scope of the plain language requirement**

Apart from the definition of a consumer as contemplated in section 1 of the CPA, the plain language requirement raises a need for the distinction between the ‘vulnerable consumer’ and the ‘average/ordinary consumer’ when there has to be a determination of compliance with the requirement. The provisions of section 22(2) of the CPA stipulate that

“For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to...”.<sup>72</sup>

Barnard contends that “Section 22(2) also seems to distinguish between ordinary consumers with the inclusion of the passage ‘of the class of persons for whom the agreement is intended’.”<sup>73</sup> In addition, Barnard submits that there is no direct inference to a vulnerable consumer in the section 22(2), however, section 3 of the CPA “compels an interpretation of section 22 that takes the purpose and policy of the CPA into account”.<sup>74</sup>

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<sup>71</sup> *Motowest Bikes and ATVS v Calvern Financial Services* [2014] JOL 32385 (SCA) para 10; *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA) para 33.

<sup>72</sup> S 2.

<sup>73</sup> Barnard 2014 *Journal of Texas Consumer and Commercial law* 5.

<sup>74</sup> *Ibid.*

## **2 6 Conclusion**

The scope of plain language is broad, as it is not only limited to the words in the consumer contract but includes the design, structure and format of the agreement. The plain language requirement places a duty on suppliers to ensure that the consumer contract is drafted in a manner that enables the consumer to *prima facie* understand its contents. Suppliers, further, have the duty to bring the essential terms in the consumer contracts to the attention of the consumers.

I submit that the plain language requirement, thus, enables consumers to easily understand and interpret consumer contracts. Finally, it is my submission that there is a burden placed on suppliers to ensure that the plain language requirement is complied with in order to ensure that the rights of the consumer with regard to plain language in consumer contracts prevail.

## **Chapter 3: ASSESSMENT OF THE BENEFITS AND CHALLENGES OF THE PLAIN LANGUAGE REQUIREMENT**

### **3 1 Introduction**

The Consumer Protection Act<sup>75</sup> serves “to promote fairness, openness and respectable business practice between the suppliers of goods or services and the consumers of such goods and services”.<sup>76</sup> The plain language requirement, thus, plays an essential role in ensuring that there is transparency and procedural fairness in consumer contracts.<sup>77</sup> Furthermore, the plain language requirement empowers both the consumer and the supplier, in that, a balance is created amongst the parties and there is equal access to understanding the relationship.<sup>78</sup> In the previous chapter, the provisions of section 22 of the CPA were outlined wholly, however, the critical discussion is only confined section 22(1) and (2) of the CPA, now I will assess the benefits and challenges of the plain language requirement as contemplated section 22(1) and (2) of the CPA.

### **3 2 Fairness and accessibility**

The promotion of fairness and accessibility is at the core of the CPA. The CPA lays its foundation by providing in its long title that it seeks to, *inter alia*,

“To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing

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<sup>75</sup> Consumer Protection Act 68 of 2008 – hereafter “CPA”.

<sup>76</sup> Stoop and Chürr “Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008” 2013 *PER / PELJ* 515.

<sup>77</sup> Naudé and Eiselen *Commentary on the Consumer Protection Act* (2014) 22-3.

<sup>78</sup> Melville, Gordon and Burt *Consumer protection act made easy* 157.



and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements...”.<sup>79</sup>

I, therefore, submit that the promotion of fairness and accessibility is imperative to the CPA. Consequently, the aim to promote fairness and accessibility is enshrined in section 3(1)(a) of the CPA. Section 3(1)(a) of the CPA provides that,

“3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally”.<sup>80</sup>

It is my submission that it is important for suppliers to ensure that consumers are afforded their right to fairness and accessibility.

### **3 3 Establishing substantive and procedural fairness**

Stoop provides that “the law of contract merely provides a framework within which contracts are enforced, without concern for their context”.<sup>81</sup> It is vital for the consumer to understand the manner in which the consumer is bound the consumer contract and the nature of the consequences of such consumer contract.<sup>82</sup> I submit that the plain language requirement is an essential tool to be considered by the supplier when establishing substantive and procedural

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<sup>79</sup> Long title of the CPA.

<sup>80</sup> S 3(1)(a).

<sup>81</sup> Stoop “The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts” 2015 *PER / PELJ* 1091.

<sup>82</sup> Melville, Gordon and Burt 162.

fairness in a consumer contract. Hawthorne provides that “consumer protection law constitutes a progressive form of law which affects procedural and substantive fairness”.<sup>83</sup>

### **3 3 1 Substantive fairness**

According to Stoop, Substantive fairness relates to “the outcome of the contracting process”.<sup>84</sup> In addition, Hawthorne states that “substantive fairness refers to the fair distribution of substantive rights and obligations in terms of the contract...”<sup>85</sup> It, therefore, relates to the question of whether, upon conclusion of the consumer contract, there has been fairness amongst the parties.

With substantive fairness, the essential terms must be reasonably brought to the attention of the consumer and there must be a reasonable disclosure of information.<sup>86</sup> It raises the relevancy of transparency in the finality of a consumer contract. I submit that substantive fairness pertains to the end result of the consumer between the supplier and the consumer.

### **3 3 2 Procedural fairness**

According to Hawthorne, “the fundamental consumer rights establish a framework for procedural fairness”.<sup>87</sup> Procedural fairness refers to “the contracting process itself”.<sup>88</sup> A consumer contract is considered to be procedurally fair if it is concluded voluntarily.<sup>89</sup> Transparency is vital, on the one hand, with regards to the terms of the consumer contract, and

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<sup>83</sup> Hawthorne “Public governance: Unpacking the Consumer Protection Act 68 of 2008” 2012 *THRHR* 346.

<sup>84</sup> Stoop 2015 *PER/PERJ* 1092.

<sup>85</sup> Hawthorne 2012 *THRHR* 361.

<sup>86</sup> Stoop 2015 *PER/PERJ* 1093.

<sup>87</sup> Hawthorne 2012 *THRHR* 356.

<sup>88</sup> Stoop 2015 *PER/PERJ* 1092.

<sup>89</sup> Stoop and Chürr 2013 *PER/PERJ* 518.

on the other hand, with regards to performance of the consumer contract.<sup>90</sup> Transparency will enable the consumer to understand and interpret the consumer contract and to subsequently make an informed decision.<sup>91</sup> It is submitted that substantive and procedural fairness interrelate as substantive fairness subsist resultant to procedural fairness.<sup>92</sup>

In *Brink v Humphries & Jewell (Pty) Ltd*<sup>93</sup> the court took cognisance of the content the contract and held that “the furnishing of a document misleading in its terms can, without more, constitute such a misrepresentation”.<sup>94</sup> I am of the view that a consumer contract that lacks transparency is neither substantive nor procedurally fair to the consumer, therefore, the plain language requirement is important in the determination of whether transparency is satisfied in a consumer contract.

#### **3 4 Documents required to be in plain language**

Melville provides that “Emphasis is placed in the Act on ensuring that consumers are enabled to make informed choices through being provided by suppliers with all the necessary information in plain and understandable language”.<sup>95</sup> Section 22 of the CPA prescribes the documents that are compelled to be in plain language. The CPA in its section 22(1) provides that,

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<sup>90</sup> Stoop 2015 *PER/PERJ* 1093.

<sup>91</sup> Stoop and Chürr 2013 *PER/PERJ* 518.

<sup>92</sup> Stoop 2015 *PER/PERJ* 1094.

<sup>93</sup> 2005 (2) SA 419 (SCA); 2012 *Obiter* 643.

<sup>94</sup> *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) 422B.

<sup>95</sup> Melville, Gordon and Burt 3.

“The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—

(a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or

(b) in plain language, if no form has been prescribed for that notice, document or visual representation”.<sup>96</sup>

The plain language requirement applies not only to consumer contracts, it also extends to marketing strategies by suppliers. In concurrence, Newman submits that

“This section refers to, not only the contractual “document”, but also to any “notice or visual presentation” provided or displayed to consumers. This is extremely wide as it refers to any writing which is made available through any manner to a consumer. It is not only a contract that is concluded with the consumer but also any notices displayed to a consumer at the place of business. These will include disclaimers and indemnities”.<sup>97</sup>

I submit that, in terms of section 22(1) of the CPA, the plain language requirement affords protection to consumers prior to the conclusion of the consumer contract, for instance in notices used by suppliers to advertise their products to consumers.

A further example that pertains to the promotion of the plain language requirement in a provision, condition or notice is provided in the CPA is section 49 of the CPA.

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

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<sup>96</sup> S 22(1).

<sup>97</sup> Newman “The application of the plain and understandable language requirement in terms of the Consumer Protection Act – Can we learn from past precedent?” 2012 *Obiter* 639.

- (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)".<sup>98</sup>

More specifically, section 49(3) of the CPA provides that "a provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22".<sup>99</sup> Section 49(3) of CPA emphasises the importance of plain language requirement, as consumers are protected from being deceived by the wording of the suppliers.

The CPA regulates written consumer agreements in terms of section 50, which provides that

- "(1) The Minister may prescribe categories of consumer agreements that are required to be in writing.
- (2) If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily—
- (a) it applies irrespective of whether or not the consumer signs the agreement; and
  - (b) the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must—
    - (i) satisfy the requirements of section 22; and
    - (ii) set out an itemised break-down of the consumer's financial obligations under such agreement.
- (3) If a consumer agreement between a supplier and a consumer is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other recordable form as prescribed".<sup>100</sup>

Consumers are thus accorded protection by section 50 of the CPA when concluding written consumer contracts. As stipulated above, section 50(2) of the CPA provides

- "(2) If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily—
- (a) it applies irrespective of whether or not the consumer signs the agreement; and

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<sup>98</sup> S 49.

<sup>99</sup> S 49(3).

<sup>100</sup> S 50.

(b) the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must—

(i) satisfy the requirements of section 22; and

(ii) set out an itemised break-down of the consumer’s financial obligations under such agreement”.<sup>101</sup>

The provisions of section 50(2) of the CPA do not only promote the plain language requirement but they further ensure that the principle of accessibility is complied with by the supplier. Section 50(2)(b) of the CPA affords the consumers an opportunity to properly consider the terms of the consumer contract and the consumer may get time to contemplate on whether the terms and conditions are fair and best suited to the consumer. In essence, it is my contention that the consumer is permitted to access the simplified, clear and understandable consumer contract.

In addition, Gouws contends that,

“There are mainly two reasons why legislation requiring consumer agreements to be written in plain language is necessary. These agreements are not written in plain language but in technical language incomprehensible for the consumer. And most of them are normally mass-produced and their terms are non-negotiable, usually one-sided, favouring the supplier. The consumer is not in a position to bargain with the supplier, and with no real choice but to sign the agreement is compelled to accept the proposed terms”.<sup>102</sup>

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<sup>101</sup> S 50(2).

<sup>102</sup> Gouws 81.

### **3 5 Elements of the plain language requirement**

The provisions of section 22<sup>103</sup> contemplate the principles which serve as guidelines to compliance with the plain language requirement. These guidelines enable the supplier, when drafting a consumer contract, to protect the rights of the consumer.

#### **3 5 1 Context**

The consumer contract must be adequately constructed by the supplier. Naudé and Eislen<sup>104</sup> state that “context indicates that it is necessary to take into account of how and when consumers read a document or how the document is used”. In addition, it is submitted that the document drafted “can take into account what the consumer would reasonably be expected to know from previous transactions”.<sup>105</sup> In essence, the context of the consumer contract in its entirety is important when giving effect to the plain language requirement.

#### **3 5 2 Comprehensiveness**

The consumer must be placed in a position to properly comprehend the consumer contract, that is, the consumer must comprehend and understand fully the nature and implications of the consumer contract. The *essentialia* of the consumer contract must be clearly outlined. The element of comprehensiveness pertains to the disclosure of all the information in the consumer contract, as such, effect is given to what is written in document.<sup>106</sup> It is correctly submitted that the consumer contract “cannot leave out any facts that are important”.<sup>107</sup>

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<sup>103</sup> S 22.

<sup>104</sup> Naudé and Eiselen 22-5.

<sup>105</sup> Melville, Gordon and Burt 163.

<sup>106</sup> Naudé and Eiselen 22-5.

<sup>107</sup> Melville, Gordon and Burt 163.



The important facts which may be contained in the consumer contract relate to the duties of both the supplier and the consumer, as well as the obligations which both parties must fulfil. When determining whether the consumer contract is comprehensive, “the contents of a document should therefore be considered and enable a consumer to make an informed choice”.<sup>108</sup> In my opinion, it is imperative that for a consumer to make an informed choice, the consumer must understand the consumer contract, as to the expected performance and the rights in the contract which must describe the full comprehension.

### **3 5 3 Consistency**

The supplier must ensure that there is some form of uniformity in the consumer contract presented before the consumer. Naudé and Eislen submit that “consistency indicates that the terminology and style must be consistent throughout the document”.<sup>109</sup> There must, therefore, be some form of regularity throughout the consumer contract. I submit that the wording by the supplier should have uniformity of some sort, this will also prevent consumers from being confused by the terms of the consumer contract. Furthermore, it is provided that “the consistent approach to the plain language requirement seems to be to simplify certain grammatical and syntactical constructions and more clearly set out the contract”.<sup>110</sup>

### **3 5 4 Organisation, form and style**

The consumer contract must be presentable to the consumer; therefore, the organisation, form and style of the consumer contract are imperative. The focus is on how the document is structured.<sup>111</sup> It is suggested that the document appear in a chorological manner of importance,

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<sup>108</sup> Naudé and Eiselen 22-6.

<sup>109</sup> Naudé and Eiselen 22-6.

<sup>110</sup> Newman 2012 *Obiter* 641.

<sup>111</sup> Naudé and Eiselen 22-6.

that is, important information first to important information last.<sup>112</sup> An example of such a consumer contract is one which both parties are described in the first page of the consumer contract.

### **3 5 5 Vocabulary, usage and sentence structure**

In addition to organisation, form and style, the consumer contract must contain vocabulary, usage and sentence structure. “Vocabulary, usage and sentence structure refers to general readability principles.<sup>113</sup> Therefore, the consumer contract should have terms that are clear, visible and understandable to the consumer. Finally, it is submitted that illustrations, examples, headings or other aids to reading and understanding form part of the elements to comply with the plain language requirement.<sup>114</sup>

According to De Stadler and Van Zyl,

“There is a tension between the principles of document design and the fundamentals of legal practice. Effective document design requires that the audience and their needs must lie at the heart of the approach. By comparison, attorneys are paid to protect their clients against consumers. This adversarial legal framework (where suppliers are pitted against consumers) creates a conflict of interest between the legal practitioners and their readership and places too much emphasis on ensuring that contracts will stand up in court. There is a failure to understand that simply writing in plain language can mitigate risk by creating a favourable impression of the supplier, managing consumers' expectations and reducing complaints”.<sup>115</sup>

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<sup>112</sup> Naudé and Eiselen 22-6.

<sup>113</sup> Naudé and Eiselen 22-6.

<sup>114</sup> Naudé and Eiselen 22-6; Melville, Gordon and Burt 163.

<sup>115</sup> De Stadler and Van Zyl “Plain-language contracts: Challenges and opportunities” 2017 *SA Merc LJ* 98.

### **3 6 Opportunities provided by the plain language requirement**

The CPA, through its plain language requirement, puts the consumer in a favourable position when concluding a consumer contract. The plain language requirement allows the consumer to make an informed decision.<sup>116</sup> In my opinion, the plain language requirement compels the supplier to avoid using complex terms in consumer contracts which may lead to confusion of the consumer.

Furthermore, in reiteration, De Stadler and Van Zyl contend that “there is a failure to understand that simply writing in plain language can mitigate risk by creating a favourable impression of the supplier, managing consumers' expectations and reducing complaints”.<sup>117</sup> The use of plain language prevents contradicting interpretations by the contracting parties. The use of plain language will guard against disputes that will arise on the basis the contracting parties were not of the same.

In addition, the plain language allows the consumer to not blindly bind themselves to a consumer contract. Stoop and Chürr further emphasise that “enabling consumers to make an informed choice means that consumers are able to compare products and the prices they are willing to pay, which makes markets more efficient”.<sup>118</sup>

Furthermore, De Stadler and Van Zyl submit that the right to disclosure improves the value of consumer protection as “it enables basic information to be presented in a uniform format”.<sup>119</sup> The consumer is placed in a position to better acquire the relevant and material terms of the

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<sup>116</sup> De Stadler and Van Zyl 2017 *SA Merc LJ* 100.

<sup>117</sup> De Stadler and Van Zyl 2017 *SA Merc LJ* 97.

<sup>118</sup> Stoop and Chürr 2013 PER/PERJ 528; Gen N 1957 in GG 26774 of 9 September 2004 (Draft Green Paper on the Consumer Policy Framework) 28.

<sup>119</sup> De Stadler and Van Zyl 2017 *SA Merc LJ* 100.

consumer contract. Furthermore, the plain language requirement creates a market that more efficient for consumers.<sup>120</sup> The provisions of section 22 of the CPA, therefore, cover a broader scope to afford consumers protection to a wider extent.

### **3 7 Challenges imposed by the plain language requirement**

The CPA aims to protect the rights of consumers, however, in doing so, there are certain obligations that are imposed on suppliers to achieve such protection. Although the plain language requirement, on the one hand, seeks to promote the rights of consumer, it, on the other hand, places a duty on suppliers to ensure that consumer rights are promoted. Melville submits that the CPA “imposes positive obligations on the suppliers of goods and services”.<sup>121</sup>

### **3 8 Determination of class of consumers by supplier**

A consumer, on the one hand, is defined in section 1 of the CPA as-

“in respect of any particular goods or services, means—

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and

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<sup>120</sup> *Ibid.*

<sup>121</sup> Melville, Gordon and Burt 33.

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)".<sup>122</sup>

Gouws submits that “consumers are the largest economic group in the country”.<sup>123</sup> A supplier, on the other hand, is defined in terms of section 1 of the CPA as “a person who markets any goods or services”.<sup>124</sup> The former person in terms of the CPA is provided with a broader definition while the latter person is not.

Although the CPA, in its section 1, provides a broad definition of a consumer, it further classifies the consumer in its section 22. Section 22 of the CPA not only compels the supplier to comply with plain language requirements, but it also provides for the classification of a consumer. The provisions of section 22(2) of the CPA introduce a classification of an “ordinary consumer”. There arises a need to distinguish between an ordinary consumer with average literacy skills and minimal experience and a vulnerable consumer. The supplier is placed under the obligation to understand the classification of consumers. The supplier must establish means on how each consumer should be approached.

### **3 9 Obligations imposed by the plain language requirement**

According to Melville, the CPA “imposes positive obligations on suppliers”.<sup>125</sup> Furthermore, the obligations posed onto the supplier have a corresponding consumer right.<sup>126</sup> The supplier has a duty to ensure that the obligations are complied with, in order, to fulfil the rights of the

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<sup>122</sup> S 1.

<sup>123</sup> Gouws “A Consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act” 2010 *SA Merc LJ* 84.

<sup>124</sup> S 1.

<sup>125</sup> Melville, Gordon and Burt 29.

<sup>126</sup> Melville, Gordon and Burt 33.

consumer. I submit that the plain language requirement does not clearly guide the suppliers on how the positive obligations should be executed.

Barnard submits that a document that is to be sent to a consumer must be in a language that the consumer is able to understand.<sup>127</sup> Furthermore, Gouws contends that a document written in plain language should be easily understood by the reader when reading it for the first time.<sup>128</sup> Accordingly, the consumer's ability to understand the document must be placed at the core of the drafting of it in plain language.

This, therefore, means that the consumer should not need to acquire further interpretation from another party in order to understand the contents of the document placed before the consumer by the supplier. The supplier is, thus, burdened with the duty of ensuring that the consumer is able to *prima facie* understand the consumer contract.

### **3 10 The usage of official language**

The CPA makes no provision that compels the usage of an official language in coherence with the plain language requirement. There is no duty on the supplier to ensure that the essential terms of the consumer contract are explained to the consumer in an official language. Naudé and Eislen provide that the requirement of an official language would have “placed an enormous burden on suppliers in South Africa”.<sup>129</sup> Coherently, De Stadler and Van Zyl state that “there is therefore no obligation to use other official languages than English when transacting with consumers”.<sup>130</sup>

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<sup>127</sup> Barnard “In search of the ordinary consumer and plain language in South Africa” 2014 *Journal of Texas Consumer and Commercial Law* 5.

<sup>128</sup> Gouws 2010 *SA Merc LJ* 81.

<sup>129</sup> Naudé and Eiselen 22-6.

<sup>130</sup> De Stadler and Van Zyl 2017 *SA Merc LJ* 108.

Contrarily, it is my submission that the supplier is faced with the duty of determining a consumer with average literacy skills, and in doing so, it might occur that the average group is confined to a certain official language group. De Stadler and Van Zyl, further, submit that “if the average literacy of the group is attached to a particular language, this should be considered by the supplier as a compelling reason to make the legal communication available in that language”.<sup>131</sup> I submit that although official language is not a requirement in the CPA, however, the supplier has to consider it when contracting with certain consumers.

### **3 11 Conclusion**

The CPA seeks to afford protection to consumers and ensure that the rights of consumers are not infringed upon. It initially does this by ensuring that consumers are accorded with fairness and accessibility. The CPA promotes the benefit of fairness and accessibility to consumers, even prior to the conclusion of consumer contracts. Suppliers are, thus, bound to ensure that they allow consumers to enjoy their benefit. It is clear that the CPA achieves its goal to afford consumers fairness and accessibility through the plain language requirement. This is because the plain language requirement prevents suppliers from unfairly misleading consumers.

Even though the CPA seems to possess an exclusive number of benefits to consumers, it places a burden on suppliers. Suppliers have to ensure that, when complying with the plain language requirement, they have to fulfil the obligation of ensuring that there is procedural and substantive fairness. Furthermore, suppliers have to establish the class of consumers that they are contracting with and also ensure that the consumers understand all the material terms of the consumer contract. The plain language requirement in terms of the CPA is to some extent, burdensome on the suppliers.

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<sup>131</sup> *Ibid.*

## **CHAPTER 4: CONCLUSION**

### **4 1 Summary of chapters**

This study is titled the plain language requirement in terms of section 22 of the Consumer Protection Act 68 of 2008 as applied to consumer contracts. In the first chapter, the purpose of this study is outlined as to investigate the regulation of plain language in terms of section 22 of the Consumer Protection Act<sup>132</sup> by determining the application of the plain language requirement in consumer contracts. The further purpose of this study as outlined in the first chapter is to determine whether the plain language requirement is beneficial to consumers and suppliers, consequently whether it is burdensome on suppliers or not.

The second chapter entails of the background of the CPA together with the provisions of section 22 of the CPA, in an effort to investigate the regulation of the plain language requirement. However, in the second chapter, I stipulated that the study will only focus on the provisions of section 22(1) and (2) of the CPA in order to achieve the aim to assess the benefits and challenges posed by the provisions on the consumers and the suppliers.

In the third chapter, the concept of fairness in section 22 of the CPA is discussed. Furthermore, the benefits and challenges of the plain language requirement are critically assessed. The fourth chapter is the conclusion chapter and recommendations to aid the challenges of the plain language requirement will be provided.

The final chapter is the conclusion chapter in which I will now provide my recommendations with regards to the challenges posed by the plain language requirement on suppliers.

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<sup>132</sup> Consumer Protection Act 68 of 2008 – hereafter “CPA”.



## **4 2 Recommendations**

The application of the plain language requirement in consumer contracts creates a fair and balanced ground between consumers and supplier. Concurrently, the provisions of section 22 of the CPA inform the supplier of what the plain language requirement is, but they do not direct the suppliers on how such requirement should be fulfilled. Suppliers interact with various consumers who fall under different class, for instance, the average consumer. A duty is placed on supplier to determine how each consumer should be classified and also what approach should be taken by the supplier in order to ensure that the plain language requirement has been complied with accordingly.

I, therefore, argue that the plain language requirement is not only beneficial to consumers but that it also burdens suppliers in its application. I submit that the wording section 22(1) and (2) of the CPA should be enhanced to formulate specific strategies that will enable suppliers to better comply with the requirement. The enhancement would allow the suppliers to accordingly ensure that the whole plain language requirement is fulfilled.

There should be guidelines which will enable suppliers to know whether they have satisfied the plain language requirement or not. These guidelines should be clear, in that, the suppliers know from the first interaction with the consumers, that consumers are properly and well-informed. Although, consumers will vary, these guidelines should be constructed in such a way that the other consumer would not benefit more than the other, in terms of the plain language requirement. The guidelines will also serve as a tool for suppliers to know how the plain language requirement should be satisfied. With the guidelines in place, it would be easier for suppliers to determine whether there has been compliance with the plain language requirement or not.

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