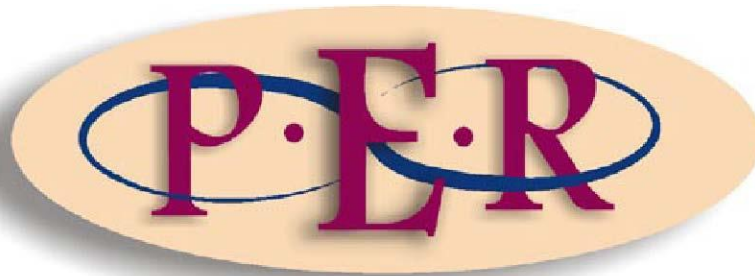


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## **THE *CONSUMER PROTECTION ACT* 68 OF 2008 AND PROCEDURAL FAIRNESS IN CONSUMER CONTRACTS**

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### **1 Introduction**

Traditionally, the law of contract merely provides a framework within which contracts are enforced, without concern for their context. Legislation is then adopted to address any imbalance, by regulating the fairness of contract terms, for instance. The starting point for consumer protection is the imbalance, from a legal and an economic perspective, between suppliers and consumers in the making of a contract, in the contract terms and in the enforcement of a contract. This imbalance may arise because the traditional (or classical) law of contract applies regardless of the identity of the parties, their relationship to each other, the subject matter of the contract, and the social context of the contract. These and other factors led to the promulgation of the *Consumer Protection Act* 68 of 2008 (CPA). The CPA applies to every transaction occurring within South Africa for the supply of goods or services, unless the transaction is exempt from the application of the CPA.<sup>1</sup> Chapter 2, Part G, of the CPA contains measures dealing with unfair, unjust, and unreasonable contract terms. The right to fair, just, and reasonable terms and conditions is the first general fairness measure introduced in South African consumer contract law by means of which a party can rely on protection if a bargain is unreasonable, unfair, or onerous to him or her.<sup>2</sup> A fundamental error is to assume that the meaning of the concept "fairness" can be determined, or may be restricted, by reference only to the right to fair, just, and reasonable terms and conditions. Rather, fairness extends much further. Although most of the fairness mechanisms of the CPA are contained under the umbrella of the right to fair, just, and reasonable terms and conditions, the CPA contains several other provisions dealing with and related to fairness. Section 22, which sets out the requirement that a contract be formulated in plain and understandable language, is

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<sup>1</sup> Section 5 of the *Consumer Protection Act* 68 of 2008 (CPA).

<sup>2</sup> Christie and Bradfield *Law of Contract* 20-22.

an example of a fairness mechanism which is not contained under the encompassing right to fair, just, and reasonable terms and conditions. This, then, makes it difficult for suppliers to understand the concept "fairness" in such a way that they are able to know whether a contract will be fair, or whether they have complied proactively with fairness requirements. One factor that may yield greater predictability is the differentiation between procedural- and substantive-fairness measures which can be applied to attain fairness in contract. In general, the concept "fairness" can be narrowed down, described and analysed with reference to the two types of fairness – substantive and procedural fairness. As the aims of these two approaches and the moment at which fairness is relevant differ, it makes sense to distinguish between them, even though they are interdependent. The focus of this article falls on procedural fairness and its role in contractual fairness. The aim of the article is to analyse the concept "procedural fairness" with reference to the fairness measures contained in the CPA so as to allow suppliers to predict whether their contracts are procedurally fair or not in terms of the CPA. Since substantive and procedural fairness are interdependent, substantive fairness is also discussed in this article. One of the major problems with consumer contracts is usually the lack of transparency. This problem can be addressed by focusing on procedural fairness preventatively, by setting transparency requirements. However, there are limits to the efficacy of procedural measures and transparency. The efficacy of procedural fairness and transparency is therefore discussed in this article. Lastly, the special procedural measures which must be considered in terms of the CPA in order to decide whether a contract is fair or not will be analysed in this article, and other measures contained in the CPA, which may also increase procedural fairness, will be pointed out so as to allow suppliers to predict whether their contracts are procedurally fair or not in terms of the CPA.

## **2 What is substantive and procedural fairness?**

In a nutshell, one can say that substantive fairness is concerned with the outcome of the contracting process, whereas procedural fairness relates to the contracting process

itself.<sup>3</sup> If a contract is substantively unfair, then there is something objectionable about its terms taken by themselves, or its terms are unfair as between the contracting parties.<sup>4</sup> Measures aimed at procedural fairness address conduct during the bargaining process and generally aim at ensuring transparency.<sup>5</sup> Transparency has two elements: (a) transparency in relation to the terms of a contract, and (b) transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract, as to aspects of the goods, service, price, and terms. Transparency in relation to the terms of a contract relates to whether the contract terms are accessible, in clear language, well structured, and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights.<sup>6</sup> One could say that a contract is procedurally fair where its terms are transparent and where it has been concluded voluntary, or, put differently, without being misled as to aspects of the goods, service, price and terms. Before turning to a discussion of the concept "procedural fairness" with reference to the fairness measures contained in the CPA, it is necessary, for the sake of completeness, to discuss briefly the interrelationship between procedural and substantive fairness and the limitations of procedural-fairness measures.

### **3 Interrelationship between procedural and substantive fairness**

Substantive fairness relates to procedural fairness through the requirement of transparency. Transparency has to do among other things with issues such as information disclosure, awareness of terms, size of print, clarity of language, and interpretation and format, as these procedural factors relate to circumstances

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<sup>3</sup> Also see Naudé 2009 *SALJ* 506, where the author distinguishes between three main categories into which legislative control mechanisms in respect of standard contract terms may be divided, namely rules on the incorporation of contract terms, content control or substantive control and rules on interpretation.

<sup>4</sup> See Smith 1996 *LQR* 140-144 (an introduction to the meaning of substantive fairness, and a discussion of the distinction between substantive and procedural fairness), and 144-155 (a discussion of the relevance of price to a decision as to whether a contract is unfair).

<sup>5</sup> See, generally, Lawson *Exclusion Clauses* 219; Naudé 2006 *Stell LR* 377.

<sup>6</sup> Willett "General Clauses" 75. Also see Paterson 2003 *MULR* 949, where the author analyses elements of transparency: a term is transparent where it is (a) expressed in reasonably plain language, (b) legible, (c) presented clearly, and (d) readily available to any party affected by the term.

surrounding the manner in which agreement is reached.<sup>7</sup> Transparency can be a negative control which allows, at most, the elimination of unclear and incomprehensible contract terms, or it may provide for positive duties, such as to explain and summarise the implication of certain substantive contractual terms.<sup>8</sup> A high level of transparency means that the consumer is placed in a position at least to have a chance of being able to exercise a reasonable degree of informed consent. Transparency may therefore enhance choice and substantive fairness.<sup>9</sup>

From a substantive-fairness perspective, procedural fairness requires that terms which are damaging to consumers' substantive interests should be transparent. Accordingly, the greater the substantive unfairness, the higher are the demands of transparency. However, consumers should be aware not only of terms that are to their detriment, but also of terms that are to their advantage. This is clearly in the consumers' interests. From this it follows that these terms should also be transparent so that consumers may avail themselves of the advantages that these terms offer. It is argued that in order to proactively or pre-contractually achieve transparency it should be compulsory to include certain terms that reflect certain rights of consumers, or that provide mechanisms which will help consumers to protect themselves post-contractually. Transparency in this regard means that a consumer should be aware of a term and should understand it. Of course, such awareness increases the number of situations in which consumers challenge terms or exercise their rights under a term.<sup>10</sup>

#### **4 The limits to the efficacy of procedural-fairness measures**

The major problem with consumer contracts (which are nearly always standard-term contracts) is usually the lack of transparency.<sup>11</sup> This problem can be addressed by focusing on procedural fairness preventatively - by setting transparency requirements. However, there are limits to the efficacy of procedural measures and transparency. Several factors would likely limit consumers' ability to overcome a lack of transparency,

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<sup>7</sup> See Nebbia *Unfair Contract Terms* 135-136.

<sup>8</sup> Nebbia *Unfair Contract Terms* at 137.

<sup>9</sup> Willett *Fairness* 55-56.

<sup>10</sup> Willett *Fairness* 58-59.

<sup>11</sup> See Macdonald *Exemption Clauses* 229-230.

irrespective of a supplier's compliance with transparency requirements. these factors include: (a) consumers' disinclination to read detailed contractual terms; (b) consumers' pre-existing expectations suggesting a successful contractual relationship, which would obviate certain contractual terms coming into play; (c) consumers not reading contractual terms properly, as they have other complex decisions to make (such as whether to contract in the first place); (d) consumers not understanding the formal terms, irrespective of them being transparent; (e) consumers' idea that they do not need to understand the contractual terms, as suppliers are unlikely to change them; (f) consumers not understanding how a term will affect them in practice; and (g) competitors expressing equivalent terms differently, which makes it difficult for consumers to compare.<sup>12</sup>

However, although transparency may often not be sufficient to ensure procedural fairness, it at least provides some basis for consumers to give informed consent. Transparency also enables consumers to ascertain their rights and duties in the event of a dispute. It may also affect the affordability of goods and services: if consumers have a clear idea of the price and quality, they may be able to assess an offer and to compare it with the offers of competitors. This may also lead to wider consumer choice and increased competition.<sup>13</sup>

There are several legislative measures one can implement to increase the value and role of transparency. However, they fall outside the scope of this article. They include standardisation of the way in which terms are presented, disclosure rules and mandatory terms, which require the disclosure of certain information or rights,<sup>14</sup> the standardisation of the substantive features of terms, or independent content control.<sup>15</sup>

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<sup>12</sup> For reasons why consumers accept standard terms without reading them, and related issues, see Naudé 2006 *Stell LR* 366-369; Donnelly and White "Effect of Information Based Consumer Protection" 283-284 (the limits of transparency, and an essential presumption underlying fairness in the form of disclosure – consumers will act rationally on the basis of information received). See, further, Paterson 2003 *MULR* 951-956.

<sup>13</sup> Willett "General Clauses" 75-76.

<sup>14</sup> See Willett "General Clauses" 72-73.

<sup>15</sup> Willett *Fairness* 59-62. For a further discussion of the role of measures aimed at procedural fairness, also see Naudé 2006 *Stell LR* 377-378.

Irrespective of the noble aims which procedural fairness serves, greater focus should be placed on substantive fairness, because, even if a contract or term is procedurally fair, it is uncertain that a consumer will really make use of or will be in the position to make use of measures aimed at procedural fairness. Although procedural-fairness measures may lead to transparency and may therefore increase the levels of consensus, their success depends on many external factors, such as whether the consumer is going to study the contract. The fact that the majority of fairness measures which are listed in the CPA (and which must be taken into account when the court has to decide whether a contract is unfair or not) are procedural measures may reduce the efficiency of the CPA.<sup>16</sup> In a South African context, where many consumers are illiterate and where consumers are often exploited owing to a lack of transparency, procedural fairness on its own can never be used to achieve contractual fairness. First, procedural fairness measures should be applied pre-contractually to address the lack of transparency and second, substantive fairness measures should also be applied, because a term that is, for example, in plain and understandable language or disclosed in advance (procedurally fair), is not necessarily substantively fair. In a South African context, procedural fairness and substantive fairness are therefore of equal importance.

## **5 The *Consumer Protection Act* and procedural fairness**

In the discussion below, the special procedural measures which must be considered in terms of the CPA in order to decide whether a contract is fair will be analysed. Other measures which may also increase procedural fairness will also be pointed out.

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<sup>16</sup> See for instance Naudé 2009 *SALJ* 510, where the author submits that incorporation prerequisites that specific types of terms be specifically drawn to the consumer's attention and initialled can be a double-edge sword which may ultimately work against the consumer, because initialled terms may strengthen the hand of the supplier to argue that they are fair. Apart from that, consumers often accept standard terms without reading them. See Naudé 2006 *Stell LR* 366-369; Donnelly and White "Effect of Information Based Consumer Protection" 283-284 (the limits of transparency, and an essential presumption underlying fairness in the form of disclosure – consumers will act rationally on the basis of information received and Paterson 2003 *MULR* 951-956 in this regard.

### **5.1 *The right to fair, just and reasonable terms and conditions***

Under the right to fair, just and reasonable terms and conditions, the CPA describes when terms and conditions will be unfair,<sup>17</sup> when a notice is required for certain terms and conditions,<sup>18</sup> and when consumer contracts must be in writing.<sup>19</sup> It also sets out which transactions, agreements, terms or conditions are prohibited (in a so-called "blacklist"),<sup>20</sup> and what the powers of the court are to ensure fair conduct, terms and conditions.<sup>21</sup> Over and above the fairness provisions contained under the right to fair contracts, the CPA also contains other provisions related to fairness.

The general fairness criterion for consumer contracts regulated in terms of the CPA is set out in section 48. It provides that, firstly, a supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.<sup>22</sup> Secondly, a supplier is not allowed to market any goods or services, or negotiate, or enter into or administer a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.<sup>23</sup> Thirdly, a supplier must not require a consumer, or a person to whom goods or services are supplied at the consumer's direction, to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.<sup>24</sup> Several factors play a role in deciding if a contract term was indeed unfair, and must be taken into account by a court. Some of these factors are procedural.

The factors which render a contract unfair, unreasonable or unjust are listed in section 48(2).<sup>25</sup> They include the provision that a term or contract is unfair (a) should it be

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<sup>17</sup> Section 48 of the CPA.

<sup>18</sup> Section 49 of the CPA.

<sup>19</sup> Section 50 of the CPA.

<sup>20</sup> Section 51 of the CPA.

<sup>21</sup> Section 52 of the CPA.

<sup>22</sup> Section 48(1)(a) of the CPA.

<sup>23</sup> Section 48(1)(b) of the CPA.

<sup>24</sup> Section 48(1)(c) of the CPA.

<sup>25</sup> The guidelines or factors listed in s 48(2) of the CPA apply only to "a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject". So it does not apply to price. It must also be noted that s 48(2) states that



excessively one-sided in favour of any person other than a consumer; (b) should the terms of the agreement or transaction be so adverse to the consumer that they are inequitable; (c) should a consumer have relied, to his/her detriment, on a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of a supplier; or (d) should the transaction or agreement have been subject to a term or condition or a notice for which a notice in terms of section 49(1) is required, and the term, condition or notice is unfair, unreasonable, unjust or unconscionable, or the fact, nature and effect of the term, condition or notice was not drawn to the consumer's attention as required by section 49(1).

Section 52(2) also lists specific factors which a court *must* consider in any proceedings before it, concerning a transaction or contract between a supplier and consumer, where it is alleged that the supplier conducted business unconscionably,<sup>26</sup> used false, misleading or deceptive representations,<sup>27</sup> or that a contract or contract term is unfair.<sup>28</sup> The word "must" indicates that the court always has to consider all these factors in each case. Factors related to procedural fairness that a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged will be discussed below.

### *5.1.1 Disclosure and mandatory terms*

The first factors related to procedural fairness that a court must consider relates to disclosure and/or mandatory terms and will be discussed below.

5.1.1.1.1 Did the consumer rely on a false, misleading or deceptive representation or a statement of opinion to his/her detriment?

In terms of the widely drafted guidelines for fairness listed in section 48(2), a contract or term will be unfair if the consumer relied on a false, misleading or deceptive

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it (s 48(2)) does not limit the generality of s 48(1). Unfairness therefore goes further than the situations mentioned in the guidelines or factors listed in s 48(2). Also see Sharrock 2010 *SA Merc LJ* 308.

<sup>26</sup> Section 40 of the CPA.

<sup>27</sup> Section 41 of the CPA.

<sup>28</sup> Section 48 of the CPA.

representation,<sup>29</sup> or a statement of opinion provided by the supplier, to the detriment of the consumer.<sup>30</sup> The first part of section 48(2) deals with false, misleading or deceptive representations as contemplated in section 41, and the second part relates to a statement of opinion provided by the supplier to the detriment of the consumer.

Section 41 regulates false, misleading or deceptive representations.<sup>31</sup> It states that suppliers are not allowed to use false, misleading or deceptive representations concerning a material fact, use innuendo, exaggeration or ambiguity as to a material fact, or fail to disclose a material fact, or must not knowingly allow consumers to believe false, misleading or deceptive facts by failing to correct an apparent misapprehension on the part of the consumer.<sup>32</sup> While a supplier thus has a duty to properly disclose material facts, failure to do so may be regarded as a false, misleading or deceptive representation. A person acting on behalf of a supplier may also not falsely represent that such person has any sponsorship, approval or affiliation or engage in conduct that the supplier is prohibited from engaging in.<sup>33</sup>

Praise of goods or service by a supplier, or sales talk or so-called "puffing" as to a material fact, can be equated with the use of "exaggeration, innuendo or ambiguity as to a material fact". In terms of common law, "puffing" is regarded as mere sales talk, which has no binding effect.<sup>34</sup> However, in terms of section 41(1)(b), exaggeration, innuendo and ambiguity as to a material fact are prohibited and, if the consumer relied upon exaggeration, innuendo or ambiguity as to a material fact, that reliance renders a contract or term unfair in terms of section 48(2)(c). Puffing as to a material fact is thus prohibited and it renders a contract or term unfair if the consumer relied on it.<sup>35</sup>

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<sup>29</sup> See s 41 of the CPA in respect of false, misleading or deceptive representations.

<sup>30</sup> Section 48(2)(c) of the CPA.

<sup>31</sup> See also para 5.2.2 below.

<sup>32</sup> Section 41(1) of the CPA.

<sup>33</sup> Section 48(2) read with s 48(1) of the CPA.

<sup>34</sup> Christie and Bradfield *Law of Contract* 42, 161-164, where it is indicated that puffing has no legal effect but that it is difficult to draw a line between mere puffing and misrepresentation. Also see Van der Merwe *et al Contract* 21, 94-95.

<sup>35</sup> The Advertising Standards Authority (ASA) is the regulatory authority voluntarily regulating the advertising industry in South Africa. In terms of s 97(1)(a) of the CPA, the National Consumer Commission may liaise with any other regulatory authority on matters of common interest and may exchange information pertaining to matters of common interest or a specific complaint or

The second part of section 48(2)(c) relates to a statement of opinion provided by the supplier to the detriment of the consumer. It states that, if a consumer relied on a statement of opinion provided by or on behalf of a supplier to the detriment of the consumer, the contract or term is unfair. A "statement of opinion" is any opinion and not only false, misleading or deceptive opinions, since "statement of opinion" is not qualified by this section. A term or contract can therefore be declared unfair should a consumer have relied on an opinion of the supplier (concerning a material fact) if it ultimately caused detriment. Suppliers who normally give opinions, such as medical doctors, attorneys and advocates, should therefore take notice of this section.

It is possible that opinion is not qualified because an opinion of a supplier amounts to his/her view or point of view, so it cannot be false or misleading. If it were possible for an opinion to be false or misleading, this would be very difficult to prove. However, it is suggested that "statement of opinion" should be qualified in one way or another, because it is unacceptable that any statement of opinion could lead to a contract being declared unfair. The words "any statement of opinion" can, for example, be replaced by the word "advice", which is a narrower term than "opinion".

Section 41(3) contains a non-exhaustive list of guidelines indicating when a representation is false, misleading or deceptive.<sup>36</sup>

#### 5.1.1.2 Was the contract subject to a term for which a notice is required?

In terms of section 48(2)(d), a contract is unfair if the contract was subject to a term or condition or a notice to a consumer contemplated in section 49(1) and (a) the term, condition or notice is unfair or (b) the fact, nature and effect of that term was not

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investigation. The Consumer Commission may thus ask the ASA to regulate puffing in the advertising industry.

36 Section 41(3) of the CPA states, among other, that it will be a false, misleading or deceptive representation to falsely state or imply or fail to correct misapprehension on the part of the consumer that: (a) a supplier has a particular status or affiliation, connection, sponsorship or approval that he/she does not have; (b) that any goods or services have, inter alia, ingredients, characteristics, uses, accessories that they do not have; or (c) goods are of a particular standard, are new or unused if they are not. The same applies to any land or immovable property with regard to (a) characteristics that such land or property does not have; (b) the purpose of the land; or (c) the facilities and features of the land.

drawn to the attention of the consumer in the manner that satisfied the requirements of section 49.

Procedural fairness requires that consumers be aware of terms that are to their detriment so that they can protect themselves against these. Disclosure of the presence of detrimental terms and other important information furthermore increases transparency. Informing a consumer of the presence of detrimental terms is therefore a measure aimed at preventing procedural unfairness. However, sometimes, a supplier's compliance with notice and disclosure requirements may not increase overall fairness, because consumers are disinclined to read detailed contract terms. In order to overcome the problems related to measures aimed at procedural fairness, strong emphasis should be placed on standardisation of the way in which terms should be presented. Standardisation will, however, still not address all these issues. For example, standardisation of terms does not make it more likely that a consumer will actually read the terms, but standardisation in presentation may make it slightly easier for a consumer to understand them, as information is presented in a standard way. It may also help a consumer to make comparisons between products, suppliers and prices.

Section 49 serves the above-mentioned purposes. In terms of this section, should a contract contain the specific terms and conditions as set out in section 49(1), it must be brought to the attention of the consumer in the prescribed manner and form.<sup>37</sup> The information must therefore not only be brought to the consumer's attention, but must also be brought to his or her attention in a standardised manner and form. These specific terms and conditions are those that purport to limit in any way the liability or risk of the supplier or someone else, that constitute an assumption of risk or liability by the consumer, that impose an obligation on a consumer to indemnify the supplier or someone else for any cause, or those which are an acknowledgement of any fact by the consumer.<sup>38</sup> The above-mentioned terms would include clauses to the effect

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<sup>37</sup> Sections 49(1), (3), (4) and (5) of the CPA.

<sup>38</sup> Section 49(1)(a)-(d) of the CPA.

that no representations were made to a consumer, as well as indemnity clauses and exemption clauses.

Furthermore, section 49(2) states that, if a provision concerns any activity or facility that is subject to risk of an unusual character or nature, or risks which the consumer could not reasonably be expected to be aware of,<sup>39</sup> or those which could result in serious injury or death, the supplier has to specifically bring the fact, nature and potential effect of the risk to the attention of the consumer in the prescribed form and manner.<sup>40</sup> Furthermore, the consumer must have assented to that provision or notice by signing or initialling the provision or by otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.<sup>41</sup> This provision may, however, be to a consumer's detriment where a supplier relies on the consumer's signature in order to show that the contract or term is fair, since the consumer was aware of it. A consumer should thus only sign it if he/she really agrees to the term and not only as a mere formality.

Again, the aims of transparency are served by the disclosure and signature requirements. In respect of form and manner, the notice or provision must be in plain language as contemplated in section 22,<sup>42</sup> and the consumer must be given sufficient time or an adequate opportunity in the circumstances to receive and comprehend the provision or notice.<sup>43</sup> A supplier can therefore minimise his or her liability for unfair contract terms by (a) drawing the attention of the consumer to the fact, nature or effect of a clause or notice (b) in plain language and (c) by giving a consumer adequate opportunity to comprehend the notice or provision.<sup>44</sup>

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<sup>39</sup> See also *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA) para [33] where the Supreme Court of Appeal held that a clause that undermines the essence of a contract and a hidden clause should be clearly and pertinently brought to the attention of a client who signs a standard contract.

<sup>40</sup> Section 49(2) of the CPA.

<sup>41</sup> Section 49(2) of the CPA.

<sup>42</sup> See para 5.1.1.3 below.

<sup>43</sup> Sections 49(3) and (5) of the CPA. The CPA further places a duty on a supplier or other person to draw the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer to the fact, nature and effect of the provision or notice (s 49(4)(a)). This must be done at the earliest before the consumer enters into the agreement or transaction, begins to engage in the activity or enters or gains access to a facility or before the consumer is required to offer consideration for the agreement or transaction (s 49(4)(b)).

<sup>44</sup> See also Jacobs, Stoop and Van Niekerk 2010 *PELJ* 357-358.

#### 5.1.1.2.1 The extent to which any documents satisfied the plain-and-understandable-language requirements

The extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22 is one of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.<sup>45</sup>

Measures aimed at procedural fairness increase transparency. Transparency in relation to the terms of a contract refers to the question whether the contract terms are accessible, in clear language, well structured and cross-referenced, with prominence being given to terms that are detrimental to the consumer or terms which grant important rights. One could therefore say that, in general, a procedurally fair contract is transparent. Although procedural fairness and measures aimed at procedural fairness have limitations,<sup>46</sup> the plain-and-understandable-language requirements as set out in section 22 are, in a multilingual South African context where consumers are often only functionally literate, probably the most important proactive fairness measure contained in the CPA.

It has been indicated that unfairness often results from standard-term contracts. Consumers and suppliers do not always reach true consensus on the terms of standard-term contracts, because the terms are not well structured and are written in formal language. If contracts are written in plain and understandable language, this may result in "true" consensus being reached, since the contract is written in language that the consumer understands. Real consensus can only exist if a consumer really understands the terms of a contract.<sup>47</sup>

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<sup>45</sup> Section 52(2)(j) of the CPA.

<sup>46</sup> See para 4 above.

<sup>47</sup> Real consensus is the coincidence of contracting parties' wills or a meeting of the minds. The will or intention of the parties must therefore be considered. However, it must be noted that, although true agreement is required, courts only concern themselves with the external manifestation of the minds. See *SA Railways and Harbours v National Bank of SA Ltd* 1924 AD 704 715; and *Trollip v Jordaan* 1961 1 SA 238 (A) 248. It must, however, never be assumed that true consensus exists or that consensus was not obtained in an improper way simply because misrepresentation, duress, undue influence or mistake was not proved or raised. In fact, the abuse of standard-term contracts urges one to require courts to, in future, approach consensus from a subjective angle (the theory of consensuality) in order to determine whether true consensus exists.

Section 22 requires notices, documents or visual representations that are required in terms of the CPA or other law to be provided in plain and understandable language as well as in the prescribed form, if any.<sup>48</sup> Section 50 also makes plain language compulsory in all written consumer agreements.<sup>49</sup>

### 5.1.2 *Bargaining position of the parties and choice*

A weak bargaining position and a lack of choice mitigate against a finding of fairness, because a weak bargaining position and a lack of choice imply that the consumer could not have done anything or was not in a position to protect his or her own interests.<sup>50</sup> A supplier would usually be in a stronger bargaining position than a consumer simply because a single consumer is usually not in the position to give him/her leverage. Therefore, a mere inequality of bargaining position cannot be the only determinant of unfairness.

#### 5.1.2.1 The nature of the parties and bargaining position

The nature of the parties to the contract or transaction (such as the size of the supplier), their relationship to each other, and their relative capacity, education, experience, sophistication and bargaining position form part of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged.<sup>51</sup>

A mere inequality of bargaining positions cannot lead a court to conclude that a contract is unfair, and *vice versa*. However, if a supplier exploits a consumer's lack of education, experience and sophistication, the inequality of the bargaining position may lead the court to the conclusion that the contract is unfair.<sup>52</sup>

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<sup>48</sup> The *National Credit Act* 34 of 2005 was the first piece of South African legislation that required agreements to be drafted in plain language (s 64). For a full discussion of plain-language requirements in South Africa, see: Gouws 2010 *SA Merc LJ* 89; Newman 2010 *Obiter* 735-745; Stoop and Chürr 2013 *PELJ* 515-553.

<sup>49</sup> See also para 5.2.3.1 below for a full discussion of s 50 of the CPA.

<sup>50</sup> Willett *Fairness* 22-25.

<sup>51</sup> Section 52(2)(b) of the CPA.

<sup>52</sup> See Sharrock 2010 *SA Merc LJ* 310-311. See also para 5.2.1 below where it is pointed out that it is unconscionable for suppliers to knowingly take advantage of a consumer because a consumer was unable to protect his/her own interests on account of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any similar factor. Section

Several broad considerations or individualised elements may play a role when bargaining positions must be judged. These considerations or elements include whether the injured party had an opportunity to enter into a similar contract with other persons without having to accept a similar term. In terms of section 52(2)(i), the amount for which, and the circumstances in which, the consumer could have acquired identical or equivalent goods or services from a supplier is one of the individualised factors the court must consider when it has to decide whether a contract is unfair. In respect of the relationship between the parties, the existence of a continuing, close working relationship and earlier collaboration may indicate that the bargaining positions of the parties were equal or that inequalities in bargaining positions have not been exploited. Previous dealings may also be a consideration.<sup>53</sup> The existence of previous dealings between parties may be an indication of knowledge of a term, and knowledge may imply fairness.<sup>54</sup>

#### 5.1.2.2 The circumstances of the transaction or agreement

The circumstances of the transaction or contract that existed or which were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was entered into, form part of the specific factors which a court must consider in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged. Such circumstances must be considered, irrespective of whether the CPA was in force at that time or not.<sup>55</sup>

The court therefore has to consider only the circumstances of the transaction or contract that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was entered into, and not the circumstances at a later stage. In general, circumstances arising after the conclusion of the contract are irrelevant, because the CPA limits circumstances to circumstances which existed

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3(1)(b) furthermore provides that the CPA aims at reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by vulnerable consumers.

<sup>53</sup> Section 52(2)(h)(ii) of the CPA.

<sup>54</sup> In terms of s 52(2)(h) of the CPA, regard must be had to any custom of trade and any previous dealings between the parties under this factor when a consumer's knowledge of a specific term is considered. This factor, to a larger extent, resorts under measures aimed at substantive fairness.

<sup>55</sup> Section 52(2)(c) of the CPA. In this regard, the CPA is therefore applied retrospectively.



or were reasonably foreseeable "at the time that the conduct or transaction occurred or contract was made". Only the current circumstances that were reasonably foreseeable may be taken into account. Whether circumstances were reasonably foreseeable is a question of fact.<sup>56</sup> It is doubtful whether a court will ever ignore circumstances which were unforeseeable or circumstances that arose after the conclusion of the contract, even if the CPA clearly requires that fairness must be judged having regard to circumstances which existed or which were reasonably foreseeable when the contract was made. The court should, however, as far as possible, ignore circumstances that arose after the conclusion of the contract, or a change in circumstances, in order to protect contractual certainty.

"Circumstances" is not defined, since circumstances would differ from contract to contract, making it too difficult to define. When a court has to assess whether a contract or term is fair in the light of the circumstances, different relevant factors, including procedural and substantive matters, must be gathered and weighed to decide on which side the balance comes down. The question is always whether a contract or term satisfies the requirement of fairness in relation to the context or circumstances of each particular contract or case. It may be argued that this contextual approach could lead to uncertainty (or have a negative impact on contract planning), because a term may be fair as against X due to the existence of certain circumstances, but not as against Y in the absence of similar circumstances. Possible uncertainty is, however, limited by the fact that the time frame against which an assessment is made is that of the conclusion of the contract which leaves an opportunity for contract planning. English law has similar provisions on circumstances that should be considered when the fairness of a contract is judged. In terms of section 11(1) of the *Unfair Contract Terms Act* 1977, an exemption clause or notice must have been fair to include in a contract, having regard to all the circumstances which were or ought to have been known to or in the contemplation of the parties when the contract was made. Despite the above-mentioned, the fact that fairness

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<sup>56</sup> See Sharrock 2010 *SA Merc LJ* 311 where he refers to the case of *Ex Parte Lebowa Development Corporation* 1989 3 SA 71 (T), which dealt with the issue of commercial insolvency. In this case (at 105-106), the court pointed out business risks that are reasonably foreseeable in modern business conditions.

(reasonableness) is to be judged at the time the contract was entered into can also be criticised, because it prevents the court from taking into account what has actually happened. Where a term seems to be fair when the contract was made, the court will not be able to consider fairness if the contract later on operates harshly. However, assessing the fairness of a term in relation to circumstances at the time of contracting helps with contract planning, because it will cause uncertainty and make contract planning a difficult task if a term is rendered unfair because it appears unfair in the light of unforeseeable events occurring after the contract was made.<sup>57</sup> It is important to note that the question is not whether the circumstances were fair, but whether the contract was fair having regard to all the circumstances. The same applies to the CPA. Furthermore, Regulation 6(1) of the English *Unfair Terms in Consumer Contracts Regulations* 1999 sets out the circumstances to be taken into account in the application of the unfairness tests. The Regulations differ slightly from the Act because the Regulations do not explicitly require circumstances which were reasonably foreseeable at the time of the conclusion of the contract to be taken into account. The Regulations state that the unfairness of a contract term must be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances attending the conclusion of the contract. Circumstances attending the conclusion of the contract include factors such as whether the contract was expressed in plain language, whether the terms were presented clearly, bargaining power, and the availability of alternatives. The degree of genuine opportunity the consumer had to read and consider the terms of a contract is also an important factor.<sup>58</sup>

### 5.1.2.3 Negotiation between the parties and the extent of negotiation

Whether there was any negotiation between the parties and the extent of it form part of the specific factors which a court must consider in any proceedings before it

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<sup>57</sup> See Beale, Bishop and Furmston *Contract* 1011 where the authors raise the point that it seems doubtful whether a court will ever ignore what has actually happened, even if the Act clearly requires that reasonableness must be judged having regard to circumstances which existed or which ought reasonably to have been known or in the parties' contemplations when the contract was made.

<sup>58</sup> Whittaker "Unfair Terms" para 15-055.

concerning a transaction or contract between a supplier and consumer where unfairness is alleged.<sup>59</sup>

This factor leads one to the conclusion that the use of standard terms in contracts may be an indication of unfairness due to a lack of negotiation. That is because non-negotiated terms or standard terms cannot always be regarded as the proper expression of the self-determination of both parties, and fairness intervention is therefore justified.<sup>60</sup> Genuine negotiation may therefore be an indication of fairness. However, that does not mean that all non-negotiated terms are unfair or that all negotiated terms are fair.

"Negotiation" is not defined in the CPA. In the light of the other factors listed in the CPA, one can assume that this factor (negotiation) has to do with a consumer's choice. The question is therefore whether the consumer had a real opportunity to influence the contents of a contract or term. The mere fact that a supplier presents the consumer with more than one pre-formulated alternative to choose from therefore does not qualify as "negotiation". In English law, negotiation is not a factor which has to be taken into account when the fairness of a contract is judged. That is because the *Unfair Terms in Consumer Contracts Regulations* apply only to non-negotiated consumer contracts.<sup>61</sup> The CPA therefore goes much further than English law, since its aim is not only to address the fairness of standard-term contracts.<sup>62</sup> In fact, the general fairness criterion also set out in section 48(1) provides that a supplier must not negotiate in a manner that is unfair.

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<sup>59</sup> Section 52(2)(e) of the CPA.

<sup>60</sup> Naudé 2006 *Stell LR* 365, 370-371.

<sup>61</sup> Regulation 5(1) of the *Unfair Terms in Consumer Contracts Regulations* 1999 (Statutory Instrument 1999 No 2083).

<sup>62</sup> The fact that the fairness of a negotiated contract is also regulated may be criticised by some as being in conflict with private autonomy. It may also be contended that it is irrational to affect the contents of individually negotiated contracts. However, the mere fact that negotiation takes place does not ensure that fair terms are used. Not all consumers in South Africa are able and free to protect their interests, so an opportunity to negotiate may be meaningless for them.

## ***5.2 Other factors which may increase procedural fairness that are not listed in sections 48(1) and 52(2)***

There are also other measures in the CPA which may contribute to fairness. However, these other measures are not part of those the court has to consider when it has to determine whether a contract is unfair or not.<sup>63</sup> Some of these measures will be pointed out and discussed below.

In terms of section 52(2), the factors discussed above must be considered when the court has to decide on the fairness of a term or contract. However, these factors must not only be considered when a contravention of section 48 (the general fairness criterion) is alleged, but also when a contravention of section 40 (prohibition of unconscionable conduct) and section 41 (false, misleading or deceptive representations) is alleged.<sup>64</sup> They must also be considered when the CPA does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct or unfairness.<sup>65</sup> In themselves, the measures contained in sections 40 and 41 may also contribute to procedural fairness.

These other measures may proactively contribute to an increase in openness or transparency and therefore to procedural fairness. Since consumer protection through the disclosure of information involves minimal interference with party autonomy, information-disclosure requirements cannot even be criticised from a supplier's point of view.<sup>66</sup> Consumer protection in South Africa in terms of the CPA is not mainly information-based, which is to be welcomed since the effectiveness of consumer protection solely through the disclosure of information can be questioned, because it is uncertain whether all South African consumers, especially the vulnerable ones, have the capacity to respond to information or whether they act rationally on the basis of information received.<sup>67</sup> Disclosure of information (on its own) therefore does not

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<sup>63</sup> See the discussion above in paras 5.1.1 and 5.1.2.

<sup>64</sup> Section 52(1)(b) of the CPA.

<sup>65</sup> Section 52(1)(a) of the CPA.

<sup>66</sup> See Donnely and White "Effect of Information Based Consumer Protection" 282-283.

<sup>67</sup> Donnely and White "Effect of Information Based Consumer Protection" 271, where the limits of transparency are pointed out and where it is indicated that an essential presumption underlying fairness in the form of disclosure is that consumers will act in a rational way on the information received.

necessarily empower the consumer. The CPA specifically aims at reducing and ameliorating any disadvantages experienced in accessing any supply of goods and services by low-income consumers or communities, minors, seniors, and other similarly vulnerable consumers, and most important, consumers whose ability to read and comprehend advertisements, contracts, marks, notices, warnings, labels or instructions is limited by reason of low literacy, visual impairment or limited fluency in the language of the representation.<sup>68</sup> Procedural-fairness measures therefore oblige suppliers, among others, to disclose specific information, and to do so in a certain way. The Preamble to the CPA states that it is necessary to develop and employ innovative means to protect the interests of all consumers and to ensure redress for consumers who are subjected to abuse or exploitation in the marketplace. It further states that the CPA was enacted to promote and protect the economic interests of consumers and to improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual needs.

### *5.2.1 Unconscionable conduct*

As pointed out above, there are other measures in the CPA which may contribute to fairness (these other measures are not part of those the court has to consider when it has to determine whether a contract is unfair or not).<sup>69</sup> The prohibition of unconscionable conduct is an example of such a measure.

One of the aims of the CPA is to protect consumers from unconscionable, unfair, unreasonable, unjust or improper trade practices and from any deceptive, misleading, unfair or fraudulent conduct. In order to fulfil this aim, consumers have a right to fair and honest dealing.<sup>70</sup> Under this right, the following matters are forbidden: unconscionable conduct such as duress or harassment,<sup>71</sup> false, misleading and

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<sup>68</sup> Section 3(1)(b) of the CPA.

<sup>69</sup> See the discussion above in paras 5.1.1, 5.1.2 and 5.2.

<sup>70</sup> Section 3(1)(c)-(d) of the CPA. For a full discussion on the right to fair and honest dealing, see Van Eeden "Consumer Protection" paras 150, 152, 161, 172-173, 200 and 208.

<sup>71</sup> Section 40 of the CPA.

deceptive representations,<sup>72</sup> fraudulent schemes and offers,<sup>73</sup> and pyramid and related schemes.<sup>74</sup>

The prohibition of unconscionable conduct in marketing, supply, negotiation, conclusion, execution or enforcement of a contract or the demand for payment or the recovery of goods from a consumer aims at preventing unconscionable (unfair) conduct in contractual procedures. This section of the CPA may therefore increase procedural fairness.

Unconscionable conduct is conduct having a character contemplated in section 40 or other improper or unethical conduct that would be improper or unethical to a degree that would shock the conscience of a reasonable person.<sup>75</sup> Section 40 prohibits the use of physical force against consumers, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct in connection with the marketing and supply of goods or services, negotiations, conclusion, execution or enforcement of a contract for the supply of goods or services to consumers or demand or collection of payment for goods or services or recovery of goods from consumers.<sup>76</sup> Common law also covers duress and undue influence.<sup>77</sup>

The CPA further expands the ambit of the unconscionable-conduct provision by stating that it is also unconscionable for suppliers to knowingly take advantage of a consumer because a consumer was unable to protect his/her own interests on account of physical or mental disability, illiteracy, ignorance, inability to understand the language

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<sup>72</sup> Section 41 of the CPA.

<sup>73</sup> Section 42 of the CPA.

<sup>74</sup> Section 43 of the CPA.

<sup>75</sup> See the definition of "unconscionable" in s 1 of the CPA.

<sup>76</sup> Section 40(1) of the CPA.

<sup>77</sup> See *Broodryk v Smuts* 1942 TPD 47 for an example of duress. Also see *Preller v Jordaan* 1956 1 SA 483 (A). Under common law, duress and undue influence are based on the idea that undue influence and duress render a contract void or voidable, depending on the facts, because such duress and undue influence affect a person's will and lead to improper obtaining of consensus. When absolute force is used, an agreement will be void *ab initio*, and when relative force or undue influence is used, the agreement will be voidable at the choice of the consumer. S 40 of the CPA, therefore, in a sense codifies the common law. However, s 40 has a wider ambit. S 40 deals not only with consensus obtained by improper means, but also with other improper or unethical conduct in marketing, supply, negotiation, execution and enforcement. S 40 reinforces the idea that parties to a contract should act in good faith and that their conduct should not be improper, unconscionable and contrary to the *boni mores*.

of an agreement, or any similar factor.<sup>78</sup> In order to avoid taking advantage of a consumer's inabilities in such a way, suppliers must make sure that the consumer understands the agreement and is able to protect his/her interests.<sup>79</sup>

### *5.2.2 False, misleading or deceptive representations*

The provision on false, misleading or deceptive representation is an example of another measure in the CPA which may contribute to fairness (these other measures are not part of those the court has to consider when it has to determine whether a contract is unfair or not).<sup>80</sup>

The prohibition of false, misleading or deceptive representations in relation to the marketing of goods and services aims at preventing unfair pre-contractual conduct in the process of marketing. It may therefore increase procedural fairness.<sup>81</sup>

In terms of section 41, suppliers are not allowed to use false, misleading or deceptive representation, innuendo, exaggeration or ambiguity, or must not knowingly allow consumers to believe false, misleading or deceptive facts in relation to the marketing of the goods and services.<sup>82</sup>

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<sup>78</sup> Section 40(2) of the CPA.

<sup>79</sup> See, among others, s 50(2)(b)(ii) of the CPA stating that the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of their agreement, which must satisfy the requirements of s 22 and set out an itemised breakdown of the consumer's financial obligations under the agreement.

<sup>80</sup> See the discussion above in paras 5.1.1, 5.1.2 and 5.2.

<sup>81</sup> See also para 5.1.1.1 above for a full discussion. S 48(2) of the CPA sets out guidelines which indicate when a contract or term is unfair. In terms of s 48(2)(c), a contract or term is unfair when the consumer relied upon a false, misleading or deceptive representation.

<sup>82</sup> Section 41(1) of the CPA. A representation will be a false, misleading or deceptive representation if it falsely states or implies or fails to correct a misapprehension on the part of the consumer that: (a) a supplier has a particular status or affiliation, connection, sponsorship or approval that he, she or it does not have; (b) that any goods or services have, inter alia, ingredients, characteristics, uses, accessories that they do not have; or (c) are of a particular standard, are new or unused if they are not. The same applies to any land or immovable property with regard to (a) characteristics that it does not have; (b) the purpose of the land; or (c) the facilities and features of the land (s 41(3)(a)-(k)).

### 5.2.3 Other forms of disclosure required by the CPA

CPA provisions requiring disclosure is an example of other measures in the CPA which may contribute to fairness (these other measures are not part of those the court has to consider when it has to determine whether a contract is unfair or not).

In consumer protection law, there are usually three stages of information disclosure. These stages aim at helping consumers to make informed choices. They also increase transparency and therefore procedural fairness. The three stages of disclosure are pre-agreement disclosure, disclosure when entering into a contract, and post-contractual disclosure.<sup>83</sup>

The first stage of disclosure entails seeking business in the form of marketing, issuing quotations or estimates, disclosure of prices, disclosure in trade descriptions and labels, and the disclosure of reconditioned or grey-market goods. The second stage is where the parties enter into a contract, and this stage entails formalities and disclosure in the contract document, for example a requirement that a contract must be in writing or that the contract must set out the financial obligations of the party or contain a cautionary statement. The third stage of disclosure entails post-contractual disclosure where copies of the contract and sales records are given to the consumer. All three stages of information disclosure are now made compulsory under the CPA. Some of these information-disclosure measures will be pointed out below.

#### 5.2.3.1 Written contracts

In terms of section 50(1), the Minister of Trade and Industry may prescribe categories of contracts that should be in writing. It further states that, even where an agreement between a supplier and a consumer has been put in writing voluntarily, it must satisfy the plain-language requirements of the CPA<sup>84</sup> and the supplier must then send a copy

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<sup>83</sup> See Grové and Otto *Principles of Consumer Credit Law* 27, 84-89 for a discussion on the three stages of disclosure.

<sup>84</sup> Section 22 of the CPA. See also the discussion on plain and understandable language in para 5.1.1.3 above.



of the agreement to the consumer.<sup>85</sup> The contract must also set out an itemised breakdown of the financial obligations of the consumer under the contract.<sup>86</sup>

Since this section requires a written contract to be in plain and understandable language, it contributes to procedural fairness. The fact that it requires an itemised breakdown of the consumer's financial obligations increases transparency. It puts consumers in a position where they have to make informed choices to protect their own interests given their current financial situation.

Section 50(2)(a) states that, if a contract between a supplier and consumer is in writing, whether voluntarily or as required by the Act, the contract applies irrespective of whether or not the consumer had signed the agreement. It is dangerous to hold a consumer to a written contract he/she did not sign and it may even open the door to fraud.

#### 5.2.3.2 Miscellaneous disclosure measures

To ensure sufficient disclosure of information, the CPA requires that certain minimum information must be disclosed to consumers.<sup>87</sup> In terms of the right to information and disclosure,<sup>88</sup> the CPA deals with: the right to information in plain and understandable language,<sup>89</sup> disclosure of the price of goods or services,<sup>90</sup> product labelling and trade descriptions,<sup>91</sup> disclosure of reconditioned or grey-market goods,<sup>92</sup> sales records,<sup>93</sup> disclosure by intermediaries<sup>94</sup> and identification of deliverers and installers.<sup>95</sup>

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<sup>85</sup> Section 50(2)(b)(i) of the CPA.

<sup>86</sup> Section 50(2)(b)(ii) of the CPA.

<sup>87</sup> For a detailed discussion on all the disclosure measures contained in the CPA, see Jacobs, Stoop and Van Niekerk 2010 *PELJ* 324, 329-336, 344, 358.

<sup>88</sup> Ch 2, Part D, of the CPA.

<sup>89</sup> Section 22 of the CPA. See also para 5.1.1.3 above.

<sup>90</sup> Section 23 of the CPA.

<sup>91</sup> Section 24 of the CPA.

<sup>92</sup> Section 25 of the CPA.

<sup>93</sup> Section 26 of the CPA.

<sup>94</sup> Section 27 of the CPA.

<sup>95</sup> Section 28 of the CPA.

In addition, the CPA requires that repair or maintenance services only be rendered once a binding estimate has been provided and the consumer had pre-authorised the charge up to a specific amount.<sup>96</sup>

The CPA furthermore sets a general standard for marketing,<sup>97</sup> and the CPA regulates direct marketing and the disclosure of a cooling-off right in the event of direct marketing.<sup>98</sup> Lastly, the CPA regulates arrangements in terms of which a person invites, solicits or requires persons to undertake work or conduct business from their homes, represents to others as being practicable to conduct the business or undertake the work from their homes, or invites, solicits or requires persons to perform work or conduct business or invest money from their homes.<sup>99</sup>

## **6 The standard for procedural fairness**

The CPA does not set an overall and general standard for procedural fairness. The only standard or question to be asked is that concerning the standard required in terms of all the factors or measures which must be applied in the determination of procedural fairness. However, owing to the nature of all factors and measures related to procedural fairness, it is clear that openness and transparency are required. Openness and transparency require that terms should be expressed fully, clearly and legibly, with no pitfalls, and that prominence should be given to certain terms which might operate to a consumer's disadvantage.

Under English law, good faith is the overarching standard for procedural fairness imposed by Regulation 5(1) of the *Unfair Terms in Consumer Contracts Regulations*.<sup>100</sup> In deciding whether a clause complies with the requirement of good faith in terms of the *Unfair Terms in Consumer Contracts Regulations*, mainly procedural matters or matters related to procedural fairness are taken into account, such as: (a) the strength of the bargaining position of the parties; (b) inducement offered to the consumer; (c)

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<sup>96</sup> Section 15 of the CPA.

<sup>97</sup> Section 29 of the CPA.

<sup>98</sup> Sections 11, 12, 16 and 32 of the CPA.

<sup>99</sup> Section 37 of the CPA.

<sup>100</sup> Regulation 5(1) provides that an unfair term is a contractual term which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

whether the goods were made to the special order of the consumer; (d) whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the general requirement of open and fair dealing; (e) whether a clause came as a surprise to a consumer; (f) whether the supplier took steps to bring a clause to the consumer's attention and to explain it; (g) whether the consumer had a real choice, or whether he/she was in a position to make a real choice; (h) whether the terms were reasonably transparent and whether the terms operated to defeat the reasonable expectations of the consumer; and (i) whether the terms were expressed fully, clearly and legibly.<sup>101</sup>

Good faith seeks to promote fair and open dealing and to prevent unfair surprises and the absence of real choice. The majority of these aspects are also addressed by measures or factors aimed at procedural fairness in terms of the CPA. These factors also significantly overlap with the procedural factors that must be taken into account by a court in terms of section 52(2) when it has to decide whether a contract or term is unfair or not. The House of Lords in *Director General of Fair Trading v First National Bank*<sup>102</sup> found that:

The requirement of good faith in this context is one of fair and open dealing. Openness requires that the 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 consumer's necessity, indigence, lack of experience, [and] 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.

So, good faith can be described as an overarching standard for procedural fairness in terms of the CPA.<sup>103</sup>

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<sup>101</sup> See the *Director General of Fair Trading v First National Bank Plc* [2000] EWCA Civ 27 paras 26-29, [2002] 1 Lloyd's Rep 489 paras 17, 36, [2001] 3 WLR 1297 paras 17, 36; *Bryen & Langley Ltd v Boston* [2004] EWCA Civ 973 para 45; the Preamble of the *EC Directive on Unfair Terms in Consumer Contracts* (93/13/EEC); and Brownsword, Howells and Wilhelmsson "Between Market and Welfare" 40-45.

<sup>102</sup> *Director General of Fair Trading v First National Bank Plc* [2002] 1 Lloyd's Rep 489 para 17; [2001] 3 WLR 1297 para 17.

<sup>103</sup> For further discussion see Stoop *Fairness* 139-140, 161-162, 197-202, 207-209.

## **7 Conclusion**

What exactly should be understood by "contractual fairness" has never been an easy question to answer. The problem with fairness is that it is very difficult to predict with certainty whether a contract is fair. Suppliers therefore struggle to comply with fairness requirements in a proactive manner. To achieve some clarity, the concept "fairness" can be analysed with reference to substantive and procedural fairness: fairness entails substantive and procedural fairness. Procedural fairness is fairness in the formation of a contract, which can be measured against the requirement of transparency. Transparency involves two elements, namely transparency in relation to the terms of a contract and transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract, about aspects of the goods, service, price and terms. Transparency in relation to the terms of a contract refers to whether the contract terms are accessible, in clear language, well structured and cross-referenced, with prominence being given to terms that are detrimental to the consumer or because they grant important rights to the consumer. Procedural-fairness measures usually enable consumers to protect themselves against substantive unfairness. Legislative measures aimed at procedural fairness are used to address the lack of transparency. Despite the noble aims of legislative measures aimed at procedural fairness, there are limits to the efficacy of procedural measures and transparency which can be addressed by legislative measures aimed at substantive fairness.

The CPA came into force on 31 March 2011 and contains several measures aimed at addressing procedural fairness. The CPA aims, among others, at promoting fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust or improper trade practices and deceptive, misleading, unfair or fraudulent conduct. The CPA also aims at improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour. When one has to interpret the CPA, the traditional approaches may not be followed. The CPA, in section 2(1), expressly provides that it must be interpreted in a manner that gives effect to its purposes. Furthermore, when interpreting the CPA,

applicable foreign law, international law, conventions, declarations or protocols may be considered.

Chapter 2, Part G, of the CPA contains measures dealing with unfair, unjust and unreasonable contract terms. The right to fair, just and reasonable terms and conditions is the first general fairness measure introduced in South African contract law whereby one party can rely on legal assistance if a bargain is unreasonable, unfair or onerous to him/her. However, the CPA also contains other provisions related to fairness.

The factors related to procedural fairness that a court must consider (in terms of the CPA) in any proceedings before it concerning a transaction or contract between a supplier and consumer where unfairness is alleged are discussed in this article. They can be categorised under measures requiring disclosure and/or mandatory terms, and measures addressing bargaining position and choice. The following factors fall under the first mentioned category: whether the consumer relied on a false, misleading or deceptive representation or a statement of opinion to his/her detriment, whether the contract was subject to a term for which a notice is required, and the extent to which any documents satisfied the plain-and-understandable-language requirements of the CPA. The second category includes the following factors: the nature of the parties and bargaining position, the circumstances of the transaction or contract that existed or which were reasonably foreseeable at the time that the conduct or transaction occurred or when the contract was entered into and negotiation between the parties and the extent of negotiation.

There are also other measures in the CPA which may contribute to fairness. However, these other measures are not part of those the court has to consider when it has to determine whether a contract is unfair or not. They include the provisions on unconscionable conduct, false misleading and deceptive representations, and additional forms of disclosure required by the CPA.

The CPA does not set an overall and general standard for procedural fairness. The only standard or question to be asked is that concerning the standard required in terms of all the factors or measures which must be applied in the determination of

procedural fairness. Owing to the nature of all these factors and measures related to procedural fairness, one can conclude that it is clear that openness and transparency are required by the CPA.

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### **LIST OF ABBREVIATIONS**

ASA	Advertising Standards Authority
CPA	Consumer Protection Act 68 of 2008
LAWSA	The Law of South Africa
LQR	Law Quarterly Review
MULR	Melbourne University Law Review
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review