

**AGAINST THE STRICT APPLICATION OF THE
CAVEAT SUBSCRIPTOR RULE IN THE CONTEXT
OF CONTRACTS OF NECESSITY**

BY

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DECLARATION OF CANDIDATE

I, Kaelin Govinden, hereby declare that the contents of this dissertation represent my own unaided work and the dissertation has not previously been submitted for academic examination towards any qualification. Furthermore, it represents my own opinions and not necessarily those of the University of Kwa-Zulu Natal, College of Law and Management Studies.

A handwritten signature in black ink, appearing to read 'K. Govinden', is written above a solid horizontal line.

Kaelin Govinden

ABSTRACT

This dissertation critically examines the common law *caveat subscriptor* rule and argues against the strict application of the rule in the context of ‘contracts of necessity’ (which is defined in the research paper). I will begin by explaining what exactly the *caveat subscriptor* rule entails and how it functions within the realm of mistake in contract as a species of the reliance theory which the South African law of contract endorses. I will then proceed to outline the narrow grounds recognized by the courts to date upon which one may escape the working of the *caveat subscriptor* rule. In section II of the paper I will briefly discuss the rise of the consumer protection movement and consider the extent to which the Consumer Protection Act now provides added protection to the unwitting signatory against the strict application of the rule. In section III I will critically examine the underlying presumptions of the *caveat subscriptor* rule which purport to justify the existence and application of the rule itself. I will then proceed to illustrate that while the assumptions underlying the *caveat subscriptor* rule may have been accurate and relevant in the past, these assumptions are no longer in keeping with the modern era of mass marketing characterized by the widespread use of standard-form contracts and consumer non-readership, which is reflected in recent judgments dealing with unread contract terms. In section IV I will examine the modern reality of consumer non-readership caused by various innate psychological factors and behavioural biases, particularly in the context of contracts of necessity. In section V I show that a change in judicial attitude towards unread contract terms and increased fairness towards the signatory is warranted not only in light of modern consumer behavior, but also in light of the courts constitutional mandate to develop the common law in accordance with section 39 (2) of the Bill of Rights as well as its underlying values. In section VI I will propose a new basis for escaping the strict application of the rule grounded in public policy and will conclude by suggesting some practical methods for reform under the common law.

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‘The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew.’

Abraham Lincoln, Annual Message to Congress, December 1, 1862

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

Innes CJ in *Burger v Central South African Railways* 1903 TS 571

‘Real people don’t read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract.’

Ben-Shahar, O ‘The Myth of the Opportunity to Read in Contract Law’ 5(1) *European Review of Contract Law* (2009) 1 at 2

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AGAINST THE STRICT APPLICATION OF THE *CAVEAT SUBSCRIPTOR* RULE IN THE CONTEXT OF CONTRACTS OF NECESSITY

INTRODUCTION

The *caveat subscriptor* rule is, essentially, a common law rule of contract law which relates to unread contracts or unread contract terms whereby the signatory is bound by the impression of assent created by his or her signature in the mind of the contract enforcer. The *caveat subscriptor* rule gains its legitimacy from several underlying assumptions such as the ‘duty to read’ which to date have received very little attention and which have yet to be truly scrutinized in light of modern commerce and consumer behavioural biases. However, these underlying assumptions have withered with time and are no longer in keeping with the ‘lived reality’ reflected in twenty-first century consumer markets characterized by consumer non-readership, particularly when dealing with contracts of necessity.

Drawing on a recent study published by the UK Office of Fair Trading, I propose, for the purposes of this paper, that a ‘contract of necessity’ is one which involves the attainment of everyday essential goods or services, “on which a variety of consumers with different needs rely”,¹ but to which they give little or no attention primarily due to the fact that the goods or services in question are a necessity (rather than a luxury or optional convenience) and therefore leave the consumer with no choice but to enter into the contract or go without the goods or services in question. A typical example of a ‘contract of necessity’ in the South African context would be a motor-vehicle insurance contract. The widespread occurrence of motor-vehicle accidents and motor-vehicle thefts in South Africa, considered in conjunction with the high costs

¹ ‘Consumer Contracts’ published by the UK Office of Fair Trading in February 2011, available at http://www.ofi.gov.uk/shared_ofi/market-studies/consumercontracts/of1312.pdf, accessed on 27 May 2012.

of motor vehicles and the deficiencies of public transport, indicates the extremely high possibility of loss associated with motor vehicles. This in turn indicates the necessity of motor-vehicle insurance for the average South African consumer. Consequently, in such circumstances, necessity in effect compels the insured to contract for insurance.

The numerous circumstances of necessity that many South African consumers find themselves in on a daily basis, together with the vast inequality of society and disparity of wealth and resources that exist in South Africa, render the freedom of all contractants something of a fallacy. It will be shown that the very necessary nature of various goods or services, such as insurance or health care, which are attainable only through the conclusion of contracts, are one of the many factors which trigger various unseen psychological reactions and inherent behavioural biases which lead consumers to, and it is submitted, reasonably, not read consumer contracts of necessity.

Consequently, a new approach to the *caveat subscriptor* rule is needed in order to ensure increased fairness towards the unwitting signatory - an approach that accounts for the realities of modern consumer behavior in order to truly protect vulnerable consumers by providing our judges with greater discretion or room to maneuver when adjudicating along the lines of mistake in contracting. Moreover, it is submitted that, in light of the often overlooked psychological factors and intrinsic behavioural biases at play at the time of contracting, a different set of rules should apply when dealing with negotiated contracts and non-negotiated standard-form consumer contracts of necessity.

In section I below I will begin by explaining in detail what exactly the *caveat subscriptor* rule entails and how it functions within the realm of mistake in contract as a species of the reliance theory which the South African law of contract endorses. I will then proceed to outline the narrow grounds recognized by the courts to date upon which one may escape the working of the *caveat subscriptor* rule. In section II I will briefly discuss the rise of the consumer protection movement and consider the extent to which the Consumer Protection Act now provides added protection to the unwitting signatory against the strict application of the rule. In section III I will begin by critically examining the underlying presumptions of the *caveat subscriptor* rule which purport to justify the existence and application of the rule itself. I will then proceed to illustrate that while the assumptions underlying the *caveat subscriptor* rule may have been accurate and relevant in the past, these assumptions are no longer in keeping with the modern era of mass

marketing characterized by the widespread use of standard-form contracts and consumer non-readership, which I contend is reflected in recent judgments dealing with unread contract terms. In section IV I will examine the modern reality of consumer non-readership caused by various innate psychological factors and behavioural biases, particularly in the context of contracts of necessity. I will then proceed in section V to show that a change in judicial attitude towards unread contract terms and increased fairness towards the unwitting signatory is warranted not only in light of modern consumer behavior, but also in light of the courts constitutional mandate to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as well as the founding constitutional values of human dignity, equality and freedom. In section VI I will propose a new basis for escaping the strict application of the rule grounded in public policy and will conclude by suggesting some practical methods for reform under the common law.

SECTION I

1.1 CAVEAT SUBSCRIPTOR – ‘LET THE SIGNATORY BEWARE’

The cautionary Latin maxim ‘*caveat subscriptor*’ literally means ‘Let the signatory beware’,² or according to the Oxford Dictionary of Law, ‘Let the person signing be on his guard’.³ The phrase derives much of its impetus from the doctrine of freedom of contract, which is also referred to as the doctrine of contractual autonomy.⁴ For over a century, our courts have accepted the doctrine of freedom of contract as the cornerstone of the law of contract.⁵ In this regard the courts quite often quote from the leading English case of *Printing and Numerical Registering Company v Sampson*⁶ where Sir George Jessel MR held:

“If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of Justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.”⁷

A contract freely and willingly entered into by parties of competent capacity and understanding, which is lawful and not affected by any of the factors that may render it invalid, has a number of consequences. Two of these consequences are, for the purposes of this discussion, firstly that such a contract is valid and binding and is accordingly enforceable in a court of law. This is the doctrine of sanctity of contracts, referred to in Latin as the *pacta sunt servanda* principle and which has long been recognized and applied by our courts.⁸ The other consequence of concluding a contract is that by signing it, the signatory is said to create the impression in the

² D Bhana, E Bonthuys & M Nortje *Students Guide to the Law of Contract* 2nd Ed (2009) 305.

³ EA Martin & J Law *Oxford Dictionary of Law* 6th Ed (2006) 79.

⁴ C Okpaluba *Law and Contemporary South African Society* (2004) 287.

⁵ See D Hutchison *The Law of Contract in South Africa* 1st Ed (2009) 21; P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 1-16.

⁶ *Printing and Numerical Registering Company v Sampson* [1875] LR 19 Eq 462.

⁷ *Ibid* 465.

⁸ Hutchison (note 5 above) 21.

mind of the other party that he assents to all its terms and provisions and accordingly agrees to be bound thereby.⁹ This is nothing other than the application of the *caveat subscriptor* rule.

To say that this simple rule of our common law of contract has been well documented would be to put it lightly. The *caveat subscriptor* rule has been discussed ad nauseam and, like the imperious Latin dictum *pacta sunt servanda*, through decades of judicial enunciation, text-book repetition and scholarly critique has grown to appear axiomatic, if not mesmeric.¹⁰ The *caveat subscriptor* rule has long been one of the cornerstones of the South African law of contract:¹¹ Over a century ago, in *Burger v Central South Railways*,¹² Chief Justice Innes expounded the seminal statement of the rule as follows:

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.”¹³

From a contractual perspective, and in simplified terms, the *caveat subscriptor* rule essentially entails that a party who has signs a contractual document will be bound to all terms contained in that document, regardless of whether or not he or she has read them or was subjectively willing to consent to them.¹⁴ A person, who signs a document which contains contractual terms, without

⁹ Okpaluba (note 4 above) 288.

¹⁰ See *Burger v Central South African Railways* 1903 TS 571; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (WLD); *Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd* 2007 (4) SA 577 (C); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); RH Christie *The Law of Contract in South Africa* 5th Ed (2006) 174-179; Bhana, Bonthuys & Nortje (note 2 above) 305; R Sharrock *Business Transactions Law* 8th Ed (2011) 76-77; E Van Eeden *A Guide to the Consumer Protection Act* 1st Ed (2009) 69; NJ Melville *The Consumer Protection Act Made Easy* 1st Ed (2011) 26; Aronstam (note 5 above) 11-12; Okpaluba (note 4 above) 287-302; J Barnard-Naude ‘The Decision in *Hartley v Pyramid Freight (PTY) LTD*: Justice Miscarried?’ (2007) 3 *Stellenbosch LR* 497; M Nortje ‘Of Reliance, Self-Reliance and Caveat Subscriptor’ (2012) 129 *SALJ* 132; C-J Pretorius ‘The Basis and Underpinnings of the Caveat Subscriptor Rule’ (2008) 71 *THRHR* 660; JB Cilliers ‘Caveat Subscriptor – Beware the Hidden Suretyship Clause’ (1996) 59 *THRHR* 168; TA Woker ‘Caveat Subscriptor: How Careful Are we expected to be?’ (2003) 15 *SA Merc LJ* 109; L Steyn ‘The Inclusion of ‘Additional’ Terms or ‘Standard Terms and Conditions’ in a Contract: The Significance of the ‘Ticket’ Cases, caveat subscriptor and the Application of the Reliance Theory’ (2004) 16 *SA Merc LJ* 106; C Lewis ‘Caveat Subscriptor and the Doctrine of Justus Error’ (1987) 104 *SALJ* 371; PMA Hunt ‘Caveat Subscriptor’ (1963) 80 *SALJ* 457.

¹¹ M Nortje ‘Unexpected Terms and Caveat Subscriptor’ (2011) 128 *SALJ* 741, 741.

¹² *Burger v Central South African Railways* (note 10 above).

¹³ Ibid 578. For a more contemporary formulation of the rule, see *Langeveld v Union Finance Holdings (Pty) Ltd* (note 10 above) 575H: “There is a strong *praesumptio hominis* (popular presumption or presumption common among persons) that anyone who has signed a document had the *animus* (intention) to enter into the transaction contained in it, and she is burdened with the *onus* of convincing the Court that she in fact had not entered into the transaction by virtue of the maxim *caveat subscriptor* (a person who signs must be careful).”

¹⁴ Christie (note 10 above) 174-175; Pretorius (note 10 above) 660-661; Nortje (note 11 above) 741.

considering all the terms that may apply, may be held bound thereto because of the impression of assent created by his or her signature.¹⁵

There are instances where liability based on one's signature can be avoided – that is, the rule is not applied without exception and within the realm of mistake a signatory who has signed a document without knowing or understanding all the terms of the document may be relieved from liability under the contract, but the grounds are very limited.¹⁶ However, in order to truly understand the workings of the *caveat subscriptor* rule and the circumstances under which one may be able to escape liability in terms of the rule, it is important to have an understanding of the different theories of contract which the South African law of contract endorses, as well as an understanding of mistake in contract law. I will briefly examine these two aspects of our law of contract, before returning to the *caveat subscriptor* rule.

According to the will theory, the basis of contract is to be found in the individual will.¹⁷ As such, the will theory advances an extremely subjective approach to contract: Consensus is the sole basis of contractual liability, with the result that if there is no genuine concurrence of wills, there can be no contract.¹⁸ It is evident however, that absolute conformity to the will theory would produce results that are both unfair and economically disastrous, as every material mistake would always lead to an absence of contractual liability.¹⁹ It would be unfair because it fails to protect the reasonable expectations of a party who has relied on the objective appearance of consensus created by the other party's conduct and economically disastrous because it ignores the need for legal certainty in commercial dealings.²⁰ As will be shown below, the shortcomings of the will theory in the event of dissensus are corrected by employing the reliance theory.

¹⁵ Bhana, Bonthuys & Nortje (note 2 above) 305; Pretorius (note 10 above) 660; Woker (note 10 above) 110; C-J Pretorius 'General Principles of the Law of Contract' (2007) *Annual Survey of South African Law* 469, 472.

¹⁶ Cilliers (note 10 above) 168.

¹⁷ Hutchison (note 5 above) 15; S Van Der Merwe, LF Van Huyssteen, MFB Reinecke & GF Lubbe *Contract, General Principles* 3rd Ed (2007) 22: "Without conscious consensus between the parties there can be no contract." For a descriptive overview of the relationship between the different theories of contract, see AJ Kerr *The Principles of the Law of Contract* 6th Ed (2002) 20-25.

¹⁸ Ibid.

¹⁹ Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 30.

²⁰ Hutchison (note 5 above) 15: "Business people must be able to rely on signed documents and other objective indications of consent, knowing that they will be upheld as binding contracts by the courts; if they cannot do so, much commercial activity will grind to a halt." For a more detailed discussion of the advantages and disadvantages of the will theory, see Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 30-32.

According to the declaration theory, the proper basis of contract is to be found in the concurring declarations of the parties. The inner wills of the party are irrelevant; what is important for contract is not what the parties think but what they say or do – “the external manifestations of their wills.”²¹ The declaration theory is best described by the following statement of Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd*:²²

“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look at their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement.”²³

If, judged purely objectively, one party has made an offer that has been unambiguously accepted by the other party, there is a contract, irrespective of what either party actually had in mind at the time. However, by favouring form over substance, it could rather nonsensically result in a contract that neither party intended.²⁴ Further, it would also permit parties to disguise their transactions. Consequently, there are serious doubts in respect of the practical viability of the declaration theory.²⁵

The reliance theory (also known as ‘the direct reasonable reliance theory’ and the doctrine of quasi-mutual assent²⁶) protects a party’s “reasonable expectation of a contract.”²⁷ The basis of contract is to be found in the reasonable belief in the existence of consensus, induced by the conduct of the other party.²⁸ The reliance theory therefore complements the will theory, correcting its deficiencies and providing an alternate basis for contract in circumstances where

²¹ Hutchison (note 5 above) 15; Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 37.

²² *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704.

²³ Ibid 715-716.

²⁴ To illustrate the shortcomings of an unqualified adherence to the declaration theory, Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 37 provide the following example: “[I]f A offers to sell for 100 and B says: ‘I accept’, the contract of sale which may arise is for 100, even if A meant 1000 and B wanted to say: ‘I accept, but only at 50’. In fact, even if A and B meant 1000 there will still be a contract for 100.”

²⁵ Hutchison (note 5 above) 16. See also Kerr (note 17 above) 20-25 where the author suggests that the declaration theory should not be followed in the future: “A theory which disregards the mental attitude of every contracting party is unsupportable.”

²⁶ Christie (note 10 above) 175; Pretorius (note 10 above) 663; Nortje (note 11 above) 744.

²⁷ Hutchison (note 5 above) 16; Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 38-39.

²⁸ Ibid.

the minds of the parties to the contract have not truly met.²⁹ This is the approach currently followed in our law of contract, as was confirmed by the then Appellate Division in *Saambou-Nasionale Bouvereniging v Friedman*³⁰ where Jansen JA reasserted that “the true basis of contractual liability in our law...is not the objective approach of the English law, but is – save in cases where the reliance theory is applied – the real consensus of the parties.”³¹

Consequently, if the parties to an agreement do have concurring intentions there is consensus and no need to question whether one of the parties had any particular impression of the other’s intention.³² If there is a material mistake by one or both of the parties and therefore no actual consensus, the reliance theory recognizes that there is a contract “if one of the parties, in a reasonable manner, relied on the impression that there was consensus.”³³

1.2 MISTAKE IN CONTRACT – A BRIEF DISCUSSION³⁴

On the basis of the above exposition, it is evident that South African law of contract is characterized by a dual basis: the primary basis is the will theory and the secondary basis is the reliance theory. In light of the fact that the point of departure in South African contract law is the consensual will theory, there can only be a valid contract if the parties have reached consensus (subjective agreement) on the following aspects of the contract:

- The parties to the contract;
- The terms of the contract; and
- The fact that the agreement is legally binding (*animus contrahendi*).³⁵

²⁹ Ibid.

³⁰ *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A).

³¹ Ibid 994-996.

³² Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 38-39. In this way the shortcomings of the will theory are corrected by an application of the reliance theory, more particularly in the form of the famous principle enunciated by Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597, 607: “If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

³³ Ibid.

³⁴ For a more detailed discussion on mistake in contract, see Hutchison (note 5 above) 81-111; Bhana, Bonthuys & Nortje (note 2 above) 281-315; Van Der Merwe, Van Huyssteen, Reinecke & Lubbe (note 17 above) 25-30; IG Farlam & EW Hathaway *A Case Book on the South African Law of Contract* 2nd (1979) 65-66.

³⁵ Bhana, Bonthuys & Nortje (note 2 above) 281.

However, difficulties arise in circumstances where there is a difference between the parties' declared agreement and their actual subjective intentions – that is, the parties appear to have reached agreement, but in fact one or both of them have a different subjective intention.³⁶ Where a party's state of mind is not in accord with the facts – that is, their objective outward declaration is not consistent with their subjective intention - they are said to be labouring under a mistake. Mistake in contract refers to the situation where a contracting party acts while under an incorrect impression regarding some or other fact that relates to and affects the contract between the parties.³⁷ The effect of the mistake depends on the type of mistake made. Our law distinguishes between causal and non-causal mistakes. A mistake is non-causal if the mistaken party would have entered into the contract on exactly the same terms even if he had not made the mistake, while, on the other hand, a mistake is causal if it affected the mistaken party's decision to contract.³⁸

Where a mistake is causal and relates to one or more of the three aspects required for subjective consensus (the parties, the terms or the *animus contrahendi*), the mistake is said to be an essential (or 'material') mistake and the contract should be regarded as invalid due to the lack of subjective agreement between the parties.³⁹ However, our law recognizes that it may be necessary to protect the non-mistaken party's reasonable reliance on the appearance of assent – that is, the non-mistaken party's belief that there is in fact consensus.

The mistaken party will sometimes be bound to the declared agreement on the basis of policy considerations in that it may be unfair to the non-mistaken party to declare the contract void in circumstances where he or she reasonably believed that the parties had reached agreement.⁴⁰

Dale Hutchison describes the situation as follows:

³⁶ Ibid.

³⁷ Hutchison (note 5 above) 82. The Oxford Dictionary of Law (note 2 above) 344 defines 'mistake' as "a misunderstanding or erroneous belief about a matter of fact (mistake of fact) or a matter of law (mistake of law)."

³⁸ Bhana, Bonthuys & Nortje (note 2 above) 282-283.

³⁹ Ibid 283 read with 293. See also Hutchison (note 5 above) 84 where the author describes an essential mistake as a 'material' or 'operative' mistake. The opposite of an essential mistake is a mistake in motive. Bhana, Bonthuys & Nortje (note 2 above) 284 describe a mistake in motive as a mistake which "only affects a party's reasons for contracting. Despite the mistake, there is still subjective consensus."

⁴⁰ Bhana, Bonthuys & Nortje (note 2 above) 293.

“A denial of contractual liability in instances where dissensus is not readily apparent to all parties could result in undue hardship for a party who has incurred expense in reasonable reliance on the existence of a contract. It could also greatly affect the reliability of contractual commitments.”⁴¹

In such circumstances our courts employ two approaches: (1) the justus error theory, and (2) the ‘reasonable reliance’ theory. In light of the working of the reliance theory, the non-mistaken party can enforce the contract despite the other party’s mistake if the following three requirements are satisfied:

1. By his conduct, the mistaken party must have created the impression that there was subjective consensus between the parties;⁴²
2. The non-mistaken party must actually have relied on the impression created by the mistaken party’s declaration;⁴³ and
3. The reliance by the non-mistaken party must have been reasonable.⁴⁴

The *caveat subscriptor* rule, expressed in terms of the reliance theory, means that, in the absence of consensus, a signatory may be held bound on the basis that by signing a document containing contractual terms s/he led the non-mistaken party reasonably to believe that s/he (the signatory) has actually assented to the contract in question.⁴⁵

The reliance of the non-mistaken party will not be reasonable where: (1) the non-mistaken party was aware that the signatory had made a mistake; (2) where the non-mistaken party “ought reasonably to have known that the terms do not reflect the signatory’s true intention”,⁴⁶ or (3) where the non-mistaken party “is in some way responsible for the fact that the signatory was not aware of the contents of the contract.”⁴⁷ These instances in which the non-mistaken party’s

⁴¹ Hutchison (note 5 above) 90-91.

⁴² Bhana, Bonthuys & Nortje (note 2 above) 293.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Pretorius (note 10 above) 663; Woker (note 10 above) 110.

⁴⁶ Sharrock (note 10 above) 78-83; Woker (note 10 above) 110; Nortje (note 11 above) 748.

⁴⁷ Ibid. The justus error approach need not be discussed in detail because, as will be shown below, the *caveat subscriptor* rule has been widely accepted as being a species of the reliance theory. However, it is important to note that in *Sonap Petroleum (formally known as Sonarep) SA (Pty) Ltd v Pappadogianis* (1992) 3 SA 234 (A) 293-240 Harms AJA effectively recast the justus error doctrine as merely an indirect application of the reliance theory, implying that both approaches were mirror images of each other or the flip-side of the same coin. In terms of the justus error approach, the mistaken party must show that the mistake was causal, essential and justus (reasonable). In order to prove that the mistake was justus, the mistaken party will rely on the same three grounds as in the case of the reasonable reliance approach – that is, the mistaken party must show that the non-mistaken party (the contract

reliance will not be reasonable provide the narrow grounds upon which a signatory may escape the strict application of the *caveat subscriptor* rule, and will be discussed in more detail below.⁴⁸ However, before proceeding to do so, I will briefly explain how the *caveat subscriptor* rule fits in with the preferred approach to contractual liability in cases of dissensus in the South African law of contract and why this is important.

1.3 THE CAVEAT SUBSCRIPTOR RULE AS A SPECIES OF THE RELIANCE THEORY

From a historical perspective, South African courts have, over the course of the last century, vacillated between subjective and objective approaches to the issue of contractual liability.⁴⁹ In respect of the *caveat subscriptor* rule, the rule was adopted in 1903⁵⁰ and at a period when a consensual (subjective) approach to contractual liability had been received from Roman-Dutch law.⁵¹ However, objective theories were introduced later by way of English law; for instance, in *Pieters & Co v Saloman*⁵² the Appellate Division chose to adopt the English approach, as was the case in *South African Railways & Harbours v National Bank of South Africa Ltd*.⁵³ Indeed, even as late as 1958, the Appellate Division could say that our law follows a “generally objective approach to the creation of contracts.”⁵⁴

Innes CJ approved the following statement made by Mellish LJ in *Parker v South Eastern Ry*:⁵⁵ “In an ordinary case of written agreement it is wholly immaterial that the signatory has not read the agreement, and does not know its contents.” But the authoritative formulation of the rule in English law is that of Scrutton LJ in *L’Estrange v F Graucob Ltd*,⁵⁶ where the court accepted

enforcer) was aware, ought to have been aware or caused the mistake. For a more detailed discussion of the justus error approach see Bhana, Bonthuys & Nortje (note 2 above) 294-297.

⁴⁸ See below, Grounds for Escaping the Strict Application of the Caveat Subscriptor Rule.

⁴⁹ C-J Pretorius ‘A Reconciliation of the Different Approaches to Contractual Liability in the Absence of Actual Consensus: *Sonap Petroleum (formally known as Sonarep) SA (Pty) Ltd v Pappadogianis* (1992) 3 SA 234 (A)’ (1992) 55 *THRHR* 668; Pretorius (note 10 above) 661; Hutchison (note 5 above) 17.

⁵⁰ *Burger v Central South African Railways* (note 10 above) 578.

⁵¹ Pretorius (note 10 above) 666.

⁵² *Pieters & Co v Saloman* 1911 AD 121.

⁵³ *South African Railways & Harbours v National Bank of South Africa Ltd* (note 14 above).

⁵⁴ *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 479.

⁵⁵ *Parker v South Eastern Ry* (1877) 2 CPD 416, 421, cited in Pretorius (note 10 above) 666. See also Farlam & Hathaway (note 34 above) 96.

⁵⁶ *L’Estrange v F Graucob Ltd* [1934] 2 KB 394.

that, within certain limits, a signature on a contractual document is a conclusive reason for holding the party who has signed to the terms of the document.⁵⁷

It is therefore interesting to note that Innes CJ formulated the *caveat subscriptor* rule with reference to English law and not Roman-Dutch law⁵⁸ – that is, the rule was introduced into our law as a species of the objective declaration theory. However, following a series of cases in which our courts made it clear that the true basis of contractual liability in our law is real consensus, tempered by the reliance theory, the *caveat subscriptor* rule was redefined in terms of reliance.⁵⁹

Defining the rule in terms of reliance has the advantage of fitting in neatly with the preferred approach to contractual liability in cases of dissensus in our law of contract, and today there is strong support for the notion that the reliance theory is the basis of the *caveat subscriptor* rule.⁶⁰ That this is the position in our law was confirmed by the Supreme Court of Appeal in *Constantia Insurance v Compusourse (Pty) Ltd*⁶¹ and subsequently in *Hartley v Pyramid Freight (Pty) Ltd*.⁶² In *Hartley* the Court held that in order to decide whether the *caveat subscriptor* rule was applicable or not, the decisive question would be whether the reliance of the contract assertor on a contract was reasonable.⁶³

Christie stresses the fact that it is crucial that the contract assertor's belief in consensus must be reasonable, because it is only a reasonable person that can rely on the doctrine of quasi-mutual assent.⁶⁴ As explained above, this approach is consistent with the theory of contractual liability

⁵⁷ Ibid 403: "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not." See also PS Atiyah *Essays on Contract* (1986) 109.

⁵⁸ *Burger v Central South African Railways* (note 10 above) 578-579. According to Pretorius (note 10 above) 664: "The rule was adopted in *Burger v Central South African Railways* TS 571 578 without a hint of the reliance theory as such and, moreover, in a manner reminiscent of classic instances of an objective approach (declaration theory)."

⁵⁹ See *Saambou-Nasionale Bouvereniging v Friedman* (note 30 above); Hutchison (note 5 above) 19.

⁶⁰ See *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) 421; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* (note 10 above) 601; *Constantia Insurance v Compusourse (Pty) Ltd* 2005 4 SA 345 (SCA) 354F; Christie (note 10 above) 175; Pretorius (note 10 above) 664; Woker (note 10 above) 110; Lewis (note 10 above) 375; Barnard-Naude (note 10 above) 502.

⁶¹ *Constantia Insurance v Compusourse (Pty) Ltd* 2005 4 SA 345 (SCA) 354F.

⁶² *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* (note 10 above).

⁶³ Ibid 603. See also Barnard-Naude (note 10 above) 500-501.

⁶⁴ Christie (note 10 above) 24. See also Barnard-Naude (note 10 above) 502; Woker (note 10 above) 110.

endorsed in our law of contract, according to which liability ensues either on the basis of consensus (the will theory) or on the basis of reasonable reliance (the reliance theory).⁶⁵

1.4 GROUNDS FOR ESCAPING THE STRICT APPLICATION OF THE CAVEAT SUBSCRIPTOR RULE

As explained above, the *caveat subscriptor* rule is not applied without exception, and there are certain narrow grounds recognized by the courts to date upon which one may escape the working of the *caveat subscriptor* rule. As hinted at by Innes CJ, there may be circumstances which provide relief for the unwitting signatory: “There are, of course, grounds upon which he may repudiate a document to which he has put his hand.”⁶⁶ Generally though, a signatory will not lightly be relieved from liability under a contract to which he has appended his signature and it remains difficult for a signatory to escape on the basis of mistake.⁶⁷

Be that as it may, it is now firmly recognized in our law that the reliance of the non-mistaken party will not be reasonable in the following narrow circumstances: (1) where the non-mistaken party was aware that the signatory had made a mistake;⁶⁸ (2) where the non-mistaken party “ought reasonably to have known that the terms do not reflect the signatory’s true intention”;⁶⁹ or (3) where the non-mistaken party is “in some way responsible for the fact that the signatory was not aware of the contents of the contract.”⁷⁰

The non-mistaken party will be held responsible for the fact that the signatory was not aware of the contents of the contract where he or she misled the mistaken party as to the nature or contents of the contract.⁷¹ Broadly stated, this will be the case in two instances: (1) where the contractual

⁶⁵ See footnotes 30 and 32 above and the authorities cited there.

⁶⁶ *Burger v Central South African Railways* (note 10 above) 578. According to Hunt (note 10 above) 461, it is “accepted that in certain circumstances the signer can successfully raise mistake to avoid liability. And this is clearly necessary: it would be bad to allow a signer to avoid liability on the merest pretext; but it would be just as bad to give his co-contractant the impression that by signing, the signer had given him (the co-contractant) *carte blanche* to bad faith. A *via media* must be found.”

⁶⁷ Pretorius (note 10 above) 661; Nortje (note 10 above) 133.

⁶⁸ *Sonap Petroleum (formally known as Sonarep) SA (Pty) Ltd v Pappadogianis* (note 47 above).

⁶⁹ See *MV Navigator (No 1): Wellness International Network Ltd v MV Navigator and Another* 2004 (5) SA 10 (C); *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W).

⁷⁰ See *Home Fires Transvaal CC v Van Wyk & Another* 2002 (2) SA 375 (W); *African Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA). See also Sharrock (note 10 above) 78-83; Woker (note 10 above) 110; Nortje (note 11 above) 748.

⁷¹ Bhana, Bonthuys & Nortje (note 2 above) 307; Sharrock (note 10 above) 81.

document is misleading in itself;⁷² or (2) where the contractual document contains unexpected or unusual terms.⁷³ In these cases our courts have recognized a duty to speak on the part of the *proferens*, and a failure to disclose the relevant unexpected terms in breach of such duty will constitute a misrepresentation (which may allow the signatory to escape liability under the *iustus error* doctrine).

To date, our courts have recognized that a contractual document may contain unexpected or unusual terms in the following circumstances: (1) where the written contract is inconsistent with your advertisement that had attracted the signatory to do business with you;⁷⁴ (2) where representations during negotiations are inconsistent with the terms of the contract to be signed;⁷⁵ or (3) because of the nature of the contract or the surrounding circumstances of the case – that is, by including an important clause in a document which, by its heading or nature, could not be expected to contain such a clause, printing an important clause in small print, or by tucking it away where it is not obvious.⁷⁶

While it could be argued that our courts have detracted from a consistently strict application of the *caveat subscriptor* rule by recognizing and developing certain exceptions, these exceptions are clearly recognized in the interests of fairness to the parties (and, especially, the signatory). In this light it is submitted that our courts must be wary of judicial idleness by preventing the unwitting signatory from escaping an unread contract where the circumstances do not fall neatly into one of the recognized categories of exceptions. As will be shown below, signatories often enter into unread contracts for various reasons – reasons which, strictly speaking, may not satisfy any of the currently recognized grounds for escaping an unread contract. The pragmatic reality of ‘unreadness’ is widely recognized. However, good or bad as this reality might be, contract law often stubbornly refuses to come to grips with it, and South African contract law is no exception.

Extensive literature in psychology and behavioural economics reveal that most consumers do not act as “rational economic agents”. Consumers often resort to the use of heuristics (short cuts)

⁷² See *Brink v Humphries & Jewell (Pty) Ltd* (note 60 above).

⁷³ See *Shepherd v Farrell’s Estate Agency* 1921 TPD 62; *Du Toit v Atkinson’s Motors* 1985 2 SA 893 (A); *Spindrifter v Lester Donovan* 1986 1 SA 303 (A); *Dlovo v Brian Porter Motors* 1994 (2) SA 518 (C); *Fourie v Hansen* 2001 (2) SA 823 (W); Bhana, Bonthuys & Nortje (note 2 above) 308-309; Sharrock (note 10 above) 80-81.

⁷⁴ See *Shepherd v Farrell’s Estate Agency*; *Du Toit v Atkinson’s Motors* supra.

⁷⁵ See *Spindrifter v Lester Donovan* (note 73 above).

⁷⁶ See *Fourie v Hansen* (note 73 above); *Dlovo v Brian Porter Motors* (note 73 above); Christie (note 10 above) 178.

when entering into contracts and can suffer when complex contracts take advantage of the short cuts they take. This problem is exacerbated by the wide use of standard-form contracts: Firms that use standard-form contracts usually acquire the services of a legal advisor to draft the terms and conditions of the document and consequently the draftsman is thus concerned with incorporating all the terms that are beneficial to the firm – usually to the disadvantage of the consumer.

Fortunately, during the last half-century and more, the consumer revolution has expanded and has been embraced in numerous legal systems, including our own. While South African law has previously had elements of consumer law, the promulgation of the Consumer Protection Act, 2008⁷⁷ is a major advance, surpassing both in scope and focus the legal framework that it replaces as the legislature has not only provided a structure for consumer protection but has also, more significantly, invited the courts to participate in extending and developing this structure.⁷⁸

The growth and development of consumer law locally and internationally has exhibited a number of distinct features, including a growing appreciation of the implications and consequences of the doctrine of unchecked freedom of contract as well as the fact that the exploitation of weaknesses in the legal system to the detriment of consumers, which is in conflict with civilised norms and values, can no longer be tolerated.⁷⁹ As such, the Act represents a comprehensive piece of legislation containing a number of requirements for consumer agreements as well as substantial consumer protection measures. This legislation follows the introduction of the National Credit Act, 2005⁸⁰ which also promotes extensive consumer protection and which has been in full effect since 1 June 2007.⁸¹ The potential impact of the Consumer Protection Act in the context of the common law *caveat subscriptor* rule warrants closer examination.

⁷⁷ Act 68 of 2008.

⁷⁸ See Van Eeden (note 10 above) 2: “[South African] courts are unfairly reproached, both for their lack of zeal in rewriting the common law, and for their restraint in not rushing in where the legislature fears to tread...courts have now been granted not only the mandate for changing the common law (which they had previously indicated that they lacked); they have also been entrusted with a commission to execute this task.”

⁷⁹ Ibid 3-4.

⁸⁰ Act 34 of 2005.

⁸¹ TA Woker ‘**Error! Main Document Only.** Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Introduction of the National Credit Act and the Consumer Protection Act’ (2010) 31 *Obiter* 2, 217.

SECTION II

2.1 THE CONSUMER PROTECTION ACT - A POSSIBLE LEGISLATIVE LEVELING OF THE PLAYING FIELDS

The Consumer Protection Act 68 of 2008⁸² was signed into law on 24 April 2009. It was brought into operation incrementally; most of the provisions took effect in October 2010, while the Act came into full force and effect on 1 April 2011.⁸³ Consumer protection is essential in every market, particularly in the South African context. The more vulnerable consumers, the more protection is required. The Consumer Protection Act is the culmination of several decades of debate and legal development in the field of consumer protection in South Africa, largely on the part of government, the national and provincial legislatures and many academics.⁸⁴

⁸² The Consumer Protection Act 68 of 2008 (cited hereafter as the Consumer Protection Act or the Act). For a comprehensive understanding and in depth analysis of the Consumer Protection Act, see E Van Eeden *A Guide to the Consumer Protection Act* 1st Ed (2009).

⁸³ Consumer Protection Act, see Schedule 2 ‘Transitional Provisions’, Item 2 ‘Incremental Effect of the Act’.

⁸⁴ In 1970 the Co-ordinating Consumer Council was established under government auspices. The Trade Practices Act 76 of 1976 was enacted in 1976, and the Unfair Business Practices (Consumer Affairs) Act 71 of 1988 (replicated in several provinces since 1996) followed in 1988. The Fifth and Final Report of the Commission of Enquiry into the Structure and Functioning of the Courts (the Hoexter Report) appeared in 1983. The Small Claims Court Act 61 of 1984 was enacted in 1984, and, in 1992, Report No 15 of the Business Practices Committee (“Consumer Codes”) foreshadowed some of the innovations that have been embodied in the Consumer Protection Act. The Report of Project 47 of the South African Law Commission, relating to Unreasonable Stipulations in Contracts and the Rectification of Contracts, was released in 1998. See D McQuoid-Mason, T Woker, L Greenbaum, I Konyn, C Lakhani, T Cohen *Consumer Law in South Africa* 1st Ed (1997) 327 and Van Eeden (note 82 above) 23.

The Act acknowledges the reality of many South African consumers: “High levels of poverty, illiteracy and other forms of social and economic inequality; living in remote or low-density population areas; being minors, seniors or other similarly vulnerable consumers; and having a limited ability to read and comprehend advertisements, agreements, instructions and warnings as a result of low literacy levels, vision impairment or language impediments.”⁸⁵ The Act also refers to the need to “fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers.”⁸⁶

While the Act does impose some duties on suppliers to ensure that consumers are aware of and understand the terms of the contracts that they conclude, these duties are not absolute as a certain degree of vigilance is still expected from the signatory.⁸⁷ This is an appropriate approach to the issue. However, in light of the modern realities surrounding consumer non-readership, particularly in the context of contracts of necessity (which will be discussed in more detail in section IV), it is submitted that the signatory should not be overburdened in this regard and that absolute vigilance on the part of the signatory should not be expected. To expect absolute vigilance on the part of the signatory would be to turn a blind eye to the fact that “consumers cannot understand and do not actually assent to the terms of the consumer contracts they sign.”⁸⁸

In relation to the application of the *caveat subscriptor* rule section 22 and section 49 of the Act are worth highlighting. As in the case with other consumer protection legislation such as the National Credit Act,⁸⁹ section 22 of the Consumer Protection Act imposes a duty on suppliers to ensure that all documents are drawn up in plain language and in a format which would be understood by a consumer with “average literacy skills and minimal experience” without undue effort.⁹⁰ In terms of section 49 exclusion (or exemption) clauses must be drawn to the attention

⁸⁵ Consumer Protection Act, Preamble. See also Maria Davey ‘A Summary of the Consumer Protection Act 68 of 2008’ available at <http://www.meumannwhite.co.za/news-details/25/>, accessed on 24 November 2012.

⁸⁶ Ibid.

⁸⁷ Nortje (note 10 above) 145.

⁸⁸ AM White & CL Mansfield ‘Literacy and Contract’ *Stanford Law & Policy Review*, Vol. 13, No. 2, 2002, 233 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008484, accessed on 24 November 2012.

⁸⁹ The National Credit Act 34 of 2005.

⁹⁰ Consumer Protection Act, S 22 Right to information in plain and understandable language:

(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

of the consumer in a conspicuous manner which is likely to be noticed by an ‘ordinarily alert’ consumer, with heightened duties placed on the supplier when the clause involves an unusual or serious risk.⁹¹ Exemption clauses have traditionally taken center stage in cases where the *caveat subscriptor* rule has been applied and are often the real issue in terms of liability for the inattentive signatory.⁹² Accordingly, this last provision may in itself go some way towards tempering the sometimes harsh consequences of application of the *caveat* rule in the context of such clauses (in consumer contracts).

(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.

⁹¹ Consumer Protection Act, S 49 Notice required for certain terms and conditions:

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

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

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

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

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

⁹² See for example *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), or the more recent judgment of *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* (note 10 above).

Undoubtedly, conscientious observance of this section of the Act by suppliers will go a long way towards making consumers aware of the risks attendant upon entering into agreements containing exemption clauses, but, viewed from the perspective of contractual mistake, the Act may in fact have a less than favourable impact.⁹³ Where a supplier has taken active steps to bring a provision to the consumer's attention, such consumer would have a hard time pleading ignorance of the provision (*iustus error*) under the traditional exceptions to the *caveat* rule. In some cases, increased transparency will be to the consumer's benefit, while in other cases the relative bargaining positions of the parties may be such that added transparency will be of little value to the consumer.⁹⁴

Providers of services are notoriously lax in pointing out exemption clauses hidden away in standard-form contracts and this has often provided our courts with a weapon, empowering them to refuse enforcement of such clauses by implying a duty to point out the clause to the other party in the circumstances.⁹⁵ Understood in terms of operative error, a failure to point out such a clause translates into reasonable mistake on the part of the unwitting signatory, or conversely, the failure of reasonable reliance on the part of the contract enforcer.⁹⁶ Compelled by the Act to point out exemption clauses, providers of goods and services will probably take precautions to do so and thereby nullify a useful common law tool which our courts have at times been prepared to wield for the benefit of the contract denier (often an unwitting signatory).⁹⁷

An important point to bear in mind at this stage, especially in light of the widespread illiteracy among South African consumers and the generally poor levels of education, is the fact that whether consumers read contracts or not is irrelevant if such contracts are difficult to understand.⁹⁸ According to White and Mansfield, "consumer disclosures retain their appeal for lawmakers despite the growing realization that they do not necessarily work...however well

⁹³ C-J Pretorius 'Exemption Clauses and Mistake, *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA)' (2010) 73 *THRHR* 491, 500.

⁹⁴ Van Eeden (note 82 above) 76.

⁹⁵ Pretorius (note 93 above) 500.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See Thalia Randall 'Low-fee schools on the rise' *Mail & Guardian* available at <http://mg.co.za/article/2012-09-07-low-fee-schools-on-the-rise> accessed on 24 November 2012: "The minority of South Africans are being schooled at fantastic private schools and former model C government schools. The rest are being educated in the disaster of our education system...Our education system is ranked lower than poorer countries in Africa and the world...ranked 133 out of 142 countries for "quality of the educational system" in the 2011-2012 World Competitiveness Report released by the World Economic Forum."

designed, [disclosure statutes] may not be able to aid most consumers in understanding the terms of their agreements.”⁹⁹ Nevertheless, judges and legislators continue to assume that consumers have the ability to read and understand, and do in fact read and understand, consumer contracts entered into – contracts which, in most cases, are entered into out of necessity. Even more worrying perhaps is the fact that “while many contract law scholars extol the virtue of disclosure statutes as a way to address unequal bargaining power”,¹⁰⁰ the experiences in foreign jurisdictions suggests that disclosure requirements are often ineffective at best, and at worst aggravate the problem.¹⁰¹ More will be said later on the relationship between the strict application of the *caveat subscriptor* rule in the context of contracts of necessity and the constitutional value of equality, as well as the ability of consumers to correctly assess, and act on, information after having read the everyday consumer contracts they enter into or after having had terms brought to their attention.

The South African education system is currently in a poor state and poverty is rife in our society. Consequently, the greatest sufferers, the poor, those most desperate to acquire goods and services and those least able to bargain over, or even understand, the terms on which they contracted, may actually experience further hardships due to the workings of certain provisions of the Act. Recently labour unrest has swept through South Africa’s mining sector. While mining bosses calculate their multi-million rand Christmas bonuses, the poor and “financially illiterate” miners are being systematically abused by money lenders and collection attorneys. One of South Africa’s debt consultants commented on the situation as follows: “[M]ost of [the miners] can’t read or write, they don’t know what they are signing for (when entering into debt agreements and authorising garnishee orders) ... automatically the system is exploiting them.”¹⁰²

The head of a homeless family may sign a lease which gives the landlord the right to raise the rent unilaterally and at will, or a consumer from a rural area may purchase furniture only to find out later that he has waived all his rights relating to latent defects in the goods sold. Ironically, in

⁹⁹ White & Mansfield (note 88 above) 262.

¹⁰⁰ DK Hart ‘Contract Law Now – Reality Meets Legal Fictions’ *University of Baltimore Law Review*, Vol. 41, No. 1, 2011, 35-36 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682902, accessed on 24 November 2012.

¹⁰¹ Ibid.

¹⁰² Malcolm Rees ‘Financially illiterate miners debt shocker’ *Moneyweb* available at <http://www.moneyweb.co.za/moneyweb-special-investigations/financially-illiterate-miners-debt-shocker-fraud-a>, accessed on 24 November 2012.

circumstances such as these, if the service provider or supplier complied with the sec. 49 notification requirements of the Consumer Protection Act, the courts will have less room in which to maneuver when adjudicating along the lines of justifiable mistake, because if such a clause has in fact been pointed out to the consumer and it falls within legal limits, the consumer may not have a leg to stand on.¹⁰³

The introduction and implementation of the Consumer Protection Act is most certainly welcomed. This new legislative leveling of the playing-field between consumers and suppliers was required by our Constitution,¹⁰⁴ which envisages a fair, caring and humane society, in which everybody counts and the dignity of everyone is respected. Unfortunately, however, the Act does not adequately address the fundamental problems in relation to the common law principle of *caveat subscriptor*, which are still very much alive.

While the Consumer Protection Act and similar legislation is one way of addressing the shortcomings inherent within a strict application of the *caveat subscriptor* rule (by, for example, introducing transparency and notification requirements in terms of sections 22 and 49 respectively), it is submitted that, in keeping with the legislature's invitation to the courts to participate in extending and developing the consumer protection structure, it is more suitable to examine the common law basis and nature of the *caveat subscriptor* rule and to consider the suitability and extent of its continued application, especially in light of modern consumer interactions. Such an approach would be perfectly compatible with the rationale behind section 39(2) of the Bill of Rights – that the common law be developed so as to be made compliant with the values that underlie the Constitution.¹⁰⁵

I will proceed to focus on the potential role of the courts and the common law in respect of suggested development of the application of the *caveat* rule. I will begin by critically examining the underlying presumptions (or precepts) of the *caveat subscriptor* rule which purport to justify the existence and application of the rule itself. This will provide a basis for attempting to illustrate that the underlying assumptions as well as the reasons why society originally demanded

¹⁰³ Pretorius (note 93 above) 502.

¹⁰⁴ Constitution of the Republic of South Africa, 1996 (1996 Constitution).

¹⁰⁵ In terms of section 39(2) of the 1996 Constitution, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

– and still demands – that the rule be applied has withered with time and is now out of step with the modern reality – that is, the once uncompromising cornerstone of our law of contract that is the *caveat subscriptor* rule has lost much of its relevance when contrasted with the more constitutionally relevant imperatives of the promotion of social justice and equality.

SECTION III

3.1 A DISTINCTION WITH A DIFFERENCE - DISTINGUISHING BETWEEN THE ACTUAL BASIS AND THE UNDERLYING ASSUMPTIONS OF THE CAVEAT SUBSCRIPTOR RULE

In ‘The Substance and Form in the Law of Contract’, Alfred Cockrell draws a distinction between the authority of the state to enforce contracts and two underlying assumptions of contracts in general: firstly, that a contract is a promise and, secondly, that a promise creates a moral obligation to perform.¹⁰⁶ The author then goes on to suggest that these underlying premises are what justify the conclusion that contracts should be enforced by the law.¹⁰⁷

Just as one can draw a distinction between the enforceability of contracts and the assumptions that underlie contractual liability, similarly one can draw a distinction between the actual basis and the underlying assumptions (or precepts) of the *caveat subscriptor* rule. As explained above, the rule has been discussed at length in various contract law textbooks and by numerous academic writers.¹⁰⁸ However, to date, the distinction between the actual basis and the underlying assumptions of the *caveat subscriptor* rule, as well as their interaction with each other, have received little (if any) attention.

¹⁰⁶ A Cockrell ‘The Substance and Form in the Law of Contract’ (1992) 109 *SALJ* 40, 47.

¹⁰⁷ *Ibid.*

¹⁰⁸ See footnote 10 and the authorities cited therein.

By and large, standard form terms form part of the enforceable agreement in consumer contracts, even though, as will be shown below in section IV, it is recognized that they are almost never read. The issue that arises is how, then, can it be said that by simply appending ones signature to a document that one has created the appearance or reasonable reliance of having assented to such terms of the contract? According to Ben-Shahar:

“Contract law [has] developed traditions that resolve this paradox through presumptions. One such presumption underlies the ‘duty to read.’ True, people do not read contracts, but they can be presumed to read. This is a fairly strong presumption...The duty to read encompasses the duty to ask someone to read or to explain the terms. This presumption, of course, is not based on generalized empirical regularity. Rather, it is a method to shift the burden of information acquisition to the passive party.”¹⁰⁹

As evidenced by the discussion above, the *caveat subscriptor* rule is a species of the reliance theory. Therefore the actual basis of the rule is concerned with a theory of contractual liability. However, it is the underlying assumptions or general precepts which inform, shape and legitimize the actual basis of the rule – that is, the underlying assumptions are what legitimize the reliance of the contract enforcer and render the reliance reasonable.¹¹⁰ These underlying assumptions or precepts of the *caveat subscriptor* rule may be described as follows:

1. The law expects the signatory to ascertain the terms of a contract before signature;¹¹¹
2. The signatory had read the contract with due care prior to signature;¹¹²
3. The signatory had an adequate opportunity to read the contract;¹¹³
4. The signatory understands the terms and appreciates their import and is aware of the consequences of signing;¹¹⁴

¹⁰⁹ O Ben-Shahar ‘The Myth of the Opportunity to Read in Contract Law’ (2008) *University of Chicago Law & Economics*, Olin Working Paper No. 415, 9-13 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162922, accessed on 24 November 2012.

¹¹⁰ See Pretorius (note 10 above) 661 where the author draws a distinction between the theory of contractual liability which underlies the rule and the ideology underpinning a theory or principle of contractual liability.

¹¹¹ Christie (note 10 above) 175; Nortje (note 11 above) 749; Nortje (note 10 above) 133; *Graaff-Reinet Municipality v Jansen* 1917 CPD 604, 610; *Trans-Drakensberg Bank Ltd v Guy* 1964 (1) SA 790 (D) 794B-C; *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd And Another* 1979 (3) SA 210 (T) 215B-C.

¹¹² Nortje (note 11 above) 750; *Coetzee v Van Der Westhuizen and Another* 1958 (3) SA 847 (T) 851E-G.

¹¹³ Ben-Shahar (note 109 above) 9-13.

¹¹⁴ Hart (note 100 above) 35-36; Aronstam (note 5 above) 232-233.

5. The deliberate decision to not ascertain the terms of a contractual document prior to signature is assumed to imply blanket consent to all the terms contained in it;¹¹⁵ and
6. The party who signs a contractual document without reading it assumes the risk of disagreement between the parties.¹¹⁶

These six general assumptions¹¹⁷ underlying the *caveat subscriptor* rule are superimposed by and wedded into the assumptions underlying the classical liberal theory of contract which still informs the South African law of contract, regardless of the fact that social and political values and conditions have changed.¹¹⁸ Simply put, the classical model of contract is based on the assumption that contracting parties generally possess a real freedom of choice whether, with whom and on what terms to contract.¹¹⁹ This assumption in turn is based on a number of other assumptions, such as that:

- The parties enjoy more or less equal bargaining power;
- There is perfect, or near-perfect, competition in the market; and
- The parties actually negotiate the terms of their contract.¹²⁰

It is now widely recognized that in many everyday situations these assumptions are simply not accurate and, as Woolman quite rightly points out, “the Supreme Court of Appeal’s classically liberal approach to the law of contract reinforces the poverty and powerlessness of many South Africans”,¹²¹ as the common law “relies upon the fiction that our private law provides a neutral background for agreements, contractual or otherwise, between fully autonomous individuals.”¹²²

The underlying assumptions of the *caveat subscriptor* rule have, like the underlying assumptions of our general law of contract and the classical liberal theory, over time become accepted as

¹¹⁵ *Durban's Water Wonderland (Pty) Ltd v Botha And Another* 1999 (1) SA 982 (SCA) 991E-F; *George v Fairmead Pty Ltd* (note 10 above) 472G-473A; Nortje (note 10 above) 133; Nortje (note 11 above) 750; *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E) 110; Ben-Shahar (note 109 above) 9.

¹¹⁶ *George v Fairmead (Pty) Ltd* (note 10 above) 472G-473A; Pretorius (note 10 above) 663-664.

¹¹⁷ Of course, there may be another, implied, assumption at work here, namely that the signatory has some measure of free choice in whether to sign the contract or not. This may often, in practice, not be the case. See the discussion in the text below.

¹¹⁸ L Hawthorne ‘The Principle of Equality in the Law of Contract’ (1995) 58 *THRHR* 157, 164; GF Lubbe & CM Murray *Farlam and Hathaway, Contract – Cases, Materials and Commentary* 3rd Ed (1988) 26.

¹¹⁹ Hutchison (note 5 above) 24.

¹²⁰ *Ibid* 24-25.

¹²¹ S Woolman ‘Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on Barkhuizen’ (2008) 125 *SALJ* 10, 11.

¹²² *Ibid*.

axiomatic truths. However, while the assumptions underlying the *caveat subscriptor* rule may have been accurate and relevant in the past, societal change and other factors appear to have overtaken them and thus their continued application in bolstering the adherence to the rule is, to say the least, questionable and deserving of closer critical examination. In order to critically evaluate the continued application of the *caveat subscriptor* rule, one needs to consider some more fundamental aspects of the development of contract law more generally, including the way in which the conclusion of contracts have evolved from actual to imputed consensus. The introduction of standard-form contracts and their widespread use in modern consumer transactions is probably the single most important factor which undermines the underlying assumptions of the *caveat subscriptor* rule. It is submitted that the ‘veiling effect’ of standard-form contracts, particularly in circumstances of consumer necessity, has resulted in the continued support for the underlying assumptions in such circumstances of necessity to constitute dubious law.

3.2 THE EVOLUTION OF CONTRACT LAW AND THE CHANGING JUDICIAL ATTITUDES TOWARDS THE RESPECTIVE RESPONSIBILITIES OF THE SIGNATORY AND THE CONTRACT-ENFORCER

As alluded to above, the classical liberal theory of contract underlying our common law of contract appears to implicitly assume an arm’s length style of bargaining and contract-making between parties of approximately equivalent bargaining strength, negotiating the terms of their contract clause by clause, with such clauses eventually being recorded in written form to reflect the agreement that has been reached between the parties after strenuous negotiation.¹²³ However, the style of contracting on the basis of a pre-printed (and often non-negotiable) form presented by the one party to the other, often under some form of time-duress, is a phenomenon of the modern age preceded by the development of the classical liberal theory of contract.¹²⁴ Consequently, in the 21st century, the classical model represents a rather idealistic and unrealistic picture of contract as experienced by ordinary people. Circumstances have changed quite

¹²³ Van Eeden (note 82 above) 69.

¹²⁴ Ibid.

dramatically over the course of the last century, calling into question some of the most basic tenets of contract law and generating pressures for reform.¹²⁵

Since the Industrial Revolution in the late 18th and early 19th centuries, the bargaining positions between individuals and corporations have become very unequal.¹²⁶ If you want to test the correctness of this statement, try crossing out and initialing some of the clauses in the next standard form contract that you are asked to sign.¹²⁷ You will no doubt be given a fresh, unaltered contract and firmly told to start again.¹²⁸

According to Sachs J, standard-form contracts are, essentially, “contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it basis, thus eliminating opportunity for arm's length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities.”¹²⁹

I need not expand on the extensive use in modern times of standard-form contracts which are drawn up by one party and merely presented for signature to the other. In the words of Atiyah, “this phenomenon has been much written about and is now widely acknowledged to involve substantial derogations from the consensual model of contract. *Frequently one party has little effective choice in the matter at all, and neither reads nor understands, nor in any real sense agrees to the terms contained in such standard documents.*”¹³⁰

¹²⁵ Hutchison (note 5 above) 25 provides that the following developments are responsible for the challenge to traditional contract theory: (1) the ever-increasing use of standardized terms and forms for concluding contracts; (2) the advent of the welfare state, with considerable government intervention in markets to alleviate poverty and some of the hardships caused by unbridled capitalism; (3) the rise of the consumer protection movement as a political force in most Western societies; (4) the growing importance attached to human rights, as manifested in South Africa by the enactment of the Constitution; and (5) a concomitant emphasis upon controlling the exercise of power and ensuring fairness in contractual relations.

¹²⁶ Melville (note 10 above) 27.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) 361F-H. See also, Van Eeden (note 82 above) 75.

¹³⁰ PS Atiyah *The Rise and Fall of Freedom of Contract* (1985) 731, cited in *Barkhuizen v Napier* 2007 5 SA 323 (CC) 152B-D. My emphasis.

Consequently, standard-form contracts, with their standardized provisions, are often described by French scholars as *contrats d' adhesion*.¹³¹ Rakoff has identified seven characteristics that define a model contract of adhesion: (1) The document consists of a printed form purporting to be a contract and containing many terms and conditions; (2) the document has been drafted by or on behalf of one of the parties to the transaction; (3) the document is presented to the adhering party with the representation (express or implied) that few, if any, of the terms will be open to negotiation, and that the drafting party is only willing to transact on those terms; (4) the document is signed by the adhering party; (5) the drafting party routinely participates in many transactions of the type in issue; (6) the adhering party enters few such transactions (relative at least to the drafting party); and (7) the main obligation that the adhering party incurs takes the form of the payment of money.¹³²

The relationship between the strict application of the *caveat subscriptor* rule, standard-form consumer contracts and the manner in which the enforcement of standard-form contracts may be viewed as the enforcement of 'private legislation' will be discussed in more detail in section V. In what follows I will briefly examine how our courts have, in my opinion, provided indications of a possible change in attitude towards the underlying assumptions of the *caveat subscriptor* rule and the respective responsibilities of the signatory and the contract-enforcer in light of the realities surrounding modern consumer transactions characterized by the extensive employment of standard-form contracts. The assumptions of reading and of blanket consent, which were once regarded as axiomatic, have become controversial following several recent judgments.¹³³

In *Keens Group Co (Pty) Ltd v Lotter*¹³⁴ the court held as follows: "I do not think that the plaintiff has established, and the onus is on it to do so, that the defendant was aware of the fact

¹³¹ K Hopkins 'Standard-Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice versus Natural Justice' (2003) 1 *J. S. Afr. L.* 150, 153. See also, S Deuch *Unfair Contracts* (1977) 2: "The term contracts of adhesion was first mentioned in an American article [The Delivery of a Life Insurance Policy (1919) 33 *HARV. L. REV.* 198, 222] where Patterson borrowed it from a civil law scholar and applied it to life insurance contracts. He stated: "The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms". The term originated with French scholar Raymond Saleilles, who invented the term *adhesion contracts* as a method for deviating from individual interpretation. Since "a single will is exclusively predominant" in these circumstances, an adhesion contract should be interpreted in a similar way to legislation, not as a contract." See further the discussion below on the manner in which the enforcement of standard-form contracts may be regarded as the enforcement of 'private legislation'.

¹³² TD Rakoff 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173, 1177.

¹³³ Nortje (note 10 above) 136.

¹³⁴ *Keens Group Co (Pty) Ltd v Lotter* 1989 (1) SA 585 (C).

that by signing the document he had undertaken a personal suretyship obligation.”¹³⁵ In effect therefore, the court held that the contract assertor bore the onus of convincing the court that the signatory was aware of the terms of the signed document.¹³⁶ In *Sun Couriers v Kimberley Diamond Wholesalers*¹³⁷ the court expressly stated: “It is common knowledge that people sign documents without reading them.”¹³⁸

Four years on, the Supreme Court of Appeal handed down judgment in *Brink v Humphries & Jewell (Pty) Ltd*.¹³⁹ Here the majority appeared to completely negate any responsibility on the signatory to ascertain the terms of the document that he or she is signing, apart from a cursory examination of the heading and the clauses in which blank spaces have to be filled in. According to Bhana and Nortje, the implication of the majority judgment in *Brink v Humphries* is that the non-mistaken party (and the law) can no longer legitimately expect the signatory to read an obviously contractual document before signing it.¹⁴⁰

The judgment in *Mercurius Motors v Lopez*¹⁴¹ was once again premised on a less than rigorous examination of the contractual document by the signatory, since the court found that the document was misleading because the disputed term had not been given sufficient prominence. The Supreme Court of Appeal, in a clear and welcomed change of direction, held that an exemption clause excluding the liability for negligence of a motor vehicle dealer entrusted with a motor vehicle for the purposes of maintenance work, “should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form, and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question.”¹⁴²

While some decisions are still reconcilable with the traditional approach in relation to a requirement of reading as the norm,¹⁴³ the implications of the judgments mentioned above is that

¹³⁵ Ibid 588B.

¹³⁶ See Nortje (note 10 above) 134.

¹³⁷ *Sun Couriers v Kimberley Diamond Wholesalers* 2001 (3) SA 110 (NC).

¹³⁸ Ibid 120.

¹³⁹ *Brink v Humphries & Jewell (Pty) Ltd* (note 60 above).

¹⁴⁰ Bhana & Nortje ‘General Principles of the Law of Contract’ (2005) *Annual Survey of South African Law* 196, 213.

¹⁴¹ *Mercurius Motors v Lopez* (note 10 above).

¹⁴² Ibid 578.

¹⁴³ See for example *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* (note 10 above) and the minority opinion of Navsa JA in *Brink v Humphries & Jewell (Pty) Ltd* (note 60 above).

the signatory is no longer expected to ensure that he or she is conversant with the terms of the contract prior to signature. Some decisions either expressly, as in the case of *Keens Group*,¹⁴⁴ or by implication, as in the case of *Brink*,¹⁴⁵ reject the traditional presumption that signature indicates awareness by the signatory.¹⁴⁶ The implication of these judgments is that it is no longer reasonable for the contract enforcer to assume that a signatory is conversant with the contents of a document – at most the contract enforcer can assume awareness of terms that a cursory reading would reveal.¹⁴⁷

As explained above, these judgments only illustrate what is in my opinion a *possible* change in attitude towards the underlying assumptions of the *caveat subscriptor* rule and the respective responsibilities of the signatory and the contract-enforcer. South African courts have for decades adopted the attitude that a person who signs a contractual document does so at his own peril and that no relief will be granted to him where he has signed recklessly, without first having read the terms of the contract.¹⁴⁸ It is submitted that the judgments discussed above offer indications of a possible re-think in respect of the traditional roles and responsibilities of the signatory and the contract-enforcer and, more importantly, indicate that the balance of fairness should be swinging in favour of the signatory rather than the traditional emphasis on fairness towards the proferens.

Of course it could be argued that these cases merely serve as examples of the application of the traditionally recognized exceptions to the *caveat subscriptor* rule relating to misleading documents or unexpected terms. As explained above, our courts have already recognized that use of unexpected terms in a document constitutes a form of misrepresentation. In light of this I will suggest later some practical methods in which this area of the common law may be developed to provide greater leeway for the signatory. However, for the present purpose, it cannot be gainsaid that these judgments do, at the very least, offer glimpses of recognition that the underlying assumptions in respect of reading as the norm cannot be accepted without question and that our courts are, to some extent, becoming more aware of the reality of consumer non-readership and, more importantly, are prepared to take creative judicial steps to ensure increased fairness towards the unwitting signatory. In section IV that follows I will discuss in detail the reality of consumer

¹⁴⁴ *Keens Group Co (Pty) Ltd v Lotter* (note 134 above).

¹⁴⁵ *Brink v Humphries & Jewell (Pty) Ltd* (note 60 above).

¹⁴⁶ See also Nortje (note 10 above) 134.

¹⁴⁷ *Ibid* 135.

¹⁴⁸ Aronstam (note 5 above) 36.

non-readership, particularly in the context of contracts of necessity, in order to demonstrate that a shift in fairness towards the signatory is most welcome in light of the modern realities involved in consumer transactions. Thereafter in section V I will illustrate that increased fairness towards the unwitting signatory in the context of contracts of necessity is not only required in light of the various psychological factors and behavioural biases at play during the time of contracting (which will be discussed in section IV), but is also warranted in terms of our courts constitutional mandate to develop the common law in light of the spirit, purport and objects of the Bill of Rights and the fundamental constitutional values of human dignity, equality and freedom.

SECTION IV

4.1 THE REALITY OF CONSUMER NON-READERSHIP AND THE PROBLEM OF ILLITERACY IN THE SOUTH AFRICAN CONTEXT

Traditional economic models of perfectly competitive markets depend on assumptions that individuals, and, in particular, consumers, possess perfect information and make optimal choices about whether and what to purchase.¹⁴⁹ These classical economic models function on the assumption that consumers rationally maximize utility, “prefer certainty to uncertainty and value outcomes absolutely, rather than relative to a reference point.”¹⁵⁰ According to Hart:

“A basic version of the rational actor looks like this: A person acts rationally where she perfectly processes available information about alternative courses of action and then ranks the possible outcomes in the order of expected utility. Expected utility is usually defined in terms of the person’s “self-interest”. “Self- interest,” in turn, is commonly assumed to be wealth-maximization. So, modern contract law’s rational actor will end up ranking all of the possible outcomes, based on all the information provided her, in the order in which they maximize her wealth. To be a rational actor therefore presupposes that one will not only have access to the information relevant to one’s decision but will also be able to understand it and make effective

¹⁴⁹ See ‘Consumer Contracts’ (note 1 above).

¹⁵⁰ Ibid.

use of it. *Unfortunately, none of this is true in general and not when it comes, more particularly, to contracts.*"¹⁵¹

It goes without saying that most modern consumers behave differently to 'rational economic agents'. Extensive works in psychology and behavioural economics reveals that consumers "often have conflicting or non-economic objectives, or may be subject to systematic biases, short-cuts or errors, particularly when decisions are complex or made in circumstances that influence, distract or pressure."¹⁵² At the time of contracting, consumers make what they believe is the wisest and most suitable decision based on the information and computational capacity available.¹⁵³ However, that "might not be the same decision they would have made with perfect information and perfect rationality."¹⁵⁴ Aronstam, in attempting to describe what would be the wholly rational or quintessential consumer in the context of neo-classical economics, comments as follows:

"The wholly rational consumer would have a complete grasp of household budgeting and the need to make provision for any contingencies. He would be aware of the range of goods and services available to him and be able to move outside his own neighborhood when shopping so as to have a wide area of choice. When contemplating the purchase of goods or services, he would be able to assess their qualities, both in terms of their suitability for their intended use and in terms of value for money. Before he signed a contract to acquire goods or services on credit, he would familiarize himself with its nature and terms, calculate the effective cost and consider the advantages and disadvantages of the available alternatives. When deciding whether the commitment was one he could afford – particularly in the case of an expensive item such as a motor vehicle – he would take account of the cost of maintaining, licensing and insuring the goods. He would also have an understanding of his legal rights and obligations when entering into a contract and of the steps he should take, and of the advisory facilities open to him, if he got into difficulties and found himself unable to perform his obligations."¹⁵⁵

However, in reality, consumers have limited processing power and "use simplifying rules of thumb ('heuristics') to deal with situations where there is too much information to evaluate or

¹⁵¹ Hart (note 100 above) 35-36. My emphasis.

¹⁵² See I Ramsay *Consumer Law and Policy: Texts and Materials on Regulating Consumer Markets* 2nd (2007) 71-76.

¹⁵³ See 'Consumer Contracts' (note 1 above) 40.

¹⁵⁴ *Ibid.*

¹⁵⁵ Aronstam (note 5 above) 232-233.

choice overload.”¹⁵⁶ For instance, consumers may choose to adhere to default options because doing so simplifies their decision making and consumers often consider “only a limited number of variables, such as the headline price, when comparing products.”¹⁵⁷ And while the Consumer Protection Act has introduced transparency and notification requirements in terms of sections 22 and 49 respectively, the harmful effects on consumers can be aggravated if contracts contain immaterial or condensed terms and conditions that puzzle consumers or hides information which is most significant to them.¹⁵⁸ According to two separate academic studies undertaken at the University of New York (NYU), almost nobody reads consumer contracts before signing (95.6% of participants considered the contract for an average of two seconds and then gladly signed) and perhaps even more surprisingly the study also revealed that “legal jargon, print density and font size are not key factors in consumers' decisions on whether to read their contracts.”¹⁵⁹

PJ Sutherland appropriately asserts that “perhaps the reasonable man of the nineteenth century would have thought it sensible to read and make sense of all the terms of the contracts that he concluded. Yet, the lifestyle of the reasonable person of the 21st century is far too complex and full for that.”¹⁶⁰

“In the modern era, we are all slaves to the form, both official and commercial. When the use of standard form contracts is coupled with a disparity of bargaining power favouring the one party, this may render it even more difficult for the weaker party to resist the imposition of a standard form contract. *Standard form contracts have a ‘veiling effect’, the consequence of which is that standard terms are accepted unseen, unread and often without any understanding of the implications thereof by the signing party. Psychological factors also play a role: the mere fact that a party is confronted by a printed form creates the impression of impartiality, officialdom and immutability.* ‘Negotiation’ often takes place with a representative who lacks the authority to change standard terms. Indeed, standard form contracts are seldom deviated from, as consumers

¹⁵⁶ See ‘Consumer Contracts’ (note 1 above) 48.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ SI Becher & E Unger-Aviram ‘The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction’ (2009) *DePaul Business & Commercial Law Journal* 1, 1 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443908, accessed on 24 November 2012.

¹⁶⁰ PJ Sutherland ‘Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 2’ (2009) 1 *Stellenbosch LR* 50, 61. See also White & Mansfield (note 88 above) 234: “[T]hese realities are known to anyone who participates in our society as a consumer. It is impossible to participate in today’s society as a consumer and not to have entered into a contract with unknown terms.”

generally do not have the specialized knowledge to dispute the terms and conditions or haggle about their amendment.”¹⁶¹

Behavioural economics, now a very large sub-discipline in economics, has become an influential source for policymaking in consumer law and policy and challenges three aspects of neo-classical economics: unbounded rationality, unbounded willpower and unbounded self-interest.¹⁶² The main contention of behavioural research is that many of the basic assumptions in standard economic models are not based on how people actually make economic decisions, and that they therefore lead to a descriptively worse theory than one based on more behaviorally correct assumptions.¹⁶³ An in-depth analysis into the field of behavioural economics is beyond the scope of this paper and in what follows I provide merely a summary of certain well established findings in the literature which may play a vital role in shedding light on how our courts should interpret and apply the *caveat subscriptor* rule in the future, and which goes hand in hand with an insightful publication released in February 2011 by the UK Office of Fair Trading (the OFT) in relation to various aspects of consumer contracts and consumer behavioural biases.

Consumers rarely read entire contracts before purchase and are subject to wide-ranging influences and biases when evaluating contracts, as revealed in the literature on behavioural economics and reflected in the OFT research findings. According to the OFT research findings the tendency not to read contracts in full arises despite the fact that 79 percent of consumers surveyed acknowledged that they were provided with sufficient time to read the contract.¹⁶⁴ The key reason provided by consumers was that the contract terms were 'standard' which, according to the OFT, means that “consumers think they are protected by the law, trust the company or think the contract is industry standard” and thus cannot go elsewhere or do anything about the contract.¹⁶⁵

¹⁶¹ Van Eeden (note 82 above) 76. My emphasis.

¹⁶² Ramsay (note 152 above) 71-72.

¹⁶³ See R. Weber & R. Dawes *Behavioural Economics in The Handbook of Economic Sociology* 2nd Ed (2005) 91, cited in Ramsay (note 152 above) 72.

¹⁶⁴ ‘Consumer Contracts’ (note 1 above) 28.

¹⁶⁵ *Ibid* 41-42: “Thirty-eight per cent of people in [the] survey who didn't read or only skimmed their contract said they trusted the firm. This is supported by EU survey evidence that 78 per cent of UK consumers agree that traders respect consumer rights, and 70 per cent trust the authorities to protect consumer rights.”

According to the OFT findings many consumers feel that consumer contracts contains no useful information which is reflected in their propensity to simplify their decision-making by overlooking certain pieces of information. Other factors which deter reading of consumer contracts can be practical or psychological: “The document itself can raise the costs of reading if it is long, in small print, uses complex language, has a poor structure, or is on low quality paper.”¹⁶⁶

“There can also be social pressure not to scrutinize contracts, for example, because of others queuing. Shoppers may feel reading a contract will be seen as an expression of distrust, or as a failure to conform and cooperate, with physical proximity to the seller strengthening the effect. Furthermore, after negotiations with salespeople, consumers can feel obliged to co-operate and conclude the transaction.”¹⁶⁷

According to Ben-Shahar, “[s]pending effort to read and to process what’s in the contract boilerplate would be one of the more striking examples of consumer irrationality and obsessive behavior”.¹⁶⁸

“Most consumers...routinely enter into contracts in an atmosphere that discourages them from reading the contract to be signed and, in any event, precludes negotiation of the terms of the writing...A consumer who actually did read each written contract associated with each consumer transaction entered into would be made by social construction to feel, and would likely be thought of as, paranoid...In many negotiation situations all of the pressures push for friendly gestures rather than a suspicious line-by-line analysis of the writing.”¹⁶⁹

Even where consumers have read the contract or had certain terms and conditions brought to their attention they may still not properly assess, and act on, that information. The actuarial knowledge required to make an intelligent and rational decision in determining whether the content of the contract is good or bad is mind-boggling.¹⁷⁰ Consequently, even if each specific term could be explained simply, consumers would not know what to do with the information and “may make errors in understanding the contract or its implication, or in the actions they take as a

¹⁶⁶ Ibid 42.

¹⁶⁷ Ibid 43.

¹⁶⁸ Ben-Shahar (note 109 above) 15.

¹⁶⁹ White & Mansfield (note 88 above) 233-234.

¹⁷⁰ See Ben-Shahar (note 109 above) 17.

result”.¹⁷¹ This could be as a result of consumer behavioural biases that affect decisions about time, by stress and emotion or by complexity (and cognitive limitations):

“[P]eople are “boundedly rational,” which simply refers to the fact that human cognitive abilities are limited. What this means is that human beings end up taking mental short cuts to help them make reasonably good decisions that provide them with more or less acceptable results, but results that may not necessarily maximize their wealth.”¹⁷²

The literature on behavioural economics and the findings of the OFT reveals that individuals often lack clear, stable or well-ordered preferences. The thrust of empirical work since the 1960’s in a variety of approaches is that the rational consumer is a fiction.¹⁷³ Ben-Shahar provides a more frank account of the reality of consumer non-readership:

“Real people don’t read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract. Besides, lots of people bought the product or the service along with the same contract and seem happy enough, so we presume that there must be nothing particularly important buried in the contract terms... Still, it is surprising how deep the unwillingness of contracts commentators to reconcile with this reality is. *Rather, it is now a standard view to confront the unreadness reality with myths, fictions, and presumptions, all intended to preserve a conceptual apparatus that fits a world in which transactors know all the terms.*”¹⁷⁴

As alluded to above in section II, whether consumers read contracts or not is irrelevant if they are difficult to understand. Would most consumers understand a term stating that “when you give us consent, you grant us a nonexclusive, worldwide, perpetual, irrevocable, royalty-free, sub-licensable (through multiple tiers) right to exercise the copyright, publicity, and database rights (but no other rights) you have in the content, in any media known now or in the future?”¹⁷⁵ According to The International Adult Literacy Survey (IALS) which measures literacy in various domains, data from the period 1994-1998 revealed that less than 20 percent of the UK adult population reached the standard judged necessary “to deal with standard consumer contracts,

¹⁷¹ Ibid.

¹⁷² Hart (note 100 above) 36.

¹⁷³ Ramsay (note 152 above) 76.

¹⁷⁴ Ben-Shahar (note 109 above) 2. My emphasis.

¹⁷⁵ Extracted from eBay’s User Agreement – see Ben-Shahar (note 109 above) 13.

such as car rental agreements and insurance contracts.”¹⁷⁶ Studies reveal that the language used in most standard-form contracts is understandable only by individuals with university degrees, which does not account for many contracting parties, particularly consumers:¹⁷⁷

“[M]andated disclosures are regularly written at forbidding reading levels. Financial privacy notices are written at third or fourth-year college reading level...over 40 million adults are functionally illiterate, and another 50 million have marginal literacy skills...*only 3-4% of the population can understand the language in which contracts are drafted.*”¹⁷⁸

The dangers of non-readership in respect of consumer contracts are exacerbated in the local context given the high levels of illiteracy in South Africa. According to Statistics South Africa the 2011 mid-year South African population stood at 50, 59 million.¹⁷⁹ According to the National Reading Strategy¹⁸⁰ published in February 2008 by the South African Department of Education levels of reading ability across the country are shockingly low with many homes and classrooms having no books.¹⁸¹ Teacher incompetency, a lack of access to libraries (only 7 percent of schools have library space stocked with books) and dire teaching conditions exacerbate the illiteracy challenge in South Africa.¹⁸² As explained above, most standard-form contracts are understandable only by individuals with university degrees. However, according to the Monitoring Learning Achievement (MLA) Survey, approximately 40 percent of adults interviewed had not completed primary education and about 60 percent had either not completed primary school, or had not achieved education levels higher than primary school.¹⁸³ Most standard consumer agreements are drafted in English, but many consumers only have it as a second or third language.¹⁸⁴ Consequently their understanding of such contracts may not be at a level sufficient for properly comprehending documents of this nature.¹⁸⁵

¹⁷⁶ ‘Consumer Contracts’ (note 1 above).

¹⁷⁷ Hart (note 100 above) 36.

¹⁷⁸ Ibid. My emphasis.

¹⁷⁹ See ‘Mid-year Population Estimates’ published by Statistics South Africa (Stats SA) available at <http://www.statssa.gov.za/publications/P0302/P03022011.pdf>, accessed on 27 May 2012.

¹⁸⁰ ‘National Reading Strategy’ published by the South African Department of Education available at <http://www.info.gov.za/view/DownloadFileAction?id=78955>, accessed on 27 May 2012.

¹⁸¹ Ibid 4.

¹⁸² Ibid 8-9.

¹⁸³ Ibid 9.

¹⁸⁴ J Du Plessis ‘Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008’ 2012 (75) *THRHR* 24, 34.

¹⁸⁵ Ibid.

In terms of section 40 of the Consumer Protection Act¹⁸⁶ 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. While Jacobs, Stoop and Van Niekerk submit that this provision will, in effect, place a heavy burden on suppliers to ensure that consumers understand agreements, it must be emphasised that illiteracy or an inability to understand the language of an agreement are not sufficient for relief under this provision.¹⁸⁷ As Du Plessis explains:

“[T]hese weaknesses must result in consumers being *substantially unable to* protect their own interests, *and* the supplier must *knowingly take* advantage of this weakness. Thus, the supplier would probably act unconscionably if the consumer indicates to the supplier that he or she is illiterate or does not understand the language used in an agreement, and the supplier nonetheless seeks to enforce the agreement, without taking any steps to indicating how it affects the consumer's interests. The provision does not require that the supplier must in each instance take steps to enquire whether the consumer is in fact illiterate or unable to understand the language.”¹⁸⁸

It is clear from the above exposition that creative judicial reasoning on the part of our courts, so as to ensure greater fairness and protection to the unwitting signatory when faced with claims of mistake in contracting, is most certainly welcome and clearly required, particularly when the contract in question is one of necessity. This is because in many circumstances, as will be elaborated on in section V below, it is precisely the very necessary nature of the goods or services in question which trigger various inherent behavioural biases which lead the consumer to, and it is submitted, reasonably, not read the contractual terms in question. In section V below I will proceed to illustrate that increased fairness towards the unwitting signatory in the context of contracts of necessity is not only required in light of various psychological factors and behavioural biases at play at the time of contracting (discussed above), but is also warranted in terms of our courts constitutional mandate in terms of section 39(2) of the Constitution to

¹⁸⁶ 68 of 2008.

¹⁸⁷ W Jacobs, PN Stoop & R Van Niekerk ‘Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview And Analysis’ (2010) 13 *PERJ* 302, 347.

¹⁸⁸ Du Plessis (note 184 above) 34.

develop the common law in light of the spirit, purport and objects of the Bill of Rights and the fundamental constitutional values of human dignity, equality and freedom.

SECTION V

5.1 THE DANGERS OF ADHERING TO THE STRICT APPLICATION OF THE CAVEAT SUBSCRIPTOR RULE

Section 1 of the 1996 Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. The Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of our constitutional democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'. In the discussion that follows, I will attempt to outline the manner in which the strict application of the *caveat subscriptor* rule in the context of contracts of necessity may implicate the fundamental constitutional values of freedom, dignity and equality.

5.2 CAVEAT SUBSCRIPTOR AND THE CONSTITUTIONAL VALUES OF FREEDOM AND DIGNITY

The classical liberal theory of contract and the doctrine of freedom of contract are based upon the premise that both parties to a contract are bargaining from positions of equal strength, and that each is free to accept and reject any terms that the other might wish to impose in the contract.¹⁸⁹ As Rakoff pointed out in an influential article, "freedom of contract has long been defined in

¹⁸⁹ Aronstam (note 5 above) 14. See also, Hutchison (note 5 above) 24-25.

terms of the separation of the market and the state, private and public law; at its fullest reach, it is the doctrine of *laissez faire*.”¹⁹⁰

However, the classical liberal theory of contract and the doctrine of freedom of contract fail to take into account that true equality rarely exists. It also fails to take into account the fact that many contracts are the result of necessity:

“A man has to make contracts in order to live. He is forced to purchase goods, to hire or acquire a home, to obtain employment, to exercise professional skills or to train to acquire such skills. Even a rich man who has no need to be an employee has to invest his wealth. The rich, like the poor, have almost no freedom in negotiations...the fact that one is able to forecast the terms of everyday contracts indicates, it is submitted, that *the pure doctrine of freedom of contract lacks practical validity*. This is particularly so precisely because freedom of contract will be absent, to a lesser or greater extent, in areas that affect the individual in his most common social activities. *Since men have to buy necessities, one might say that the consumer is compelled to contract upon particular terms and that, in a loose sense, he is the victim of compulsion.*”¹⁹¹

Consequently, it is submitted that, to use a framework characterized and fueled by the principles of the classical liberal theory of contract and the doctrine of freedom of contract in dealing with standard-form consumer contracts in circumstances of necessity or compulsion “is to err both in valuing highly a claim to freedom that is inapposite, and to overlook the elements of liberty that are actually at stake”.¹⁹²

“Far from enforcement of the organization’s standard-form terms furthering fundamental human values, the standard document grows out of and expresses the needs and dynamics of the organisation...Emphasis on the standard analysis...obscures the manner in which individual freedom really is at stake...*What the courts should say is that enforcing boilerplate terms trenches on the freedom of the adhering party*. Form terms are imposed on the transaction in a way no individual adherent can prevent, and a major purpose and effect of such terms is to ensure that the drafting party will prevail if the dispute goes to court.”¹⁹³

¹⁹⁰ Rakoff (note 132 above) 1237.

¹⁹¹ Aronstam (note 5 above) 14. My emphasis.

¹⁹² Rakoff (note 132 above) 1237.

¹⁹³ Ibid. My emphasis.

The inequality of society and the disparity of wealth and resources that exists in South Africa render the freedom of all contractants something of a fallacy.¹⁹⁴ Similarly abroad, the Crowther Committee, in its report on the laws and practices in the United Kingdom, found that the concept of freedom of contract has little meaning in consumer transactions.¹⁹⁵ The theme of standard-form contracts and the resultant powerlessness on the part of consumers also resonates through the minority judgment of Sachs J in *Barkhuizen v Napier*:

“Proliferated standard-form contracts undermine rather than support the integrity of what was actually concluded between the parties. They unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. *It may be said that far from promoting autonomy, they induce automatism. The consumer's will does not enter the picture at all.* Indeed, it could be contended that the question has moved from being one of whether Judges should impose their own subjective and undefined preferences in this field, to one of whether their own vision has become so clouded by anachronistic doctrine as to prevent them from seeing objective reality.”¹⁹⁶

The accuracy of Sachs’s assertion that the consumer’s will does not enter the picture at all when contracting by means of standard-form cannot be gainsaid, especially when the contract entered into by the consumer is one of necessity or circumstantial compulsion. It is absolutely vital to take cognizance of the fact that in a modern society such as ours many services (water, electricity, telephones and transportation, to name a few) may be regarded as necessities and that to the large majority of South Africans the pure doctrine of freedom of contract is merely an illusion.¹⁹⁷

¹⁹⁴ Hopkins (note 131 above) 155.

¹⁹⁵ Crowther Committee: Final Report on Consumer Credit (1971) 233, cited in Ramsay (note 152 above) 159.

¹⁹⁶ *Barkhuizen v Napier* (note 129 above) 369B-D. My emphasis.

¹⁹⁷ Aronstam (note 5 above) 14-15 commenting on the South African context provides the following assessment: “The consumer has no freedom to choose the person with whom he is to contract. Nor is he free to negotiate the supplier’s remuneration. Nor, in many cases, can he choose not to contract at all: he has to have water to drink if he is to survive. This is clearly illustrated by a contract entered into with the Post Office to acquire a telephone service. A person wishing to acquire such a service has to contract with the Post Office. The telephone subscriber has no freedom to negotiate the terms and conditions of the service. In making his application for the service, he is compelled to accept, for example, the provision that the Department of Posts and Telecommunications may at any time convert his service into a ‘shared service’. Nor is he free to negotiate the fee at which the service is to be rendered. The Postmaster-General has the power, by regulation in the *Government Gazette*, to determine from time to time the fees, rates or charges to be demanded in respect of international and internal telephone services. An increase in the fees takes effect from the date fixed by the Postmaster-General in the regulations. The subscriber’s right to sue the Postmaster-General for damage caused by the negligence of his servants or employees is also

5.3 CONTRACTUAL AUTONOMY AND THE VALUE OF DIGNITY

Of the values that underlie the 1996 Constitution, that of freedom logically appears most relevant to contractual autonomy.¹⁹⁸ Both the Supreme Court of Appeal and the Constitutional Court have made it clear the value of freedom encapsulates contractual autonomy. For instance, in *Brisley v Drotzky*¹⁹⁹ Cameron JA held that “contractual autonomy is part of freedom.”²⁰⁰ However, perhaps more controversially, Cameron JA argued that “[s]horn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity”²⁰¹ and has the potential, if employed carefully, of enhancing individual dignity and self-respect.²⁰² In

expressly excluded by s 115 of the Post Office Act 1958”. F Kessler ‘Contracts of Adhesion - Some Thoughts about Freedom of Contract’ (1943) 43 *Columbia L Rev* 629, 632 describes the situation as follows: “The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party...” See also, D Jacobson ‘The Standard Contracts Law of Israel’ (1968) 12 *Journal of Business Law* 325 cited in Aronstam (note 5 above) 15: “On the other side there stands the person who requires services or purchases the goods and he can either accept the contract as it is without any changes, or refuse to become a party thereto. In fact very often, or almost always, the supplier is the only one, or one of few, who is in a position to supply the required services or the necessary goods – and the suggested option of the customer is merely theoretical for in fact it does not exist” and Okpaluba (note 4 above) 288: “[T]he doctrine of freedom of contract says nothing about the unequal bargaining position of the parties and the fact that quite often the party in a weaker bargaining (economic) position has very little choice, if any at all, but to enter into a contract on terms and conditions dictated by the other party. Herein lies the fallacy of the doctrine of private autonomy, i.e. the freedom of the parties to enter into or not enter into a contract, and if so, on fair and reasonable terms.”

¹⁹⁸ D Bhana & M Pieterse ‘Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited’ (2005) 122 *SALJ* 865, 877.

¹⁹⁹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

²⁰⁰ *Ibid* 94E-F.

²⁰¹ *Ibid*. In support of this contention, Cameron JA referred to the following passage from HLA Hart *The Concept of Law* (1961) 40-41: “If we look at the law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills and other structures of rights and duties which he is enabled to build.”

²⁰² Bhana & Pieterse (note 198 above) 874.

Barkhuizen v Napier,²⁰³ Chief Justice Ngcobo echoed the sentiments shared by Cameron JA by stating that “[s]elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity”,²⁰⁴ while Sachs J noted that “freedom of contract has been said to lie at the heart of [the] constitutionally prized values of dignity and autonomy.”²⁰⁵

The notion of dignity displays a “perplexing capacity to pull in several directions and may accordingly fulfill very different roles.”²⁰⁶ On the one hand, an ‘empowerment-based’ conception of dignity enhances individual liberty by locating dignity in the ‘capacity for autonomous action’ and, accordingly, holding that dignity is enhanced by the protection of autonomous choices.²⁰⁷ An ‘empowerment-based’ conception of dignity is conducive to and supports a law of contract that is based on individual autonomy and that accordingly “reflects the pillars of the so-called classical law of contract, such as consensuality, freedom of contract and the strict enforcement of agreements seriously entered into.”²⁰⁸

On the other hand, a ‘constraint-based’ conception of dignity is founded on the recognition of the intrinsic moral worth of all human beings, which is deserving of protection even if it places a constraint on freedom – that is, any exercise of autonomy that undermines basic human dignity is unacceptable.²⁰⁹ A ‘constraint-based’ conception of dignity “may subvert rather than enhance choice”²¹⁰ by implying that society should not tolerate exercises of autonomy that affront human dignity.

It is submitted that South Africa’s caring and aspirationally egalitarian society embraces everyone and accepts people for who they are and, particularly in light of our apartheid legacy, it is more likely that an approach to the fundamental constitutional value of human dignity which

²⁰³ *Barkhuizen v Napier* (note 129 above).

²⁰⁴ *Ibid* 57C-D.

²⁰⁵ *Ibid* 150D-E.

²⁰⁶ G Lubbe ‘Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law’ (2004) 121 *SALJ* 395, 421.

²⁰⁷ Bhana & Pieterse (note 198 above) 881.

²⁰⁸ Lubbe (note 206 above) 421.

²⁰⁹ D Bhana ‘The Law of Contract and the Constitution: *Napier v Barkhuizen* (SCA)’ (2007) 124 *SALJ* 269, 274.

²¹⁰ Lubbe (note 206 above) 421.

views it as constraint-based will be favoured. According to Bhana and Pieterse, “the Constitutional Court’s equality jurisprudence lends support to such a proposition”.²¹¹

“[Our] court[s] seems to ascribe to a collectivist notion of dignity that is grounded in the equal moral worth of all humans and that encompasses the material preconditions for a dignified existence through an explicit acknowledgement of the link between intrinsic individual worth and the material context within which an individual finds herself in society.”²¹²

It was made clear in the discussion above that for the large majority of South Africans the principle of freedom of contract is merely an illusion. The circumstances of necessity that many South Africans find themselves in on a daily basis render the notion of contractual autonomy little more than a fallacy. Consequently it would be adding insult to injury to make the many vulnerable and poor South African consumers to feel “that arcane, lawyer-made and highly technical rules beyond their ken leave them with a sense of having been cheated out of their rights by the big enterprises with which they perform have to do business.”²¹³

While a court might say there is a contract based on the reliance of the contract enforcer, it is submitted that the court must also take into consideration the fact that today people (for various reasons often not readily apparent) habitually sign contracts without reading (as shown above in section IV) and the fact that the signatory may very well have appended his or her signature to the contractual document in circumstances of necessity, and therefore may not have acted ‘freely and voluntarily’ in any true sense. Our courts must also consider the fact that one of the main reasons why individuals (particularly consumers) enter into unread contracts is precisely because of the lack of any real freedom or choice in the circumstances.

Consequently, to suggest that one acts freely in such circumstances of necessity or compulsion is to undermine individual autonomy; to mock one’s sense of freedom and to diminish dignity. Individuals are relegated to a position where they are treated as mere automatons thus inducing consumer automatism and, contrary to the foundation of any understanding of dignity, are used

²¹¹ Bhana & Pieterse (note 198 above) 881. See also Bhana (note 209 above) 274.

²¹² Ibid.

²¹³ Per Sachs J in *Barkhuizen v Napier* (note 129 above) 184.

as a means to an end rather than being used as an end in themselves.²¹⁴ In this manner, the strict application of the *caveat subscriptor* rule in circumstances of necessity may implicate the values of freedom and dignity and will run counter to the constraint-based conception of dignity which our Constitutional Court's jurisprudence endorses. Consumer protection relates not only to things, services and money, but also to feelings, and the dignity and moral citizenship of people who expend almost all their scarce resources on the daily necessities of life.²¹⁵ The open and democratic society envisaged by our Constitution could not allow people to feel diminished as human beings because technical rules beyond their understanding seem to be robbing them of their rights.²¹⁶ The mere fact that contractual provisions, designed by suppliers and embodied in standard format, become the norm in countless consumer contracts does not necessarily mean that such contracts are an expression of so-called freedom of contract.²¹⁷ The existence of such a norm would indeed seem to argue the opposite.²¹⁸ It is submitted that contracts, market practices and the continued application of the *caveat subscriptor* rule should, at the very minimum, not diminish human dignity, human capacity and self-reliance.

5.4 CAVEAT SUBSCRIPTOR AND THE VALUE OF EQUALITY

The private law's endorsement of inequality is best illustrated in contractual transactions where one of the parties transacts from an overwhelming position of strength.²¹⁹ When the *caveat subscriptor* rule is enforced in conjunction with the sanctity of contract doctrine to uphold harsh and oppressive standard-form contracts in circumstances of necessity, then the private law is in effect facilitating an abuse of power by the party in the stronger bargaining position.²²⁰

Companies that use standard-form contracts usually acquire the services of a legal advisor to draft the terms and conditions of the document and consequently the draftsman is thus concerned

²¹⁴ See Lubbe (note 206 above) 421: "At the bedrock of any understanding of dignity lies the Kantian tenet that human beings are autonomous subjects that 'cannot be used merely as a means to an end by any human being...but must always be used at the same time as an end.'"

²¹⁵ Van Eeden (note 82 above) forward.

²¹⁶ *Barkhuizen v Napier* (note 129 above) 184.

²¹⁷ Van Eeden (note 82 above) 13.

²¹⁸ *Ibid.*

²¹⁹ Hopkins (note 131 above) 152-153.

²²⁰ *Ibid* 153.

with incorporating all the terms that are beneficial to the company – usually to the disadvantage of the consumer.²²¹ According to Justice Sachs:

“Their objective is not to record negotiated terms but to be as un-prominent as possible so as to provide the least possible distraction from finalising the contract, while securing the greatest obligatory reach for the consumer and the most-reduced prospect of liability for the provider. Thus, while businesspeople can get their lawyers to scrutinise the small print with professional lenses and advise accordingly, ordinary consumers cannot be expected to do the same. The result is that much of the contract is in reality not a record of what was agreed upon but a superimposed construction favouring one side.”²²²

In an attempt to protect their client from all possible contingencies, a contract is produced which more often than not surpasses the basic requirements of the company and abuses every possible opportunity permitted by the law.²²³ According to Hopkins, the result is more than simply a contract containing harsh provisions to the detriment of the adhering party:

“[I]t is objectionable because in most cases the adhering party has no bargaining power to negotiate out of the prejudice resultant from the oppressive terms of the document. Consumers are forced to either take-it-or-leave-it on the terms offered. In countries like South Africa, this take-it-or-leave-it attitude endorsed by the law is wholly inadequate and hugely damaging to the welfare of the country’s vulnerable majority.”²²⁴

The author goes on to state most tellingly:

“Whilst it is true that the exploitation of historically disadvantaged and currently unsophisticated consumers is not a problem unique to South Africa, the apartheid legacy is such that the majority of South Africans are either burdened by poverty or else they are illiterate. *Both of these factors discriminate economically and socially in such a way that these vulnerable consumers become particularly susceptible to an abuse of power by unscrupulous capitalists in superior bargaining positions.*”²²⁵

²²¹ Ibid 154.

²²² *Barkhuizen v Napier* (note 129 above) 156E-F.

²²³ Hopkins (note 131 above) 154.

²²⁴ Ibid.

²²⁵ Ibid. My emphasis.

Two species or conceptions of the concept of equality are recognized by our Constitution: ‘Formal equality’ simply requires that “all persons are equal bearers of rights and does not take into account the actual social and economic disparities between groups and individuals.”²²⁶ ‘Substantive equality’, on the other hand, “requires a consideration of the actual social, economic and political conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld.”²²⁷

It cannot be gainsaid that South Africa’s Constitutional Court’s jurisprudence embodies a rejection of the notion of ‘formal equality’, opting instead for a substantive understanding of equality.²²⁸ Indeed, one of the clearest indications that the substantive conception of equality is envisaged by the Constitution is the declaration in s 9(2) that “equality includes the full and equal enjoyment of all rights and freedoms.”²²⁹

The right to equality is the foundational tool in the achievement of our constitutional democracy’s ultimate vision – ‘transformation’. The Constitution does not use the term but, according to the Constitutional Court, nevertheless implicitly declares its commitment to transformation in a number of places.²³⁰ This commitment requires an understanding of the constitutional value of equality as a process towards the goal of an equal society.²³¹

However, according to Jordaan, “[a]lthough the Constitution creates the possibility that private persons can be obliged by subsequent legislation to promote substantive equality in specific

²²⁶ I Currie & J De Waal *The Bill of Rights Handbook* 5th Ed (2005) 232-233: “For example, on a formal conception of equality, equality is achieved if all children are educated according to the same school curriculum. Substantive equality on the other hand would require equality of outcome. If children with disabilities (deaf children, for example) undergo the same program as other children they may very well end up receiving an education that is inadequate for their special needs. To realise the right to equality of such children it may therefore be necessary to treat them differently to everyone else.”

²²⁷ P De Vos ‘Same-sex Sexual Desire and the Re-Imagining of the South African Family’ (2004) 20 *SAJHR* 179, 184.

²²⁸ See MS Kende ‘Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation’ (2000) 117 *SALJ* 745, 760: “[T]he fundamentally transformative purpose behind the South African Constitution’s promise of substantive, not formal, equality.”

²²⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 62.

²³⁰ *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) 73: “This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution recognises the injustices of our past and makes a commitment to establishing a society based on democratic values, social justice and fundamental rights. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.”

²³¹ Currie & De Waal (note 226 above) 234.

ways, the Constitution does not place a general positive duty on private persons to promote the achievement of equality.²³² The author continues as follows:

“Private persons are only prohibited from *unfairly discriminating* against other persons. Even if the terms of the contract favours the contracting party with most resources unreasonably, this fact *per se* does not embody some kind of differentiation that is “based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner” and will therefore not constitute unfair discrimination. The fact that the Constitution does not place a general positive duty on private persons to promote substantive equality cannot be altered by the court’s duty, as contained in the so-called seepage clause [that is, section 39(2) of the Constitution], to promote the spirit, object and purport of the Bill of Rights when developing the common law. To argue, based on this duty, that the court must develop the common law so as to impose a general positive duty on private persons to promote substantive equality to the detriment of contractual autonomy, firstly goes completely beyond the intention of the equality clause, and secondly has a selective and isolated focus on only the equality clause.”²³³

While there may not exist a positive duty on private parties to promote substantive equality, this does not detract from the fact that our courts, firstly, must not allow the inequality that does exist between contractual parties from being exacerbated or further entrenched and, secondly, must not be prevented from attempting, through creative judicial reasoning, to restore the equality imbalance that does exist. It is submitted that surely our courts are under such a duty when applying the *caveat subscriptor* rule, for to argue otherwise would be to turn a blind eye to the reality of the vast difference in the power balance between contracting parties, as well as the fact that consumers cannot understand and do not actually assent to the terms of the consumer contracts they sign, particularly in the context of consumer contracts of necessity. In this respect the words of our Deputy Chief Justice are worth noting:

“It is now well beyond contest that our Constitution has set itself the mission to transform society in the public and private spheres. The exercise of public power, and indeed of private power, in a manner that impinges on the entrenched rights or in a way that is inconsistent with the

²³² DW Jordaan ‘The Constitution’s Impact on the Law of Contract in Perspective’ (2004) 37 *De Jure* 58, 62.

²³³ *Ibid* 62-63.

foundational democratic values of human dignity, equality and freedom may very well attract constitutional consequences.”²³⁴

To the extent that almost all contracting now takes place by means of standard-form contracts, drafted by legal advisors on behalf of the stronger party and offered on a take-it-or-leave-it basis to consumers who have little (if any) bargaining power, the strict application of the *caveat subscriptor* rule, in circumstances where the contract entered into was one of necessity, will function exclusively to serve the interests of the contract enforcer at the expense of the signatory, who, in light of the various undetected and often overlooked psychological factors and behavioural biases at play at the time of contracting (discussed in section IV above), may reasonably not have read or understood all the terms of the contract. It is submitted that in such instances, the strict application of the *caveat subscriptor* rule will not only serve as an instrument to perpetuate inequality but may also have the effect of locking the weakest members of our society in a cycle of oppression. The South African Constitution “intends a not fully defined but nonetheless unmistakable departure from liberalism towards an empowered model of democracy with a goal of real substantive equality and distribution.”²³⁵ Preferences are virtually required under this approach.²³⁶ The strict application of the *caveat subscriptor* rule may not only end up diminishing freedom and liberty, it may reinforce and worsen the vast inequality in the distribution of power and resources between consumers and suppliers in a manner that offends our conception of distributive justice and restitutionary equality.

5.5 CAVEAT SUBSCRIPTOR AND THE ENFORCEMENT OF ‘PRIVATE LEGISLATION’

In the 2008 Durban and Coast Local Division case of *Den Braven SA (Pty) Ltd v Pillay and another*,²³⁷ Wallis JA expressed the view that power vested in the three spheres of government identified in s 40(1) of the Constitution and that “private citizens do not make law.”²³⁸ In a critical response, Davis J in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another*²³⁹

²³⁴ D Moseneke ‘Transformative Constitutionalism: Implications for the Law of Contract’ (2009) 1 *Stellenbosch LR* 3, 4.

²³⁵ Kende (note 228 above) 762.

²³⁶ *Ibid.*

²³⁷ *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D).

²³⁸ *Ibid* 30.

²³⁹ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C).

described Wallis JA's assessment as "the mischaracterisation of the law fashioned by private power."²⁴⁰ Davis J held that "private power in South Africa is also accountable to the principles of the Constitution"²⁴¹ and quoted with approval the following passage as per Madala J in *Du Plessis and Others v De Klerk and Another*:²⁴²

"Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society."²⁴³

The challenge of our Constitution, according to Davis J, is therefore "not to reproduce uncritically the shibboleths of the past, but to transform (as opposed to abolish or ignore) legal concepts in the image of the Constitution."²⁴⁴ It is submitted that the *caveat subscriptor* rule is but one of the concepts of our contract law which must be transformed and shaped in light of the image of the Constitution.

Although his article antedated the growth of the consumer protection movement, Friedrich Kessler's 'Contracts of Adhesion: Some Thought about Freedom of Contract' expressed clearly the fears of later writers concerning the use of private contracts as an instrument of corporate power.²⁴⁵

"Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. *Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a*

²⁴⁰ Ibid 85B-C.

²⁴¹ Ibid 85C-D.

²⁴² *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

²⁴³ Ibid 38.

²⁴⁴ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* (note 239 above) 85F-G.

²⁴⁵ Ramsay (note 152 above) 158.

substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.²⁴⁶

South Africa's liberal, or 'social democratic', Constitution endorses aspirations of equality, redistribution and social security.²⁴⁷ In addition to multiculturalism, paying close attention to gender and sexual identity and placing an emphasis on participation and governmental transparency, the extension of democratic ideals into the 'private sphere' has also been described as an essential feature of the South African experiment.²⁴⁸ To this end, the words of Justice Didcott are worth noting:

“No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring [the] benefits [of an open and democratic society based on freedom and equality].”²⁴⁹

Similar sentiments were expressed by Justice Sachs in his evaluation of the legal status of standard-form contracts in *Barkhuizen v Napier*:²⁵⁰

“A conception of contractual freedom modelled on the opposition between individual and state is inadequate in industrialised, organised and institutionalised society. Institutions other than the state can and do dominate the individual within the framework of private law as ordinarily conceived.”²⁵¹

According to Klare, the Constitution intends to “irradiate democratic norms and values into the so-called “private sphere”, particularly the market, the workplace and the family.”²⁵² However, in the context of the present review, standard form consumer contracts are essentially undemocratic ‘private legislation’, imposed upon consumers by large private organizations.²⁵³ Indeed the power sometimes exercised by large banks and insurance companies is every bit as

²⁴⁶ Kessler (note 197 above) 640. My emphasis.

²⁴⁷ KE Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146, 151.

²⁴⁸ *Ibid.*

²⁴⁹ *Du Plessis and Others v De Klerk and Another* (note 242 above) 145.

²⁵⁰ *Barkhuizen v Napier* (note 129 above).

²⁵¹ *Ibid* 145A-C.

²⁵² Klare (note 247 above) 155.

²⁵³ Ramsay (note 152 above) 159.

oppressive as the power exercised by the state. Consider the following example put forward by Hopkins:

“[I]n scenario A, parliament, from its position of strength, legislates to bind those subordinate to its authority; in scenario B, a powerful non-statal institution (like a bank or an insurance company) contracts in standard-form to bind the meek who are subject to its will. The company effectively legislates the terms of the agreement in a standard-form document. There are frightening similarities between these two scenarios. The only real difference, from a constitutional law perspective, is that in scenario A the strong is an organ of the state.”²⁵⁴

Commenting on the American context of the early 1970’s, Slawson estimates that “standard-form contracts probably account for more than ninety-nine percent of all the contracts made.”²⁵⁵ However, “the overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered.”²⁵⁶ Most consumers would have a tough time recalling when last they contracted other than by standard form and apart from casual oral agreements, they probably never have.²⁵⁷ However if they are lively and active, chances are that they contract by non-negotiated standard form numerous times a day.²⁵⁸ Credit card applications, car rental leases, air travel tickets, credit agreements and numerous other agreements are expressed in printed form from which no deviation is possible.²⁵⁹ Suppliers and consumers are aware of this contractual reality, and both know that printed contractual documentation is not to be questioned.²⁶⁰

Standard-form contracts have been used “to control and regulate the distribution of goods from producer all the way down to the ultimate consumer”²⁶¹ and “have become one of the many devices to build up and strengthen industrial empires.”²⁶² Consequently, in the current South African context, it becomes apparent just how vulnerable the weakest in our society are to exploitation. The strict application of the *caveat subscriptor* rule in circumstances of necessity

²⁵⁴ Hopkins (note 131 above) 159.

²⁵⁵ WD Slawson ‘Standard Form Contracts and Democratic Control of Lawmaking Power’ (1971) 84 *Harvard Law Review* 3 529, 529. See also, Ramsay (note 152 above) 159.

²⁵⁶ Slawson (note 149 above) 530.

²⁵⁷ Hopkins (note 131 above) 155.

²⁵⁸ *Ibid.*

²⁵⁹ Van Eeden (note 82 above) 75.

²⁶⁰ *Ibid.*

²⁶¹ Kessler (note 197 above) 632.

²⁶² *Ibid.*

may work to the detriment of the most vulnerable members of our society and simultaneously endorse the imposition of ‘private legislation’ in the form of standard form contracts while reinforcing the abuse of private power in a manner that is contrary to the image and aspirations of South Africa’s transformative Constitution.

In light of the modern realities surrounding consumer transactions, the various psychological factors and behavioural biases which come into play at the time of contracting (discussed in section IV above) as well as the possible dangers, from a constitutional perspective, in adhering to a strict application of the *caveat subscriptor* rule, particularly in the context of contracts of necessity, it is submitted that our courts should not be confined to distinct categories of exceptions when adjudicating along the lines of contractual mistake. In section VI that follows, I will propose a new basis for escaping the strict application of the *caveat subscriptor* rule in the context of contracts of necessity, as defined in the introduction to this paper, which will be grounded in public policy so as to provide our courts with a greater discretion or room to maneuver when faced with claims of mistake in contracting.

SECTION VI

6.1 A NEW GROUND FOR ESCAPING THE STRICT APPLICATION OF THE CAVEAT SUBSCRIPTOR RULE AND THE ROLE OF PUBLIC POLICY

The notion of public policy as a ground for declaring a contract invalid or unenforceable in South African contract law has developed radically in respect of our post-constitutional dispensation. While determining the content of public policy was once fraught with difficulties, this is no longer the case, as expounded by Justice Ngcobo in the seminal judgment of *Barkhuizen v Napier*:²⁶³

²⁶³ *Barkhuizen v Napier* (note 129 above).

“Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it...the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law...What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable...the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.”²⁶⁴

In coming to its conclusion, the court laid down a two-stage public policy test determining the fairness of enforcing contractual rights in the light of applicable constitutional values. However, a crucial aspect of the case that is often overlooked when considering the two-stage public policy test pronounced by the court is the fact that it was formulated in the context of determining the reasonableness of a time-bar clause which restricted access to court. Consequently, the majority’s approach to application of the Bill of Rights to private contracts has led to a situation where courts (and litigating parties) have, subsequent to *Barkhuizen*, expressed the view that the central question in a challenge to the validity of a provision in a contract is whether or not it is *fair* to allow a party to the contract to terminate on the basis of that provision or avoid the enforcement of the provision being challenged.²⁶⁵

However, in *Breedenkamp and others v Standard Bank of South Africa*²⁶⁶ Harms JA held that there is no such thing as a core value of fairness in the Bill of Rights and that there is no such thing as an overarching principle of fairness in contract which would allow for a contract to be

²⁶⁴ Ibid 28-30. This approach, according to Ngcobo J, “leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.”

²⁶⁵ See *Breedenkamp and others v Standard Bank of South Africa LTD and Another* 2009 (5) SA 304 (GSJ) 48 where Judge Jajbhay claims that *Barkhuizen v Napier* is authority for the proposition that a party to a contract cannot first, impose a term on another party if it would, if applied, operate unfairly and cannot, secondly, enforce a term in a manner that is unfair. See also *Breedenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (6) SA 277 (GSJ); *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* (234/10) [2011] ZASCA 45 (30 March 2011); *Maphango v Aengus Lifestyle Properties* (611/2010) [2011] ZASCA 100 (1 June 2011).

²⁶⁶ *Breedenkamp and others v Standard Bank of South Africa LTD* 2010 (4) SA 468 (SCA).

challenged simply on the basis of it being unfair.²⁶⁷ Nevertheless, Harms JA did suggest that where there is an identifiable constitutional value (dignity, equality or freedom) which is actually implicated by the provision being challenged, then one may be able to claim that unfairness should provide a basis to challenge the provision, but it must be brought under the umbrella of an identifiable constitutional value.²⁶⁸ The question that then arises is whether we can now say that an unwitting signatory can challenge the enforcement of a contractual term on the basis that enforcement would be unfair, where the strict application of the *caveat subscriptor* rule in circumstances of necessity would implicate a constitutional value.

While enforcement of the *caveat subscriptor* rule would mean that a court might hold that all the terms of the contract are enforceable against the signatory (based in the reasonable reliance of the contract enforcer), the enforcement of a contractual term which the signatory claims to have had no knowledge of at the time of contracting or no appreciation as to the legal consequences thereof, may offend against public policy as the signatory may not have exercised any real contractual autonomy when entering into the transaction and the enforcement of such a contractual term on the basis of *caveat subscriptor* may serve to perpetuate inequality. The enforcement of the contractual provision would be challenged on the basis of it being unfair, but such a challenge to the contractual provision would be brought under the umbrella of the constitutional values of freedom, dignity and equality.

In order to succeed, the unwitting signatory would first have to establish that the contract in question was in fact a ‘contract of necessity’ in the sense that the contract involved the attainment of everyday essential goods or services, on which a variety of consumers with different needs rely, but to which they give little or no attention primarily due to the fact that the goods or services in question are a necessity. The signatory would have to provide a substantial

²⁶⁷ Ibid 43-49. In other words, Harms JA expressed the view that *Barkhuizen v Napier* was not authority for the proposition that fairness is a core value of the Bill of Rights and that it is therefore a broad requirement of our law generally. In *Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs and Another* (2010 (4) SA 261 (ECM)) [2009] ZAECMHC 30; [2009] ZAECMHC 28 (12 November 2009) 78, Alkema J explained the position in our law quite astutely as follows: “[T]he concept of “fairness” runs like a golden thread through the Bill of Rights. However, even a superficial glance will reveal that it is used as an adverb or adjective (“unfairly discriminate” (s.9) or “fair public hearing” (s.34) and it is not an independent or substantive constitutional right.”

²⁶⁸ Ibid 47. An example, according to Harms JA, would be where “a lease provides for the right to sublease with the consent of the landlord. Such a term is prima facie innocent. Should the landlord attempt to use it to prevent the property being sublet in circumstances amounting to discrimination under the equality clause, the term will not be enforced.”

basis for showing that the goods or services in question were not merely a luxury or optional convenience and that the contract was concluded out of necessity. In laying such a basis the signatory may require the court to consider the following factors: whether the contract in question was a standard-form contract; whether the provision being challenged was offered on a take-it-or-leave-it basis; the font size in respect of the contractual term in question; whether the clause was on the reverse side of the contract; the length and complexity of the contract term being challenged; the relevant bargaining power of the parties; the reasonable cost for the consumer to search for and deliberate on the term in question; the reasonable costs of legal advice in respect of the meaning and effect of the term; the signatories time limits when entering into the contract; the signatories financial resources; the signatories educational history, computational proficiency and memory capacity; the signatories ability to gather information and perform extensive calculations in order to produce a rational decision during the contracting process.

Once the court has accepted that the contract in question is in fact one of necessity, the court must thereafter ask whether, in light of the factors stated above and in conjunction with the various psychological factors and behavioural biases at work at the time of contracting (discussed in section IV), it is reasonable to have expected the average South African consumer to have (1) read the contractual term in question or (2) understood the legal effect and meaning of the contractual term in question. It is submitted that should the court find that it is unreasonable to have expected the average South African consumer to have read or understood the term in question, then enforcement of the provision in question would be contrary to public policy as the consumer would have acted out of circumstantial compulsion or necessity rather than 'freedom of contract' in the classical liberal sense. Enforcement of the term would not only be unfair, but would also implicate the fundamental constitutional values of freedom and dignity as the court would be turning a blind eye to uncontrollable and intrinsic consumer deficiencies and the consumer would be treated as a mere automaton and as a means to an end for the supplier rather than an end in themselves. The consumer, who's only choice would be to contract on the terms stipulated by the supplier or go without the necessary goods or services, would be contracting from an unequal bargaining position by default and therefore the strict application of the *caveat subscriptor* rule in such circumstances of necessity may not only end up diminishing freedom and dignity, it may reinforce and worsen the vast inequality in the distribution of power

and resources between consumers and suppliers in a manner that offends our conception of distributive justice and restitutionary equality.

It must be borne in mind however, that I am not advocating for a new approach to challenge the validity of a contract on the basis of public policy. Rather, I am encouraging the development of a new basis for escaping the strict application of the *caveat subscriptor* rule, particularly in the context of contracts of necessity, which will operate alongside the traditionally recognized exceptions to the *caveat subscriptor* rule in order to challenge the enforcement of a particular contractual provision, which, in light of the numerous factors stated above and the various psychological factors and consumer behavioural biases at play at the time of contracting, would, in all probability, not have been read and/or understood by the average South African consumer. It is submitted that such a development would provide our courts with greater discretion and room to maneuver when adjudicating along the lines of contractual mistake, would safeguard against judicial idleness by preventing the unwitting signatory from escaping an unread contract where the circumstances do not fall neatly into one of the recognized categories of exceptions and perhaps most importantly, would allow our courts to bring a more ‘human face’ to the law of contract.

Whilst, by operation of the principle of freedom of contract, individuals are at liberty to conclude contracts with whom and on what terms they deem fit, and the courts will, by way of the principle *pacta sunt servanda*, generally enforce these contracts, our courts have deemed it necessary to retain a residual power to refuse to enforce the terms of a contract when to do so would be contrary to public policy.²⁶⁹ Our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground. In *Breedenkamp v Standard Bank*²⁷⁰ Harms JA traced this residual power of the courts all the way back to Codex 2.3.6 which states that “it is a self-evident principle that contracts (*pacta*) concluded contrary to laws, imperial constitutions, or the *boni mores*, are of no force or effect”.²⁷¹ In *Sasfin v Beukes*²⁷² Smalberger

²⁶⁹ M Kruger ‘The Role of Public Policy in the Law of Contract, Revisited’ (2011) *SALJ* 712, 715.

²⁷⁰ *Breedenkamp and others v Standard Bank of South Africa LTD* (note 266 above).

²⁷¹ *Ibid* 37.

²⁷² *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

JA explained that courts have “the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals.”²⁷³

Determining whether or not an agreement was contrary to public policy requires a balancing of competing values. Matthew Kruger astutely describes the concept of public policy as follows:

“Public policy means that a judge, when engaging public policy, is equipped with a ‘basket’ of policy considerations. From this ‘basket’ she is required, in a given case, to choose those considerations which are relevant to the facts of that case, and then to balance these considerations against each other so as to determine whether a particular contractual term should be enforced. The outcome of this identification and balancing process is what the courts term public policy.”²⁷⁴

No doubt the more open-ended approach of dealing with the application of the *caveat subscriptor* rule as advocated for here may invoke a storm of criticism from legal scholars and commercial lawyers who, with their need for legal certainty, may find such an approach difficult to accept and who may harbor fears that such development would “disturb the equilibrium of interests that common law seeks to achieve and would sacrifice the legal certainty associated with the unfettered operation of well-oiled common law rules in favour of ad-hoc, unprincipled, subjective, abstract and value-based decision-making.”²⁷⁵ However, it is submitted that contingencies that are not insurmountable should not stand in the way of principle: “individuals should not be denied justice simply because this produces a temporary hassle for practitioners.”²⁷⁶

“Lawyers often become trapped in a sterile argument about legal principles rather than settle down to solve the key problem of where justice lies. Law is sometimes seen as a mathematical formula. The formula is applied to a particular set of facts, and, if all the requirements of a recognized legal action are satisfied, the plaintiff succeeds. But if one of the elements is missing or suspect, the matter fails regardless of how aggrieved the poor individual in the street may feel.

²⁷³ Ibid 9.

²⁷⁴ Kruger (note 269 above) 716.

²⁷⁵ Bhana & Pieterse (note 198 above) 893.

²⁷⁶ J Lewis ‘Fairness in South African Contract Law’ (2003) 120 *SALJ* 330, 345.

*Nowhere, I believe, is this more obvious than in the law of contract with its emphasis on principles such as caveat subscriptor and its rules of interpretation.*²⁷⁷

Commenting on the importance of the *pacta sunt servanda* principle in our legal system Davis J in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*²⁷⁸ held that “[m]anifestly, without this principle, the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties.”²⁷⁹ However, while it is clear that there is great value and importance to be had in promoting certainty, it is equally important to recognize that certainty alone is not a consideration that can trump all other policy considerations in all circumstances.²⁸⁰ Legal certainty is not the only truism or foundational principle of our legal system: “[o]ur law, like all legal systems – indeed, like our Constitutions – prizes more than one ideal, more than one value, and aims for more than just one end.”²⁸¹

It is submitted that dogmatic adherence to legal rules such as *caveat subscriptor* for the sake of legal certainty and predictability will strip the common law of its inherent potential and consequently frustrate legal and social transformation.²⁸²

“The drive towards closure, self-justification and self-serving certainty always seems to gain the upper hand in the course of time. It makes life easier, and making life easier, at least for oneself or ourselves, appears to be the first item on the agenda of humanity. This is the deeply sacrificial logic that underlies the law. Hence the reduction of principles of reasonableness, good faith and boni mores to blunt instruments that no longer cut into, but actually shield the self-serving tendencies of the law. Hence the need for revolutionary interventions that truly expose and resist the self-serving and status quo-entrenching tendencies of the law.”²⁸³

²⁷⁷ TA Woker ‘A Fresh Breeze of the Bench’ (2000) 12 *SA Merc LJ* 432, 432. My emphasis. See also BC Stoop ‘Hereditas damnosa? Some Remarks on the Relevance of Roman Law’ (1991) 54 *THRHR* 175, 184, discussing the importance of teaching Roman law: “[M]odern legal science tends to be dogmatic and removed from reality. When confronted with a problem, the lawyer trained in dogmatic constructions rather than in the awareness of social needs and adaptation of legal rules, feels powerless and turns to the legislature for aid ...to make the necessary changes to the law. They should become “romanised”, that is, aware of their most important task, that of responding to the needs of society and avoiding engagement in sterile dialectics.”

²⁷⁸ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* (note 239 above).

²⁷⁹ *Ibid* 85.

²⁸⁰ Kruger (note 269 above) 738.

²⁸¹ *Ibid* 739.

²⁸² Bhana & Pieterse (note 198 above) 894.

²⁸³ J Van Der Walt ‘Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence’ (2001) 17 *SAJHR* 341, 362.

In terms of section 39(2) of the Constitution, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. One must remember, as Bhana and Pieterse correctly point out, “that the trade-off for temporarily reduced legal certainty is an alignment of common-law doctrine with the constitutional ethos which will serve not only to infiltrate formal rules with substantive justice, but also to relegitimize the common law”.²⁸⁴

“[T]here is much less to fear than one may suppose when our legal world is brought into jeopardy by its re-evaluation through the values, the spirit, purport and objects of the Constitution and the Bill of Rights. The result is not to undermine the foundations of the law, to unsettle every rule, and to leave every existing right or entitlement in jeopardy. No doubt the exercise will reveal those rules and structures that do not have solid foundations. Those which cannot be supported by the values of the new constitutional dispensation are in jeopardy of being condemned. They will need to be replaced with rules which are supported by those values. Those rules which can be, or are, supported by those values will find a foundation as secure as any set of rules can be.”²⁸⁵

CONCLUSION AND SUGGESTIONS FOR REFORM

All South African consumers would prefer to live in a society and economy where they can afford as much as they desire of all goods and services, such as food, housing, medical services and education for their children.²⁸⁶ However, the reality is that the daily existence of many South African consumers is characterized by struggle, poverty, famine and an absence of basic services.

²⁸⁴ Bhana & Pieterse (note 198 above) 895.

²⁸⁵ CJ Roederer ‘Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law’ (2003) 19 *SAJHR* 57, 61.

²⁸⁶ Van Eeden (note 82 above) 185.

“The realities of today’s marketplace...and readability research cry out for a new theory of consumer contract and statutory law that is based on reality. Consumer protection legislation should not be based on the false notion that documentary disclosures give consumers the ability to protect themselves when they enter into adhesion contracts. Consumer contract law should not be based on the false notion that by signing one of these form contracts, the consumer knows of, understands, and has assented to the terms of the writing. New approaches are needed to truly protect consumers and to give judges the ability to police consumer agreements...By holding on to the freedom-of-contract doctrine as the main common law component, and using disclosure laws as the main statutory component of consumer law, the legal system is engaging in the fiction of a free and informed market, while turning a blind eye to the realities of the marketplace and to the fact that consumers cannot understand and do not actually assent to the terms of the consumer contracts they sign.”²⁸⁷

It is submitted that what is required is a revised understanding of the *caveat subscriptor* rule - an understanding that will ultimately result in adjudication in cases of mistake that is consistent with, and supportive of, our Constitution’s transformative hopes. The basis and underpinnings of the *caveat subscriptor* rule must be re-examined and built on the rock of democratic values embodied in the Constitution. This will not entail an abolishment of the rule. Rather, the rule will remain, but will remain having established a renewed foundation - it will remain because it will be worthy of serving the values of the new regime. I believe that the development of the common law along the lines encouraged above would be consistent with the objective normative value system underpinning our Constitution, and with the courts’ duty to develop the common law in light of the Bill of Rights and those very values.²⁸⁸

Such an approach advocated above will deprive the consumer’s signature of the air of conclusiveness and finality with which it has hitherto been endowed by the common law. A supplier will no longer be able to assume that the court will enforce a consumer contract simply on the basis that, on being presented with a document bearing the consumer’s signature, the court will summarily accept the consumer’s signature on the document as conclusive proof that the

²⁸⁷ White & Mansfield (note 88 above) 267.

²⁸⁸ See section 39(2) of the Constitution of the Republic of South Africa, 1996; *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) 54; *NK v Minister of Safety and Security* (2005) 26 ILJ 1205 (CC) 1213-5.

consumer had read, understood and assented to the terms of the contract.²⁸⁹ The supplier will no longer be able to assert that the court is precluded from looking behind the consumer's signature and the standard form print, or that the fairness or unfairness of the contract is immaterial.²⁹⁰ Ultimately, this will mean two things for judges:

“[F]irstly, they will no longer be entitled to simply rely on judicial precedent when deciding a case; and second, they can longer limit their enquiry to the contractual capacity of the parties and the legality of the transaction. Instead they will now have to engage to some degree with issues of fairness and reasonableness as they will need to justify hard cases through a process of normative reasoning.”²⁹¹

In addition to the more open-ended approach proposed above for challenging the strict application of the *caveat subscriptor* rule in the context of contracts of necessity, there are certain practical methods by which the *caveat subscriptor* rule may be modified by our courts in order to ensure increased fairness towards the unwitting signatory who may have contracted out of necessity. The first method would entail a lowering of the threshold in respect of the reasonableness on the part of the unwitting signatory. As explained above in section III above, our courts have traditionally adopted the attitude that no relief will be granted where the mistaken party has signed recklessly, without first having read the terms of the contract. However, it is submitted that in light of the realities surrounding consumer non-readership our courts need to stop interpreting consumer non-readership as mere recklessness, but rather as a natural human condition. In *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers*²⁹² the mistaken signatory was a senior attorney, with 44 years' experience, who practised commercial law, did a fair amount of contract work and a fairly substantial amount of litigation.²⁹³ In *Langeveld v Union Finance Holdings (Pty) Ltd*²⁹⁴ the mistaken signatory was an accomplished businesswoman of many years' standing who had signed an agreement as a surety without reading it.²⁹⁵ It is submitted that to simply say that these individuals are reckless is to move too quickly and to turn a blind eye to the reality of consumer transactions. Literature on psychology

²⁸⁹ Van Eeden (note 82 above) 169.

²⁹⁰ Ibid.

²⁹¹ Hopkins (note 131 above) 160.

²⁹² *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* (note 10 above).

²⁹³ Ibid 601D-E.

²⁹⁴ *Langeveld v Union Finance Holdings (Pty) Ltd* (note 10 above).

²⁹⁵ Ibid 575G-H.

and behavioural economics (as discussed in section IV) proves that there is something more at play here. Consequently, it is submitted that our common law needs to respond and develop according to human behavior as studies have shown that almost nobody reads consumer contracts and (more surprisingly perhaps) that “legal jargon, print density and font size are not key factors in consumers' decisions on whether to read their contracts.”²⁹⁶ Furthermore, cases such as *Hartley* and *Langeveld* suggest that education levels and the signatory's profession are also not key factors in consumers' decisions on whether to read their contracts. Recently, even Judge Richard Posner (one of the greatest legal minds of his generation) admitted that he doesn't read contracts before signing.²⁹⁷

According to Professor Calamari, “[I]n the current era of mass marketing, a party may reasonably believe that he is not expected to read a standardized document and would be met with impatience if he did. In such circumstances an imputation that he assents to all of the terms in the document is dubious law.”²⁹⁸ It is submitted that in light of the modern realities surrounding consumer non-readership, this is even more so in the context of non-negotiated standard-form consumer contracts of necessity.

Conversely to the first method for reform, the second method would entail the raising of the threshold in respect of the reasonableness of the reliance on the part of the contract enforcer. As explained above in section I, it is crucial that the contract assertor's belief in consensus must be reasonable, because it is only a reasonable person that can rely on the doctrine of quasi-mutual assent. Where the contract being challenged is one of necessity and the factors mentioned above (standard-form, small font size, lengthily terms etc.) are present, the court must ask whether a reasonable person in the position of the contract enforcer would have (in light of the well-established realities surrounding consumer non-readership as outlined in section IV) believed that the signatory, by signing such a contract of necessity in the circumstances, understood and intended to bind themselves to the particular term being challenged. By having to take into

²⁹⁶ Becher & Unger-Aviram (note 159 above) 1.

²⁹⁷ See Mike Masnick 'If Even The Best Legal Minds Don't Read Boilerplate Contracts... Why Are They Considered Binding?' available at <http://www.techdirt.com/articles/20101001/14083711252/if-even-the-best-legal-minds-don-t-read-boilerplate-contracts-why-are-they-considered-binding.shtml>, accessed on 6 August 2012: “[M]ost people realize that the language of such things will almost never actually matter, but of course, when it does matter, it *really* does matter. And, of course, that leads to a general question: why do we even bother with all this ridiculous legal language if no one's *really* agreeing to it?”

²⁹⁸ D Calamari 'Duty to Read – A Changing Concept' (1974) 43 *Fordham Law Review* 3 341, 361.

account the realities surrounding consumer non-readership as well as factors such as the signatories' financial resources, educational history and computational proficiency the court would require the contract enforcer to display a higher standard of reasonableness in respect of his or reliance on the signature of the unwitting signatory.

It is important to bear in mind at this point that the reasonableness of the reliance on the part of the contract enforcer is determined objectively (alternatively, stated in terms of the doctrine of *iustus error*, the reasonableness of the mistake on the part of the signatory is determined objectively). Consequently, any fault the part of the signatory is irrelevant to the enquiry. This much was made clear in *Sonap Petroleum v Pappadogianis*²⁹⁹ where Harms AJA held that fault was not a requirement as there is little or no authority for such a requirement and that such a requirement had received much academic criticism and is unnecessary.³⁰⁰ According to Harms AJA the decisive question is whether “the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?...To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby?”³⁰¹ According to Harms AJA, “[t]he last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?”³⁰²

It is submitted that, in light of the now well documented and widespread prevalence of consumer non-readership, the reasonable proferens with even a minimum level of experience of operating in the modern consumer market could not, objectively speaking, reasonably expect the average South African consumer entering into a contract of necessity to read and/or understand lengthy and complex contract terms, and more importantly, to understand the legal consequences of agreeing to such terms, unless such terms were specifically pointed out and explained in sufficient detail. Therefore, while the proferens may claim to have been misled by the signature of the signatory, it is difficult, where the contract was one of necessity and in light of the realities

²⁹⁹ *Sonap Petroleum (formally known as Sonarep) SA (Pty) Ltd v Pappadogianis* (note 47 above).

³⁰⁰ Ibid 240C-I.

³⁰¹ Ibid 240 I-J.

³⁰² Ibid 240 A-B.

surrounding consumer non-readership, to see how the reliance of the proferens would be reasonable. This brings us to the third possible method for reform.

The third method would entail a development of the common law of misrepresentation in respect of unexpected terms or misleading documents. As explained in section I, our courts have already recognized that the use of misleading documents and unexpected terms in a document constitutes a form of misrepresentation with a duty to speak on the part of the contract enforcer. It is submitted that this area of our common law that can be developed to provide greater leeway for the unwitting signatory by requiring greater disclosure on the part of the contract enforcer.

The SCA has already recognized in *Absa Bank Ltd v Fouche*³⁰³ that “[a] party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him ‘would be mutually recognized by honest men in the circumstances.’”³⁰⁴ Three years later in *Dauids en Andere v ABSA Bank Bpk*³⁰⁵ the court had to deal with a standard-form agreement of suretyship, which the clients of a bank had signed at the behest of the bank. The court held that no reasonable person would have believed that the clients, by signing such a document in the circumstances, understood and intended to bind themselves to the content thereof. The court went further and criticized the length of the sentences in the contract, pointing out that the sentences were each hundreds of words long. The court made the wry comment that even if the clients had read the agreement, it is doubtful whether they would have understood what they were reading due to this fact. The court then went on to hold that “public interest demanded that a complicated document of this nature had to be explained to the signatory, especially where the signing thereof could have such drastic consequences.”³⁰⁶ With a view to ensuring increased fairness and a greater level of protection towards the unwitting signatory, it is submitted that, in the spirit of *Absa Bank Ltd v Fouche* and *Dauids en Andere v ABSA Bank Bpk*, our courts should place a far greater burden on suppliers of essential goods and services (who, it must be remembered, contract from a far greater bargaining position) to not only point out certain contractual terms such as exemption

³⁰³ *ABSA Bank Ltd v Fouche* (344/2001) [2002] ZASCA 111; [2002] 4 All SA 245 (SCA) (19 September 2002).

³⁰⁴ *Ibid* 5.

³⁰⁵ *Dauids en Andere v ABSA Bank Bpk* 2005 (3) SA 361 (C).

³⁰⁶ *Ibid* 24.

clauses, but also to ensure that the consumer is fully aware of the meaning and legal consequences of being bound to lengthy and complex contract terms which could operate adversely to the interests to the consumer at the time of contracting and in the future.

The fourth possible method for reform under the common law would involve the introduction of a rebuttable presumption, particularly when dealing with claims of mistake in the context of contracts of necessity. When the unwitting signatory claims mistake and the contract in question is one of necessity, then the onus could shift to the contract enforcer to prove why their reliance is reasonable. This would require the contract enforcer to bring evidence so prove why the unwitting signatory should be held bound to the particular term in the contract even though the contract was one of necessity and even though the latest findings on consumer psychology and behavioural economics suggests that the average South African consumer would not have read and/or understood the term in question. This may require the contract enforcer to prove, for example, that the specific clause being challenged was specifically pointed out and/or explained to the consumer and that there exists sufficient business reasons for including and enforcing the term. Some support for this suggestion for reform can be found in the Consumer Protection Act³⁰⁷ which has introduced so-called ‘black list’ and ‘grey list’ terms. According to Naude, “[a] black list is a list of prohibited terms which are invalid under all circumstances, whereas a grey list is a list of terms which may be unfair, but the final decision depends on the circumstances of the particular case.”³⁰⁸ Section 51 of the Act contains the ‘black list’ terms which are prohibited under all circumstances, while Regulation 44 of the Act provides the ‘grey list’ of terms which are presumed to be unfair. A supplier is permitted to include these ‘grey list’ terms in the contracts, however, in certain circumstances, the inclusion of these terms will be presumed to be unfair.³⁰⁹ Under the common law and in terms of section 48 of the Consumer Protection Act, the consumer would normally bear the onus of proving that a particular term in a contract is unfair. However, following the introduction of ‘grey list’ terms, the use of certain terms by the supplier of goods and services is presumed to be unfair in certain circumstances and the onus is on the supplier to be able to provide a justification for why the particular term has been included in the

³⁰⁷ 68 of 2008.

³⁰⁸ T Naude ‘The Use of Black and Grey Lists In Unfair Contract Terms Legislation in Comparative Perspective’ (2007) 124 *SALJ* 1 128, 130.

³⁰⁹ *Ibid* 130-131. See also Elizabeth de Stadler ‘Explaining the grey listed terms in the Consumer Protection Act (regulation 44)’ available at <http://www.esselaar.co.za/legal-articles/explaining-grey-listed-terms-consumer-protection-act-regulation-44>, accessed on 17 May 2012.

contract and is necessary. It is submitted that our courts should introduce a similar shift in onus where a signatory claims mistake in respect of a particular contractual term and the contract in question is one of necessity.

Fears that ‘uncertainty’ would result in our courts to be flooded by litigation and would ultimately stifle commercial traffic are exaggerated.³¹⁰ As with all branches of common law, the degree of uncertainty in contract law is moderated through the doctrine of precedent.³¹¹ A solid set of rules will gradually develop over time if the open-ended approach and practical methods for reform suggested above are developed incrementally and applied carefully — thus, while the outcome may not be able to be foreseen with scientific accuracy, litigants will in most circumstances have a fair indication of what it may be.³¹²

“[T]he introduction of the Constitution has heralded a new legal era and it requires a re-think of all areas of the law. This is not to argue that the doctrine of precedent should be abandoned and that decisions should be based merely on what seems fair in the circumstances. But we do live in a world which is constantly changing...if we are to pay more than lip service to the notion that our common law is a vibrant living system, it is necessary for our courts to consider issues of equity and social policy. That we have a Constitution which emphasizes these values means that it is far easier for the courts to move away from strict adherence to an approach based on inflexible logic where solutions must be found in already existing pigeon holes. It must be accepted that in the short term this approach may lead to uncertainty, particularly in the law of contract, and that boundaries will have to be examined and established. But in the end this will hopefully revitalize our vibrant commercial legal system and so ensure that it is well capable of keeping up with the ingenious developments of modern commerce.”³¹³

³¹⁰ Bhana & Pieterse (note 198 above) 894-895: “It is in fact not uncommon in law for the policy objective of legal certainty to be relaxed in circumstances where competing social considerations and the development of the common law warrant it. In the law of delict, for example, the test for wrongfulness, which is based on the legal convictions of the community, wholeheartedly embraces competing social and economic considerations (including those reflected in the Constitution), notwithstanding the inevitable reduction in legal certainty. The law of contract, as a branch of the common law, is equally meant to embrace normative and constitutional values so as to adapt to the changing needs of the community. It is therefore difficult to discern a cogent explanation for contract law’s apparent need for more certainty and its attendant ‘elevated’ status.”

³¹¹ Ibid.

³¹² Ibid.

³¹³ Woker (note 277 above) 436.

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3 December 2012

Mr Kaelin Govinden 208514672
School of Law
Howard College Campus

Dear Mr Govinden

Protocol reference number: HSS/1291/012M

Project title: Against the Strict Application of the Caveat Subscriptor Rule in the Context of Contracts of Necessity

EXPEDITED APPROVAL

I wish to inform you that your application has been granted Full Approval through an expedited review process.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the school/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Professor Steven Collings (Chair)

/pm

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