

UNIVERSITY OF KWAZULU NATAL

**CONSUMER PROTECTION IN SWAZILAND: A COMPARATIVE ANALYSIS OF
THE LAW IN SOUTH AFRICA AND THE UNITED KINGDOM**

2012

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By

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ACKNOWLEDGMENTS

Each person has a certain story about their life that must be told. I have been fortunate enough to have certain individuals who have left significant imprints in ensuring that my success story is told in years to come. The people are the following:

My former colleague and learned friend in the Attorney General's office in Swaziland, Mr. Mzila Nxumalo. Thank you for patiently ensuring that I pursued my dream of studying at Masters Level and travelling with me the very long distances on the roads from Swaziland to Natal. Your enduring friendship is unequalled.

I would like to express deep gratitude to my family and friends whose emotional and spiritual support kept me going through life's turbulences while I was alienated from them.

Dr. Goodier, who made comments that strengthened a number of chapters and refined my grammatical architecture, while guiding me when I wandered.

My supervisor, Mr. Darren C. Subramanien, who was patient in guiding me and ensuring that my ideas penetrated the sometimes narrow and often misty academic lens.

Finally, thank you God for the enduring love you have bestowed upon me, your purpose has been established.

FORMAL DECLARATION

I hereby declare that this thesis is my own work, and that all my sources of information have been acknowledged. To my knowledge, neither the substance of this thesis, nor any part thereof, is being submitted for any degree in any other University.

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ABSTRACT

Consumer protection has become an important issue in many spheres of trade. This fact is borne out by the many consumer protection laws introduced in many countries globally. However, despite these developments Swaziland is lagging behind. Obviously, this state of affairs has left consumers in Swaziland in a totally vulnerable position. Consumers are often exploited in two material respects. They are either subjected to unfair contract terms in the provision of services, or supplied with defective products having the potential of causing serious bodily harm. In protecting consumers the common law has been judicially developed over many centuries to curb these unfair trading practices. The doctrine of freedom of contract has been the driving force in regulating the relations between consumers and suppliers. The import of this doctrine is the unyielding recognition of an individual's autonomy in the conclusion of consumer transactions. The underlying percepts of this doctrine are privity of contract, which only recognises obligations between contracting parties, and *pacta sunt servanda* which requires contractual undertakings to be recognised. The operation of contractual freedom in concluding agreements often leads to unfair results against consumers because suppliers usually impose unfair terms as a result of their stronger bargaining power over consumers. In short, problems faced by consumers were twofold; first, they have to battle the issue of potentially harmful goods, and secondly, their economically weak bargaining position is exploited by suppliers through the use of unfair contract terms. Many countries, including the United Kingdom and South Africa, addressed these two consumer issues decisively through statutory reform aimed at protecting consumers against potentially harmful products and unfair contract terms. Swaziland requires statutory reformative measures that will ensure a shift from the current consumer framework regulated by outmoded common law principles towards a modern framework that will comply with international standards.

LIST OF ABBREVIATIONS

ARSO	African Standardization Organisation
CI	Consumers International
CPA	Consumer Protection Act
EC	European Community
EEC	European Economic Community
FAO	Food and Agricultural Organisation
IOCU	International Organization of Consumer Unions
IEC	International Electrotechnical Commission
IAF	International Laboratory Accreditation Forum
INM	Imbokodvo National Movement
ISO	International Organisation of Standardization
NNLC	Ngwane National Liberatory Congress
SPP	Swaziland Progressive Party
SUF	Swaziland United Front
SABS	South African Bureau of Standards
SALC	South African Law Commission
SALJ	South African Law Journal
SANAS	South African National Accreditation System
SANCU	South African National Consumer Union
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Economic Social and Cultural Organisation

INTRODUCTION

1. GENERAL PURPOSE OF THE STUDY

Howells¹ warns that comparative studies in general are fraught with hazard particularly because ‘any comparative law work is a major undertaking for the researcher who faces being embarrassed by his incomplete knowledge of foreign legal systems’. These words serve as a caution for the present international consumer law study involving a comparison between Swaziland, South Africa, and the United Kingdom (UK). The last two countries boast of advanced consumer frameworks while Swaziland has extremely thin legislation and case-law material available on the subject. While Howells² cannot be faulted for his observations, the need for consumer law development and reform in Swaziland far outweighs any inaccuracies and incompleteness that may be occasioned in this work. It is hoped that this dissertation will lay a consumer foundation for Swaziland on which future developments will be built in this very important area of law.

Consumer protection in this study will be considered from two perspectives, namely unfair contract terms in consumer agreements and product liability. With regard to unfair contract terms in Swaziland the question is whether the power to invalidate unfair contract terms will continue to vest in the courts as seen in some decided cases.³ At the heart of this question is the doctrine of contractual freedom which requires courts to recognise and enforce the wishes of contracting parties.⁴ Standard form contracts are the main instruments that defeat the freedom of parties to enter and conclude contracts since they dispense with negotiation. The problem is that recognition of contractual freedom has led to many consumer injustices because courts have refused to discharge consumers from disadvantageous contract terms embodied in standard form contracts. This is the main weakness underlying freedom of contract.⁵ While courts generally

¹ G Howells *Comparative Product Liability* (1993) vii.

² *Ibid.*

³ See the cases of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) and *Jajbhay v Cassim* 1939 AD 537.

⁴ Hawthorne ‘The Principle of Equality in the Law of Contract’ (1995) 58 *THRHR* 152, 163. See also *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq. 462; *Burger v Central South African Railways* 1903 TS 571; *Wells v South African Alumenite Company* 1927 AD 69 at 73; *Osry v Hirsch, Loubser & Co. Ltd* 1922 CPD 531 at 546; *George v Fairmaid (Pty) Ltd* 1958 (2) SA 465 (A) at 472; *Bank of Lisbon and South Africa v Ornelas and Another* 1988 (3) SA 580 (A); *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 SCA 34; *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

⁵ *Osry v Hirsch, Loubser & Co. Ltd* (note 4 above).

enforce contractual provisions, there has been uncertainty because in some instances it has been held that strict adherence to freedom of contract perpetrates injustices and as a matter of public policy courts will ensure that ‘simple justice between man and man’ is achieved in contractual relationships.⁶ This will be one of the areas of focus.

Concerning product liability the study examines the liability of manufacturers who disseminate defective products to third party consumers. Third party consumers often lack information on the origin of goods they purchase coupled with the lack of knowledge on how to enforce their rights against suppliers. The issue of liability is of importance in Swaziland because a majority of the consumed products are imported from foreign countries and determining the liability of foreign-based manufacturers to consumers in Swaziland is crucial.⁷ The study will consider this issue and the remedies that may be available to third parties in Swaziland.

Foreign jurisdictions like South Africa and the UK once faced the difficulties surrounding unfair contract terms and issues of product liability. Both countries were able to address the problems in these areas by introducing certain control measures to mitigate consumer exploitation. These measures were introduced under the common law and later entrenched through legislative regulation. Consumer protection in this study will consider both these developments and recommend consumer law reform in Swaziland that will introduce practical changes that will accord with international standards.

2. BROAD PROBLEMS AND ISSUES TO BE DISCUSSED

The undeveloped nature of consumer protection in Swaziland has been the cause of many consumer injustices, particularly because the common law has failed to adjust to the varying consumer imperatives. In giving the study its proper context, the definitional quagmire of the term ‘consumer’ which many scholars have attempted to clarify and define will be considered. The term will be addressed in light of the legislative and judicial divergence with regard to its use in the different consumer jurisdictions to be considered in this study. There are two

⁶ *Jajbhay v Cassim* (note 3 above). See also *Sasfin (Pty) Ltd v Beukes* (note 3 above) at 9; *Botha v Finanscredit* 1989 (3) SA 773 (A) at 783; *Bank of Lisbon and South Africa v Ornelas and Another* (note 4 above) 613.

⁷ ‘Economy of Swaziland’ available at http://en.m.wikipedia.org/wiki/Economy_of_Swaziland, accessed on 25 September 2012.

fundamental issues that this study attempts to address. The first issue will be to consider whether the common law of contract is sufficient in protecting consumers outside the realm of legislative regulation. In considering this issue specific focus will be directed to contractual freedom and standard form contracts. An argument in favour of legislative regulation will be developed by focusing on the adverse effects of freedom of contract and how the courts in different jurisdictions have reluctantly challenged this concept through the introduction of certain control techniques.⁸ The second issue will consider whether consumers are afforded sufficient safeguards in instances where defective products are supplied. In this respect, the study will examine whether the common law of liability for defective products is sufficient and legislative reform will be suggested where appropriate.

3. SOURCES AND APPROACH

The present study is undertaken in the context of Swaziland as an emerging economy.⁹ As Swaziland endeavours to become more investor-friendly towards local and foreign businesses it must be remembered that enacting drastic consumer protection legislation may be counter-productive towards this aim.¹⁰ Tebbutt JA highlighted this fact in the Swaziland Court of Appeal case of *Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd* (unreported) Civil Appeal Case 23/2006, as follows:

‘There are, however, other considerations of which this Court must not lose sight. This Court should not, by its judgments, stultify free trade and economic development within the country. It must take care that it does not place unnecessary restraints thereon and create obstacles that may lead to the discouragement of foreign investment in the Kingdom.’¹¹

While the above observation serves as caution, great care must be taken that consumer reform in Swaziland does not become superficial, leading to the introduction of a weak consumer protection framework. This is especially because consumer protection mechanisms remain elusive and no systematic structures are in place to safeguard the interests of consumers in

⁸ In the case of *Sasfin (Pty) Ltd v Beukes* (note 3 above) the concept of freedom of contract was challenged successfully.

⁹ ‘Swaziland’ available at <http://www.sadt.int/files/2013/0277/8289/Swaziland.doc>, accessed on 25 September 2012.

¹⁰ *Ibid.*

¹¹ At Para 63.

Swaziland. While safeguarding the interests of consumers through legislation has become a common feature in many countries of the civilized world, as will be evident in the coming chapters, Swaziland is lagging behind. The objective of this study is to consider the advantages of enacting consumer legislation to regulate product liability and contract terms because the protections offered by common law are no longer adequate in protecting consumers.

The thesis will outline the background of the law in Swaziland from the historical and constitutional perspective as it evolved from the colonial era until the current constitutional dispensation. In this respect the study will consider text book sources and legislation inclined towards consumer protection. This will include the Swaziland Hire Purchase Act 11 of 1969, the Money Lending and Credit Financing Act 3 of 1991 as well as the Fair Trading Act of 2001. These statutes are relevant in this study because they contain provisions that safeguard consumer interests. In considering consumer protection in the South African context, particular attention will be directed to the South African Consumer Protection Act 68 of 2008 (CPA of 2008) since the Act is the main statute regulating consumer protection in South Africa. Consumer protection in the UK is mainly regulated by statute and the different statutes will be considered including the Consumer Protection Act of 1987 and the Sale of Goods Act of 1979. The application of the case of *Donoghue v Stevenson* [1932] A.C. 562 is wide-ranging and will be discussed throughout the dissertation in the area of product liability. The study will also make use of other sources and literature including journal articles and textbooks. Case law will also be used in the study in order to provide insightful direction.

4. STRUCTURE OF THE DISSERTATION

The first chapter in the thesis will focus on the history and background of the manner in which Roman-Dutch law became the common law of Swaziland. This chapter explores the inter-relation between the common law of Swaziland and South African law from a historical perspective. Furthermore, it establishes the link between the law of Swaziland and South Africa which has a significant influence in shaping legislation and the common law of Swaziland. This chapter also considers the extent to which South African law applies in Swaziland in light of constitutional developments brought about by the Constitution of Swaziland Act 001 of 2005. Chapter two introduces the concept of consumer protection and dissects the term ‘consumer’ by

examining various definitions proffered by legal scholars, statutory provisions and case law. The influence and impediments of the law of contract and delict in consumer protection law is also discussed. The need for legislative regulation is emphasised throughout the chapter in light of the consumer injustices perpetrated by common law regulation.

Chapter three focuses on Swaziland. This chapter examines a number of important cases on consumer protection in Swaziland from the manufacturer's liability under the common law to specific provisions of the Hire Purchase Act 11 of 1969 and the Money Lending and Credit Financing Act of 1991. The various delictual and contract law principles directly impacting consumers are critically discussed and juxtaposed with case law in their sphere of application. Although not exhaustive, this chapter is amongst the most elaborate in this dissertation. Chapter four focuses on South Africa. It commences by setting out and critically discussing the genesis of South African consumer law and the lacuna that the CPA of 2008 sought to fill. The main theme of this chapter is a rights-based approach to consumer protection where provisions of the CPA of 2008 on unfair contract terms and product liability are critically interrogated.

Chapter five examines consumer protection law in the UK. In this chapter, the history of consumer law in this jurisdiction will be examined in line with specific decided cases which shaped consumer law at its infancy. The leading Scottish case of *Donoghue v Stevenson*¹² will be dissected in the chapter particularly its role in the development of the law of negligence. In addition, an analysis of the different statutes regulating consumer affairs leading up to present-day European Community regulation will be made. Chapter six focuses on international law development of consumer protection. This chapter considers the impact of the various international agencies, particularly the steps that are continually being implemented to improve the current consumer ambience. Chapter seven is the concluding chapter which will summarise the findings of the study and also propose recommendations in order to map the way forward with regard to implementation strategies.

¹² *Donoghue v Stevenson* [1932] A.C. 562

CHAPTER 1

HISTORICAL BACKGROUND OF THE SWAZI LEGAL SYSTEM

1. INTRODUCTION

This chapter sets out the historical background and the development of the legal system of Swaziland. The legal history will enable a better understanding of the nature of the problem causing the slow development of consumer protection in Swaziland and the challenges faced in developing a sound consumer framework. Initially the legal developments of the late 19th and early 20th century will be discussed. This period is important because it is at this time that written laws were introduced to operate in tandem with the long established customary law practices and it is these early developments of the Swazi legal system which provide the context in which consumer protection will be discussed in chapter 3. In particular, the consequences of Swaziland being a British protectorate will shed light on why the early underdeveloped legal system of Swaziland could not accommodate a consumer framework at the time. In this respect the reasons behind the inapplicability of English consumer laws in Swaziland will be considered. Next, the post-independence events of 1968 that could have signaled changes in consumer development will be considered. It will be argued that after gaining independence, however, this did not take place. Finally, with this historical background, it will be contended that the recently enacted Constitution of Swaziland Act 001 of 2005 should be the driving force in developing a modern consumer protection policy because consumer rights are enshrined in the Bill of Rights.

2. THE COLONIAL HISTORY OF SWAZILAND

The historical dispensation of Swaziland is divided into four phases: the period of the clans and the emergent state (from the 15th century up to 1839); the Concessions Period until the Partition of 1907; the post-partition period up to 1968; and the Independence Period after 1968.¹ Of relevance in this study are the last three periods. The discovery of huge gold deposits shortly before the close of the 19th century in the former Transvaal, the Witwatersrand, as well as the Eastern Transvaal border areas of Swaziland (Forbes Reef), commences this discussion on

¹ JSM Matsebula *A History of Swaziland* (1972) 3-24, 28-97, 98-121. See also H Kuper *An African Aristocracy: Rank among the Swazi* (1980) 11-33.

events that were to later shape the legal history of Swaziland.² The mineral content in the areas mentioned motivated white settlers in Southern Africa in the 1800's to draw closer towards the borders of Swaziland.³ Swaziland had fertile soils conducive for the cultivation of crops.⁴ Before the arrival of white settlers and the development of capitalist Swaziland, the country was occupied by its native inhabitants who lived according to the dictates of Swazi law and customary practices.⁵ The life of the occupants was typically guided by principles of tradition and unwritten customary rites passed down from generation to generation.⁶ At the beginning of the 19th century relations between Swaziland and foreigners on issues of commerce and trade came into existence.⁷ The first time Europeans came into Swaziland was in 1844 when they established a missionary camp after being invited by the then King, Mswati II.⁸ Boer settlers then followed in 1875 and from this period onwards the population of Swaziland became a mixture of Europeans, Boers and indigenous Swazis.⁹ The result of foreign presence meant that portions of land had to be allocated to the settlers at various fees for subsistence purposes.¹⁰

2.1. The granting of concessions

Realising the overwhelming presence and continued influx of Boer and European settlers King Mbandzeni¹¹ signed a treaty with the ZAR¹² Boer leaders (the Boers) which recognised their presence in Swaziland.¹³ The treaty also provided that Swaziland would give military assistance to the Boers in times of war.¹⁴ In return, Swaziland was guaranteed peace through protection from any form of enemy invasion.¹⁵ Protection was necessary in the colonial era because other

² R Levin 'Is this the Swazi way? State, Democracy and the Land Question' *Transformation* No. 13 (1990) 47.

³ Ibid. See also Matsebula (note 1 above) 16; P Bonner *Kings, Commoner and Concessionaries: The Evolution and Dissolution of the Nineteenth- Century Swazi State* (1983) 171.

⁴ Kuper (note 1 above) 21. See also Matsebula (note 1 above) 36; Levin (note 2 above).

⁵ Kuper (note 1 above) 35-36, 137. See also Bonner (note 3 above) 49.

⁶ Kuper (note 1 above) 35-36, 137. See also B Dube & A Magagula 'The Law and Legal Research in Swaziland' (2007), available at <http://www.nyulawglobal.org/globalex/swaziland.htm>, accessed on 14 October 2012.

⁷ RT Nhlapo *Marriage and divorce in Swazi Law and Custom* (1992) 7. See also Bonner (note 3 above) 45.

⁸ Matsebula (note 1 above) 21, 36. See also Nhlapo (note 7 above).

⁹ Matsebula (note 1 above) 35-36; See also Nhlapo (note 7 above); Bonner (note 3 above) 45.

¹⁰ Kuper (note 1 above) 25. See also Levin (note 2 above); *Sobhuza II v Miller and Another* (unreported) Appeal (No. 158/ 1924) 518 at 519. Concessions ranged from £15, 000- £20, 000.

¹¹ King Mbandzeni reigned between the years 1875-1889.

¹² 'Boer War', available at http://history-net.com/Start/Boer_War/boer_war.html, accessed on 14 October 2012.

¹³ Matsebula (note 1 above) 29. See also Nhlapo (note 7 above) 7-8; Levin (note 2 above); Bonner (note 3 above) 136.

¹⁴ Nhlapo (note 7 above) 8. See also Matsebula (note 1 above) 29; Bonner (note 3 above) 136.

¹⁵ Matsebula (note 1 above) 29. See also Nhlapo (note 7 above) 8; Bonner (note 3 above) 136-137.

states and tribes sought to increase their territories through conquest.¹⁶ Therefore, the treaty signed between the Boer leaders and King Mbandzeni served as an instrument of protection.¹⁷ However, the signing of this treaty gave rise to three material issues. First, the Boers began claiming land previously belonging to and occupied by natives in Swaziland.¹⁸ Secondly, the Boer settlers were effectively given access to exploit Swaziland's mineral resources upon payment of subsidized mineral levies directly to the king.¹⁹ Thirdly, as the grant of concessions continued, so did efforts by the South African Republic to indirectly press for their claim to annex Swaziland.²⁰ King Mbandzeni had not anticipated these results when he signed the treaty. Perhaps this can be attributed to his lack of formal education since formal education in Swaziland was introduced only in the early 1900s.²¹ King Mbandzeni's death in 1889 resulted in the Boer settlers exerting more pressure in their quest for the annexation of Swaziland into the South African Republic.²² However, this attempt was foiled when the King's counsellors sought the intervention of the Europeans who had already settled in Natal.²³ The Europeans intervened solely to restrain the Boers after conflict had erupted along the borders of Swaziland in their endeavours to annex the country.²⁴

2.2. The introduction of foreign law

Disputes on the validity of concessions frequently arose amongst white settlers in Swaziland.²⁵ The problem was that they did not recognise the indigenous dispute resolution framework which regulated the native inhabitants as being the proper forum to decide issues amongst themselves.²⁶ After the death of King Mbandzeni in 1889, Queen Sibati, who acted as the Queen Regent, experienced difficulty in controlling the settlers involved in disputes on the concessions granted by King Mbandzeni.²⁷ This led her to issue a Proclamation to the Nation of 1889, which officially recognised Roman Dutch Law as the law that would regulate disputes among the

¹⁶ Matsebula (note 1 above) 16-19. See also Bonner (note 3 above) 136.

¹⁷ Nhlapo (note 7 above) 8.

¹⁸ Ibid.

¹⁹ *Sobhuza II v Miller and Another* (note 10 above). See also Kuper (note 1 above) 25; Levin (note 2 above).

²⁰ Kuper (note 1 above) 25-27. See also Matsebula (note 1 above) 45, 80-81; Nhlapo (note 7 above) 8.

²¹ Kuper (note 1 above) 25. See also Matsebula (note 1 above) 100.

²² Nhlapo (note 7 above) 8. See also Kuper (note 1 above) 25-27; Matsebula (note 1 above) 45, 80-81.

²³ Bonner (note 3 above) 176. See also Nhlapo (note 7 above) 8.

²⁴ Matsebula (note 1 above) 81. See also Nhlapo (note 7 above) 8.

²⁵ Matsebula (note 1 above) 40.

²⁶ Ibid. see also B Khumalo *Legal Systems and Methods* (1996) 97; Nhlapo (note 7 above) 9, 15.

²⁷ Matsebula (note 1 above) 43. See also Nhlapo (note 7 above) 9.

settlers.²⁸ This proclamation was probably the second legal instrument, after Mbandzeni's treaty, to regulate the affairs of foreigners in Swaziland. Several other legal instruments having the same effect followed the Proclamation, including the Swaziland Convention of 1890, which vested a 'Chief Court' with general jurisdiction over settlers.²⁹ Another significant addition was King Bhunu's Organic Proclamation³⁰ which provided that:

'The laws to be administered by all Courts of Justice shall be established under this Proclamation to be the Roman-Dutch law as in force in South Africa, but subject to such alterations, additions, or amendments as may be made by Proclamation of the Government Committee of any laws, Rules or Regulations approved of by Her Majesty's High Commissioner and the State President of the South African Republic, without whose joint consent no Law, Rule or Regulation shall be proclaimed by the Government Committee, or if proclaimed be binding...'³¹

The impact of Queen Sibati's Proclamation of 1889 on the possible existence of a consumer framework in Swaziland must be briefly discussed. The process of adopting the English consumer protection framework in Swaziland may have had its roots in the late 1800s after Jan van Riebeeck imported Roman-Dutch law into the Cape of Good Hope from Holland in 1652.³² When the proclamation came into force in 1889, South Africa was constituted by four colonies, namely, the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony.³³ From 1814, when the Cape Colony had been formally ceded to the British, Roman Dutch law was infused with a very strong dose of English law.³⁴ For example, the court structure was based on the English law.³⁵ In addition, parties could launch their claims with a magistrate's court and end

²⁸ Matsebula (note 1 above) 68-69. See also Nhlapo (note 7 above) 9, 13.

²⁹ HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 570. See also Matsebula (note 1 above) 68-70; Khumalo (note 26 above); Nhlapo (note 7 above) 9.

³⁰ Proclamation of 1890.

³¹ Article 8 of King Bhunu's Proclamation.

³² Hahlo & Kahn (note 29 above) 571; See also P Havenga *et al General Principles of Commercial Law* 7 ed (2011) 4; KD Chetty 'Sources of Law' in MA Fouche (ed) *Legal Principles of Contract and Negotiable Instruments* 3ed (1995) 7; FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71.

³³ Hahlo & Kahn, (note 29 above) 150.

³⁴ Havenga (note 32 above). See also Chetty (note 32 above) 8. The Cape Colony was officially ceded to the British in 1814.

³⁵ Havenga (note 32 above).

up in the appeal in the Privy Council in London which was the highest court.³⁶ Furthermore, the English laws of criminal procedure, evidence, and insolvent estates were incorporated into the law of the Cape during that time.³⁷

In 1894, the Transvaal Convention which effectively made Swaziland a ‘protectorate’ of the Transvaal was enacted.³⁸ A protectorate, as opposed to a colony, was defined by the Privy Council in the land dispute case of *Sobhuza II v Miller and Another* (unreported) Appeal (No. 158/ 1924), as follows:

‘In the general case of a British protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its government cannot hold direct communication with any other foreign power, nor a foreign power with its government.’³⁹

The significance of the above case will be discussed in 2.3 below. As a protected state, Swaziland was only to become semi-sovereign.⁴⁰ Britain, as the protecting state, had the authority, albeit limited, to interfere in the affairs and administration of Swaziland in order to fulfill international law obligations.⁴¹ The Transvaal Convention of 1894 placed Swaziland under Boer administration.⁴² However, the Anglo-Boer war between the British and the Boers for the control of the Transvaal from 1899 to 1902 resulted in the Boers being defeated and their rule over Swaziland coming to an end.⁴³ The Swaziland Order-in-Council of the 25th June, 1903, discussed in 2.3 below, made the position official.⁴⁴

³⁶ Ibid.

³⁷ Ibid. See also Chetty (note 32 above) 8.

³⁸ Nhlapo (note 7 above) 9-10. See also Kuper (note 1 above) 28; Matsebula (note 1 above) 76.

³⁹ At 523.

⁴⁰ WordWeb Dictionary, available at <http://www.wordweb.info/free>, accessed on 15 July, 2012, defines a ‘semi-sovereign state’ or ‘protectorate’ as a state or territory partly controlled by (but not a possession of) a stronger state but autonomous in internal affairs, and are established by treaty. They are also referred to as ‘associated states’.

⁴¹ Under the English Foreign Jurisdiction Act of 1890. See *Sobhuza II v Miller and Another* (note 10 above) at 522-523.

⁴² *Lucky Nhlanhla Bhembe v The King* (unreported) Criminal Case No. 20/ 2002 at 2, 5. See also Hahlo & Khan (note 29 above) 570.

⁴³ Matsebula (note 1 above) 91. See also Nhlapo (note 7 above) 10.

⁴⁴ Ibid. See also Hahlo & Khan (note 29 above) 570.

It must be noted that English consumer law at this time was at its development stage both on the judicial and legislative plane.⁴⁵ For example, various statutes like the Merchandise Marks Acts of 1887; Adulteration of Food and Drink Act of 1860; Adulteration of Food, Drink and Drugs Act of 1872, were some of the earliest consumer law statutes enacted in the United Kingdom.⁴⁶ Although the importation of English consumer law cannot be said to have been fully-fledged because it was still developing, what is abundantly clear is that the English laws of criminal procedure, evidence, and insolvent estates were those being applied by the British in the Cape Colony during this period.⁴⁷ From a consumer law point of view it can be concluded that by recognizing Roman Dutch law as it applied in the Cape of Good Hope at the time, English law consumer law influences were also received. Furthermore, it goes without saying that present-day mercantile dealings amongst consumers in Swaziland are regulated by legal principles and statutes of South African and English law origin.⁴⁸ It is because the historical link of the consumer laws of these countries has an important role in the legal development of Swaziland that the present study focuses on consumer protection.

The instability of the status of Swaziland as described in this section was not conducive for the establishment of a consumer protection framework for two main reasons. First, after the Anglo-Boer war Swaziland had not yet developed a legal system that could sustain a consumer framework.⁴⁹ The foundation of a competent legal system was only to be introduced in 1907.⁵⁰ Secondly, consumer protection was not a practical reality. It is doubtful whether consumer issues during this time were a concern in Swaziland because Swazis mainly earned a living through agriculture and subsistence farming under the regulation of native authorities.⁵¹ In other words, no consumer complaints could have arisen so as to warrant a consumer framework.

⁴⁵ S Smith *Atiya's Introduction to the Law of Contract* 6 ed (2005) 12. For example, the following statutes were enacted in the mid to late 19th century: Adulteration of Food and Drink Act of 1860, Adulteration of Food, Drink and Drugs Act of 1872, Merchandise Marks Acts of 1887.

⁴⁶ D W Oughton *Consumer Law: Text, Cases and Material* (1991) 12. See also P Cartwright *Consumer Protection and the Criminal Law: Law, Theory and Policy in the U.K* (2001) 152, 212; G Howells *Comparative Product Liability* (1993) 3.

⁴⁷ Havenga (note 32 above) 4-5.

⁴⁸ The Swaziland Hire Purchase Act 11 of 1969 and the Bills of Exchange Act of 1902 amongst others.

⁴⁹ It is common knowledge that consumer protection derives from basic common law principles. Swaziland did not have a 'common law' but only regulated the affairs of its inhabitants through customary law.

⁵⁰ This was to be done through the General Law and Administration Proclamation 4 of 1907.

⁵¹ Matsebula (note 1 above) 36. See also Kuper (note 1 above) 35-36, 137.

2.3. *The Swaziland Order-in-Council of 25th June, 1903*

Nhlapo⁵² states that section 5 of the Order-in-Council⁵³ gave the High Commissioner authority to legislate by Proclamation in Swazi territory. In exercising his legislative authority, the High Commissioner was to respect the native laws and customs within the Swazi territory.⁵⁴ On the other hand, the *Sobhuza v Miller and Others*⁵⁵ case maintains that through the Order-in-Council, the Crown ordered that the Governor administering the Transvaal exercise all powers and jurisdiction of the Crown and do all things in the interest of His Majesty's service.⁵⁶ These two versions are not in harmony concerning the institution in which authority to legislate was vested by the Order-in-Council.⁵⁷ Perhaps the inconsistency stems from the use of the phrase 'High Commissioner' by Nhlapo.⁵⁸ The judgment of the Privy Council delivered in the case of *Sobhuza v Miller and Others*⁵⁹ makes reference to the word 'Governor'. 'High Commissioner' and 'Governor' in this context are words that cannot be used inter-changeably because Nhlapo⁶⁰ makes no mention whatsoever of a 'Governor'. The case of *Sobhuza v Miller and Others*⁶¹ on the other hand reveals that both institutions of 'Governor' and 'High Commissioner' existed at the time. A passage in the judgment reads as follows:

'By Order-in Council dated 1 December, 1906, the powers given to the *Governor* administering the Transvaal were transferred to the *High Commissioner* for South Africa.'⁶² (Emphasis added)

Matsebula⁶³ clarifies the position by stating that the Governor of the Transvaal at that time also served as the High Commissioner of South Africa. In other words, the powers of Governor and High Commissioner were vested in the same individual.⁶⁴ In 1906 the role of the Governor of Swaziland was officially transferred through the Order-in-Council of 1906 to the office of the

⁵² Nhlapo (note 7 above) 10.

⁵³ Swaziland Order in Council of 1903.

⁵⁴ Nhlapo (note 7 above) 10. See also *Sobhuza II v Miller and Another* (note 10 above) 518.

⁵⁵ (note 10 above) 521.

⁵⁶ *Sobhuza II v Miller and Another* (note 10 above) at 526.

⁵⁷ *Ibid.* See also Nhlapo (note 7 above) 10.

⁵⁸ Nhlapo (note 7 above) 10.

⁵⁹ (note 10 above) 527.

⁶⁰ Nhlapo (note 7 above) 10.

⁶¹ *Sobhuza v Miller and Another* (note 10 above) 527.

⁶² *Ibid.*

⁶³ Matsebula (note 1 above) 92, 94.

⁶⁴ *Ibid.*

High Commissioner for South Africa.⁶⁵ The Order-in-Council of 1906 confirmed earlier legislative instruments that had recognised Roman-Dutch law as the applicable law in the affairs of settlers of foreign extraction and was later to form the base of the common law of Swaziland which is examined below.

3. THE DEVELOPMENT OF THE SWAZI LEGAL SYSTEM

Having traced the nascent stages of legal development in Swaziland, it is important to examine the legal system that emanated from the General Law and Administration Proclamation of 1907.⁶⁶ Many African countries retained their ‘received’ colonial laws after the end of colonialism in 20th century Africa.⁶⁷ The customary laws continued to govern the lives of the indigenous native population whilst the received laws applied as the general law binding on both indigenous inhabitants and foreign settlers.⁶⁸ Swaziland was no exception to these events, and its legal system is characterized by two sets of laws. Thus Nhlapo⁶⁹ describes the Swazi legal system as comprising:

‘...a system which is composed of the Roman-Dutch common law as modified by statute, and that complex of traditional rules and practices to which the Swazi have owed allegiance over the years, known collectively as Swazi law and custom.’

The General Law and Administration Proclamation 4 of 1907 commonly referred to as ‘the reception statute’ is now examined below.

3.1. *The General Law and Administration Proclamation No. 4 1907*

The principal aim of the General Law and Administration Proclamation No.4 of 1907 (the reception statute) was, *inter alia*, to dispense with the ‘monopoly’ the natives enjoyed over rights to their land.⁷⁰ Realising that the passing of this statute was aimed at enabling non-natives to access Swazi nation land and curtailing the rights of natives to freely own land, the native

⁶⁵ Ibid. See also Hahlo & Kahn (note 29 above) 570; *Sobhuza II v Miller and Another* (note 10 above) 527.

⁶⁶ Kuper (note 1 above) 29. See also *Sobhuza II v Miller and Another* (note 10 above) 526-527.

⁶⁷ Nhlapo (note 7 above) 14.

⁶⁸ Ibid 6.

⁶⁹ Ibid.

⁷⁰ Initially referred to as the Swaziland Administration Proclamation No. 4 of 1907.

inhabitants protested.⁷¹ What compounded matters was that the process of land division had already commenced three years previously through Proclamation 3 of 1904, which allowed settlers to claim large portions of land from the natives through concessions.⁷² The provisions of section 3 of the General Law and Administration Proclamation 4 of 1907 provide as follows:

‘(1) The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be the law in Swaziland.

(2) Save and except in so far as the same have been repealed or amended the statutes in force in the Transvaal on the fifteenth day of October 1904, and the statutory regulations thereunder shall *mutatis mutandis*, and as far as they may be applicable, be in force in Swaziland.’

There are three central issues that relate to this particular section. The first issue that will be addressed concerns the question whether pure Roman-Dutch law was received in Swaziland.⁷³ In answering this question a brief examination of Roman law, Dutch law, Roman-Dutch law, and the influences of English law in the law of South Africa will be undertaken. Although not extensively considered, the second issue briefly touches on the position of Swazi customary law as a result of the reception of Roman-Dutch law. The last issue to be discussed is whether the application of Transvaal statutes was subject to a cut-off date or was meant apply for all future time in Swaziland in accordance with 3 (2) of the Proclamation.

3.2. Roman-Dutch Law

The reception statute clearly and unequivocally recognised Roman-Dutch law as received from the Transvaal as the common law of Swaziland.⁷⁴ A discussion of what this entailed should begin with an analysis of the nature of the phrase ‘Roman-Dutch law’. The phrase ‘Roman-Dutch’ has been a subject of debate and scrutiny by many writers. The phrase derives from publications produced by Simon van Leeuwen between 1652 and 1664 where he used the

⁷¹ Levin (note 2 above) 47-48.

⁷² Ibid.

⁷³ Nhlapo (note 7 above) 11.

⁷⁴ S. 3 (1) of the General Law and Administration Proclamation No. 4 of 1907.

original and accurate Dutch version- ‘Roomsch-Hollandsch Recht’.⁷⁵ Nhlapo⁷⁶ and Lee⁷⁷ contend that the English definition of the phrase ‘Roman-Dutch law’ is not accurate. They argue that in the translation from the original by Van Leeuwen, the word ‘Dutch’ suggests that all of the provinces of the United Netherlands are included, when in fact Van Leeuwen referred only to Holland, which was a single province.⁷⁸ Another commentator on the translation ‘Dutch’ was Wessels,⁷⁹ who observed that the term included the Roman law of Justinian, customs and statutory law in force in the provinces of North and South Holland during the medieval era. It seems fairly settled, however, that this law has its origins in the Netherlands and the exact location of its extraction is of little practical significance.⁸⁰

Hahlo and Kahn,⁸¹ observe that the ‘Roman’ component of the phrase does not refer to the pure and juristic classical Roman law developed from around the 2nd century AD. Instead, they argue that the Roman law referred to is that developed by the emperor Justinian when he codified the *Corpus Iuris* (in particular the Digest) with the assistance of his compilers and further developed by the Glossators, the Commentators, the Humanists and the Natural Law school, and even the Catholic church during the Medieval period.⁸² It is apparent that it was a combination of these separate and ‘impure’ legal regimens that formed the Roman-Dutch law that was eventually adopted in the ‘Reception’ in 1907.⁸³ It is for that reason Khumalo⁸⁴ asserts that the received Roman-Dutch law can be described as mixture of Roman law principles and early Germanic law significantly influenced by Dutch law. The already ‘diluted’ Roman-Dutch law was brought to the Cape by Jan van Riebeeck along with the Dutch settlers of the Dutch East India Company to the Cape of Good Hope in 1652.⁸⁵

⁷⁵ RW Lee ‘Roman-Dutch Law in South Africa’ (1924) 41 *SALJ* 297. See also Chetty (note 32 above) 7; Nhlapo (note 7 above) 11.

⁷⁵ Hahlo & Kahn (note 29 above) 330, 555.

⁷⁶ Nhlapo (note 7 above) 11.

⁷⁷ Lee (note 75 above).

⁷⁸ Ibid 298. See also Nhlapo (note 7 above) 11.

⁷⁹ J Wessels ‘The Future of Roman-Dutch Law in South Africa’ (1920) 37 *SALJ* 265. See also Chetty (note 32 above) 7.

⁸⁰ Ibid; Nhlapo (note 7 above) 11.

⁸¹ Hahlo & Kahn (note 29 above) 581-582.

⁸² Ibid.

⁸³ Ibid. See also Chetty (note 32 above) 7.

⁸⁴ Khumalo (note 26 above) 96.

⁸⁵ Hahlo & Khan (note 29 above) 567. See also Havenga (note 32 above); Brand (note 32 above).

Since the Cape was ceded to the British around 1814, the question for determination is whether the Roman-Dutch law that had previously been imported from Holland is the same law applicable in present-day Swaziland. The cession caused a very strong dose of English law into be introduced into the already diluted Roman Dutch law.⁸⁶ The influences of English law were notable in the court structures particularly because the Supreme Court and magistrate's courts structure of Britain replaced the Dutch court setup that had been in existence.⁸⁷ The court structures allowed disputing parties to ventilate their grievances to the extent of filing appeals to the Privy Council in London.⁸⁸ Additionally, the English laws of criminal procedure, evidence, and insolvent estates were received and applied as they were.⁸⁹ Roman-Dutch law, along with its developed principles, was subsequently taken further inland during the Great Trek by the Voortrekkers.⁹⁰ The law which the Boers subsequently took with them into the interior of South Africa during the Great Trek eventually became a combination of the imported Roman-Dutch law and English law.⁹¹

In summary, while it cannot be denied that the law imported into Swaziland by the reception statute was the Roman-Dutch law as applied in South Africa, legal writers agree that the affairs of Boer settlers who came to Swaziland around 1875 were regulated by Roman-Dutch law which had English law undertones.⁹² Therefore, the Roman-Dutch law received in Swaziland was neither a combination of the classical 'Roman' and 'Dutch' law nor was it the Roman Dutch law as brought by Jan van Riebeeck to the Cape of Good Hope in 1652. Instead, the received Roman Dutch law was that which had been influenced by English law.⁹³

3.3. Swazi customary law

Despite the enactment of the reception statute in 1907, chiefs and other traditional authorities could preside over disputes in native courts among Swazis specifically and not the general

⁸⁶ Havenga (note 32 above).

⁸⁷ Ibid. Wessels (note 79 above) 272-275.

⁸⁸ Ibid.

⁸⁹ Hahlo & Kahn (note 29 above) 576. See also Chetty (note 32 above) 8.

⁹⁰ Hahlo & Kahn (note 29 above) 570.

⁹¹ Ibid 567-571.

⁹² Ibid 584-585. See also *Pearl Assurance Company v Union Government* [1934] A.C. 570 (P.C.) at 579; 1934 A.D. 560 (PC) at 563.

⁹³ Wessels (note 79 above) 272. See also Hahlo & Kahn (note 29 above) 584-585.

population. The authority of the received Roman Dutch law became even more evident with the enactment of the Native Courts Proclamation No. 80 of 1950 which later became the Swazi Courts Act 80 of 1950.⁹⁴ This Act provided for the formal composition of customary courts, the type of law to be applied (customary law), the procedure to be followed and the limits of the court's jurisdiction over persons.⁹⁵ Customary law is applied in Swazi National Courts which administer the unwritten Swazi law and custom in terms of the Swazi Courts Act of 1950.⁹⁶ The court has criminal jurisdiction over petty common law offences such as theft but may only exercise such jurisdiction if the parties to a dispute are indigenous Swazis.⁹⁷ It is also important to note that legal representation is prohibited by the Swazi Courts Act;⁹⁸ therefore, parties personally represent themselves and may not retain counsel.⁹⁹

4. THE RELATIONSHIP BETWEEN THE SOUTH AFRICAN LEGAL SYSTEM AND THE LAW IN SWAZILAND

The history and evolution of Roman-Dutch law and how it came to be received in Swaziland as the common law has been outlined above. What remains now in this discussion is to consider the current legal framework in Swaziland and whether the statutes of the Transvaal currently apply. Until 2005, Swaziland did not have a written constitution after the independence constitution of 1968 was abrogated on the 12th April 1973.¹⁰⁰ It is important to uncover the events that led to the enactment of the Constitution of 2005.

4.1. *The Independence Constitution of 1968*

King Sobhuza II reigned a period of six decades from 1921 to 1982.¹⁰¹ Perhaps this period could have seen the rise and development of consumer protection because of the economic activity that was prevalent. Immediately after the King ascended to the throne in 1921 the consequences of the practice of exchanging land for revenue by King Mbandzeni were realised.¹⁰² After the

⁹⁴ Matsebula (note 1 above) 109. See also Nhlapo (note 7 above) 17.

⁹⁵ The Native Courts Proclamation 80 of 1950 later became the Swazi Courts Act 80 of 1950.

⁹⁶ Nhlapo (note 7 above) 4-6, 18.

⁹⁷ S. 7 (1) of the Swazi Courts Act 80 of 1950.

⁹⁸ S. 23 of the Swazi Courts Act 80 of 1950.

⁹⁹ Nhlapo (note 7 above) 21-22.

¹⁰⁰ Levin (note 2 above) 62. See also The Swaziland Independence Order 1968 (S.I 1968 No. 1377) which contained the Constitution of the Kingdom of Swaziland of 1968.

¹⁰¹ Matsebula (note 1 above) 100-101.

¹⁰² Ibid. See also *Sobhuza II v Miller and Another* (note 10 above) 521.

discovery that more than two-thirds of land belonging to native Swazis had been lost to foreigners due to concessions, King Sobhuza II initiated a long series of protests aimed at regaining land believed to have been illicitly expropriated during the concessions era.¹⁰³ However, these endeavours did not yield any positive results. After failed negotiations with the British government to reclaim the land and an unsuccessful appeal to the Privy Council in 1926 case of *Sobhuza II v Miller and Another*,¹⁰⁴ King Sobhuza resorted to a land buy-back scheme which involved every Swazi household.¹⁰⁵ To the present day, Swaziland is trying to negotiate back certain tracts of land forming part of the present-day South Africa.¹⁰⁶ The present king of Swaziland, King Mswati III established the Border Restoration Committee whose mandate is to bring back 'Swazi' territory falling under South African control.¹⁰⁷ It is doubtful, however, that the Committee will successfully recover the land because international law rules do not promote the shifting of colonial boundaries.¹⁰⁸

Consumer awareness among Swazis could have commenced in the early 1930s when British and South African companies commenced mining activity and large scale forestry in Swaziland.¹⁰⁹ Many Swazi workers were also migrating to South Africa after being recruited and offered employment in South African mines.¹¹⁰ Swaziland was a British protectorate from 1903 until 6 September, 1968 when she gained independence from Britain.¹¹¹ This period also saw the introduction of a few manufacturing plants and the expansion of agriculture.¹¹² Furthermore, a census conducted revealed the population of Swaziland had significantly increased to an estimated 395 294 people in 1966.¹¹³ The 'Lifa Fund' that had been formed by King Sobhuza II as a buy-back scheme eventually formed the base of Tibiyo TakaNgwane in 1968, a conglomerate which, *inter alia*, regulated the mineral fees of the companies mining asbestos,

¹⁰³Kuper (note 1 above) 31. See also Matsebula (note 1 above) 102-103.

¹⁰⁴ *Sobhuza II v Miller and Another* (note 10 above).

¹⁰⁵ Kuper (note 1 above) 31. See also Matsebula (note 1 above) 103, 108-109; Levin (note 2 above) 50.

¹⁰⁶ 'Swaziland: The Clock is Ticking' - (2005) 29 International Crisis Group Africa Policy Briefing 10.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* 10-11.

¹⁰⁹ RH Davies *et al The Kingdom of Swaziland: A profile* (1985) 2-3. See also Matsebula (note 1 above) 108.

¹¹⁰ Bonner (note 3 above) 222.

¹¹¹ 'Focus on Swaziland: A kingdom in Crisis' (2000) *Human Rights Committee Report* 6. See also Matsebula (note 1 above) 120-121.

¹¹² Matsebula (note 1 above) 108.

¹¹³ *Ibid.*

diamond and other minerals in Swaziland.¹¹⁴ The resources generated by Tibiyo TakaNgwane were able to repurchase some of the land lost during the concessions era and to establish a sugar industry on the repurchased tracts of land.¹¹⁵ Sugar is now the main export industry in Swaziland. These are some of the factors that could have influenced the establishment of a consumer framework.

After his efforts to win independence from the British on the basis of a purely monarchical system failed, King Sobhuza II felt the need to form a political party in 1964 in an effort to appease the British and formed a party called the *Imbokodvo*¹¹⁶ National Movement (INM).¹¹⁷ The first democratic elections were held and the king's party, the INM, won a landslide victory in the house of Assembly.¹¹⁸ The following elections saw the Imbokodvo losing four seats as result of stiff competition from opposition like the Ngwane National Liberatory Congress (NNLC), Swaziland United Front (SUF) and the Swaziland Progressive Party (SPP).¹¹⁹ The independence constitution of 1968 put in place a Westminster-type model parliamentary system that provided for a Constitutional Monarchy, a Prime Minister and multi-party politics.¹²⁰ The constitution further provided for all aspects of government, civil liberties, the rights and powers of the King (*Ngwenyama*), the role of traditional institutions and a procedure of amending the constitution.¹²¹ A year after the constitution was enacted in 1968 the Hire Purchase Act 11 of 1969 was signed into law and assented to by King Sobhuza II on 7 May 1969. This Hire Purchase Act was possibly the first piece of legislation which sought to protect Consumers who purchased goods on hire purchase in Swaziland. After only a year of independence, Swaziland had successfully enacted a consumer law statute.¹²² This Act will be the focus of a critical discussion in chapter 3.

¹¹⁴ Davies (note 109 above) 4-5, 15-21. See also Levin (note 2 above) 50, 57.

¹¹⁵ *Ibid.*

¹¹⁶ '*Imbokodvo*' means 'grinding stone'.

¹¹⁷ Matsebula (note 1 above) 118. See also 'Swaziland: The Clock is Ticking- Crisis Group Africa Briefing' (note 106 above).

¹¹⁸ Matsebula (note 1 above) 118.

¹¹⁹ Davies (note 109 above) 8-9. See also Matsebula (note 1 above) 120.

¹²⁰ *Lucky Nhlanhla Bhembe v The King* (note 42 above). See also 'Swaziland: The Clock is Ticking- Crisis Group Africa Briefing' (note 106 above).

¹²¹ *Ray Gwebu and Another v Rex* (unreported) Court of Appeal Case No. 19 of 2002 at 2.

¹²² This Act protects consumers purchasing goods on hire purchase.

On the 12th April, 1973 King Sobhuza II issued what was termed the ‘Proclamation to the Nation’, effectively repealing the Independence Constitution.¹²³ The major features of the Proclamation were that it declared a state of emergency; repealed the 1968 Constitution; gave the king supreme power to rule by decree; gave the king power to appoint Cabinet and the Prime Minister and banned political parties.¹²⁴ The relevant provisions of the Proclamation stated:¹²⁵

‘NOW THEREFORE I, SOBHUZA II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in Swaziland and that all Legislative, Executive and Judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers. I further declare that to ensure the continued maintenance of peace, order and good government, my Armed Forces in conjunction with the Royal Swaziland police have been posted to all strategic places and have taken charge of all government places and all public services. I further declare that I, in collaboration with my Cabinet Ministers, hereby decree that:-

- A. The Constitution of the Kingdom of Swaziland which commenced on the 6th September, 1968, is hereby repealed;
- B. All laws with the exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with this and ensuing decrees.’¹²⁶

The justification of the Proclamation was that the 1968 constitution had failed to provide the machinery for good government and for the maintenance of good peace and order.¹²⁷ The king asserted that the constitution was the cause of unrest, insecurity and dissatisfaction with the state of affairs in the country.¹²⁸ He went on to elaborate on his criticism of the Constitution saying it

¹²³ ‘Focus on Swaziland: A kingdom in Crisis’ (note 111 above) 7.

¹²⁴ King’s Proclamation to the Nation of the 12th April, 1973, Paragraphs 1-14. See also Davies (note 109 above) 42; *Lucky Nhlanhla Bhembe v The King* (note 42 above); *Lawyers for Human Rights (Swaziland) and Another v The Attorney General and Another* (unreported) High Court Civil Case No. 1822/ 2001 at 4.

¹²⁵ King’s Proclamation to the Nation of the 12th April, 1973 at Para 2.

¹²⁶ *Ibid.*

¹²⁷ *Lucky Nhlanhla Bhembe v The King* (note 42 above). See also *Ray Gwebu and Another v Rex* (note 121 above) 3; King’s Proclamation to the Nation of the 12th April, 1973 Paragraph 1-14.

¹²⁸ Levin (note 2 above) 62. See also *Ray Gwebu and Another v Rex* (note 121 above) 3; S. 2 of the King’s Proclamation to the Nation of the 12th April, 1973.

permitted the importation of political practices which were, inter alia, designed to disrupt and destroy ‘our own peaceful and constructive and essentially democratic methods of political activity’.¹²⁹ Swaziland was from that day without a constitution and the king ruled through Proclamations and Orders-in-Council.¹³⁰ In the interim period between the Proclamation and the introduction of a formal government structure in 1978, the king set up a Royal Constitutional Review Commission.¹³¹ The recommendations of this commission led to the promulgation of the Establishment of Parliament Order 23 of 1978, which introduced a Parliament which was no longer based on a purely Westminster model but a *tinkhundla*¹³² system of government fused with the Westminster model. A *tinkhundla* system is a customary system of governance in terms of which the King rules Swaziland through chiefs who exercise authority in chiefdoms.¹³³ The *tinkhundla* system applies to this day under the constitutional dispensation. These are some of the legal developments in the consumer protection framework of Swaziland.

4.2. The constitutional dispensation and the applicability of South African law

Following the enactment of the Hire Purchase Act in 1969, another consumer protection statute was passed into law. The Money Lending and Credit Financing Act 3 of 1991 (the Money Lending Act) was enacted so that consumers in the sphere of credit financing and money-lending were protected.¹³⁴ The impact of this Act will be discussed fully in chapter 3 where the consumer framework of Swaziland is critically analysed. On 26 July, 2005 the Constitution of the Kingdom of Swaziland Act, 001 of 2005 (Constitution of 2005) became law. In as much as this Constitution of 2005 replaced the independence Constitution of 1968, it has changed little of the political state of affairs existing post-1973.¹³⁵ However, the unpleasant political ramifications of Swazi political history are not objective of this study but rather the development of legislation for consumer protection. In relation to the development of the law the Constitution of 2005 has

¹²⁹ *Ray Gwebu and Another v Rex* (note 121 above) 3.

¹³⁰ *Ibid.*

¹³¹ ‘Report of the Promotional Mission to the Kingdom of Swaziland’ (2006) African Commission 2-4, available at http://old.achpr.org/english/Mission_reports/Swaziland/swazi%20report.pdf, accessed 14 October 2012; Levin (note 2 above) 62; *Ray Gwebu and Another v Rex* (note 121 above) 3.

¹³² This is a system of rule in terms of which the king rules through chiefs who head chiefdoms or *tinkhundla* areas.

¹³³ ‘Focus on Swaziland: A kingdom in Crisis’ (note 111 above) 11-12. See also S. 79- S. 92 of the Constitution of Swaziland Act 001 of 2005, which entrench the *tinkhundla* system of government.

¹³⁴ See the Long title of the Money Lending and Credit Financing Act 3 of 1991.

¹³⁵ The King retained all legislative, Executive and Judicial powers and is immune from suit or prosecution. There is effectively no separation of powers which is one of the cornerstones of a democratic system of government.

made radical changes, especially the application of South African law in present-day Swaziland.¹³⁶ The most significant change in the legal system is that section 3 of the General Law and Administration Proclamation 4 of 1907 has been altered. It is appropriate to reproduce the section as follows:

‘3. (1) The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be the law in Swaziland.

(2) Save and except in so far as the same have been repealed or amended the statutes in force in the Transvaal on the fifteenth day of October 1904, and the statutory regulations thereunder shall mutatis mutandis, and as far as they may be applicable, be in force in Swaziland.’

The Proclamation finds resonance and expression in section 252 (1) of the Constitution of 2005 which provides as follows:

‘Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman-Dutch common law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.’

The above constitutional provision affirms the position that, subject to the Constitution of 2005 and Swazi statutory law, the South African common law applies as it is in Swaziland.¹³⁷ Pain¹³⁸ notes that through the reception statute the courts in Swaziland had assumed the authoritativeness of South African case law decisions. Nhlapo¹³⁹ takes the argument further and opines that not only did South African case law apply in Swaziland but the reception statute made it clear that a continued application of Transvaal statutory law was also contemplated.

¹³⁶ S. 252 of the Constitution of 2005 omitted section 3 (2) of the General Law and Administration Proclamation of 1907.

¹³⁷ Nhlapo (note 7 above) 15.

¹³⁸ JH Pain, ‘The Reception of English and Roman-Dutch law in Africa with Reference to Botswana, Lesotho and Swaziland’ (1978) XI *CILSA* 137, 167 cited in Nhlapo (note 7 above) 13-14.

¹³⁹ Nhlapo (note 7 above) 14.

While Nhlapo¹⁴⁰ correctly declared the position of the law at that time, that position was radically altered by the Constitution of 2005 when the carefully couched wording of section 252 (1) of the Constitution of 2005 ousted the operation of the Transvaal statutes in Swaziland.¹⁴¹ In other words while preserving Roman-Dutch law as provided in section 3 (1), section 252 (1) of the Constitution of 2005 steered clear of incorporating section 3 (2) of the reception statute.¹⁴² It must be remembered that Section 3 (2) of the Proclamation incorporated into the law of Swaziland statutes that applied in the Transvaal at the date of reception. As a result, prior to the Constitution of 2005 coming into force in 2005, the statutes of Transvaal applied fully in Swaziland but only in as far as they were applicable.¹⁴³ The language of the subsection meant that Transvaal statutes worked in tandem with Roman-Dutch law in Swaziland.¹⁴⁴ The Constitution of 2005, by only retaining section 3 (1) of the reception statute, finally brought to an end the debate on the applicability of South African statutory law in Swaziland.¹⁴⁵

Section 1 (1) of the Constitution Act of 2005 provides that Swaziland is a sovereign Kingdom.¹⁴⁶ In view of this provision, the application of South African statutory law in Swaziland would have created an inconsistency if Transvaal statutes were to be allowed to be in force in Swaziland. It appears from the foregoing that only the South African common law applies in Swaziland, subject to exceptions. The question whether the South African common law applies completely has been a controversial subject in the courts of Swaziland.¹⁴⁷ The issue of the application of South African law in Swaziland was at the forefront when the case of *Annah Lokudzinga Matsenjwa v R* [1970-76] SLR 25 was decided. In this case the accused assailant had been charged and convicted with the crime of murder, having stabbed a 17 month old child while attempting to stab its mother.¹⁴⁸ On the conviction for murder, the accused contended that the court *a quo* misdirected itself in finding her guilty of murder and instead of the lesser crime of

¹⁴⁰ Ibid.

¹⁴¹ S. 252 of the Constitution of 2005 does not recognise Transvaal statutes as was the position before.

¹⁴² Ibid.

¹⁴³ S. 3 (2) of the General Law and Administration Proclamation No. 4 of 1907.

¹⁴⁴ The subsection used the word 'shall'. Therefore, it was mandatory for the former Transvaal statutes to apply.

¹⁴⁵ By virtue of S. 251 (1) of the Constitution of 2005 omitting Transvaal statutes.

¹⁴⁶ S. 1 (1) of the Constitution of 2005 provides that Swaziland is a unitary, sovereign, democratic Kingdom.

¹⁴⁷ See the cases of *Annah Lokudzinga Matsenjwa v R* [1970-76] SLR 25 and *R v Mnisi and Another* (unreported) High Court case No. 35 of 2004; [2006] SZHC 72. Both cases address the doctrine of *versari in re illicita*. The former case recognizes the *versari in re illicita* doctrine, while the latter rejects it as part of the law in Swaziland.

¹⁴⁸ At 26.

culpable homicide. She also challenged the sentence of life imprisonment as being too excessive.¹⁴⁹

One of the issues for determination was whether the old doctrine of *versari in re illicita*,¹⁵⁰ was part of the law of Swaziland.¹⁵¹ The reason why this doctrine came under judicial scrutiny in this case was that the doctrine had been invalidated as part of South African law in the case of *S v Bernardus* 1965 (3) SA 287 (A).¹⁵² The doctrine of *versari in re illicita* states that a person will be held responsible for the unlawful consequences of any unlawful act.¹⁵³ This doctrine was an exception to the trite principle of criminal law that intention is a requirement for a murder conviction.¹⁵⁴ The accused alleged that she did not have the intention to kill the child but wanted to stab its mother. The court *a quo* had applied this doctrine and had concluded that, as a result of an unlawful act of assault, the accused was liable for the consequence of the death of the child despite not having intended to kill it. In other words, despite having caused the child's death accidentally, the accused was liable because she was involved in a legally prohibited assault.¹⁵⁵ On appeal, the court had to make the finding whether the doctrine of *versari in re illicita*, which had been abolished in South Africa, was the law in Swaziland.¹⁵⁶ The court *per* Schreiner P (Milne JA dissenting) refused to follow the South African approach and confirmed the application of the doctrine as follows:

'If this conclusion involves a departure from the law as now established in the Republic of South Africa this is to be deplored, for it is much to be desired that the law of Southern Africa should in essentials be uniform. But we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result.'¹⁵⁷

¹⁴⁹ At 25.

¹⁵⁰ BA Garner *Black's Law Dictionary* (2004) 1594. See also *Annah Lokudzinga Matsenjwa v R* (note 147 above) 28.

¹⁵¹ *Annah Lokudzinga Matsenjwa v R* (note 147 above) 28.

¹⁵² At 297-298. See also *S v Mtshiza* 1970 (3) SA 747 (A) at 751-752 Holmes JA also referred to the *versari in re illicita* doctrine as being 'an outworn doctrine' and an 'outmoded concept'.

¹⁵³ CR Snyman *Criminal Law* 4 ed (2002) 148-150.

¹⁵⁴ *Annah Lokudzinga Matsenjwa v R* (note 147 above) 27-28.

¹⁵⁵ *Ibid* 30. The leading case of *S v Bernardus* 1965 (3) SA 287(A) changed the position in South Africa by invalidating the doctrine of *versari in re illicita*.

¹⁵⁶ *Annah Lokudzinga Matsenjwa v R* (note 147 above) 28-29.

¹⁵⁷ At 29.

Although the above decision maintained the application of the *versari in re illicita* doctrine in Swaziland, the position had not been clearly settled. Subsequently, the High Court of Swaziland was called upon to decide the application of the *versari in re illicita* doctrine in Swazi law in the case of *R v Mnisi and Another* (unreported) High Court case No. 35 /2004. In this case the two accused were charged with the crimes of murder and theft of a motor vehicle respectively.¹⁵⁸ The second accused in this case had shot the deceased when the parties sold each other dagga.¹⁵⁹ During the sale transaction a misunderstanding arose between the parties which led to the second accused producing a pistol and fatally shooting the deceased.¹⁶⁰ The question whether the *versari in re illicita* doctrine was applicable came to the fore because an unintended death had resulted from the illegal sale of a habit forming drug.¹⁶¹ The prosecution had argued, presumably on the strength of the *Annah Lokudzinga Matsenjwa v R*¹⁶² case, that the accused were both guilty of murder.¹⁶³ Annandale ACJ, without referring to the case of *Annah Lokudzinga Matsenjwa v R*,¹⁶⁴ refused to recognize the doctrine of *versari in re illicita*. He stated as follows:

‘The crucial issue in this trial, in so far as the murder charge goes, is whether the two accused persons have been shown to act with a common purpose, showing a joint intent to kill him. From the evidence, I have severe reservations as to whether this has been proven. The only indicator of a possibility of a common purpose is that the two accused were at the same time and same place in the presence of the deceased and that they did partake in an unlawful expedition in so far as the dagga goes. Our law does not recognize as valid or proper the doctrine of *versari in re illicita*. This doctrine imputes on persons involved in or during the committal of an unlawful enterprise, a further wrongdoing, which is a result or a consequence of the first wrongdoing. In other words, according to this doctrine, because the accused were busy with an unlawful dagga transaction and in the process thereof the deceased was killed, they would therefore on strength of the doctrine of *versari in re illicita* also be held liable on that basis. But that is not the case.’¹⁶⁵

¹⁵⁸ Para 1.

¹⁵⁹ Para 24.

¹⁶⁰ Para 29.

¹⁶¹ Para 33.

¹⁶² *Annah Lokudzinga Matsenjwa v R* (note 147 above).

¹⁶³ Both the accused were alleged to have acted in the furtherance of a common purpose.

¹⁶⁴ *Annah Lokudzinga Matsenjwa v R* (note 147 above).

¹⁶⁵ At paragraphs 32-33.

The court in the above case did not give reasons for deviating from the case *Annah Lokudzinga Matsenjwa v R*.¹⁶⁶ Furthermore, it is curious to note that the court, in *R v Mnisi and Another*,¹⁶⁷ did not cite any authority nor did it provide reasons for its departure from *Annah Lokudzinga Matsenjwa v R*.¹⁶⁸ Indeed, there were no further cases dealing with the doctrine in Swaziland until the *R v Mnisi and Another*.¹⁶⁹ It cannot be denied, however, that the decision in *Mnisi* is in harmony with the law in South Africa¹⁷⁰ and Botswana,¹⁷¹ where the doctrine no longer applies. It is also clear from the contrasting cases of *Annah Lokudzinga Matsenjwa v R*¹⁷² and *R v Mnisi and Another*,¹⁷³ that the Courts in Swaziland are at liberty to administer laws they deem applicable and are not bound to apply South African law.¹⁷⁴ Thus under the Constitutional dispensation, the courts in Swaziland are neither bound by South African statutory or case law. South African case law is only of high persuasive value in assisting the courts in arriving at just decisions. It therefore appears safe to submit that the application of South African case law in Swaziland is a purely discretionary act by the courts.

5. CONCLUSION

Understanding the history and development of the legal system of Swaziland is important for purposes of contextualizing the consumer protection framework that that will be examined in greater detail under chapter 3. This chapter began by tracing the legal history of Swaziland and how it has evolved. An analysis of the dual nature of Swaziland's legal system was traced from the colonial era to the constitutional dispensation. It has also been shown how South African law influenced the Swazi legal system. It has been seen that one of the reasons why consumer protection law has not developed in Swaziland was the influence of colonialism. After gaining independence from her colonial masters, Swaziland failed to develop consumer legislation despite a promising start and current consumer legislation has not been improved since gaining

¹⁶⁶ *Annah Lokudzinga Matsenjwa v R* (note 147 above).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *S v Bernardus* (note 155 above).

¹⁷¹ See the case of *Pati v The State* (Criminal Appeal No. F. 12 OF 2004) [2006] BWHC 25 (31 March 2006)

¹⁷² *Annah Lokudzinga Matsenjwa v R* (note 147 above).

¹⁷³ *R v Mnisi and Another* (note 147 above).

¹⁷⁴ *Annah Lokudzinga Matsenjwa v R* (note 147 above) 29.

independence in 1968. For example, the Hire Purchase Act of 1969 has never at any point been amended or repealed by any other statute and the same applies to the Money Lending and Credit Financing Act of 1991.

CHAPTER 2

GENERAL CONSUMER PROTECTION PRINCIPLES

1. INTRODUCTION

This chapter focuses on the basic principles underlying consumer protection. The principles to be discussed have had similar application in both the legal systems of the United Kingdom (UK) and South Africa. Perhaps what is responsible for this state of affairs is the manner in which English law has been woven into and has reshaped South African Roman Dutch law as highlighted in the previous chapter.¹ For example, the principles governing the law of ‘negligence’ under the Roman Dutch law of delict in South Africa apply in a similar manner under the English law of tort.² In addition, the laws applicable in present-day consumer transactions between South African consumers and suppliers were largely influenced by English consumer law.³ It is for this reason that the discussion in the present chapter will be based on principles as they apply in both the English and South African law context. Perhaps the only point of divergence between these is where some of the principles have been statutorily modified to suit consumer needs in South Africa. These statutory developments will also be discussed whenever applicable. The ultimate objective is to reveal the inadequacies of the common law principles and justify the need for legislative intervention in consumer protection.

2. CONSUMER PROTECTION

2.1. A *brief historical overview*

Consumer protection in general has its roots in the era dating from the pre-industrial revolution in the UK.⁴ During this period shop-owners and guild craftsmen dealt directly with consumers in

¹ HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 575-578.

² J Burchell *Principles of Delict* (1993) 247. See also Macquoid-Mason ‘Consumers and Consumerism’ in D Macquoid-Mason (ed) *Consumer Law in South Africa* (1997) 5; *A Gibb and Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co. (Pty) Ltd* 1975 (2) SA 457 (W) at 463-464.

³ E Van Eeden *A guide to the Consumer Protection Act* (2009) 24. See also Macquoid-Mason (note 2 above); *A Gibb and Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co. (Pty) Ltd* (note 2 above).

⁴ DW Oughton *Consumer Law: Text, Cases & Materials* (1991) 11-12. See also R Lowe & GF Woodroffe *Consumer Law and Practice* (1980) 1.

mercantile affairs.⁵ For example, consumers were able to individually protect their own interests by personally inspecting goods and shunning shop-owners or small businesses which supplied defective products or which were of inferior quality.⁶ It was not until the industrial revolution of the 18th and 19th century that technological innovation introduced radically different methods of manufacture, distribution and merchandising.⁷ Industrialization and large scale manufacturing of cheap goods not only replaced individual retailers and craftsmen but also introduced a number of disadvantages. One of these disadvantages was that manufactured goods could not be easily inspected by consumers during and after manufacture resulting in an information gap.⁸ Following from this, as technology gained popularity in the 20th century, the concern for consumer exploitation increased along with the potential of defective products being produced by manufacturers.⁹ As a result, consumers required protection from harmful products. One of the first countries to respond to consumer exploitation was the UK where the ‘Molony Committee’ was established in 1959, tasked with specifically looking into consumer problems in order to make law reform proposals.¹⁰ When the committee submitted its Report in 1962, it made the following comment:

‘Whereas the consumer of fifty years ago needed only a reasonable modicum of skill and knowledge to recognize the composition of the goods on offer and their manner of production, and to assess their quality and fitness for his particular purpose, the consumer of today finds it difficult if not impossible to do so because of the development of complicated production techniques.’¹¹

The above excerpt is testament to the fact that common law principles were insufficient and that consumers required legislative protection from exploitation. As a result of the committee’s findings, the UK introduced a series of consumer protection statutes aimed at protecting not only

⁵ Macquoid-Mason (note 2 above) 7. See also Molony Committee Report *The Final Report of the Committee on Consumer Protection* (1962) (Cmnd 1781, 1962) Para 41.

⁶ Ibid.

⁷ Ibid. See also R Cranston *Consumers and the Law* 2ed (1978) 1.

⁸ Cranston (note 7 above). See also Lowe & Woodroffe (note 4 above) 2.

⁹ Molony Report (note 5 above) paragraphs 42-43.

¹⁰ P Cartwright *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (2001) 4.

¹¹ Molony Report (note 5 above).

those consumers in a weak bargaining position but also those who were often deliberately misled by unscrupulous suppliers in the course of business.¹²

2.2. The rationale for consumer protection

There are a number of reasons why consumer protection steadily developed in the 20th century. First, consumers could no longer easily inspect manufactured goods to identify defects because of the complex manner in which they were produced.¹³ The second reason is suggested by Van Eeden¹⁴ who notes that there was a spirited consumer movement influenced by economic and other forces against old-established and often hallowed principles which did not favour consumers.¹⁵ The last significant factor which propelled consumer protection into the legislative era of the mid-20th century was the influence of criticisms advanced by scholars and legal writers alike against the inadequacy of the private law.¹⁶ The result was a consumer revolution which began in the United States of America, and spread to countries like the UK, Australia, Canada, and recently in South Africa where consumer legislation was introduced to meet the demands of changing market trends.¹⁷

However, the idea of introducing consumer protection legislation by governments was not entirely welcomed and received censure for different reasons. The main proponent of the criticism leveled against legislative intervention in consumer protection was the ‘Chicago School of Economists’.¹⁸ This school argued for a limitation of government interference and legislative regulation in consumer affairs.¹⁹ They believed that private law adequately protected consumers without statutory intervention and argued that unfair trading practices could be controlled by free and open markets.²⁰ For example, where a supplier sold an unsatisfactory product either due to its price or quality, consumers would simply inform each other to refrain from purchasing that

¹² Lowe & Woodroffe (note 4 above) 1.

¹³ Ibid 2.

¹⁴ Oughton (note 4 above) 11-14. See also Van Eeden (note 3 above) 1.

¹⁵ Van Eeden (note 3 above) 1.

¹⁶ Cranston (note 7 above) 67.

¹⁷ Van Eeden (note 3 above) 1.

¹⁸ Cranston (note 7 above) 19. See also Cartwright (note 10 above) 5.

¹⁹ GG Howells & S Weatherill *Consumer Protection Law* (1995) 70, 448.

²⁰ Ibid. See also Cartwright (note 10 above) 5-6; Cranston (note 7 above) 19-21.

product.²¹ The resulting decline in sales would either force the seller to decrease the cost of the product, revise its general appearance, alter production methods, or totally cease manufacturing the product.²² They argued that unnecessary restrictive enactments by government would affect these market processes and in the end stifle market growth.²³

The ideas of the Chicago School of Economists were opposed by those who argued that it was illusory to expect consumers to protect themselves from exploitation with the advent of industrialization because it was not easy to inspect sophisticated products.²⁴ For example, a latent defect in a manufactured product could not be detected by a consumer on reasonable inspection as was the case before industrialization.²⁵ Therefore, it was necessary that regulation be introduced to regulate and protect consumers from incidents of this nature. Cranston²⁶ observes that a consumer framework without legislative regulation is like a house built on sand. Howells and Weatherhill²⁷ also criticize non-legislative consumer regulation as being ‘alluring as it is unrealistic’. The above theories are wide and remarkably contentious therefore, the motivation of this study is not drawn to the debate on the opposing views. It is clear that without state regulation through legislative enactment consumers are at a disadvantage. Swaziland exemplifies a legal system without a consumer framework circumscribed by statutory parameters.²⁸

Having discussed the development and need for consumer protection it is important to go on and define the terms ‘consumer protection’ and ‘consumer’ respectively.

²¹ Cranston (note 7 above) 19.

²² Ibid.

²³ Ibid 20-21.

²⁴ Cranston (note 7 above) 21.

²⁵ Ibid.

²⁶ R Cranston ‘Consumer Protection Law and Economic Theory’ in AJ Duggan & LW Darvall (eds) *Consumer Protection Law and Theory* (1980) 243 cited in Cartwright (note 10 above) 18. See also Howells & Weatherill (note 19 above) 1.

²⁷ Howells & Weatherill (note 19 above) 1.

²⁸ The only relevant statutes being the Hire-Purchase Act 11 of 1969; Fair Trading Act, 2001; Money Lending and Credit Finance Act 3 of 1991.

2.3. Defining ‘Consumer Protection’

Having discussed the development and need for consumer protection, it is important to define the term. In an attempt to define consumer protection, Mickleburgh²⁹ asserts that ‘the expression “consumer protection” has not yet achieved the full status of a term of art’. It may be that the author was simply saying that the phrase has not been clearly defined. Like many definitions, ‘consumer protection’ is an imprecise notion that cannot be defined with a degree of precision.³⁰ The term includes those circumstances where the law will intervene to ensure that inequality in bargaining power between consumers and suppliers does not prejudice consumers.³¹ The Molony Committee attempted to define the phrase as follows:

“‘Consumer protection’ is an amorphous conception that cannot be defined. It consists of those instances where the law intervenes to impose safeguards in favour of purchasers and hire purchasers, together with the activities of a number of organisations, variously inspired, the object or effect of which is to procure fair and satisfying treatment for the domestic buyer. From another viewpoint “consumer protection” may be regarded as those measures which contribute, directly or indirectly, to the consumer’s assurance that he will buy goods of suitable quality appropriate to his purpose; that they will give him reasonable use, and that if he has a just complaint, there will be means of redress.’³²

From the above definition it can be deduced that the aim of consumer protection is to achieve fair and satisfying treatment for consumers despite the many problems they face. Perhaps consumer protection is better defined when considered in tandem with the definition of the term ‘consumer’ since these two concepts mutually complement each other and cannot be individually understood. The term will be discussed below.

2.4. What is a consumer?

Black’s Law Dictionary³³ gives a general definition of a ‘consumer’ as follows:

²⁹ J Mickleburgh *Consumer Protection* (1979) xi.

³⁰ Molony Report (note 5 above) Para 21.

³¹ Ibid. see also Oughton (note 4 above) 14.

³² Molony Report (note 5 above) 8 Para 21.

³³ BA Garner *Black’s Law Dictionary* (2004) 335.

‘A person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.’

Despite the above definition, attempting to define the word ‘consumer’ has been an endemic problem in shaping the law in consumer protection.³⁴ Although academic writers and statutory provisions have made attempts to hazard definitions of the term, it refuses to accept a solitary definition and it will become evident that the various statutory definitions do not cover all aspects of the word in its broader sense.³⁵ Limiting the definition through statute in each jurisdiction was probably aimed at attaining a degree of certainty in countries like the UK, Canada, Australia and South Africa, all of which resorted to defining the term in context.³⁶ The aim is to identify the common features and divergences inherent in the definitions.

2.4.1. Statutory definitions of ‘consumer’

Before an in-depth analysis of the term is attempted, the statutory provisions defining of the word ‘consumer’ must be set out. The definitions will be drawn from selected consumer protection laws in different countries.³⁷ The starting point is the South African Consumer Protection Act 68 of 2008 (South African CPA of 2008), which defines a consumer as a person to whom goods or services are supplied or marketed, including one who has entered into a transaction with a supplier in the ordinary course of business.³⁸ This definition is not limited to a natural person because it includes a franchisee in terms of a franchise agreement³⁹ and other juristic persons whose asset value or annual turnover is less than the threshold value.⁴⁰ The exact threshold value is unclear because some authors hold that it the amount of R 2 million,⁴¹ while

³⁴ Cartwright (note 10 above) 2. See also Mickleburgh (note 29 above) 3.

³⁵ Ibid.

³⁶ These definitions are contained in consumer legislation of the countries and are discussed in this chapter.

³⁷ The definitions will be taken from legislation in the UK, Canada, Swaziland, Australia and South Africa.

³⁸ S. 1 of the CPA of 2008. See also W Jacobs *et al* ‘Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis’ (2010) 13 (3) *PER* 302, 309, 313.

³⁹ S. 1 as read with S. 5 (6) (b)-(e) of the CPA of 2008.

⁴⁰ S. 1 & S. 5 (2) (b) of the CPA of 2008.

⁴¹ R Bregman ‘The Consumer Protection Guide for Lawyers’ (2011) *Law Society of South A* 13, 15.

others hold that the threshold value is the amount of R3 million.⁴² This study will proceed on the basis of the threshold value being R3 million.⁴³

On the other hand, the UK Consumer Protection Act of 1987 defines a consumer as a person supplied with the goods for private use or services otherwise than for the purposes of any business.⁴⁴ This definition also includes a person who might wish to occupy the accommodation otherwise than for the purposes of any business of his.⁴⁵ In addition, the Consumer Protection Act of 1987 is complimented by the English Consumer Protection (Code of Practice for Traders on Price Indicators) Approval Order of 1988⁴⁶ which provides that a consumer is anyone supplied with goods, services, accommodation or facilities, other than for business use'.⁴⁷

The Canadian Consumer Protection Act, 2002 defines a consumer in two different sections as an individual that participates or may participate in a transaction involving goods or services.⁴⁸ This definition also includes a person who buys a consumer product from a retail seller but not for the purpose of resale or business purposes.⁴⁹ In Swaziland a consumer is defined in the Competition Act of 2007 as any person who purchases or offers to purchase goods otherwise than for the purpose of resale.⁵⁰ The definition also includes a person to whom a service is rendered.⁵¹ In Australian consumer legislation a consumer is defined in the Competition and Consumer Act of 2010. The Competition and Consumer Act of 2010 defines a consumer as a person who has acquired goods and the amount payable for those goods does not exceed \$40 000 or any greater amount that has been prescribed.⁵² The goods must either be for personal, domestic or household use or consumption.⁵³

⁴² T Naude 'The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) 23 *SA Merc LJ* 336, 338.

⁴³ GG GN 294 in Government Gazette 34181 of 1 April 2011.

⁴⁴ S. 20 (6) of the UK Consumer Protection Act of 1987.

⁴⁵ *Ibid.*

⁴⁶ (S.I. 1988/ 2078).

⁴⁷ Macquoid -Mason (note 2 above) 3.

⁴⁸ S. 3 (a) of the Consumer Protection Act of Canada 2002.

⁴⁹ S. 39 of the Consumer Protection Act of Canada 2002.

⁵⁰ S. 2 (a) of the Competition Act of 2007.

⁵¹ S. 2 (b) of the Competition Act of 2007.

⁵² Schedule 2 section 3 (1) (a) of the Competition and Consumer Act 2010.

⁵³ Schedule 2 section 3 (1) (b) of the Competition and Consumer Act 2010.

Statutory definitions are not an entirely new phenomenon and in some countries, for example South Africa, the term was defined in prior statutes before the CPA of 2008 came into force.⁵⁴ In the South African context the CPA of 2008 fused all the definitions from previously existing statutory provisions to come up with an all-encompassing definition.⁵⁵ As highlighted earlier, academic writers have also made a number of contributions in as far as defining the word ‘consumer’. These definitions will be considered below.

2.4.2. *Non-statutory definition of ‘consumer’*

Nader,⁵⁶ who has been described as an American consumer law activist, asserts that a consumer is every citizen.⁵⁷ On the other hand, a consumer was defined by the Molony Committee⁵⁸ ‘as one who purchases (or hire-purchases) goods for private use or consumption’. A consumer has also been described as a customer who buys for personal use and not for business purposes.⁵⁹ Another view is that a consumer is ‘a person to whom goods, services or credit are supplied or sought to be supplied by another in the course of a business carried on by him.’⁶⁰ Cranston,⁶¹ opined that every citizen of England is a consumer, of welfare, benefits, public utilities, health services, educational services and so on. Oughton⁶² states that, ‘it is also the case that the term encompasses a person who makes use of the services provided by public-sector bodies or private monopolies subject to public control’.⁶³ Mcquoid-Mason⁶⁴ on the other hand approaches the definition of ‘consumer’ from two perspectives- the broad and the narrow perspective. In the broad sense, he observes, everybody who makes use of goods or services generally is a consumer.⁶⁵ Consumers under this category are protected by the law of delict because they are not party to a contractual relationship with a supplier or service provider.⁶⁶ In the narrow sense,

⁵⁴ For example, S. 1 of the Trade Practices Act 76 of 1976 (now repealed by S. 121 (2) (e) of the CPA 68 of 2008); The Harmful Business Practices Act 71 of 1988; S. 107 of the Water Act 54 of 1956. See also Macquoid-Mason, (note 2 above) 2.

⁵⁵ S. 1 of the CPA of 2008.

⁵⁶ R Nader ‘The Great American Gyp’ (1968) Vol. 11 *N.Y Rev. of Books* 28, cited in Cranston (note 7 above) 3, 8.

⁵⁷ Oughton (note 4 above) 1. See also Cartwright (note 10 above) 3; Macquoid-Mason (note 2 above) 1.

⁵⁸ Molony Report (note 5 above) Para 2.

⁵⁹ Lowe & Woodroffe (note 4 above). See also Oughton (note 4 above) 6.

⁶⁰ Mickleburgh (note 29 above) 3.

⁶¹ Cranston (note 7 above) 8.

⁶² Oughton (note 4 above) 1.

⁶³ Ibid. See also Cranston (note 7 above) 8.

⁶⁴ Macquoid-Mason (note 2 above) 1.

⁶⁵ Ibid. See also Cranston (note 7 above) 8.

⁶⁶ Ibid.

he states that a consumer can be regarded as any person who directly purchases the goods from a supplier.⁶⁷ Consumers of this class are protected by contractual remedies.⁶⁸

The various definitions advanced appear to include persons who purchase or hire goods or services for private or domestic use, and those affected by the use of the goods. At this point it is necessary to investigate critically the common features in the definitions that have been covered.

2.5. Dissecting the term ‘Consumer’

In this section the analysis of the term ‘consumer’ will be considered as it applies both in the UK and South Africa. The common law and statutory definitions discussed above reveal that the definition of a consumer essentially encompasses three elements or common denominators.⁶⁹ The first element or factor is that the consumer must be an individual who does not act in the course of business.⁷⁰ The second factor revealed by the definitions is that only the supplier must act in a business capacity and not the consumer;⁷¹ and the third and final factor is that the consumer must intend to use the goods and services supplied privately.⁷² These key rudiments of the term will be analysed below.

2.5.1. The individual consumer must not act in the course of business

This requirement affects companies.⁷³ In consumer law the word ‘individual’ is not limited to a natural person but includes business entities such as sole proprietorships, unincorporated body of persons and partnerships.⁷⁴ These business entities qualify as individuals because the management and capital of these entities is invested in the individuals constituting the business.⁷⁵ A corporate entity such as a company on the other hand is not an individual and ‘cannot for all purposes be equated with a natural person’.⁷⁶ This limitation has caused problems in consumer

⁶⁷ Macquoid-Mason (note 2 above) 1. See also Cranston (note 7 above) 7.

⁶⁸ Ibid. see also *Lillicrapp, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) 475 (A).

⁶⁹ Oughton (note 4 above) 2. See also Cartwright (note 10 above) 3.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid. See also Lowe & Woodroffe (note 4 above) 1.

⁷³ Oughton (note 4 above) 3. See also *R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321.

⁷⁴ Oughton (note 4 above) 2.

⁷⁵ HS Cilliers *et al Corporate Law* 2 ed (1992) 2. See also Oughton (note 4 above) 2.

⁷⁶ Ibid 3. See also JT Pretorius *South African Company Law: Through the Cases* 6 ed (1999) 7.

law because consumer statutes both in the UK and South Africa recognise certain categories of juristic persons as consumers.⁷⁷ The different jurisdictions are considered next.

The UK

In the UK, there are a number of statutes dealing with individual consumers. For example, section 189 (1) of the Consumer Credit Act of 1974 provides that a consumer must be an individual and this includes a partnership and any unincorporated body of persons.⁷⁸ The Unfair Contract Terms Act of 1977 on the other hand provides that a person who neither makes a contract in the course of business nor holds himself out as doing so will be considered a consumer.⁷⁹ It is necessary to consider the manner in which courts have dealt with the issue.

In deciding whether a company has concluded a contract in the course of business courts have held that the transaction in issue must have attained some degree of regularity and be an integral part of its business.⁸⁰ If a degree of regularity has not been made out or the transaction was merely incidental then that transaction was not made in the ordinary course of business and a corporate entity can be held to have acted as a consumer.⁸¹

This test was applied in the case of *R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321. In this case the plaintiff company was a freight forwarding agent that had purchased a second hand motor vehicle on credit under a contract of sale which was to be used by its directors for both the business and private purposes.⁸² The plaintiff rejected the vehicle after discovering that it was not fit for purpose since it had a leaking roof.⁸³ After the plaintiff claimed damages in contract the defendants disputed liability by relying on an exemption clause embedded in the contract.⁸⁴ If it was found that the plaintiff company dealt as a consumer in terms of the Unfair Contract Terms Act⁸⁵ then the exemption clause would be

⁷⁷ For example S. 189 (1) of the UK Consumer Credit Act of 1974, and S. 1 of the South African CPA of 2008.

⁷⁸ *Lowe & Woodroffe* (note 4 above) 238. See also *Oughton* (note 4 above) 2; *Mickleburgh* (note 29 above) 4.

⁷⁹ S. 12 (1) (a) of the Unfair Contract Terms Act 1977. See also *Cartwright* (note 10 above) 2.

⁸⁰ *R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd* (note 73 above) at 330-331.

⁸¹ *Ibid.*

⁸² At 323-324.

⁸³ At 325.

⁸⁴ At 325.

⁸⁵ S. 6 (2) & S. 12 (1) of the Unfair Contract Terms Act of 1977.

ineffective.⁸⁶ One of the questions for determination was whether the plaintiff company had purchased the vehicle in the course of business.⁸⁷ Dillon LJ stated that the general rule was that corporate entities are always acting in the course of business and any non-business ventures engaged in would be *ultra vires*⁸⁸ and illegal.⁸⁹ However, the court held that in the context of the Unfair Contract Terms Act,⁹⁰ the plaintiff company could be held not to have concluded the contract in the ordinary course of business under certain circumstances.⁹¹ The court stated:

‘The reconciliation between that phrase and the need for some degree of regularity is, as I see it, as follows: there are some transactions which are clearly integral parts of the businesses concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a once-off adventure in the nature of trade where the transaction itself would constitute a trade or business.’⁹²

Applying the above test, Dillon LJ held that the plaintiff did not regularly purchase motor vehicles from the defendant on credit.⁹³ Since a degree of regularity had not been made out in the case, the plaintiff company was held to have dealt as a consumer.⁹⁴

South Africa

In the South African context the CPA of 2008 does not state when company is said to be acting in the course of business. Instead, the Act provides that an individual consumer includes a body corporate, partnership, unincorporated association, as well as a trust in terms of the Trust Property Act 57 of 1988.⁹⁵ In terms of the Act juristic persons or businesses whose asset value or annual turnover is less than R 3 million are also considered individual consumers.⁹⁶ Van Eeden⁹⁷

⁸⁶ At 328.

⁸⁷ At 328.

⁸⁸ ‘*Ultra vires*’ means an ‘act beyond the legal power or authority of a person or official or body’ etc, see Garner (note 33 above) 1559.

⁸⁹ At 329. See also Cilliers (note 75 above) 3; Oughton (note 4 above) 3.

⁹⁰ S. 12 of the Unfair Contract Terms Act of 1977.

⁹¹ At 330.

⁹² At 330-331.

⁹³ At 331.

⁹⁴ At 330-331.

⁹⁵ S. 1 of the CPA of 2008.

⁹⁶ S. 5 (2) (b) of the CPA of 2008. See also Bregman (note 41 above).

⁹⁷ Van Eeden (note 3 above) 41.

suggests that the recognition of juristic persons in the South African CPA of 2008 is ‘somewhat surprising’. His view is that the CPA of 2008 was enacted to protect consumers who are natural persons and not businesses.⁹⁸ Nevertheless, it seems that the CPA of 2008⁹⁹ recognises both natural persons and a certain category of juristic persons as qualifying to be individuals.

2.5.2. The supplier must act in the course of business

Given that the individual is regarded as a non-business purchaser of goods and services, the next enquiry is to decide as to when exactly a supplier can be said to be acting in the course of business.

The UK

There is inconsistency surrounding the understanding of the phrase ‘in the course of business’.¹⁰⁰ The reason is that the phrase is interpreted differently in the Trade Descriptions Act¹⁰¹ and in sale of goods legislation.¹⁰² The House of Lords applied two divergent approaches in respect of these statutes when deciding when a supplier can be said to be acting in the course of business.¹⁰³ With respect to sale of goods legislation a supplier was held to act in the course of business even if trading in the goods was not on a regular basis.¹⁰⁴ In other words supplying goods in a once-off transaction was deemed to be in the course of business.¹⁰⁵ In terms of the Trade Descriptions Act¹⁰⁶ the other hand it was held that supplying goods regularly was a requirement for a transaction to occur in the course of business.¹⁰⁷ The two approaches are considered below.

The first approach was considered by Lord Wilberforce in the case of *Ashington Piggeries Ltd and another v Christopher Hill Ltd* [1972] A.C. 441 (HL). In this case the appellants’ herring died as a result of the presence of dimethylnitrosamine (DMNA) in herring meal supplied to

⁹⁸ Ibid.

⁹⁹ S. 1 of the CPA of 2008.

¹⁰⁰ Oughton (note 4 above) 4.

¹⁰¹ S. 1 (1) (a) of the Trade Descriptions Act of 1968.

¹⁰² Sale of Goods Act of 1893 and Sale of Goods Act of 1979. See also Oughton (note 4 above) 4.

¹⁰³ See the conflicting decisions of *Ashington Piggeries Ltd and another v Christopher Hill Ltd* [1972] A.C. 441 (HL), and *Davies v Sumner* [1984] 1 WLR 1301 (HL).

¹⁰⁴ *Ashington Piggeries Ltd and another v Christopher Hill Ltd* (note 103 above) at 494.

¹⁰⁵ Oughton (note 4 above) 4.

¹⁰⁶ S. 1 (1) of the Trade Descriptions Act of 1968.

¹⁰⁷ *Davies v Sumner* [1984] 1 WLR 1301 (note 103 above) at 1305. See also Oughton (note 4 above) 4.

them by the respondents.¹⁰⁸ The herring meal was an ingredient in a compound of mink food ordered on behalf of the appellants under a contract of sale.¹⁰⁹ As a result of losing a large number of mink the appellants claimed damages against the respondent for having breached the implied warranty on description in terms of 14 (1) and (2) of the Sale of Goods Act of 1893.¹¹⁰ The Act referred to goods of a description which it was 'in the course of the seller's business to supply'.¹¹¹ After the respondent had argued that it had not sold the mink food to the appellants in the ordinary course of business and breached section 14 (1) and (2) of the Sale of Goods Act of 1893, Lord Wilberforce held as follows:

'I do not accept that, taken in its most linguistic strictness, either subsection bears the meaning contended for. I would hold that (as to subsection (1)) it is in the course of a seller's business to supply goods if he agrees, either generally, or in a particular case, to supply the goods when ordered, and (as to subsection (2)) that a seller deals in goods of that description if his business is such that he is willing to accept orders for them. I cannot comprehend the rationale of holding that the subsections do not apply if the seller is dealing in the particular goods for the first time...'¹¹²

In upholding the appeal, the Judge rejected the respondent's argument and held that supplying goods for the first time may occur in the course of business under section 14 of the Sale of Goods Act of 1893.¹¹³

The second approach was considered in the case of *Davies v Sumner* [1984] 1 WLR 1301 (HL). In this case the respondent sold a car he had used to transport films and other related material around Wales for a television company in his business as a professional courier.¹¹⁴ Before selling the car to a car dealer he tampered with the mileage on the odometer of the vehicle and misrepresented the distance by applying a false description contrary to section 1 (1) of the Trade

¹⁰⁸ At 488.

¹⁰⁹ Ibid.

¹¹⁰ At 472.

¹¹¹ At 493.

¹¹² At 494.

¹¹³ At 495.

¹¹⁴ At 1303.

Descriptions Act of 1968.¹¹⁵ He did this in order to sell his car at a higher price than its book value. The respondent was convicted for his actions after a consumer protection department laid a charge against him but successfully appealed his conviction.¹¹⁶ After the appellant prosecutor appealed to the House of Lords the court was called upon to decide whether the respondent had applied the trade description to the vehicle in the course of business.¹¹⁷ Lord Keith of Kinkel stated:

‘The expression “in the course of a trade or business” in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity, and it is to be observed that the long title to the Act refers to “misdescriptions of goods, services, accommodation and facilities provided in the course of trade”.’¹¹⁸

Lord Keith held that there was no degree of regularity because the practice of buying and selling vehicles had not been established when the offence was committed. This approach was also adopted in the case of *R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd*.¹¹⁹

The inconsistency from the above decisions leaves the law in an uncertain state.

South Africa

In terms of the CPA of 2008 a supplier is either an individual person, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services or is a public-private partnership marketing goods or services.¹²⁰ However, the Act does not define what is meant by supplying goods ‘in the course of business’.¹²¹ It is suggested that the CPA of 2008 limits the phrase ‘in the course of business’ to the normal transactions of a particular business to the

¹¹⁵ At 1303.

¹¹⁶ At 1303.

¹¹⁷ At 1304.

¹¹⁸ At 1305.

¹¹⁹ *R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd* (note 73 above) at 329.

¹²⁰ S. 1 as read with S. 5 (8) of the CPA of 2008.

¹²¹ RD Sharrock ‘Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act’ (2010) 22 *SA Merc LJ* 295, 301-302. See also Naude (note 42 above) 337.

exclusion of ‘once-off’ transactions that are unusual to the business concerned.¹²² Naude¹²³ states that the test for determining whether a transaction occurs in the course of business is ‘whether the contract falls within the scope of that business and whether the transaction is one with commonly-used terms that ordinary businessmen would have entered into in the circumstances.

This test derives from a decision by the Supreme Court of Appeal in the case of *South African Amalgamated Banks of South Africa Bpk v Goede En n ander* 1997 (4) SA 66 (SCA). In this case a close corporation providing passenger services and owned by the respondent sureties had been granted overdraft facilities by the appellant bank.¹²⁴ The respondents were a teacher and a clerk who signed the surety agreement forms without having obtained the consent of their spouses in terms of section 15 of the Matrimonial Property Act 88 of 1984.¹²⁵ After the appellant bank claimed damages against the respondents for failure to honour the loan the respondents raised the defence that they had not obtained the consent of their spouses in terms of the Matrimonial Property Act¹²⁶ when they signed the surety agreement.¹²⁷ The appellant argued that consent was not necessary if the act was performed by the spouse in the ordinary course of his ‘profession, trade or business’.¹²⁸ One of the questions was whether the ‘once-off’ transaction performed by the respondents was in the course of business.¹²⁹

The court held the issue was not whether the respondents normally stood as sureties in the course of their profession, trade or business but whether the juristic act of standing as surety by the respondents had been performed in the ordinary course of business.¹³⁰ In finding that the respondents had acted in the course of business, Grosskopf AR held that it was immaterial whether the respondents had their individual professions and were not actively involved in the running of the passenger business.¹³¹ A single isolated act such as signing the surety agreement

¹²² Sharrock (note 121 above) 302.

¹²³ Naude (note 42 above) 337.

¹²⁴ At 69.

¹²⁵ At 69.

¹²⁶ S. 15 (2) (h) of the Matrimonial Property Act 88 of 1984.

¹²⁷ At 69.

¹²⁸ S. 15 (6) of the Matrimonial Property Act of 1984.

¹²⁹ At 75.

¹³⁰ At 75

¹³¹ At 77.

qualified the respondents as having acted in the course of business because as ordinary businessmen.¹³² Therefore, it is immaterial whether an act is performed frequently.¹³³

2.5.3. The goods or services must be ‘for private use or consumption’

The third and final element in the definition of a consumer is that the goods or services at the disposal of that consumer must be for private use or consumption.¹³⁴ Some statutory provisions require that goods and services acquired should be intended for non-business or private consumer use.¹³⁵ In terms of this requirement the goods must be intended for the private use of the consumer. In order to fulfill this requirement, the goods or services do not necessarily have to be exclusively used by the consumer.¹³⁶ This point appears to raise no material issues, even though each case may have to be judged on its own circumstances.¹³⁷

The UK

The requirement that goods must be for private use is recognised in a number of statutory provisions. For example, the Unfair Contract Terms Act¹³⁸ mentions goods supplied for private use or consumption. In relation to goods the UK Consumer Protection Act¹³⁹ also refers to a consumer who might wish to be supplied with goods for his own private use or consumption.

South Africa

In the South African context the position of the law on the requirement is not clear because the CPA of 2008 does not make reference whatsoever to goods obtained for private use.¹⁴⁰ The CPA of 2008 includes juristic persons as consumers.¹⁴¹ This means that a company consumer is entitled to acquire goods for business purposes since private consumption is ordinarily inconsistent with corporate entities.¹⁴²

¹³² At 78.

¹³³ Sharrock (note 121 above) 302.

¹³⁴ Oughton (note 4 above) 5-6.

¹³⁵ S. 12 (1) (c) of the Unfair Contract Terms Act 1977; and S. 10 (7) and S. 20 (6) of the UK CPA 1987.

¹³⁶ Oughton (note 4 above) 6.

¹³⁷ Ibid.

¹³⁸ S. 12 (1) (c) of the Unfair Contract Terms Act 1977.

¹³⁹ S. 20 (6) (a) of the UK Consumer Protection Act of 1987.

¹⁴⁰ Sharrock (note 121 above) 300.

¹⁴¹ S. 1 of the CPA of 2008.

¹⁴² Sharrock (note 121 above).

In as far as case law is concerned it is doubtful whether the case of *Standard Credit Corporation Ltd v Strydom and Others* 1991 (3) SA 644 (W), can be relied upon. In this case the court held that a person who receives credit ‘ceases to be a consumer where he does not intend to use the goods himself’.¹⁴³ However, the modern application of this case is uncertain for two reasons. First, the case involved the interpretation of the Credit Agreements Act 75 of 1980 which was a consumer credit statute.¹⁴⁴ Secondly, the Credit Agreements Act 75 of 1980 was repealed in 2005 by the South African National Credit Act 34 of 2005.

This section has dealt with the definitions of the term ‘consumer’ and ‘consumer protection’; it is now opportune to investigate the common law protections afforded consumers.

3. THE ROLE OF PRIVATE LAW IN CONSUMER PROTECTION

‘Private law’ is defined as the body of law dealing with the relations of private persons and their property.¹⁴⁵ It is important to properly locate the position of private law, and ultimately, consumer protection law within the hierarchy of laws. The law has two main divisions.¹⁴⁶ It is composed of the international law and national law.¹⁴⁷ This chapter is not concerned with international law but with national law. In most legal systems, the legal framework basically consists of a national law which is divided into private law and public law.¹⁴⁸ The present study is concerned with private law. Under the private law there are three further divisions: the law of persons, mercantile and industrial law, and the law of things.¹⁴⁹ The focus of the present study is on the law of things which is constituted by the law of property, the law of obligations and the law of succession.¹⁵⁰ Consumer protection is found under the law of obligations comprising the law of contract and the law of delict.¹⁵¹

¹⁴³ At 652.

¹⁴⁴ S. 2 (1) (a) of the repealed Credit Agreements Act 75 of 1980.

¹⁴⁵ Garner (note 33 above) 1234.

¹⁴⁶ Hahlo & Kahn (note 1 above) 111.

¹⁴⁷ KD Chetty ‘Sources of Law’ in MA Fouché *Legal Principles of Contracts and Negotiable Instruments* 3ed (1995) 13.

¹⁴⁸ Ibid 14.

¹⁴⁹ Ibid. See also Hahlo & Kahn (note 1 above) 120.

¹⁵⁰ Hahlo & Kahn (note 1 above) 120, 130.

¹⁵¹ Van Eeden (note 3 above) 59.

In enforcing their rights, consumers often rely on the remedies available in the law of delict and contract because there is no branch of consumer law in the hierarchy of private law.¹⁵² The law of delict is particularly relevant to the consumer because it provides remedies under the aquilian action for harm caused by defective products under negligence.¹⁵³ In order to successfully claim damages under negligence a consumer must establish that the harm was caused by the negligent manufacture of the goods consumed.¹⁵⁴ Under the law of contract on the other hand a consumer will be entitled to contractual relief upon establishing that a supplier breached a contractual term or failed to fulfill his contractual obligations.¹⁵⁵

While the development of the private law as a conduit for consumer protection has received statutory recognition in some countries, this branch of the law has been criticised as being inherently inadequate for consumer protection because it continues to recognise principles like freedom of contract.¹⁵⁶ Many legal writers including note that, contrary to popular belief, ‘private law is an inadequate tool for consumer protection’.¹⁵⁷ Unlike legislation, which is self-implementing, private law requires consumers to assert their rights so as to ensure that they are protected against exploitation.¹⁵⁸ Van Eeden¹⁵⁹ holds the same view but maintains that private law remains ‘an indispensable part of the legal framework in the consumer market’. In other words, he appreciates the blend between legislation and private law as more progressive than the total obliteration of private law in consumer protection. The following section will investigate this critique.

4. CONSUMERS AND THE LAW OF CONTRACT

Visser¹⁶⁰ defines a contract as follows:

¹⁵² Ibid 31. See also Cranston (note 7 above) 67.

¹⁵³ Van Eeden (note 3 above) 31.

¹⁵⁴ Ibid 31-32.

¹⁵⁵ Howells and Weatherill (note 19 above) 7.

¹⁵⁶ Cranston (note 7 above) 67.

¹⁵⁷ Ibid 413.

¹⁵⁸ Cranston (note 7 above) 79.

¹⁵⁹ Van Eeden (note 3 above) 57.

¹⁶⁰ C Visser *et al South African Mercantile and Company Law* 8 ed (2003) 9.

‘A contract is a lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts which are possible of performance.’

The above definition reveals that the foundations of a contract are based on agreement between parties who bargain on an equal footing.¹⁶¹ Initially, when the law of contract developed the focus of control was upon procedural propriety as opposed to the substantive fairness of the contract.¹⁶² Throughout history, the law of contract afforded protection to consumers who were party to the consumer transaction of those goods or services.¹⁶³ The same position obtains even today except in circumstances where legislation has intervened. The law of contract developed along with the notion of freedom of contract.¹⁶⁴ This doctrine and how it applies will be considered below.

4.1. Freedom of contract

In the case of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 Q.B 284, Lord Denning M.R stated as follows:

‘Faced with this abuse of power- by the strong against the weak...- the judges did what they could do to put a curb on it. They still had before them the idol, ‘freedom of contract’. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called ‘the true construction of the contract’. They used it with great skill and ingenuity.’¹⁶⁵

The above words reveal the challenges that courts have had to face in the past concerning the doctrine of freedom of contract which is examined in this section.

¹⁶¹ Cranston (note 7 above) 67.

¹⁶² PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 404. See also Howells & Weatherill (note 19 above) 13; Cartwright (note 10 above) 11; S Smith *Atiyah's Introduction to the Law of Contract* (2005) 10.

¹⁶³ Smith (note 162 above) 335.

¹⁶⁴ *Ibid* 10.

¹⁶⁵ At 297.

Deeply embedded in the law of contract is the old established notion of ‘freedom of contract,’ which underpins the fundamental common law right of parties to freely enter into contracts.¹⁶⁶ Freedom of contract recognises the right of people to freely choose with whom they wish to contract and on what terms; once parties have entered into a contract, the courts are not empowered to consider whether the contract is fair.¹⁶⁷ In order to properly understand this concept it is necessary to briefly set out the manner in which it developed in the UK.

Construed in its historical sense, the doctrine recognised individual autonomy in the affairs of merchants and was considered as the most appropriate approach in shaping future principles of the law of contract.¹⁶⁸ Professor Friedmann¹⁶⁹ confirms that the doctrine simply means that parties enter into a contract out of their own free will without the influence of external forces. The origins of freedom of contract can be traced back to 16th and 17th century commentators and legal writers including Grotius, Locke, Hobbes and Mill.¹⁷⁰ These pioneers of contractual freedom all agree that the right of an individual to contract with another was initially recognised as a basic human right that could not be trammled upon by any person, including the state.¹⁷¹ In pursuit of this basic right a person had the choice to regulate his affairs with another person.¹⁷² The right of a person to regulate his own affairs also meant that any contractual relationships entered into would be based on consent.¹⁷³ A corollary of the freedom to regulate one’s affairs was minimum state interference.¹⁷⁴ Restraining contractual freedom through legislation was therefore not acceptable. It was immaterial whether that person stood in a weaker bargaining position as long as the agreement entered into was respected.¹⁷⁵ The only exception to the

¹⁶⁶ Smith (note 162 above) 9. See also Cartwright (note 10 above) 7-8; *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq. 462; *Burger v Central South African Railways* 1903 TS 571 at 576.

¹⁶⁷ P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 13-14.

¹⁶⁸ *Ibid* 1. See also Howells and Weatherill (note 19 above) 19; L Hawthorne ‘The Principle of Equality in the Law of Contract’ 1995 (58) *THRHR* 157, 166.

¹⁶⁹ W Friedmann *Law in a Changing Society* 1ed (1959) 93, cited by AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 8.

¹⁷⁰ Aronstam (note 167 above) 1-5.

¹⁷¹ *Ibid*.

¹⁷² *Ibid* 4.

¹⁷³ *Ibid* 3.

¹⁷⁴ Smith (note 162 above) 9.

¹⁷⁵ Aronstam (note 167 above) 3.

doctrine was that in the exercise of this freedom, the actions of one party were not to be allowed to cause harm to the other party in the contractual relationship.¹⁷⁶

As time went by, the 18th and 19th century saw the introduction of industrial technology and mass production techniques which required legislation to control the manner in which manufactured goods circulated in industry.¹⁷⁷ However, legislative regulation of business dealings between consumers and merchants was opposed.¹⁷⁸ The basis for opposing legislative regulation was based on the argument that consumers and merchants were able to regulate their own affairs in trade and that the industries would equally flourish without regulation.¹⁷⁹ The courts also played a significant role in galvanizing freedom of contract during this period.¹⁸⁰ Among the first judicial decisions to recognise freedom of contract in the late 19th century was the very old and famous high watermark English decision of *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq. 462. In this case, Sir George Jessel M.R made the following trenchant remarks which resonate to this day:

‘If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts entered into fairly and voluntarily shall be held sacred and shall be enforced by the courts of justice.’¹⁸¹

When the Judge made the above comment freedom of contract had been ‘elevated to its highest point’.¹⁸² Despite its classical impact, the doctrine over time failed to catch up consumer developments and began to decline as a result of the industrial revolution.¹⁸³ This period saw the introduction of mass production in industries, the establishment of railway companies and public utilities which consumers had little choice but to use.¹⁸⁴ Standard form contracts were also

¹⁷⁶ Ibid 4.

¹⁷⁷ Atiyah (note 162 above) 224.

¹⁷⁸ Smith (note 162 above) 9. See also Aronstam (note 167 above) 5.

¹⁷⁹ Aronstam (note 167 above) 5.

¹⁸⁰ Atiyah (note 162 above) 387.

¹⁸¹ At 465.

¹⁸² Atiyah (note 162 above) 387.

¹⁸³ Ibid 572-581. See also Smith (note 162 above) 11.

¹⁸⁴ Smith (note 162 above) 12.

introduced to regulate the commercial activity of these entities.¹⁸⁵ The use of standard form contracts became common and consumers were supplied with goods and services subject to terms that had not been negotiated.¹⁸⁶ As a result consumers had little choice but to accept whatever terms were contained in the standard form contracts because the necessity of obtaining goods ‘was an incidence of living in society’.¹⁸⁷ The result was that it could not be said there was ‘freedom’ of contract.

Turning to the development of freedom of contract in the South African context, it can be said that the doctrine was judicially recognised when Innes CJ stated in the case of *Burger v Central South African Railways* 1903 TS 571 that reasonableness was not sufficient in releasing a party from a contract he had freely and voluntarily concluded.¹⁸⁸ Another significant court decision to make pronouncements on contractual freedom is the case *Osry v Hirsch, Loubser & Co. Ltd* 1922 CPD 531, where Kotze JP made the following remarks:

‘[T]he spirit of modern jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observations of De Villiers CJ, in *Henderson v Hanekom* (1903) 20 SC 513 at 519: “All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law.”’¹⁸⁹

In addition, in the case of *Wells v South African Alumenite Company* 1927 AD 69, Innes CJ stated that the harshness of a clause was not a ground for invalidating a contract, as follows:

‘[I]f people must sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands.’¹⁹⁰

Freedom of contract suffered a temporary setback in the 1939 Appellate Division decision of *Jajbhay v Cassim* 1939 AD 537. In this case the court dispensed with freedom of contract and

¹⁸⁵ Ibid. See also Aronstam (note 167 above) 17.

¹⁸⁶ Smith (note 162 above) 12.

¹⁸⁷ Ibid. See also Cranston (note 7 above) 68.

¹⁸⁸ At 576.

¹⁸⁹ At 546.

¹⁹⁰ At 73.

coined the proposition that in some instances the courts must disseminate ‘simple justice between man and man’ as required by public policy.¹⁹¹ The critical reaction of legal scholars against the *Jajbhay v Cassim*¹⁹² judgment is captured by Barnard¹⁹³ as follows:

‘This decision was however heavily criticised by the doyennes of contract at the time, De Wet and Van Wyk, who took it upon themselves to appeal for the restoration of freedom of contract to its unqualified position as the central value and primary determinant of public policy in the law of contract: “This decision of the Appellate division throws this matter into a boundless morass of uncertainty, and that on the grounds of unconvincing considerations[...]. It is in any event undesirable to make the issue of whether one can reclaim or not dependent on such an uncertain test such as simple justice between man and man and the conviction of the court whether the one or the other should be relieved.” This privileging of freedom of contract echoes in the court rooms of this country like a hollow warning to those who dare to claim that their contract might be unfair.’

Nevertheless, from the judgment of *Jajbhay v Cassim*¹⁹⁴ onwards, freedom of contract has emerged triumphant.¹⁹⁵ Considering the opinions of the legal scholars above in tandem with the judicial decisions already examined reveals that there are four different approaches to freedom of contract.¹⁹⁶ First, in entering the contract, there must be freedom of interference from the state or its officials; secondly, a party must be free to choose the party with which he contracts; thirdly, there must be freedom not to contract; and finally, a contract that has been concluded must not be interfered with.¹⁹⁷ Freedom of contract therefore forms the basis of refusal by the courts to come to the rescue of consumers who enter into contracts and later claim that the agreement runs counter to his interests.¹⁹⁸

¹⁹¹ At 544.

¹⁹² *Jajbhay v Cassim* 1939 AD 537.

¹⁹³ AJ Barnard ‘A Critical Legal Argument for Contractual Justice in the South African Law of Contract’ 2006 (unpublished LLD Thesis, University of Pretoria) 84.

¹⁹⁴ *Jajbhay v Cassim* (note 192 above).

¹⁹⁵ See the cases of *Brisley v Drotosky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

¹⁹⁶ Aronstam (note 167 above) 13-15. See also Hawthorne (note 168 above) 163.

¹⁹⁷ *Ibid.*

¹⁹⁸ Aronstam (note 167 above) 11.

It is important to consider whether limitations to contractual freedom exist and the extent of their application by the courts. The following section deals with this.

4.2. Limitations to freedom of contract

It cannot be denied that the strict application of contractual freedom sometimes leads to unfair results for consumers because strict adherence to the doctrine may lead to the enforcement of unfair terms by the courts.¹⁹⁹ As a response the courts have attempted to graft common law concepts such as equality, public policy and good faith to control contractual freedom.²⁰⁰ These values were, however, criticised as ‘abstract notions’ which could not be relied on as independent substantive legal rules to curb the enforcement of contracts.²⁰¹ A brief analysis of how public policy has been used to control freedom of contract in decided cases is presented below.

4.2.1. Public Policy

The concept of public policy has been applied by the courts as a control measure and serves an important role in curbing the indiscriminate application of contractual freedom in the sphere of contract law.²⁰² South African courts have on previous occasions held that contractual terms that offend public policy will be struck down as invalid.²⁰³ For example, in the case of *Morrison v Angelo Deep Gold Mines* 1905 T.S. 775, Innes CJ stated as follows:

‘Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognise any arrangement which is contrary to public policy. That is a principle of the Roman-Dutch law as well as of the English law...’²⁰⁴

¹⁹⁹ Hawthorne (note 168 above) 163.

²⁰⁰ *Barkhuizen v Napier* (note 195 above) at Para 51. See also Hawthorne (note 168 above) 169-173; FDJ Brand ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71, 89-90.

²⁰¹ *Brisley v Drotzky* (note 195 above) at Para 32. See also *Barkhuizen v Napier* (note 195 above) at Para 171; Brand (note 200 above).

²⁰² Hawthorne (note 168 above) 173.

²⁰³ *Wells v SA Alumenite Co.* 1927 AD 69 at 72. See also *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 803; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9; *Botha v Finanscredit* 1989 (3) SA 773 (A) at 783.

²⁰⁴ At 779.

Circumstances under which courts exercise this power vary and, as a general rule, public policy requires courts not to enforce terms that shield a party from liability for injury or harm resulting from willful or fraudulent conduct.²⁰⁵

The leading case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) brilliantly illuminates the court's non-recognition of unfair terms in standard form contracts on grounds of public policy. This decision dealt with, *inter alia*, the validity of specific terms in a deed of cession between the respondent doctor who had borrowed money from the appellant financing company.²⁰⁶ The agreement made the respondent perpetually indebted to the appellant because he had placed his professional earnings as security whether or not he was indebted.²⁰⁷ In its attempt to enforce the contents of the deed of cession, the appellant applied to court for an order interdicting and restraining the respondent from collecting fees from its patients and debts ceded by him to the appellant.²⁰⁸ The court *a quo* dismissed the application on grounds that the deed of cession violated public policy because it left the respondent in a state of perpetual debt.²⁰⁹ On appeal, the court had to consider whether the offensive terms in the deed of cession were contrary to public policy; and secondly, if it was found that such terms existed, whether they were severable from the deed.²¹⁰ In dismissing the appeal, Smalberger JA confirmed the decision of the court *a quo* and held that courts had the power not to recognize contracts offending public policy.²¹¹ When handing down the decision, Smalberger JA sounded a luminary warning that the power to invalidate contracts on grounds of public policy was subject to limits, thus:

‘No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contrary to public policy should however be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power. One must be careful not to

²⁰⁵ *Sasfin (Pty) Ltd v Beukes* (note 203 above) at 7. See also *Wells v SA Alumenite Co.* (note 203 above) at 72

²⁰⁶ At 6.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ At 7.

²¹⁰ At 7.

²¹¹ At 7, 13-15.

conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.'²¹²

The warning sound by the court was probably inspired by commentators of the subject like Turpin,²¹³ who suggested that 'the requirements of public policy are elusive, and the courts power must be exercised with care'. Indeed, the warnings were necessary because public policy was thereafter abused by litigants as 'the favourite defence of last resort'²¹⁴ leading to judicial comment that the notion had become so popular such that it was 'regarded as a free pardon for recalcitrant and otherwise defenceless debtors'.²¹⁵ It eventually became settled law before the South African constitutional dispensation came into existence that a contractual provision could only be declared contrary to public policy if it was so unreasonable that harm to the public was substantially incontestable.²¹⁶

The post-constitutional era in South Africa introduced a number of legal developments. One of the most important changes in the law of contract was that public policy was considered as deeply rooted in the constitution. A number of court decisions recognised public policy as a constitutional value.²¹⁷ Amongst these decisions is the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC), which reveals the tensions that simmer when intrusions are contemplated against freedom of contract on grounds of public policy. In this case a divided Constitutional Court had to determine whether a time-bar clause was enforceable in light of public policy considerations.²¹⁸ The applicant damaged his vehicle beyond repair in an accident and lodged an insurance claim with the respondent insurance broking company in terms of his insurance policy.²¹⁹ The claim was rejected by the respondent.²²⁰ The applicant claimed damages against

²¹² At 9.

²¹³ CC Turpin 'Contracts and Imposed Terms' (1956) 73 *SALJ* 144, 157.

²¹⁴ *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1992 (4) CLD 314 (W) at 315.

²¹⁵ *Donnelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 381. See also Brand (note 200 above) 73, 76.

²¹⁶ *Sasfin (Pty) Ltd v Beukes* (note 203 above) at 8.

²¹⁷ See *Brisley v Drotsky* (note 195 above); *Afrox Healthcare Bpk v Strydom* (note 195 above).

²¹⁸ *Barkhuizen v Napier* (note 195 above) Madala J, O'Regan J, Nkabinde J, Skweyiya J, Van der Westhuizen J, Langa CJ, and Yacoob J concurring with Ngcobo CJ for the majority; Sachs J, Moseneke DCJ and Mokgoro J (dissenting).

²¹⁹ At Para 2.

²²⁰ *Ibid.*

the respondent after a period of two years from the date when the insurance claim was made.²²¹ The respondent alleged that the proceedings were time-barred in terms of a time-limitation clause in the insurance policy concluded by the parties.²²² The long and chequered history of the matter culminated in the court having to grapple with the vexed interface between freedom of contract and public policy under the Constitution.²²³

The Constitutional Court stated that the Constitution is the yardstick for determining public policy and any contract term ‘inimical to the values enshrined in the Constitution is contrary to public policy and is, therefore, unenforceable’.²²⁴ The Constitution ‘strikes down the unacceptable excesses of freedom of contract’.²²⁵ The court went on to state that public policy requires contracting parties to ‘comply with contractual obligations freely and voluntarily undertaken’.²²⁶ Ngcobo J also mentioned that inequality in bargaining between contracting parties was a crucial and relevant factor in determining whether a contract term is contrary to public policy.²²⁷ The Judge found that the time limitation clause did not offend the Constitution and was not contrary to public policy because the contract was freely and voluntarily concluded between persons with equal bargaining power.²²⁸

The majority judgment sparked what will most probably become one of the most celebrated dissenting judgments in modern contract law, delivered by Sachs J. The eminent judge, in a carefully scripted and eloquently presented judgment, set out to explain the role of standard form contracts and their inter-relation with public policy considerations in South Africa’s constitutional dispensation. Moseneke DCJ, a precursor to the dissenting judgment of Sachs J, could not conceal his admiration of the reasoning in the dissension and buttressed his opinion with the following remarks:

²²¹ At Para 3.

²²² Ibid.

²²³ Paragraphs 20, 43.

²²⁴ At Para 29.

²²⁵ At Para 12.

²²⁶ At Para 57.

²²⁷ At Para 59.

²²⁸ At paragraphs 66-67.

‘The appropriate test as to whether a contractual term is at odds with public policy has little or nothing to do with whether the party seeking to avoid the consequences of the time bar clause was well-resourced or in a position to do so. The question to be asked is whether the stipulation clashes with public norms and whether the contractual term is so unreasonable as to offend public policy. In the context of this case, the question to be posed is whether the provision itself unreasonably or unjustifiably limits the right to seek judicial redress. Ordinarily, the answer should not rest with the peculiar situation of the contracting parties, but with an objective assessment of the terms of their bargain.’²²⁹

The above criterion underpinned the dissenting judgment, *per* Sachs J, who opined that the majority judgment had not gone far enough in ventilating the issue which had to be determined.²³⁰ In his view the primary question was whether public policy, as informed by the constitution, could compel courts to refuse to give legal effect to imposed, onerous, and one-sided terms in standard form contracts in a constitutional era.²³¹ In answering this question, he first analysed the time limitation clause in the contractual context.²³² The judge traced the consumer protection trail across the globe, from Hong Kong²³³ in Asia to Brazil in South America,²³⁴ traversing the European²³⁵ consumer landscape in the process. He finally considered the opinions of academic commentators and consumer developments in South Africa before criticizing the majority decision.²³⁶ He underscored his approach as follows:

‘What is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society. More specifically it calls for examination of the “tendency” of the provision at issue and the extent to which, in the context of the contract as a whole, it vitiates standards of reasonable and fair dealing that the legal convictions of the community would

²²⁹ At Para 96.

²³⁰ At Para 124.

²³¹ At Para 122.

²³² At paragraphs 125-134.

²³³ At Para 168.

²³⁴ At Para 166.

²³⁵ At Para 164.

²³⁶ At paragraphs 169-175.

regard as intrinsic to appropriate business firm/consumer relationships in contemporary society.’²³⁷

The above excerpt laid the foundation for addressing the question whether public policy in a constitutional dispensation permitted an insurer to rely on a non-negotiated hidden clause written in small print in a standard form contract.²³⁸ The question whether public policy could limit freedom of contract was eventually answered in the affirmative.²³⁹ The views of Sachs J on contractual freedom support the holding in *Sasfin (Pty) Ltd v Beukes*²⁴⁰ with the qualification that public policy has become a constitutional value. Despite the cautious importation of public policy the authorities appear to be *ad idem* that courts do not have *carte blanche* discretion to invalidate contract terms on grounds of public policy because the doctrine requires finer tuning.²⁴¹ Thus, there remains little doubt that public policy has become firmly established as a mechanism of judicial control over freedom of contract.²⁴²

4.3. Criticisms against freedom of contract

The main assault on freedom of contract in consumer law emanates from the unfair bargaining position individual consumers often find themselves in when concluding contracts with suppliers. More often than not, contracts entered into contain unfair terms against consumers usually in the form of exemption clauses.²⁴³ The general willingness of consumers to accept unfair contract terms is usually motivated by the need to acquire products or services offered by a business.²⁴⁴ However, due to the rigidity of the doctrine a consumer is prevented from going against an unfair agreement.²⁴⁵ At the end of the day the consumer suffers because a bargain entered into will be enforced by courts.²⁴⁶ Strict adherence to freedom of contract inevitably

²³⁷ At Para 146.

²³⁸ At Para 181.

²³⁹ At paragraphs 182-185

²⁴⁰ *Sasfin (Pty) Ltd v Beukes* (note 203 above).

²⁴¹ Brand (note 200 above) 87.

²⁴² Ibid.

²⁴³ Smith (note 162 above) 149. See also Oughton (note 4 above) 124.

²⁴⁴ Cranston (note 7 above) 68.

²⁴⁵ Hawthorne (note 168 above) 163.

²⁴⁶ Howells and Weatherill (note 19 above) 13-14. See also *Printing and Numerical Registering Co. v Sampson* (note 166 above); *Burger v Central South African Railways* (note 166 above).

becomes the prime source of many social inequalities.²⁴⁷ Many countries introduced remedial statutes as means of intervention and corrected the unjust state of affairs, thereby presenting a significant adaptation to the common law of contract.²⁴⁸ Hahlo²⁴⁹ criticises freedom of contract as follows:

‘Provided a man is not a minor or a lunatic and his consent is not initiated by fraud, mistake or duress, his contractual undertakings will be enforced by the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of market-place.’

Jansen JA in the case of *Bank of Lisbon and South Africa v Ornelas and Another* 1988 (3) SA 580 (A), also criticised freedom of contract by stating that it was not an absolute value that could not be dispensed with,²⁵⁰ while Smallberger JA in the case of *Sasfin v Beukes*²⁵¹ held that any agreements inimical to the interests of the community ought not to be recognised by the courts despite the overpowering effect of contractual freedom. There have been developments in many countries including the UK and South Africa where legislation has been introduced to curtail freedom of contract.²⁵² Likewise, realizing the need to protect consumers against unfair contracts, the South African CPA of 2008 provisions require contracts to have fair contractual terms.²⁵³ Freedom of contract in modern contract law is no longer applied by the courts in its classical sense.²⁵⁴ In limiting the doctrine, the current approach is for the courts not only to consider the procedural aspects but also the substance of a contract in deciding whether or not a contract is valid.²⁵⁵ In as much as freedom of contract limits in the ability of the law of contract to protect consumers, legislation has narrowed the gap.

²⁴⁷ Hawthorne (note 168 above) 163.

²⁴⁸ Smith (note 162 above) 15. See also Howells and Weatherill (note 19 above) 20.

²⁴⁹ HR Hahlo ‘Unfair Contract Terms in Civil-Law Systems’ (1981) 98 *SALJ* 70.

²⁵⁰ At 613.

²⁵¹ *Sasfin (Pty) Ltd v Beukes* (note 203 above) at 8-9. See also *Eastwood v Shepstone* 1902 TS 294 at 302.

²⁵² For example, the UK Consumer Protection Act of 1987 and the South African CPA of 2008.

²⁵³ S. 48- S. 52 of the South African CPA of 2008.

²⁵⁴ Smith (note 162 above) 20. See also Howells and Weatherill (note 19 above) 20.

²⁵⁵ Smith (note 162 above) 6.

4.4. *Standard form contracts*

Having discussed the criticisms directed at freedom of contract it is necessary to consider standard form contracts where the doctrine features most prominently. The origins of standard form contracts reach as far back as 15th century Europe where standard insurance policies were regulated by these forms.²⁵⁶ Standard form contracts had already become complex documents when they were later introduced them in 17th century England by Lord Mansfield.²⁵⁷ When industrialization permeated the consumer landscape in the 19th century these forms were extensively used.²⁵⁸ However, the term ‘standard form contract’ has been difficult to define.²⁵⁹ Standard form contracts have been defined as those contracts drafted in advance and presented to consumers by suppliers on a ‘take it or leave it’ basis.²⁶⁰ This means that the conditions in the contracts are prepared in advance and are open to acceptance in that form without negotiation.²⁶¹ These contracts are sometimes referred to as ‘mass contracts’ or ‘contracts of adhesion’, in terms of which there is no room for negotiation because the supplier in the contract imposes the terms on the consumer.²⁶² Sales,²⁶³ asserts that ‘neither the expression “standard form contract” nor any variant of it has acquired the status of a term of art or, indeed, any recognised and distinctive meaning...’ This is confirmed by Bright,²⁶⁴ who states that ‘[e]veryone has his own dictionary on the subject’ of standard form contracts. The difficulty in defining the phrase, according to Aronstam,²⁶⁵ arises from the widespread use of standard form contracts in different types of agreements and situations. This makes it is near impossible to attach meaning to a contract without a specific definition in context, content or terminology.²⁶⁶

The different justifications advanced in favour of the use of standard-form contracts have exacerbated the unrelenting and recurrent practice of including unreasonable and unfair contract

²⁵⁶ Ibid 12. See also Aronstam (note 167 above) 16-17.

²⁵⁷ Aronstam (note 167 above) 17.

²⁵⁸ Smith (note 162 above) 12.

²⁵⁹ Aronstam (note 167 above) 17.

²⁶⁰ *Barkhuizen v Napier* (note 195 above) Para 135. See also Sharrock (note 121 above) 296; Howells and Weatherill (note 19 above) 305; Kerr (note 169 above) 7; Turpin (note 213 above) 145.

²⁶¹ Aronstam (note 167 above) 16.

²⁶² Ibid 18. See also Kerr (note 169 above) 7; Sharrock (note 121 above); Howells and Weatherill (note 19 above) 17.

²⁶³ HB Sales ‘Standard Form Contracts’ (1953) 16 *MLR* 318. See also Aronstam (note 167 above) 17.

²⁶⁴ CH Bright ‘Contracts of Adhesion and Exemption Clauses’ (1967) 41 *Australian LJ* 261. See also Aronstam (note 167 above) 17.

²⁶⁵ Aronstam (note 167 above) 17.

²⁶⁶ Ibid 17-18.

terms in agreements.²⁶⁷ In the services sector, standard form contracts are most often monopolized by banks,²⁶⁸ insurance companies,²⁶⁹ financing houses,²⁷⁰ by businesses selling goods on hire purchase and public utilities entities that often have no competition in the provision of services.²⁷¹ For example, public sector entities that provide essential services like water and electricity often do not have competitors in the provision of those services.²⁷² Applied in this sense, consumers have no freedom to negotiate the terms that will govern the contractual relationship because the terms have already been pre-determined in the standard form.²⁷³ This effectively leaves room for exploitation through the inclusion of oppressive terms in the contract.²⁷⁴

While it sometimes happens that standard contracts are imposed by law the main reason for the use of standard form contracts is said to be convenience, particularly to dispense with the requirement of drafting separate contracts whenever a consumer seeks a service.²⁷⁵ Wilson²⁷⁶ supports the good intentions of standard form contracts as follows:

‘Preoccupation with the evils of standardised contracts from the point of view of the offeree must not allow their admitted virtues to be over looked. By saving time and trouble in bargaining, simplifying internal administration and facilitating planning, they reduce administrative costs to an extent which must benefit both parties. They have, it is said, a lulling effect induced by the knowledge that one is signing “what everyone else has signed”. They also reduce risk to a calculable quantity and, perhaps most important of all, have the potential, if drawn up in an enlightened manner, of becoming a wide code, governing intra- or extra-trade relations of a business group’.²⁷⁷

²⁶⁷ Cranston (note 7 above) 70. See also Howells and Weatherill (note 19 above) 17.

²⁶⁸ *Bank of Lisbon and South Africa v Ornelas and Another* 1988 (3) SA 580 (A); *First National Bank of South Africa Ltd v Bophuthatswana Consumer Council* 1995 (2) SA 853 (BG).

²⁶⁹ *Barkuizen v Napier* 2007 (5) SA 323 (CC).

²⁷⁰ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

²⁷¹ Aronstam (note 167 above) 14.

²⁷² *Ibid.*

²⁷³ *Ibid.* 22. See also Cranston (note 7 above) 70.

²⁷⁴ Turpin (note 213 above) 145. See also Aronstam (note 167 above) 23.

²⁷⁵ Howells and Weatherill (note 19 above) 17. See also Cranston (note 7 above) 70.

²⁷⁶ NS Wilson ‘Freedom of Contracts and Adhesion of Contracts’ (1965) 14 *Int & Comparative LQ* 172, 176.

²⁷⁷ *Ibid.* See also Aronstam (note 167 above) 24; Howells and Weatherill (note 19 above) 17, 305; Cranston (note 7 above) 70.

Hopkins²⁷⁸ aligns himself with the above view and asserts that standard form contracts provide advantages for both contracting parties, especially mitigating costs, thereby making economic sense in the process.²⁷⁹

There is some truth in the opinions that have been expressed; however, it cannot be denied that standard form contracts often contain terms that consumers are unable to negotiate with suppliers and this results in unsympathetic consequences for consumers.²⁸⁰ Christie,²⁸¹ for instance, acknowledges the noble beginnings of standard form contracts but goes on to say that what started off as a 'legitimate aid to planning and costing became an expensive trap for the unwary consumer' through the imposition of unfair terms which oust the consumer's common law remedies. The observation was made by Sachs J in *Barkhuizen v Napier*²⁸² that standard form contracts 'contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and operate to limit or exclude the consumer's normal contractual rights and the supplier's contractual obligations and liabilities'.²⁸³

From a business perspective, standard form contracts benefit the lawyers and experts who author them because they limit processes such as negotiation.²⁸⁴ Kessler²⁸⁵ expressed this view in the following way:

'The weaker party, in need of goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contracts 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, terms whose consequences are often understood only in a vague way, if at all.'

²⁷⁸ K Hopkins 'Standard Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice' (2003) 1 *TSAR* 150, 150-154.

²⁷⁹ Aronstam (note 167 above) 16-17. See also Howells and Weatherill (note 19 above) 305.

²⁸⁰ Smith (note 162 above) 12. See also Howells and Weatherill (note 19 above) 17.

²⁸¹ RH Christie *The Law of Contract in South Africa* 5 ed (2006) 184. See also Aronstam (note 167 above) 20.

²⁸² *Barkhuizen v Napier* (note 195 above).

²⁸³ At Para 135.

²⁸⁴ *Barkhuizen v Napier* (note 195 above) at paragraphs 137, 184. See also Christie (note 281 above) 183-184.

²⁸⁵ F Kessler 'Contracts of Adhesion- Some thoughts about Freedom of Contract' (1943) 43 *Columbia LR* 629, 632. See also Aronstam (note 167 above) 15.

Suppliers form small groups and organize themselves in order to monopolize trade.²⁸⁶ The engine of trade often used is the standard form contract which introduces standard conditions that apply uniformly across a trading group.²⁸⁷ This practice was expressed by Bowen LJ in *Mogul Steamship Co. Limited v McGregor, Gow & Co & others* (1889) 23 Q.B.D. 598, as follows:

‘All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future.’²⁸⁸

Perhaps it must be considered how standard form contracts, coupled with their non-negotiable import, impose unfair contract terms on consumers. Such concerns are raised especially because standard form contracts systematically oust the negotiation of terms and inevitably compromise an individual’s freedom to contract.²⁸⁹ Lord Reid, commenting on the lack of freedom of contract in standard form agreements, pointed out the following in the English case of *Suisse Atlantique Société D’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361:

‘In the ordinary way, the customer has no time to read [the standard terms], and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told he could take or leave it. And if he went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining.’²⁹⁰

It must be noted that standard contracts are inherently arbitrary and have the potential of importing of unreasonable terms.²⁹¹ These forms have been attacked by the courts in a number of ways. Coetzee J brought standard form contracts under heavy spotlight in the case of *Western*

²⁸⁶ Aronstam (note 167 above) 20-21.

²⁸⁷ Ibid 21.

²⁸⁸ At 615.

²⁸⁹ In *Barkhuizen v Napier* (note 195 above) Para 138.

²⁹⁰ At 406.

²⁹¹ Aronstam (note 167 above) 16. See also *Western Bank v Sparta Construction Co.* 1975 (1) SA 839 (W) at 840.

Bank v Sparta Construction Co. 1975 (1) SA 839 (W) where he made the following trenchant remarks:

‘It is undesirable that this form of [contracting]...should be developed without adequate safeguards in law to protect those members of the public who are in need of this type of finance. They should not find themselves in a position where they have to rely on the honesty and sense of fair dealing of the financier. One can point to a number of undesirable features of these printed agreements. If a [person] could read and understand them, he might very well not find the agreement, as a whole, acceptable to him. The time has arrived when a proper investigation into this form of [contracting] should be made and, if found desirable and feasible, legal provisions which are fair to both parties should then be enacted to regulate their peculiar relationship.’²⁹²

The above excerpt reveals that, in the absence of reading and understanding the contents of standard form contracts, it is difficult to conclude that there is contractual ‘freedom’ between the parties.²⁹³ Furthermore, bargaining on terms which the consumer is unaware and specifically has no information about negates free-will on his part.²⁹⁴ Jansen JA in *Bank of Lisbon and South Africa v Ornelas and Another*²⁹⁵ observed that freedom of contract had come under attack for various reasons, one of them being the large-scale use of standard form contracts. It is somewhat startling and remarkable that the courts have had considerable difficulty in intervening on behalf of consumers in order to dispel the tensions created by freedom of contract through standard form contracts.²⁹⁶ Sachs J. in *Barkhuizen v Napier*²⁹⁷ lamented as follows:

‘Proliferation of standard-form contracts undermine rather than support the integrity of what was actually concluded between the parties. It may be said that far from promoting autonomy, they induce automatism.’²⁹⁸

²⁹² At 840. See also Aronstam (note 167 above) 16.

²⁹³ Atiyah (note 162 above) 731.

²⁹⁴ Ibid.

²⁹⁵ *Bank of Lisbon and South Africa v Ornelas and Another* (note 268 above) at 613.

²⁹⁶ See the cases of *First National Bank of Southern Africa Limited v Rosenblum and Another* 2001 (4) SA 189 (A). *Afrox Healthcare Bpk v Strydom* (note 195 above); *Brisley v Drotzky* (note 195 above).

²⁹⁷ *Barkhuizen v Napier* (note 195 above).

²⁹⁸ At Para 155.

And further that:

‘In my view, to treat mass-produced script as sanctified legal Scripture is to perpetuate something hollow and to dishonor the moral and philosophical foundation of contract law.’²⁹⁹

In the case of *Linstom v Venter* 1957 (1) SA 125 (SWA), Claassen JP disapproved standard form contracts containing unfair contract terms, stating:

‘The person who is unable to pay cash for a valuable article such as a motor-car, often finds his freedom of contract very limited, because so many trading firms have adopted standard forms of contract which the purchaser has to sign or remain without the article. Theoretically the prospective purchaser is free to offer terms and reject counter-offers, but in practice he usually has to sign the seller’s printed form of contract in order to obtain the desired article. Such contracts are designed for the protection of the seller and their terms are often of an oppressive nature.’³⁰⁰

Clearly, standard form contracts have hatched and fermented under freedom of contract.³⁰¹ The unfortunate situation is that consumers often have no option but to accept the standard form contract with its attendant unfair provisions.³⁰²

In order to arrest the problems accompanying standard form contracts legislative regulation was considered the ideal solution.³⁰³ In the UK contract terms in standard form contracts are controlled by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, while the CPA of 2008 governs same in South Africa.³⁰⁴ Besides statutory regulation judicial control has also played an important role.³⁰⁵ In a jurisdiction such as

²⁹⁹ Ibid.

³⁰⁰ At 127.

³⁰¹ Howells & Weatherill (note 19 above) 17-18. See also Smith (note 162 above) 12; Aronstam (note 167 above) 16.

³⁰² *Linstom v Venter* 1957 (1) SA 125 (SWA).

³⁰³ T Naude & G Lubbe ‘Exemption Clauses- A Rethink Occasioned by Afrox Healthcare Bpk v Strydom’ Vol. 122 (2005) *SALJ* 441.

³⁰⁴ Sharrock (note 121 above) 297-298.

³⁰⁵ Turpin (note 213 above) 146. See also Howells & Weatherill (note 19 above) 20-25, 306-310; Lowe & Woodroffe (note 4 above) 97-104.

Swaziland, where there is no legislation controlling contract terms in general, it is more plausible for courts to protect bargains that have not been subject to negotiation between parties.³⁰⁶

4.5. *Caveat subscriptor*

Caveat subscriptor is a maxim that loosely translates, ‘let the signer beware’, and is a common law principle stating that a party will be bound by the terms of a contract he signs.³⁰⁷ This maxim is disadvantageous because a consumer who signs an agreement cannot later contend that he did not read the document if the terms turn out to be unfair.³⁰⁸ Courts will not release a ‘foolish improvident contractant who has willingly but unwisely signed a contract’.³⁰⁹ This principle finds expression in the leading case of *Burger v Central South African Railways*³¹⁰ where the court was of the view that it could not protect a party from a contract he had willingly entered into and signed. Innes, CJ reinforced contractual freedom under the banner of *caveat subscriptor* as follows:

‘[O]ur law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable.’³¹¹

He further stated that:

‘It is a sound principle of our 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. There are, of course, grounds upon which he may repudiate a document to which he has put his hand.’³¹²

The above decision became authority for many subsequent judgments. The most notable is that of *George v Fairmaid (Pty) Ltd* 1958 (2) SA 465 (A) where the court held that, when people sign

³⁰⁶ Ibid.

³⁰⁷ Turpin (note 213 above) 150. See also Aronstam (note 167 above) 11; Christie (note 281 above) 174-175.

³⁰⁸ *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) at 524. See also M Havenga *et al General Principles of Commercial Law* 7 ed (2011) 111; MA Fouche ‘Consensus (continued) Factors Influencing Consensus’ in Fouché (note 147 above) 64.

³⁰⁹ Aronstam (note 167 above) 11.

³¹⁰ *Burger v Central South African Railways* (note 166 above).

³¹¹ Ibid at 576.

³¹² Ibid at 578.

documents, their intention is simply to indicate that they agree with the words that appear above their signatures in the document in question.³¹³ In this case the appellant lost his clothing and personal effects while lodging as a guest at a hotel.³¹⁴ The appellant had signed a register without acquainting himself with a clause indemnifying the hotel from claims arising from, but not limited to, theft.³¹⁵ Despite his pleading mistake, the court held that this was not a reasonable plea.³¹⁶ In refusing to set aside the contract that had apparently not been read by the plaintiff, Fagan CJ held as follows:

‘When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.’³¹⁷

And further that:

‘So now he knew that he was signing a document which contained terms of his contract. Just below the items he had filled in, but above the space for his signature, he saw what he himself described as “a long passage”. The merest glance at it would have shown him that it commenced with the words “I hereby agree”. But “he did not bother to read it”. Yet he signed... [H]e knew that he was assenting to something, and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a *justus error*.’³¹⁸

In dismissing the appeal, the court came to the conclusion that the liability of the respondent had been excluded by the contract. Nevertheless, there are exceptions to this doctrine. Courts have held that where one party misleads another to enter into and sign a contract, they would intervene and come to the aid of the party that was misled on grounds of public policy.³¹⁹ This is an exception to and constitutes one of the grounds under which the doctrine of *caveat subscriptor*

³¹³ At 472.

³¹⁴ At 468.

³¹⁵ Ibid.

³¹⁶ At 471.

³¹⁷ At 472.

³¹⁸ At 472-473.

³¹⁹ *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* (note 308 above) at 524.

will fail. In the case of *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) the court effectively refused to allow a motor repair company to rely on an exemption clause contained in a job-card.³²⁰ The customer had signed the job-card after being told that her signature was needed before repair-work could commence on her motor vehicle.³²¹ In other words, the customer appended her signature while labouring under the impression that she was authorizing the repair work on her vehicle.³²² She was not informed of the exemption clause written in small print at the bottom of the card which absolved the garage from liability for loss of any nature, including loss arising from the company employees' negligence.³²³ After loss eventuated, the customer sought the court's intervention. The court came to the conclusion that the customer was under the impression that she was signing a document for the limited purpose explained to her, namely- repair-work on her vehicle.³²⁴ Further, the court found that there was no reasonable basis on which the company's employees could be entitled to accept that the customer had read the job-card and was aware of the existence of the exemption clause.³²⁵ As a result the *caveat subscriptor* principle did not apply and the garage was held liable.

The *caveat subscriptor* principle could not assist the second defendant in the case of *Fourie N.O v Hansen and Another* 2001 (2) SA 823 (W), where several co-workers attended a sporting event using a microbus hired by their employer.³²⁶ The vehicle had been delivered to the home of first defendant who signed a rental agreement while labouring under the impression that he was signing a document for accepting delivery of the vehicle.³²⁷ The agreement contained an exemption clause absolving the second defendant from liability for, among other things, injury caused by the vehicle.³²⁸ The court held that in order for the doctrine of *caveat subscriptor* to apply, the offensive clause should have been drawn to the plaintiff's attention.³²⁹ In the absence

³²⁰ At 527.

³²¹ At 521-522.

³²² At 526.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ At 527.

³²⁶ At 827.

³²⁷ At 829.

³²⁸ At 827.

³²⁹ At 834.

of drawing the existence of the clause to the plaintiff's attention, the *caveat subscriptor* principle was inapplicable.³³⁰

Other exceptions that serve as defences to the *caveat subscriptor* principle are duress, fraud, misrepresentation, undue influence and illegality of the agreement.³³¹ Additionally, *justus error* or mistake also operates as a bar to the *caveat subscriptor* principle if it can be shown that the signer of the document had been misled as to the nature, purport and content of the document signed.³³² Christie³³³ bluntly states that if one party sets a trap by tricking another into signing a contract hastily without drawing attention to certain provisions, courts will not apply the doctrine of *caveat subscriptor*.

It has been demonstrated that the principle of *caveat subscriptor* generally applies in contractual relations between parties save where the recognised exceptions find application. In other words, whether or not a contractual provision is unfair is of little concern to the courts.³³⁴ In fact, the authorities examined above reveal that the courts are generally not concerned with the question whether contractual terms are at variance with consumer interests. Instead, they are more willing to sacrifice consumer rights in order to uphold the hollowed doctrine of contractual freedom on the ground that a contract has been freely and voluntarily concluded.³³⁵

4.6. Caveat emptor

Having demonstrated the manner in which standard form contracts support contractual freedom it is important to consider *caveat emptor*, a common law principle under which freedom of contract thrives. This principle has its origins in 17th century England where it was pronounced upon in the very old case of *Chandelor v Lopus* (1603) Cro. Jac. 4, 79 E.R. 3.³³⁶ The maxim of

³³⁰ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) at Para 33.

³³¹ Christie (note 281 above) 177. See also Havenga (note 308 above).

³³² *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* (note 308 above) at 524. See also *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471.

³³³ Christie (note 281 above) 178.

³³⁴ Aronstam (note 167 above) 13.

³³⁵ *Ibid.*

³³⁶ Atiya (note 162 above) 178-179.

caveat emptor simply means that purchasers buy goods at their own risk.³³⁷ In terms of this principle, consumers are required to carefully examine goods and exercise extreme caution when they purchase goods.³³⁸ If a buyer 'is not aware'; he may lose his right of recourse in law against products that were badly manufactured.³³⁹ The point being made is that the almost sovereign slogan and age-old business expression, 'the customer is always right', has no place when *caveat emptor* is invoked. Goldring,³⁴⁰ commenting on the role of *caveat emptor* in consumer transactions, states:

'In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor*- meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. Now the marketing of goods and services is conducted on an organized basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods and services on terms and conditions suitable to the vendor. The consumer needs protection by law.'

In the case of *Kruger v Pizzicanella & another* 1966 (1) SA 450 (C), the question whether a lease agreement on certain immovable property contained the full and correct terms of an agreement had to be decided in the context of the *caveat emptor* doctrine.³⁴¹ In this case the defendant lessee occupied a piece of land that had been recently purchased by the plaintiff. The land previously belonged to a certain seller who was a landlord to the defendant.³⁴² The seller and defendant had concluded a lease agreement which was subsequently varied orally so that the rental paid by the defendant lessee on the premises would be reduced.³⁴³ When the plaintiff purchased the property from the seller he was not informed about the oral variation of the written lease agreement.³⁴⁴ The plaintiff challenged the amendments but was held bound to them under

³³⁷ C Hemphill *The Consumer Protection Handbook: A Legal Guide* (1981) 3. See also Oughton (note 4 above) 13; Garner (note 33 above) 236.

³³⁸ Ibid.

³³⁹ Howells and Weatherill (note 19 above) 14.

³⁴⁰ J Goldring *Consumer Protection Law* 5 ed (1997) 2. See also J Goldring 'Consumer Protection and the Trade Practices Act (1974-1975)' 6 *Federal Law Review* at 228.

³⁴¹ At 454.

³⁴² At 451.

³⁴³ At 451.

³⁴⁴ At 452.

the doctrine of *caveat emptor* and it was held that a duty rested upon him to ascertain whether existence of any amendments on the document.³⁴⁵ In allowing the amendments to stand the court held that the plaintiff ought to have enquired from the seller if any amendments had been made to the agreement and any fraudulent misrepresentations would have entitled him to a remedy.³⁴⁶

Fraudulent misrepresentation as a limitation to *caveat emptor* was considered in the case of *Jones v Mazza & another* 1973 (1) SA 570 (R). In this case the plaintiff landlord reduced a monthly rental of \$ 190 after rentals the defendants had fraudulently misrepresented the fact that they could not afford it.³⁴⁷ The plaintiff reduced the monthly rental to \$ 145 for a period of 5 years believing that defendants would be deprived of their means of livelihood.³⁴⁸ The question whether the misrepresentation was material was decided in light of the doctrine of *caveat emptor*. The court referred with approval to the often cited dictum of Kotzé J in the case of *Corbett v Harris* 1914 CPD 535³⁴⁹ as follows:

‘When a man offers a farm or anything else for sale, it is not every statement made by him, which subsequently turns out to be untrue, that will justify either a rescission of the contract or a diminution of the purchase price. Simple puffing and mere commendation in describing the thing offered for sale are not actionable. In such a case the maxim *caveat emptor* applies, and the purchaser will have to content with his bargain.’³⁵⁰

Goldin J found the *caveat emptor* doctrine inapplicable in this case because the defendants had not merely puffed but had fraudulently misrepresented facts.³⁵¹ It was held that the plaintiff was entitled to the outstanding balance.³⁵²

From the above discussion on the role of the law of contract in private law, it is evident that the under each principle the courts have attempted to shield consumers from unfair trading practices

³⁴⁵ At 454-455.

³⁴⁶ At 455.

³⁴⁷ At 570.

³⁴⁸ At 570-571.

³⁴⁹ At 543.

³⁵⁰ At 572.

³⁵¹ At 579.

³⁵² Ibid.

engaged in by suppliers. The law of contract in general has been substantially developed both in the UK and South Africa through legislative regulation.³⁵³ However, the same cannot be said of Swaziland. It is necessary to consider below the extent to which the law of delict affects consumer relationships.

5. CONSUMERS AND THE LAW OF DELICT

The basic function of the law of delict is to place the victim of injury in the state that existed prior to the harm eventuating so as to restore the status *quo ant e*.³⁵⁴ A delict is defined as follows:

‘A delict is any unlawful culpable act whereby a person (the wrongdoer) causes the other party (the person prejudiced) damage or an injury to personality, and whereby the prejudiced person is granted a right to damages or compensation, depending on the circumstances.’³⁵⁵

The standard of wrongfulness is determined by the legal convictions of the community or the *boni mores*, while culpability requires proof of intention or negligence.³⁵⁶ Van Eeden³⁵⁷ defines negligence as ‘conduct of carelessness, thoughtlessness or imprudence because by giving insufficient attention to his actions the wrongdoer failed to adhere to the standard of care required of him’. A consumer who suffers bodily injury or harm as a result from defective products from a manufacturer may have a claim under the *acquilian* action in terms of which he must prove that the harm was caused by the wrongful and culpable conduct of the manufacturer.³⁵⁸

The definition of the word ‘consumer’ examined earlier in this chapter may have created the impression that a consumer relationship is limited only contracting parties. However, this is not so. There is another class of consumers which has a non-contractual relationship with suppliers

³⁵³ In the UK there are several statutes regulating contracts including the Unfair Contract Terms Act of 1977, while in South Africa contracts are regulated in S. 48- S. 51 of the CPA of 2008.

³⁵⁴ Cartwright (note 10 above) 15.

³⁵⁵ Havenga (note 308 above) 36.

³⁵⁶ Ibid.

³⁵⁷ Van Eeden (note 3 above) 63.

³⁵⁸ Ibid. See also *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (2) All SA 167 (SCA) at Para 17; Christie (note 281 above) 497.

commonly referred to as ‘third party consumers’.³⁵⁹ Third-party consumers are considered below.

5.1. Third parties in consumer contracts

It has been stated above that contracting parties only include those persons bound under a contractual agreement.³⁶⁰ In other words, third parties are usually not party to the contract because they are excluded by the doctrine of contractual privity.³⁶¹ In the strict contractual sense, third parties only become parties to a contract either, (a) under a contract for the benefit of a third party (*stipulato alteri*); (b) assignment; (c) cession; or (d) delegation.³⁶² The common law has been responsible for a number of important rules which have been adopted as consumer protection measures. In delict it has now been established that an agreement between the supplier and the ultimate consumer of the goods or services is not an ingredient for liability to arise.³⁶³ The sanctions imposed on a manufacturer arise from a duty of care owed to consumers of manufactured products.³⁶⁴ Thus, consumers may claim damages for personal injury or death resulting from defective products.³⁶⁵ The ability of a consumer to proceed against manufacturers or suppliers with whom he has no contractual relationship has been confirmed in different jurisdictions.

In the United States of America development commenced in 1916 after the New York Court of Appeals held in *Macpherson v Buick Motor Co* 217 NY.382 III N E 1050 (1916) that a car manufacturer had to compensate an injured third party for injury caused by defective manufacture. The plaintiff was a third party since the motor vehicle had been purchased from a dealer and not directly from the manufacturer. The court had to decide whether a duty of care by the manufacturer extended to third parties.³⁶⁶ In arriving at his decision, Cardozo J held that the consumer had been injured as a result of a defect that arose during manufacture which could

³⁵⁹ Smith (note 162 above) 13. See also Howells and Weatherill (note 19 above) 31-32; Oughton (note 4 above) 7, 129; Macquoid-Mason (note 2 above) 5.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² MA Fouché ‘Parties to a Contract’ in Fouché (note 147 above) 116.

³⁶³ Smith (note 162 above) 13.

³⁶⁴ *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co. (Pty) Ltd* (note 2 above) at 462. See also *Cape Town Municipality v Paine* 1923 A.D 207 at 216-217; *Donoghue v Stevenson* [1932] A.C 562 at 580.

³⁶⁵ Ibid.

³⁶⁶ JS Ashworth *Product Liability Case book* (1984) 4.

have been discovered by the manufacturer on reasonable inspection.³⁶⁷ The court concluded that the manufacturer was liable to the plaintiff consumer.

In the UK, up until 1932, the position of the law was that third parties had no right of claim against manufacturers because no contractual relationship between the parties.³⁶⁸ The right to recover damages for personal injury was confined to parties in a contractual relationship.³⁶⁹ The Law Lords in the well-known Scottish case of *Donoghue v Stevenson* [1932] A.C. 562 recognised third parties in consumer transactions and Lord Atkin laid the rule that a manufacturer owes a duty of care to such third parties.³⁷⁰ In this case Mrs. Donoghue, the appellant, suffered physical harm as a result of drinking ginger-beer containing the decomposed remains of a snail.³⁷¹ The appellant suffered from shock and severe gastro-enteritis as a result of a decomposed snail in ginger beer she had consumed.³⁷² She alleged that the manufacturer had a duty to provide an efficient system of inspecting ginger beer bottles before them with ginger-beer; that he had failed in discharging these duties; and as a result the manufacturer was liable for negligence to the appellant.³⁷³ Being aware that her claim against the manufacturer was barred by privity of contract, the appellant contended that the manufacturer owed a duty of care to ensure that the products its products did not harm third party consumers.³⁷⁴ Privity of contract also barred the appellant from claiming damages against the café because the drink had been purchased by her friend.³⁷⁵

Indeed, the appellant, Mrs. Donoghue, was struggling in a sea of adverse authority because all the legal authorities, but one, were against the claim she pursued.³⁷⁶ Lord Atkin, realising that an injustice loomed large between third party consumers and manufacturers, took it upon himself to grapple with the authorities.³⁷⁷ He experienced a bitter struggle and was occasionally tossed

³⁶⁷ Ibid.

³⁶⁸ Smith (note 162 above) 13.

³⁶⁹ Ibid.

³⁷⁰ *Donoghue v Stevenson* (note 364 above) at 580.

³⁷¹ At 566.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ *Donoghue v Stevenson* (note 364 above) at 568, 597.

³⁷⁶ At 584.

³⁷⁷ At 579.

upon the rocks by the stormy currents of the unsympathetic case law.³⁷⁸ The learned judge however, was intent in coming to the aid of the appellant who was destitute of a remedy.³⁷⁹ In a very narrow majority decision, he navigated the hostile case law and arrived safely at his ruling, curtailing the doctrine of privity of contract in the process. The court formulated a principle that had no previous existence and which set out the criteria for determining when a duty is owed to a third party based on foreseeability of harm.³⁸⁰ Confirming the existence of the alleged duty of manufacturers towards third parties, Lord Atkin formulated the ‘neighbour principle’ as follows:

‘The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’³⁸¹

This case was classical in consumer law simply because it laid the foundation for the now established proposition that a manufacturer owes consumers a duty of care to third parties in the course of manufacturing his products with foreseeability of harm being the guiding principle.³⁸² The neighbour principle was later applied in the famous Australian case of *Grant v Australian Knitting Mills* [1936] A.C. 85. In this case the appellant consumer was a medical practitioner who purchased from a retailer defectively manufactured underwear which contained excess chemical irritant-free sulphites which resulted in him contracting dermatitis.³⁸³ The court held that he was entitled to sue the manufacturer as a third party irrespective of the fact that he had not purchased the underwear from the manufacturer but from the retailer.³⁸⁴

³⁷⁸ Decisions like *Longmeid v Holiday* (6 Ex. 761.) and *Langridge v Levy* (4 M.W. 337; 2 M.W. 519) did not assist Lord Atkin.

³⁷⁹ At 583. See also G Cameron *Law Basics: Delict* (2002) 6.

³⁸⁰ At 582-583. See also Cameron (note 379 above) 7.

³⁸¹ At 580.

³⁸² Cameron (note 379 above) 7. See also Cartwright (note 10 above) 15.

³⁸³ At 89-90.

³⁸⁴ At 101.

In the South African case of *Blore v Standard General Insurance Co. Ltd* 1972 (2) SA 89 (O) the plaintiff was a passenger in a motor vehicle that had a defective steering mechanism.³⁸⁵ The motor vehicle in which the plaintiff was travelling in was involved in a collision and the plaintiff got injured in the process.³⁸⁶ It turned out that the vehicle had been negligently serviced by an employee in a garage. The plaintiff, as a third non-contracting party, was awarded damages against the garage which was held liable to the plaintiff.³⁸⁷ Similar considerations were taken into account in the case of *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* [2003] 2 All SA 167 (SCA). In this case the court recognized that the manufacturer, while not under a contractual duty to the appellant, was under a legal duty in delict to avoid harm to the appellants.³⁸⁸ The appellant suffered personal injury in a hospital as a result of a defective anesthetic injection called 'regibloc'.³⁸⁹ The appellant was a third party towards the manufacturer who had contracted with the hospital in the procurement of the anesthetic injection. Despite the absence of a contractual relationship between the appellant and the respondent, Howie P acknowledged third party consumers as follows:

'This matter concerns the extent to which a manufacturer can be strictly liable in delict for unintended harm caused by defective manufacture of a product where there is no contractual privity the manufacturer and the injured person.'³⁹⁰

The court then considered whether the manufacturer breached its duty of care towards the appellant by supplying the defective injection.³⁹¹ The appellant was not successful because the claim had not based on the aquilian action but on common law strict liability which does not exist in South African law.³⁹² While the ultimate consumer principle requires manufacturers to take consumer interests into account during production of goods, it is insufficient in safeguarding consumers. It is for this reason that some countries have enacted legislation that imposes strict liability on manufacturers for defective products in certain circumstances.

³⁸⁵ At 89.

³⁸⁶ At 90.

³⁸⁷ At 99.

³⁸⁸ At Para 7.

³⁸⁹ At Paragraphs 1-2.

³⁹⁰ At Para 1.

³⁹¹ At Para 7.

³⁹² At Para 38.

Having discussed the basic concepts that underpin the law of delict it is important to go on and identify the inherent weaknesses and consider the criticisms leveled on the law of delict in consumer law.

5.2. Criticisms against the law of delict

The weakness of the law of delict in protecting consumers lies in requiring consumers to prove fault either in the form of negligence or intention on the part of the manufacturer.³⁹³ The contention is that fault is extremely difficult to establish.³⁹⁴ Proving fault is difficult because consumers do not have access to information on the manufacturing processes and the general workings of manufacturers which would assist them in reinforcing claims.³⁹⁵

While common law rules have had some influence in consumer protection, it is also true that in many respects, the common law proved to be an inadequate tool and that statutory intervention was necessary.³⁹⁶ It is for that reason that in recent years the position of the non-contractual consumer has been recognized, especially through the enactment of legislation in both the UK and South Africa. Third parties in the UK find refuge in the Consumer Protection Act of 1987³⁹⁷ as read with the Product Safety Regulations 1994, while South African third party consumers are protected from harm caused by defective goods under the CPA of 2008.³⁹⁸ The task facing the injured consumer is not an easy one, especially proving that harm resulted from defective manufacturing processes.³⁹⁹ The requirements are not easy to establish. For this reason, some statutes have introduced strict liability in terms of which a party need not necessarily prove fault.⁴⁰⁰ This development will be discussed in the chapters to follow where legislation is examined.

³⁹³ Van Eeden (note 3 above) 65. See also Macquoid-Mason (note 2 above) 5; *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co. (Pty) Ltd* (note 2 above) 461, 463.

³⁹⁴ Ibid. See also *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* (note 358 above) at Para 10.

³⁹⁵ Cranston (note 7 above) 4-7.

³⁹⁶ Ibid 67.

³⁹⁷ S. 2 (2) (a) - (c) of the UK Consumer Protection Act of 1987.

³⁹⁸ S. 61 of the CPA of 2008.

³⁹⁹ Havenga (note 308 above) 35-36. See also Lowe & Woodroffe (note 4 above) 72.

⁴⁰⁰ For example S. 61 of the South African CPA of 2008; S. 2 of the UK Consumer Protection Act 1987. See also Oughton (note 4 above) 55-57; Howels & Weatherill (note 19 above) 199, 415.

6. CONCLUSION

One of the conclusions to be drawn from this chapter is that the definition attached to the word 'consumer' may be understood in different contexts, with the potential of attracting different results. No specific definition is completely correct, neither is there one held to be completely wrong. It has been demonstrated that consumers are not limited to contracting parties. A consumer includes the ultimate user of goods and services. This chapter has also revealed that freedom of contract under the law of contract militates against consumer protection if not carefully monitored.

There is no perfect approach to consumer protection to 'guard against every wile or adjust every trifling injustice'.⁴⁰¹ The law in modern consumer parlance protects the consumer from many different injustices in different ways. The common law concepts discussed in this chapter form the basis of the chapters that follow. Each of the chapters to be considered will constantly make reference to the concepts discussed in this chapter. In line with this approach, the next chapter will discuss consumer protection in Swaziland against the background of the principles examined in this chapter.

⁴⁰¹ Molony Report (note 5 above) Para 896.

CHAPTER 3

CONSUMER PROTECTION IN SWAZILAND

1. INTRODUCTION

The previous chapter introduced and defined the concepts of ‘consumer’ and ‘consumer protection’, and the manner in which they have been interpreted and applied in other jurisdictions. The fundamental consumer protection principles under the common law were also discussed. Moving from a focus on other jurisdictions, this chapter will examine the situation with regard to consumer protection in Swaziland. While there are numerous areas in the consumer landscape of Swaziland that require urgent attention, the analysis will restrict itself to unfair contract terms and product liability. In addition to a discussion of these two areas the chapter will include an analysis of legislation dealing with consumer issues. Legislation to be considered includes the Hire-Purchase Act 11 of 1969, Money Lending and Credit Finance Act 3 of 1991 and the Fair Trading Act, 2001. It will be demonstrated that although not expressly protecting consumers, these pieces of legislation are the only statutes that go anyway at all in an attempt to safeguard consumer interests.

2. THE CONSUMER FRAMEWORK IN SWAZILAND

The economic market of Swaziland is mainly constituted by imported goods.¹ There are a number of challenges posed by goods of foreign origin. One of the challenges is that competition between vendors and suppliers in the distribution of imported goods raises product quality concerns because such goods are not subject to product-compliance tests.² The reason is that there are currently no laboratories in Swaziland to conduct quality tests on imported products.³ Instead, South African product quality standards under the South African Bureau of Standards (SABS)⁴ and the South African National Accreditation System (SANAS) apply in Swaziland.⁵ This raises a serious problem because the SABS standards are regulated by the South African

¹ ‘Swaziland’ available at <http://www.sadt.int/files/2013/0277/8289/Swaziland.doc>, accessed on 25 September 2012.

² ‘Kingdom of Swaziland’- Tralac Trade Law Centre, available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/TPR2009annex_5_swaziland_201003.pdf, accessed on 25 September 2012.

³ Ibid. see also ‘Swaziland’ (note 1 above).

⁴ Established in terms of the South African Standards Act 29 of 1993.

⁵ ‘Swaziland’ (note 1 above). See also ‘Kingdom of Swaziland’ (note 2 above).

Standards Act 29 of 1993. In other words, the SABS standards as they apply in Swaziland are subject to a South African statute.⁶ This situation is unfortunate because Swaziland is a sovereign country that has the capacity to formulate and apply its own statutory law.⁷ The Fair Trading Act of 2001 also offers no assistance as it only prohibits the importation of goods bearing false trade descriptions or trade marks.⁸ The importance of regulating imported goods cannot be over-emphasised, especially because Swaziland it is yet to acquire membership of international standards bodies like the International Organisation of Standardization (ISO), African Standardization Organisation (ARSO), International Electrotechnical Commission (IEC), and the International Laboratory Accreditation Forum (IAF).⁹

In as far as contractual terms are concerned courts rely on the common law to resolve disputes between contracting parties.¹⁰ However, certain contract terms are regulated by statute.¹¹ For example, hire purchase agreements are regulated by the Hire Purchase Act 11 of 1969, while money lending agreements are regulated under the Money Lending and Credit Financing Act 3 of 1991. As will be seen later in the chapter, courts in Swaziland have demonstrated zeal in protecting consumers of credit in most instances.¹² However, other consumer areas have been neglected and courts have been slow in developing consumer jurisprudence this regard. To illustrate this point, a case which presented the court with an opportunity to develop consumer law jurisprudence will be analysed. This case reveals that courts are not only aware that consumers require protection, but that consumer protection itself is a very important issue. The case in issue is that of *Meshack Kunene v Swaziland Electricity Board* (unreported) High Court Civil Case 849/ 2007. In this case the applicant sought an order to reconnect electricity into his home after the respondent electricity company had disconnected and removed its power line on

⁶ The South African Standards Act 29 of 1993.

⁷ S. 1 (1) of the Swaziland Constitution of 2005.

⁸ S. 19 (1) - (3) of the Fair Trading Act of 2001.

⁹ 'Kingdom of Swaziland' (note 2 above).

¹⁰ *Development and Savings Bank v Diversa Holding Corporation* (unreported) High Court Civil Case 3624/ 2005 Para 1-2.

¹¹ For example, hire purchase agreements are regulated by the Hire Purchase Act 11 of 1969.

¹² See the cases of *Paulos Simelane v Bonisile Magagula and another In re: Bonisile Magagula v Paulos Simelane* (unreported) High Court Civil Case 948/ 2005. See also *Mandla James Dlamini v Select Management Services (Pty) Ltd and others* (unreported) High Court Civil Case No. 3381/ 2009; *Reckson Mawelela v Mbabane Association of Money Lenders & Another* (unreported) Civil Appeal Case No. 43/ 99, amongst others.

allegations that the applicant had tampered with electricity connections.¹³ The opening remarks of the court were as follows:

‘This application before court is concerned with the very important issue of the protection of consumer rights where the Applicant a simple landowner at Nkwalini Zone 4 had his electricity disconnected by the Respondent being Swaziland Electricity Board on account that he had fraudulently tampered with the supply of electricity to the sum of E 4, 903-27.’¹⁴

Despite this promising introduction, the judge eventually shied away from addressing the adverse effects of estimated billing which is a widespread practice affecting consumers in Swaziland’s electricity industry.¹⁵ The ability to identify the issue of consumer protection yet the failure to address it reflects the challenges experienced by the courts in Swaziland. Nevertheless, this chapter will consider the alternatives available to the courts in ensuring that consumers in Swaziland.

Having highlighted the some of the challenges in the current consumer framework, it is necessary to consider the issues affecting consumers in more detail.

3. UNFAIR CONTRACT TERMS IN SWAZILAND

It is generally accepted that freedom of contract forms the basis of all contractual relationships.¹⁶ This section will consider the effects of contractual freedom under three types of clauses which are often used to exploit consumers. These are the exemption clause; the non-variation clause; and the *voetstoots* clause. The analysis will suggest that statutory regulation of these clauses is imperative because they are susceptible to abuse by suppliers and service providers against economically weak consumers. The various clauses are discussed in turn.

¹³ At Para 1.

¹⁴ Ibid.

¹⁵ At paragraphs 9 and 11.

¹⁶ *Gugu Fakudze and another v Principal Secretary in the Ministry of Enterprise and Employment and Others* (unreported) High Court Civil Case No. 2485/ 2008 at paragraphs 37, 42. See also M Havenga *et al General Principles of Commercial Law* 7 ed (2011) 48.

3.1. *The exemption clause*

An exemption clause limits or excludes the liability of a party in a contract.¹⁷ The origin of exemption clauses is traced to the European industrial revolution of the mid-18th century when mass production of goods was introduced.¹⁸ The clauses were introduced by manufacturers in order to avoid lawsuits since the risk of producing defective goods in large quantities was high.¹⁹ Over time, exemption clauses were no longer used by manufacturers to protect their economic interests, but became traps to exploit consumers, who were in a weaker bargaining position.²⁰ Except in exceptional circumstances, courts often refused to release consumers from oppressive exemption clauses in recognition of contractual freedom.²¹ It must now be considered how courts in Swaziland have dealt with exemption clauses.

There is not much case law on exemption clauses in Swaziland save for the case of *Nonhlanhla Tsabedze v The University of Swaziland* (unreported) High Court Civil Case 3432/ 2010 which dealt with relevant principles. In this case a prospective student was provisionally offered a place to study in the University of Swaziland after successfully applying for admission.²² After accepting the offer, but before registration, the university realised that she did not meet the qualification requirements.²³ The university later refused to register her as a student despite having initially accepted her.²⁴ As a result, the prospective student then moved an urgent application in court seeking admission.²⁵ The question for determination was whether the applicant was entitled to an order for specific performance.²⁶ However, the learned judge was drawn to consider a different issue. Accordingly, the court felt there was a need to address a certain stipulation in the letter offering the prospective student a place to study which read:

¹⁷ AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 427-428. See also PN Stoop 'The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract' (2008) 20 *SA Merc LJ* 496.

¹⁸ D Yates *Exclusion Clauses in Contracts* 2 ed (1982) 1.

¹⁹ *Ibid.*

²⁰ *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C) at 477. See also CJ Pretorius 'Exemption Clauses and Mistake: *Mercurius Motors v Lopez* 2008 (3) SA 572 SCA' (2010) 73 *THRHR* 491.

²¹ *Burger v Central South African Railways* 1903 TS 571 at 578.

²² At Para 3.

²³ At Para 3.

²⁴ At Paragraphs 3-5.

²⁵ At Para 6-8.

²⁶ At Para 13.

‘The University reserves the right to withdraw the offer in the event it is found to have been made in error or obtained fraudulently.’²⁷

What must be noted at this point is that the court, throughout the judgment, was referring to the document containing the above clause as ‘a letter of offer’.²⁸ After referring to authority and in dismissing the application, the court held that the above excerpt was, in fact, an exemption clause embodied in a contract.²⁹ It is submitted, nevertheless, that the court did not consider three important questions. The first question is whether or not a contract existed between the university and the prospective student.³⁰ The second question is whether the court was dealing with a reservation clause or an exemption clause, and the third question is whether public policy was material in coming to a just decision.³¹ These questions are addressed below.

Concerning the first question, the court had to determine whether the written document constituted a contract so as to warrant the application of contractual principles.³² It is trite that, when a document purporting to contain contractual terms is in issue, a court must first consider whether the document is a contract.³³ In order for a document to be considered a contract, it must be shown that the contracting parties accepted the document in the belief that they were concluding a contract.³⁴ In instances where the true nature of a document is in issue, the court has a duty to decide whether the document purporting to be a contract is in fact a contract or not.³⁵ It cannot simply be concluded that the document in issue was a contract because certain considerations militate against it being deemed a contract. One of the reasons for this uncertainty concerning the question of whether the document was a contract is that throughout the case the court referred to the document as ‘a letter of offer’.³⁶ Furthermore, the court recognised the existence of a contractual relationship between the parties on the one hand, while acknowledging

²⁷ At Para 14.

²⁸ For example, at paragraphs 3, 13, 14 and 15.

²⁹ At paragraphs 41-42. The court stated that the issue of specific performance was simply being dealt with for the sake of completeness since it had already made a finding on the case as whole.

³⁰ S Smith *Atiyah's Introduction to the Law of Contract* 6 ed (2005) 136.

³¹ These issues were not adequately discussed in the judgment.

³² Smith (note 30 above) 139.

³³ RH Christie *The Law of Contract in South Africa* 5 ed (2006) 194. See also J Mickleburgh *Consumer Protection* (1979) 321.

³⁴ Smith (note 30 above) 139.

³⁵ *Ibid* 136.

³⁶ At paragraphs 3, 13, 14 and 15.

the absence of such a relationship on the other.³⁷ The contrast finds expression in the following excerpt:

‘I should also say *obiter* that it would appear to me that the contractual relationship is fully consummated and made effectual at the stage of registration of the student concerned. This would suggest to me that the applicant was a prospective student because she is not registered as a student and by means of this court’s process, sought an order for her registration. She, it would appear, was offered a place as a student but did not consummate that position because registration did not eventuate. This, as I have said is a side issue.’³⁸

These words reveal that a contract between the parties had not yet come into effect.³⁹

The issue to be considered is whether it was appropriate for the court to decide the case on principles applicable in contract. An exemption clause is found in contract and not in a letter.⁴⁰ That the court constantly referred to the document as a ‘letter of offer’, coupled with the non-recognition of a contractual relationship between the parties militates against the letter of offer being considered a contract. The mere fact that the letter was a written document does not ultimately mean that it is in contractual form.⁴¹ The underlying principle is that the parties to an agreement must know or reasonably contemplate that the document in issue is contractual before it can actually be considered a contract.⁴² This fact was not established by the court. Nevertheless, it can be held that the court decided the case on the basis that a written contract existed between the parties as gleaned from the following comments:

‘What must not be allowed to sink into oblivion is that there is the principle of freedom of contract which allows a person in the Respondent’s position, to stipulate terms on which it can deal with other parties, including terms that are designed to exclude, limit or exempt it from liability. Where those clauses are inserted, it would appear to me that in appropriate case, it is the duty of the courts to scrutinize the same and to ensure that they are fair and do not

³⁷ Paragraphs 8 and 32 of the judgment.

³⁸ At Para 32.

³⁹ At Para 32.

⁴⁰ P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 26.

⁴¹ *Ibid.* See also Christie (note 33 above) 194; Mickleburgh (note 33 above).

⁴² *Ibid.*

contravene public policy and do not operate unduly harshly on other persons, particularly those who bargain from a position of relative weakness.’⁴³

If it is accepted that the document was indeed a contract, the second question arises. The question is whether the clause interpreted by the court was an exemption clause or a reservation clause. This question is raised by two defining paragraphs in the judgment which state:

‘In an equally compelling argument, Mr. Sibandze submitted to the contrary. He submitted that *the term at the end of the offer reserving the Respondent’s right to withdraw the offer it made in error or one made fraudulently, removed the instant case from the realms of those cases to which the general rule referred to above applies.*’⁴⁴ (Emphasis added)

And further that:

‘Reverting to the clause in question, it would appear to me *the clause was inserted to reserve the Respondent’s right to withdraw an offer made to a prospective student in error or one in which the offer was made as a result of fraud...*In this wise, the clause acts as both a shield and a sword. A shield to protect the Respondent from the normal consequences of an error it may have made. As a sword to attack fraudster students or prospective students who attempt to throw dust into its eyes, to have the offer withdrawn after registration.’⁴⁵ (Emphasis added)

It is abundantly clear from the above quotations that the letter of offer contained a reservation clause which empowered the respondent to revoke an offer made erroneously or as a result of being fraudulently induced by a prospective student. However, after stating that a reservation clause was in issue the court went on to deal with the clause embodied in the letter of offer as though it was a an exemption clause.⁴⁶ Thus Masuku J stated:

⁴³ At Para 24.

⁴⁴ At Para 18

⁴⁵ At Para 33.

⁴⁶ At Para 30.

‘The question to answer would, in the circumstances be *whether the exemption in question* was arbitrary, unfair or unduly oppressive and secondly, whether it was operated in a manner that is unfair.’⁴⁷ (Emphasis added)

In stating this, the judge equated the reservation clause contained in the letter with an exemption clause in a contract. This observation is drawn from failure by the court to justify why principles applicable to exemption clauses should also be applied to clauses reserving the rights of a party in an agreement, namely reservation clauses. The court simply grafted principles applying to exemption clauses into the sphere of the reservation clause that was in issue. This approach led the court to consider case law dealing with exemption clauses under the law of contract on a document it had not pronounced to be a contract.⁴⁸ The court did not embark on a discourse to reconcile the two types of clauses, nor did it state the reasons for treating two substantially different clauses similarly under the law of contract. An exemption clause is a contractual stipulation that limits or excludes the liability of a party to a contract in the event of defective performance, while a reservation clause simply retains rights of a party perform certain acts.⁴⁹ The point being made here is that the clause failed to qualify as an exemption clause for two reasons. First, a reservation clause cannot simply be deemed an exemption clause because the two types of clauses serve different purposes as already indicated. Secondly, the clause in question was contained in a letter as opposed to a valid and binding contract.⁵⁰

The respondent in this case did not have to adduce evidence to establish that the clause in issue was embodied in a contract nor that the letter was in contractual form because she had not raised the issue.⁵¹ The court had raised the issue of its own accord but did not make this determination.⁵² If, however, it is accepted that the letter was a contract containing an exemption clause, then the third and final question must be answered. The question is whether the findings of fairness and public policy imported by the court in determining the matter were necessary, and

⁴⁷ At Para 30.

⁴⁸ At Para 19-29.

⁴⁹ BA Garner *Black's Law Dictionary* 8 ed (2004) 1334.

⁵⁰ See paragraphs 3, 13, 14 and 15 of the judgment. See also Yates (note 18 above) 56.

⁵¹ At Para 15.

⁵² Ibid.

if so, whether they were properly applied.⁵³ The finding by Masuku J that the clause was fair and supported by public policy can be assailed on several grounds.⁵⁴ First, courts sparingly resort to considerations of public policy and only do so in the clearest of circumstances in order to afford relief to consumers against unfair contract terms.⁵⁵ Secondly, while relying on the South African decisions of *Breedenkamp and Others v Standard Bank of South Africa and Another* 2009 (5) SA 304 (GSJ) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the court did not apply criteria set out in these cases which recognise the constitution as the cornerstone of public policy.⁵⁶ It is now well-established that any clause purporting to offend public policy is tested against constitutional provisions by the courts.⁵⁷ It is further accepted that courts will refuse to enforce an agreement that is contrary to public policy since that contractual undertaking is considered disadvantageous to social expedience.⁵⁸

Harms DP in the South African Supreme Court of Appeal decision of *Breedenkamp v Standard Bank of South Africa and Another*⁵⁹ also upheld this approach. The appeal in this case concerned the right of the bank to close the account of its client.⁶⁰ The appellant's accounts were closed by the respondent bank because he was listed and designated a supporter of Zimbabwe's regime under President Robert Mugabe.⁶¹ In order to preserve its reputation with the United States of America where the bank had financial interests, the bank ceased the appellant's accounts.⁶² The appellant attacked the closure of the bank account on constitutional grounds.⁶³ The court used the constitution as a yardstick to determine whether the clause was contrary to public policy.⁶⁴

⁵³ At Para 29-30, 38.

⁵⁴ At Para 38.

⁵⁵ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) at 9.

⁵⁶ At Para 27. See *Breedenkamp and Others v Standard Bank of South Africa and Another* 2009 (5) SA 304 (GSJ) at 315.

⁵⁷ See the cases *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵⁸ See the cases of *Sasfin (Pty) Ltd v Beukes* (note 55 above); *Botha v Finanscredit* 1989 (3) SA 773 (A) at 783; *Barkhuizen v Napier* (note 58 above).

⁵⁹ *Breedenkamp and Others v Standard Bank of South Africa and Another* (note 56 above).

⁶⁰ At Para 6.

⁶¹ At paragraphs 12-14.

⁶² At paragraphs 13-14.

⁶³ At Para 9.

⁶⁴ At paragraphs 53-66.

It is suggested that Masuku J in the case of *Nonhlanhla Tsabedze v The University of Swaziland*⁶⁵ also had the opportunity to explore this approach. Swaziland exists in a constitutional dispensation and it is assumed that public policy is deeply rooted in the constitution.⁶⁶ The judge fell short of highlighting the importance of section 20 and section 151 (2) (a) of the Constitution Act of 2005 which vest the High Court with the responsibility of ensuring that equality of all persons before the law is enforced in the spirit of the Bill of Rights. Perhaps this contribution could have been valuable in the development of consumer law in Swaziland. The point being made is that the court had the opportunity to introduce constitutional inroads in determining whether or not the clause in issue was enforceable. Since Masuku J raised the issue of the clause in the letter at his own instance, he ought to have also dealt fully with public policy.⁶⁷ The judge should have taken into account the warning of Smallberger JA in the case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) where he stated:

‘The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms...offend one’s sense of propriety and fairness.’⁶⁸

Similar sentiments had earlier been expressed in the United Kingdom by Lord Atkin in the old case of *Fender v St John-Mildmay* [1937] 3 All ER 402 that:

‘[T]he doctrine [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.’⁶⁹

Perhaps Masuku J did not heed the above warnings. If properly interpreted and applied, exemption clauses serve a useful purpose in the law of contract and outlawing them would

⁶⁵ *Nonhlanhla Tsabedze v The University of Swaziland* (unreported) High Court Civil Case 3432/ 2010.

⁶⁶ S. 20 of the Swaziland Constitution of 2005 recognises the right to equality.

⁶⁷ At paragraphs 13-15 & 30.

⁶⁸ At Para 31.

⁶⁹ At 407.

diminish consumer choice.⁷⁰ Courts in Swaziland should limit the clauses only in so far as they are abused to obtain unfair results. It is apparent from the above discussion that the necessity of introducing legislation to regulate exemption clauses cannot be emphasised, particularly because other countries like South Africa and the UK have enacted legislation in this regard.⁷¹

3.2. The non-variation clause

In Swaziland the strength of the non-variation clause under the law of contract finds expression in the common law ‘parol evidence’ rule.⁷² As an underlying percept of contractual freedom, the parol evidence rule requires agreements concluded in writing to be similarly varied in writing.⁷³ The rule provides that no evidence tending to explain the terms of a written agreement is admissible in court.⁷⁴ In the case of *Rucci Supermarket (Pty) Ltd v Swaziland National Housing Board* (unreported) High Court Civil Case 25 of 2012, the court considered the parol evidence rule in the context evidence on affidavit.⁷⁵ In this case the appellant was ejected by the respondent from its premises after a lease agreement between the parties had terminated.⁷⁶ In arguing the appeal, the appellant attempted to introduce evidence through an affidavit to explain the terms of the lease.⁷⁷ Ota J held that it was established law under the parol evidence rule to exclude extrinsic evidence tending to prove the terms of a written agreement.⁷⁸ The court stated:

‘It follows therefore, that the applicable position of the law of the Kingdom is that , where parties have reduced their intention in a written document, non (*sic*) of the parties is entitled to lead evidence tending to prove anything contrary to the express terms of the agreement.’⁷⁹

⁷⁰ T Woker ‘Consumers and Contracts of Purchase and Sale’ in D Macquoid-Mason (ed) *Consumer Law in South Africa* (1997) 32. See also Howells and Weatherill *Consumer Protection Law* (1995) 306.

⁷¹ The UK enacted the Unfair Contract Terms Act 1977, while South Africa regulates exemption clauses in S. 48- S. 51 of the CPA of 2008.

⁷² *Rucci Supermarket (Pty) Ltd v Swaziland National Housing Board* (unreported) High Court Civil Case No. 25 of 2012.

⁷³ E Van Eeden *A Guide to the Consumer Protection Act* (2009) 71. See also Christie (note 33 above) 192.

⁷⁴ Christie (note 33 above) 192-194.

⁷⁵ At paragraphs 51-52.

⁷⁶ At paragraphs 3-4.

⁷⁷ At paragraphs 51-61.

⁷⁸ At Para 51.

⁷⁹ At Para 53.

After making the above observations, the court refused to admit the evidence.⁸⁰ The refusal to admit extrinsic evidence affecting the terms of an agreement was also expressed in the case of *Busaf (Pty) Limited v Vusi Emmanuel Khumalo* (unreported) High Court Case 2839/ 2008. In this case the plaintiff sold two buses to the defendant under a written agreement.⁸¹ After initially paying deposit on the buses, the defendant subsequently failed to pay the outstanding balance.⁸² The defendant challenged the terms of the agreement arguing that the buses were overpriced, had inherent mechanical faults, and that the plaintiff had made certain fraudulent misrepresentations regarding their value when the agreement was signed.⁸³ Masuku J held that the defendant was not entitled to question the validity of the terms of the agreement.⁸⁴ He stated:

‘It will be apparent from reading the papers filed by the defendant that he now seeks to question the validity of certain terms of the agreement signed by both parties. Should he be allowed to do so? In particular, the Defendant now seeks to say that the vehicles he purchased were in a faulty mechanical condition and further contends that the Plaintiff made certain representations about the fitness of the vehicles and how they would raise good money, so to speak.’⁸⁵

And further that:

‘The import of the foregoing on the case is that because the parties to the agreement, namely, the Plaintiff and the Defendant decided to embody all the terms of the agreement in a single memorial, the *Defendant may not seek to lead evidence tending to prove anything contrary to the express terms of the agreement*. To the extent that he seeks to do so, he is totally out of order.’⁸⁶ (Emphasis added)

From the above, it is abundantly clear that the parol evidence rule prohibits the introduction of evidence which attempts to explain the terms of a written agreement.⁸⁷

⁸⁰ At paragraphs 51-61.

⁸¹ At Para 2.

⁸² At Para 5.

⁸³ At Para 12.

⁸⁴ At Para 14.

⁸⁵ Ibid.

⁸⁶ At Para 17.

⁸⁷ Christie (note 33 above) 192.

It must be noted, however, that the position expressed above is not unassailable because certain exceptional circumstances may warrant departure from the rule.⁸⁸ Christie⁸⁹ holds that freedom of contract perpetrates injustices through the instrumentality of the parol evidence rule. Thus:

‘One does not need a very fertile imagination to see how, necessary as the rule is, it can lead to injustice if vigorously applied, by excluding evidence of what the parties really agreed. It has therefore been the constant endeavour of the courts to prevent the rule being used as an engine of fraud by a party who knows full well that the written contract does not represent the true agreement...Perhaps the best way to look at the rule is to it as a backstop which comes into operation only in the absence of some more dominant rule.’⁹⁰

These observations find support in the case of *Beaton v Baldachin Bros* 1920 AD 312 where the Appellate Division adverted to certain circumstances that warrant departure from the parol evidence rule. Innes CJ stated:

‘Now the general rule is clear: a party to a written instrument cannot vary its terms by parol evidence. But a party to such a writing, which it is sought to use against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by the signatories to operate as such, but was given for another purpose. And when he has thus got rid of the writing, he may, if he can, establish another verbal contract as the true agreement. The law upon this point was clearly stated... Such a case is always difficult to establish; but it may be attempted, provided the pleadings are so framed as to raise it.’⁹¹

The court was explaining that not only will the document purporting to be a contract be interrogated, but extrinsic evidence may be introduced to determine the existence of subsequent

⁸⁸ Ibid 194. See also *Havenga* (note 16 above) 113-114; *Van Eeden* (note 73 above) 72.

⁸⁹ Christie (note 33 above) 194. See also *Swaziland Development and Savings Bank v Diversa Holding Corporation* (note 10 above) at Para 28.

⁹⁰ At 194.

⁹¹ At 315. See also *Aronstam* (note 40 above) 37-38.

or prior agreements which may have varied a contract.⁹² In the case of *Richer v Bloemfontein Council* 1922 A.D 57 it was stated as follows:⁹³

‘Extrinsic evidence is only admissible to explain the construction of a document where words occur which are ambiguous in them or as read in their context.’⁹⁴

Over and above explaining ambiguous contract terms, the utility of extrinsic evidence is also necessary whether the conclusion of an agreement was influenced either by illegality, mistake, fraudulent misrepresentation or duress.⁹⁵ In this respect, a court will go behind the terms of the agreement in order to defeat the terms of a written contract.⁹⁶ Consumers are thereby protected since the parol evidence rule does not affect evidence relating to the conclusion or subsequent variation of an agreement.⁹⁷ Likewise, proof of a condition precedent to the conclusion of the disputed document is not subject the rule.⁹⁸ Evidence challenging the very nature of the contract is also not subject to the parol evidence rule which only applies to evidence tending to prove the terms of the contract.⁹⁹

The above position was also acknowledged by Masuku J in the case of *Swaziland Development and Savings Bank v Diversa Holding Corporation* (unreported) High Court Civil Case 3624/2005 where he considered a non-variation clause in light of the parol evidence rule. This case is interesting because a well-recognised plaintiff banking institution ‘got the short end of the stick’ against an equally scrupulous business concern, contrary to the belief that consumers in a weaker bargaining position are always targeted in consumer transactions.¹⁰⁰ The plaintiff bank purchased certain immovable property from the defendant under a deed of sale containing a non-variation

⁹² Christie (note 33 above) 194. See also Havenga (note 16 above) 113; Van Eeden (note 73 above) 72.

⁹³ Cited with approval in the case of *Standard Bank of Swaziland Limited v Ashley Friedman* (unreported) High Court Civil Case 918/2001.

⁹⁴ At 5.

⁹⁵ *Swaziland Development and Savings Bank v Diversa Holding Corporation* (note 10 above) at Para 20.

⁹⁶ *Ibid* at Para 18. See also Christie (note 33 above) 194-195; Havenga (note 16 above) 113; Van Eeden (note 73 above) 72.

⁹⁷ Havenga (note 16 above) 114.

⁹⁸ Christie (note 33 above) 197.

⁹⁹ *Ibid.* see also Havenga (note 16 above) 114.

¹⁰⁰ Throughout this study it is apparent that most complaints in consumer transactions are brought forth by individual consumers who are often in a weaker bargaining position. However, in the present case a banking institution was shortchanged by a scrupulous seller.

clause after an advertisement of the property was published by the defendant in a daily newspaper.¹⁰¹ While labouring under the belief that it was purchasing land with two warehouses the plaintiff discovered after purchase that there was only one warehouse.¹⁰² The plaintiff then sued the defendant for damages alleging that the defendant had made negligent representations during the course of the sale.¹⁰³ The question for determination was whether the court could admit extrinsic evidence tending to prove the terms of the deed of sale agreement in light of the non-variation clause.¹⁰⁴ Masuku J stated:

‘It is fitting that I should mention at this juncture that fraud is not the only basis upon which the Court may go behind the terms of a written agreement, with a view to ultimately defeat the terms of a written deed or contract. Extrinsic evidence regarding issues such as illegality, mistake, misrepresentation or duress will always be admitted in order to defeat the terms of a written contract. I mention *en passant* that the Plaintiff does not rely on any of the above variables for the relief it seeks and therefore stands to be non-suited.’¹⁰⁵

Indeed, the court was justified in refusing to grant the plaintiff’s claim since the requisite exceptions to the parole evidence rule had not been established by the plaintiff.¹⁰⁶ However, the strong influence that contractual freedom has in directing the operation of the parole evidence rule is gleaned from the concluding remarks of the court, which were as follows:

‘[T]o countenance the plaintiff’s claim in the present circumstances, would be tantamount to doing serious violence to the freedom of contract and would also result in a serious and unnecessary negation of the parole evidence rule, particularly considering that this case does not fall within the rubric of any of the exceptions to the parole evidence rule mentioned earlier.’¹⁰⁷

While the parole evidence rule is necessary, it cannot be denied that its application sometimes leads to unjust results because contracting parties are at liberty to alter the terms of their

¹⁰¹ At Para 3-4.

¹⁰² At Para 5.

¹⁰³ At Para 5-6.

¹⁰⁴ At paragraphs 7-8.

¹⁰⁵ At Par 20.

¹⁰⁶ At Para 26.

¹⁰⁷ At Para 31.

agreement at any time.¹⁰⁸ For example, one of the parties may seek refuge under the rule to enforce a written agreement which he knows was consensually altered to the detriment of the other party.¹⁰⁹ Courts realise that the fear of admitting valuable evidence of potentially true statements agreed to by contracting parties and vindicating them through cross-examination was misplaced and unjustified.¹¹⁰ Nevertheless, the general rule still applies and consumers will be bound by the written terms of the contracts they conclude. If the concluding remarks of the court above are anything to go by, then the exceptions to the parol evidence face a serious challenge against freedom of contract in Swaziland. It is probably necessary to control non-variation clauses through statutory regulation in the same way as countries like South Africa and the UK have limited their effect in consumer transactions.¹¹¹

3.3. The voetstoots clause

Contracts sometimes contain clauses for the sale of goods on an ‘as is’ basis, commonly referred to as *voetstoots* clauses.¹¹² This type of clause exempts a seller in a sale transaction from the implied common law warranty against latent defects.¹¹³ In defining a latent defect, Woker¹¹⁴ states that the defect in question must be such that ‘the feature in question must be one which destroys or impairs the usefulness of the things for everyone and not just the particular purchaser’. A *voetstoots* clause in a contract of sale is only included by express agreement and its absence may expose a seller to liability for any latent defects in goods sold.¹¹⁵ It is therefore common practice for sellers to protect themselves from liability against latent defects by including *voetstoots* clauses in sale agreements.¹¹⁶

In the case of *Selby Dlamini v Fred Ostergetel and another* (unreported) High Court Civil Case No. 2087/ 2001, the validity and enforcement of an oral *voetstoots* clause had to be determined

¹⁰⁸ Christie (note 33 above) 194.

¹⁰⁹ Ibid.

¹¹⁰ Van Eeden (note 73 above) 72.

¹¹¹ In the UK this has been done through the Consumer Protection Act of 1987 and Unfair Contract Terms of 1977, while in South Africa unfair contract terms are regulated by the CPA of 2008 from S. 48- S.51.

¹¹² MA Fouché ‘The Contract of Sale’ in Fouché *Legal Principles of Contracts and Negotiable Instruments* 3 ed (1995) 160.

¹¹³ Ibid. See also Havenga (note 16 above) 156.

¹¹⁴ Woker (note 70 above) 50.

¹¹⁵ RH Zulman & G Kairinos *Norman’s Law of Purchase and Sale in South Africa* 5 ed (2005) 176.

¹¹⁶ Ibid.

by the court. The plaintiff buyer purchased a second hand motor vehicle from the defendant seller.¹¹⁷ The defendant falsely represented to the plaintiff that the motor vehicle had been fitted with a new engine.¹¹⁸ However, it was later discovered that the engine had serious mechanical defects.¹¹⁹ In his defence, the defendant relied on an oral *voetstoots* clause and the court had to consider whether the clause could be upheld.¹²⁰ The court found that there was evidence to support the plaintiff's claim, and accepted the defendant's version that the sale was indeed subject to the oral *voetstoots* clause.¹²¹ As a result, the common law warranty against latent defects was held not to be applicable.¹²²

In the case of *Herbert Ndzabukelwako v Sinkhwa Semaswati t/a Mister Bread* (unreported) High Court Civil Case 899/ 2007, the defendant sold a vehicle without an engine to the plaintiff.¹²³ The sale was subject to a *voetstoots* clause under a deed of sale signed by the parties.¹²⁴ The cause of complaint was that the plaintiff had not received the motor vehicle registration documents from the defendant which could enable him to facilitate transfer of ownership of the vehicle.¹²⁵ As a result the plaintiff suffered damages due to failure to register the vehicle.¹²⁶ The defendant argued that the sale was subject to a *voetstoots* clause, and therefore, the vehicle registration documents were not part of the agreement.¹²⁷ In deciding the matter the court clarified that the deed of sale did not refer to the sale of a 'motor vehicle'.¹²⁸ The object sold was a vehicle without an engine, and that, as such, it could not be classified as a 'motor vehicle'.¹²⁹ The *voetstoots* clause limited the sale to the vehicle, to the exclusion of ancillary items. The court stated:

¹¹⁷ At 2.

¹¹⁸ Ibid.

¹¹⁹ At 5.

¹²⁰ Ibid.

¹²¹ At 9.

¹²² At 10.

¹²³ At paragraphs 1-2.

¹²⁴ At Para 2.

¹²⁵ At Para 1.

¹²⁶ At Para 3.

¹²⁷ At Para 4.

¹²⁸ At Para 5.

¹²⁹ At Para 11.

‘The agreement of sale specifically states that the vehicle has no engine. An engine is a motor. A vehicle is any carriage or conveyance that may be used on land. The parties were alive to these facts about the merx and did not refer to it as a motor vehicle.’¹³⁰

It is only when a ‘motor vehicle’ is sold that a vehicle registration book is to be transmitted to new owner.¹³¹ The court held that since the vehicle was without its ‘motor’, there was no duty under law on the seller to furnish the buyer with the registration documents for purposes of change of ownership.¹³² Perhaps the plaintiff assumed that the *voetstoots* clause did not preclude the accompanying documents common in ‘motor vehicle’ sales. The above case reveals a highly technical application of *voetstoots* terms in contracts which led to the plaintiff only acquiring a bare vehicle shell. Under these circumstances it is imperative that statutory regulation is introduced to regulate *voetstoots* clauses because unfair results like the above will continue to affect consumers.¹³³

Having discussed the unfair results consumers have been subjected to under the most common contract clauses in Swaziland, it is necessary to consider the common law concept of the *exceptio doli generalis*.

3.4. The validity and enforcement of the *exceptio doli generalis* in Swaziland

This section considers whether the *exceptio doli generalis* doctrine applies in Swaziland despite its invalidation in South Africa. Historically, the *exceptio doli generalis* doctrine was a defence based on good faith against a party to a contract who had acted in bad faith.¹³⁴ Good faith in this context refers to honesty in the conclusion of agreements and has its origins in Roman law.¹³⁵ ‘Bad faith’ on the other hand has been described as ‘acting in a manner contrary to the standards

¹³⁰ At Para 5

¹³¹ S. 21 (2) (c) of the Road Traffic Act 6 of 1965 imposes a duty on a seller of a motor vehicle to surrender to the new owner of the motor vehicle the registration book, the motor vehicle licence and clearance certificate of roadworthiness in respect of the vehicle.

¹³² At Para 6.

¹³³ In the South African context the clauses are regulated in S. 56 of the CPA of 2008, while in the UK the Sale of Goods Act of 1979 and the CPA of 1987 have a similar effect.

¹³⁴ Aronstam (note 40 above) 169. See also *Bank of Lisbon and South Africa v Ornelas and Another* 1988 (3) SA 580 (A) at 611; FDJ Brand ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71, 73.

¹³⁵ *Ibid.*

regarded by society as acceptable in the given circumstances'.¹³⁶ The notion of good faith as underpinning the *exceptio doli generalis* was developed and eventually became a central pillar in maintaining equitable relations between parties in contractual relations.¹³⁷

The operation of the *exceptio doli generalis* was twofold. First, it provided a remedy against unfair contract terms, and secondly, it prevented the enforcement of a contract in unfair circumstances.¹³⁸ South African courts applied the *exceptio doli generalis* maxim until the late 20th century.¹³⁹ The doctrine was, however, invalidated in the case of *Bank of Lisbon and South Africa v Ornelas and Another* 1988 (3) SA 580 when Joubert J.A stated:

‘All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace.*’¹⁴⁰

It must be noted that like all common law principles applicable in South Africa under the Roman Dutch law, the *exceptio doli generalis* doctrine was also recognised in Swaziland before the *Bank of Lisbon and South Africa v Ornelas and Another*¹⁴¹ decision.¹⁴² Nathan CJ referred to the doctrine in the case of *Photo Agencies (Pty) Ltd v The Commissioner of Swaziland Royal Police and another* 1976-1980 S.L.R 398,¹⁴³ where he refused to entertain an application for the release of an arms consignment on grounds that the applicant had approached the court with unclean hands.¹⁴⁴ This case, however, is not relevant in the current discussion because the doctrine was not examined.¹⁴⁵

¹³⁶ AJ Kerr ‘The Defence of Unfair Conduct on the Part of the Plaintiff at the Time the Action is brought: The *Exceptio Doli Generalis* and the *Replicatio Doli* in Modern Law’ (2008) 125 *SALJ* 241.

¹³⁷ Brand (note 134 above).

¹³⁸ Christie (note 33 above) 12.

¹³⁹ At 607B. See also Brand (note 134) 73-74.

¹⁴⁰ *Ibid.*

¹⁴¹ *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above).

¹⁴² *EIS Marketing (Pty) Limited v Swaziland Sugar Association* (unreported) Civil Appeal Case 51/ 2006. In *Photo Agencies (Pty) Ltd v The Commissioner of Swaziland Royal Police and another* 1976-1980 S.L.R 398, the court referred to the *exceptio doli generalis*. The applicant had used a false address in Swaziland in order to overcome and circumvent the sanctions imposed by the United Nations Security Council against the Republic of South Africa.

¹⁴³ At 407.

¹⁴⁴ *Sipho Fernandez Dlodlu v Philani Clinics (Pty) Ltd and others* (unreported) High Court Civil Case 1971/ 2005 at Para 24.

¹⁴⁵ At 398-399.

The question is whether consumers in Swaziland can raise the defence that a party to a contract has acted in bad faith, namely the *exceptio doli generalis*. This question poses a serious challenge both for consumers and the courts in Swaziland. The challenge arises in two ways, namely, whether consumers can raise the defence and, if it is raised, whether the courts will recognise it as applicable in Swaziland.¹⁴⁶ There are two opposing views to be considered in addressing this issue. On the one hand, it may be contended that courts in Swaziland have followed the decision in *Bank of Lisbon and South Africa v Ornelas and Another*¹⁴⁷ and do not recognise good faith as a defence. On the other hand, it may be contended that good faith is a defence and that the *exceptio doli generalis* doctrine was left intact since courts in Swaziland are not bound to follow South African decisions.¹⁴⁸ These contentions are now considered.

South African courts have recognised good faith as a ground for invalidating unfair contract terms despite the decision in *Bank of Lisbon and South Africa v Ornelas and another*.¹⁴⁹ In the very same case Jansen JA held that the *exceptio doli generalis* was not an empty shell and that to deny the defence a place in the law would leave a vacuum.¹⁵⁰ The same approach was adopted by Olivier JA in the Supreme Court of Appeal decision of *Eerste Nasionale van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA) where he also held in his dissenting judgment that the notion of good faith was useful in dealing with unfair contract terms.¹⁵¹ In this case the respondent *curatrix bonis* sought to set aside a deed of suretyship signed by her mother whose capacity to sign the suretyship was in issue.¹⁵² Olivier JA held that good faith can be used to invalidate established rules of contract.¹⁵³

Again, Van Zyl J in the case of *Janse van Rensburg v Grieve Trust CC* 2001 (1) SA 315 (C) followed the approach of Olivier JA in holding that courts were empowered to vary the well

¹⁴⁶ The case of *Sipho Fernandez Dlodlu v Philani Clinics (Pty) Ltd and others* (note 144 above) at Para 24 referred to *Photo Agencies (Pty) Ltd v The Commissioner of Swaziland Royal Police and another* (note 142 above) when it mentioned the doctrine, without considering its application. The problem is that invalidation of the doctrine in South Africa does not mean it is invalidated in Swaziland because courts in Swaziland apply what they deem to be the law in Swaziland. See *Annah Lokudzinga Matsenjwa v R* (unreported) [1970-76] SLR 25 at 29.

¹⁴⁷ *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above).

¹⁴⁸ *Annah Lokudzinga Matsenjwa v R* (note 146 above).

¹⁴⁹ *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above). See also Brand (note 134 above) 78.

¹⁵⁰ At 616.

¹⁵¹ At 321, 322, 326, 331.

¹⁵² At 304.

¹⁵³ At 326.

established legal principles on grounds of good faith.¹⁵⁴ Ntsebeza AJ In the case of *Miller and another NNO v Dannecker* 2001 (1) SA 928 (C) also expressed the value of good faith in invalidating established principles.¹⁵⁵ In this case the defendant had purchased franchise rights from a seller in respect of a guest house.¹⁵⁶ After the seller reneged on certain oral terms that the parties had agreed upon, the court held that public policy prevented a party to a subsequent oral contract based on a written agreement from turning back on his word.¹⁵⁷ Hutchison¹⁵⁸ agrees with the outcome of the decision in *Miller and another NNO v Dannecker*,¹⁵⁹ and contends that the concept of good faith has a key role in determining the enforcement of contractual clauses.¹⁶⁰

All the above views recognise the notion of good faith in limiting unfair contract terms which operate to a consumer's disadvantage. It is now necessary to consider the opposing argument which rejects good faith as a principle capable of invalidating contractual terms.

There is a series of decisions where courts have held that the concept of good faith cannot be used to invalidate unfair contract terms.¹⁶¹ The majority decision in the case of *Bank of Lisbon and South Africa v Ornelas and Another*¹⁶² laid down this proposition. While this majority decision has been criticised for being over-scholarly and out of touch with the role of the courts in dispensing justice, Christie¹⁶³ holds a different view and agrees with the judgment. He says that it would be undesirable to bring back the *exceptio doli generalis* because 'the half-life of the *exceptio* from 1925 to 1988 showed it to be so entangled in its history that it was not a satisfactory instrument for modern courts to use'.¹⁶⁴ Subsequent decisions that followed this line of reasoning include the case of *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C), where the defendant had signed as a surety for his son-in-law in favour of the plaintiff bank which

¹⁵⁴ At 325-326. See also Brand (note 134 above) 79.

¹⁵⁵ At 938.

¹⁵⁶ At 931.

¹⁵⁷ At 937.

¹⁵⁸ D Hutchison 'Non-variation Clauses in Contract: Any Escape from the Shifren Straitjacket?' (2001) 118 *SALJ* 722.

¹⁵⁹ *Miller and another NNO v Dannecker* 2001 (1) SA 928 (C).

¹⁶⁰ Hutchison (note 158 above).

¹⁶¹ See the cases of *Brisley v Drotzky* (note 57 above); *Afrox Healthcare Bpk v Strydom* (note 57 above); *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above), amongst others.

¹⁶² *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above) at 605. See also Brand (note 134 above) 78.

¹⁶³ Christie (note 33 above) 13.

¹⁶⁴ *Ibid.*

eventually sued on the agreement.¹⁶⁵ On appeal, the court refused to accept the defence that the plaintiff had not acted in good faith.¹⁶⁶ In the case of *Brisley v Drotzky* 2002 (4) SA 1 (SCA) the court dismissed the defence of good faith and held that the dissenting judgment of Olivier JA in the case of *Eerste Nasionale van Suidelike Afrika Bpk v Saayman*¹⁶⁷ was the opinion of ‘a single judge’.¹⁶⁸ The court held that good faith was not an independent substantive rule.¹⁶⁹ In the case of *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), the Supreme Court of Appeal held that good faith was not a ‘free-floating basis’ for invalidating contracts,¹⁷⁰ while in the case of *South African Forestry Co. Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA), it was held that good faith could only be applied as a procedural aid in explaining established rules of contract law.¹⁷¹

The above contending views are captured by the conflicting opinions of Kerr¹⁷² and Brand¹⁷³ on the interpretation of the Constitutional Court decision of *Barkhuizen v Napier*.¹⁷⁴ Arguing that good faith is not a legal concept capable of invalidating a contract, Brand¹⁷⁵ holds that Ngcobo J in *Barkhuizen v Napier*¹⁷⁶ laid down this position when the latter stated that good faith is not a ‘self-standing rule, but an underlying value that is given expression through existing rules of law’. He argues that by incorporating the abstract values of reasonableness and fairness, the court was not recognizing good faith as an independent ground for interference with contractual relationships.¹⁷⁷ He concludes that resorting to principles like good faith may lead to uncertainty and ‘palm-tree’ justice.¹⁷⁸

¹⁶⁵ Brand (note 134 above) 79.

¹⁶⁶ Ibid.

¹⁶⁷ *Eerste Nasionale van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA).

¹⁶⁸ At Para 16

¹⁶⁹ At Para 22. The court also dismissed the views of Van Zyl J in *Janse van Rensburg v Grieve Trust CC* 2001 (1) SA 315 (C)

¹⁷⁰ At Para 32.

¹⁷¹ At Para 32.

¹⁷² Kerr (note 136 above) 246.

¹⁷³ Brand (note 134 above) 89-90.

¹⁷⁴ *Barkhuizen v Napier* (note 57 above).

¹⁷⁵ Brand (note 134 above) 86.

¹⁷⁶ *Barkhuizen v Napier* (note 57 above) at Para 82.

¹⁷⁷ Brand (note 134 above) 85.

¹⁷⁸ Ibid 89-90.

On the other hand, Kerr¹⁷⁹ argues on the strength of the decision in *Barkhuizen v Napier*,¹⁸⁰ the case of *Bank of Lisbon and South Africa v Ornelas and Another*¹⁸¹ and the later case of *Brisley v Drotzky*¹⁸² were wrongly decided. He contends that by recognizing fairness, good faith and reasonableness as constitutional values, the court in *Barkhuizen v Napier*¹⁸³ gave these concepts a wide field of operation and a 'more prominent place in the law than they had held in the years before the constitution was adopted'.¹⁸⁴ He holds that by recognizing good faith under the constitution the Constitutional Court revived the *exceptio doli generalis* doctrine.¹⁸⁵ Thus, the Constitutional Court, as a higher Court, overruled the Appellate Division decision of *Bank of Lisbon and South Africa v Ornelas and Another*.¹⁸⁶ In conclusion he says that all courts are bound by the Constitutional Court decision of *Barkhuizen v Napier*,¹⁸⁷ and that 'those who thought that the *Bank of Lisbon* [decision] was correct are now obliged to note that it can no longer be considered'.¹⁸⁸

Without a doubt the above contention will cause problems in Swaziland because consumers cannot be certain whether good faith under the *exceptio doli generalis* doctrine can be applied as a defence against contracts imposing unfair contract terms. Courts will have similar difficulty because they will first have to determine whether the *exceptio doli generalis* applies in Swaziland taking into account that it has been invalidated in South Africa. If the doctrine applies, then consumers may invoke it to deflect unfair contract terms. However, if courts adopt the decision of *Bank of Lisbon and South Africa v Ornelas and Another*¹⁸⁹ and conclude that the doctrine is invalid in Swaziland, they will be faced with the task of grafting on the constitutional developments alluded to in the case of *Barkhuizen v Napier*.¹⁹⁰

¹⁷⁹ Kerr (note 136 above) 246.

¹⁸⁰ *Barkhuizen v Napier* (note 57 above).

¹⁸¹ *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above).

¹⁸² *Brisley v Drotzky* (note 57 above).

¹⁸³ *Ibid.*

¹⁸⁴ Kerr (note 136 above) 246.

¹⁸⁵ *Ibid.* 247.

¹⁸⁶ *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above). See also Kerr (note 136 above) 246.

¹⁸⁷ *Barkhuizen v Napier* (Note 57 above).

¹⁸⁸ Kerr (note 136 above) 246.

¹⁸⁹ *Bank of Lisbon and South Africa v Ornelas and Another* (note 134 above).

¹⁹⁰ *Barkhuizen v Napier* (note 57 above).

Having discussed the relevant issues affecting consumers under the law of contract, it is necessary to move to a consideration of product liability in Swaziland.

4. PRODUCT LIABILITY AND THIRD PARTY CONSUMERS

Wright¹⁹¹ defines product liability as ‘the civil liability of a manufacturer or distributor for damage or injury caused by a defect in the product’. Walker¹⁹² on the other hand defines product liability as the basis and extent to which ‘a manufacturer or supplier of some product should be liable to the ultimate consumer or user for harm done by reason of a defect in design or manufacture’. Both these definitions limit liability for defective products to manufacturers. Howells¹⁹³ has a broader view of product liability and extends the scope of the concept to liability imposed on producers, distributors, importers, retailers and other suppliers of products which cause death, injury or damage to property as a result of their use. This section considers of the liability of manufacturers towards third party consumers in Swaziland under negligence.

4.1. Product liability under negligence

Manufacturers of products owe a duty of care to the end-users of the products they produce.¹⁹⁴ The duty of care owed by manufacturers towards third parties was expressed by Van der Heever JA in the case of *Herschel v Mrupe* 1954 (3) SA 464 (A) as follows:

‘By putting into circulation potentially harmful things...the manufacturer is not merely exercising a legal right but encroaching upon the rights others not to be exposed, when going about their lawful occasions and when accepting the implied general limitation to acquire and use such commodities, to danger without warning and without their having a reasonable opportunity to become aware of such danger before use. In other words, it is an encroachment upon the rights of others to set hidden snares for them in exercise of their own rights. To refrain from doing so is a duty owing to the world at large.’¹⁹⁵

¹⁹¹ CJ Wright, ‘*Product Liability: The Law and its Implications for Risk Management*’ (1989) 3, cited in D Macquoid-Mason ‘Consumers and Product Liability’ in D Macquoid-Mason (note 70 above) 64.

¹⁹² DM Walker *The Oxford Companion to Law* (1980) 1005.

¹⁹³ G Howells *Comparative Product Liability* (1993) 1.

¹⁹⁴ *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co. (Pty) Ltd* 1975 (2) SA 457 (W) at 462. See *Donoghue v Stevenson* [1932] A.C 562 at 580.

¹⁹⁵ At 486-487.

The question whether a supplier was negligent for defective products in Swaziland was dealt with in the case *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers* (unreported) High Court Civil Case 1457/ 2004.¹⁹⁶ In this case the plaintiff purchased from the defendant specialist fast food seller a take away meal which contained snails.¹⁹⁷ While eating he realised that the meal consisted of snails and this caused him to vomit and thereafter to suffer from trauma whenever he thought about what had transpired.¹⁹⁸ In determining negligence and the quantum of damages, Ebersohn J considered a number of decisions, two of which were the case of *Donoghue v Stevenson* [1932] A.C. 562 and the case of *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* 1964 (3) SA 561 (A).¹⁹⁹ It is necessary to consider how and why the court applied these decisions.

In the case of *Donoghue v Stevenson*²⁰⁰ the question was whether a manufacturer of products which could not be inspected by both the distributor and end-consumer was under a legal duty to the end-consumer for any harm suffered as a result a defectively manufactured product.²⁰¹ It was held that manufacturers of food, medicine and related products were liable for any defect which was detrimental to the health of the end-consumer.²⁰² In applying the case of *Donoghue v Stevenson*²⁰³ the court in the case of *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers*²⁰⁴ did not determine whether the defendant was a manufacturer or a merchant seller. The principles in the case of *Donoghue v Stevenson*²⁰⁵ apply only to manufacturers and their duty to end-consumers or third parties, not to merchant sellers.²⁰⁶

The second case that the court applied was the case of *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* 1964 (3) SA 561 (A) where the appellant cooperative had sold a toxic

¹⁹⁶ At paragraphs 1-11.

¹⁹⁷ At 2. The meal comprised two pieces of chicken, a 340 ml cold drink and some lettuce.

¹⁹⁸ Ibid.

¹⁹⁹ At Para 26.

²⁰⁰ *Donoghue v Stevenson* (note 194 above).

²⁰¹ At 578.

²⁰² At 582-583

²⁰³ *Donoghue v Stevenson* (note 194 above).

²⁰⁴ *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers* (unreported) High Court Civil Case 1457/ 2004.

²⁰⁵ *Donoghue v Stevenson* (note 194 above).

²⁰⁶ Ibid 578.

metasystox pesticide to the respondent farmers.²⁰⁷ The pesticide was intended to destroy lice on kaffircorn cultivated by the farmers, but it actually destroyed the respondents' crops due to an inherent latent defect.²⁰⁸ The respondents alleged that the appellant had breached the warranty of fitness for purpose and sued for the amount of R48 150.²⁰⁹ The question for determination was whether the appellant was liable to the respondents for consequential damage caused by the pesticide having a latent defect.²¹⁰ It was held that a merchant seller could not be held liable for manufacturing faults of products he sold because a retailer could not possibly be aware of such defects.²¹¹ The only exception to this rule is that a retailer who professes some expert knowledge or attributes of skill in the product in question will be held liable if the goods prove to be defective.²¹² The court further held that where a merchant seller was found to have professed such skill and knowledge in supplying defective goods, a consumer had remedies under the *actio quanti minoris* or the *actio redhibitoria*.²¹³ These remedies only apply in the law of sale.²¹⁴

Returning to the judgment of Ebersohn J, it is not clear which principles the court applied from the two decisions examined above. The case of *Donoghue v Stevenson*²¹⁵ dealt with manufacturers, while the case of *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha*²¹⁶ dealt with the consequential liability of merchant sellers. The principles enunciated in these two cases are different. On a reading the judgment of Ebersohn J in its entirety it is clear that the court did not make a finding of negligence on the part of the respondent. The problem with the manner in which the court disposed of this matter is such that it was never decided whether liability attached to the respondent as a manufacturer in line with the principles set out in *Donoghue v Stevenson*,²¹⁷ or attached to the defendant as a merchant in accordance with the principles set out in *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha*.²¹⁸ Another issue is that Ebersohn J did not consider the contractual relationship of sale that existed between

²⁰⁷ At 565-566.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ At 571.

²¹² Ibid.

²¹³ At 566.

²¹⁴ Zulman & Kairinos (note 115 above) 167, 170.

²¹⁵ *Donoghue v Stevenson* (note 194 above).

²¹⁶ *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* 1964 (3) SA 561 (A).

²¹⁷ *Donoghue v Stevenson* (note 194 above).

²¹⁸ *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* (note 216 above).

the plaintiff and defendant seeing that the plaintiff consumer had purchased the take-away from the defendant.²¹⁹ It must be remembered that the defendant was a fast food retailer, not a manufacturer.²²⁰ Perhaps Ebersohn J should have considered the principle set out in the Australian case of *Grant v Australian Knitting Mills* [1936] A.C. 85, a case he also highlighted, where it was stated:

‘[R]etailers...are liable in contract: so far as they are concerned, no question of negligence is relevant to the liability in contract. But when the position of the manufacturer is considered, different questions arise: there is no privity of contract between the appellant and the manufacturers: between them the liability, if any, must be in tort, and the gist of the cause of action is negligence.’²²¹

It is submitted that if the above comments were considered by the court, then it would have been obvious that the case of *Donoghue v Stevenson*²²² was inapplicable and the case of *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha*²²³ was more to the point since it dealt with the liability of merchant sellers towards consumers.

Nevertheless, it is important to note that the decision in *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha*²²⁴ was criticised by Shutz J.A sitting in the Appellate Division in *Langeberg Voedsel Bpk v Sarculum Beordery Bpk* 1996 (2) SA 565 (A). This case also dealt with consequential damages for goods with latent defects.²²⁵ The appellant canner and processor of fruit and vegetables supplied defective seed to the respondent and the result was that the respondent’s crop did not yield. Despite recognizing its authority, the reasoning in *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha*²²⁶ was criticised by the court and it was

²¹⁹ These avenues were considered in court ought to have considered the South African case of *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* 2003 (2) All SA 167 (SCA).

²²⁰ *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers* (note 204 above) at paragraphs 2-10.

²²¹ At 100.

²²² *Donoghue v Stevenson* (note 194 above).

²²³ *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* (note 216 above).

²²⁴ *Ibid.*

²²⁵ At 566-567.

²²⁶ *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* (note 216 above) at 569-570.

stated that it fell to be reconsidered because it was out of touch with the realities of the modern age of commerce.²²⁷ The court went on to accordingly dismiss the appeal.²²⁸

It is submitted that Ebersohn J in the case of *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers*²²⁹ ought to have, at least, discussed the significance of the criticism of Shutz J.A. Perhaps this approach could have had the desired effect of assisting both the courts and litigants in future case where product liability matters fall to be determined.

These are some of the challenges faced by courts in dealing with product liability issues in Swaziland. Statutory regulation may assist the courts in dealing with product liability issues. Product liability legislation will make the law in this area more certain.

4.2. The liability of foreign manufacturers

The liability of foreign manufacturers for harm caused by defective products they produce is one of the problematic areas of consumer law in Swaziland. Howells²³⁰ states the problem thus:

‘A common lacuna in consumer protection law is the inability to regulate or sue manufacturers outside the jurisdiction.’²³¹

It is important to highlight the rather strange situation in Swaziland where most of the products manufactured are not consumed by local consumers but rather exported to foreign countries.²³² For example, manufactured products like textiles and sugar are exported to European Union countries and the United States of America, while coal is exported to South Africa.²³³ Swaziland Fruit Canners (SFC) is the only grower and processor of fruits in Swaziland whose goods are sold to consumers in Swaziland.²³⁴ The Republic of South Africa is the main import partner of Swaziland and about 95.6% of imported goods come directly into Swaziland from South

²²⁷ *Langeberg Voedsel Bpk v Sarculum Beordery Bpk* 1996 (2) SA 565 (A) at 571.

²²⁸ At 572.

²²⁹ *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers* (note 204 above).

²³⁰ Howells (note 193 above) 31.

²³¹ *Ibid.*

²³² ‘Swaziland’ (note 1 above). See also ‘Kingdom of Swaziland’ (note 2 above).

²³³ *Ibid.*

²³⁴ ‘Kingdom of Swaziland’ (note 2 above).

Africa.²³⁵ Furthermore, all fuel consumed in Swaziland is imported from South Africa and about 80% of Swaziland's electricity is supplied by South Africa's electricity giant ESKOM, while Mozambique provides 10% of the electricity supply.²³⁶ Other imported goods include machinery, motor vehicles, transport equipment, foodstuffs, petroleum products and chemicals.²³⁷

It is inevitable that the high importation ratio may lead problems for consumers. The question is whether a foreign manufacturer can be held liable for product-based harm to third party consumers in Swaziland.²³⁸ In order for liability to attach and for a consumer to successfully recover damages, the party cited must be the one best-suited to prevent the injury or harm from eventuating from the defect inherent in the supplied product. What is central here is whether it is in the interests of fairness and equity to hold importers, distributors and retailers of these imported goods liable for manufacturing defects of which they themselves are unaware. In order for a manufacturer to be held liable under negligence, a third party consumer must establish that:

- (a) The product was made by the manufacturer;
- (b) The product was defective;
- (c) A reasonable person in the position of the manufacturer would have foreseen the likelihood of the product being defective and causing harm to the plaintiff;
- (d) A reasonable person in the position of the manufacturer would have taken reasonable steps to prevent the product being defective and causing harm to the plaintiff;
- (e) The manufacturer did not take reasonable steps to prevent the product being defective and causing harm to the plaintiff; and
- (f) The defective product caused harm to the plaintiff.²³⁹

²³⁵ 'Swaziland' (note 1 above).

²³⁶ 'Kingdom of Swaziland' (note 2 above).

²³⁷ 'Swaziland' (note 1 above).

²³⁸ Howells (note 193 above) 31. See also *Distillers Co (Bio-Chemicals) Ltd v Thompson* [1971] 1 All ER 694 (PC) at 700; *Moran et al v Pyle National (Canada) Ltd* 43 DLR (3d) 239 at 250; *Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C) at 121.

²³⁹ D Macquoid-Mason 'Consumers and Product Liability' in Macquoid-Mason (note 70 above) 96.

The consumer's claim will succeed if the duty of care owed by the manufacturer is proved to have been breached through his negligence.²⁴⁰ Without a doubt, consumers who suffer personal injury or harm as a result of defective imported goods in Swaziland face an uphill task in establishing the above elements against foreign manufacturers. The crucial feature to note about the decision of *Donoghue v Stevenson*²⁴¹ is that the case was decided in the context of manufacturers carrying on business within a country's borders. This case applies only infrequently in Swaziland because, as seen above, most of the goods consumed are imported from neighbouring countries. It is now necessary to determine the delictual jurisdiction of courts in Swaziland.

4.2.1. Jurisdiction of the courts in respect of foreign manufacturers

The only crucial factor in ascertaining the liability of foreign manufacturers is considering where the cause of action arose in order for a court to exercise jurisdiction.²⁴² It must be noted that there is no hard and fast rule in determining the proper forum for determining liability of foreign manufacturers especially because the criteria used to determine the locus of a delict in different countries has not always been identical.²⁴³ It will be shown below that the problem of foreign manufacturers is not peculiar to Swaziland but the approaches to this problem are different for each country.²⁴⁴

The Privy Council in the case of *Distillers Co (Bio-Chemicals) Ltd v Thompson and another* [1971] 1 All ER 694 (PC) explored three avenues in determining the place where the cause of action arose so as to vest a court with jurisdiction over foreign manufactured goods.²⁴⁵ In this case the plaintiff sought an order to serve a writ of summons to the defendant English manufacturer having its registered offices and carrying on business in Britain.²⁴⁶ The defendant produced pharmaceuticals, including 'Distval', a sedative and sleep-inducing drug containing

²⁴⁰ Ibid 93.

²⁴¹ *Donoghue v Stevenson* (note 194 above).

²⁴² Macquoid-Mason (note 239 above) 95. See also *Thomas v BMW South Africa (Pty) Ltd* (note 238 above) at 125; *Wright v Stuttford & Co.* 1929 EDL 10 at 33-34; *Ramphela v Minister of Police* 1979 (4) SA 902 (W) at 904.

²⁴³ *Thomas v BMW South Africa (Pty) Ltd* (note 238 above). See also *Moran et al v Pyle National (Canada) Ltd* (note 238 above); *Distillers Co (Bio-Chemicals) Ltd v Thompson* (note 238 above).

²⁴⁴ Ibid.

²⁴⁵ At 699.

²⁴⁶ At 695-696.

thalidomide which was exported to New South Wales in Australia by a the second defendant distributor.²⁴⁷ The defective nature of the drug resulted in the plaintiff being born with defective eyesight and without arms as a result of the drug taken by its mother while pregnant in New South Wales, Australia.²⁴⁸ The question for determination was whether the plaintiff had, as against the defendant, a cause of action which arose within the jurisdiction of the Supreme Court of New South Wales.²⁴⁹

The court stated that in determining whether a cause of action was foreign or local a court was to consider and apply a theory based on the three determinant factors.²⁵⁰ The proper court was the one where either; (i) every ingredient of the delict occurred; or (ii) the last ingredient of the delict occurred; or (iii) the act of the defendant which gave rise to the cause of complaint occurred.²⁵¹ This test is referred to as the ‘substance test’ and was later considered in South Africa,²⁵² Australia²⁵³ and Canada.²⁵⁴ While generally accepting the test, Lord Pearson criticised the first factor of the theory as ‘too restrictive for the needs of modern times’, and the second as ‘wrong’.²⁵⁵ The judge stated that in determining which country’s courts have the jurisdiction to try an action the degree of connection between the cause of action and the country concerned should be the determining factor.²⁵⁶ Lord Pearce held that ‘it is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did wrong’.²⁵⁷ In dismissing the appeal, the court held that the plaintiff was entitled to claim relief in New South Wales since the act giving rise to the cause of complaint occurred there.²⁵⁸

In the Canadian case of *Abbott-Smith v Governors of University of Toronto* 45 DLR (2d) 672 (NSSC) an oral polio vaccine negligently produced in Toronto caused harm to the appellant in

²⁴⁷ At 696.

²⁴⁸ Ibid.

²⁴⁹ At 695.

²⁵⁰ At 698-699.

²⁵¹ The last factor followed the rule laid down in *Jackson v Spittali* (1870) L.R 5 C.P 542, where it was held that the question whether a cause of action is to be decided as local or foreign is to be answered by ascertaining the place of ‘the act on the part of the defendant which gives the plaintiff his cause of complaint.’

²⁵² *Thomas v BMW South Africa (Pty) Ltd* (note 238 above).

²⁵³ *Voth v Manildra Flour Mills (Pty) Ltd & another* (1990) ALR 124 (HC of A).

²⁵⁴ *Abbott-Smith v Governors of University of Toronto* 45 DLR (2d) 672 (NSSC).

²⁵⁵ At 699.

²⁵⁶ Ibid.

²⁵⁷ At 700.

²⁵⁸ At 701.

Nova Scotia. When it had to be determined which court between the two provinces had the necessary jurisdiction, it was held that a court with jurisdiction was one where all the elements of the delict occurred.²⁵⁹ However, this case was overturned by the Canadian Supreme Court in the case of *Moran et al v Pyle National (Canada) Ltd* 43 DLR (3d) 239. In this case the appellant's husband who was an electrician was fatally injured in the province of Saskatchewan while removing a spent lightbulb negligently manufactured and assembled by the respondent in Ontario.²⁶⁰ The appellant claimed that the respondent was negligent in the manufacture and construction of the bulb and failed to provide safety checks to prevent the defective bulb from leaving the manufacturing plant for distribution.²⁶¹ The issue was whether the defendant, which had its assets and business in Ontario, could be served with summons for an alleged tort committed in Saskatchewan.²⁶² Dickson J departed from both the cases of *Abbott-Smith v Governors of University of Toronto*²⁶³ and *Distillers Co (Bio-Chemicals) Ltd v Thompson*,²⁶⁴ and stated as follows:

'Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognised in contemporary jurisprudence.'²⁶⁵

The learned judge went on to discard the first factor of the substance test as a 'draconian theory' because in his view it was unlikely that all elements of a delict were to happen at the same place.²⁶⁶ He formulated a new rule applicable to the 'careless manufacture' thus:

'[T]he following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or

²⁵⁹ *Thomas v BMW South Africa (Pty) Ltd* (note 238 above) 123.

²⁶⁰ At 241.

²⁶¹ *Ibid.*

²⁶² At 242-243.

²⁶³ *Abbott-Smith v Governors of University of Toronto* (note 254 above).

²⁶⁴ *Distillers Co (Bio-Chemicals) Ltd v Thompson and another* (note 238 above).

²⁶⁵ At 250.

²⁶⁶ At 249.

consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial discretion over that foreign defendant. This rule recognises the important interest a state has or injuries suffered by persons within its territory. It recognises that the importance of negligence as a tort is to protect against carelessly inflicted injury and that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.²⁶⁷

The court was simply saying that manufacturers will be liable for goods they disseminate for public consumption either inside or outside of a county's territorial borders. The court allowed the appeal and held that the courts in Saskatchewan had jurisdiction.²⁶⁸

In the South African context the liability of a foreign manufacturer was exhaustively dealt with by Van Reenen J in the case of *Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C). The plaintiff in this case sued the defendant in Cape Town; the defendant's principal place of business was in Gauteng.²⁶⁹ The plaintiff was injured because the defendant manufacturer was responsible for a manufacturing defect in a cruise control mechanism of a motor vehicle the plaintiff had purchased from a dealer in Cape Town where he also lived.²⁷⁰ As a result of the defect, the motor vehicle vehicle's cruise control mechanism forced the vehicle to accelerate and swerve off the road onto a fence by the roadside, thereby causing him bodily injury.²⁷¹ The plaintiff sued the defendant in Cape Town where he had purchased the vehicle and where the accident had occurred.²⁷² The question for determination was whether the court in Cape Town had jurisdiction over the matter in view of the fact that the defendant was based in Gauteng.²⁷³ In the South African context a plaintiff may be an *incola* of one province and the defendant a

²⁶⁷ At 250.

²⁶⁸ At 251.

²⁶⁹ At 110.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ At 111.

peregrinus of that province (but an *incola* of the Republic of South Africa generally) as was the situation in this case.²⁷⁴ In deciding the matter Van Reenen J considered the delictual liability of foreign based manufacturers in different jurisdictions.

The court recognised that choice of law problems arose when delictual jurisdiction over foreign manufactured goods had to be exercised.²⁷⁵ The underlying factor is that there is no ‘hard and fast’ rule in determining the liability of foreign manufacturers especially because the criteria used to determine the locus of a delict in different contexts are not always identical.²⁷⁶ The court explained that if the ‘act and effect’ of the delict occur in different countries, the law of one of these countries was to apply to the exclusion of the other.²⁷⁷ The problem lay only in determining the locus of the delict.²⁷⁸ This issue is crucial because the cause of action determines which court has jurisdiction between two countries.²⁷⁹ Van Reenen J rejected the first element of the substance test that all elements of a delict must have occurred in a court’s jurisdictional area for it to assume jurisdiction.²⁸⁰ Instead, he formulated a test that was to apply in South African law.²⁸¹ Thus:

‘As already stated, the duty of care the defendant is alleged to have owed the plaintiff in the instant case is the duty to lawful users of vehicles manufactured and/or distributed by the defendant, including the plaintiff, to take all reasonable steps to ensure that such vehicles and their component parts are free from defects in design, quality and/or manufacture that might cause serious injury or death to such users in the event of their malfunctioning when being used. That duty, save that it is limited to lawful users, has been formulated without any restriction as regards territory, time or identity of the persons whom it is owed. It is apparent from the admitted documentation...that, although the defendant manufactures vehicles in Gauteng, they are intended for distribution throughout the Republic of South Africa, Botswana, the Kingdoms of Lesotho and Swaziland, as well as Namibia. In the circumstances, it is likely to have been in

²⁷⁴ At 115.

²⁷⁵ At 121-122.

²⁷⁶ *Ibid.* See also *Moran et al v Pyle National (Canada) Ltd* (note 238 above); *Distillers Co (Bio-Chemicals) Ltd v Thompson* (note 238 above).

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* See also *Macquoid-Mason* (note 239 above) 95.

²⁷⁹ *Ibid.*

²⁸⁰ At 125.

²⁸¹ *Ibid.*

the reasonable contemplation of the defendant that defectively manufactured vehicles would be supplied and/or used, inter alia, in the jurisdiction of this court and that mishaps and injuries resulting from such defects might occur and result in damages there. Accordingly, the defendant owed the plaintiff a duty of care in this court's jurisdiction.²⁸²

The conclusion reached by the court, which also appears to have been accepted as the position of South African law, is that for jurisdictional purposes the locus of a delict will be determined in line with the most relevant facts and their number occurring within a court's jurisdiction.²⁸³ Therefore, it is not necessary for all the ingredients of the delict to have happened within the court's proximity for a court to be vested with jurisdiction.²⁸⁴

In Swaziland, perhaps the question on the liability of foreign manufacturers ought to have been considered by the court in the case of *Lungile Ndzinisa v McCarthy Swaziland (Pty) Ltd t/a Savells Furnishers* (unreported) High Court Civil Case 3305/ 2003. This case concerned a defective refrigerator sold by the respondent to the applicant under a hire purchase agreement.²⁸⁵ The refrigerator in question had developed severe cracks on its corners, doors and edges after being used by the applicant for only nine months.²⁸⁶ It became apparent during the course of the case that the cracks may have been the result of a manufacturing defect or 'factory fault', as the applicant put it.²⁸⁷ When evidence was presented in court it was further revealed that one witness had previously purchased a similar refrigerator which developed the same problem.²⁸⁸ Despite returning the refrigerator to have it repaired or replaced by the respondent, the applicant was unsuccessful in her endeavours which then prompted her to invoke legal processes for cancellation of the hire purchase agreement.²⁸⁹ In deciding the matter, Mabuza J limited her decision to the contractual relationship between the parties as governed by the hire purchase agreement and found in favour of the applicant purchaser.²⁹⁰ While the question of foreign origin

²⁸² At 126.

²⁸³ Macquoid-Mason (note 239 above) 95.

²⁸⁴ Ibid.

²⁸⁵ At Para 4.

²⁸⁶ At paragraphs 4-6, 29-30.

²⁸⁷ At Para 5.

²⁸⁸ Ibid.

²⁸⁹ At paragraphs 10-12.

²⁹⁰ At paragraphs 33-37.

of the refrigerator was not canvassed by the court, the court alluded to South African law in its finding.²⁹¹ Thus:

‘The use of South African legislation in Swaziland is illegal and not applicable. Swaziland has its own Hire Purchase Act. What then becomes of an agreement such as the one before court? My considered view is that it is void. What then governs the contract between the parties? Their contract is subject to the common law. However, I was not asked to make a finding on the law to be applied and my remarks are merely obiter.’²⁹²

It is not a far-fetched conclusion from the reference to South African law in the excerpt above that has the connotation that the refrigerator may have been imported from South Africa.²⁹³ Perhaps the court should have made general comments about the liability of foreign manufacturers who supply defective goods. Nevertheless, if the reasoning of the court in *Thomas v BMW South Africa*²⁹⁴ is anything to go by, then foreign manufactures may be held liable in the courts of Swaziland within the confines of the test formulated by that court.²⁹⁵ Furthermore, the Canadian decision of *Moran et al v Pyle National (Canada) Ltd*,²⁹⁶ already examined above seems to vest courts where the delict occurred with jurisdiction over foreign manufacturers. However, it is unclear what position the courts in Swaziland would adopt in dealing with harm caused by imported goods which cause physical harm as a result of negligent manufacture in view of the tests applied in the different countries as seen above. The question is left for the courts to decide whether they have the necessary jurisdiction to adjudicate on a claim brought by a consumer in Swaziland against a foreign manufacturer.

²⁹¹ At Para 31.

²⁹² Ibid.

²⁹³ Although Swaziland does export refrigerators (see ‘Economy of Swaziland’ available at http://en.m.wikipedia.org/wiki/Economy_of_Swaziland, accessed on 25 September 2012), the reason for this conclusion is that South African legislation, it was argued by the respondent, ought to have governed the hire purchase agreement for the sale of the refrigerator. This only leads to the conclusion that the refrigerator originated from South Africa.

²⁹⁴ *Thomas v BMW South Africa* (note 238 above).

²⁹⁵ At 126.

²⁹⁶ *Moran et al v Pyle National (Canada) Ltd* (note 238 above).

5. THE HIRE PURCHASE ACT 11 of 1969

5.1. Definition and scope

'Hire purchase' is an agreement for the sale of goods where the purchase price is paid in instalments and ownership in such goods does not transfer to the purchaser until payment of the last instalment is made.²⁹⁷ When a consumer buys goods on hire purchase, his bargaining power is substantially reduced because he is tempted to purchase goods he cannot afford, while the seller on the other hand is usually in a dominant bargaining position because he supplies both the goods and the credit required.²⁹⁸ As a result, the consumer may be susceptible to abuse.²⁹⁹ The potential of consumer exploitation in hire purchase sales has led some countries to introduce statutory regulation in hire purchase selling.³⁰⁰ For example, South Africa enacted the Hire Purchase Act 36 of 1942³⁰¹ while the UK enacted the Hire Purchase Act of 1938.³⁰² In the case of *Smit and Venter v Fourie and another* 1946 SA 9 (WLD), Millin J explained the rationale for the now repealed South African Hire Purchase Act as follows:

'[T]he mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill-afford to pay and on terms which are harsh and unconscionable, and it was intended to give protection to such persons against their own improvidence and folly.'³⁰³

Similar sentiments were expressed by De Villiers JP in the case of *National Motors v Fall* 1958 (2) SA 570 (E) as follows:

'I think it is clear that the Hire Purchase Act, 36 of 1942 and the clauses therein, relevant to the present enquiry, were passed with the view to protecting purchasers of goods under hire-purchase agreements against their own misplaced optimism in their ability of keeping up with the payments of the instalments and so becoming owners of the goods, and of avoiding being

²⁹⁷ S. 2 of the Hire Purchase Act 11 of 1969.

²⁹⁸ MA Diemont & PJ Aronstam *The Law of Credit Agreements and Hire Purchase in South Africa* (1982) 31.

²⁹⁹ Howels & Weatherill (note 70 above) 235.

³⁰⁰ Ibid. See also Diemont & Aronstam (note 298 above) 32.

³⁰¹ This Act was replaced by the Credit Agreements Act of 1980, and later by the National Credit Act 34 of 2005.

³⁰² Diemont & Aronstam (note 298 above) 7. See also DW Oughton *Consumer Law: Texts, Cases and Materials* (1991) 155.

³⁰³ At 13. See also Diemont & Aronstam (note 298 above) 32.

compelled to return goods and forfeit all instalments paid, even where the total instalments are very little short of the full purchase price.’³⁰⁴

The above excerpts reveal that hire purchase legislation was intended to protect consumers. In Swaziland, the Hire Purchase Act of 1969 was also introduced as a regulatory measure to control sales concluded through hire purchase agreements.

5.2. The contract of sale in hire purchase agreements

Sellers often reserve ownership through a suspensive condition (sometimes referred to as a reservation clause or *pactum reservati dominii*) contained in a hire purchase agreement.³⁰⁵ The effect of including a suspensive condition in a hire purchase sale is that the transfer of ownership to the purchaser is temporarily delayed and remains vested in the seller until the last instalment is paid by the consumer.³⁰⁶ Suspensive conditions are common in hire purchase statutes and in Swaziland it is found in section 2 of the Hire Purchase Act which provides as follows:

“hire-purchase agreement” means any agreement whereby *goods are sold subject to the condition that the ownership in such goods shall not pass* merely by the transfer of the possession of such goods, and the purchase price is to be paid in instalments, two or more of which are payable after such transfer; and includes any other agreement which has, or agreements which together have, the same import, whatever form such agreement or agreements may take.’ (Emphasis added)

The above excerpt implies that a hire purchase agreement is a contract of sale because it is an agreement in terms of which ‘goods are sold’. If that is the correct position, the conclusion is that a hire purchase agreement is, in fact, a sale. It is a well-established principle of the Roman Dutch law of sale that a sale is complete or *perfecta* when three requirements have been satisfied.³⁰⁷ In

³⁰⁴ At 571.

³⁰⁵ S. 2 (1) of the Hire Purchase Act of 1969

³⁰⁶ MA Fouché ‘The Contents of the Contract’ in MA Fouché (note 112 above) 123. See also Diemont & Aronstam (note 298 above) 4.

³⁰⁷ Woker (note 70 above) 16. See also CI Belcher *Norman’s Purchase and Sale in South Africa* (1972) 2; Fouché (note 112 above) 154.

order for a sale to exist there must be consent of the parties to enter into the sale agreement;³⁰⁸ the subject-matter or object (*merx*) of the sale must be determined or readily ascertainable by the parties;³⁰⁹ and the purchase price must have been fixed or definite.³¹⁰ If all these elements exist then legal duties follow immediately, but if one of these elements is missing, there is no sale.³¹¹ That the items purchased have been delivered does not imply that ownership in the goods has passed to the consumer.³¹² The passing of ownership is not a requirement that brings a sale into existence but only the agreement constitutes the sale.³¹³ In the case of *Nimmo v Klinkenberg Estates Co Ltd* 1904 TH 310, it was stated:

[The] word “sale” is used with various meanings. To lawyers discussing it from an academic point of view it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase price has been paid or whether there has been delivery of the thing sold.’³¹⁴

While section 2 of the Hire Purchase Act of 1969 states that a hire purchase agreement is an agreement where goods are sold, it has been held that such an agreement is not a sale under the law of hire purchase.³¹⁵ This conflicting view was enunciated in the very old case of *Quirk’s Trustees v Assignees of Liddle & Co.* (1885) 3 SC 322. In this case, Liddle’s assignees entered into a contract with Quirk for the sale of hotel furniture.³¹⁶ The purchase price of the furniture was the amount of £ 650 .00 which Quirk agreed to pay in four instalments within a period of twelve months. It was further agreed that ownership in the furniture would pass to Quirk only upon payment of last instalment. The furniture was subsequently delivered and Quirk failed to pay the amount as agreed.³¹⁷ The question for

³⁰⁸ Belcher (note 307 above) 70.

³⁰⁹ Ibid 33.

³¹⁰ Ibid 62. See also Woker (note 70 above) 16; Diemont & Aronstam (note 298 above) 119; Fouché (note 112 above) 154-155.

³¹¹ Woker (note 70 above) 16. See also Visser *et al South African Mercantile & Company Law* (2005) 110.

³¹² Visser *et al* (note 311 above) 112-113. See also Belcher (note 307 above) 2.

³¹³ Diemont & Aronstam (note 298 above) 17. See also Belcher (note 307 above) 4; *Kleyhans Bros v Wessels’ Trustee* 1927 AD 271 at 282.

³¹⁴ At 314. See also Visser *et al* (note 311 above) 110.

³¹⁵ See the cases of *Quirk’s Trustees v Assignees of Liddle & Co.* (1885) 3 SC 322; *Leo v Loots* 1909 TS 366; *Diggers Development (Pty) Ltd v City of Matlosana and Another* [2011] ZASCA 247 (1 December 2011).

³¹⁶ MA Diemont & RM Marias ‘*The Law of Hire Purchase in South Africa*’ (1964) 12.

³¹⁷ Ibid.

determination was whether ownership in the goods had passed to Quirk. Lord Chief Justice De Villiers stated that the very existence of a suspensive condition in a contract intended to be one of sale was inconsistent and repugnant to the nature of sales in general.³¹⁸ The court concluded that since contracts of sale do not generally contain suspensive conditions, the agreement concluded was not one of sale.³¹⁹

Chief Justice Innes, applied the same principle in the old South African case of *Leo v Loots* 1909 TS 366³²⁰ and adopted the position set out in *Quirk's Trustees v Assignees of Liddle & Co.*³²¹ that suspensive conditions are inconsistent with contracts of sale. Chief Justice Innes explained why the court in *Quirk's Trustees v Assignees of Liddle & Co.*³²² came to the conclusion that a contract of sale was suspended until the suspensive condition was fulfilled.³²³ Based on the above decisions and other judgments that followed this line of reasoning, it may be said that there is no contract of sale between a consumer and a supplier in hire purchase agreements until payment of the last instalment is made by the consumer.³²⁴

This position is clearly contrary to the wording of section 2 of the Hire Purchase Act of Swaziland which states that a hire purchase agreement is a sale.³²⁵ The courts seem to make much of the suspensive condition, which they consider as the dividing line between a contract of sale and a sale on hire purchase. In other words, if a contract of sale contains a suspensive condition on the passing of ownership, then that contract is one of hire purchase and not of sale.³²⁶ There are later decisions that followed this line of reasoning.³²⁷

³¹⁸ Ibid.

³¹⁹ Ibid. See also *Fazi Booy v Short* (1882) 2 EDC 301.

³²⁰ At 370.

³²¹ *Quirk's Trustees v Assignees of Liddle & Co.* (note 315 above).

³²² Ibid.

³²³ At 370.

³²⁴ *Diggers Development (Pty) Ltd v City of Matlosana and Another* (note 315 above).

³²⁵ Hire Purchase Act (note 301 above) S. 2.

³²⁶ *Quirk's Trustees v Assignees of Liddle & Co.* (note 315 above); *Leo v Loots* (note 315 above); *Diggers Development (Pty) Ltd v City of Matlosana and Another* (note 315 above).

³²⁷ See the cases *Flax v Van der Linde* 1928 CPD 495; *Frasers Ltd v Nel* 1929 OPD 182; *Johnson v Samuels* 1914 CPD 169; *Davis v Pretorius* 1909 TS 868; *Cotton Tail Homes (Pty) Ltd v Palm Fifteen (Pty) Ltd* 1977 (1) SA 264 (W) which was confirmed on appeal in *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (AD); *Elphick v Barnes* (1880) 5 C.P.D 321; *Fazi Booy v Short* (note 319 above); *Diggers Development (Pty) Ltd v City of Matlosana and Another* (note 315 above) amongst others.

However, all the decisions following the approach set out in *Quirk's Trustees v Assignees of Liddle & Co.*³²⁸ have been criticised.³²⁹ The criticism derives from the question whether the suspensive condition suspends the whole contract of sale until payment of the last instalment, or whether the contract of sale comes into existence but only the transfer of ownership is suspended pending the payment of the last instalment.³³⁰ There is no definite answer to this question.³³¹ In the case of *Forsdick Motors Ltd v Lauritzen* 1967 (3) S.A 247 (N), James J framed the question thus:

'The question whether the condition in a hire purchase agreement reserving ownership in the article sold in the seller until the whole purchase price has been paid has the effect of suspending the whole contract, or whether the contract of sale comes into existence but only the delivery of the article into the hands of the purchaser is conditional, is a matter which does not appear to have been finally settled in our law.'³³²

Diemont and Aronstam³³³ approach the issue in the following way:

'What is the legal effect [on the contract] of a *pactum reservati domini*? Does the clause suspend the whole contract or merely the passing of the ownership, or, to put the question differently, is the whole contract of sale subject to a suspensive condition, or is it a completed sale with a term making only the passing of ownership conditional?'³³⁴

The consequences of the two interpretations expressed above are two-fold.³³⁵ If the suspensive condition suspends the sale in its entirety then risk in the goods does not pass to the consumer when the hire purchase agreement is concluded.³³⁶ On the other hand, if a sale comes into existence but only transfer of ownership is suspended then risk passes immediately the hire

³²⁸ *Quirk's Trustees v Assignees of Liddle & Co.* (note 315 above).

³²⁹ Diemont & Aronstam (note 298 above).

³³⁰ *Forsdick Motors Ltd v Lauritzen* 1967 (3) S.A 247 (N) at 253. See also Belcher (note 307 above) 139; Diemont (note 298 above) 13.

³³¹ *Forsdick Motors Ltd v Lauritzen* (note 330 above).

³³² Ibid.

³³³ Diemont & Aronstam (note 298 above) 13.

³³⁴ Ibid.

³³⁵ Ibid. See also Belcher (note 307 above) 140.

³³⁶ Ibid. See also Belcher (note 307 above) 142; Visser *et al* (note 311 above) 117.

purchase agreement is concluded.³³⁷ It has been demonstrated that case law adopts the former position rather than the latter. However, the issue sparked a jurisprudential debate among South African legal scholars and writers who adopt different views. The reason why there was considerable debate on the topic is because the definition of ‘hire purchase agreement’ in section 1 of the repealed South African Hire purchase Act conflicted with the judgments examined above.³³⁸ The debate is relevant in Swaziland because section 1 of the repealed South African Hire purchase Act contained a similar definition of ‘hire purchase agreement’ as contained in the Hire Purchase Act³³⁹ of Swaziland. It is for that reason that the judgments and the debates on the South African section 1 apply fully in the context of Swaziland. A legal scholar who agrees with the decisions examined above is Belcher,³⁴⁰ who asserts that the courts are correct in saying a contract of sale does not come into existence in hire purchase agreements until the payment of the last instalment by the consumer. It is interesting to note that this author does not clearly state the kind of relationship that exists between a consumer and a seller in a hire purchase agreement if the contract is not that of sale.³⁴¹ He says that it is ‘a very real and definite contractual relationship though not of sale’, which can also be classified as an ‘interim contract’.³⁴²

Diemont and Aronstam³⁴³ on the other hand contend that a contract of sale comes into existence when goods are sold on hire purchase and hold the view that only the passing of ownership is suspended. Mackeurtan³⁴⁴ shares the same views and argues that the Cape Supreme Court in the decision of *Quirk’s Trustees v Assignees of Liddle & Co.*³⁴⁵ was untenable and wrong in holding that a suspensive condition in a hire purchase agreement negates the agreement as being one of sale.³⁴⁶ The only requirements for a sale to exist is if the parties have agreed on the goods to be sold (the *merx*), the price to be paid (the *pretium*), and they have the intention that one will be exchanged for the other (*animus vivendi et emendi*); and once these conditions are in place then

³³⁷ Diemont & Aronstam (note 298 above) 13.

³³⁸ Belcher (note 307 above) 140-143, agrees with the courts’ views, while B O’Donovan *Mackeurtan’s Sale of Goods in South Africa* 4 ed (1972) 154, and Diemont & Aronstam (note 298 above) 13, reject the decision in *Quirk’s Trustees v Assignees of Liddle & Co.* (note 315 above).

³³⁹ S2. Hire Purchase Act of 1969.

³⁴⁰ Belcher (note 307 above) 137-143.

³⁴¹ Ibid 140.

³⁴² Ibid.

³⁴³ Diemont & Aronstam (note 298 above) 14, 19.

³⁴⁴ O’Donovan (note 340 above) 96-99.

³⁴⁵ *Quirk’s Trustees v Assignees of Liddle & Co.* (note 315 above).

³⁴⁶ O’Donovan (note 340 above) 96-99. See also Diemont & Aronstam (note 298 above) 15.

the sale is complete.³⁴⁷ The common thread in the arguments of Mackeurtan,³⁴⁸ Diemont and Aronstam³⁴⁹ is that a contract of sale arises upon the fulfilment of these three elements and that in hire purchase agreements they are in existence. Therefore, whether or not a suspensive condition suspends the transfer of ownership does not affect the sale because it is already *perfecta* upon conclusion of the hire purchase agreement.³⁵⁰

It appears that the difficulties are difficult to resolve.³⁵¹ Nevertheless, this debate ended in South African law when the South African Hire Purchase Act was eventually repealed in 1980. While the views expressed by Diemont and Aronstam³⁵² are quite logical, the law appears to be that expressed in *Quirk's Trustees v Assignees of Liddle & Co.*³⁵³ and all the subsequent cases that followed this decision.³⁵⁴ A more recent case on this issue is that of *Diggers Development (Pty) Ltd v City of Matlosana and Another* [2011] ZASCA 247 (1 December 2011). This case concerned the sale of immovable property between a municipality and a company which was subject to a deed of sale which contained suspensive conditions.³⁵⁵ Although not discussing hire purchase sales, Cloete JA, after citing a number of authorities, held that that no contract of sale comes into existence until the final instalment is payable in a sale subject to a suspensive condition.³⁵⁶ It cannot be gainsaid that such judicial pronouncements remain law.

However, the cases already discussed raise serious practical issue for consumers. If there is no contract of sale in existence between a consumer and a seller under a hire purchase agreement, it follows that that consumer cannot invoke the aedilician remedies against the seller until payment of the last instalment.³⁵⁷ The aedilician remedies either under the *actio quanti minoris*, or the *actio redhibitoria* shield consumers from sellers who supply defective goods under a contract of

³⁴⁷ Diemont & Aronstam (note 298 above) 18. See also Fouché (note 112 above) 154.

³⁴⁸ O'Donovan (note 340 above) 96-99.

³⁴⁹ Diemont & Aronstam (note 298 above) 18.

³⁵⁰ Ibid.

³⁵¹ *Forsdick Motors Ltd v Lauritzen* (note 330 above).

³⁵² Diemont & Aronstam (note 298 above) 14-20.

³⁵³ *Quirk's Trustees v Assignees of Liddle & Co.* (note 315 above).

³⁵⁴ Diemont & Aronstam (note 298 above) 119-122.

³⁵⁵ At Para 6.

³⁵⁶ At paragraphs 23- 24.

³⁵⁷ Diemont & Aronstam (note 298 above) 132-133. See also Belcher (note 307 above) 140.

sale.³⁵⁸ However, since no contract of sale exists, the inexorable conclusion is that consumers have no remedies under the law of sale.³⁵⁹ Diemont and Aronstam³⁶⁰ suggest that in order for a consumer to invoke these remedies he must first bring a contract of sale into existence by paying all the instalments upfront. In this way the last instalment will have been paid and the sale comes into existence.³⁶¹ The problem with this approach is that the consumer may not have the money to pay the money in full, and if he does have the money, paying the full purchase price may render him susceptible to the defence of waiver by the seller if the consumer does invoke the aedilician remedies.³⁶²

The enquiry on hire purchase agreements may never again see the light of day in South African law after the repeal of the South African Hire Purchase Act.³⁶³ The courts in Swaziland ought to take the baton and develop the law on hire purchase because the Hire Purchase Act of Swaziland is still in force. Perhaps the development will be in line with the South African decided cases which do not recognise a contract of sale in hire purchase agreements. Until the problem is effectively dealt with by the Courts in Swaziland, it will persist.

5.3. The selling price

Besides controlling unscrupulous sellers the Hire Purchase Act also ensures that consumers who cannot afford to pay the cash price in a single transaction obtain the goods they seek through piecemeal payments.³⁶⁴ In order to achieve this objective section 7 of the Hire Purchase Act prescribes mandatory stipulations for all hire purchase agreements one of which is the selling price. It will be seen below that the issue of the selling price is confusing to most consumers, irrespective of social standing. While popular belief is that the poor are the most exploited in hire purchase agreements because of their weak bargaining power, it is suggested that the in-built provisions of section 7 of the Hire Purchase Act affect even the affluent consumers in society.³⁶⁵

³⁵⁸ Fouché (note 112 above) 160.

³⁵⁹ Diemont & Aronstam (note 298 above) 133-134.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid 123.

³⁶⁴ Ibid 32.

³⁶⁵ *Smit and Venter v Fourie & another* 1946 WLD 9 at 13. See also Diemont & Aronstam (note 298 above) 30.

The selling price can either be the 'cash price' and the 'purchase price' of goods.³⁶⁶ A distinction must be drawn between the two. Section 7 (1) (a) and (b) embodies provisions on the 'cash price' and 'purchase price' respectively. Section 7 (1) (a) provides that every agreement shall contain 'a statement of the price with which the goods may be purchased by the buyer from the seller for a cash amount in money'. In order to place the section in its proper context it is essential to define 'cash price'. Section 2 of the Hire Purchase Act defines a cash price as follows:

“‘cash price’- in relation to any goods, means the price stated in respect of those goods under section 7 (1) (a).’

Section 7 (1) (a) is to be read together with section 2 and section 5 (1) of the Act. Section 5 (1) of the Act requires the seller to inform the buyer in writing of the cash price before a hire purchase agreement is entered into between the parties. When these sections are read together it is apparent that a consumer purchaser must be made aware of the cash price in writing before entering into the agreement and, if he enters into the agreement, the cash price must be included in the agreement itself.³⁶⁷ Section 7 (1) (b) on the other hand requires the 'purchase price' to be included in the agreement. This section states that every agreement shall contain 'a statement of the amounts which are included in the purchase price and each such amount shall be separately specified opposite the matter in respect of which it is payable'.³⁶⁸ Section 2 defines a purchase price as follows:

“‘purchase price’- the total sum payable under any agreement to the seller by the buyer, exclusive of any sum payable in terms of the agreement as a penalty or as damages for the breach thereof or by way of interest upon instalments which are in arrear.’

When comparing the above provisions it appears that a purchase price consists of other amounts in addition to a cash price.³⁶⁹ They include ancillary finance charges, maintenance fees,

³⁶⁶ S. 7 (1) (a) & (b) of the Hire Purchase Act of 1969.

³⁶⁷ S. 7 (1) (a), S. 5 (1) & S. 2 of the Hire Purchase Act of 1969.

³⁶⁸ S. 7 (1) (b) of the Hire Purchase Act of 1969.

³⁶⁹ Diemont & Aronstam (note 298 above) 86.

accessories fees, licence fees, insurance fees, service fees, delivery fees, instalment fees, etc.³⁷⁰ The additional amounts included must be those readily ascertainable at the time of entering into the agreement and do not include any subsequent amounts arising during the subsistence of the contract.³⁷¹ Any amounts, though incidental to the agreement, which are not definite during the conclusion of the hire purchase agreement, do not form part of the purchase price and are not to be included in the agreement.³⁷²

The cash price and purchase price was also considered in the leading case of *Van der Wath v Pienaar* 1948 (1) SA 587 (T). In this case the plaintiff seller and the defendant purchaser had entered into a hire purchase agreement for the sale of certain equipment, including a three stamp battery belonging to the plaintiff.³⁷³ The agreement provided that if the defendant failed to pay the instalments the goods would be auctioned and the plaintiff would be paid from the proceeds of the auction conducted on the goods.³⁷⁴ In finding that the agreement did not comply with section 5 (1) (a) of the now repealed South African Hire Purchase Act, the court held that the Legislature had not intended the purchase price to be the cash price of goods sold on hire purchase.³⁷⁵ Section 5 (1) (a) of the South African Hire Purchase Act was similar to section 7 (1) (a) of the Hire Purchase Act of Swaziland in that it required the cash price to be stipulated. Therefore, the judgment is relevant for Swaziland. Commenting on section 5 (1) (a) and (b) of the repealed South African Hire Purchase Act Neser J, made the following pronouncement:

‘There is a clear indication that the Legislature did not intend the purchase price stipulated in a hire purchase agreement to be the price at which the goods sold could be purchased for a cash amount in money.’³⁷⁶

The court further expressed the view that the purchase price was more than the cash price because a purchase price contemplated other charges like interest in addition to the cash price.³⁷⁷

³⁷⁰ Ibid. See also S. 2 of the Hire Purchase Act of 1969.

³⁷¹ Diemont & Aronstam (note 298 above) 86.

³⁷² Ibid.

³⁷³ At 589.

³⁷⁴ At 588.

³⁷⁵ At 590-591.

³⁷⁶ At 591.

³⁷⁷ Ibid.

This view is supported by Belcher³⁷⁸ who asserts that a cash price cannot exceed the purchase price and that if that if this were to happen it would be contrary to the provisions of the South African Hire Purchase Act. Section 16 (b) of the Hire Purchase Act of Swaziland also lends support to the view that the cash price is less than the purchase price because it makes provision to the effect that if the purchase price is paid in full before the due date, it may be reduced.³⁷⁹ The courts in Swaziland are likely to adopt the approach adopted by South African courts when faced with an interpretation of section 7 of the Hire Purchase Act of Swaziland.³⁸⁰ The provisions of the Act also do not indicate the contrary. Comparatively, the purchase price exceeds the cash price because of the additional fees and charges it includes.³⁸¹

Consumers are not usually aware of this difference in amounts until the last minute when they enter into the agreement, especially because the hire purchase agreement itself contains the figures. The general failure by consumers to differentiate between the cash price and the purchase price which contains additional costs and charges will not only unsettle the poor and unwary, but will worry even the more sophisticated consumers.³⁸² The consumer must be made aware of both selling prices at the earliest convenience so as to properly decide whether or not to purchase goods on hire purchase.

6. THE MONEY LENDING AND CREDIT FINANCING ACT 3 OF 1991

The purpose of the Money Lending and Credit Financing Act 3 of 1991 (Money Lending Act) is to regulate the micro-lending industry by protecting consumers in need of financial assistance through monetary loans from unscrupulous lenders.³⁸³ The motivation for examining Money Lending Act is driven by the often high interest rates consumers in Swaziland are subjected to when they have to repay loans offered by money lenders.³⁸⁴ The urgent need for further

³⁷⁸ Belcher (note 307 above) 173.

³⁷⁹ S. 16 (b) of the Hire Purchase Act of 1969.

³⁸⁰ The fact that S. 5 of the South African Hire Purchase Act of 1942, was judicially considered in South Africa may assist courts in Swaziland whenever S. 7 of the Hire Purchase Act of 1969 is in issue.

³⁸¹ S. 2 (1) of the Hire Purchase Act of 1969.

³⁸² Diemont & Aronstam (note 298 above) 32. See also Belcher (note 307 above) 166.

³⁸³ See the Long title of the Money Lending and Credit Financing Act of 1991. See also *Reckson Mawelela v MB Association of Money Lenders & Another* (note 12 above) at 10.

³⁸⁴ *Paulos Simelane v Bonisile Magagula and another In re: Bonisile Magagula v Paulos Simelane* (note 12 above); *Reckson Mawelela v Mbabane Association of Money Lenders & Another* (note 12 above); *Afinta Financial Services (Pty) Ltd v Luke Malinga T/A Long Distance Transport* (unreported) High Court Civil Case No. 123/ 2001.

protection is illuminated by Annandale A.C.J., who launched a scathing attack on money lenders charging exorbitant interest at the expense of disadvantaged consumers in the case of *Paulos Simelane v Bonisile Magagula and another In re: Bonisile Magagula v Paulos Simelane* (unreported) High Court Civil Case 948/ 2005. He stated as follows:

‘Shylock, micro money lender or loan shark- William Shakespeare immortalized the ruthless exploitation of indigent borrowers of money at exorbitant costs in the ‘Merchant of Venice’. To satisfy a debt, the shylock had to extract his pound of flesh without causing a drop of blood to spill in the process. A likewise scenario has developed in Swaziland where moneylenders seek to extract their ‘pounds of flesh’ but not carrying how much misery, hardship and unlawful exploitation the impecunious but imprudent and unsuspecting borrowers are caused to suffer in the process...It is a malpractice that causes misery to many Swazis who are bamboozled and cajoled into financial serfdom by moneylenders who charge unlawful enormous amounts of interest, which the borrowers ingratiatingly agree to, with the principal sum of money multiplied many times over by the time the borrower eventually regains financial freedom. The courts of the land have adversely commented on the scourge of this infamous exploitation but the legislature is yet to enact a regulated micro money lending industry. It must be done sooner rather than later if the lot of the common man and woman, the average citizen, is of any concern to those in the halls of power. The receiver of revenue may also stand to gain in the form of tax collection.’³⁸⁵

The Money Lending Act³⁸⁶ does not define a ‘moneylender’ and the definition of ‘money lending transaction’ is unhelpful in seeking guidance on the exact nature of the legal relationship between parties to such agreements. It must be pointed out that the Money Lending Act does not apply to any transaction to which the Hire Purchase Act applies.³⁸⁷ Court decisions dealing with the money lending have predominantly focused on the *in duplum r ule*. This rule will be discussed with reference to case law below.

³⁸⁵ At paragraphs 2-3.

³⁸⁶ S. 2 of the Act only defines a ‘money-lending transaction’.

³⁸⁷ S. 10 (d) of the Money Lending and Credit Financing Act of 1991.

7.1. Analysis of case law with regard to the Money Lending and Credit Financing Act of 1991
In *Afinta Financial Services (Pty) Ltd v Luke Malinga T/A Long Distance Transport* (unreported) High Court Civil Case 123/ 2001 the Money Lending Act³⁸⁸ was in issue. This case was an urgent application moved by the applicant motor vehicle financing company for the cancellation of a vehicle rental credit agreement and the repossession of its 30 seater bus form the respondent transport operator.³⁸⁹ The respondent had failed to pay the agreed monthly instalments in terms of the agreement. Among other issues to be decided was whether the applicant had been charged excessive interest contrary to section 3 (1) (b) of the Money Lending Act.³⁹⁰ Section 3 (1) (b) of the Act of the Act provides as follows:

‘3. (1) Where in respect of any money-lending or credit transaction the principal debt:
(b) exceeds E500 or such amount as may be prescribed from time to time, no lender shall charge an annual interest rate of more than 8 percentage points, or such amount as may be prescribed , above the rate for discounts , rediscounts and advances announced from time to time by the Central Bank of Swaziland Order, 1974.’

The respondent alleged that the applicant had charged an interest of 14% on the principal debt contrary to the above provision. Any credit transaction or lending agreement contrary to the provisions of the Act is null and void and as such unenforceable.³⁹¹ The court found that the interest in issue was not on the principal debt but was interest on arrear charges.³⁹² In the case of *Reckson Mawelega v M.B. Association of Money Lenders and Another* (unreported) Civil Appeal Case 43/ 1999 the appellant in this case sought an order to set aside a default judgment that had been granted in favour of the respondent.³⁹³ The appellant had pledged his motor vehicle and borrowed from the respondent the amount of E5 000- 00 charged a monthly interest of 30% on the loaned sum.³⁹⁴ After making payments of E1 300 and E6 300- 00 respectively, the appellant was informed by the respondent that the balance due and outstanding in terms of the loan was the

³⁸⁸ S. 3 of the Money Lending and Credit Financing Act of 1991.

³⁸⁹ At 1.

³⁹⁰ At 1. The judgment constantly refers to section 4. This section does not regulate interest rates but deals with disclosure of such interest and stipulations that ought to be included in credit agreements.

³⁹¹ S. 6 of the Money Lending and Credit Financing Act of 1991.

³⁹² At 6.

³⁹³ At 1.

³⁹⁴ At 2.

amount of E9 923- 68.³⁹⁵ The appellant failed to pay the amount claimed and the respondent obtained an order against him which also declared the vehicle executable for the recovery of the loaned amount.³⁹⁶ In granting the appeal, Tebbutt JA explained that the common law *in duplum* rule has its origins in Roman law and further states that ‘no interest runs- and is therefore claimable- after the amount of interest is equal to the capital’.³⁹⁷ For example, interest on a principal loan amount of E3 000-00 ceases to run if it equals the outstanding principal debt E3 000- 00. In Swaziland, the *in duplum* rule is reaffirmed and entrenched in the Money lending Act³⁹⁸ which states that no lender shall recover from a borrower of credit an amount exceeding the sum of the principal debt owed.³⁹⁹

Another important decision on the Money Lending Act is that of *Paulos Simelane v Bonisile Magagula and another In re: Bonisile Magagula v Paulos Simelane*.⁴⁰⁰ The plaintiff money lender sought to recover an amount of over E20 000- 00 from a debt of E2 000- 00 loaned and advanced to the defendant who earned a meager salary of E2 326- 00.⁴⁰¹ The 30% interest charged on the principal debt of E2 000 mutated into a claim for the amount of E15 373- 00 against the defendant for a loan agreement that was to run for three months.⁴⁰² The question for determination revolved around the validity of the loan agreement between the parties in view of section 3 and section 6 of the Money Lending Act.⁴⁰³ The court easily came to the conclusion that the interest rate of 30% was above the statutory minimum prescribed by section 3 of the Act.⁴⁰⁴ Section 3 bars moneylenders from recovering an annual interest of more than 8% annually. In this case the creditor set the interest at 30% per month. The court reasoned that this amounted to an annual interest of 360% per annum which was overly excessive.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ At 9. See also *Union Government v Jordaan’s Executor* 1916 TPD 411 at 413; *Van Copenhagen v Van Copenhagen* 1947 (1) SA 567 (T) at 581-582.

³⁹⁸ S. 3 as read with S. 6 of the Money Lending and Credit Financing Act 3 of 1991.

³⁹⁹ Ibid.

⁴⁰⁰ *Paulos Simelane v Bonisile Magagula and another In re: Bonisile Magagula v Paulos Simelane* (note 12 above).

⁴⁰¹ At paragraphs 2-4.

⁴⁰² At paragraphs 4-5.

⁴⁰³ At Para 13.

⁴⁰⁴ At Para 22.

The *in duplum* rule was also considered by Dlamini J in the case of *Bhokile Elliot Shiba v Swaziland Development and Savings Bank and Others* (unreported) High Court Civil Case 1716/2006. The applicant in this case moved a rescission application to nullify an order of court granted in favour of the respondent under an acknowledgment of debt the parties has signed. The applicant had contended that the amounts claimed violated the *in duplum* rule. In dismissing the application, the court highlighted that the rule finds resonance in section 3 (1) (b) and section 6 (1) of the Money Lending Act.⁴⁰⁵ Dlamini J further opined that while interest does not lose its character it ought not to offend the rule.⁴⁰⁶ What must be noted is that the *in duplum* rule as it applies under the common law does not substantially have the same effect under the Money Lending Act.⁴⁰⁷ Section 3 (1) (b) prohibits a money lender from setting interest above 8% of a rate set by the Central bank to the detriment of consumers. For example, if the central bank set the interest rate at 15%, a money lender was to set its interest at any rate whose maximum would not exceed 8%.⁴⁰⁸ This means the total interest that may be set by a money lender should not exceed 23% and similarly, if the Central bank sets the interest rate at 5%, a money lender would not be at liberty to charge any interest over the total of 13%.⁴⁰⁹ That the common law *in duplum rule* is qualified under the Money Lending Act was explained by Hlophe J in some of his decisions.⁴¹⁰ Hlophe J. introduced this factor which courts and litigants alike had glaringly failed to take into account when pursuing their claims under the Money Lending Act.⁴¹¹

In the recent case of *Swaziland Development Finance Corporation v Mzuzu Construction and others* (unreported) High Court Civil Case 20/ 2011 the Money Lending Act⁴¹² was once again in issue. In this case, the plaintiff loaned and advanced to the first defendant the amount of E200 000- 00 as working capital for the defendant's construction company while the other three defendants had signed surety agreements undertaking to pay the sum if the first defendant failed

⁴⁰⁵ At Para 66.

⁴⁰⁶ At Para 63.

⁴⁰⁷ *Swaziland Development Finance Corporation v Mzuzu Construction and others* (unreported) High Court Civil Case 20/ 2011 At Para 16.

⁴⁰⁸ At Para 16.

⁴⁰⁹ Ibid.

⁴¹⁰ *Swaziland Development Finance Corporation v Mzuzu Construction and others* (note 407 above); *Dandi Investments (Pty) Ltd v Frederick J. Hawley* (unreported) High Court Civil Case 90/ 2012.

⁴¹¹ For example, see the cases of *Reckson Maweela v Mbabane Association of Money Lenders & Another* (note 12 above); *Afinta Financial Services (Pty) Ltd v Luke Malinga T/A Long Distance Transport* (note 384 above); *Paulos Simelane v Bonisile Magagula and another In re: Bonisile Magagula v Paulos Simelane* (note 12 above).

⁴¹² S. 3 of the Money Lending and Credit Financing Act of 1991.

to fulfill the loan agreement.⁴¹³ In terms of the loan agreement the amount was repayable in instalments to be paid within forty two months at an annual interest rate fixed at ‘Prime plus 4.5%’, which was at the time of concluding the agreement fixed at 16% per annum.⁴¹⁴ The plaintiff issued a summons after defendant had failed to pay the amount owing. The defendants did not defend the substantive claim but simply attacked the validity of the loan agreement, contending that it was null and void because it offended section 3 (1) (b) of the Money Lending Act.

The court was faced with the question whether it could declare an undisputed debt on the strength of section 3 (1) (a) of the Act. Hlophe J. explained the importance of the last part of section 3 (1) (b), which was of significant importance because the Central Bank of Swaziland does from time to time adjust the interest rate. In the present case it had been set at 11.5% when the agreement was concluded.⁴¹⁵ The plaintiff did not apply the statutory maximum interest of 8%, but a lesser 4.5% which added up to 16%.⁴¹⁶ The court clarified that the levying of interest and the 8% maximum as provided in section 3 (1) (b) of the Money Lending Act served to qualify the *in duplum* rule.⁴¹⁷ Not only does interest top running when it equals the principal loan amount, but the amount of interest charged in terms of a money lending agreement always depends on the rates for discounts, rediscounts and advances announced by the Central Bank of Swaziland from time to time.⁴¹⁸ The rate of discount (or repo rate) is the rate at which commercial banks can borrow money from the Central Bank which periodically fixes the rate on economic considerations.⁴¹⁹ The prime rate on the other hand is the rate at which commercial banks lend out money to their clients and this rate is usually higher than the repo rate because banks have to make profit.⁴²⁰ Therefore, if for example, interest is set at 4.5% above a prime interest rate of 14.5%, the total interest required would be 19%.⁴²¹ The above case introduced an

⁴¹³ At paragraphs 2-3.

⁴¹⁴ At Para 3.

⁴¹⁵ At Para 16.

⁴¹⁶ Ibid.

⁴¹⁷ At paragraphs 19-26.

⁴¹⁸ S. 3 (1) (b) of the Money Lending and Credit Financing Act of 1991 as read with the Central Bank Order of 1974.

⁴¹⁹ *Swaziland Development Finance Corporation v Olive Mhlobo Sikhondze t/a Mntimandze Flats* (unreported) High Court Civil Case 2196/ 2010, at Para 9.

⁴²⁰ Ibid.

⁴²¹ Ibid.

existing but often ignored dimension in money lending agreements. As already stated above Hlophe J introduced a factor which previous courts and litigants alike had glaringly failed to take into account when pursuing their claims under the Money Lending Act.

Hlophe J was once again called upon to explain the operation of the *in duplum* rule under the Money Lending Act in the case of *Dandi Investments (Pty) Ltd v Frederick J. Hawley* (unreported) High Court Civil Case 90/ 2012. In this case the applicant borrowed a sum of E40 000- 00 and pledged his vehicle to the respondent.⁴²² The respondent loaned and advanced to the applicant an amount of 32 000- 00 with, the balance of E8 000- 00 being set-off as interest.⁴²³ After a while the loan mutated into the sum of E91 800- 00 which the applicant failed to pay.⁴²⁴ Having failed to pay the amount coupled with the fact that the respondent was now using the pledged vehicle, the applicant sought the court's intervention in cancelling the loan agreement.⁴²⁵ The court clarified the position of the *in duplum* rule under the Money Lending Act⁴²⁶ as follows:

‘I can only mention in passing that in terms of the Money Lending and Credit Financing Act no interest above 8% of the prime rate of interest fixed by the central Bank at a given time is chargeable.’⁴²⁷ (Emphasis added)

In this case, because the court could not ascertain the prime interest rate set by the Central bank at the time the agreement was concluded, and since the parties had not agreed on any fixed interest, the applicant was directed to pay the outstanding loan with the *mora*⁴²⁸ interest of 9%.⁴²⁹

The common thread running through the cases examined above is that the most money lenders exploit consumers by charging high interest in contravention of sections 3 and 6 of the Money

⁴²² At Para 5.

⁴²³ Ibid.

⁴²⁴ At Para 14.

⁴²⁵ At Para 13.

⁴²⁶ S. 3 of the Money Lending and Credit Financing Act of 1991.

⁴²⁷ At Para 5.

⁴²⁸ ‘*Mora*’ is a Latin word meaning ‘willful delay or default in fulfilling a legal obligation’. See Garner (note 49 above) 1030. In this context, *mora* interest is default interest expected from a debtor.

⁴²⁹ At Para 31.

Lending Act which entrench the *in duplum* rule. Having examined the Money Lending Act, it is necessary to go on and consider the Fair Trading Act of 2001.

8. THE FAIR TRADING ACT, 2001

This Act came into force on the 5th of November 2001 and provides for the standard code of trading conduct.⁴³⁰ Part II of the Fair Trading Act is one of the most important parts because it regulates misleading, deceptive and unfair practices in the supply chain.⁴³¹ The application of the Fair Trading Act is wide-ranging because not only does it apply in within Swaziland's borders, but it also applies to persons engaged in business outside of Swaziland provided they are resident or ordinarily carry out their business in Swaziland.⁴³² Goods bearing false trade descriptions are prohibited in Swaziland and cannot be imported from other countries.⁴³³ It must be highlighted that in prohibiting misleading and deceptive conduct, the Fair Trading Act uses peremptory language and subjects violations of its provisions to penalties.⁴³⁴ Persons are prohibited from contravening the provisions of Part II of the Fair Trading Act unless they can establish that the contravention was either a mistake, or due to reliance on information supplied by another person, or caused by another person after but steps were taken to avoid it.⁴³⁵

The Act prohibits bait advertising which is often used by sellers in luring or inducing consumers into purchasing goods other than those advertised.⁴³⁶ The advertising of goods that will not be supplied at the advertised price or quantity as stated in an advertisement is also prohibited.⁴³⁷ Where goods are advertised, the person who makes the advert must ensure that the goods are available and supplied as advertised particularly when it comes to the price and quantity.⁴³⁸ The purpose of this section is to protect consumers against being lured into shops where goods are not available according to the manner they were advertised. Other conduct that is expressly

⁴³⁰ S. 1 and the Long Title of the Fair Trading Act of 2001.

⁴³¹ S. 4- S. 19 of the Fair Trading Act of 2001.

⁴³² S. 3 (1) of the Fair Trading Act of 2001.

⁴³³ S. 19 (1) of the Fair Trading Act of 2001.

⁴³⁴ Part II as read with S. 25 of the Fair Trading Act of 2001.

⁴³⁵ S. 25 as read with S. 21 of the Fair Trading Act of 2001.

⁴³⁶ S. 13 (1) (a) of Fair Trading Act of 2001.

⁴³⁷ S. 13 (1) (b) of the Fair Trading Act of 2001.

⁴³⁸ S. 13 (2) of the Fair Trading Act of 2001.

prohibited is ‘referral selling’ which occurs when a consumer benefits from informing a supplier on where to find other consumers.⁴³⁹

The last significant form of conduct prohibited by the Act is the use of pyramid selling schemes.⁴⁴⁰ The Act simply states that a person shall not promote or operate a pyramid selling scheme and goes on to define what constitutes such a scheme.⁴⁴¹ In the case of *Mamba and Others v The Central Bank of Swaziland and Others* (unreported) High Court Civil Case 4536/2008 a pyramid scheme was defined in terms of the US Securities and Exchange Commission.⁴⁴² In this case the applicant’s three bank accounts and assets were seized and frozen by the respondent for unlawfully defrauding and masterminding the theft of large sums of money belonging to consumers through deposit-taking under a pyramid scheme.⁴⁴³ The Respondent exercised its powers under the Financial Institutions Act of 2005 to freeze the applicant’s assets and accounts.⁴⁴⁴ The court dismissed the application for the release of the assets and accounts only on points of law, but felt duty-bound to comment on the scourge of pyramid schemes.⁴⁴⁵ It is interesting to note however, that instead of relying on the definition of a pyramid scheme as contained in the Fair Trading Act,⁴⁴⁶ the court resorted to defining the phrase in terms of the US Securities and Exchange Commission.⁴⁴⁷ Furthermore, the court did not refer to the Fair Trading Act anywhere in the judgment despite that pyramid schemes are prohibited under section 18 of the Fair Trading Act.⁴⁴⁸ Despite these material omissions in the judgment, the above case reveals that pyramid schemes are prohibited in Swaziland in order to safeguard consumers and their interests.

⁴³⁹ S. 14 of the Fair Trading Act of 2001.

⁴⁴⁰ S. 18 of the Fair Trading Act of 2001.

⁴⁴¹ S. 18 (1) of the Fair Trading Act of 2001.

⁴⁴² At Para 46.

⁴⁴³ At Paragraphs 1-2, 23.

⁴⁴⁴ At Para 24.

⁴⁴⁵ At Para 22.’

⁴⁴⁶ S. 18 (2) of the Fair Trading Act of 2001.

⁴⁴⁷ At Para 46.

⁴⁴⁸ S. 19 of the Fair Trading Act of 2001.

Nevertheless, there are two significant weaknesses in the Fair Trading Act. The first weakness is that the Act vests power in two different Ministries.⁴⁴⁹ The second weakness is that while it attempts to protect consumer interests, it does not offer a definition of the term ‘consumer’.⁴⁵⁰ Concerning the first weakness, the Act empowers both the Minister for Enterprise and the Minister for Commerce to perform certain Acts authorized in its provisions.⁴⁵¹ Without a doubt, it is risky and anomalous for the Act to empower each Minister in a different Ministry to exercise certain powers in terms of its provisions.⁴⁵² For example, either of the Ministers may make an application to court for an order compelling a person who violates the provisions of the Act to publish certain information in terms of section 23 of the Act. Not only would this lead to a duplication of duties by the two Ministers, but the courts may be saddled with the burden of issuing two substantially similar orders based on a similar cause of action. Further, consumers may be subjected to double-jeopardy by the singular and independent acts of either Minister for substantially the same issue.⁴⁵³ A practical illustration of double jeopardy may eventuate under section 27 of the Act which authorizes a Minister to send his officials to a person’s premises for purposes of conducting a search. The section states:

‘Power to search

27. (1) The Minister may authorize an officer of the Ministry to search any place named in the warrant for the purpose of ascertaining whether a person mentioned in the warrant has engaged in or is engaging in conduct that constitutes or may constitute a contravention of this Act.

(3) A warrant issued under subsections (1) or (2) authorizes the officer named in it-

(b) to use such assistance (including that of the Police) as is reasonable, in the circumstances;

(c) the (sic) use such force for gaining entry of any property and for breaking open any article or thing as is reasonable in the circumstances;

(d) where necessary, to take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant in the case...’⁴⁵⁴

⁴⁴⁹ S. 2 (1) of the Fair Trading Act of 2001 defines ‘Minister’ as the Minister responsible either for the Ministry of Commerce or Ministry of Enterprise and Employment.

⁴⁵⁰ The Act protects consumers by regulating misleading, deceptive and unfair practices in the supply chain.

⁴⁵¹ S. 2 (1) as read with S. 23 of the Fair Trading Act of 2001.

⁴⁵² Ibid.

⁴⁵³ The reason why consumers are being referred to as such is that the Act itself does not define a consumer. Therefore, it is possible that suppliers are also consumers. The end result is that the people for whom the Act was designed to protect may be prejudiced by the independent Acts of the Ministers concerned.

⁴⁵⁴ S. 27 of the Fair Trading Act of 2001.

The problem created by the section is that it authorizes the use of unrestrained force in gaining entry to a person's premises and the breaking of any article while assisted by the police.⁴⁵⁵ Both Ministers may send different officials to the same premises without each knowing this has been done by the other.⁴⁵⁶ If a person resists, obstructs or delays the officials sent by a Minister on grounds that a search has already been conducted he may be found guilty and fined an amount of E10 000 or a period of 5 years imprisonment.⁴⁵⁷ The danger is that he may be prosecuted for the same offence and this is clearly this is unacceptable.⁴⁵⁸

Concerning the second problem which is the failure by the Act to define 'consumer', it is clear that even individual consumers face the risk of the harsh consequences already referred to above. The Fair Trading Act⁴⁵⁹ defines a 'person' as including 'a local authority, or any association of persons whether incorporated or not'. The result is that even individual consumers, whom the Act may possibly have been designed to protect, are subjected to the stringent requirements which ought to be imposed on suppliers.⁴⁶⁰ This conclusion must be drawn because the Act neither defines a 'consumer' nor a 'supplier', which means it applies equally to both consumers and suppliers in terms of the definition of 'person' as provided. Further, the Fair Trading Act may be enforced by any person.⁴⁶¹ It is unfortunate that the provisions of the Act have not been in issue in the courts of Swaziland since it was enacted in 2001.⁴⁶² Case law needs to be developed in this important consumer statute.

9. CONCLUSION

The discussion in this chapter considered the consumer framework of Swaziland as well as the manner in which courts have tackled unfair contract terms and issues of product liability. The chapter also covered the relevant statutes in consumer protection. The issues raised in this

⁴⁵⁵ S. 27 (3) (b) & (c) of the Fair Trading Act of 2001.

⁴⁵⁶ The Act does not prohibit this conduct on the part of Ministers.

⁴⁵⁷ S. 27 (5) of the Fair Trading Act of 2001.

⁴⁵⁸ What must be noted is that the Fair Trading Act of 2001 does not control or limit the powers of the two Ministers and this may lead to problems for consumers.

⁴⁵⁹ S. 2 (1) of the Fair Trading Act of 2001.

⁴⁶⁰ The absence of a demarcation line between consumers and suppliers lends weight to the conclusion.

⁴⁶¹ S. 22 & S. 24 of the Fair Trading Act of 2001.

⁴⁶² The case of *Mamba and Others v The Central Bank of Swaziland and Others* (unreported) High Court Civil Case 4536/ 2008 was not based on the Act but it is relevant because the issue that had to be determined was regulated by the Act.

chapter, juxtaposed with the authorities examined, galvanize the need for law reform in these crucial consumer areas. It has been seen that in Swaziland very few consumer cases have presented themselves for judicial determination. It is therefore difficult to say with a degree of precision what approach the superior courts would follow in dealing with the cluster of issues raised in this chapter in light of the prevailing Constitutional developments recently experienced in Swaziland. A further difficulty is that the development of the law on hire purchase in South Africa effectively came to a halt in 1980 when the South African Hire Purchase Act was repealed and replaced by the Credit Agreements Act 75 of 1980. The impact has been felt in Swaziland, particularly in developing jurisprudence on hire purchase because no South African case law can be of assistance to the courts in Swaziland in arriving at consumer problems manifesting in the 21st century. The duty is upon the courts to develop the law in this regard.

CHAPTER 4

CONSUMER PROTECTION IN SOUTH AFRICA

1. INTRODUCTION

The previous chapter examined consumer protection in Swaziland, particularly the inherent common law and legislative weaknesses in the consumer framework. This chapter focuses on consumer protection in South Africa with specific reference to the Consumer Protection Act 68 of 2008 (CPA of 2008). Particular attention will be focused on critically examining the changes that were introduced by the Act in the common law of contract and product liability. Narrowing the chapter to unfair contract terms and product liability will provide perspective since there is much academic commentary and case law on these two important subject areas. Taking into account the fact that product liability and the law of contract in consumer law are very wide areas in themselves, the discussion will in no way be exhaustive but will be predicated on the most pertinent issues affecting consumers. The chapter will conclude by highlighting some of the weaknesses in the CPA of 2008.

2. HISTORICAL BACKGROUND OF THE SOUTH AFRICAN CONSUMER FRAMEWORK

The earliest period from which consumer protection germinated in South Africa is 1942 when the South African Hire Purchase Act 36 of 1942 was enacted.¹ This was a period when a global consumer movement in the mid-20th century was sweeping across Europe and the United States of America.² However, consumer protection development in South Africa was not as radical as that experienced in Europe and other parts of the world, being rather a progressive process in its history.³ Historically, the majority of South African consumers were marginalized in as far as the equal provision of goods and services was concerned.⁴ More often than not, black consumers

¹ *Smit and Venter v Fourie and another* 1946 SA 9 (WLD) at 13. See also *National Motors v Fall* 1958 (2) SA 570 (E) at 571.

² D Macquoid-Mason 'Consumers and Consumerism' in D Macquoid-Mason (ed) *et al Consumer Law in South Africa* (1997) 7. See also E van Eeden *A guide to the Consumer Protection Act* (2009) 1, 3.

³ Van Eeden (note 2 above) viii.

⁴ *Ibid* vii. See also Macquoid-Mason (note 2 above) 9; Department of Trade and Industry (DTI) Green Paper Vol. 471 09/04 in GG 26774 (9 September 2004) 4.

were most disadvantaged because the South African economy was controlled and influenced by the dominant economic strength of the white business community.⁵ This situation was prevalent at the height of the apartheid era which was characterized by racial segregation and economic inequality.⁶ This era had an adverse effect on the legacy of consumer policy since it restricted commercial activity of the black majority in South African society.⁷ Besides the widespread human rights abuses, the apartheid regime promoted inequality in the consumption of goods and mainly responded to the problems of white consumers at the time.⁸

The apartheid consumer dispensation has been described as ‘a dog-eat-dog and survival of the fittest’ era where only the powerful, rich, and affluent members of South African society thrived.⁹ Nevertheless, change was inevitable and individuals started mobilising themselves into groups pursuing consumer interests.¹⁰ The impact of this mobilization led to the establishment of consumer organisations such as the Housewives’ League, South African National Consumer Union (SANCU), and the National Black Consumer Union amongst others.¹¹ Although the impact and lobbying influence of these groups on the South African government appears to be in doubt, the enactment of the Sale and Services Matters Act 25 of 1964 and the Price Control Act 25 of 1964 suggests the contrary.¹² In fact, these organisations exerted sustained pressure on government leading to the establishment of the South African Co-ordinating Consumer Council in the early 1970s in terms of the Marketing Act 59 of 1968.¹³ This was an umbrella consumer body established by government to handle consumer concerns and interests.¹⁴ However, the Council was only concerned with issues affecting businesses rather than individual consumer interests.¹⁵ A few years later the Trade Practices Act 76 of 1976 was enacted.¹⁶ The Trade

⁵ Macquoid-Mason (note 2 above) 9.

⁶ Preamble to the CPA of 2008. See also DTI Green paper (note 4 above) 4.

⁷ Ibid. See also Macquoid-Mason (note 2 above) 9.

⁸ Macquoid-Mason (note 2 above) 9. See also DTI Green paper (note 4 above) 22.

⁹ Van Eeden (note 2 above) ix.

¹⁰ Ibid. see also Macquoid-Mason (note 2 above) 8.

¹¹ Macquoid-Mason (note 2 above) 8.

¹² Ibid.

¹³ Ibid. See also Van Eeden (note 2 above) 23.

¹⁴ Macquoid-Mason (note 2 above) 8.

¹⁵ Ibid.

¹⁶ Van Eeden (note 2 above) 23. The Trade Practices Act 76 of 1976 was later repealed under S. 121 (2) (e) of the CPA of 2008.

Practices Act¹⁷ prohibited misleading advertisements, statements and price indications amongst others.¹⁸ Again, the Credit Agreements Act 75 of 1980 was enacted, effectively replacing the South African Hire Purchase Act as the law regulating the South African credit industry.¹⁹ The efforts of the South African government culminated in the enactment of the Unfair Business Practices (Consumer Affairs) Act 71 of 1988 which came into effect in 1988.²⁰ Despite these legislative reforms, the majority of South African consumers remained marginalized.²¹

The activities of the 1990s signaled changes that foreshadowed the introduction of the CPA of 2008. For example, in the period between 1992 and 1994 a number of consumer awareness studies were conducted in order to determine the social and economic factors contributing to the consumer imbalance in South African Society.²² Further, the Business Practices Committee was set up under the Unfair Business Practices Act to look into issues of business and industry.²³ The Committee submitted Report No. 15 which primarily initiated innovations in business through recommending the introduction of industry codes.²⁴ The waves of change in consumer protection grew stronger when South Africa broke free from the clutches of apartheid in 1994 and a constitutional dispensation was birthed. The South African consumer framework had to be reviewed and brought into alignment with consumer frameworks of the industrialised world.²⁵ The main motivation behind a new consumer framework was to create a single statute that spelt out consumer rights while at the same time rooting out the apartheid policies on black South Africans.²⁶ This process would involve the introduction of consumer legislation that would level the playing field.²⁷

¹⁷ The Trade Practices Act 76 of 1976 was later repealed by the CPA of 2008.

¹⁸ See the cases of *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd and others* 1990 (4) SA 136 (D); *S v Pepsi-Cola (Pty) Ltd and Others* 1985 (3) SA 141 (C).

¹⁹ MA Diemont & P Aronstam *The Law of Credit Agreements and Hire Purchase in South Africa* (1968) 43.

²⁰ The Unfair Business Practices Act 71 of 1988 was initially called the Harmful Business Practice Act.

²¹ DTI Green paper (note 4 above) 4.

²² Macquoid-Mason (note 2 above) 9.

²³ T Woker 'Business Practices Statutes and Consumer Protection' in Macquoid-Mason (note 2 above) 123.

²⁴ *Ibid.*

²⁵ DTI Green paper (note 4 above) 4, 6, 9.

²⁶ See the Preamble to the CPA of 2008.

²⁷ DTI Green paper (note 4 above) 4.

The democratic dispensation provided the much needed impetus because, in 1994, the South African Law Commission (SALC)²⁸ was set up and specifically tasked with looking into issues of contract terms and consumer agreements in general.²⁹ The efficiency of the SALC resulted in the publication of a working paper in 1994 which suggested ways in which courts would intervene in contractual disputes involving agreements embodying unfair contract terms, including exemption clauses.³⁰ Two years into the post-apartheid period the SALC engaged in further extensive research which led to the publication of a discussion paper.³¹ In the discussion paper the SALC recognised the need for courts to intervene and control exemption clauses which operated unfairly against consumers in contracts, but warned against a ‘witch-hunt’ against the clauses in general.³² In 1998, the SALC released its final ‘Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts’³³ which the South African Department of Trade and Industry (DTI) used as a foundation in 2004 in formulating the ‘Draft Green Paper on the Consumer Policy Framework’.³⁴ This was part of an ongoing process to introduce the CPA of 2008. The DTI concluded in its green paper that South Africa lacked a vibrant and strong consumer movement and made many recommendations, including the enactment of an all-encompassing consumer statute that would include general provisions on unfair contracts.³⁵ Applying the SALC’s report in tandem with draft consumer legislation prepared by the DTI, the South African government finally fused the scattered legislation on consumer protection into the CPA of 2008.³⁶ The CPA of 2008 has introduced significant changes in this area of the law and contains provisions ranging from the preservation of fundamental consumer rights to enforcement procedures under the various institutions it has set up.³⁷

²⁸ The SALC was established by the South African Law Commission Act 19 of 1973.

²⁹ SALC ‘Unreasonable Stipulations in Contracts and the Rectification of Contracts’ Working Paper 54 (Project 47, 1994) Para 2.

³⁰ Ibid paragraphs 2.74- 2.76. See also T Woker ‘Consumers and Contracts of Purchase and Sale’ in Macquoid-Mason (note 2 above) 26.

³¹ SALC ‘Unreasonable Stipulations in Contracts and the Rectification of Contracts’ Discussion Paper 65 (Project 47, 1996).

³² Ibid Para 1.12 (iv). See also Woker (note 30 above) 44-45.

³³ SALC ‘Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts’ (Project 47, 1998). See also RD Sharrock ‘Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act’ (2010) 22 SA *Merc LJ* 295, 298.

³⁴ DTI Green paper (note 4 above) 30-31.

³⁵ W Jacobs *et al* ‘Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis’ (2010) 13 *PER* 302, 354.

³⁶ DTI Green paper (note 4 above) 23.

³⁷ S. 8- S. 119 of the CPA of 2008.

3. THE GENERAL OVERVIEW AND SCOPE OF THE CPA OF 2008

The CPA of 2008 partially draws its existence from other international consumer protection instruments.³⁸ The CPA of 2008 has a ‘rights-based approach’ towards consumer protection because it entrenches certain consumer rights.³⁹ Therefore, consumer law in South Africa is no longer at its infancy and law reform debates and studies in the consumer field have played a critical role in changing the consumer climate.⁴⁰ The CPA of 2008 now forms the nucleus of consumer legislation because it has brought together several statutes to create a comprehensive framework of international standard, removing the cleavages of race, class, gender, inequality and brought major changes in South African consumer law. Firstly, it will be seen how the Act has effectively curtailed the ancient and inflexible common law principles of contractual freedom and *pacta sunt servanda* which have been the central jurisprudential pillars of private law.⁴¹ Furthermore, the Act enjoins courts to develop the common law thereby bringing to an end judicial reluctance to develop common law propositions as has been expressed in some decisions.⁴² It is hoped that the Act will also remedy inconsistent judicial pronouncements that have been experienced by consumers especially when the doctrine of contractual freedom is in issue.⁴³

While the Act has ushered in a new consumer dispensation, totally ignoring the old framework may be suicidal for consumers.⁴⁴ It may be prudent to embrace the old common law framework because the CPA of 2008 enjoins courts to develop the common law as necessary to improve the realisation and enjoyment of consumer rights.⁴⁵ In other words, the common law is still very much alive in regulating consumer affairs with the exception that it is now statutorily

³⁸ Preamble to the CPA of 2008. See also Van Eeden (note 2 above) 5, 24.

³⁹ DTI Green paper (note 4 above) 6, 12.

⁴⁰ Ibid 29. See also Van Eeden (note 2 above) 23.

⁴¹ S. 22 and Part G of the CPA of 2008. See also Van Eeden (note 2 above) vii, 3.

⁴² *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* 2003 (2) All SA 167 (SCA) at paragraphs 37-38. See also FDJ Brand ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71, 72.

⁴³ See the cases of *Bank of Lisbon and South Africa v Ornelas* 1988 (3) SA 580 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha v Finanscredit* 1989 (3) SA 773 (A); *First National Bank of Southern Africa v Bophuthatswana Consumer Council* 1995 (2) SA 853 (BG); *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

⁴⁴ Van Eeden (note 2 above) 57.

⁴⁵ S. 4 (2) (a) of the CPA of 2008.

circumscribed. Van Eeden⁴⁶ states that ‘there is a symbiosis between the common law and evolving statute’. He says the ‘new and old legal frameworks are interwoven and interlocked such that the new cannot be understood without the old.’⁴⁷ Indeed, the Act recognises the authority of and gives effect to the common law.⁴⁸ Therefore, consumers are still required to observe the common law despite the enactment of the Act. A modicum of responsible behaviour on the part of the consumer is still imperative because the Act has not totally obliterated some common law principles like freedom of contract, which may entitle suppliers to use unfair terms in consumer agreements.⁴⁹

3.1. Application of the CPA of 2008

The Act had different dates of commencement and came into effect in two stages.⁵⁰ The ‘general effective date’ was on the 24th of October 2010, which was subsequently deferred for a further 5 months to April 2011, the month in which the Act as a whole became effective.⁵¹ On the other hand, certain provisions, especially those relating to product liability, came into effect on the 29th April 2010. This latter date is commonly referred to as the ‘early effective date’.⁵² The significance of these dates is very important when we consider agreements pre-existing the CPA of 2008.⁵³ Pre-existing agreements are defined in Schedule 2 of the Act to be agreements made before the general effective date (April 2011).⁵⁴ The terms of section 5 set out the scope of application of the Act which is limited to transactions occurring within the Republic for the supply of goods or services unless the transaction is exempted from the application of the Act. Section 5 (2) refers to transactions to which the CPA of 2008 does not apply. The Act does not

⁴⁶ Van Eeden (note 2 above) 57.

⁴⁷ Ibid 58.

⁴⁸ S. 2 (10), S. 4 (2) (a) & S. 56 (4) (a) of the CPA of 2008.

⁴⁹ For example, S. 51 (1) (c) (i) of the CPA of 2008 only prohibits exclusion of liability for gross negligence, and not ordinary negligence in a contract.

⁵⁰ R Bregman ‘The Consumer Protection Guide for Lawyers’ (2011) *Law Society of South Africa* 16. See also *City of Johannesburg v National Consumer Commission* (NCT/ 2667/2011/101 (1) (P), NCT/2081/2011/101(1) (P)) [2012] ZANCT 6 (30 March 2012) at Para 112.

⁵¹ Ibid. See also Jacobs *et al* (note 35 above) 316. Item 2 (1) of Schedule 2 of the CPA of 2008 refers to the ‘early effective date’ (one year after signature of the Act by the President). Item 2 (2) of schedule 2 refers to ‘general effective date’. The general effective date is 18 months after signature of the Act by the President.

⁵² Item 2 (2) of schedule 2 of the CPA of 2008. See also Bregman (note 50 above) 16; Jacobs *et al* (note 35 above) 316.

⁵³ Item 3 (2) (a) (b) of schedule 2 of the CPA of 2008.

⁵⁴ Schedule 2 (S. 121 (3)) of the CPA of 2008.

apply to credit agreements in general but regulates the goods and services under that agreement.⁵⁵

The Act also does not apply to transactions where goods or services are supplied or promoted to the state.⁵⁶ Further, the Act does not apply to juristic persons whose asset value or annual turnover, at the time of the transaction, is more or equal to the threshold value determined by the Minister in terms of section 6.⁵⁷ The threshold was determined and set by the Minister of Trade and Industry to be the amount of R 3 million.⁵⁸ The CPA of 2008, however, does not prescribe the manner in which information concerning a juristic person's annual turnover will be obtained.⁵⁹ The Act also does not apply to transactions involving the supply of services under an employment contract⁶⁰ and transactions giving effect to a collective agreement in terms of section 213 of the Labour Relations Act 66 of 1995.⁶¹

3.2. Interpretation of the CPA of 2008

Section 2 (1) and (2) of the CPA of 2008 provide that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3, and in the interpretation exercise, international law, amongst others, may be considered. This approach in interpretation allows words to be interpreted in their broader international context as opposed to their strict dictionary meaning.⁶² It is suggested that the criteria for interpretation gives less prominence to the traditional rules of interpretation, *viz*, the literal rule;⁶³ the mischief rule⁶⁴ and the golden rule,⁶⁵

⁵⁵ S. 5 (2) (d) of the CPA of 2008. See also Bregman (note 50 above) 13.

⁵⁶ S. 5 (2) (a) of the CPA of 2008.

⁵⁷ S. 5 (2) (b) of the CPA of 2008.

⁵⁸ GN 294 in GG 34181 of 1 April 2011. See also T Naude 'The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality under S. 55 and S. 56 of the Consumer Protection Act 68 of 2008' (2011) 23 *SA Merc LJ* 336, 338.

⁵⁹ Jacobs *et al* (note 35 above) 310.

⁶⁰ S. 5 (2) (e) of the CPA of 2008.

⁶¹ S. 5 (2) (g) of the CPA of 2008.

⁶² Jacobs *et al* (note 35 above) 305.

⁶³ BA Garner *Black's Law Dictionary* (2004) 1462, defines the literal rule as a form of judicial construction holding that statutes are to be interpreted according to their literal terms.

⁶⁴ *Ibid* 1019. The mischief rule of interpretation states that a statute should be interpreted by first identifying the problem or mischief that the statute was designed to remedy and then adopting a construction that will suppress the problem and advance the remedy.

⁶⁵ *Ibid* 713. The golden rule of interpretation states that when a statute's literal meaning would lead to an absurd or unjust result, or even to an inconsistency within the statute itself, the statute should be interpreted in a way that avoids such a result or inconsistency.

which assist courts in determining the intention of the legislature when a statute is ambiguous.⁶⁶ While Roman Dutch law generally recognises the incorporation of international law in interpretation, Jacobs *et al*⁶⁷ argues that legislation is usually interpreted according to the ordinary grammatical meaning of words. The fear of applying international law in interpretation is that this method of interpretation may lead to results which may not come about when applying the traditional rules when interpreting the Act.⁶⁸ However, by referring to international law and other interpretation aids, section 2 (1) of the CPA of 2008 does not mean the established rules of interpretation will be jettisoned entirely when courts engage in the interpretation exercise.⁶⁹ Therefore, the ordinary rules of interpretation will apply with the qualification that only less emphasis is placed on them.

If the provisions of chapter 5 of the CPA of 2008 conflict with the Public Finance Management Act 1 of 1999 or the Public Service Act 103 of 1994, the last-mentioned Acts apply.⁷⁰ The extensive list of definitions embodied in section 1 of the CPA of 2008 have the potential of introducing confusion if not properly addressed as will be discussed later in the chapter. Suffice to say, the definitions in the CPA 2008 are not only limited to section 1, but other sections have in-built definitions in themselves.⁷¹

3.3. General scope of the CPA of 2008

Courts in South Africa have been criticised for lack of zeal in rewriting the common law and especially for their unjustified restraint in pronouncing on unfair contract terms due to their reverence of contractual freedom.⁷² The reproaches often directed towards the courts have been met with section 4 (2) (a) of the CPA of 2008 which enjoins courts to develop the common law in the spirit of the Act.⁷³ This means that courts have been handed a lifeline because through this

⁶⁶ Jacobs *et al* (note 35 above) 305.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ S. 2 (2) of the CPA of 2008 states that the court may consider international law but this is not mandatory.

⁷⁰ S. 2 (8) CPA of 2008.

⁷¹ For example, S. 53 of the CPA of 2008.

⁷² For example, Howie P was not prepared to alter the common law in *Anna Elizabeth Jacomina Wagener v Pharmicare Ltd, Cuttings v Pharmicare Ltd* (note 42 above) at Para 38. See also Van Eeden (note 2 above) 2.

⁷³ S. 173 of the South African Constitution Act 108 of 1996, enjoins courts to develop the common law in line with the interests of justice.

section the legislature has invited them to breathe new life into the common law.⁷⁴ The CPA of 2008 vests consumers with rights and creates bargaining equality with businesses by promoting equality, access to information, fair marketing and business practices.⁷⁵ Chapter 2 of the Act guarantees the following rights:

- Right of equality in the consumer market⁷⁶
- Consumer's right to privacy.⁷⁷
- Consumer's right to choose.⁷⁸
- Right to disclosure and information.⁷⁹
- Right to fair and responsible marketing.⁸⁰
- Right to fair and honest dealing.⁸¹
- Right to fair, just and reasonable terms and conditions.⁸²
- Right to fair value, good quality and safety.⁸³
- Supplier's accountability to consumers.⁸⁴

Discussing the entire provisions of the CPA of 2008 is not a practical undertaking for this study. In what follows, the chapter will focus on how the CPA of 2008 deals with contract terms in line with the right to fair, just and reasonable terms and conditions,⁸⁵ and product liability under the right to fair value, good quality and safety,⁸⁶ while the other consumer rights will be adverted to whenever applicable in each area.

⁷⁴ Van Eeden (note 2 above) 2, 38.

⁷⁵ Preamble to the CPA of 2008.

⁷⁶ S. 8-10 of the CPA of 2008.

⁷⁷ S. 11-12 of the CPA of 2008.

⁷⁸ S. 13-21 of the CPA of 2008.

⁷⁹ S. 22-28 of the CPA of 2008.

⁸⁰ S. 29-39 of the CPA of 2008.

⁸¹ S. 40-47 of the CPA of 2008.

⁸² S. 48-52 of the CPA of 2008.

⁸³ S. 53-61 of the CPA of 2008.

⁸⁴ S. 62-67 of the CPA of 2008.

⁸⁵ S. 48-52 of the CPA of 2008.

⁸⁶ S. 53-61 of the CPA of 2008.

4. UNFAIR CONTRACT TERMS UNDER THE CPA OF 2008

The long history of unfair contract terms in South Africa dates back to the inflexible principle of freedom of contract enunciated by Innes, C.J. over a century ago in the case of *Burger v Central South African Railways* 1903 TS 571.⁸⁷ Between the time of the pronouncement of Innes CJ and the enactment of the CPA of 2008, South African contract law was a minefield in which courts were called upon to tread masterfully in judicially restricting unfair contract terms.⁸⁸ A salient feature of many court decisions before the CPA of 2008 came into force is that courts often grappled with the hallowed doctrine of freedom of contract.⁸⁹ The battle for supremacy between freedom of contract and considerations of fairness and good faith in contractual relationships led to the invalidation of the *exceptio doli generalis* by the Appellate Division in the landmark case of *Bank of Lisbon and South Africa v Ornelas* 1988 (3) SA 58 (A).⁹⁰ Christie⁹¹ opines that the rejection of the doctrine was rather abrupt and unexpected and it for that reason that the SALC was tasked with investigating, among other issues, the potential effects of the lacuna that had been created by this decision in the South African law of contract.⁹² Over and above this mandate the SALC had to make proposals on legislation specifically regulating contracts, but this idea was not easily accepted by members of the legal community and the judicial impression was that the common law remedies were sufficient.⁹³ It was contended that the existing legislation at the time was adequate and that only partial legislative intervention, if any, was necessary.⁹⁴ However, following recommendations of the SALC, the DTI in 2004 proposed in its draft green paper⁹⁵ that provisions dealing with unfair contract terms be included in the contemplated CPA of 2008.⁹⁶ These were the initial steps that signaled the birth of provisions aimed at curbing unfair, unconscionable and unreasonable terms in consumer agreements. Prior to the enactment of the CPA of 2008, South African law had no legislative control over unfair

⁸⁷ In *Burger v Central South African Railways* 1903 TS 571 at 576. See also RH Christie *The Law of Contract in South Africa* 5 ed (2006) 14; Jacobs *et al* (note 35 above) 353-354.

⁸⁸ See the cases of *Jajbhay v Cassim* 1939 AD 537 and *Sasfin (Pty) Ltd v Beukes* (note 43 above).

⁸⁹ *Ibid.*

⁹⁰ Christie (note 87 above) 12.

⁹¹ *Ibid.*

⁹² *Ibid.* See also SALC (note 33 above) Para 1.9-1.10.

⁹³ SALC (note 33 above) Para 2.1.3. See also T Naude & G Lubbe 'Exemption Clauses- A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*' Vol. 122 (2005) *SALJ* 441; Sharrock (note 33 above).

⁹⁴ SALC (note 33 above) Para 2.2.1.1.

⁹⁵ DTI Green paper (note 4 above) 30-31. See also SALC (note 33 above) Para 1.1.

⁹⁶ *Ibid.* See also Jacobs *et al* (note 35 above) 354.

contract terms.⁹⁷ However, this position has changed because Chapter 2, Part G of the CPA of 2008 regulates unfair contract terms.⁹⁸ The analysis that follows considers the impact of the CPA in reference to established common law principles as interpreted in judicial decisions.

4.1. Non-variation clauses

Non-variation clauses were considered in the context of the parol evidence rule in the previous chapter, while in the present chapter the application and enforcement of a non-variation clause will be considered in the context of the *Shifren* principle⁹⁹ which will be discussed below.

As earlier explained, a non-variation clause bars the informal relaxation of original contract terms in favour of either party in a contract.¹⁰⁰ The validity and effectiveness of non-variation clauses had been one of the most controversial issues in the South African law of contract until 1964.¹⁰¹ The question surrounding non-variation clauses was whether an agreement could impose a term stipulating that no variation of the agreement could be valid unless it was in writing.¹⁰² There were two contending views on this question.¹⁰³ On the one hand, the contention was that non-variation clauses were invalid in contractual agreements, while on the other hand they were recognised as valid and enforceable.¹⁰⁴ The debate was eventually christened the ‘Shifren saga’ by professor Hahlo¹⁰⁵ because a non-variation clause was considered at length by the Appellate Division in protracted litigation in the case of *SA Se ntrale K o-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).¹⁰⁶ In this case the plaintiff landlord and the defendant tenant had concluded a lease agreement which contained two clauses stating that the premises were not to be sub-let or ceded by the defendant tenant to a third party

⁹⁷ Naude & Lubbe (note 93 above) 441. See also *First National Bank of Southern Africa v Bophuthatswana Consumer Council* (note 43 above) at 864; Sharrock (note 33 above) 297.

⁹⁸ S. 48- S. 52 of the CPA of 2008.

⁹⁹ The phrase derives from the case of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

¹⁰⁰ HR Hahlo ‘Non-variation Clauses’ (1965) *SALJ* 4, 6.

¹⁰¹ D Hutchison ‘Non-variation Clauses in Contract’ (2001) 118 *SALJ* 720. See also PMA Hunt ‘Non-variation Clauses’ (1963) *Annual Survey of SA* 137.

¹⁰² Hahlo (note 100 above) 4.

¹⁰³ Hunt (note 101 above).

¹⁰⁴ Hutchison (note 101 above). See also Hunt (note 101 above).

¹⁰⁵ Hahlo (note 100 above) 4.

¹⁰⁶ *Ibid.* See also Hunt (note 101 above) 137.

without the written consent of the plaintiff landlord.¹⁰⁷ The plaintiff thereafter orally agreed a cession from the defendant to a third party to the agreement on condition that the defendant guaranteed the payment of rent by the third party.¹⁰⁸ The plaintiff sought to cancel the lease agreement on grounds that the defendant had leased the premises without consent contrary to the clause in the agreement.¹⁰⁹ The question whether non-variation clauses were valid in contracts was laid to rest in this case since the court answered the question in the affirmative and held that the oral cession was invalid because the non-variation clause contemplated a written amendment.¹¹⁰ This decision is also celebrated for formulating the well-known ‘*Shifren* principle’ which underpins non-variation clauses by stating that a contractual provision that requires written amendments is valid and enforceable.¹¹¹

Almost 30 years later the issue of orally varying the terms of a written agreement presented itself in the case of *Van Tonder en ’n Ander v Van der Merwe en Andere* 1993 (2) SA 552 (W). In this case the applicants had entered into an agreement with the respondent for the sale of company shares and rights in a loan account.¹¹² Thereafter, the parties to the contract orally agreed to postpone payment of the balance of the purchase price by the respondent.¹¹³ However, the sale agreement contained a non-variation clause which provided that, ‘no amendment of this contract is binding unless it is in writing and signed by the parties or their duly authorized agents’.¹¹⁴ The applicant thereafter resiled on the oral agreement and applied to court for its cancellation on grounds that the respondent had not paid the balance on time. Spoelstra R, applying the reasoning in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*,¹¹⁵ held that the oral agreement relied upon by the respondents did in fact amend the written contract and was accordingly not binding.¹¹⁶

¹⁰⁷ *Shifren and others v SA Sentrale Ko-op Graanmaatskappy Bpk* 1963 3 SA 721 (O) 722-723.

¹⁰⁸ *Ibid* 723.

¹⁰⁹ *Ibid*.

¹¹⁰ At 767. See also Hutchison (note 101 above).

¹¹¹ Van Eeden (note 2 above) 71. See also Hutchison (note 101 above) 745.

¹¹² At 553.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

¹¹⁵ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* (note 99 above).

¹¹⁶ *Van Tonder en ’n Ander v Van der Merwe en Andere* 1993 (2) SA 552 (W) at 553.

The decision of *Van Tonder en n Ander v Van der Merwe en Andere*¹¹⁷ above found support in the case of *Miller and another NNO v Dannecker* 2001 (1) SA 928 (C) where Ntsebeza AJ reluctantly applied the *Shifren* principle.¹¹⁸ In this case the defendant had purchased franchise rights from a certain seller in respect of a guest house.¹¹⁹ In terms of the written agreement of franchise the defendant was to pay the purchase price to the seller in three monthly instalments and any failure to make payment would entitle the seller to cancel the agreement and claim damages.¹²⁰ The franchise agreement contained a non-variation clause which provided that there was to be no amendment to the agreement except on the written consent of both parties.¹²¹ The defendant failed to honour his obligations and had a meeting with the seller to explain his difficulty in making payment as agreed.¹²² Subsequently, it was orally agreed between the parties that the defendant would sell his interest in the guest house and thereafter pay the seller with the proceeds of the said sale.¹²³ However, the seller later cancelled the agreement and ceded all his right, title and interest in the franchise agreement to a trust under the care of the plaintiff trustees who were now entitled to the payment by the defendant.¹²⁴ In claiming the outstanding payment from the defendant the plaintiff trustees contended that the oral variation of the franchise agreement between the defendant and seller contravened the non-variation clause.¹²⁵

In coming to his decision, Ntsebeza AJ held that the agreement had not been orally amended but postponed.¹²⁶ He further noted that a party who grants an indulgence to another by extending time so as to show forbearance or substituted performance cannot go back on his word.¹²⁷ The court found that by renegeing from the oral undertaking, the seller had breached the duty of good faith.¹²⁸ Although the judgment does not address the question when it is appropriate to apply the

¹¹⁷ Ibid.

¹¹⁸ Hutchison (note 101 above) 722.

¹¹⁹ At 931.

¹²⁰ At 931-932.

¹²¹ At 935.

¹²² At 932-933.

¹²³ At 933.

¹²⁴ At 932.

¹²⁵ At 935.

¹²⁶ At 937.

¹²⁷ Ibid.

¹²⁸ At 938.

Shifren principle, Hutchison¹²⁹ agrees with the outcome of the decision in *Miller and another NNO v Dannecker*,¹³⁰ particularly the application of ‘good faith’ in determining the enforcement of a non-variation clause. He says that case came to ‘an agreeable outcome’ and that judge was ‘to be congratulated for his boldness in approach’ since the concept of good faith is an escape-valve from the harsh consequences of non-variation clauses.¹³¹

However, a different finding was arrived at by the Supreme Court of Appeal where the court was called upon to reconsider the *Shifren* principle in light of the constitutional developments in the leading case of *Brisley v Drotsky* 2002 (4) SA 1 (SCA).¹³² The appellant tenant concluded a lease agreement with the respondent landlord which provided that rentals were payable in advance at the beginning of each month and that if rentals were not paid promptly the landlord was entitled to cancel the lease.¹³³ The lease provided that any changes to the agreement were to be recorded in writing by the parties and the respondent was empowered in terms of the agreement to cancel the lease if rent was not paid promptly on the first day of each month.¹³⁴ Pursuant to an oral agreement between the parties the appellant had on several occasions paid her monthly rentals later than the date stipulated in the lease agreement.¹³⁵ After several months of late payment, the respondent disregarded the oral agreement and instituted eviction proceedings against the appellant.¹³⁶ Amongst other issues, the question was whether the non-variation clause under the *Shifren* principle contravened the concept of equality.¹³⁷

In coming to its decision, the court stated that historical and jurisprudential considerations underlying non-variation clauses under the *Shifren* principle had to be taken into account.¹³⁸ One of the considerations was that the *Shifren* principle had become an established rule spanning a period close to 40 years and therefore, it could not simply be invalidated, destabilizing trade and

¹²⁹ Hutchison (note 101 above) 722.

¹³⁰ *Miller and another NNO v Dannecker* 2001 (1) SA 928 (C).

¹³¹ Hutchison (note 101 above) 722.

¹³² At Para 1.

¹³³ At Para 4.

¹³⁴ Ibid.

¹³⁵ At Para 5.

¹³⁶ Ibid.

¹³⁷ At Para 7.

¹³⁸ At Para 6.

business.¹³⁹ The court also considered that dispensing with the principle would compromise the desired certainty in legal proceedings.¹⁴⁰ Assimilating the *Shifren* principle into the constitutional era, Cameron JA stated that non-variation clauses in contracts were no longer controversial and did not detract from constitutional values.¹⁴¹ He stated:

‘[T]he appellant asks this Court to reverse the doctrine that contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing. This court nearly four decades ago upheld the validity of such clauses.’¹⁴²

The Judge found support from the suggestion that the *Shifren* principle was not intended to protect the party in a stronger bargaining position, but instead served to limit disputes and protect the interests of both parties in an agreement.¹⁴³ The argument that the *Shifren* principle offended ‘good faith’ was rejected in favour of the notion that good faith was not a ‘free-floating’ basis for rescinding non-variation clauses in agreements.¹⁴⁴ It was concluded that the non-variation clause in the lease agreement was valid.¹⁴⁵

Kerr¹⁴⁶ argues that the case was wrongly decided and contends that the respondent’s conduct was unfair and ought to have been discountenanced by the court in view of the subsequent oral agreement between the parties varying the written lease. The argument is sound because strict adherence to non-variation clauses under the *Shifren* principle allows the dominant party in a contract to go back on his word to the detriment of a consumer has relied on it.¹⁴⁷ It has been suggested that in order to avoid the harsh consequences of the *Shifren* principle, any subsequent informal undertakings between parties must be reduced to writing and inserted into existing

¹³⁹ At Para 8.

¹⁴⁰ Ibid.

¹⁴¹ At Para 2.

¹⁴² At Para 2.

¹⁴³ At Para 7. See also Van Eeden (note 2 above) 71.

¹⁴⁴ At Para 22. See also Van Eeden (note 2 above) 80.

¹⁴⁵ At Para 47.

¹⁴⁶ AJ Kerr ‘The Defence of Unfair Conduct on the Part of the Plaintiff at the Time the Action is brought: The Exceptio Doli Generalis and the Replicatio Doli in Modern Law’ (2008) 125 *SALJ* 241, 246.

¹⁴⁷ Hutchison (note 101 above) 721.

agreements in terms of the prescribed formalities.¹⁴⁸ The above cases reveal inconsistencies in judicial reasoning in as far as non-variation clauses are concerned and this situation obviously leaves the consumer at a disadvantage. Whether the CPA of 2008 has addressed the issue of non-variation clauses, and if so, whether consumers have been afforded greater protection will be discussed in the next section.

4.1.1. The impact of the CPA of 2008 on non-variation clauses

The CPA of 2008 contains provisions which introduce significant changes concerning the manner in which courts deal with non-variation clauses.¹⁴⁹ Consumer agreements, whether or not in writing, are recognised under section 50 of the Act. Such agreements may be challenged by a contracting party for contravening either section 40, 41 or 48 of the CPA of 2008.¹⁵⁰ In circumstances where the CPA of 2008 does not provide a remedy sufficient to correct the prohibited conduct, unfairness or injustice complained of relating to the agreement, the courts may consider other factors that further the purpose and spirit of the Act.¹⁵¹ In this respect courts may be persuaded to depart from the *Shifren* principle because the Act allows the admission of evidence concerning the nature of the parties to the agreement, their relationship to each other, their relative capacity, education, experience, sophistication and bargaining position.¹⁵² Although the CPA of 2008 had not yet come into force, one of these considerations was highlighted by the court in *Brisley v Drotsky*.¹⁵³ The court considered the bargaining position of the appellant and came to the conclusion that she had not been in a weaker bargaining position when the lease agreement was concluded.¹⁵⁴ Whether or not a consumer agreement has been signed is not a consideration that courts will consider in ensuring fairness between contracting parties.¹⁵⁵

Another important factor that has a bearing on the *Shifren* principle concerns negotiations conducted between contracting parties either before or after an agreement is concluded.¹⁵⁶ The

¹⁴⁸ Van Eeden (note 2 above) 72.

¹⁴⁹ S. 52 (2) of the CPA of 2008.

¹⁵⁰ S. 52 (1) (a) of the CPA of 2008.

¹⁵¹ S. 52 (2) (a)-(j) of the CPA of 2008.

¹⁵² S. 52 (2) (b) of the CPA of 2008.

¹⁵³ *Brisley v Drotsky* (note 43 above) at paragraphs 26, 33.

¹⁵⁴ *Ibid.*

¹⁵⁵ S. 50 (2) (a) of the CPA of 2008.

¹⁵⁶ S. 52 (2) (e) of the CPA of 2008.

CPA of 2008 recognises such negotiations, irrespective of when they were conducted.¹⁵⁷ By introducing evidence of prior or subsequent negotiations between parties to a contract, the CPA of 2008 effectively varies the principle because a court will strike down a variation clause contrary to subsequent negotiations.¹⁵⁸ The scope of 52 (2) of the CPA of 2008 is wide enough to cover oral negotiations as long as the outcome will further the realisation of consumer interests.¹⁵⁹ If a court concludes that a non-variation clause is void or contrary to section 49 of the CPA of 2008, the court may invalidate and sever the clause to make the agreement lawful; or declare the whole agreement void.¹⁶⁰ These considerations also find support in section 4 (2) (a) of the CPA of 2008 which empowers the courts to develop the common law for the realisation and enjoyment of consumer rights.

4.2. The exemption clause

The nature and purpose of exemption clauses has already been discussed in chapter 3 and in this section, the aim is to consider the developments introduced by the CPA of 2008 to exemption clauses. At the height of addressing the problems posed by unfair contract terms in South Africa, the SALC in its ‘Report on Unreasonable Stipulations in Contracts and the Rectification of Contract Terms’¹⁶¹ recommended that exemption clauses be subjected to stricter regulation.¹⁶² Important as these recommendations were, it must be noted that South African courts had already developed and applied different techniques to control and mitigate the unjust results of exemption clauses.¹⁶³ For example, in the case of *Wells v SA Alumenite Co.* 1927 AD 69, Innes CJ held that courts would discountenance any exemption clause protecting fraud.¹⁶⁴ In this case the appellant had purchased an ‘alumenite lighting system’ from the respondent company after being induced by untrue representations into making the purchase.¹⁶⁵ The agreement signed by the appellant contained a clause absolving the respondent from liability for any representations it

¹⁵⁷ Jacobs *et al* (note 35 above) 361.

¹⁵⁸ Ibid.

¹⁵⁹ S. 4 (2) (a) of the CPA of 2008. See Jacobs *et al* (note 35 above) 361.

¹⁶⁰ S. 52 (4) (a) of the CPA of 2008.

¹⁶¹ SALC (note 33 above) Para 1.1.2 (iii).

¹⁶² Ibid.

¹⁶³ See for example the case of *Sasfin (Pty) Ltd v Beukes* (note 43 above).

¹⁶⁴ At 72.

¹⁶⁵ At 71.

made in the course of its business.¹⁶⁶ The appellant then refused to pay for the lighting system alleging that the respondent's employees had made misrepresentations on the fuel consumption, construction and mode of ignition of the machine.¹⁶⁷ The appellant failed in the appeal because there was no allegation that the misrepresentation made by the respondent was fraudulent.¹⁶⁸ Recognizing the non-enforcement of exemption clauses protecting fraudulent conduct, the court stated as follows:

‘On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. the courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud.’¹⁶⁹

The analysis below considers the control measures applied by courts in dealing with exemption clauses. The control measures to be examined below often overlap.¹⁷⁰ The discussion has taken this consideration into account.

4.2.1. Contractual form

The requirement that a contract term must be embodied in contractual form has been applied by the courts as a control measure against exemption clauses.¹⁷¹ This rule finds expression in the English case of *Chapelton v Barry Urban District Council* [1940] 1 All ER 356 (CA). In this case the appellant hired two deck-chairs from the respondent council at a beach, and after paying the required fee he was issued with two tickets which contained clauses exempting the respondent from liability for injury or harm consequential from the hire.¹⁷² The chair on which appellant was sitting collapsed and the appellant was injured in the process.¹⁷³ Slesser LJ in the Court of Appeal held that the tickets were not contractual documents and therefore the appellant

¹⁶⁶ At 71 -72.

¹⁶⁷ At 71.

¹⁶⁸ At 73.

¹⁶⁹ At 72.

¹⁷⁰ Woker (note 30 above) 40.

¹⁷¹ P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 26, 39. See also *Gordon Wilson (Pty) Ltd v Barkhuizen* 1947 (2) SA 244 (O) at 248.

¹⁷² At 357.

¹⁷³ At 358.

could not be bound by the exemption clause in the ticket.¹⁷⁴ This limits an exemption clause because whether or not the parties agreed the clause in issue must have been reasonably expected in the contractual document.¹⁷⁵ Lord Denning M.R in *Olley v Marlborough Court Ltd* [1949] 1 All ER 127 (CA) held that people who seek to rely on a contract must strictly prove that the written document is a contract.¹⁷⁶ If the terms are embodied in a written document, such a document must be a contract or one that is reasonably expected to contain contractual terms.¹⁷⁷ For example, a receipt given to a purchaser as proof of payment cannot simply be considered a contract for the reason that it only constitutes evidence of a contract that has already been concluded.¹⁷⁸ It is for that reason that Fischer JP in *Gordon Wilson (Pty) Ltd v Barkhuizen* 1947 (2) SA 244 (O) stated as follows:

‘[W]here as here there is a document which purports to be a record of an agreement come to between the parties the rule of evidence does not prohibit the signatory to the document from pleading and proving that the document does not represent the true agreement between the parties and was not given *animo contrahendi*.’¹⁷⁹

The above excerpt underpins the view that a supplier cannot simply allege that a consumer signed a document or a piece of paper signifying his will to certain terms; instead, it must be proved that the document is a contract.¹⁸⁰ It sometimes happens that a contractual document resembling a receipt is signed by a consumer purchaser.¹⁸¹ In such circumstances, the consumer will be bound by the provisions of the document whether or not it is a receipt because he is deemed to know that the document created relations between himself and the other party.¹⁸²

¹⁷⁴ At 360.

¹⁷⁵ Aronstam (note 171 above) 26.

¹⁷⁶ At 134.

¹⁷⁷ Christie (note 87 above) 182. See also Aronstam (note 171 above) 26.

¹⁷⁸ Ibid.

¹⁷⁹ At 248.

¹⁸⁰ Aronstam (note 171 above) 37.

¹⁸¹ Ibid 28.

¹⁸² Ibid 27-28.

4.2.2. *Unexpected terms*

A party may successfully challenge an exemption clause if it was not reasonably expected in a contract.¹⁸³ An exemption clause in a contract must not be ‘surprising’ or unexpected because it may be rendered contrary to the essence of a contract.¹⁸⁴ Naude and Lubbe¹⁸⁵ assert that a contract term that varies the consequences of a contract in a manner that is contrary to its fundamental essence is ‘surprising’. Therefore, courts should not recognise the clause unless it has been brought to the notice of the consumer prior to signature of the agreement.¹⁸⁶ A consumer will reasonably expect terms consistent with a contract; however, if an unexpected term is contained in the agreement there is a legal duty on the other party to point out the inconsistency between the contract in its entirety and the term in issue.¹⁸⁷ Consumers are thereby protected from harsh clauses because the contract assessor is bound to communicate with the consumer and this promotes substantive equality because bargaining may be possible, especially in standard form contracts.¹⁸⁸

There are several decided cases where this concept has been applied. In the case of *Shephard v Farrell’s Estate Agency* 1921 TPD 62, the appellant wanted to sell his business.¹⁸⁹ The appellant approached the respondent estate agent after seeing an advert in a newspaper posted by the respondent stating as follows: ‘Our motto: no sale no charge: All advertisements at our expense’.¹⁹⁰ The advertisement simply meant that the respondents would not charge any commission if they failed to sell property on behalf of any person who had enlisted their services.¹⁹¹ The parties concluded an agreement in terms of which the respondent would sell the appellant’s business on his behalf.¹⁹² However, the agreement signed by the parties was at variance with the advertisement in that it gave the respondent the right to claim commission even

¹⁸³ Naude & Lubbe (note 93 above) 454.

¹⁸⁴ Ibid. See also *Mercurius Motors v Lopez* (note 43 above) Para 33.

¹⁸⁵ Naude & Lubbe (note 93 above) 454.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid. See also *Mercurius Motors v Lopez* (note 43 above) Para 33.

¹⁸⁸ *Mercurius Motors v Lopez* (note 43 above) Para 33.

¹⁸⁹ At 63.

¹⁹⁰ At 63-64.

¹⁹¹ At 66.

¹⁹² At 64.

if the house was not sold by the respondent agency.¹⁹³ It happened that the business was indeed sold, but by a different agency.¹⁹⁴ After the business was sold, the respondent claimed commission from the appellant despite not being responsible for the sale.¹⁹⁵ The court came to the conclusion that the appellant had not expected the term regarding commission to form part of the agreement since it was contrary to the advertisement in the newspaper.¹⁹⁶ Mason J held that the appellant was entitled to assume that he had signed an agreement in terms of the advertisement.¹⁹⁷

The above approach was also followed in the case of *Du Toit v Atkinson Motors* 1985 (2) SA 893 (A). In this case the respondent published an advertisement in a newspaper offering a ‘Mercedes-Benz 350, 1979’ for sale.¹⁹⁸ The appellant was enticed by the advertisement and purchased the vehicle.¹⁹⁹ In order to complete the sale transaction the appellant was requested by the respondent’s sales manager to sign a document which, however, did not contain the year of manufacture of the vehicle.²⁰⁰ The document contained an exemption clause absolving the respondent from all liability concerning representations on the year of manufacture of the vehicle.²⁰¹ After 3 months the appellant realised that the vehicle was a 1976 model and not a 1979 model as published in the newspaper advertisement.²⁰² The respondent approached the court for cancellation of the contract and repayment of the purchase price.²⁰³ In upholding the appeal Van Heerden AR held that by failing to explain the effect of the exemption clause to the appellant the respondent’s employees created the impression that the signed document was not at variance with the advertisement.²⁰⁴ In other words, the exemption clause in the document was unexpected and the appellant had been misled into purchasing the vehicle.²⁰⁵

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ At 66.

¹⁹⁷ Ibid.

¹⁹⁸ At 894.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ At 905-906.

²⁰⁵ At 906.

Another important case dealing with unexpected terms was that of *Bok Clothing Manufacturers (Pty) Ltd and another v Lady Land (Pty) Ltd (Under Provisional Judicial Management)* 1982 (2) SA 565 (C). In this case the applicant supplier of clothing had a long-standing business relationship with the respondent retailer in terms of which it supplied women's clothing for sale.²⁰⁶ The terms and conditions of sale of the clothes were found at the back of the order forms which facilitated the sale transactions between the parties.²⁰⁷ These conditions stated that the sale was subject to a reservation of ownership which authorized the applicant to terminate the agreement either when the respondent was placed under judicial management or for non-payment of purchased goods.²⁰⁸ The respondent was eventually placed under judicial management and at the same time it was indebted to the applicant.²⁰⁹ The respondent's director alleged that he was not aware of the conditions referred to by the applicant since he often ordered merchandise from the applicant through an agent using a foolscap sheet of paper which he regarded as the official order form.²¹⁰ He contended that he had no knowledge of the order form and only became aware of its existence when the company was placed under judicial management.²¹¹ While acknowledging that clerks of the respondent company received order forms from the applicant, he stated that as a director he was not personally aware of the applicant's order forms.²¹² The question that King AJ had to decide was whether the conditions of sale on the back of the order form governed the sales of the articles sold between the parties.²¹³ In dismissing the application King AJ held that the respondent director had not been aware of the terms and conditions embodied in the order form.

In the case of *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) the court had to consider the validity of an exemption clause.²¹⁴ In this case the appellant was the owner of a private hospital in which the respondent patient was admitted.²¹⁵ On admission, the respondent signed a standard

²⁰⁶ At 567.

²⁰⁷ At 568.

²⁰⁸ At 567.

²⁰⁹ At *ibid.*

²¹⁰ At 567-568.

²¹¹ At 568.

²¹² At *ibid.*

²¹³ At *ibid.*

²¹⁴ At Para 1.

²¹⁵ At Para 2.

form contract containing a clause exempting the hospital from liability for any cause, including personal injury and death resulting from the negligence of its nursing staff.²¹⁶ The respondent suffered post-operative complications which left him permanently disabled as a result of the negligence of a nurse.²¹⁷ The appellant relied on the exemption clause after the respondent brought a claim for damages resulting from the negligence of its nursing staff.²¹⁸ Fire AR had to determine, amongst other issues, whether the exemption clause was brought to the notice of the respondent before the standard form contract was signed.²¹⁹ The respondent contended that he had not been made aware of the clause and that there was a duty on the appellant to bring the clause to his notice because it was unexpected.²²⁰ The court found that the exemption clause was not surprising or unexpected, and that there was therefore no legal obligation on the appellant to draw the respondent's notice to the clause.²²¹ It was further held that the test whether or not a contract term is unexpected is objective in nature.²²² The court concluded that the subjective expectations of the respondent on being informed of the clause were immaterial since exemption clauses were the rule rather than the exception.²²³

This decision has come under heavy criticism.²²⁴ Naude and Lubbe²²⁵ contend that the exemption clause was, in fact, unfamiliar and surprising on grounds of the *justus error* doctrine. They argue that by virtue of excluding liability for negligence the exemption clause allowed the hospital to provide a service that was essentially different from its obligation to provide professionally acceptable medical care.²²⁶ This led to the exemption clause to be one that was surprising and unexpected.²²⁷ Pretorius²²⁸ contends that the decision in *Afrox Healthcare Bpk v*

²¹⁶ At Para 3. The respondent had suffered complications which caused damage exceeding R2 million.

²¹⁷ At Para 2.

²¹⁸ At Para 3. The clause was contained in Article 2 of the agreement.

²¹⁹ At Para 33.

²²⁰ At Para 35.

²²¹ At Para 36.

²²² *Ibid.* See also CJ Pretorius 'Exemption Clauses and Mistake: *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA)' (2010) 73 *THRHR* 491, 496.

²²³ At Para 36.

²²⁴ Naude & Lubbe (note 93 above) 459-460. See also Pretorius (note 222 above) 496.

²²⁵ Naude & Lubbe (note 93 above) 459-460.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ Pretorius (note 222 above) 496.

*Strydom*²²⁹ should be revisited by the Supreme Court of Appeal because it undermines the rule to the effect that unexpected terms must be brought to a consumer's notice. In the later decision of *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA), the Supreme Court of Appeal had again to determine whether an exemption clause relied on by the appellant had to be brought to a customer's notice.²³⁰ In this case the respondent customer's vehicle was stolen from the appellant dealer's premises after the vehicle had been delivered for general service and repairs.²³¹ The vehicle was stolen during a robbery at the appellant's premises and when sued by the respondent for damages the appellant relied on an exemption clause.²³² The exemption clause absolving the appellant from liability for, *inter alia*, theft was contained in a 'repair order form' in barely legible writing.²³³ The court held that the exclusion clause undermined the very essence of the agreement and therefore, the clause ought to have been brought to the respondent's notice in clear and legible writing.²³⁴ Pretorius²³⁵ agrees with the court's finding and asserts that the exemption clause was unexpected especially because the vehicle was still under warranty and the lease agreement embodying the warranty did not contain an exemption clause despite the fact that it was the principal agreement.²³⁶ The decision in *Mercurius Motors v Lopez*²³⁷ also finds support in the CPA of 2008 which states that any provision purporting to limit the risk or liability of a supplier or any other person must be brought to the knowledge of the consumer in plain language.²³⁸ Furthermore, the clause must be written in plain language and the party must be given an adequate opportunity to examine the agreement.²³⁹ The decision in *Afrox Healthcare Bpk v Strydom*²⁴⁰ is clearly at variance with *Mercurius Motors v Lopez*²⁴¹ and the provisions of the CPA of 2008.²⁴² It may be the Supreme Court of Appeal needs to revisit the decision.

²²⁹ *Afrox Healthcare Bpk v Strydom* (note 43 above).

²³⁰ At paragraphs 11-18.

²³¹ At Para 1.

²³² At paragraphs 7-8.

²³³ At paragraphs 15-16.

²³⁴ At Para 33.

²³⁵ Pretorius (note 222 above) 496.

²³⁶ *Ibid.*

²³⁷ Naude & Lubbe (note 93 above) 459-460.

²³⁸ S. 49 (1) (a) and (5) as read with S. 22 of the CPA of 2008.

²³⁹ S. 22 of the CPA of 2008.

²⁴⁰ *Afrox Healthcare Bpk v Strydom* (note 43 above).

²⁴¹ *Mercurius Motors v Lopez* (note 43 above).

²⁴² S. 49 (1) (a) and (5) as read with S. 22 of the CPA of 2008.

4.2.3. Negligence

Another safeguard used by the courts has been to give special attention to exemption clauses that are drafted for the purpose of limiting liability for negligence. The analysis below will examine whether the traditional position, that a party may validly exempt him or herself from liability for ordinary and gross negligence through an exemption clause, still subsists after the CPA of 2008 came into force.²⁴³

Perhaps the starting point would be to analyse the case of *South African Railways and Harbours v Lyle Shipping Co. Ltd* 1958 (3) SA 416 (A) where the appellant's ship, the 'Cape Sable', was involved in a collision with the respondent's tug.²⁴⁴ The collision between the two vessels occurred during operations performed under a towage contract between the parties.²⁴⁵ The contract in question contained an exemption clause absolving the appellant from liability for negligence brought about by its servants.²⁴⁶ The question for determination on appeal was predicated on whether the exemption clause exempting the appellant from liability from negligence was valid.²⁴⁷ The court found that the exemption clause did not explicitly or generally exempt the appellant from liability and went on to interpret the exemption clause, explaining the situations under which a clause limiting liability for negligence may be construed.²⁴⁸ It was stated that in instances where liability for damages which an exemption clause purported to eliminate rested only on negligence, that exemption was to be considered in the context of only excluding liability for negligence.²⁴⁹ However, where the liability rested on some other ground other than negligence, then it was to be excluded to the extent of that ground and not on negligence except when expressly stated.²⁵⁰ This principle has been described as the traditional

²⁴³ *Sasfin (Pty) Ltd v Beukes* (note 43 above) at 15.

²⁴⁴ At 418. A 'tug' is a powerful small boat designed to pull or push larger ships.

²⁴⁵ *Ibid.*

²⁴⁶ At 418-419.

²⁴⁷ At 419.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.* See also *First National Bank of Southern Africa Limited v Rosenblum and Another* 2001 (4) SA 189 (A) Para 6.

²⁵⁰ *Ibid.*

approach to exemption clauses limiting liability for negligence.²⁵¹ In dismissing the appeal Steyn J.A. held that the exemption clause did not shield the appellant from liability for negligence.²⁵²

In the case of *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) the issue of negligence was also considered. In this case the appellant sought to recover damages for the loss of its jute grainbags stored by the respondent in a warehouse under a contract of bailment embodying an exemption clause.²⁵³ The grainbags had been stolen by the respondents' employees, including the chief security officer.²⁵⁴ Although the decision did not deal with gross negligence, Wessels ACJ mentioned in passing that a party may absolve himself from such liability through an exemption clause.²⁵⁵ In dismissing the appeal, the court held that the clause in question absolved the respondent from willful negligent conduct on the part of its employees.²⁵⁶

The Supreme Court of Appeal in South Africa had to decide among other issues whether an exemption could limit liability for negligence in the case of *First National Bank of Southern Africa Limited v Rosenblum and Another* 2001 (4) SA 189 (A). In this case the appellant bank had concluded an agreement to retain a safe deposit box on behalf of the first plaintiff at an annual retainer fee.²⁵⁷ The safe deposit box which kept the respondents' valuable articles was, however, stolen by one of the bank's employees and the appellant bank was unable to restore the respondents' articles.²⁵⁸ Relying on negligence by the bank, the respondent husband and wife successfully sued the appellant bank in the court *a quo* for damages arising from the theft of contents of a safe deposit box.²⁵⁹ The bank appealed in the Supreme Court of Appeal and relied on an exemption clause embodied in the contract which limited its liability for theft and other

²⁵¹ *First National Bank of Southern Africa Limited v Rosenblum and Another* (note 249 above) at Para 6.

²⁵² At 419-420.

²⁵³ At 800.

²⁵⁴ At 801.

²⁵⁵ At 807. See also J Neethling & JM Potgieter 'Borderline between the Law of Contract and the Law of Delict' (2012) 75 *THRHR* 107, 110-111.

²⁵⁶ At 806-807.

²⁵⁷ At Para 4.

²⁵⁸ At Para 4-5.

²⁵⁹ At paragraphs 2-3.

potential hazards.²⁶⁰ The question on appeal was whether the exemption clause covered acts of theft and negligence by the bank's employees.²⁶¹

In upholding the appeal, the court restated the traditional approach on exemption clauses coined in the case of *South African Railways and Harbours v Lyle Shipping Co. Ltd*²⁶² and came to the conclusion that the exemption clause was valid.²⁶³ The court found that the bank was exempted from liability for theft and negligence whether or not loss or damage was preventable.²⁶⁴ On the important question of whether the bank was liable for the willful misconduct of employees acting within the scope of their employment, it was held that the exemption clause protected the appellant bank because it did not derive any benefit from the misconduct committed by its employees.²⁶⁵

A similar conclusion was reached in the much criticised and very controversial case of *Afrox Healthcare Bpk v Strydom*²⁶⁶ where the Supreme Court of Appeal was faced with an exemption clause embodied in a standard hospital form. In recognizing an exemption clause as a rule rather than the exception, Fire A.R upheld its validity by stating that the exemption clause protecting the hospital from liability for negligence was not contrary to public policy.²⁶⁷ The court stated that exemption clauses in hospital forms were the rule rather than the exception.²⁶⁸ An exemption clause contained in a contract between a patient and a hospital ought to be declared contrary to public policy because it offends the very essence of the contract.²⁶⁹ It is suggested that such exemption clauses should be invalidated by the legislature because a patient is not only in a vulnerable position physically but also in a weaker bargaining position.²⁷⁰ In *Afrox*

²⁶⁰ At Para 1.

²⁶¹ At Para 5. See also *Wells v SA Alumenite Co.* 1927 AD 69 at 72.

²⁶² *South African Railways and Harbours v Lyle Shipping Co. Ltd* 1958 (3) SA 416 (A) 419.

²⁶³ *First National Bank of Southern Africa Limited v Rosenblum and Another* (note 249 above) at paragraphs 6-7, 20-22.

²⁶⁴ At paragraphs 11-12.

²⁶⁵ At Para 22.

²⁶⁶ *Afrox Healthcare Bpk v Strydom* (note 43 above).

²⁶⁷ At Para 24.

²⁶⁸ At Para 36.

²⁶⁹ Naude & Lubbe (note 93 above) 456.

²⁷⁰ *Ibid.*

*Healthcare Bpk v Strydom*²⁷¹ the court clearly sacrificed substantive justice on the altar of judicial formalism because too much emphasis was placed on the bargaining power of the hospital and the patient rather than taking the conditions under which patients usually sign hospital forms.²⁷² Naude and Lubbe²⁷³ opine that by placing too much emphasis on the hospital's business interests, the non-commercial interests of the patient were accorded less weight, especially because the court summarily dismissed the consideration that the patient was in a weak bargaining position.²⁷⁴

In the more recent decision of *Mercurius Motors v Lopez*²⁷⁵ Navsa J.A found that an exemption clause could not protect the appellant from liability for negligence.²⁷⁶ He restated the test for negligence as follows:

‘(a) would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;

(b) would a reasonable person have taken steps to guard against that possibility;

(c) did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?’

If all three parts of this test receive an affirmative answer, then the defendant has failed to measure up to the standard of the reasonable person and will be adjudged negligent.’²⁷⁷

The court concluded that negligence attached because the appellant had not acted reasonably in the circumstances. The cases examined above reveal an inconsistency in judicial opinion concerning the validity of a clause exempting a party for his own negligence. The inconsistency between *Afrox Healthcare Bpk v Strydom*;²⁷⁸ *First National Bank of Southern Africa Limited v*

²⁷¹ *Afrox Healthcare Bpk v Strydom* (note 43 above).

²⁷² Naude & Lubbe (note 93 above) 460-61.

²⁷³ *Ibid.* See also *Afrox Healthcare Bpk v Strydom* (note 43 above).

²⁷⁴ *Afrox Healthcare Bpk v Strydom* (note 43 above) at Para 12.

²⁷⁵ *Mercurius Motors v Lopez* (note 43 above).

²⁷⁶ At paragraphs 33-34.

²⁷⁷ At Para 34.

²⁷⁸ *Afrox Healthcare Bpk v Strydom* (note 43 above).

*Rosenblum and Another*²⁷⁹ and *Mercurius Motors v Lopez*²⁸⁰ is alarming taking into account that all these cases were decided in the constitutional dispensation.

Exclusion from negligence for bodily injury has also been considered by the courts in relation to the case of *Afrox Healthcare Bpk v Strydom*.²⁸¹ For instance, in the case of *Johannesburg Country Club v Stott* 2004 5 SA 517 (SCA) the respondent brought a claim against the appellant country club alleging that her husband, a certain Mr. Stott, had passed away as a result of the negligence of the club.²⁸² The late Mr. Stott, while playing golf at the country club sought cover under a shelter in order to avoid a rainstorm.²⁸³ Lightning struck while he was under the shelter and he was severely injured and subsequently passed away.²⁸⁴ The respondent claimed damages for her loss of support and other costs against the country club, alleging that her husband had been killed as a result of the negligence of the club.²⁸⁵ The club relied on an exemption clause contained in rules to which all its members were bound, including Mr. and Mrs Stott.²⁸⁶ The clause in issue absolved the club from liability for personal injury or harm to members, their children and their guests.²⁸⁷ The question for determination was whether the exemption clause absolved the club from liability arising from a dependant's claim as opposed to a claim by a member.²⁸⁸ The court held that the exemption clause only protected the club against claims made by its members in respect of personal injury and did not contemplate claims made by dependants of club members.²⁸⁹ The court went on to consider the general validity of an exemption clause absolving a party from liability for negligently causing the death of another.²⁹⁰ In considering the clause Harms JA highlighted that it was arguable whether an exemption clause of this nature was consistent with public policy and the South African Constitution.²⁹¹ It was held that an

²⁷⁹ *First National Bank of Southern Africa Limited v Rosenblum and Another* (note 249 above).

²⁸⁰ *Mercurius Motors v Lopez* (note 43 above).

²⁸¹ *Afrox Healthcare Bpk v Strydom* (note 43 above). See also Neethling & Potgieter (note 255 above) 111.

²⁸² At 515.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ 516.

²⁸⁸ *Ibid.*

²⁸⁹ At 517-518.

²⁹⁰ At 518.

²⁹¹ *Ibid.*

exemption clause absolving a party from liability for negligently causing the death of another must contain clear wording to that effect.²⁹²

The court in *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD) rendered the opinion that public policy carries more weight when measured against an exemption clause which takes away the right to bodily integrity as enshrined in the Constitution.²⁹³ In this case the plaintiff tenant fell while climbing a short flight of stairs and he attributed his fall to negligent failure on the part of the defendant landlord to erect a handrail on the stairs which could have prevented his fall.²⁹⁴ Wallis J held that the Constitutional Court decision in the case of *Mercurius Motors v Lopez*²⁹⁵ had broadened the scope of the Supreme Court of Appeal decision in the case *Afrox Healthcare Bpk v Strydom*.²⁹⁶ In this respect the court concluded that exemptions from liability for physical injury infringe upon the right to freedom, security of the person, bodily and psychological integrity embodied in section 12 of the Bill of Rights in the South African Constitution.²⁹⁷

It appears from the cases of *Johannesburg Country Club v Stott*²⁹⁸ and *Swinburne v Newbee Investments (Pty) Ltd*²⁹⁹ that courts are slowly moving away from the decision in *Afrox Healthcare Bpk v Strydom*³⁰⁰ where it was held that exemption clauses excluding liability for personal injury in hospital forms were the rule rather than the exception. This will be more evident when considering the provisions of the CPA of 2008 to be examined below.

4.2.4. Prior notice

Prior notice is another control measure applied by the courts in limiting the indiscriminate use of exemption clauses. This control measure requires a party to draw an unexpected contractual term

²⁹² Ibid. See also PN Stoop ‘The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract’ (2008) 20 *SA Merc LJ* 496, 503; Neethling & Potgieter (note 255 above) 107, 111.

²⁹³ At 312. See also Neethling & Potgieter (note 255 above) 111.

²⁹⁴ At 299.

²⁹⁵ *Mercurius Motors v Lopez* (note 43 above).

²⁹⁶ At 312. See also *Afrox Healthcare Bpk v Strydom* (note 43 above); Neethling & Potgieter (note 255 above) 111.

²⁹⁷ At 312.

²⁹⁸ *Johannesburg Country Club v Stott* 2004 (5) SA 517 (SCA).

²⁹⁹ *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD).

³⁰⁰ *Afrox Healthcare Bpk v Strydom* (note 43 above).

in an agreement to the notice of the other.³⁰¹ The issue of bringing a contractual provision to the attention of a contracting party had been problematic under the South African law of contract particularly because there has been conflicting judicial opinion.³⁰² In the case of *Diners Club SA v (Pty) Ltd v Livingston and another* 1995 (4) SA 493 (W), the first defendant signed an application form that bound him as a co-principal debtor with the plaintiff while labouring under the impression that he was signing an application form for a corporate credit card.³⁰³ In finding that the first defendant was misled into signing the document, Labe J held that there was a duty on the plaintiff club to draw to the first defendant's attention a clause written in extremely small print on the back of a signed application form for the corporate credit card.³⁰⁴

The issue of prior notice was also explored in the case of *Fourie N.O v Hansen and Another* 2001 (2) SA 823 (W) where several co-workers attended a sporting event using a microbus hired by their employer.³⁰⁵ The vehicle had been delivered at the home of first defendant who signed a rental agreement while labouring under the impression that he was signing a document for accepting delivery of the vehicle.³⁰⁶ The agreement contained an exemption clause absolving the second defendant from liability.³⁰⁷ The vehicle overturned on the way back from the sporting event and a claim against the driver and car-hire company was instituted.³⁰⁸ The car hire company disputed liability and relied on an exemption clause that purported to exempt it from liability.³⁰⁹ The court held that the exemption clause was unexpected in the agreement and thereby ought to have been brought to the notice of the party who signed the contract.³¹⁰ In other words, the clause was unexpected and should have been brought to the attention of the first defendant because it offended the very nature of contracts that involve the hiring vehicles.³¹¹

³⁰¹ *Mercurius Motors v Lopez* (note 43 above) Para 33. See also Aronstam (note 171 above) 32.

³⁰² See the conflicting decisions of *Fourie N.O v Hansen and Another* 2001 (2) SA 823 (W); *Afrox Healthcare Bpk v Strydom* (note 43 above); *Mercurius Motors v Lopez* (note 43 above).

³⁰³ At 494-495.

³⁰⁴ At 496-497.

³⁰⁵ At 829.

³⁰⁶ *Ibid.*

³⁰⁷ At 828.

³⁰⁸ At 830.

³⁰⁹ At 828.

³¹⁰ At 832.

³¹¹ At 832-833.

A few months later the Supreme Court of Appeal came to a different conclusion in *Afrox Healthcare Bpk v Strydom*.³¹² The court concluded that there was no legal duty on one party to bring an exemption clause to the knowledge of the other.³¹³ The authority of the *Afrox Healthcare Bpk v Strydom*³¹⁴ decision was tested in a later judgment of the same court in *Mercurius Motors v Lopez*.³¹⁵ On the issue of prior notice, Navsa JA in the latter case stated that a person delivering his vehicle would reasonably expect that his car would be safely kept and any unexpected exemption clause ousting such a duty ought to be brought to a customer's knowledge without the slightest hesitation.³¹⁶ He expressed himself as follows:

'An exemption clause... that undermines the very essence of the contract of the contract ... 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.'³¹⁷

Thus, an exemption clause that defeats the purpose for which the parties contracted for in the first place is invalid, especially if the party affected was not aware of its existence.³¹⁸

Another important area that requires examination is that involving unsigned documents or the famous 'ticket cases'.³¹⁹ It often happens in ordinary consumer transactions that suppliers limit their liability through the inclusion of exemption clauses in tickets and notices in general public areas.³²⁰ The principle of prior notice also applies to tickets, notices and other contractual documents issued by suppliers when concluding consumer transactions.³²¹ However, it must be pointed out that in ticket and notices cases the application of the doctrine of prior notice slightly

³¹² *Afrox Healthcare Bpk v Strydom* (note 43 above).

³¹³ At Para 36.

³¹⁴ *Afrox Healthcare Bpk v Strydom* (note 43 above).

³¹⁵ *Mercurius Motors v Lopez* (note 43 above). See also *Fourie N.O v Hansen and Another* (note 302 above).

³¹⁶ At Para 33.

³¹⁷ *Ibid.*

³¹⁸ Naude & Lubbe (note 93 above) 455.

³¹⁹ Christie (note 87 above) 179. See also Aronstam (note 171 above) 26-29; S Smith *Atiya's Introduction to the Law of Contract* 6 ed (2005) 139; Woker (note 30 above) 39.

³²⁰ Christie (note 87 above) 180. See also Woker (note 30 above) 39.

³²¹ *Ibid.* See also Smith (note 319 above) 140.

differs because such documents are not usually signed by consumers.³²² One of the earliest South African decisions which considered an exemption clause in a ticket is the leading case of *Central South African Railways v McLaren* 1903 TS 727. In this case an employee of the appellant issued a cloak room ticket to the respondent after receiving luggage from him.³²³ The ticket contained an exemption clause limiting the appellant's liability for any loss to £5.³²⁴ After losing the respondent's luggage, the appellant was granted a claim of £20 in the lower court and the appellant challenged this decision on the ground that the ticket contained a clause limiting the liability of the railway company to an amount of £5.³²⁵ The court dismissed the appeal and held that the clause had not been properly drawn to the respondent's knowledge.³²⁶

While the effect of the established doctrine of prior notice has been entrenched in the law of contract it must be pointed out that there are exceptions to the rule in ticket cases.³²⁷ The exceptions are instances where a consumer cannot allege that a term was not brought to his notice. The requirement of prior notice will not be recognised if it is not possible to give personal notification of the exemption clause, or if it is commercially impossible or impractical to give the notice.³²⁸ Further, the clause under scrutiny will be held as being applicable when everything was reasonably done to inform the person to whom the clause must apply.³²⁹ Another important factor is that if the clause is clearly and conspicuously marked out by a service provider, the consumer will be presumed to have seen it and will be held bound by the clause.³³⁰ In the case of *Davidson v Johannesburg Turf Club* 1904 TH 260, Solomon J had to consider a widely published notice which contained certain conditions of admission on the defendant country club's premises.³³¹ The plaintiff merchant seller was assaulted, detained and forcibly ejected from defendant's premises by police detectives who had been acting as servants of the

³²² Christie (note 87 above) 180-181.

³²³ At 732.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ At 735-736.

³²⁷ Woker (note 30 above) 41.

³²⁸ Ibid. See also Christie (note 87 above) 180

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ At 262.

defendant.³³² All persons who visited the racecourse at the country club on that day had purchased tickets which contained a provision that the defendant reserved the right to eject anyone from the premises.³³³ The court recognised the wide publication of the terms of admission and stated that the defendant was entitled to rely on the clause reserving its right to eject persons from its premises.³³⁴

Despite the above exceptional cases, the guiding light is that the rule on a notice is not inflexible and determining what constitutes reasonable notice is always circumstantial.³³⁵ It will be seen below that the CPA of 2008 reinforces the common law doctrine of prior notice.³³⁶ The Act requires clauses limiting liability to be brought to a consumer's notice and affords a consumer an adequate opportunity to examine the provision in issue.³³⁷ The cumulative effect of the cases examined above demonstrates that the control measure on prior notice has been effective in limiting the unfair results of exemption clauses on consumers.

4.2.5. The *Contra Proferentem* rule of interpretation

Another type of judicial control to exemption clauses is the *contra proferentem*³³⁸ rule of interpretation. In addition to prior notice, considerations of negligence and unexpected terms, South African courts have also used the *contra proferentem* rule of interpretation as another common law technique to shield unsuspecting consumers from the clutches of exclusion clauses.³³⁹ The rule has been applied by the courts in order to curb the undesired effects of exemption clauses, especially where a party seeks to escape liability by inducing the other party into being bound by ambiguous contract terms.³⁴⁰ This rule is usually applied as a last resort and requires ambiguous contract terms to be interpreted unfavourably and restrictively against the

³³² At 264.

³³³ At 262.

³³⁴ At 265.

³³⁵ Woker (note 30 above) 41. See also Christie (note 87 above) 182.

³³⁶ S. 51 (1) (c) and S. 49 of the CPA of 2008 apply to all exemption clauses generally.

³³⁷ S. 49 (5) of the CPA of 2008. See also Pretorius (note 222 above) 500.

³³⁸ This is a Latin phrase translating 'against the offeror'. See Garner (note 63 above) 352.

³³⁹ *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C) at 477. See also *Cairns (Pty) Ltd v Playdon & Co. Ltd* 1948 (3) SA 99 (A) at 123.

³⁴⁰ *J Mickleburgh Consumer Protection* (1979) 324.

drafter in favour of the weaker consumer.³⁴¹ This proposition was expressed in the case of *Cairns (Pty) Ltd v Playdon & Co. Ltd* 1948 (3) SA 99 (A). In this case the plaintiff brought an action against the defendant for specific performance under a contract of the sale of immovable property.³⁴² The contract had a provision of an option to purchase the immovable property.³⁴³ After contentions arose on the interpretation of the document between the parties, the court held that the seller bore the blame for not properly expressing the terms plainly in the agreement.³⁴⁴ In holding that the agreement was to be interpreted against the party in whose power it was to make the agreement clearer Davis J held as follows:

‘The *contra proferentem* rule, however, is one which is not to be used unless all the ordinary rules of interpretation have been exhausted in an attempt to arrive at the true intention of the parties, that is to say, of course, the true expressed intention...’³⁴⁵

The *contra proferentem* rule of interpretation affords relief only where the clause in question is ambiguous and yields no clear meaning.³⁴⁶ If the clause is clear, it will apply with full force and effect.³⁴⁷ The *proferens* is the party who authors the contract personally or does so through his agent.³⁴⁸ In explaining the operation of the rule, McNally JA in the case of *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co Ltd* 1991 (4) SA 150 (ZSC), cited with approval the comments made by Lord Denning in the English decision of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 QB 284³⁴⁹ and held that when courts apply the doctrine they often give the narrowest of meanings to the wording of an ambiguous exemption clause.³⁵⁰ Construing contract terms in this manner requires the courts to analyse the contract term in tandem with the surrounding circumstances especially where all methods of ascertaining the

³⁴¹ *Transport & Crane Hire (Pvt) Ltd v Hubert Davies & Co. (Pvt) Ltd* 1991 (4) SA 150 (ZS) at 163. See also *Cairns (Pty) Ltd v Playdon & Co. Ltd* (note 339 above); CC Turpin ‘Contracts and Imposed Terms’ (1956) 73 *SALJ* 144, 156; Aronstam (note 171 above) 35-36; Christie (note 87 above) 224.

³⁴² At 108.

³⁴³ At 108.

³⁴⁴ At 121

³⁴⁵ At 123.

³⁴⁶ Christie (note 87 above) 224. See also Aronstam (note 171 above) 35-36.

³⁴⁷ *Lynn & Main Inc v Brits Community Sandworks CC* 2009 (1) SA 308 (SCA) at Para 23. See also *First National Bank of Southern Africa Limited v Rosenblum and Another* (note 249 above) at Para 11.

³⁴⁸ Christie (note 87 above) 224.

³⁴⁹ At 296-297.

³⁵⁰ At 163.

intentions of the parties have failed.³⁵¹ The *contra proferentem* rule of interpretation says this rule of interpretation effectively ‘cuts the Gordian Knot’ in ambiguous contract stipulations.³⁵² The main justification for the application of *contra proferentem* rule of interpretation is that the author of an incurably ambiguous agreement must be held to suffer the adverse consequences because it was within his power to prepare the agreement in plain and clear language.³⁵³ The manner in which this rule applies is seen in a number of cases.

In the case of *Weinberg v Oliver* 1943 AD 181, the plaintiff entered into an oral agreement with the defendant under which it was agreed that the plaintiff would park his car at defendant’s garage at a monthly fee.³⁵⁴ The words, ‘Cars garaged at owner’s risk’ were painted in large letters on the inside wall of the defendant’s garage and were plainly visible to anyone using the garage.³⁵⁵ The contract concluded by the parties was also subject to the terms on this notice.³⁵⁶ The car was damaged by the defendant’s employee while pursuing his private errands and the defendant argued that he was protected by the notice that cars in the garage were parked the owner’s risk.³⁵⁷ Watermeyer JA restrictively interpreted the notice and held that the plaintiff undertook risk only in respect of occurrences happening inside the garage and not outside where the car was damaged.³⁵⁸ Therefore, the plaintiff did not undertake to bear any additional risks to which the car might become exposed to if it was taken out of the garage into the public streets.³⁵⁹ The notice did not relieve the defendant from liability.³⁶⁰

The case of *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd*³⁶¹ already examined above also illustrates the restrictive nature of the principle. In this case Wessels A.C.J. restrictively interpreted the exemption clause which provided that the defendant

³⁵¹ Aronstam (note 171 above) 35-36.

³⁵² *Cairns (Pty) Ltd v Playdon & Co. Ltd* (note 339 above). See also Christie (note 87 above) 224.

³⁵³ Aronstam (note 171 above) 36. See also Christie (note 87 above) 224.

³⁵⁴ At 184-185.

³⁵⁵ At 185.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ At 188-189. See also Woker (note 30 above) 42.

³⁵⁹ At 188.

³⁶⁰ At 189.

³⁶¹ *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

was absolved from liability for damage or loss arising in respect of the bailor's property.³⁶² The question was, *inter alia*, whether willful conduct in the form of theft was exempted.³⁶³ In dismissing the appeal the court interpreted the clause and found that its words were wide enough to cover the loss suffered by the appellant through the unintentional breach of contract or negligent conduct of the respondent.³⁶⁴

In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C) the plaintiff had entered into an agreement with a security company for the latter to guard plaintiff's premises.³⁶⁵ A clause in the agreement exempted the security company from loss or damage that was to be suffered by the plaintiff during the tenure of the contract.³⁶⁶ The plaintiff suffered damage as a result of fire started by the security company's employee. The security company was at all material times insured by the first defendant. The plaintiff sued the defendants who sought to deflect liability by engaging the exemption clause in the agreement. In granting the relief claimed Hlophe J, quoting from Christie,³⁶⁷ stated that:

'For many years South African Courts have interpreted exemption clauses narrowly because "the law cannot stand aside and allow such traps to operate unchecked, and the courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit..."'³⁶⁸

In coming to its findings, the court simply construed the exemption clause narrowly and relied on the case of *South African Railways and Harbours v Lyle Shipping Co. Ltd*,³⁶⁹ where the concept had been previously applied and explained. The court concluded that the conduct complained of went to the root and very essence of the contract and the defendant could thus not be exempted.³⁷⁰ Likewise, the *contra proferentem* principle was applied in the case of *First*

³⁶² At 806.

³⁶³ At 805-806.

³⁶⁴ At 807.

³⁶⁵ At 467.

³⁶⁶ Ibid.

³⁶⁷ Christie (note 87 above) 204.

³⁶⁸ At 477.

³⁶⁹ *South African Railways and Harbours v Lyle Shipping Co. Ltd* (note 262 above).

³⁷⁰ At 476.

*National Bank of Southern Africa Limited v Rosenblum and Another*³⁷¹ and it was found that the appellant was exempted for theft and acts of negligence.³⁷² The appellant relied on Clause 2 of the agreement which read:

‘The bank hereby notifies all its customer that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm of water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage and whether the loss or damage is due to the bank’s negligence or not’.³⁷³

The respondents had argued that the exemption clause could not shield the appellant bank’s employees when they committed acts of theft.³⁷⁴ The respondents based their contentions on the principle that one cannot exempt oneself from liability for willful acts as explained in the case of *Wells v SA Alumenite Co.*³⁷⁵ They further argued that it was only theft beyond the control of the bank which the clause recognised; thus, theft or negligence by the bank or its employees was not covered by the clause.³⁷⁶ In interpreting the clause the court dismissed the respondent’s arguments and stated that the exemption clause excluded liability for the potential negligence of the bank’s employees as they were part of the ‘directing and controlling’ minds of the bank.³⁷⁷ Marias J reasoned that if the clause did not include the employees of the bank under such circumstances the clause would have not been necessary in the first place.³⁷⁸ In this respect, the court held that the phrase ‘controlling and directing’ minds of the bank not only applied to senior management but extended to ordinary employees of the bank.³⁷⁹ The rationale was that it would only happen in the rarest of instances where the actual controlling minds of the bank (the bank management) would be complicit in the theft of safe deposit boxes and this was not the reason

³⁷¹ *First National Bank of Southern Africa Limited v Rosenblum and Another* (note 249 above).

³⁷² At Para 26.

³⁷³ At Para 3.

³⁷⁴ At paragraphs 8-9.

³⁷⁵ *Wells v SA Alumenite Co* (note 261 above) at 72 at Para 9.

³⁷⁶ At Para 10-11.

³⁷⁷ At Para 17.

³⁷⁸ *Ibid.*

³⁷⁹ At Para 18.

why the clause was inserted.³⁸⁰ Therefore, it was held that the exemption clause contemplated negligent acts of the many employees of the bank as well.³⁸¹ The principle set out in the case of *Wells v SA Alumenite Co.*³⁸² relied upon by the respondents was also dismissed as not being applicable to construction of contractual terms but rather to their enforcement.³⁸³ Nevertheless, it seems settled that where the theft or fraud committed by an employee benefits an employer, the employer will be barred from relying on the exemption clause.³⁸⁴

4.3. The impact of the CPA of 2008 on exemption clauses

The CPA of 2008 regulates unfair contract terms in sections 48 to section 52 and prescribes the content and formalities which all consumer contracts must comply with.³⁸⁵ While this discussion is limited to exemption clauses, it must be made clear that the provisions of Part G apply with equal force to other clauses, namely, indemnity clauses, clauses where a consumer assumes risk or liability and clauses where a consumer acknowledges certain facts.³⁸⁶ Therefore, any reference to exemption clauses must also be deemed to also apply to the above clauses. The CPA of 2008 has ‘grey list’³⁸⁷ and ‘black list’³⁸⁸ provisions.³⁸⁹ Grey list provisions are embodied in section 49 in terms of which contractual provisions to comply with certain requirements before they can be recognised as valid, while black list provisions are found in section 51 and are prohibited in contracts.³⁹⁰ It is necessary to consider the impact of the CPA of 2008 against the control measures examined above.

³⁸⁰ At Para 20.

³⁸¹ At Para 21.

³⁸² *Wells v SA Alumenite Co* (note 261 above) at Para 9.

³⁸³ At Para 23.

³⁸⁴ At Para 22. See also *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) 98-99; *Stoop* (note 292 above) 503, 509.

³⁸⁵ *Sharrock* (note 33 above) 297.

³⁸⁶ S. 49- S. 52 of the CPA of 2008.

³⁸⁷ S. 49 of the CPA of 2008.

³⁸⁸ S. 51 of the CPA of 2008.

³⁸⁹ *Sharrock* (note 33 above) 316, 321. See also T Naude ‘The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative perspective’ (2007) 124 *SALJ* 128, 131

³⁹⁰ *Sharrock* (note 33 above) 316. See also T Naude ‘The Consumer’s “Right to Fair, Reasonable and Just Terms” Under the new Consumer Protection Act in Comparative perspective’ (2009) 126 *SALJ* 505, 519.

4.3.1. *Prior notice and unexpected terms under the CPA of 2008*

It must be remembered that under the common law only unexpected or surprising clauses were to be brought to the consumer's notice. However the CPA of 2008 has now entrenched the common law requirement of prior notice without any qualifications whatsoever.³⁹¹ The CPA of 2008 requires a consumer to be given adequate time to consider an exemption clause which must be brought to his attention in plainly written language.³⁹² A supplier who seeks to enforce an exemption clause must establish that the clause was brought to a consumer's notice in terms of section 49 of the CPA of 2008.³⁹³ Therefore, it seems the proposition propounded in *Afrox Healthcare Bpk v Strydom*³⁹⁴ that exemption clauses are the rule rather than the exception, no longer applies since all exemption clauses must be brought to a consumer's notice. Therefore, the position in the case of *Afrox Healthcare Bpk v Strydom*,³⁹⁵ has been altered.³⁹⁶

Another factor to be taken into account is that it is now immaterial whether or not the Minister has prescribed certain agreements to be written in plain and understandable language. This is because the CPA of 2008 recognises both written and oral agreements concluded by a supplier and consumer.³⁹⁷ Such agreements are enforceable whether or not they have been signed.³⁹⁸

Furthermore, exemption clauses in 'small print' in tickets, notices and agreements as witnessed in the case of *Mercurius Motors v Lopez*³⁹⁹ are dispensed with by the Act which requires all the clauses listed in the section to be conspicuously drawn to the attention of a consumer in a conspicuous manner likely to attract the attention of an ordinarily alert consumer.⁴⁰⁰

³⁹¹ S. 49 (1) of the CPA of 2008.

³⁹² S. 49 (1), (3), (5) and S. 22 of the CPA of 2008.

³⁹³ Pretorius (note 222 above) 500.

³⁹⁴ *Afrox Healthcare Bpk v Strydom* (note 43 above) Para 36.

³⁹⁵ *Ibid.*

³⁹⁶ S. 49 of CPA of 2008.

³⁹⁷ S. 50 (1), (2) & S. 22 of the CPA of 2008.

³⁹⁸ *Ibid.*

³⁹⁹ *Mercurius Motors v Lopez* (note 43 above).

⁴⁰⁰ S. 49 (1) (4) (a) of the CPA of 2008. See also Naude (note 390 above) 508.

4.3.2. Negligence under the CPA of 2008

The CPA of 2008 only prohibits exemption clauses for gross negligence expressly and leaves room for suppliers to exploit exemption clauses under any other circumstances subject to section 49 (1) of the Act.⁴⁰¹ Section 51 of the CPA of 2008 provides:

‘51. (1) A supplier must not make a transaction or agreement subject to any term or condition if-

(c) it purports to-

(i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier.’

Where a clause purports to exempt a supplier for negligence, that exemption clause must be brought to the consumer’s attention who must then counter-sign against the clause in issue because negligence imputes the existence of potential risk.⁴⁰² Therefore, where an agreement anticipates the existence of potential risk of an unusual character or which is not even reasonably expected to possibly lead or result in serious injury or death, a consumer is required to counter-sign against such an exemption clause.⁴⁰³ Once this formality is complied with, the exemption clause will be deemed valid and enforceable.⁴⁰⁴

Naude⁴⁰⁵ raises concern about counter-signing an exemption clause that excludes liability for negligence likely to result in personal injury or death and contends that such a provision is a ‘double-edged sword’. He says that by assenting to such terms consumers give suppliers leverage for contending that exemption clauses which exclude liability for personal injury or death are always fair, which he totally rejects.⁴⁰⁶ This is the danger that results where gross negligence is black-listed in terms of section 51 without expressly grey-listing ordinary negligence under

⁴⁰¹ S. 51 (1) (c) (i) of the CPA of 2008. Furthermore, S. 49 (1) (a) of the CPA of 2008 provides that any provision purporting to limit the risk or liability of a supplier or any other person must be brought to the knowledge of the consumer in plain language.

⁴⁰² S. 49 (1) & (2) of the CPA of 2008. See also Naude (note 390 above) 510; Pretorius (note 222 above) 500.

⁴⁰³ S. 49 (2) of the CPA of 2008. See also Naude (note 390 above) 510; Pretorius (note 222 above) 500.

⁴⁰⁴ S. 49 (2) of the CPA of 2008.

⁴⁰⁵ Naude (note 390 above) 510.

⁴⁰⁶ Ibid.

section 49.⁴⁰⁷ While the Act requires countersigning by the consumer, it has been observed that the procedural step of counter-signing an exemption clause does not detract from the fact that service providers may avoid liability for personal injury resulting from their negligent conduct.⁴⁰⁸ The reality is that by condoning the exemption of liability for negligence the CPA of 2008 indirectly gives latitude to the *Afrox Healthcare Bpk v Strydom*⁴⁰⁹ decision that hospitals may exempt themselves from liability for negligence, with the qualification that patients need only to counter-sign against the exemption clause.⁴¹⁰ It may be that the CPA of 2008 leaves possible room for encroachment on an individual's fundamental right to life and bodily integrity enshrined in the Bill of Rights.⁴¹¹

The decision of *Afrox Healthcare Bpk v Strydom*⁴¹² has been criticised primarily for failing to take into account a weak and vulnerable patient's precarious position when signing hospital forms which often contain exemption clauses introduced at the last minute.⁴¹³ In healthcare, an exemption clause protecting a hospital from liability ought to be declared contrary to public policy and invalid because consumers in such instances are not able to guard against a supplier's negligence.⁴¹⁴ Sharrock⁴¹⁵ holds the view that any exemption clause limiting the liability of a supplier for 'ordinary' negligence should be considered unfair. The overall criticism leveled on section 49 is that the section mainly addresses the procedural aspects of an agreement, thereby sacrificing substantive fairness which is always paramount in consumer agreements.⁴¹⁶

4.3.3. The contra proferentem principle under the CPA of 2008

The Section 4 (4) (a) of the CPA of 2008 provides as follows:

⁴⁰⁷ Naude (note 390 above) 523.

⁴⁰⁸ Ibid.

⁴⁰⁹ *Afrox Healthcare Bpk v Strydom* (note 43 above).

⁴¹⁰ S. 49 (2) (c) of the CPA of 2008.

⁴¹¹ Naude (note 390 above) 510.

⁴¹² *Afrox Healthcare Bpk v Strydom* (note 43 above).

⁴¹³ Naude (note 390 above) 510.

⁴¹⁴ Naude & Lubbe (note 93 above) 456. See also Naude (note 390 above) 511.

⁴¹⁵ Sharrock (note 33 above) 318.

⁴¹⁶ Naude (note 390 above) 511.

‘4. (4) to the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer-

(a)so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer.’

The CPA of 2008 has thus entrenched the *contra proferentem* rule in section 4 (4) (a) in terms of which courts may interpret ambiguous contract terms to the benefit of consumers.⁴¹⁷ Standard form contracts are also subject to interpretation in accordance with the provisions of the Act. The rule therefore finds recognition in the CPA of 2008.

5.4. The time-limitation clause

A time limitation clause denies a contracting party the right to seek the intervention of a court upon the prescription of a stipulated time-frame in an agreement.⁴¹⁸ Such clauses have been described as ‘conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law’.⁴¹⁹ A time-limitation clause has the same effect whether it appears in a contract or in the provisions of a statute and it is necessary to examine the approaches under both instances.⁴²⁰

The Constitutional Court of South Africa had to determine the validity of a statutory time-limitation clause in the case of *Mohloni v Minister of Defence* 1997 (1) 124 (CC). In this case the plaintiff brought an action for damages against the defendant for injuries suffered as a result of being intentionally shot by a soldier.⁴²¹ The defendant disputed the claim and relied on section 113 (1) of the Defence Act 44 of 1957 which stated that no civil action was to be instituted against the State after a period of 6 months had elapsed since the date on which the cause of action arose.⁴²² The plaintiff contended that section 113 (1) of the Defence Act was contrary to

⁴¹⁷ Ibid 506-507. See also Jacobs *et al* (note 35 above) 307.

⁴¹⁸ Van Eeden (note 2 above) 74.

⁴¹⁹ Innes JA in *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185.

⁴²⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at Para 46. See also Van Eeden (note 2 above) 74.

⁴²¹ At 126.

⁴²² Ibid.

section 22 of the interim constitution of the Republic of South Africa Act 200 of 1993.⁴²³ This particular section stated that every person had the right to have a dispute settled by a court of law.⁴²⁴

The question for determination was whether the section in the Defence Act⁴²⁵ contravened section 22 of the interim constitution of the Republic of South Africa.⁴²⁶ Didcott J noted that non-variation clauses had been familiar in the statutory terrain of South Africa, and had to be taken into consideration when legal proceedings were contemplated against a department of the State.⁴²⁷ He explained that the utility of such clauses was to allow an organ of government enough time to investigate claims laid against it in a responsible manner and to consider whether or not to be embroiled in litigation,⁴²⁸ while at the same time preventing procrastination in litigation and its harmful consequences.⁴²⁹ The court formulated a test and stated that the question whether the right of access to a court in terms of section 22 of the interim constitution of South Africa was impeded depended on the availability of an initial real and fair opportunity to exercise the right.⁴³⁰ The court stated as follows:

‘What counts..., I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of the case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line.’⁴³¹

⁴²³ At 128.

⁴²⁴ Ibid.

⁴²⁵ S. 113 (1) of the Defence Act 44 of 1957.

⁴²⁶ At 128.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ At 130.

⁴³⁰ Ibid.

⁴³¹ Ibid.

The court concluded that 113 (1) of the Defence Act of 1957 was to be struck down as unconstitutional.⁴³² Departing from a time-limitation clause in a statutory provision, in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the court had to determine the validity of a time-limitation clause in a contract from a constitutional context.⁴³³ The question in this case was whether a time-limitation clause in a short-term insurance policy was contrary to the Constitution of the Republic of South Africa Act 108 of 1996, and thus invalid on considerations of public policy.⁴³⁴ Ngcobo J pointed out that the test in *Mohlomi v Minister of Defence*⁴³⁵ formulated by Didcott J was not a hard and fast rule as the Constitutional Court had held.⁴³⁶ Ngcobo J went on to extend the test and stated that in a constitutional dispensation it was necessary to incorporate considerations of reasonableness and fairness when determining whether a time-limitation clause was contrary to public policy.⁴³⁷ The court stated:

‘There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.’⁴³⁸

Ngcobo J applied the above test and came to the conclusion that the clause was not offensive and dismissed the appeal. The question whether the CPA of 2008 regulates time-limitation clauses must be answered in the negative because the Act does not contain any provision that regulates these clauses. Therefore, it appears that the common law propositions set out above will continue to sustain legal force.

4.5. The *voetstoots* clause

A *voetstoots* sale is one where goods are sold as they are and a seller is protected by the clause if the goods are latently defective. In other words, goods are sold ‘as is’. However, a *voetstoots* clause does not protect a seller who fraudulently sells goods with the full knowledge of latent

⁴³² At 135-136.

⁴³³ The court had to determine whether a time-limitation clause prevented the plaintiff from accessing the courts and thus contrary to S. 34 of the South African Constitution of 1996.

⁴³⁴ At paragraphs 1, 19.

⁴³⁵ *Mohlomi v Minister of Defence* 1997 (1) 124 (CC).

⁴³⁶ At Para 50.

⁴³⁷ At paragraphs 51-52.

⁴³⁸ At Para 56.

defects inherent in the articles sold.⁴³⁹ This constitutes the exception to the operation of *voetstoots* sales. In order for the exception to apply, the seller must have withheld information on the latent defect with intention to defraud the buyer.⁴⁴⁰ In *Van Den Bergh v Coetzee* 2001 (4) SA 93 (T) the defendant executor completed the sale immovable property to the plaintiff initiated by the deceased owner through an agreement of sale which included a *voetstoots* clause.⁴⁴¹ The deceased owner of the property had sold the property fully aware that it had irreparable latent defects; however, the executor was not aware of these latent defects.⁴⁴² Shongwe J. restated the proposition of the law set out in *Van der Merwe v Meades* 1991 (2) SA 1 (A) that:

‘A seller will be deprived of the protection afforded by a *voetstoots* clause where the seller (1) was aware of the defect in the *merx* at the time of making the contract and (2) *dolo malo* concealed its existence from the purchaser with the purpose of defrauding him.’⁴⁴³

The *voetstoots* clause was able to protect the executor because he had no knowledge whatsoever of the latent defects on the property and thus could not have had the intention to defraud the plaintiff.⁴⁴⁴ In *Truman v Leonard* 1994 (4) SA 371 (SE) it was held that a *voetstoots* clause was enforceable where a seller knows of a latent defect but does not conceal it with the intention of defrauding a buyer.⁴⁴⁵ The court stated that in such circumstances the *voetstoots* clause cannot be ‘thought away’ and the seller is entitled to rely on the clause provided he acted honestly.⁴⁴⁶

In *Mayes and A nother v N oordhof* 1992 (4) SA 233 (C) the court arrived at a different conclusion. In this case, the defendant sold property to the plaintiffs, who were a couple, without informing them that a squatter camp was located next to the property purchased.⁴⁴⁷ When the couple visited the site where the property was located they discovered the squatter camp and

⁴³⁹ *Van Den Bergh v Coetzee* 2001 (4) SA 93 (T) at 95-96.

⁴⁴⁰ Ibid.

⁴⁴¹ At 94.

⁴⁴² At 94-95.

⁴⁴³ At 96.

⁴⁴⁴ At 95-96.

⁴⁴⁵ At 373.

⁴⁴⁶ Ibid.

⁴⁴⁷ At 234.

thereafter made attempts to return the land to the defendant who refused to accept it.⁴⁴⁸ The plaintiffs then sought the court's intervention. The court stated that plaintiffs could only succeed if they proved that the defendant withheld information with a wrongful intention.⁴⁴⁹ Fagan J found that, although there was no direct evidence that the defendant intended to defraud the plaintiffs, there existed circumstantial evidence that the defendant willfully withheld information with the intention to defraud the plaintiffs and accordingly granted the application.⁴⁵⁰

4.5.1. *The application of the CPA of 2008 in voetstoots clauses*

The case law examined above dealt with immovable property. A legal interest in land or any other immovable property constitutes 'goods' in terms of the CPA of 2008.⁴⁵¹ It follows that the CPA of 2008 treats movable and immovable property in a similar manner. Therefore, the discussion that follows applies to both immovable property and movables.⁴⁵²

The common law principle of *voetstoots* is brought about by the provisions of section 55 (6) of the CPA of 2008. In terms of this section, the consumer's right to safe, good quality goods is curtailed if the consumer was informed of the condition of the goods prior to the consumer transaction and the consumer expressly accepted the goods in that condition.⁴⁵³ The presence of a *voetstoots* clause in a consumer agreement is sufficient to fulfill the above requirement. In other words, the CPA of 2008 recognises the authority of a *voetstoots* clause, and a consumer cannot claim that the goods are not fit for purpose, or that they are not in good working order, or even that they are defective.⁴⁵⁴

The provisions of section 55 as enforced in section 56 (2) of the CPA do not appear to apply to *voetstoots* sales because in such sales a consumer undertakes to purchase the goods in the state he finds them in. Section 56 (2) allows a consumer to return whatever goods within a period of 6 months from the date of delivery if they are not up to the required standard. In other words, a

⁴⁴⁸ At 235.

⁴⁴⁹ At 247.

⁴⁵⁰ At 247-248.

⁴⁵¹ See the definition of 'goods' in S. 1 of the CPA of 2008.

⁴⁵² *Ibid.*

⁴⁵³ S. 55 (6) (a) & (b) of the CPA of 2008.

⁴⁵⁴ *Ibid.*

consumer has 6 months to enforce the provisions of section 55 failing which the remedies under section 56 become unenforceable.⁴⁵⁵ It is clear that section 55 (6) of the CPA of 2008 preserves the common law position in as far as *voetstoots* clauses are concerned and consumers will continue to suffer at the hands of cunning sellers because they will continue to sign agreements containing the causes when purchasing second hand goods. This position will be exacerbated by the fact that the Act not only recognises express consent of the consumer, but any conduct consistent with accepting goods in a potentially unfit condition.⁴⁵⁶ It has not been stated in the CPA of 2008 what factors will be considered in ascertaining such conduct.

5. PRODUCT LIABILITY AND THIRD PARTY CONSUMERS

In South Africa product liability has, through the years, been subject to much scrutiny by academic scholars.⁴⁵⁷ As already discussed in chapter 2, the common law imposes liability on manufacturers for goods which cause harm to consumers either under the law of contract or the law of delict.⁴⁵⁸ Under the law of contract manufacturers are liable under the aedilician remedies.⁴⁵⁹ Under negligence, a manufacture could be held liable for consequential damages when a consumer relies on the aquilian action under the law of delict.⁴⁶⁰ Van Eeden⁴⁶¹ expresses the difficulty of prosecuting a delictual claim against manufacturers in the following manner:

‘The plaintiff who contemplates bringing an action based on product liability must travel a route beset with a formidable range of substantive and procedural obstacles and hurdles, including the requirements and complexities of the private law of evidence and the law of procedure.’

Before the CPA of 2008 came into force a manufacturer could limit his liability for consequential damages arising from harm caused by defective products through the use of an

⁴⁵⁵ Jacobs *et al* (note 35 above) 373.

⁴⁵⁶ S. 55 (6) (b) of the CPA of 2008.

⁴⁵⁷ *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* (note 42 above) at Para 8. See also Van Eeden (note 2 above) 21.

⁴⁵⁸ Van Eeden (note 2 above) 31.

⁴⁵⁹ MA Fouché ‘The Contract of Sale’ in MA Fouché *Legal Principles of Contracts and Negotiable Instruments* (1995) 160.

⁴⁶⁰ Van Eeden (note 2 above) 31.

⁴⁶¹ *Ibid* 65.

exemption clause.⁴⁶² It will be revealed below whether such liability can still be limited now that the CPA of 2008 regulates product liability in South Africa. Product liability in the present context will be predicated on the development of the common law leading to the imposition of strict liability in terms of section 61 of the CPA of 2008.

5.1. Strict liability under the common law

The extent to which a manufacturer can be held liable in delict for unintended harm caused by defective manufacture in an instance where there was no contractual relationship between the manufacturer and the consumer was considered by the South African Supreme Court of Appeal in the leading case of *Anna Elizabeth Jacomina Wagener v Pharmicare Ltd, Cuttings v Pharmicare Ltd* 2003 (2) All SA 167 (SCA). The appellant urged the court to apply the *acquilian* remedies and ‘fashion a remedy’ that enforced and protected their constitutional right to bodily integrity in terms of the Bill of Rights as enshrined in the Constitution.⁴⁶³ In fashioning this remedy the court was urged to extend the propositions in the case of *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* 1964 (3) SA 561 (A) which had already attached strict liability for consequential damages arising from defective merchandise supplied by merchant sellers who had professed expert knowledge.⁴⁶⁴ However, the court rejected the urge to impose general strict liability under the common law despite appellant’s desperate attempts at breaking new ground in the field of a manufacturer’s liability.⁴⁶⁵ Further, the court was against a total rejection of long established principles regulating the liability manufacturers under the common law, rather preferring an incremental shift into a more modern approach.⁴⁶⁶ The court then came to the conclusion that ‘if strict liability is to be imposed it is the legislature that must do it’.⁴⁶⁷ The manner in which the legislature dealt with the issue will be addressed in the next subsection.

⁴⁶² Ibid 32.

⁴⁶³ At Para 9.

⁴⁶⁴ Ibid.

⁴⁶⁵ At Para 22.

⁴⁶⁶ At Para 37.

⁴⁶⁷ At Para 38.

5.2. The CPA of 2008 and product liability

The South African product liability regime under the CPA of 2008 has its origins in product liability legislation of the European Union and the UK Consumer Protection Act of 1987.⁴⁶⁸ Before the CPA of 2008 came into force, general safety standards in South Africa did not apply but were specifically provided in areas of medicine, electrical components, transport and foodstuffs.⁴⁶⁹ However, certain dangerous manufactured goods containing active ingredients did not have safety standards.⁴⁷⁰ Consumers assumed that the South African Bureau of Standards (SABS) quality marks were safety guarantees, and this was obviously a misconception.⁴⁷¹ The advent of the CPA of 2008 has seen the codification of liability for damage caused by defective goods in section 61 of the Act which dispenses with the requirement of proving negligence.⁴⁷² This development was a response to the difficulties experienced by consumers in proving a manufacturer's fault in the production process.⁴⁷³

Under the dispensation of the CPA of 2008 every individual in the South African territory is afforded protection under section 61.⁴⁷⁴ For example, a consumer's right to claim a refund, replacement or repair of goods is recognised under the Act.⁴⁷⁵ Another important development introduced by the CPA of 2008 in South African consumer law is that a consumer can claim economic loss for personal injury, death or loss of property.⁴⁷⁶ Under the common law of delict a party could not claim damages for pure economic loss but this has position has changed under the Act.⁴⁷⁷ The CPA of 2008 also entrenched the warranty on fitness for purpose under section 55 of the Act. In terms of the Act consumers have the right to receive goods that are reasonably suitable for the purposes for which they were intended, are of good quality, in good working

⁴⁶⁸ Van Eeden (note 2 above) 24.

⁴⁶⁹ DTI Green paper (note 4 above) 31.

⁴⁷⁰ For example, dangerous but necessary household items like paraffin, pesticides, disinfectants, and cleaning solvents among others.

⁴⁷¹ DTI Green paper (note 4 above) 31.

⁴⁷² S. 61 (1) of the CPA of 2008.

⁴⁷³ *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* (note 42 above) at Para 38.

⁴⁷⁴ S. 5 (5) of the CPA of 2008.

⁴⁷⁵ Naude (note 390 above) 506.

⁴⁷⁶ S. 61 (4) of the CPA of 2008. See also Van Eeden (note 8 above) 32.

⁴⁷⁷ J Burchell *Principles of Delict* (1993) 9. See also *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL) at 923.

order and free from any defects.⁴⁷⁸ The implied warranty on fitness for purpose is in addition to any common law or express warranty by a producer, importer, distributor or supplier.⁴⁷⁹

There are two differing opinions on the type of liability that is imposed by section 61. The first opinion is advanced by Bregman,⁴⁸⁰ who is of the view that section 61 imposes 'strict' liability in the sense that it is immaterial whether or not the harm resulted from the negligence of the manufacturer or importer, distributor or retailer of the products.⁴⁸¹ Strict liability 'does not depend on actual negligence or intent to harm, but is based on the breach of an absolute duty to make something safe'.⁴⁸² In other words, liability attaches in all consumer agreements and transactions, including those exempted from the application of the Act.⁴⁸³ The *raison d'être* for strict liability is that risk attached to the use of a product is evenly distributed among users of that product and any defect arising thereby is automatically borne by the manufacturer.⁴⁸⁴

The second view is advanced by Van Eeden⁴⁸⁵ who asserts that section 61 of the CPA of 2008 introduces a form of 'modified' strict liability. Section 61 is not 'strict' in the sense that manufacturers, importers, distributors or retailers can be absolved from liability if they are able to prove any of the defences listed in section 61 (4) of the Act.⁴⁸⁶ Therefore, the defences act as a shield from the consequences of section 61 and thus it cannot be said that liability is strict.⁴⁸⁷ Naude⁴⁸⁸ adopts neither of the above views but instead, she carefully states that 'section 61 does not create absolute no-fault liability'. Although the views expressed above are not mutually destructive, the view expressed by Van Eeden⁴⁸⁹ appears to be more appropriate because the Act does in fact state that liability of a particular person will not arise if any of the provisions of section 61 (4) are established.

⁴⁷⁸ S. 55 (2) (a) & (b) of the CPA of 2008.

⁴⁷⁹ S. 56 (4) of the CPA of 2008.

⁴⁸⁰ Bregman (note 50 above) 93.

⁴⁸¹ S. 61 (1) of the CPA of 2008. See also Jacobs *et al* (note 35 above) 383.

⁴⁸² Garner (note 63 above) 934.

⁴⁸³ S. 5 (5) as read with S. 61 (1) of the CPA of 2008.

⁴⁸⁴ GG Howels & S Weatherill *Consumer Protection Law* (1995) 204.

⁴⁸⁵ Van Eeden (note 2 above) 242.

⁴⁸⁶ S. 61 (4) of the CPA of 2008.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Naude (note 58 above) 346.

⁴⁸⁹ Van Eeden (note 2 above) 32.

The position of the law expressed by Howie P that strict liability is generally not sustainable in delictual claims in the case of *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd*⁴⁹⁰ has been altered since the Act imposes no-fault liability for defective products.⁴⁹¹

6. CRITICISMS OF THE CPA OF 2008

6.1. Drafting flaws in the Act

The extensive list of definitions embodied in section 1 may have the potential of introducing confusion if not properly attended to. Suffice to say, the definitions in the CPA of 2008 are not only limited to section 1, but other sections have in-built definitions in themselves.⁴⁹² One of the sections in issue is section 4 (4) (b) which allows a court to interpret a contract limiting the rights of a consumer in line with the reasonable expectations of a person. Naude⁴⁹³ contends that the section is unnecessary. Courts are already empowered to invalidate unfair contract terms in Part G of the Act and ‘section 4 (4) (b) should be deleted’.⁴⁹⁴

Another problem is the application of the Act being limited to transactions⁴⁹⁵ ‘occurring within the Republic’.⁴⁹⁶ The first issue with this phrase is that it is inconsistent with other consumer statutes which apply to transactions ‘having effect within South Africa’.⁴⁹⁷ The second issue arising is that the scope and meaning of the phrase is not certain.⁴⁹⁸ The uncertainty arises because section 5 (8) (a) of the CPA of 2008 provides that the Act applies to suppliers who reside or have their principal offices outside the Republic of South Africa.⁴⁹⁹ It has been pointed

⁴⁹⁰ *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* (note 42 above).

⁴⁹¹ S. 61 of the CPA of 2008.

⁴⁹² S. 53 of the CPA of 2008.

⁴⁹³ Naude (note 390 above) 507.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ ‘Transaction’ is defined in S. 1 of the CPA of 2008.

⁴⁹⁶ S. 5 (1) (a) of the CPA of 2008.

⁴⁹⁷ S. 4 (1) National Credit Act 34 of 2005.

⁴⁹⁸ Jacobs *et al* (note 35 above) 309.

⁴⁹⁹ *Ibid* 313.

out that this situation may give rise to jurisdictional and choice of law problems where a consumer seeks to enforce his remedies against a foreign supplier in terms of the Act.⁵⁰⁰

Another problem is raised by section 5 (2) (a) which provides that the Act does not apply to services or goods supplied or promoted to the state. The problem with this section is that since the Act does not define ‘state’, it is not clear whether business entities such as companies, where the state holds shares, are exempted by the Act.⁵⁰¹ The CPA of 2008 is not clear in this respect.

6.2. Choice of forum

There arises a question on the proper forum for challenging unfair terms in consumer agreements in terms of the Act. The question is raised by the content of section 69, as read with section 52 of the CPA of 2008. These sections are not entirely in harmony. Section 52 gives ordinary courts adjudicating authority in issues involving the fairness of terms in consumer agreements. Section 69 (a) – (d) on the other hand states that a consumer may only approach an ordinary court with jurisdiction over a matter upon exhausting the other remedies available to him.⁵⁰² This observation is made by Jacobs *et al*⁵⁰³ who opines that a court of law may only be approached as a last resort after the consumer has presented his case either with the Tribunal, Ombud, provincial consumer court or Commission, or refers the matter to an alternative dispute resolution agent. This opinion appears contrary to the express provisions of section 52 which does not expressly state that only ordinary courts have jurisdiction in dealing with unfair contract terms.

7. CONCLUSION

The CPA of 2008 has made significant strides in curbing injustices that were perpetrated by the common law under the law of contract, especially freedom of contract which has been curtailed by Part G and suppliers no longer enjoy a monopoly over consumers.⁵⁰⁴ Furthermore, the CPA of 2008 has shifted liability to every type of supplier who is now held strictly liable where

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² S.1 of the CPA of 2008 defines a ‘court’ as excluding a consumer court.

⁵⁰³ Jacobs *et al* (note 35 above) 362.

⁵⁰⁴ S. 48- S. 52 of the CPA of 2008.

defective products are proved to have been supplied and this marks a milestone feat in the realm of the manufacturer's liability in South African consumer law.⁵⁰⁵ Nevertheless, the problems embedded in the Act leave it in a state of imperfection. The various gaps will undoubtedly have to be filled by the courts when they interpret the Act in accordance with their mandate to develop the common law.⁵⁰⁶ This is a judicial mandate recognized in the Act itself and the courts have a duty to develop the common law in accordance with the purpose and spirit of the Act. South Africa, propelled by constitutional values that find expression in judicial pronouncements, has finally emerged from the dark chapters of consumer exploitation and carried the banner of consumer justice into the 21st century.

⁵⁰⁵ S. 61 of the CPA of 2008.

⁵⁰⁶ S. 4 (2) of the CPA of 2008.

CHAPTER 5

CONSUMER PROTECTION IN THE UNITED KINGDOM

1. INTRODUCTION

The previous chapter addressed contract terms and aspects of product liability in South African consumer protection law. This chapter considers the manner in which unfair contract terms and product liability have been tackled in the United Kingdom (UK). Consumer protection in the UK is mainly regulated by legislation and this chapter will consider the changes introduced by legislation in product liability and in regulating unfair contract terms. The main statutes to be examined in this chapter include the Unfair Contract Terms Act of 1977, Sale of Goods Act of 1979 and the Consumer Protection Act of 1987. This chapter will also consider the impact of European Community (EC) legislation in UK consumer law.

2. HISTORICAL BACKGROUND OF THE CONSUMER FRAMEWORK IN THE UNITED KINGDOM

Unlike consumer protection in Swaziland and South Africa, consumer protection in the UK has largely been influenced by legislation since its inception and its roots are very deep-seated.¹ The earliest period from which UK consumer protection law can be traced is as far back as the 13th century when Henry III's Assize of Bread and Ale was enacted in 1266 to control contaminated food through uniform weights and measures.² The Assizes of Bread and Ale prohibited traders from supplying products in short weight.³ As business methods developed in mercantile relations during the 17th and 18th centuries, it was considered necessary to regulate the price of bread and coal.⁴ It has been observed that most of the statutes regulating these commodities were inclined towards fair trading rather than consumer protection.⁵

¹ DW Oughton *Consumer Law: Text, Cases and Material* (1991) 11-12. See also R Lowe & GF Woodroffe *Consumer Law and Practice* (1980) 1; G Howells *Comparative Product Liability* (1993) 3; P Cartwright *Consumer Protection and the Criminal Law: Law, Theory and Policy in the U.K* (2001) 1.

² Howells (note 1 above) 3. See also Oughton (note 1 above) 12; Cartwright (note 1 above) 152.

³ Oughton (note 1 above) 12.

⁴ Ibid.

⁵ Ibid.

While legislation regulated the relations of merchants during the formative years freedom of contract later dominated transactions between merchants and consumers.⁶ Freedom of contract eventually attained judicial recognition in the 19th century and courts refused to interfere in the affairs of traders and consumers except where a contract was influenced by fraud or misrepresentation.⁷ However, freedom of contract declined in the late 19th century as a result of the industrial revolution and consumer protection legislation focusing on consumers rather than traders began to be enacted.⁸ One of the first statutory instruments aimed at achieving this goal was the Adulteration of Food and Drink Act of 1860 which made it an offence to knowingly sell poisoned food or food which contained harmful ingredients.⁹ This Act was followed by the Pharmacy Act of 1868 which extended protection to harm from adulterated drugs, and later the Adulteration of Food, Drink and Drugs Act of 1872 was enacted.¹⁰ The Merchandise Marks Acts of 1887 to 1953 later followed and eventually formed the core provisions of the Trade Descriptions Act of 1968.¹¹ While legislative developments of the 20th century took place, there was also an upsurge in judicial intervention with the House of Lords being influential in the development of the law of torts which had been neglected in favour of the law of contract.¹²

The House of Lords realised that the complexities in manufacturing and production processes brought about by industrialization placed the personal safety of consumers at risk because consumers could no longer easily inspect goods they purchased.¹³ Therefore, the court took it upon itself to protect end-consumers of products since consumer protection legislation was a 'patchwork' and 'harm had to occur in order to stimulate a legal response'.¹⁴ The decisions of *Donoghue v Stevenson* [1932] A.C. 562 and *Grant v Australian Knitting Mills* [1936] A.C. 85 were the first stages of judicial intervention in favour of a third party consumer harmed by defectively manufactured goods. Later on a proposal to regulate consumer affairs through

⁶ Oughton (note 1 above) 12-13. See also GG Howells & S Weatherill *Consumer Protection Law* (1995) 13-14.

⁷ Ibid. See also PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 403; *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq. 462.

⁸ S Smith *Atiyah's Introduction to the Law of Contract* 6 ed (2005) 11-12.

⁹ Cartwright (note 1 above) 212. See also Oughton (note 1 above) 12; Howells (note 1 above).

¹⁰ Howells (note 1 above).

¹¹ Cartwright (note 1 above) 162. See also Lowe & Woodroffe (note 1 above) 156; Howells & Weatherill (note 6 above) 333.

¹² Smith (note 8 above) 13, 352-353.

¹³ J Burchell *Principles of Delict* (1993) 246. See also *Donoghue v Stevenson* [1932] A.C. 562; *Grant v Australian Knitting Mills* [1936] A.C. 85.

¹⁴ Howells & Weatherill (note 6 above) 379.

government was rejected as ‘a grandiose notion’ by the Molony Committee in 1962.¹⁵ Nevertheless, there was a surge of consumer legislation from the 1960’s through to the 1980’s where statutes imposing both criminal sanctions and affording civil redress were enacted to rectify the many common law deficiencies.¹⁶ The regulation of implied terms is considered next.

3. IMPLIED TERMS

Prior to the introduction of sale of goods legislation, courts in the UK had developed common law protections aimed at shielding unsuspecting consumers from potentially defective products.¹⁷ The courts formulated and enforced implied terms on description, merchantability and fitness for purpose of goods sold to consumers.¹⁸ These implied terms were later statutorily entrenched in the Sale of Goods Act of 1893 and later in the Sale of Goods Act of 1979.¹⁹ The entrenchment of the implied terms effectively dispensed with the common law doctrine of *caveat emptor* which required purchasers to be cautious whenever they purchased goods.²⁰ The Sale of Goods Act of 1979 regulates the purchase of goods between sellers and buyers and also imposes certain warranties on purchased goods.²¹ It is necessary to consider the scope and operation of each implied term.

3.1. Implied term on description

The implied term on description requires goods sold to be defined according to their correct specification or description.²² The test whether goods have been sold by description is a ‘broad, common sense test of mercantile character’.²³ There are several factors that must exist before a sale can be considered one by description. In terms of the Sale of Goods Act²⁴ the implied term on description must be complied with whether or not the sale is conducted in the course of

¹⁵ Molony Committee Report *The Final Report of the Committee on Consumer Protection* (1962) (Cmnd 1781, 1962) Para 886. See also Oughton (note 1 above) 18.

¹⁶ Lowe & Woodroffe (note 1 above).

¹⁷ Howells (note 1 above) 53. See also Oughton (note 1 above) 13; M Griffiths *Law of Purchasing and Supply* (1994) 87.

¹⁸ Howells (note 1 above) 53.

¹⁹ *Ibid.*

²⁰ *Kindell & Sons v Lillico & Sons and others* [1969] 2 A.C. 31 at 123.

²¹ S. 11- S. 15 of the Sale of Goods Act of 1979. See also Griffiths (note 17 above) 87-88.

²² S. 13 of the Sale of Goods Act of 1979.

²³ *Ashington Piggeries Ltd and another v Christopher Hill Ltd* [1972] A.C. 441 (HL) at 489, per Lord Wilberforce.

²⁴ S. 13 (1) of the Sale of Goods Act of 1979.

business.²⁵ The goods need not actually be handed to the consumer when the description is made because section 13 of the Sale of Goods Act of 1979 has been extended to apply even to displayed products.²⁶ This was expressed by Lord Wright in the famous Australian case of *Grant v Australian Knitting Mills*.²⁷ This case involved the appellant consumer, a medical practitioner, who contracted dermatitis as a result of defective woollen underwear containing excess chemical irritant-free sulphites.²⁸ The appellant brought an action under negligence against both the retailer and the manufacturer which produced the defective underwear.²⁹ In determining when a sale can be said to be by description the court stated:

‘It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing sold by description, though it is specific, so long as it is sold as not merely as the specific thing but as a thing corresponding to that description...’³⁰

With regard to unascertained goods, the question whether a sale is by description is always construed in terms of the contractual provisions governing the sale.³¹ Lord Diplock answered this question in the case of *Ashington Piggeries Ltd and another v Christopher Hill Ltd* [1972] A.C. 441, when he stated that unascertained goods are presumed to be sold by description under a contract of sale intended to identify the kind of goods to be supplied.³²

One of the most important requirements for a sale to qualify as one by description is that the purchaser must have relied on the seller’s skill and judgment when making the purchase.³³ This requirement was expressed in the case of *Harlingdon & Leinster Enterprises v Christopher Hull Fine Art* [1990] 1 All ER 737, where the defendant dealer sold a picture to the plaintiff which

²⁵ Oughton (note 1 above) 200. See also Howells (note 1 above) 54.

²⁶ *Grant v Australian Knitting Mills* (note 13 above) at 100.

²⁷ *Grant v Australian Knitting Mills* (note 13 above).

²⁸ At 86.

²⁹ *Ibid.*

³⁰ At 100.

³¹ Howells (note 1 above) 55. See also *Ashington Piggeries Ltd and another v Christopher Hill Ltd* (note 23 above) at 503; *Harlingdon & Leinster Enterprises v Christopher Hull Fine Art* [1990] 1 All ER 737 at 741.

³² At 503.

³³ *Harlingdon & Leinster Enterprises v Christopher Hull Fine Art* (note 31 above) at 744. See also *Ashington Piggeries Ltd and another v Christopher Hill Ltd* (note 23 above) at 490.

later turned out to be a forgery.³⁴ The plaintiff alleged that it relied on a description of the picture by the defendant and that the defendant had breached the implied warranty on description in terms of section 13 (1) of the Sale of Goods Act of 1979.³⁵ The court held that reliance by a buyer on the description made by a seller ‘is the natural index of a sale by description’.³⁶ In other words, the court was saying that in order for a sale to be by description, the description must be influential in the sale such that it becomes an essential term of the contract.³⁷ Therefore, without such influence, the description cannot be said to be one by which the contract for the sale of goods is made.³⁸

The cumulative effect of the above considerations constitutes what may be defined as a sale by description. The implied term on merchantability is considered in the next subsection.

3.2. Implied term on merchantability

The Sale of Goods Act³⁹ requires goods sold to be of merchantable quality and unlike the implied term on description, this term applies to goods sold in the course of business.⁴⁰ However, the exact meaning of the phrase ‘merchantable quality’ is not clear.⁴¹ Section 14 (6) of the Sale of Goods Act 1979 does not define the phrase. It must be noted that the phrase does not attach any specific value or feature of quality and goods may be of inferior quality and yet still be deemed merchantable.⁴² The converse is also as Lord Wilberforce held in the case of *Ashington Piggeries Ltd and another v Christopher Hill Ltd*, that ‘goods may quite well be unmerchantable even if purpose-built’.⁴³ In the case of *Rogers and another v Parish (Scarborough) Ltd and others* [1987] 2 All ER 232, the plaintiff businessman had bought a motor vehicle which later turned out to be faulty.⁴⁴ The plaintiff then rejected the motor vehicle on grounds that it was not of merchantable quality in terms of section 14 (6) and claimed that the defendants had thus

³⁴ At 739.

³⁵ Act of 1979.

³⁶ At 744.

³⁷ At 741.

³⁸ At 741.

³⁹ Act of 1979.

⁴⁰ Section 14 (2) of the Sale of Goods Act of 1979.

⁴¹ Griffiths (note 17 above) 97.

⁴² Ibid 98.

⁴³ At 495.

⁴⁴ At 234.

breached section 14 (2) of the Sale of Goods Act of 1979.⁴⁵ Upholding the appeal, Mustill LJ held that in determining merchantability, it had to be taken into account whether the vehicle could be driven with any degree of comfort, handling, reliability and pride in the vehicle's outward appearance, and that merchantability was not limited to the vehicle's mechanics.⁴⁶

Likewise, in the case of *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220, the plaintiff purchased a new motor vehicle from the defendant and the vehicle later broke down after a piece of sealant entered the lubrication system and cut off the oil supply to the camshaft.⁴⁷ Thereafter the plaintiff brought an action against the defendant, contending that the vehicle was not of merchantable quality in terms of section 14 (6) and that the defendant had breached section 14 (2) of the Sale of Goods Act of 1979.⁴⁸ Roughton J declined to define 'merchantability'.⁴⁹ The court held that in determining merchantability, it had to be considered, *inter alia*, (a) whether the car was capable of being driven in safety; (b) the ease with which the defect could be remedied; and (c) whether there was a succession of other defects.⁵⁰ The court granted judgment in the plaintiff's favour.⁵¹

The scope of the phrase 'merchantable quality' also extends to a consumer's expectation over second hand goods.⁵² In the case of *Shine v General Guarantee Corporation* [1988] 1 All ER 911 the defendant finance company let a motor vehicle to the plaintiff which had previously been submerged in water and treated as an insurance company write-off because the expense of repairing it was too great.⁵³ In allowing the appeal the court held that the condition of merchantability imposed by the Sale of Goods Act⁵⁴ required the purchaser's reasonable expectation about the goods and their condition at the time of sale to be considered.⁵⁵

⁴⁵ At 235.

⁴⁶ At 237.

⁴⁷ At 221.

⁴⁸ *Ibid.*

⁴⁹ At 222.

⁵⁰ *Ibid.*

⁵¹ At 231.

⁵² *Shine v General Guarantee Corporation* [1988] 1 All ER 911 at 915.

⁵³ At 912.

⁵⁴ S.14 (2) of the Sale of Goods Act of 1979.

⁵⁵ At 915.

An important consideration on the implied term on merchantability is that it does not apply when the defects in question were drawn to the buyer's attention, or where such defects were ascertainable upon inspection or examination as prescribed in the contract of sale.⁵⁶ The implied term on fitness for purpose is considered next.

3.3. Implied term on fitness for purpose

In terms of the Sale of Goods Act⁵⁷ any goods purchased must be fit for the purpose for which they were purchased. A buyer is at liberty to assume that goods are fit for purpose if the seller is aware why the goods are being purchased.⁵⁸ In order for the implied warranty on fitness for purpose to apply the buyer must have relied on the seller's skill and judgment when purchasing the goods.⁵⁹ There are instances where goods are fit for purpose but are unsuitable to the buyer's own preferences.⁶⁰ In such situations a seller is not in breach of the warranty if the goods are not to the purchaser's own personal satisfaction.⁶¹ For example, in the case of *Griffiths v Peter Conway* [1939] 1 All ER 685 the plaintiff contracted dermatitis from a tweed coat purchased from the defendant.⁶² The plaintiff's skin was rather abnormal and had an idiosyncrasy which resulted in her contracting the dermatitis.⁶³ As a result of the dermatitis the plaintiff alleged that the coat was not fit for purpose and then brought an action for damages against the defendants on grounds of breach of warranty imposed by section 14 (1) of the Sale of Goods Act of 1893.⁶⁴ In finding that section 14 (1) of the Sale of Goods Act of 1893 did not apply to the plaintiff, the court stated that before the warranty on fitness for purpose can be implied it was necessary for the buyer to make known to the seller, either expressly or impliedly, the purpose for which the goods were required.⁶⁵ The court further held that if a person suffering from an abnormality requires goods for his use and seeks the protection of section 14 (1) of the Sale of Goods Act of 1893, it was essential for the seller to know that the goods are required by a buyer who suffers

⁵⁶ S. 14 (2) (a) and (b) of the Sale of Goods Act of 1979.

⁵⁷ S. 14 (3) of the Sale of Goods Act of 1979.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* See also *Grant v Australian Knitting Mills* (note 13 above) at 99.

⁶⁰ *Griffiths v Peter Conway* [1939] 1 All ER 685. See also Howells (note 1 above) 62.

⁶¹ *Ibid.*

⁶² At 686.

⁶³ At 691.

⁶⁴ At 690.

⁶⁵ At 691.

from abnormalities.⁶⁶ Informing the seller will enable the exercise of the seller's skill and judgment in accordance with that knowledge.⁶⁷

In the case of *Kindell & Sons v Lillico & Sons and others* [1969] 2 A.C. 31, a large number of pheasants purchased by the respondent died as a result of toxic groundnut extractions supplied by the appellant sellers.⁶⁸ The respondent claimed damages for breach of warranty in terms of section 14 (1) and (2) of the Sale of Goods Act of 1893.⁶⁹ Despite the fact that the appellants attempted to rely on an exemption clause, Lord Pearce stated that in determining fitness for purpose, 'the rarity of unsuitability would be weighed against the gravity of its consequences'.⁷⁰ Lord Reid also held that the scope of section 14 (1) was not limited to defects that could be detected, but also extended to latent defects.⁷¹

The case of *Vacwell Engineering Co Ltd v B.D.H Chemicals* [1971] 1 Q.B 88, applied this standard. In this case there was a violent and fatal chemical explosion in the plaintiff company's laboratory after a chemical called boron tribromide supplied by the defendant company came into contact with water while laboratory procedures were being performed.⁷² The plaintiff company thereafter claimed damages against the defendant for the losses on its laboratory.⁷³ The question for determination was whether the plaintiff's had made known to the defendants the purpose for which they purchased the chemical such that the defendants realised that the plaintiffs were relying on the defendant's skill and judgment in terms of section 14 (1) of the Sale of Goods Act of 1893.⁷⁴ In granting the claim, the court realised that although the chemical was fit for its intended purpose, there was likelihood of an explosion resulting from the chemical coming into contact with water which ought to have been foreseen in ordinary industrial use, and therefore, the implied term of fitness for purpose was found to have been breached.⁷⁵

⁶⁶ At 691.

⁶⁷ *Ibid.*

⁶⁸ At 122.

⁶⁹ At 73-74.

⁷⁰ At 115.

⁷¹ At 84.

⁷² At 93-94.

⁷³ At 93.

⁷⁴ At 104.

⁷⁵ At 105-105. See also Howells (note 1 above) 63.

It has been demonstrated above that the sale of goods legislation effectively curtailed freedom of contract under the doctrine of *caveat emptor* in contracts of sale.⁷⁶ The Sale of Goods Act was amended in 2002 by the Sale and Supply of Goods to Consumers Regulations 2002⁷⁷ to implement the Consumer Sales Directive of 1999;⁷⁸ however, the impact of this amendment is yet to be seen.⁷⁹ Interventions to control unfair contract terms are considered in section 4 below.

4. UNFAIR CONTRACT TERMS IN THE UK

Before legislation was enacted to deal with unfair contract terms in the UK, the common law was primarily concerned with the procedural aspects of contracts as underpinned by concepts like duress, fraud and misrepresentation under freedom of contract.⁸⁰ Over time, the law of contract was developed to focus on the substantive regularity of contracts to the point of statutory regulation.⁸¹ Perhaps the most notable statute regulating unfair contract terms is the Unfair Contract Terms Act of 1977. This section will first examine the manner in which exemption clauses were controlled under the common law and later consider the innovations introduced by the Unfair Contract Terms Act of 1977 in redressing the inherent flaws in the common law.

4.1. Judicial control of exemption clauses

The perpetual abuse of exemption clauses was met with hostility by the English judiciary, particularly judicial mavericks like Lord Denning, who attempted to remedy the effects of exclusion clauses which stripped consumers of their rights.⁸² The history of judicially controlling exemption clauses is summed up by Lord Denning deciding the Court of Appeal case of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 Q.B 284 as follows:

‘None of you nowadays will remember the trouble we had- when I was called to the bar- with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any

⁷⁶ *Kindell & Sons v Lillico & Sons and others* (note 20 above).

⁷⁷ SI 2002/3045.

⁷⁸ Directive 99/44/EC (OJ 1999 L171).

⁷⁹ The Law Commission and the Scottish Law Commission ‘Consumer Remedies for Faulty Goods’ (Law Com No. 317) (Scot Law Com 216) 2009, Cm 7725 SG/2009/218, at viii. See also J Poole *Case Book on Contract Law* (2003) 218.

⁸⁰ Atiya (note 7 above). See also Cartwright (note 1 above) 11.

⁸¹ Howells & Weatherill (note 6 above) 7-8.

⁸² *Lloyds Bank v Bundy* [1975] 2 QB 326. See also Smith (note 8 above) 289, 302, 310.

person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it.' The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, 'You must put it in clear words,' the big concern had no hesitation in doing so. It knew that the little man would never read the exemption clauses or understand them. It was a bleak winter for our law of contract...Faced with this abuse of power- by the strong against the weak- by the use of the small print of the conditions- the judges did what they could do to put a curb on it. They still had before them the idol, 'freedom of contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called 'the true construction of the contract'. They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability; or that in the circumstances the big concern was not entitled to rely on the exemption clause...But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld, at any rate when the clause did not exclude liability entirely but only limited it to a reasonable amount.'⁸³

While judicial control of exemption clauses was based on the above premise, it will be seen later in this section that the Unfair Contract Terms Act of 1977 and Unfair Terms in Consumer Contracts Regulations 1999⁸⁴ made a number of developments. The judicial innovations applied by the English courts are examined below.

4.1.1. Fairness

The notion of fairness has never attained the force of law so as to be recognised as a legal concept in the UK despite Lord Denning M.R. attempting to introduce 'equality of bargaining power' as a basis for determining the validity of contracts in the case of *Lloyds Bank v Bundy*

⁸³ At 296-298.

⁸⁴ (SI 1999/2083) as amended by SI 2001/1186.

[1975] 2 QB 326.⁸⁵ In this case the appellant farmer mortgaged his farmhouse to the respondent bank as collateral for an overdraft loan in favour of his son's company which was in financial trouble.⁸⁶ The contract encumbering the house had been negotiated by the bank's manager with the appellant.⁸⁷ The company failed to pay the amount owed and the respondent bank foreclosed on the house and instituted eviction proceedings against the appellant.⁸⁸ In granting the appeal Lord Denning M.R. held that there was inequality of bargaining power between the parties which had resulted in the conclusion of an unfair contract.⁸⁹ Lord Denning's efforts were not well received by the House of Lords which resisted applying a fairness test to contractual terms.⁹⁰ Lord Scarman in *National Westminster Bank plc v Morgan* [1985] A.C. 686 stated that the task of providing a general principle of relief against inequality of bargaining power was a matter for Parliament, not the courts.⁹¹

4.1.2. Prior Notice

Unusual contract terms must be brought to the notice of a contracting party.⁹² In the case of *Thornton v Shoe Lane Parking* [1971] All ER 686 the plaintiff was injured in the defendant's multi storey car park which had a sign at its entrance indicating that all cars were parked at the owner's risk.⁹³ When the plaintiff entered the car park, a ticket containing an exemption clause was issued by an automated machine at the entrance of the parking area.⁹⁴ The plaintiff was injured in the parking area when he returned to collect his motor vehicle.⁹⁵ After the plaintiff sued the defendant for the injury sustained, the defendant did not deny liability but alleged it was protected by the exemption clause on the parking ticket.⁹⁶ In coming to their decision, the court stated that the plaintiff would only be held bound by the exemption clause if he knew the clause existed or if the defendant did what was reasonably necessary to bring the clause to the notice of

⁸⁵ Oughton (note 1 above) 100. See also Cartwright (note 1 above) 12.

⁸⁶ At 334.

⁸⁷ At 335.

⁸⁸ At 336.

⁸⁹ At 339-340.

⁹⁰ Howells & Weatherill (note 6 above) 306-307. See also Oughton (note 1 above) 100.

⁹¹ At 708. See also Oughton (note 1 above) 100. See also RH Christie *The Law of Contract in South Africa* 5 ed (2006) 18.

⁹² *Thornton v Shoe Lane Parking* [1971] All ER 686 at 690. See also *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1988] 1 All ER 348 at 352; Lowe & Woodroffe (note 1 above) 98.

⁹³ At 688.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

the plaintiff.⁹⁷ The court found that neither requirement had been satisfied and dismissed the appeal.⁹⁸

In the case of *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1988] 1 All ER 348, the plaintiff company which operated a library of photographic transparencies sent, at the defendant's request, 47 transparencies along with a delivery note containing certain conditions.⁹⁹ One of the conditions stated that the transparencies were to be returned within 14 days from the date of delivery failing which a daily penalty would be imposed in respect of each.¹⁰⁰ The transparencies were returned later than the usual time limits resulting in the imposition of the penalty.¹⁰¹ The plaintiff then claimed the amount owing in respect of the late return of the transparencies based on the penalty clause on the conditions contained in the delivery note.¹⁰² After the defendants had challenged the clause, the court held that the clause was onerous and the defendants could not have known of its existence unless it was brought to their attention.¹⁰³ It was not expected that a delivery note would contain a clause purporting to charge a holding fee for the retention of the transparencies at a high and exorbitant rate.¹⁰⁴ In granting the appeal, the court held that 'if one condition in a set of printed conditions is particularly unusual or onerous, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party'.¹⁰⁵

4.1.3. Contractual form

Closely linked with the requirement of prior notice is the requirement that the exemption clause must be one embodied in contractual form in order to be recognised as part of the agreement.¹⁰⁶ A court will refuse to recognise the clause if it was contained in a document not considered to be contractual.¹⁰⁷ In the case of *Olley v Marlborough Court Hotel Ltd* [1949] 1 All ER 127 (CA),

⁹⁷ At 690.

⁹⁸ Ibid.

⁹⁹ At 349.

¹⁰⁰ Ibid.

¹⁰¹ At 349, 350.

¹⁰² At 350.

¹⁰³ At 352.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Smith (note 8 above) 139. See also *Olley v Marlborough Court Hotel Ltd* [1949] 1 All ER 127 (CA) at 134.

¹⁰⁷ Ibid.

the plaintiff was a guest at the defendant hotel.¹⁰⁸ The plaintiff decided to leave the hotel for a while, and when she left, she left her hotel room key on a rack at the hotel reception.¹⁰⁹ Upon her return she found her hotel room key missing from the rack and gained access to her room using a pass key only to discover that her furs, jewellery and other personal items had been stolen.¹¹⁰ She claimed damages against the defendant hotel on the ground that the defendant had negligently failed to guard or supervise the place where the key was kept.¹¹¹ After the defendant relied on an exemption clause in a notice in the plaintiff's room the question whether the clause formed part of the contract between the parties was answered by Lord Denning as follows:

'People who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be clearly proved, but also the intention to create legal relations- the intention to be legally bound- must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him, before or at the time of the contract, a written contract specifying certain terms and making it clear to him that the contract is in those terms.'¹¹²

The court went on to dismiss the appeal by the defendant and held that the exemption clause could not come to its rescue.¹¹³

4.1.4. *The contra proferentem rule of interpretation*

As already discussed in previous chapters, the *contra proferentem* rule of interpretation simply requires ambiguous contract terms to be interpreted against the party who relies on the contract for the enforcement of its provisions.¹¹⁴ Historically, courts in the UK adopted a hostile approach towards unreasonable contract terms.¹¹⁵ Contractual clauses which sought to limit liability were treated more favourably than those clauses which completely excluded liability.¹¹⁶ The distinction between clauses that exclude liability and those that limit liability was expressed in

¹⁰⁸ At 128.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² At 134.

¹¹³ Ibid.

¹¹⁴ D Yates *Exclusion Clauses in Contracts* 2 ed (1982) 137.

¹¹⁵ Oughton (note 1 above) 133.

¹¹⁶ Ibid.

the case of *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd* [1983] 1 All ER 101. In this case there was a clause that limited the liability of a security company which had negligently performed its services leading to the loss of a boat.¹¹⁷ Lord Wilberforce stated that with regard to limitation clauses, courts were not required to create ambiguity by strained interpretation where a natural and plain meaning of the clause was more desirable.¹¹⁸ He expressed himself as follows:

‘Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure.’¹¹⁹

The criterion in the above excerpt was applied by Lord Denning MR Lord in the case of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* who refused to restrictively interpret a limitation clause contained in a contract for the sale of certain cabbage seeds. The appellants in this case had supplied cabbage seed which produced cabbages with no heart.¹²⁰ Thus, the cabbages were commercially useless and the plaintiff claimed damages for the loss suffered.¹²¹ The court stated that with the enactment of the Unfair Contract Terms Act of 1977, the problem of narrow and strict interpretation of exemption clauses under the *contra proferentem* rule was a thing of the past.¹²² The Judge held that in interpreting exemption clauses the court ‘should no longer have to go through all kinds of gymnastic contortions to get around them’.¹²³ The court went on to dismiss the appeal.¹²⁴ The findings of Lord Denning that the seeds were qualitatively defective were confirmed by Lord Bridge on appeal in the House of Lords where it was held that the limitation clause was clear and that it was not fair for the appellants to limit their liability in the circumstances.¹²⁵ As opposed to exemption clauses, this case reveals the more relaxed and literal interpretation of limitation clauses by the courts.

¹¹⁷ The plaintiff had claimed damages exceeding the amount the company was liable for in terms of the agreement.

¹¹⁸ At 124.

¹¹⁹ Ibid.

¹²⁰ At 294

¹²¹ Ibid.

¹²² At 298-299.

¹²³ At 299. Coincidentally, this is one of the last cases to be considered in the Court of Appeal by one of the greatest English judges in Lord Denning on the 29th September, 1982.

¹²⁴ At 302.

¹²⁵ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803 (HL) at 817.

It is clear from the above cases that the dividing line between limitation and exclusion clauses was always an issue that was to be taken into account in the application of the *contra proferentem* rule. However, an effort to dispense with this demarcation has been successfully made by the courts.¹²⁶ Under the Unfair Contract Terms Act of 1977, it has been held that courts are required to interpret exemption clauses in a similar way to limitation clauses and thereby dispense with the strenuous interpretation that once prevailed towards these clauses.¹²⁷ This is a more modern approach which gives exemption clauses their ordinary meaning and any ambiguity arising will be subject to the provisions of the Unfair Contract Terms Act.¹²⁸

After the Unfair Contract Terms Act came into force the *contra proferentem* rule had little effect as demonstrated in the landmark case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. In this case retired investors had mortgaged their homes to secure advances and enhanced interest rates in equity linked bonds.¹²⁹ A fall in equities resulted in severe losses and the investors presented their claims to the appellant on their collective investment.¹³⁰ The appellant caused the investors to sign a form which assigned all their rights to the appellant subject to reservations.¹³¹ The question was whether there had been a valid assignment in terms of the form when a certain clause affecting the rights of the contracting parties had to be interpreted.¹³² The court held that a more contextual approach to interpretation was more appropriate in the circumstances.¹³³ Lord Hoffman held that in construing a contractual document the aim was to find the meaning which the document would convey to a reasonable man having all the background knowledge.¹³⁴ The court rejected the common method of interpretation and held that ‘the old intellectual baggage of “legal” interpretation’ had been discarded in favour of ‘common sense principles by which any serious utterance would be interpreted in ordinary life.’¹³⁵

¹²⁶ Smith (note 8 above) 153. See also *Bank of Credit and Commerce International SA v Ali* [2001] WLR 735 at 739.

¹²⁷ Smith (note 8 above) 153.

¹²⁸ Ibid.

¹²⁹ At 907.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² At 914.

¹³³ At 912.

¹³⁴ Ibid.

¹³⁵ Ibid.

This approach was followed by the House of Lords in the case of *Bank of Credit and International SA v Ali* [2001] WR 735, where the appellant bank became insolvent after declaring its employees redundant.¹³⁶ The employees brought claims against the appellant based on individual agreements on employee benefits signed in full and final settlement.¹³⁷ In dismissing the appeal, Lord Bingham of Cornhill for the majority in the House of Lords reaffirmed the observations of Lord Hoffman¹³⁸ (who dissented in this particular judgment) as follows:

‘In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural ordinary meaning in the context of the agreement, the parties’ relationship and all the relevant facts surrounding the transaction so far as known to the parties.’¹³⁹

In the above excerpt, the court was simply saying that in determining the wishes of contracting parties, courts consider the express language of the terms in the agreement. It can be concluded therefore that in the UK, the *contra proferentem* is no longer applies in its traditional sense after the Unfair Contract Terms Act was enacted, but is only applied as ‘a desperate remedy’ to cure a widespread injustice’.¹⁴⁰

The above discussion reveals the different judicial interventions and the extent to which courts were willing to go in shielding consumers from unfair exemption clauses. The impact of the Unfair Contract Terms Act in regulating unfair contract terms is considered below.

4.2. Impact of the Unfair Contract Terms Act of 1977 on exclusion clauses

The Hire Purchase Act of 1938 which proscribed the exclusion of the implied conditions of merchantability and fitness for purpose was the first legislative attempt to deal with exclusion

¹³⁶ At 737.

¹³⁷ At 737-738.

¹³⁸ In the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912.

¹³⁹ At 739.

¹⁴⁰ *Bank of Credit and International SA v Ali* (note 126 above) at 756.

clauses in the UK.¹⁴¹ A later statute of general application towards the regulation of exemption clauses was enacted in the form of the Unfair Contract Terms Act of 1977.¹⁴² Before the Unfair Contract Terms Act was introduced the courts had generally failed to control and disembodiment exclusion clauses from the confines of contractual freedom.¹⁴³ The Unfair Contract Terms Act only deals with exemption clauses and invalidates exclusion clauses in all contracts of sale in the course of business, including sales on hire purchase.¹⁴⁴ It is said that the name of the Unfair Contract Terms Act is quite misleading and is a misnomer because it is both narrow and wide at the same time.¹⁴⁵ Lowe and Woodroffe¹⁴⁶ suggest that the name of the Act is narrow because it refers to ‘contract’, yet it also deals with aspects of negligence under different circumstances. On the other hand, it is suggested that the name of the Act is wide because it does not regulate all ‘unfair terms’ but only focuses on exemption clauses.¹⁴⁷

It is interesting to note that despite the House of Lords’ reluctance to endorse Lord Denning’s recognition of fairness as a ground for invalidating unfair contracts, the English legislature eventually enacted the Unfair Contract Terms Act of 1977. The enactment of this Act significantly reduced judicial temptation to apply the fairness criterion in dealing with exemption clauses as illustrated in the case of *Lloyds Bank v Bundy*.¹⁴⁸ Besides vesting courts with the authority to invalidate unfair terms the Unfair Contract Terms Act also empowers courts to determine the reasonableness of contract terms in terms of section 11 of the Act. The application of the Act is considered next.

¹⁴¹ R Cranston *Consumers and the Law* (1978) 72.

¹⁴² Smith (note 8 above) 313.

¹⁴³ Lowe & Woodroffe (note 1 above) 95.

¹⁴⁴ Smith (note 8 above) 314.

¹⁴⁵ N Locket & M Egan *Unfair Terms in Consumer Agreements: The New Rules Explained* (1995) 51. See also Lowe & Woodroffe (note 1 above) 106; Howells & Weatherill (note 6 above) 25; J Mickleburgh *Consumer Protection* (1979) 328; Smith (note 8 above) 314.

¹⁴⁶ Lowe & Woodroffe (note 1 above) 106.

¹⁴⁷ *Ibid.* See also Locket & Egan (note 145 above) 51; Howells & Weatherill (note 6 above) 25; Cartwright (note 1 above) 11.

¹⁴⁸ *Lloyds Bank v Bundy* (note 82 above). See also Howells & Weatherill (note 6 above) 311.

4.2.1. Total invalidity of certain clauses in consumer contracts

The Unfair Contract Terms Act totally invalidates some clauses.¹⁴⁹ Section 2 of the Act prohibits contractual terms that limit liability of a contracting party for bodily injury or death resulting from negligence.¹⁵⁰ For example, any notice that warns a consumer to enter any premises ‘at his risk’ does not sustain legal force if injury or death subsequently eventuates after having entered such premises.¹⁵¹ Therefore the exemption clause in *Thornton v Shoe Lane Parking*¹⁵² would have been void under section 2 of the Unfair Contract Terms Act had the Act been already in existence when the case was decided. However, this section does not apply indiscriminately but is subject to the limitations imposed by section 1 (2) of the Act which refers to exceptional circumstances under which section 2 (1) may not apply.

4.2.2. Reasonableness criterion in determining the fairness of an exemption clause

The Unfair Contract Terms Act¹⁵³ allows courts to exercise their discretion in determining whether an exemption clause is fair and reasonable.¹⁵⁴ Any exemption clause restricting the implied warranties of description, merchantable quality and fitness for purpose will be subject to the reasonableness test.¹⁵⁵ Therefore, the statutorily implied terms cannot be excluded unless it is proven to the court’s satisfaction that the exclusion was reasonable in the circumstances.¹⁵⁶ Amongst other clauses, indemnity clauses are prohibited subject to being declared reasonable in terms of section 11 of the Act.¹⁵⁷ The same applies to clauses that exclude or limit liability for a misrepresentation or remedies for misrepresentation over one party.¹⁵⁸ The application of the Act therefore controls exemption clauses in these material areas.

¹⁴⁹ Yates (note 114 above) 74.

¹⁵⁰ S. 2 (1) of the Unfair Contract Terms Act (note 84 above).

¹⁵¹ Smith (note 8 above) 314.

¹⁵² *Thornton v Shoe Lane Parking* (note 92 above).

¹⁵³ Ibid.

¹⁵⁴ Yates (note 114 above) 81. See also Mickleburgh (note 145 above) 339.

¹⁵⁵ S. 6 (2) (a) of the Unfair Contract Terms Act (note 84 above). See also Yates (note 114 above) 77; Howells (note 1 above) 65.

¹⁵⁶ S. 11 of the Unfair Contract Terms Act of 1977. See also Yates (note 114 above) 77; Howells (note 1 above) 65.

¹⁵⁷ S. 4 of the Unfair Contract Terms Act of 1977.

¹⁵⁸ S. 8 of the Unfair Contract Terms Act of 1977.

4.3. *The Unfair Terms in Consumer Contracts Regulations 1999*

The Unfair Terms in Consumer Contracts Regulations of 1999¹⁵⁹ were implemented by the UK in accordance with the EC Council Directive on Unfair Terms in Consumer Contracts.¹⁶⁰ The Regulations repealed and replaced the Unfair Terms in Consumer Contracts Regulations of 1994¹⁶¹ and are read together with the Unfair Contract Terms Act in regulating unfair terms between suppliers and consumers.¹⁶² A contract term falling within the scope of the Regulations will be considered unfair if contrary to the requirement of good faith it causes an imbalance in the contractual relationship between a consumer and supplier to the consumer's detriment.¹⁶³ However, the contract in its entirety will continue to bind the parties if it is capable of continuing in existence without the unfair term.¹⁶⁴

In pursuit of ensuring compliance with this requirement the Director of Fair Trading in the case of *Director General of Fair Trading v First National Bank plc* [2001] 3 WLR 1297 was the first to seek legal enforcement of the Regulations.¹⁶⁵ In this case the appellant Director of Fair Trading sought an injunction to restrain the respondent bank from using a purportedly unfair term in its standard form credit agreements.¹⁶⁶ The bank argued that the regulation which formed the basis of the injunction was inapplicable to the term in question, and further that the term was not unfair.¹⁶⁷ The House of Lords had to determine two questions: whether the fairness provisions of the 1994 Regulations applied to the term in the standard form credit agreement, and if they applied, whether the term was unfair.¹⁶⁸ Lord Bingham stated that the requirement of good faith was crucial in ensuring that contractual relationships were fair, as follows:

¹⁵⁹ Unfair Terms in Consumer Contracts Regulations of 1999 (SI 1999/2083) as amended by SI 2001/1186.

¹⁶⁰ Unfair Terms in Consumer Contract Directive 93/13/EEC (OJ 1993 L95/29). See *Director General of Fair Trading v First National Bank plc* [2001] 3 WLR 1297 at 1303; Smith (note 8 above) 317.

¹⁶¹ Unfair Terms in Consumer Contracts Regulations (SI 1994/3159).

¹⁶² R Lawson *Exclusion Clauses and Unfair Contract Terms* 7 ed (2004) 198, 200. See also Smith (note 8 above) 313; *Director General of Fair Trading v First National Bank plc* (note 160 above).

¹⁶³ Regulation 4 (1) as read with Schedule 2 of the Unfair Terms in Consumer Contracts Regulations 1994. See also *Director General of Fair Trading v First National Bank plc* (note 160 above) at 1307.

¹⁶⁴ Regulation 5 (2) of the Unfair Terms in Consumer Contracts Regulations 1994.

¹⁶⁵ *Director General of Fair Trading v First National Bank plc* (note 160 above) at 1311. See also Smith (note 8 above) 317.

¹⁶⁶ At 1300.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

‘Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the customer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in schedule 2 of the regulations.’¹⁶⁹

In allowing the appeal, Lord Bingham of Cornhill held that the term did not cause a significant imbalance so as to be contrary to good faith.¹⁷⁰ Despite this case being concerned with the Unfair Terms in Consumer Contracts Regulations of 1994,¹⁷¹ it reveals that the Director of Fair Trading is authorized to challenge unfair terms through applying for injunctive relief whenever a contract term is unfair.¹⁷² It must be noted that the Regulations import the once rejected concepts of good faith and equality in determining the fairness of consumer contracts.¹⁷³ Regulation 7 (2) entrenches the *contra proferentem* rule while regulation 7 (1) seeks to ensure that contract terms are drafted in clear language so as to avoid ambiguity.¹⁷⁴

Having dealt with unfair contract terms, it is necessary to consider the manner in which product liability has been regulated in the UK.

5. PRODUCT LIABILITY AND THIRD PARTY CONSUMERS

The law of contract could not cover all areas of consumer relations and it is for that reason that the law of tort often came to the consumer’s aid.¹⁷⁵ Before examining the legislative provisions controlling product liability it is important to first consider the common law position as expressed in case law. The consumer protection legislation on product liability with which this

¹⁶⁹ At 1301.

¹⁷⁰ At 1310.

¹⁷¹ Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

¹⁷² *Director General of Fair Trading v First National Bank plc* (note 160 above) at 1300. See also Smith (note 8 above) 317, 326.

¹⁷³ Regulation 4 of the Unfair Terms in Consumer Contracts Regulations 1994. See also Smith (note 8 above) 322.

¹⁷⁴ Poole (note 79 above) 245.

¹⁷⁵ Howells & Weatherill (note 6 above) 375-376.

section is concerned is the UK Consumer Protection Act 1987. First, it is necessary to consider the manner in which the common law dealt with product liability.

5.1. Negligence

Lowe and Woodroffe¹⁷⁶ state that ‘the history of the law of tort is one of gradual and cautious development’. Liability for defective products in the UK was governed by the doctrine of contractual privity under the law of contract until 1932 when the landmark decision of *Donoghue v Stevenson*¹⁷⁷ was handed down by the House of Lords.¹⁷⁸ Contractual privity limited the right to recover damages only to contracting parties, to the exclusion of third party consumers.¹⁷⁹ There were two exceptions that applied to privity of contract which enabled a third party to recover damages for defective goods.¹⁸⁰ These were where a seller had induced a sale of defective goods by fraudulent misrepresentation and where the goods sold were inherently dangerous.¹⁸¹ Lord Atkin revealed the general discontentment of the courts concerning the effects of contractual privity whenever defective products caused harm to third party consumers when he made the following comments in the landmark Scottish case of *Donoghue v Stevenson*:¹⁸²

‘I do not think a more important problem has occupied lordships in your judicial capacity: important because of its bearing on public health and because of the practical test which it applies to the system under which it arises.’¹⁸³

The manner in which the law of torts developed the law of negligence leading to the curtailment of contractual privity will be better understood through examining the case *Donoghue v Stevenson*.¹⁸⁴

¹⁷⁶ Lowe & Woodroffe (note 1 above) 31.

¹⁷⁷ *Donoghue v Stevenson* (note 13 above).

¹⁷⁸ Lowe & Woodroffe (note 1 above) 31. See also S Ashworth *Product Liability Casebook: US and UK Judgments and Commentaries* (1984) 102.

¹⁷⁹ *Ibid.* See also Smith (note 8 above) 335.

¹⁸⁰ Ashworth (note 178 above).

¹⁸¹ *Ibid.*

¹⁸² *Donoghue v Stevenson* (note 13 above).

¹⁸³ At 579.

¹⁸⁴ *Donoghue v Stevenson* (note 13 above).

5.1.1. The dissenting judgment of Lord Buckmaster in Donoghue v Stevenson

It goes without saying that when the above case was decided in the House of Lords the very compelling dissenting judgment by Lord Buckmaster aligned with the established and already existing principles of privity of contract.¹⁸⁵ In upholding privity of contract Lord Buckmaster for the minority commenced by distinguishing a number of 19th century decisions the first of which was *Langridge v Levy* (1837) 2 M & W 519.¹⁸⁶ In this case a gunsmith sold a gun he knew was defective for the use of the purchaser's son.¹⁸⁷ Upon use, the gun exploded and injured the purchaser's son who was held to have a right of action against the gunmaker.¹⁸⁸ This case outlined the two exceptions to privity of contract where a manufacturer could be held liable to a third party for harm resulting from defectively manufactured products.¹⁸⁹ The first exception was that privity of contract did not apply where fraudulent misrepresentation had induced the purchase of defective articles which eventually resulted in harm to a third party in a contract.¹⁹⁰ Secondly, a manufacturer was liable for harm caused by an article inherently dangerous.¹⁹¹ Under both circumstances, the seller was liable to the end-user of the article whenever harm arose as a result of its use.¹⁹² Lord Buckmaster dismissed this case as inapplicable because it dealt with a fraudulent misstatement which was not the issue he was called upon to decide.¹⁹³

Lord Buckmaster went on to consider the case of *Winterbottom v Wright* (1842) 10 M & W 109 where the defendant had contracted with the Post-master General to convey mail through a mail-coach with latent defects and to keep the mail in safe condition.¹⁹⁴ Owing to the latent defects of the mail-coach the plaintiff driver got injured after being thrown off from the mail-coach.¹⁹⁵ The Court of Exchequer held that the plaintiff could not recover damages against the defendant in tort because the parties did not stand in a contractual relationship with each other.¹⁹⁶ In concluding

¹⁸⁵ At 567.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Howells (note 1 above) 69-70.

¹⁹⁰ *Donoghue v Stevenson* (note 13 above) at 569.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.* See also Ashworth (note 178 above); Howells (note 1 above) 69-70.

¹⁹³ *Donoghue v Stevenson* (note 13 above) at 567.

¹⁹⁴ *Ibid.* 588-589. See also Howells (note 1 above) 69.

¹⁹⁵ *Donoghue v Stevenson* (note 13 above) at 589. See also Ashworth (note 178 above).

¹⁹⁶ Howells (note 1 above) 69.

that a manufacturer was not liable to a third party for negligent construction the Lord Buckmaster quoted Alderson B, as follows:

‘It may be noted, also, that in this case that Alderson B said: “The only safe rule is to confine the right to recover to those who enter to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty”.’¹⁹⁷

The above underpins privity of contract as it applied in 1842, particularly the fact that courts would not grant relief to third parties.¹⁹⁸ In fact, the judicial view expressed by Lord Abinger CB in the case of *Winterbottom v Wright*¹⁹⁹ was that discarding the established doctrine of contractual privity would result in ‘infinity of actions’.²⁰⁰ Lord Buckmaster went on to examine the case of *Longmeid v Holliday* (1851) 6 Ex 761 where the wife of a man had purchased ‘the holiday lamp’ from the defendant seller and maker of the said lamp.²⁰¹ The plaintiff was induced into purchasing the defective lamp by the defendant.²⁰² The defendant made false warranty that the lamp was reasonably fit for purpose and the plaintiff relied on this warranty.²⁰³ When the plaintiff lighted the lamp it exploded and injured her.²⁰⁴ This case also found disfavour with Lord Buckmaster who held that the case was inapplicable because the suite had been brought against the vendor instead of the manufacturer.²⁰⁵ Lord Buckmaster recognised the doctrine of privity as applying between manufacturers and third parties but held that the doctrine did not apply in instances where the article in question was dangerous in itself or where a manufacturer fraudulently conceals a defect in the article.²⁰⁶

Lord Buckmaster refused to follow the case of *George v Skivington* (1869) LR 5 Exch. 1 which was considered the closest to *Donoghue v St evenson*.²⁰⁷ In this case a chemist had sold

¹⁹⁷ *Donoghue v Stevenson* (note 13 above) at 568.

¹⁹⁸ Ashworth (note 178 above).

¹⁹⁹ *Winterbottom v Wright* (1842) 10 M & W 109.

²⁰⁰ Ashworth (note 178 above) 104.

²⁰¹ *Donoghue v Stevenson* (note 13 above) at 589.

²⁰² *Ibid* 589-590.

²⁰³ *Ibid* 590.

²⁰⁴ *Ibid*.

²⁰⁵ At 568.

²⁰⁶ At 569.

²⁰⁷ *Ibid*.

hairwashing shampoo to the plaintiff's husband which caused her harm upon use.²⁰⁸ While the shampoo was inherently dangerous, the court did not make reference to the yardstick of inherently dangerous articles in its classification.²⁰⁹ Lord Buckmaster found this case embarrassing because the claim succeeded much against the established exceptions to privity. What compounded matters further was that the case of *Langridge v Levy*,²¹⁰ earlier dismissed by Lord Buckmaster as being more inclined to fraudulent misstatements, was applied and approved by the court in *George v Skivington*²¹¹ without proper justification. Lord Buckmaster emphatically rejected the words of Cleasby B., in *George v Skivington*²¹² in the following manner:

‘...and Cleasby B., who, realising that *Langridge v Levy* (2 M.W. 519.) was decided on the ground of fraud, said: “Substitute the word ‘negligence’ for ‘fraud’, and the analogy between *Langridge v Levy* (2 M.W. 519.) and this case is complete”. It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence. I do not propose to follow the fortunes of *George v Skivington* (L.R. 5 Exch. 1); few cases can have lived so dangerously and lived so long.’²¹³

Howells²¹⁴ suggests that the court was ‘generous’ in this decision considering the authoritative effect of contractual privity at the time. Lord Buckmaster also considered the case of *Heaven v Pender* [1883] 11 QBD 503 where the plaintiff worker was injured during the collapse of a staging within the precincts of a dry-dock owned by the defendant.²¹⁵ A dictum in this case had been harped upon by the majority judgment despite the case being generally inapplicable because it only revolved around the duty of the owner of premises to invited persons.²¹⁶ The court in this case granted damages for personal injury on the basis of an occupier's liability.²¹⁷ After carefully examining further cases in detail Lord Buckmaster came to the conclusion that:

²⁰⁸ Ibid at 584.

²⁰⁹ Howells (note 1 above) 69.

²¹⁰ *Langridge v Levy* (1837) 2 M & W 519.

²¹¹ *George v Skivington* (1869) LR 5 Exch. 1.

²¹² Ibid.

²¹³ *Donoghue v Stevenson* (note 13 above) at 570.

²¹⁴ Howells (note 1 above) 70.

²¹⁵ *Donoghue v Stevenson* (note 13 above) at 573.

²¹⁶ Ibid.

²¹⁷ Howells (note 1 above) 70.

‘So far, therefore, as the case of *George v Skivington* (L. R. 5 Ex. 1.) and the dicta in *Heaven v Pender* (11 Q.B.D 503, 509) are concerned, it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law.’²¹⁸

The minority held that no case, with the exception of *George v Skivington*,²¹⁹ ever violated privity of contract and that, as a result, third party liability under tort could not be sustainable in the law.²²⁰ This approach prompted Lord Atkin to adopt a different approach which is considered below.

5.1.2. The majority judgment of Lord Atkin in Donoghue v Stevenson

As already pointed out above, the English judiciary was intent on protecting third parties under the law of tort. Lord Atkin had realised that industrialization in the UK had brought along certain potential hazards on the personal safety of consumers.²²¹ In setting a new consumer trail on which future decisions would derive, Lord Atkin formulated the ‘neighbour principle’ which imposed a duty of care on manufacturers towards third party consumers of products. He stated:

‘At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa,’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of the complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be- persons who are so closely and directly affected by my

²¹⁸ *Donoghue v Stevenson* (note 13 above) at 576.

²¹⁹ *George v Skivington* (note 211 above).

²²⁰ *Donoghue v Stevenson* (note 13 above) at 577-578.

²²¹ Burchell (note 13 above).

act that I ought reasonably to have them in contemplation as being so affected when I am directing mind to the acts or omissions which are called in question.’²²²

This understanding meant that manufacturers were obliged to take extra precaution during manufacture because the end users of their products could not inspect the goods themselves.²²³ The Judge observed that this was a ‘common sense’ approach and that the law could be extended under the circumstances.²²⁴ He stated:

‘It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacture. If this were the result of the authorities, I should consider the result a great defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer would have no remedy against the manufacturer, he would have none against anyone else...I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is obviously a social wrong.’²²⁵

Lord Thankerton and Lord Macmillan agreed with Lord Atkin in the majority decision and the liability of manufacturers to third parties for negligent manufacture under negligence attained judicial recognition. The above principles were later extended to cover a wide range of circumstances in further cases including innocent by-standers.²²⁶ These situations are considered below.

5.1.3. Extension of the manufacturer’s liability

Although the case of *Donoghue v Stevenson*²²⁷ had made a significant departure from contractual privity, the original effect of the decision had been severely limited in that it had been decided in

²²² At 580.

²²³ At 582.

²²⁴ At 599.

²²⁵ At 582.

²²⁶ For example, see the cases of *Stennet v Hancock and Peters* [1939] 2 All ER 578 and *Hill v James Crowe (Case) Ltd* [1978] 1 All ER 812.

²²⁷ *Donoghue v Stevenson* (note 13 above).

the context of persons who had suffered harm as a result of internally consumed food and drinking products.²²⁸ The decision in *Donoghue v Stevenson*²²⁹ was later broadened to cover other forms of liability analogous to that presented before the House of Lords.²³⁰ In the famous Australian case of *Grant v Australian Knitting Mills*²³¹ the tort of negligence as applied in *Donoghue v Stevenson*²³² was brought under the judicial spotlight. The manufacturer was held liable despite the products not being food articles. Lord Wright extended the neighbour principle as follows:

‘It was argued, but not perhaps very strongly, that *Donoghue*’s case was a case of food or drink to be consumed internally, whereas the pants were to be worn externally. No distinction, however, can be logically drawn for this purpose between a noxious thing taken internally and a noxious thing taken externally...’²³³

The Privy Council drew inferences from the known circumstances of the case and reversed the decision of the Australian High Court.²³⁴ It was found that the defendant manufacturer owed a general duty of care to the plaintiff because the product had reached the plaintiff with the defect it had when it left the manufacturer.²³⁵ The case of *Daniels and Daniels v R White & Sons Ltd and Tabbard* [1938] 4 All ER 258 was less consumer friendly in the extension of liability and the development of the law of negligence since it neither followed *Donoghue v Stevenson*²³⁶ nor *Grant v Australian Knitting Mills*.²³⁷ In this case a man purchased lemonade for himself and his wife from the second defendant retailer and the lemonade later led to their illness because it contained carbolic acid.²³⁸ The husband and wife thereafter claimed damages against both the manufacturer and retailer of the lemonade. Lewis J stated that the duty owed by a manufacturer to the consumer or end-user of a product was not to ensure that the manufactured goods were perfect but to take reasonable care that the goods did not have a defect that was likely to cause

²²⁸ Ibid 583, 595. See also Ashworth (note 178 above) 105.

²²⁹ *Donoghue v Stevenson* (note 13 above).

²³⁰ Smith (note 8) 353.

²³¹ *Grant v Australian Knitting Mills* (note 13 above).

²³² *Donoghue v Stevenson* (note 13 above).

²³³ At 106.

²³⁴ At 101. See also Cranston (note 141 above) 150.

²³⁵ At 107.

²³⁶ *Donoghue v Stevenson* (note 13 above).

²³⁷ *Grant v Australian Knitting Mills* (note 13 above).

²³⁸ At 259-260.

injury.²³⁹ The court held that the plaintiffs had failed to prove that the defendant company had breached its duty of care.²⁴⁰ However, the husband was able to recover damages for personal injury against the retailer since there was a breach of the implied warranty on description in terms of section 14 (2) of the Sale of Goods Act of 1893.²⁴¹ The wife was not successful with her claim against both the retailer and manufacturer because she was considered a third party towards both defendants.

Despite this temporary setback, the principles in *Donoghue v Stevenson*²⁴² were later extended in the case of *Stennet v Hancock and P eters* [1939] 2 All ER 578. In this case the plaintiff was severely bruised on the leg by a flange falling off the wheel of the first defendant's lorry while walking on a pavement.²⁴³ The flange had dislodged because the lorry was negligently repaired by an employee of the second defendant.²⁴⁴ Instead of finding the first defendant liable the court held that the second defendant must have known that if the flange was not properly fixed, injury would result to other road users.²⁴⁵ The court held that any failure on its part to grant relief would 'be a sad lacuna in the law'.²⁴⁶

The case of *Daniels and Daniels v R White & Sons Ltd and Tabbard* was brought under judicial spotlight in the case of *Hill v James Crowe (Cases) Ltd* [1978] 1 All ER 812. In this case the plaintiff was on duty packing wooden cases into a lorry he was driving.²⁴⁷ The plaintiff fell and injured his ankle and hand after one of the wooden cases manufactured by the defendant collapsed.²⁴⁸ He then claimed damages against the defendant manufacturer alleging that the cases were badly manufactured.²⁴⁹ The plaintiff argued that the defendant had failed in its duty of care to ensure that the cases were fit for any transit hazards which included standing on the cases

²³⁹ At 261.

²⁴⁰ At 263.

²⁴¹ At 264.

²⁴² *Donoghue v Stevenson* (note 13 above).

²⁴³ At 579.

²⁴⁴ At 581.

²⁴⁵ At 583.

²⁴⁶ At 585

²⁴⁷ At 813.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

while they were being loaded.²⁵⁰ Besides finding that liability had been established by the plaintiff Mackenna J rejected the case *Daniels and Daniels v R White & Sons Ltd and Tabbard*²⁵¹ as having been wrongly decided.²⁵²

Lord Wilberforce and all the judges in the House of Lords stretched the neighbour principle to breaking point in *Anns v Merton London Borough Council* [1978] A.C 728 (HL). In this case the plaintiffs were occupants of a block of flats under the jurisdiction of the defendant municipal council.²⁵³ The building was built on inadequate foundations after the defendant had approved the building plans.²⁵⁴ After a while the building cracks and slopping floors which resulted in structural movements.²⁵⁵ The plaintiffs claimed damages against the defendant council for negligently failing to inspect the foundations on which the block of flats was constructed.²⁵⁶ The question for determination by the court was whether the defendant owed a duty of care to the occupants with regard to building inspections.²⁵⁷ In answering this question Lord Wilberforce formulated a two-stage test that was to be considered in determining whether a duty of care existed. He stated:

‘[I]n order to establish that a duty of care arises in a particular situation...the question the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter- in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.’²⁵⁸

²⁵⁰ Ibid.

²⁵¹ *Daniels and Daniels v R White & Sons Ltd and Tabbard* [1938] 4 All ER 258.

²⁵² At 816.

²⁵³ At 749.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ At 751.

²⁵⁸ At 751-752.

The Judge was saying that in certain circumstances a duty of care to avoid negligently causing pure economic loss against another person was recognised by courts which only had the duty of establishing the limits of such liability.²⁵⁹ In finding the council liable for the breach of its duty the court unanimously held that the plaintiffs were entitled to ‘the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly expenses arising from necessary displacement.’²⁶⁰

However, Lord Keith in a unanimous decision of the House of Lords in the case of *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL)²⁶¹ set the judicial limits of a manufacturer’s duty of care when he held that the neighbour principle was not intended to go beyond injury to a person or property.²⁶² In this case the plaintiff purchased a house after the defendant council had approved its construction on a concrete raft foundation.²⁶³ Over time the raft foundation developed cracks which resulted in the plaintiff’s house also developing serious cracks in the inner walls.²⁶⁴ The plaintiff moved to a new house and claimed damages against the defendant council for costs incurred in moving to a new location.²⁶⁵ This case was peculiar because the House of Lords had to be constituted of seven judges as opposed to the usual five because it had to overrule its own decision as expounded by Lord Wilberforce almost 13 years earlier in the case of *Anns v Merton London Borough Council*.²⁶⁶ Lord Keith was of the view that the scope of a manufacturer’s duty of care as set out in the case of *Anns v Merton London Borough Council*²⁶⁷ fell to be reconsidered because the ‘two-stage’ enquiry formulated by Lord Wilberforce was ‘not a universally applicable principle’.²⁶⁸ The court was unanimous in holding that the case of *Anns v Merton London Borough Council*²⁶⁹ was based on pure economic loss

²⁵⁹ At 752. See also Burchell (note 13 above) 8.

²⁶⁰ At 759.

²⁶¹ Also cited as [1991] 1 A.C 398.

²⁶² Burchell (note 13 above) 9.

²⁶³ At 912.

²⁶⁴ Ibid.

²⁶⁵ At 913.

²⁶⁶ *Anns v Merton London Borough Council* [1978] A.C 728 (HL). See also Burchell (note 13 above) 8.

²⁶⁷ *Anns v Merton London Borough Council* (note 266 above).

²⁶⁸ At 914.

²⁶⁹ *Anns v Merton London Borough Council* (note 266 above).

which went ‘much further than a duty to take reasonable care to prevent injury to safety or health’.²⁷⁰ Lord Keith stated:

‘In my opinion it is clear that *Anns* did not proceed on any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place.’²⁷¹

In rejecting the case of *Anns v Merton London Borough Council*,²⁷² Lord Keith stated:

‘In my opinion there can be no doubt that *Anns* has for long been widely regarded as an unsatisfactory decision...I think it must be recognised that it did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation...There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.’

The court concluded that extending liability to pure economic loss was injudicious and ‘put the law of negligence in a state of confusion defying rational analysis’.²⁷³ Having held that *Anns v Merton London Borough Council*²⁷⁴ was wrongly decided and upholding the appeal the court overruled all subsequent decisions that had previously relied on the case.²⁷⁵ Despite these innovations, consumers continued to experience difficulties, especially identifying the manufacturer and proving factors like fault, the nature of the defect and causation.²⁷⁶ It was then that the English legislature enacted the Consumer Protection Act of 1987 which is considered below.

²⁷⁰ At 920.

²⁷¹ At 922.

²⁷² *Anns v Merton London Borough Council* (note 266 above).

²⁷³ At 923.

²⁷⁴ *Anns v Merton London Borough Council* (note 266 above).

²⁷⁵ At 923.

²⁷⁶ Howells (note 1 above) 51. See also Howells & Weatherill (note 6 above) 376; Cartwright (note 1 above) 15.

5.2. The impact of the Consumer Protection Act of 1987 on Product liability

The liability of suppliers for defective products finally attained legislative recognition when the UK consumer Protection Act of 1987 was enacted.²⁷⁷ The UK consumer Protection Act of 1987 came as a result of the ‘White Paper on The Safety of Goods’²⁷⁸ after the ‘duty of care’ requirement in *Donoghue v Stevenson*²⁷⁹ was deemed insufficient for consumers.²⁸⁰ The ‘White Paper on The Safety of Goods’²⁸¹ introduced the imposition of safety standards on suppliers, and penalties for failure to comply with these standards.²⁸² The Act was a timely response to public concern at the height of panic and fear in the UK following the outbreak of salmonella²⁸³, listeria²⁸⁴ and BSE (Bovine Spongiform Encephalitis)²⁸⁵ which had had been found in certain food products in certain parts of the UK in the late 1980s to early 1990s.²⁸⁶ Although not automatically imposing sanctions on manufacturers for the production of defective products, the Act provides significant protection to consumers by imposing strict liability against manufacturers who supply defective products.²⁸⁷

The neighbour principle found legislative recognition in section 2 of the UK Consumer Protection Act of 1987 which imposes liability for defective products on producers, importers or any person who, by putting out his name or mark on a product has held himself out to be the producer.²⁸⁸ A manufacturer may, however, avoid liability for defective products by raising any of the defences listed in section 4 of the Act. The UK Consumer Protection Act of 1987 is read in tandem with the Product Safety Regulations 1994 which are the main sources of product safety

²⁷⁷ The UK consumer Protection Act of 1987 replaced the Consumer Protection Act of 1961.

²⁷⁸ Cmnd 9302.

²⁷⁹ *Donoghue v Stevenson* (note 13 above).

²⁸⁰ Cartwright (note 1 above) 137. See also Lowe & Woodroffe (note 1 above) 72; Howells & Weatherill (note 6 above) 380. Part III of the UK CPA 1987 replaced S. 11 of the Trade Descriptions Act 1968 which now contains the law relating to misleading price indications.

²⁸¹ Cmnd 9302.

²⁸² Cartwright (note 1 above) 137.

²⁸³ ‘WordWeb’ Dictionary, available at <http://www.wordweb.info.free>, accessed on 17 July, 2012, defines this word as ‘a rod-shaped gram-negative enterobacteria which causes typhoid fever and food poisoning’. This bacterium can also be used as a bioweapon.

²⁸⁴ ‘WordWeb’ Dictionary (note 283 above), defines this word as ‘a large group of bacteria having rigid cell walls; motile types have flagella’.

²⁸⁵ ‘WordWeb’ Dictionary (note 283 above), defines this word as ‘a fatal disease of cattle that affects the central nervous system; causes staggering and agitation’. It is also called mad cow disease.

²⁸⁶ Cartwright (note 1 above) 166.

²⁸⁷ *Ibid* 87. See also Part I of the UK Consumer Protection Act 1987.

²⁸⁸ S. 2 (2) (a) - (c) of the UK Consumer Protection Act of 1987.

law.²⁸⁹ The provisions of Part I of the Act cannot be excluded from application by a contract term, by notice or in any other manner.²⁹⁰ It must be mentioned that in the event claims based on negligence fall outside the ambit of the UK Consumer Protection Act of 1987, the ordinary negligence principles as set out in *Donoghue v Stevenson*²⁹¹ will apply in those circumstances and fault will have to be alleged and proved by the plaintiff.²⁹²

Although not forming part of the core aims of this study, it is necessary to briefly highlight the role of the criminal law in safeguarding consumer interests in the UK.

6. CONSUMER PROTECTION AND THE CRIMINAL LAW

As has already been pointed out at the introductory part of this chapter, the criminal law in the UK has had significant input in the protection of consumers.²⁹³ The principal criminal statute in UK consumer protection is the Trade Descriptions Act of 1968.²⁹⁴ The Trade Description Act is a strict liability statute imposing criminal sanctions on traders who make false descriptions concerning goods.²⁹⁵ Section 2 (1) of the Act defines a trade description as ‘an indication, direct or indirect, and by whatever means given’ of any matter described.²⁹⁶ The effect of this statute in UK consumer protection was considered in the case of *Wings v Ellis* [1984] 3 W.L.R 965. In this case the respondent holiday firm distributed a brochure containing false information that bedrooms at a certain hotel in Sri Lanka were fully air-conditioned.²⁹⁷ The respondent later discovered that the information on the brochures was false since the bedrooms were not air-conditioned and took remedial action by sending letters to all clients who had booked holidays through various travel agents informing them about the inaccurate information.²⁹⁸ The complainant booked and travelled to the advertised destination without being informed of the inaccuracy of the information on the brochure neither by the respondent nor the travel agent

²⁸⁹ Cartwright (note 1 above) 94. The Regulations implemented EC Directive 92/59/EEC (OJ 1992 L228/24). Regulation 7 states that ‘no producer shall place a product on the market unless the product is a safe product’.

²⁹⁰ S. 7 of the UK Consumer Protection Act of 1987.

²⁹¹ *Donoghue v Stevenson* (note 13 above).

²⁹² Howells & Weatherill (note 6 above) 376.

²⁹³ Oughton (note 1 above) 55. See also the Trade Descriptions Act 1968; Parts II & III of the UK Consumer Protection Act 1987; Food Safety Act 1990.

²⁹⁴ Cartwright (note 1 above) 15.

²⁹⁵ Lowe & Woodroffe (note 1 above) 158. See also Cartwright (note 1 above) 156, 162.

²⁹⁶ Howells & Weatherill (note 6 above) 375.

²⁹⁷ At 968.

²⁹⁸ *Ibid.*

where he made the booking.²⁹⁹ After complaint lodged a complaint on his return the respondent was charged with the offences of contravening section 14 (1) (a) (ii) and 14 (b) (ii) of the Trade Descriptions Act for the false information on the brochure.³⁰⁰ The question for determination was whether section 14 (a) of the Trade Descriptions Act created a strict liability offence.³⁰¹ This section makes it an offence to make a statement knowing it to be false in the course of business.³⁰² Lord Scarman defined the Trade Descriptions Act thus:

‘The Act is not based on the law of contract or tort. It operates by prohibiting false descriptions under the pain of penalties enforced through criminal courts. But it is not a truly criminal statute. Its purpose is not the enforcement of the criminal law but the maintenance of trading standards. Trading standards, and not criminal behaviour, are its concern.’³⁰³

In order to avoid the harsh consequences of strict liability courts have continuously interpreted statutory provisions in favour of defendants.³⁰⁴ In doing so, courts either consider the express wording of the statute, or examine the context in which the statutory provision exists in order to determine the mischief which Parliament sought to remedy.³⁰⁵ A majority of the offences in the Trade Descriptions Act impose strict liability with the exception of section 14 (1) (a) and (b) which has been said to impose some form of ‘semi-strict’ liability because the section refers to words such as ‘knowingly’ and ‘recklessly’ which are believed to impute fault.³⁰⁶ The reason section 14 is not completely a strict liability section is that a manufacturer may raise a defence of ‘due diligence’ against a complainant in terms of section 24 of the Act.³⁰⁷ The defence is proved on a balance of probabilities and is designed to mitigate the potential harshness the may result from the imposition of strict liability.³⁰⁸

²⁹⁹ Ibid.

³⁰⁰ At 969.

³⁰¹ At 976.

³⁰² Ibid. See also S. 14 (a) of the Trade Descriptions Act of 1968.

³⁰³ At 978. See also Cartwright (note 1 above) 94.

³⁰⁴ Oughton (note 1 above) 57.

³⁰⁵ Ibid 56.

³⁰⁶ *Wings v Ellis* [1985] A.C. 272; *Wings v Ellis* [1984] 3All ER 577. See also Oughton (note 1 above) 56.

³⁰⁷ Cartwright (note 1 above) 91. See also Regulation 9 of the General Product Safety Regulations of 1994.

³⁰⁸ S. 24 of the Trade Descriptions Act of 1968. See also Cartwright (note 1 above) 93.

In the case of *Gammon (Hong Kong) Ltd and others v Attorney-General of Hong Kong* [1984] 2 All ER 503, the question whether a statutory provision imposed strict liability had to be determined after it was alleged that the appellants had breached the Hong Kong Building Ordinance by deviating from an approved building plan.³⁰⁹ Lord Scarman stated that strict liability would be imposed if it assisted in the enforcement of the statute by promoting greater vigilance by the offender.³¹⁰ The court dismissed the appeal on grounds that the Ordinance imposed strict liability.³¹¹

If the offender has observed due vigilance in discharging his duties, he is entitled to rely on the defences under the Trade Descriptions Act.³¹² The case of *Tesco Supermarkets Ltd v Natrass* [1972] A.C. 153 represents this proposition.³¹³ In this case a branch of the appellant supermarket advertised by displaying a poster offering discounts on a certain washing powder. The complainant consumer was later charged the normal price by the appellant after the discounted washing powder had run out of stock.³¹⁴ The higher cost was not the appellant's fault but that of the branch manager who had failed to prevent his assistant from replacing the discounted items with washing powder indicating the original price.³¹⁵ The complainant lodged a complaint in terms of section 11 (a) of the Trade Descriptions Act, which made it an offence to offer goods at a lower price than that at which they were, in fact, being offered.³¹⁶ The appellant invoked section 24 of the Act which entitles a person to rely on the defence that the offence was a result of reliance by a complainant on information supplied by another.³¹⁷ In finding that the appellant was not liable for the offence, Lord Diplock stated:

‘If the principal has taken all reasonable precautions in the selection and training of servants to perform supervisory duties and has laid down an effective system of supervision and used all

³⁰⁹ At 505.

³¹⁰ At 505, 508.

³¹¹ At 512.

³¹² S. 24 of the Trade Descriptions Act of 1968.

³¹³ At 129.

³¹⁴ At 129.

³¹⁵ *Ibid.*

³¹⁶ At 129.

³¹⁷ At 135.

due diligence to see that it is observed, he is entitled to rely on a default by a superior servant in his supervisory duties as a defence under s. 24 (1)...³¹⁸

Therefore, the company was able to deflect liability at the expense of the manager who had failed to perform his duties diligently. Furthermore, Lord Morris of Borth-Y-Gest held that it was not sufficient for a defendant to show that he took reasonable precautions, what was necessary was that the precautionary measures were implemented with due diligence.³¹⁹ From the above, it is clear that a person who is not at fault may raise the defence that he or she took reasonable precaution which was exercised with due diligence under section 24 of the Trade Descriptions Act.³²⁰

7. CONCLUSION

The chapter has revealed the shift from common law regulation of consumer protection to the use of statutory innovations that were introduced in the different consumer protection areas in the UK. Also considered has been the manner in which judicial remedies like implied terms were grafted into and presented in statutory form to the benefit of consumers. It cannot be denied that the changes in UK consumer law, especially in product liability, were initiated by the courts as opposed to Parliament. Nevertheless, the legislature took the baton and made significant changes which provide sufficient protection for consumers under the law of contract and in product liability. Despite the enactment of a number of statutes, the courts in the UK have not adopted an armchair approach to consumer protection but are continuously engaged in the process of interpreting the statutes whenever rights accruing to consumers are threatened.

³¹⁸ At 154.

³¹⁹ At 139-140.

³²⁰ At 135, 154.

CHAPTER 6

INTERNATIONAL CONSUMER PROTECTION

1. INTRODUCTION

Although international consumer protection is a vast topic, this chapter will limit itself to a brief discussion of the types of consumer protection instruments at international level. The reason for considering international consumer instruments is because the Constitution of Swaziland of 2005¹ makes provision for the adoption of international agreements into the domestic law of the country. The international agreements recognised under the Constitution include treaties, conventions, protocols and other international agreements or arrangements.² These instruments may be of great assistance to Swaziland in formulating a consumer framework. Unfair contract terms and product liability per se, covered in the previous chapters, will not be dealt with here.

The importance of consumer protection is recognised at international level by bodies such as the United Nations (UN), the European Community (EC) and Consumers International (CI) which have made significant strides in setting the parameters for member countries.³ Unfortunately, the African Union is lagging behind in as far as consumer protection is concerned and there appears to be no collective consumer policy regulating member countries in the African continent. The role of the above international bodies in ensuring that consumer interests are prioritized on a global scale will be examined and international consumer protection instruments will be considered.

2. THE EUROPEAN COMMUNITY (EC)

2.1. *The EC Treaty*

Oughton⁴ suggests that historically, consumer protection in Europe was ‘chequered’ and ‘unspectacular’ because when the European Economic Community (EEC) was established by the

¹ S. 238 of the Constitution of 2005.

² S. 238 (6) of the Constitution of 2005.

³ P Cartwright *Consumer Protection and the Criminal Law: Law, Theory and Policy in the U.K* (2001) 156-157.

⁴ DW Oughton *Consumer Law: Texts, Cases and Materials* (1991) 72.

Treaty of Rome in 1957, a consumer protection framework was not anticipated.⁵ The Treaty of Rome, initially signed by six countries, was the founding document which brought the EEC into existence in order to introduce economic integration in Europe.⁶ The Treaty of Rome was later amended in 1987 by the Single European Act which introduced several changes in the operation of markets in the EEC, particularly decision making processes under Article 100A.⁷ In 1991 member states of the EEC agreed to change the name from the EEC to the EC through the Treaty of the European Union (EC Treaty) in the Netherlands.⁸ The most important feature which is relevant in this discussion is that the EC was vested with legal personality under Article 281 of the EC Treaty.⁹ The power to institute and defend legal proceedings, as will be seen below, derives from this Article.

2.2. Respect for EC law

In ensuring that consumers are adequately protected, the EC Treaty requires all Member states to follow EC Community law and no state may plead that its internal laws, policies and procedures justify non-compliance with its EC obligations.¹⁰ This proposition was set out in the case of *Commission of the European Communities v The Kingdom of the Netherlands* Case C-144/99 [2001] ECR I-3541.¹¹ In this case the Kingdom of the Netherlands was bound to adopt provisions of Council Directive 73/239/EEC on laws and regulations on the business of direct insurance designed to protect consumers from exploitation.¹² Article 35 (1) of the directive required member states to amend their national laws so as to comply with the directive within a stipulated time-frame and in the present case the Kingdom of the Netherlands was bound to amend its laws with 18 months from notification by the Commission.¹³ After the Kingdom of the Netherlands failed to comply with the notice of compliance for over six years (1975-1981), the

⁵ Ibid. See also R Lowe & GF Woodroffe *Consumer Law and Practice* (1980) 302; GG Howells & S Weatherill *Consumer Protection Law* (1995) 80, 97.

⁶ Oughton (note 4 above) 29. See also Howells & Weatherill (note 5 above) 80.

⁷ N Lockett & M Egan *Unfair Terms in Consumer Agreements: The New Rules Explained* (1995) 2. See also Howells & Weatherill (note 5 above) 80; Oughton (note 4 above) 29.

⁸ Howells & Weatherill (note 5 above) 81.

⁹ HG Beale *Chitty on Contracts* 29 ed (2004) Vol. 1 684.

¹⁰ *Commission of the European Communities v The Kingdom of the Netherlands* Case C-144/99 [2001] ECR I-3541 at Para 4642, available at <http://eur-lex.europa.eu/lexUriServ/UriServ.do?uri=CELEX:61982CJ0160:EN:PDF>, accessed 29 November 2012.

¹¹ Ibid.

¹² At Para 4641.

¹³ At Para 4638.

Commission of the European Communities brought an action under Article 169 of the EEC Treaty (not the EC Treaty which was adopted in 1991) for a declaration that the Kingdom of the Netherlands had failed to fulfill its obligations under the EEC Treaty. Despite not raising a defence the Kingdom of the Netherlands alleged that it had to revise its own internal laws before implementing provisions of Directive 73/239/EEC. In coming to its decision the European Court of Justice (the ECJ) stated:

‘According to well-established case-law first, a Member state may not plead provisions, notices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from Community directives, and secondly mere administrative practices, which by their nature may be changed according to the whim of the authorities and which lack appropriate publicity cannot be regarded as constituting a valid implementation of the duty imposed on Member states by the third paragraph of Article 189 of the Treaty.’¹⁴

In essence the court maintained that internal legislation was not a ground for justifying non-compliance.

Another important consideration is that the EC requires member states to act in good faith and abstain from conduct calculated to jeopardize the objectives of the Treaty.¹⁵ Article 10 of the Treaty provides:

‘Member states shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by institutions of the Community. They shall facilitate the achievement of Community tasks. They shall abstain from any measure which would jeopardize the attainment of the objectives of this Treaty.’

Article 10 of the EC Treaty was considered in the case of *Commission of the European Communities v Grand Duchy of Luxembourg* Case C-266/03.¹⁶ In this case the Grand Duchy of

¹⁴ At Para4642.

¹⁵ Article 10 of the EC Treaty.

Luxembourg had compromised the implementation of contested bilateral agreements by negotiating and bringing them into force contrary to Article 10 of the EC Treaty.¹⁷ When the Commission brought an action against the Grand Duchy of Luxembourg it was declared that Article 10 had been violated.¹⁸ The same conclusion was reached by the ECJ in the case of *Commission of the European Communities v Ireland* Case C459/03.¹⁹ In this case British Nuclear Fuel operated a Mixed Oxide Fuel (MOX) plant on the coast of the Irish Sea that was designed to recycle plutonium from spent nuclear fuel.²⁰ The plant mixed plutonium dioxide with depleted uranium dioxide in order to produce MOX.²¹ After extensive consultations and the Commission's having approved the commencement of operations in the plant, Ireland lodged a complaint and brought proceedings against the UK in the Arbitral Tribunal contending that the MOX plant posed an environmental hazard because of the potential harm of ionizing radiation. The Commission was not pleased with Ireland's prosecuting the matter in the Arbitral Tribunal and brought proceedings against Ireland under Article 292 of the EC Treaty for failure to respect the jurisdiction of the ECJ to rule on the application and interpretation of EC law.²² The Commission also sought an order against Ireland for failing to adhere to the duty of good faith and corporation under Article 10 of the Treaty, failing to consult Community institutions and exercising competence exclusively reserved for the Community.²³

The ECJ found in favour of the Commission and held that Ireland had breached Article 10 of the Treaty by breaching the duty of good faith.²⁴ Furthermore, the court held that Ireland had breached Article 292 of the Treaty by submitting instruments of Community law for interpretation and application by the Arbitral Tribunal.²⁵

¹⁶ *Commission of the European Communities v Grand Duchy of Luxembourg* Case C-266/03 (2 June 2005)

Available at

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=60187&pageIndex=0doclang=EN&mode=1st&dir=&occ=first&part=1&cid=53440>, accessed 29 November 2012.

¹⁷ At Para 53.

¹⁸ At Para 67.

¹⁹ *Commission of the European Communities v Ireland* Case C459/03 Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0459:EN:HTML>, accessed 29 November 2012.

²⁰ At Para 21.

²¹ At Para 21.

²² At Para 59.

²³ At Para 158.

²⁴ At Para 183.

²⁵ At Para 157.

2.3. Free movement of consumer goods in the EC

The Treaty requires the economic interests of consumers to be safeguarded under Article 129A.²⁶ One of the important provisions which aim to preserve consumer choice in the EC is Article 30 which requires the free movement of goods among EC member states.²⁷ Article 30 states that rules imposing direct or indirect restrictions on imports are prohibited between member states.²⁸ In other words, stringent domestic trade laws that hinder trade on imported goods may be challenged on the ground that they hinder the free movement of goods under Article 30.²⁹

Article 30 of the EC Treaty was considered by the European Court of Justice in the landmark decision of *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979] ECR 649 (often called the ‘*Cassis de Dijon* case’). In this case a French blackcurrant liqueur called ‘Cassis de Dijon’ was imported into Germany, where restrictions were imposed on the importation and marketing of weak alcoholic drinks.³⁰ German law required a minimum alcohol content of 25% for specific alcoholic drinks yet the imported liqueur had an alcoholic content of 15-20% which was very weak according to German standards.³¹ The court was called upon to decide whether the restrictions imposed by German law violated Article 30 of the EC Treaty.³² After it was contended that the restriction was aimed at protecting the health of consumers, the court held that the law stifled consumer choice and did not, in any way, advance consumer interests.³³ The court also laid down the principle that where an imported product had previously been sold in one member state without any hindrances, subsequent sale of the same product in another member state would be proper.

A similar finding was made by the court in the case of *Walter Rau v Smedt* Case 261/181 [1982] ECR 3961. In this case Belgian law required margarine to be marketed in cube-shaped blocks and in no other manner.³⁴ In finding that Belgian law unduly restricted consumer choice, the

²⁶ Cartwright (note 3 above) 156.

²⁷ Howells & Weatherill (note 5 above) 85.

²⁸ Ibid.

²⁹ *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, cited in Howells & Weatherill (note 5 above) 87.

³⁰ Howells & Weatherill (note 5 above) 87.

³¹ Oughton (note 4 above) 77.

³² Howells & Weatherill (note 5 above) 87.

³³ Ibid. see also Oughton (note 4 above) 77.

³⁴ Howells & Weatherill (note 5 above) 88.

court held that the rule limited the importation of margarine marketed in different ways in other member states contrary to Article 30.³⁵

2.4. EC Consumer protection instruments

Consumer protection measures in the EC are enforced through different legislative instruments, namely, Regulations, Directives and Recommendations.³⁶ Directives are considered the most important legislative instruments in the EC because of their binding nature on a member states.³⁷ Article 189 of the EC Treaty provides that a Directive ‘shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’.³⁸ A Regulation on the other hand is ‘self-executing’ in that it binds a member state upon enactment by the EC and does not require domestic implementation by a member state like directives.³⁹ As opposed to Regulations and Directives, Recommendations are not binding to member states at all and only serve to guide member states in implementing and interpreting EU policy.⁴⁰

2.4.1. Instruments regulating contracts

Unfair contract terms in the EC are regulated by the Unfair Terms in Consumer Contracts Directive⁴¹ (the directive), which was adopted in 1993 to ensure that consumers were not subjected to unfair contract terms within the EC.⁴² The directive only sets minimum contract standards for Member states which are at liberty provide more protection through domestic legislation.⁴³

³⁵ Ibid 89.

³⁶ Locket & Egan (note 7 above) 5.

³⁷ Ibid. See also S Smith Atiyah’s *Introduction to the Law of Contract* 6 ed (2005) 25.

³⁸ Howells and Weatherill (note 5 above) 104.

³⁹ Locket & Egan (note 7 above) 5. See also Oughton (note 4 above) 71.

⁴⁰ Locket & Egan (note 7 above) 6.

⁴¹ Directive 93/13/EEC (OJ L95/29).

⁴² Locket & Egan (note 7 above) 19. See also *Director General of Fair Trading v First National Bank plc* [2001] 3 WLR 1297 at 1311.

⁴³ RD Sharrock ‘Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act’ (2010) 22 *SA Merc LJ* 295, 298.

Prior to the adoption of the Directive, there were concerns advanced both by the business community and consumer groups on the scope of implementation of the directive.⁴⁴ Business concerns did not wish the Directive to curtail the monopoly in the supply of products, including in particular contract terms which had not been negotiated, while consumer groups argued that consumers required more protection from unfair contract terms.⁴⁵ When the directive was subsequently adopted, Article 3 (1) provided that ‘a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.⁴⁶ This signified that the directive was more inclined towards preserving consumer interests. The Directive was, however, criticised by Lord Steyn in the case of *Director General of Fair Trading v First National Bank plc* [2001] 3 WLR 1297 to the effect that it was ‘inelegantly drafted’ and ‘generally untidy in its text [so] that it could not be said it was entirely harmonious’.⁴⁷

2.4.2. Instruments regulating products

EU Directives are enacted for different reason but the core mandate of these legal instruments is to facilitate trade in EU countries.⁴⁸ Concern over the safety of goods by member states at the European level resulted in the enactment of several product liability Directives some of which introduced strict liability into EC consumer law.⁴⁹ Product safety Directives include the Toy Safety Directive⁵⁰ which regulates toy safety in the EC; the European Product Liability Directive⁵¹ which imposes strict liability for defective products and the General Directive on Product Safety⁵² which regulates all supplied products within the community.⁵³

⁴⁴ Locket & Egan (note 7 above) 14.

⁴⁵ Ibid.

⁴⁶ Ibid 99. See also T Naude & G Lubbe ‘Exemption Clauses- A Rethink Occasioned by Afrox Healthcare Bpk v Strydom’ (2005) 122 *SALJ* 441, 457; T Naude ‘The Consumer’s “Right to Fair, Reasonable and Just Terms” Under the New Consumer Protection Act in Comparative Perspective’ (2009) 126 *SALJ* 505, 511, 523.

⁴⁷ *Director General of Fair Trading v First National Bank plc* (Note 42 above) at 1312.

⁴⁸ Smith (note 37 above) 323.

⁴⁹ Howells and Weatherill (note 5 above) 199.

⁵⁰ Directive 88/378/EEC (OJ 1988 L187).

⁵¹ Directive 374/85/EEC (OJ 1985 L210/29).

⁵² Directive 92/59/EEC (OJ 1992 L228/24).

⁵³ Howells and Weatherill (note 5 above) 385.

3. THE UNITED NATIONS

The UN has introduced a number of innovations in consumer protection. One of these innovations is the adoption of the ‘Guidelines on Consumer Protection’ (the Guidelines)⁵⁴ in 1985, which were aimed at encouraging countries to adopt consumer protection policies.⁵⁵ The Guidelines are a benchmark following which member states of the UN may enhance their domestic consumer laws and policies.⁵⁶ The Guidelines provide for:

- (a) the physical safety of consumers
- (b) the protection of economic interests of consumers
- (c) access to information by consumers
- (d) measures to enable consumers to obtain redress
- (e) distribution of essential goods and services
- (f) satisfactory production and performance standards
- (g) adequate business practices and informative marketing
- (h) proposals for international co-operation in the field of consumer protection.⁵⁷

Further, appendix 1 of the Guidelines recognises the following basic consumer rights:

- (a) the right to be heard
- (b) the right to be informed
- (c) the right to safety
- (d) the right to choose
- (e) the right to safety
- (f) the right to redress
- (g) the right to consumer education
- (h) the right to a healthy environment
- (i) the right to the satisfaction of basic needs

⁵⁴ The UN Guidelines were passed through UN General Assembly Resolution 39/248 of 9 April 1985.

⁵⁵ Cartwright (note 3 above) 154.

⁵⁶ Macquoid-Mason ‘Consumers and Consumerism’ in Mcquoid-Mason *Consumer Protection in South Africa* (1997) 12. See also E Van Eeden *A Guide to the Consumer Protection Act* (2009) 5.

⁵⁷ Ibid.

The UN also introduced the (Vienna) Convention on Contracts for the International Sale of Goods in 1980 as part of its consumer protection initiative in the sphere of contract law.⁵⁸ Article 36 (2) (b) of the Convention provides that supplied goods must be ‘fit for any purpose expressly or impliedly made known to the seller at the time of the conclusion of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill or judgment’.⁵⁹

4. CONSUMERS INTERNATIONAL

Besides the establishment of regional bodies like the EC there were other international consumer protection developments in the last part of the 20th century.⁶⁰ One of the international consumer developments was the establishment of an international consumer organisation called Consumers International which is a federation of consumer groups.⁶¹ The organisation was formed in 1960 and named the International Organization of Consumer Unions (IOCU).⁶² The founding consumer groups were the Belgian *Association de s Consommateurs*, the English Consumers Association, the American Consumers Union, the Australian Consumers Association, and the Dutch *Consumenten*.⁶³ The name was changed to ‘Consumers International’ in 1994 and the objective of offering technical assistance and raising consumer standards in developing countries around the world was maintained.⁶⁴

Consumers International is registered in the UK as a non-profit company with over 240 members in 120 countries.⁶⁵ As a consumer pressure group the organisation champions consumer rights at an international level and helps consumers in developing countries to access UN institutions like the Food and Agricultural Organisation (FAO), the United Nations Economic Social and

⁵⁸ Smith (note 37 above) 25. See also T Naude ‘The Consumer’s Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008’ (2011) 23 *SA Merc LJ* 336, 341.

⁵⁹ Naude (note 58 above).

⁶⁰ Macquoid-Mason (note 56 above) 11.

⁶¹ ‘Consumers International’ available at <http://www.consumersinternational.org/who-we-are/about-us>, accessed 30 November 2012.

⁶² *Ibid.* See also Macquoid-Mason (note 56 above).

⁶³ Macquoid-Mason (note 56 above).

⁶⁴ *Ibid.*

⁶⁵ ‘Consumers International’ (note 61 above).

Cultural Organisation (UNESCO) as well as the Economic and Social Council.⁶⁶ This consumer body has also had significant influence in the passing of major international consumer protection instruments such as the UN Guidelines on Consumer Protection of 1985 after lobbying for a period spanning a decade.⁶⁷

5. CONCLUSION

The EC and the UN have introduced measures aimed at ensuring that the relevant member states formulate their domestic laws in line with the prescribed international legislative instruments. The Directives as they apply in the EU appear to be effective since goods circulating in member countries are subject to the EU control. The fact that consumer protection is at an advanced stage at an international level is an indictment on Swaziland which has not made any attempt at recognizing international consumer laws in its domestic legislation.

⁶⁶ Macquoid-Mason (note 56 above).

⁶⁷ 'Consumers International' (note 61 above).

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

This concluding chapter does not make a crystal ball forecast on the future of consumer law in Swaziland, instead, it suggests possible solutions to the weaknesses identified in the consumer framework. It has been revealed in the study that contract terms in general are unregulated, and consumers are not accorded sufficient protection from defective goods. This is a general observation drawn from the study. While it may be true that the current consumer framework has its weaknesses, there are areas where consumer exploitation has been controlled. The most notable has been the reluctance of courts to enforce agreements where money lenders charge consumers excessive interest on credit advanced under the Money Lending and Credit Financing Act 3 of 1991.¹

At the introductory stage of this comparative study it was stated that two issues affecting consumers were to be considered. The first issue concerned the impact of unfair contract terms in consumer agreements in Swaziland. In particular, the question was whether courts are authorized to invalidate unfair contract terms in consumer agreements under the common law. The second issue was whether the current consumer framework affords consumers in Swaziland sufficient protection from manufacturers who supply defective goods. In considering whether these two issues have been addressed the chapter will make general conclusions and recommendations on unfair contract terms followed by conclusions and recommendations on product liability. This recommendations made are in line with consumer developments in the UK and South Africa as already examined.

2. UNFAIR CONTRACT TERMS

One of the objectives at the beginning of this study was to examine the struggle experienced by courts in dealing with unfair contract terms under the common law. In particular, the question was whether courts are empowered to invalidate contracts that impose onerous terms on

¹ S. 4 & S. 6 of the Money Lending and Credit Financing Act 3 of 1991.

consumers. For example, courts have had to consider controversial Contract terms in healthcare where hospitals avoid liability for negligent treatment of patients.² In considering whether such contract terms can be invalidated the study has proved to be more than a mere academic exercise since it has provided practical solutions not only for lawyers but also for consumers in Swaziland.

The English and South African decisions examined reveal that courts have attempted to combat unfair contract terms by introducing certain techniques of control. These control measures ensure that consumers are afforded remedies against oppressive contract terms. There seems to be judicial consensus that the Constitution can be used as an instrument to adapt freedom of contract under public policy.³ This view is also shared by academic writers who agree that courts should refuse to enforce contractual provisions which are unfair, oppressive and unconscionable on public policy considerations.⁴

Despite earlier South African and English decisions where courts were reluctant to invalidate contract terms on grounds of public policy it appears from later decisions that a new-found willingness to protect consumers by recognizing public policy developed. This led to assimilating the often rejected concepts of fairness and good faith which emerged as important factors whenever a contract term was challenged.⁵ Lawyers took it upon themselves to assist courts in ensuring that contract terms passed constitutional scrutiny in accordance with constitutional values as illustrated in a number of South African decisions.⁶ For example, in the case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) an exemption clause was challenged under section 27 (1) (a) of the South African Constitution of 1996 which protects the right to health. In the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) a time-limitation clause was challenged under section 34 of the South African Constitution of 1996 which protects the right to freely access an independent tribunal.

² *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

³ *Ibid* Para 174. See also *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at Para 91.

⁴ P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 42.

⁵ *South African Forestry Co. Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA). See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

⁶ See the cases of *Afrox Healthcare Bpk v Strydom* (note 2 above), *Barkhuizen v Napier* (note 5 above); *Johannesburg Country Club v Stott* 2004 5 SA 517 (SCA).

The same constitutional values may also be invoked in Swaziland and consumers are at liberty to challenge unfair contract terms on constitutional grounds. For instance, the constitutionality of an exemption clause that absolves a party from liability for negligently causing death to another may be tested under section 15 (1) of the Constitution of 2005 which guarantees the right to life. Section 20 of the Constitution of 2005 which guarantees the right to equality of persons may also be raised by an aggrieved consumer alleging inequality in the bargaining position of parties at the conclusion of the consumer agreement. Similarly, a consumer can challenge a time-limitation clause under section 33 of the Constitution of 2005 which protects the right to administrative justice. The above avenues are open to consumers in Swaziland and the duty is upon courts to judiciously meet the challenge of applying public policy unlike the half-hearted attempt to apply the concept as illustrated in the case of *Nonhlanhla Tsabedze v The University of Swaziland* (unreported) High Court Civil Case 3432/ 2010.

Whether courts are able to deal with unfair contract terms under the common law in Swaziland is not clear because the cases examined do not reveal any challenges directed towards the fairness of contract terms. Therefore, the study has not revealed that the common law of contract is inadequate in protecting consumers in Swaziland. Neither has it been demonstrated that the common law of contract is fraught with weaknesses in as far as protecting consumers is concerned. Perhaps when the fairness of a contract term falls for determination the courts will adopt the constitutional approach. Another important and fundamental consideration that may be suggested in order to enhance innovative judicial law making in the law of contract is for courts in Swaziland to place more emphasis on the protection of consumers and their rights over the profit-making motive of businesses.⁷ This will yield positive results for consumers and assist the courts in deciding what is fair and reasonable in any circumstance.⁸

Having considered the obvious importance of the control measures applied by the courts under the common law, it cannot be said that judicial control as the primary method of protecting

⁷ K Hopkins 'Standard Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice v Natural Justice' (2003) 1 *TSAR* 150, 152.

⁸ FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71, 85.

consumers against unfair contract terms works to the consumer's advantage.⁹ The controls introduced by courts are insufficient because they can be simply overcome by skilled draftsmanship as seen in a number decided cases including the case of *First National Bank of Southern Africa Limited v Rosenblum and Another* 2001 (4) SA 189 (A).¹⁰ It is recommended that the legislature enacts consumer legislation that will regulate contract terms in general as is the position in the United Kingdom where the Unfair Contract Terms of 1977 was enacted to control exemption clauses. Legislative recognition of contract terms was also made in South Africa under the CPA of 2008. Perhaps this is the route to follow in Swaziland if consumers are to be protected from harsh contract terms.

Concerning the defence of *exceptio doli generalis* which was invalidated in South Africa, the results of the study raise a number of questions: Is the doctrine applicable law in Swaziland? If so, what is the legal basis for such application? On the other hand, if the doctrine is said not to apply, what is the basis for its rejection? In exercising the discretion whether or not to apply South African law, what criteria will the courts apply? These are some of the important questions that courts in Swaziland will have to address when faced with the doctrine. Indeed, not only was the rejection of the doctrine a 'calamity of major proportions' in South African law, its invalidation will have far-reaching consequences in Swaziland as well.¹¹ When the doctrine was invalidated in South Africa, it left a 'gap' in the law and South Africa made speedy attempts to fill this vacuum.¹² In Swaziland, this question must also be addressed. The question whether the *exceptio doli generalis* is part of the law of Swaziland requires proper ventilation by the courts, unlike the unfortunate rejection of the *versari in re illicita* doctrine by Annandale ACJ in the case of *R v Mnisi and Another* High Court Civil Case No. 35 of 2004 as seen in chapter 1 where the reasons for its rejection were not advanced.¹³ It is suggested that the bindingness of South African law in Swaziland be considered when the validity of *exceptio doli generalis* falls for pronouncement.

⁹ Aronstam (note 4 above) 206.

¹⁰ Ibid.

¹¹ Brand (note 8 above) 74.

¹² Ibid 76-77.

¹³ *R v Mnisi and Another* (unreported) High Court Civil Case No. 35 of 2004 at paragraphs 32-33.

3. PRODUCT LIABILITY

The second issue with which this study was concerned revolved around the question whether the current product liability mechanism is adequate in protecting consumers in Swaziland. As the discussion unfolded it became apparent that the consumer protection challenges in Swaziland are rather deep-seated than initially anticipated. There are several challenges facing consumers who are harmed by defective products. Perhaps the starting point is to make general conclusions on foreign manufactured goods which cause harm to consumers in Swaziland. Since a majority of consumed products in Swaziland are imported from foreign countries the first hurdle is determining the court in which a consumer may pursue a particular claim. The deciding factor is the country in which the cause of action arose. As already discussed the criteria for determining the cause of action vary with each country and it is not clear which approach applies in Swaziland taking into account that such an issue is yet to be decided by the courts. Furthermore, jurisdictional and choice of law issues may be raised whenever courts are called upon to exercise their jurisdiction over foreign based business enterprises. The above considerations constitute impediments against consumers seeking relief against foreign based manufacturers

Another challenge revealed in the study relates to the approach adopted by the courts when consumers pursue product liability claims. Courts adopt a relaxed approach towards product liability claims. The case of *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers* (unreported) High Court Civil Case 1457/ 2004, is probably a classic example where the court can be faulted on two aspects. Firstly, the court did not consider the liability of the defendant under the law contract and second, the compensation award was a far cry from the amount claimed. The conclusion that can be drawn from the manner in which the case was decided can only be that courts in Swaziland have not yet begun considering product liability claims in a serious light. This conclusion is supported by the approach adopted by the court in *Meshack Kunene v Swaziland Electricity Board* (unreported) High Court Civil Case 849/ 2007, where the court mentioned that a consumer issue had to be decided but later disregarded the subject. It cannot be overemphasized that the onus is upon the courts to ensure that consumer claims are judiciously ventilated.

The Constitution appears to have a very limited role in product liability. The reason is that, unlike in South Africa, the consumer's right to bodily integrity is not constitutionally entrenched in Swaziland.¹⁴ Therefore, consumers cannot challenge suppliers and manufacturers on grounds that physical harm caused by goods supplied resulted in the infringement of a constitutional right.¹⁵ Perhaps depends of a consumer who died as a result of consuming defective goods may raise an argument based on section 15 of the Constitution which protects the right to life.

Amending the Fair Trading Act of 2001 is probably one of the ways in which law reform in can be implemented in product liability. The reason why this statute is considered the most suitable in controlling the supply of goods is because its provisions are more inclined towards certain conduct and practices in the provision of goods.¹⁶ For example, there is currently no law compelling suppliers to accept goods returned by consumers in Swaziland. Perhaps an amendment that codifies the common law implied warranties is necessary.¹⁷ The advantage of entrenching implied warranties is that consumers will be at liberty to return goods that are defective without being ignored as was the case in *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers*.¹⁸ The importance of this right was recognised more than 2 centuries ago in the United Kingdom when it was statutorily entrenched as early as 1893¹⁹ and later under the Sale of Goods Act of 1979.²⁰ This goes to show the necessity and importance of this right.

Another important amendment to the Fair Trading Act may be to extend the scope of section 19 which prohibits the importation of goods bearing false trade descriptions and trade marks. This section can be extended to specify which party in the supply chain is liable to the ultimate consumer where imported goods cause physical harm or death; whether it is the manufacturer, importer, distributor, or retailer. This development can also be an opportunity to lay the foundation for the imposition of strict liability on the party responsible for supplying defective

¹⁴ *Anna Elizabeth Jacomina Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* 2003 (2) All SA 167 (SCA) at Para 9.

¹⁵ In South Africa, this right is protected under S. 12 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁶ See the long title to the Fair Trading Act 2001.

¹⁷ Aronstam (note 4 above) 206.

¹⁸ *Wandile Ndzinisa v Steers Fast Foods and Restaurant t/a Steers* (unreported) High Court Civil Case 1457/ 2004.

¹⁹ Under the Sale of Goods Act of 1893.

²⁰ Aronstam (note 4 above) 188-189.

products. perhaps the difficulties of establishing the source of a defect as illustrated in *Lungile Ndzinisa v McCarthy Swaziland (Pty) Ltd t/a Savells Furnishers* (unreported) High Court Civil Case 3305/ 2003, can be remedied by this development.

4. CURRENT LEGISLATION

It has been demonstrated that both South Africa and the UK first introduced changes in their consumer frameworks through judicial inventiveness, and later, through legislative innovations aimed at controlling the effects of unfair contract terms and liability for defective goods. With regard to the consumer framework in Swaziland it is quite clear that existing legislation protects certain classes of consumers and not all consumers generally. For example the Hire Purchase Act²¹ protects consumers who enter into hire purchase agreements, while the Money Lending and Credit Financing Act²² protects consumers who enter into money lending agreements. There is no broad and all-encompassing law aimed at protecting a majority of consumers who make use of goods and services in general. Further, the Hire Purchase Act which regulates both instalment agreements and hire-purchase agreements is outdated. The enactment of legislation to control contract terms and regulate the supply of goods is necessary. In achieving this goal there are two alternatives. The first may be to apply the UK approach where Separate statutes regulating both areas may be enacted. The second alternative is to adopt the South African approach where a single consumer statute regulating both contracts and product liability was enacted.

5. INTERNATIONAL LAW

Recognizing international consumer instruments may influence law reform in Swaziland. The United Nations Guidelines on Consumer Protection of 1985 can be used as a stepping stone at ensuring that consumers in Swaziland are adequately protected.²³ As a member of the United Nations, this is one of the obligations Swaziland has undertaken to fulfill in terms of international law. It must be noted, however, that the United Nations Guidelines on Consumer Protection of 1985 do not qualify as an 'international agreement' as envisaged in section 238 (6) of the Constitution of Swaziland. In terms of the Constitution international agreements only

²¹ S. 2 (1) of the Hire Purchase Act 11 of 1969.

²² S. 2 of the Money Lending and Credit Financing Act 3 of 1991.

²³ P Cartwright *Consumer Protection and the Criminal Law: Law, Theory and Policy in the U.K* (2001) 139.

attain the force of law in Swaziland upon fulfilling constitutional requirements.²⁴ Therefore, the guidelines cannot be ratified into becoming the domestic law of Swaziland but will only serve as a guide when the legislature contemplates consumer legislation. While these observations are true, it is urged that Swaziland considers the guidelines when implementing consumer law reform.

6. LIMITATIONS OF THE STUDY

Consumer protection law is vast and addressing all the consumer problems in Swaziland in the present study was not a practical undertaking. Indeed, the current study on consumer protection in Swaziland is relatively new and focusing on unfair contract terms and product liability was considered to be the ideal route. This is not to suggest that these areas are of more importance, but there are a number of equally important areas that require attention which have not been addressed. In particular, consumer credit financing is vital component of consumer law in general and in Swaziland this area requires attention since it is regulated by outdated legislation.²⁵ Perhaps this can be a focal point for future studies and legal research.

7. CONCLUSION

In conclusion, it must be stated that there is no evidence to support any suggestion that consumers have been educated about their rights in Swaziland. The introduction of consumer education programmes either regionally or countrywide is vital in consumer development particularly because it is well accepted that consumers lack knowledge on their rights and are often in a deprived financial position.²⁶

A warning must also be directed to the importation of South African case law after the CPA of 2008 came into force in South Africa. Courts in Swaziland must be careful not to import case law infused with statutory undertones of the CPA of 2008. Now that South Africa has had legislative developments in consumer protection, Swaziland must develop its own consumer law incrementally as opposed to radically.²⁷ The law in Swaziland must adapt in accordance with the

²⁴ Section 238 of the Constitution of 2005.

²⁵ Credit financing by banking institutions is regulated by the Hire Purchase Act 11 of 1969.

²⁶ Aronstam (note 4 above) 215.

²⁷ Brand (note 8 above) 72.

exigencies of the present age in order to meet the social and economic imperatives of a changing society. While the common law remains vigilant consumer legislation will not rise and act from the ashes like a phoenix to shield consumers. The role of enacting laws is reserved for the legislature. At the end of the day, legislation is necessary to turn the page from a dark chapter to a new era of consumer protection in the country.

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