

## FUNDAMENTAL CONSUMER RIGHTS UNDER THE CONSUMER PROTECTION ACT 68 OF 2008: A CRITICAL OVERVIEW AND ANALYSIS

W Jacobs\*

PN Stoop\*\*

R van Niekerk\*\*\*

### 1 Introduction

The controversial<sup>1</sup> *Consumer Protection Act*<sup>2</sup> (hereafter the Act) was signed by the President of the Republic of South Africa on 29 April 2009 and published in the *Government Gazette* on 29 April 2009.<sup>3</sup> The most contentious part of the Act concerns the fundamental consumer rights contained in Chapter 2.<sup>4</sup> The article (in two parts) provides a critical overview of, and comments on, the entire fundamental consumer rights provided for in the Act. The discussion on the right to fair, just and reasonable terms and conditions (for example, fair contract terms) and the right to fair value, good quality and safety (for example, product liability) particularly contain detailed critical analysis. This article, in particular, aims to evaluate these rights and to establish the extent to which consumer protection, if any, previously provided for under the common law, may have been amended or extended by the Act.<sup>5</sup> The impact of the Act on the legal position of both the consumer and the supplier is also analysed. The authors raise many questions in the course of the article, some of which remain unanswered. These questions illustrate some of the uncertainties in regard to the scope and possible interpretation of fundamental consumer rights and prompt the reader to further reflection.

\* Wenette Jacobs. BLC LLB (UP) LLM (UNISA) Dip ADR (UP and AFSA). Senior lecturer, Department of Mercantile Law, School of Law, University of South Africa (jacobw@unisa.ac.za).

\*\* Philip N Stoop. BCom LLB (UP). Senior lecturer, Department of Mercantile Law, School of Law, University of South Africa (stooppn@unisa.ac.za).

\*\*\* René van Niekerk. BProc LLB LLM (RAU). Senior lecturer, Department of Mercantile Law, School of Law, University of South Africa (rvanniekerk@unisa.ac.za).

1 See Du Preez 2009 *TSAR* 60–61 for a list of some of the controversial provisions in the *Consumer Protection Bill* of 2008 – hereafter the CPA Bill.

2 68 of 2008.

3 See Schedule 2; see Stassen 2009 *De Rebus* 42–44 for a concise overview of the commencement dates of application of the sections of the Act and also see generally Van Eeden *Guide*.

4 Parts A–I paras 8–67.

5 See 3 in the article.

The reader is cautioned not to study sections of the Act in isolation, as this may create a false impression of, for example, the application (or not) of the fundamental consumer protection rights. Before turning to a critical evaluation of the fundamental consumer rights, it is imperative to analyse the interpretation, purpose and application of the Act as set out in Chapter 1.<sup>6</sup> A proper understanding of the extensive list of definitions<sup>7</sup> in the Act plays a central role in determining whether the Act (and thereby also the fundamental consumer rights) applies to a transaction.<sup>8</sup>

The authors assume that the reader will consult the Act in conjunction with the article and have therefore attempted to avoid lengthy quotations from the Act.

## 2 The purpose, interpretation and application of the Act

### 2.1 Purpose of the Act

Existing consumer protection measures were outdated and fragmented. The consumer protection framework had to be reviewed. South Africa needed a comprehensive outline to provide a framework of legislation, policies and government authorities to regulate consumer-supplier interaction.<sup>9</sup> The Act now provides an extensive framework for consumer protection and aims to develop, enhance and protect the rights of the consumer and to eliminate unethical suppliers and improper business practices.<sup>10</sup>

Certain areas of the common law regarding consumer rights have been codified by the Act and certain unfair business practices that were previously unregulated are now governed by the Act (see examples in the course of the article). In terms of the Act, consumers obtain several new rights and some of the existing rights are

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6 Parts A–B paras 1–7. See A 2 in the article.

7 S 1; also see 2.6 in the article.

8 Certain parts of or sections in the Act contain their own definitions, eg S 53 in Part H of Chp 2. In this regard, see 3.8.1 in the article.

9 DTI *Draft Green Paper on the Consumer Policy Framework 09/04* 9 GN 1957 in GG 26774 of 9 September 2004.

10 See the Preamble to the Act.

broadened and reinforced.<sup>11</sup> Therefore, suppliers will have to evaluate whether their business practices comply with the Act and make the necessary changes. In some instances, drastic measures will have to be implemented (again, see examples in the course of the article).

Both the *National Credit Act*<sup>12</sup> and the *Consumer Protection Act* contain extensive consumer rights for the protection of consumers. If a consumer, for example, enters into a credit agreement<sup>13</sup> with a supplier, the credit agreement is regulated by the *National Credit Act* and any goods so purchased by the *Consumer Protection Act*.

Section 3 sets out the purpose of the Act, which is to protect and develop the social and economic welfare of consumers, in particular vulnerable consumers.<sup>14</sup> Section 3(2) prescribes additional responsibilities for the National Consumer Commission<sup>15</sup> to ensure the realisation of the purposes of the Act. The Commission must take all reasonable and practical steps to promote the purposes of the Act to conduct research and to propose policies relating to consumer issues to the Minister.<sup>16</sup> Furthermore, an annual report regarding prescribed consumer matters must be sent to the Minister.

The Act places mammoth obligations on suppliers and authorities to ensure consumer protection. It remains to be seen whether the Act will achieve its purpose and be as successful in consumer protection as the *National Credit Act* has proven to be.

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11 See, eg, undue influence and duress in 3.6.1 in the article.

12 34 of 2005.

13 S 8 *National Credit Act*.

14 See S 3(1) of the Act on the ways in which these purposes are to be achieved. S 3(1)(b)(i)–(iv) identifies vulnerable consumers as low-income persons or low-income communities who live in remote, isolated or low-density population areas or communities; minors, seniors or other vulnerable consumers; or those with limited literacy as a target group.

15 The National Consumer Commission is established in terms of S 85(1). See S 1 sv "Commission".

16 S 1 sv "Minister" means the member of the cabinet responsible for consumer protection.

## 2.2 *Interpretation of the Act*<sup>17</sup>

The Act has its own interpretation clause, which provides that it must be interpreted in a manner that gives effect to the purposes that are set out in Section 3 of the Act.<sup>18</sup> When interpreting the Act, applicable foreign law, international law, conventions, declarations or protocols may be considered.<sup>19</sup> This method of interpretation may lead to a result different to that expected when the traditional rules of interpretation are applied to ascertain the intention of the legislature, which is the main aim of interpretation. Usually, legislation is interpreted according to the ordinary grammatical meaning of words,<sup>20</sup> but contextual interpretation (namely to interpret the meaning that the words have ascertained in their broader legal context in the rest of the world) is not unknown to our law. The Act further provides that any decision of a consumer court, ombud or arbitrator in terms of this Act that has not been set aside by a higher court may also be considered when interpreting the Act. Precedents may thus be created if a consumer court, ombud or arbitrator interprets the Act.

Section 2(3) provides for the use of electronic signatures in cases in which the Act requires signatures or initialling.

Sections 2(8) and 2(9) prescribe rules in cases of conflict between the Act and other legislation. Should there be an inconsistency between any provisions of Chapter 5 of this Act (which deals with national consumer protection institutions) and the *Public Finance Management Act*<sup>21</sup> or the *Public Service Act*,<sup>22</sup> the last-mentioned Acts will apply. In other instances in which there is an inconsistency between any provisions of the Act and other legislation, the provisions of both acts will apply concurrently to the extent that it is possible. If it is not possible to apply the provisions of the Acts

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17 S 2.

18 S 2(1).

19 S 2(2).

20 This is in terms of the literal interpretation principle, which is firmly entrenched in our law (see 934J; also see Botha *Wetsuitleg* 14–15 and De Ville *Constitutional and Statutory Interpretation* 94 *et seq*). On contextual interpretation, see Botha *Wetsuitleg* 11–15 and De Ville *Constitutional and Statutory Interpretation* 238–241.

21 1 of 1999.

22 103 of 1994.

concurrently, the provision that extends the greater protection to consumers must prevail.

### 2.3 ***The realisation and enforcement of consumer rights***<sup>23</sup>

The following persons have *locus standi* to approach a court, the Tribunal or the Commission and allege that their rights in terms of this Act have been infringed:<sup>24</sup>

- (a) a person acting on his/her own behalf;<sup>25</sup>
- (b) an authorised person acting on behalf of another person who cannot act in his/her own name;<sup>26</sup>
- (c) a person acting as a member of a group or class of affected persons;<sup>27</sup>
- (d) a person acting in the public interest with leave from the Tribunal or court;<sup>28</sup>
- (e) an association acting in the interest of all its members (membership of associations includes club memberships).<sup>29</sup>

Section 38(c) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution), makes provision for a group or class of persons to approach a court in cases in which there has been an infringement of a right in the Bill of Rights.<sup>30</sup> The Act also makes provision for class actions in Section 4(1)(c). A member of a group or class of affected persons who seeks redress for infringement of his, her or their rights may institute action against a particular supplier. Should the class action be successful, all members of a group or class may benefit from the settlement or award. Class actions are to the benefit of individual consumers who do not have the ability or financial means to institute action against a supplier. However, class actions may have major and adverse implications on suppliers' finances and public image. Suppliers therefore need sufficient liability insurance.

23 S 4 and 69.

24 S 4(1). The Tribunal is established in terms of S 26 of the National Credit Act to conclude hearings and to deal with various consumer matters.

25 S 4(1)(a).

26 S 4(1)(b).

27 S 4(1)(c).

28 S 4(1)(d).

29 S 4(1)(e).

30 See *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E) and *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC), in which the court dealt with various issues relating to class actions.

In terms of Section 4(2), the Tribunal or a court has an obligation to develop the common law to the extent that it improves the realisation and enjoyment of consumer rights in a general sense, and specifically those rights of vulnerable consumers. Furthermore, a Tribunal or a court must promote the spirit and purposes of the Act.<sup>31</sup> Should any part of the Act be construed to have more than one meaning, the Tribunal or court is obliged to interpret it in a way that promotes the purposes of this Act and improves the realisation of consumer rights, especially the rights of vulnerable consumers.<sup>32</sup>

Section 4(4) prescribes rules to be followed when interpreting any contracts, forms or documents prepared by a supplier or on his, her or its behalf. In cases in which ambiguities exist or in which consumer rights are limited, interpretation must be to the benefit of the consumer. This section confirms, and perhaps even extends, the *contra proferentem* rule<sup>33</sup> under the common law.

Section 4(5) is a clause of general application that prohibits certain conduct in the ordinary course of business with consumers. The prohibitions include conduct that defeats the purposes of the Act, is misleading, or constitutes a false representation of facts.

## 2.4 ***Enforcement of rights by consumers***<sup>34</sup>

The Act provides for various mechanisms for the enforcement of consumer rights. Consumers may seek redress by referring the matter to the Tribunal,<sup>35</sup> if the Act permits it. Should the supplier be subject to the jurisdiction of an applicable ombud,

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31 S 4(2)(a)–(b).

32 S 4(3).

33 In terms of the *contra proferentem* rule in terms of which a document is construed against the drafter if ambiguities exist. See *Lynn & Main Inc v Brits Community Sandworks CC* 2009 1 SA 308 (SCA) para 24, in which where the court also referred to *Cairns (Pty) Ltd v Playdon and Co Ltd* 1948 3 SA 99 (A) 122.

34 S 69.

35 S 69(a). A referral to the Tribunal must be in the prescribed form and manner as provided for in S 75 of the Act. In matters referred to the Tribunal, a hearing must be conducted in accordance with the requirements of the Act and the applicable provisions of the *National Credit Act* (see generally Chp 7 Parts D–E). The Tribunal may make any order provided for in the Act or in the relevant sections of the *National Credit Act*. Hearings before the Tribunal are held in public, are as informal as possible and are of inquisitorial nature.

the matter may be referred to that ombud.<sup>36</sup> Should this not be the case,<sup>37</sup> the matter may be referred to a provincial consumer court, should one exist, for alternative dispute resolution, or a complaint may be lodged with the Commission.<sup>38</sup> Should all remedies in terms of national legislation have been exhausted, a court of law with jurisdiction may be approached.<sup>39</sup> This implies that a court of law may not be approached, unless a consumer has first approached the Tribunal, ombud, provincial consumer court or Commission, or referred the matter to an alternative dispute resolution agent. These different enforcement mechanisms may lead to confusion and forum-shopping in an instance in which an aggrieved consumer has to choose the appropriate forum to seek redress under the Act.<sup>40</sup>

A court hearing a matter under this Act may order that any conduct that is inconsistent with this Act should be changed or stopped or may make an order that is specifically provided for in the Act.<sup>41</sup> Damages may be awarded, including damages to a class of consumers, on any terms and conditions that the court may consider to be just and suitable and in accordance with the purposes of the Act.<sup>42</sup>

Generally, the Act provides for severe penalties and administrative fines for non-compliance with the Act. It provides for a fine, or imprisonment of a maximum of twelve months, or both if a person is convicted of an offence in terms of the Act.<sup>43</sup> When a supplier has disclosed any personal or private information as prohibited in Section 107, it provides for a fine, or imprisonment of not longer than ten years, or both.<sup>44</sup> The severity of these penalties indicates that the legislature regards the disclosure of personal information in a very serious light. The Tribunal may impose an administrative fine<sup>45</sup> that does not exceed the greater of ten per cent of the

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36 S 69(b).

37 S 69(c)(i)–(iii).

38 The Commission falls outside the public service but is an organ of state in terms of S 85(1). It is furthermore a juristic person with jurisdiction throughout South Africa in terms of S 85(2)(a)–(b). The Commission must therefore also exercise its functions in accordance with the principles listed in S 195 of the Constitution. See S 99 on the enforcement functions of the Commission.

39 S 69(d).

40 See Du Preez 2009 *TSAR* 81.

41 S 76(1)(a)–(b).

42 S 76(1)(c).

43 S 111(1)(b).

44 S 111(1)(a).

45 S 112(3)(a)–(g).

supplier's annual turnover during the previous financial year<sup>46</sup> or R1 million<sup>47</sup> for prohibited or required conduct.

## 2.5 *Application of the Act*

One of the aims of the new consumer policy framework is to provide a consistent, predictable and effective regulatory framework that fosters consumer confidence in the market.<sup>48</sup> The scope and field of application of the regulatory framework had to be determined. One of the greatest pitfalls in consumer law, prior to the commencement of the Act, was the absence of a uniform definition of a "consumer".<sup>49</sup> Furthermore, to afford the required wide protection to consumers, a "consumer" must be defined broadly as an individual who purchases "goods" and "services".<sup>50</sup>

The Act has a wide field of application. The Act applies to every transaction occurring within South Africa for the supply of goods or services or the promotion of goods or services and the goods or services themselves, unless the transaction is exempted from the application of the Act.<sup>51</sup> The Act does not apply to the following:

- (a) transactions for the supply or promotion of goods or services to the State;<sup>52</sup>
- (b) transactions in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, is more than or equal to the threshold value determined by the Minister in terms of Section 6;<sup>53</sup>

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46 S 112(2)(a).

47 S 112(2)(b).

48 GN 1957 in GG 26774 of 9 September 2004 para 13.

49 GN 1957 in GG 26774 of 9 September 2004 para 25.

50 GN 1957 in GG 26774 of 9 September 2004 para 25.

51 S 5(1)(a)–(d). It is uncertain what the meaning and scope of "occurring within South Africa" are. While the Act applies to every transaction "occurring within South Africa", other legislation, such as the *National Credit Act*, applies to transactions "having effect within South Africa". See 2.5–2.6 in the article, where the enforcement, jurisdictional and choice of law issues that could result from Ss 5(5) and 5(8) of the Act are mentioned.

52 S 5(2)(a). The Act does not contain a definition of "State". It is not clear whether companies and other entities, of which the State is a shareholder or member, are included in the definition of "State". However, an "organ of state" is defined in S 1 as an organ of state as defined in S 239 of the Constitution.

53 S 5(2)(b). See 2.7 in the article. Ss 4(1)(a)(i), 4(1)(b) and 9(4) of the *National Credit Act* (read with GN 713 in GG 28893 of 1 June 2006) have the same type of exemption for juristic persons. The *Consumer Protection Act* does not stipulate the manner in which information on a juristic person's annual turnover or asset value will be obtained. Furthermore, the differentiation between

- (c) transactions that have been exempted by the Minister in terms of Sections 5(3) and 5(4);<sup>54</sup>
- (d) transactions that constitute credit agreements under the *National Credit Act* (the goods and services subject to such a credit agreement are not excluded from the application of the Act);<sup>55</sup>
- (e) transactions pertaining to services to be supplied under an employment contract;<sup>56</sup>
- (f) transactions that give effect to a collective bargaining agreement in terms of the *Labour Relations Act*<sup>57</sup> and the Constitution,<sup>58</sup> or

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juristic persons who qualify as consumers and juristic persons who are not protected in terms of the *Consumer Protection Act* should be fair and based on accessible information to avoid discrimination. For example, how will the protection of a sole proprietorship-consumer with a very large annual turnover be justified if a company with the same annual turnover will not be protected in terms of the *Consumer Protection Act*? And further, does the *Consumer Protection Act* not aim to protect individual consumers rather than businesses? See Stassen *De Rebus* 43. The exception in S 5(2)(b) does not apply to franchises (see S 5(7)). See the discussion of the definition of "transaction" in 2.6 for a discussion of the exemption of juristic persons. Also see 2.7 in the article.

54 S 5(2)(c). In terms of S 5(3), only a regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the Act on the basis that the provisions overlap or duplicate a regulatory scheme regulated by the authority under national legislation, treaty, international law, convention or protocol. Therefore, an individual supplier or a representative body may not apply for an exemption from the Act. However, in terms of S 5(4), the Minister may, by notice in the *Government Gazette*, grant an exemption to an industry, after receiving advice from the Commission. Such an exemption may only be granted to the extent that the regulatory scheme ensures the achievement of the purposes of the Act and its provisions. The exemption may be subjected to limits or conditions that are necessary to ensure the achievement of the purposes of the Act.

55 S 5(2)(d). Although this exemption seems to be clear, it is not. The *National Credit Act* makes provision for so-called incidental credit agreements. Incidental credit agreements are credit agreements in terms of Ss 1, 5(2) and 8(4)(b) of the *National Credit Act*. However, an incidental credit agreement is only regarded as a credit agreement twenty "business days" (see S 2(5) of the *National Credit Act*) after the supplier of goods or services first charges interest or fees for late payment of an account (see Otto *National Credit Act Explained* 39–40 and Stoop 2008 *De Jure* 357–358). Therefore, during the above-mentioned first twenty business days, an incidental credit agreement does not constitute a credit agreement in terms of the *National Credit Act*. The question is then, whether the *Consumer Protection Act* can apply to an "incidental credit agreement" that is not yet a credit agreement in terms of the *National Credit Act*. Furthermore, the *Consumer Protection Act* only excludes credit agreements in terms of the *National Credit Act* from its ambit. Marketing of credit products in terms of the *National Credit Act* is not expressly excluded from the application of the *Consumer Protection Act*. Therefore, the *National Credit Act* and the *Consumer Protection Act* should apply to credit advertisements and marketing of credit. This leads to a duplication of regulations. The National Credit Regulator could, on behalf of the credit industry, apply for an exemption from the marketing provisions of the *Consumer Protection Act* in terms of S 5(3). However, should there be any inconsistency between any provisions of the *Consumer Protection Act* and other legislation, the provisions of both Acts apply concurrently to the extent that it is possible. Should it not be possible to apply the provisions of the Acts concurrently, the provisions that extend the greater protection to consumers must prevail (S 2(9) of the *Consumer Protection Act*).

56 S 5(2)(e). It is not clear whether this exemption includes temporary employment contracts, but one could accept that all employment contracts are covered by this exemption.

57 66 of 1995.

(g) a collective agreement in terms of Section 213 of the *Labour Relations Act*.<sup>59</sup>

Furthermore, advice or intermediary banking or related financial service, or the undertaking, underwriting or assumption of risk, is excluded from the definition of "service" in Section 1 to the extent that the service is regulated by the *Financial Advisory and Intermediary Services Act*<sup>60</sup> or the *Long-term Insurance Act*<sup>61</sup> or *Short-term Insurance Act*.<sup>62</sup> It follows that such a service is therefore excluded from the application of the Act.<sup>63</sup>

However, if goods are supplied within South Africa in terms of a transaction that are exempted from the application of the Act, such goods (and the importer or producer, distributor and retailer of those goods) are still subject to Sections 60 and 61 that deal with unsafe goods, safety-monitoring, recall and damage caused by such goods. Where a juristic person, for example, does not qualify as a consumer, Sections 60 and 61 will apply to the goods purchased by it and to the supplier of the goods.<sup>64</sup>

## 2.6 **Definitions**

In order to determine the field of application of the Act, the most important definitions given in Section 5 of the Act should be analysed. As stated above, the Act applies to every *transaction* occurring within South Africa for the *supply of goods or services* or the promotion of goods or services and the goods or services themselves, unless the transaction is exempted.<sup>65</sup>

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58 S 23 of the Constitution.

59 S 5(2)(f)–(g).

60 37 of 2002.

61 52 of 1998.

62 53 of 1998.

63 See the discussion of the definition of "service" in 2.6 in the article. An insurance policy would therefore be exempted from the application of the Act.

64 S 5(5). Also see the discussion on the effect of S 5(8) of the Act in 2.6 in the article. Further, see Stassen *De Rebus* 43.

65 S 5(1)(a)–(d).

The first important definition is that of "transaction".<sup>66</sup> A "transaction" refers to transactions in the ordinary course of business and once-off transactions are therefore not transactions in terms of the Act. A transaction is an agreement between two or more persons for the supply of goods or services for consideration.<sup>67</sup>

However, supply for consideration<sup>68</sup> is not always a requirement of a "transaction", since, in terms of Section 5(6), certain arrangements must be regarded or deemed as a "transaction" irrespective of whether a charge or economic contribution is required. For example, the free supply of energy drinks by a marathon club to its members will constitute a transaction. These arrangements that must be regarded as a transaction include the supply of goods or services in the ordinary course of business to members of a club, trade union, association, society or an incorporated or corporate voluntary association of people for a common purpose.<sup>69</sup>

A solicitation of offers to enter into a franchise agreement also constitutes a "transaction".<sup>70</sup> Furthermore, an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee, a franchise agreement or an agreement supplementary to it, and the supply of goods and services to a franchisee in terms of the franchise agreement also constitute a "transaction" between a supplier and consumer in terms of the Act.<sup>71</sup> The Act applies to these potential franchises or franchise agreements, irrespective of the Section 5(2)(b) exclusion that states that the Act does not apply to transactions in which the consumer is a juristic person whose asset value or annual turnover equals or exceeds a threshold value to be determined by the Minister.<sup>72</sup> Therefore, the Act applies to the above-mentioned franchise transactions irrespective of whether the size of the consumer juristic person falls outside the determined threshold. The reason that the Act applies irrespective of the annual turnover or asset value of the franchisees could be because franchise agreements are usually concluded between a larger franchisor

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66 S 1 sv "transaction".

67 S 1 sv "transaction".

68 S 1 sv "consideration".

69 S 5(6)(a).

70 S 5(6)(b).

71 S 5(6)(c)–(e).

72 S 5(7). See 2.7 in the article on the threshold determination.

and a smaller juristic person established by an individual or by a few individual consumers (as the franchisee).

Furthermore, the Act applies to "transactions" in terms of Section 5, irrespective of whether the supplier resides or has its principal office outside South Africa, or irrespective of the supplier's nature<sup>73</sup> or the fact that a licence is required to supply the products or services or part thereof to the public.<sup>74</sup> The effect is therefore that the Act also applies to foreign franchisors and suppliers of goods and services in terms of every transaction occurring within South Africa, even if the supplier or franchisor has no principal office or residence within South Africa. This could result in enforcement, jurisdictional and choice of law issues. For example, it would be difficult to enforce a consumer's remedies in terms of the Act against a franchisor residing outside the borders of South Africa.

The second important definition is that of a "consumer".<sup>75</sup> A "consumer" is any person<sup>76</sup> to whom goods or services are marketed or supplied in the ordinary course of a supplier's business, unless the transaction is exempted from the application of the Act by Sections 5(2) or 5(3).<sup>77</sup> Furthermore, a user, a recipient or beneficiary of a product or service is a consumer, even if the person was not a party to the transaction for the purposes of the supply of the goods or service. This would, for example, be in a case in which a person receives a gift from another consumer. The receiver of the gift will then also be regarded as a consumer.<sup>78</sup> A franchisee in terms of a franchise agreement is also a consumer to the extent provided for in Section 5(6).<sup>79</sup> Although a juristic person can be a "consumer" in terms of the Act, the Act will not always protect a consumer-juristic person because the Act does not apply to

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73 S 5(8)(c). The supplier can be an individual, juristic person, partnership, trust, organ of state, an entity directed or owned by an organ of state or a public-private partnership. Although the State is not protected as a consumer under the Act (see S 5(2)(a)), it can still be a supplier.

74 S 5(8)(a)–(d).

75 S 1 sv "consumer".

76 In terms of the definition of a "person" in S 1, a juristic person is included.

77 See the exemptions in 2.5 of the article.

78 However, it is not clear whether a recipient or beneficiary would have *locus standi* in terms of S 4(1)(a) to ensure realisation of his/her consumer rights.

79 See the discussion on S 5(6) in 2.8 in the article.

transactions in which the consumer is a juristic person whose asset value or annual turnover equals or exceeds a threshold value to be determined by the Minister.<sup>80</sup>

The third important definition is that of "goods".<sup>81</sup> The definition contains the word "includes". The effect of the word "includes" is possibly that the definition is not limited only to the specific items listed in the definition.<sup>82</sup> "Goods" include anything marketed for human consumption, any tangible objects, literature, music, photographs, motion pictures, games, information, data, software, codes or other intangible products written on any medium, licences to use such intangible objects, legal interests in land or other immovable property, gas, water and electricity. Bread, compact discs, electronic appliances and books, for example, qualify as goods.

The fourth important definition is that of "service".<sup>83</sup> "Service" includes, but is not limited to, work performed by a person for the direct or indirect benefit of another; the provision of education, information, advice or consultation;<sup>84</sup> banking or similar financial services;<sup>85</sup> transportation of goods or an individual; accommodation; entertainment or access to entertainment; access to electronic communication infrastructure;<sup>86</sup> access or a right of access to an event, premises, activity or facility; or access to or use of property in terms of a "rental".<sup>87</sup> "Service" also includes the right of occupancy of, or power or privilege over, land or immovable property, and the rights of a franchisee in terms of a franchise agreement to the extent provided for in Section 5(6). Banks, advice or intermediary services subject to regulation in terms of the FAIS Act are excluded from the application of the Act, but the Act will, *inter alia*, apply to marketing of financial services.<sup>88</sup> Any service<sup>89</sup> that is regulated by the *Short-term Insurance Act* or the *Long-term Insurance Act* is excluded from service for the purposes of the Act.<sup>90</sup> The exclusion of services regulated by the Insurance

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80 S 5(2)(b). See 2.7 in the article on the threshold determination.

81 S 1 sv "goods".

82 The definition of "service", however, unlike that of "goods", expressly contains the words "includes, but is not limited thereto". See S 2(7) on the interpretation of "includes".

83 S 1 sv "service".

84 This could include medical advice.

85 See 2.5 in the article on the application of the Act and the exclusion of some services.

86 Such as access to cellular network coverage.

87 S 1 sv "rental".

88 Again, see 2.5 in the article on the application of the Act and the exclusion of some services.

89 S 1 sv "service".

90 See the discussion on the application of these Acts in 2.5 in the article.

Acts is subject to the condition that they should be aligned with the consumer protection measures provided for in the *Consumer Protection Act* within eighteen months from the commencement of the Act.<sup>91</sup> Should the legislature fail to align these Acts with the measures in the *Consumer Protection Act* within the prescribed time, the *Consumer Protection Act* will apply to these services.<sup>92</sup>

In order to determine the field of application of the Act, it is further necessary to analyse the definition of "supplier".<sup>93</sup> A "supplier" is any person<sup>94</sup> who markets goods or services. To market means to "supply" or "promote"<sup>95</sup> goods or services.<sup>96</sup> In terms of Section 1, "promote" means to advertise, display or offer to supply services or goods in the ordinary course of business for consideration. It also means to make any representation in the ordinary course of business that could be inferred as expressing willingness to supply services or goods for consideration or engagement in any other conduct in the ordinary course of business that could reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction. "Supply"<sup>97</sup> in relation to goods includes<sup>98</sup> to sell, rent, exchange and hire in the ordinary course of business for consideration,<sup>99</sup> and in relation to services, it means to sell services, to perform or to cause services to be performed or provided, and to grant access to premises, events, activities or facilities in the ordinary course of business for consideration. The words "to grant access to" possibly also refer to so-called agents or third parties selling, for example, tickets for entertainment shows and tours. These definitions of "supply" and "supplier" are wide, and the Act will therefore affect a very wide range of suppliers of goods and services.

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91 In other words, the insurance industry must align insurance legislation with the consumer protection measures in the Act before 24 April 2012, failing which the Act will apply.

92 Item 10 of Schedule 2.

93 S 1 sv "supplier". Whether an innocent consumer would still be protected in terms of the Act should the supplier's acts be unlawful or illegal (other than in terms of the Act) is not clear from the definition of "supplier". However, in terms of S 44(1)(a)–(b), a consumer has a right to assume that a supplier is entitled to sell or lease goods. Furthermore, in terms of S 44(2), if a transaction between a consumer and a supplier infringes a right or claim of a third party pertaining to these goods, the supplier is liable to the third party. See 3.6.5 in the article on a consumer's right to assume that a supplier is entitled to sell and lease goods.

94 S 1 sv "juristic person".

95 Also see Stassen *De Rebus* 42–43.

96 S 1 sv "market".

97 S 1 sv "supply".

98 In cases in which goods are supplied, the definition of "supply" is not limited to the instances listed in the definition, due to the use of the word "includes". To the contrary, the definition of "supply" in relation to services is limited.

99 S 1 sv "consideration".

## 2.7 **Threshold determination**<sup>100</sup>

Save for the transactions relating to franchise agreements as contemplated in Section 5(6)(b)–(e),<sup>101</sup> the Act does not apply to transactions in which the consumer is a juristic person whose asset value or annual turnover equals or exceeds the monetary threshold value determined the Minister.<sup>102</sup> The Minister, by notice in the *Government Gazette*, must determine the threshold by the "early effective date"<sup>103</sup> (namely 24 April 2010).<sup>104</sup> This so-called "initial threshold" takes effect on the "general effective date"<sup>105</sup> (namely 24 October 2010).<sup>106</sup> The Minister must determine subsequent monetary thresholds at intervals of a maximum five years.<sup>107</sup> Each subsequent interval will take effect six months after the date on which it is published in the *Government Gazette*.<sup>108</sup>

## 2.8 **Franchise requirements**<sup>109</sup>

The Act specifically regulates franchise agreements<sup>110</sup> (which are excluded from the definition of "consumer agreements").<sup>111</sup> It provides that a franchise agreement must comply with the following requirements:<sup>112</sup>

- (a) it must be in writing and signed by or on behalf of the franchisee;<sup>113</sup>

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100 S 6.

101 Ss 5(2) and 5(7).

102 See the discussion on the application of the Act in 2.5 in the article.

103 S 6(1).

104 Item 1(1) of Schedule 2 sv "early effective date"; and also see item 2(1) of Schedule 2. The "early effective date" refers to the date that is one year after the date on which the Act was signed by the President.

105 S 6(2).

106 Item 1(1) of Schedule 2 sv "general effective date"; and also see item 2(2) of Schedule 2. The "general effective date" refers to the date that is eighteen months after the date on which the Act was signed by the President.

107 S 6(1).

108 S 6(2).

109 S 7.

110 A "transaction" under the Act includes a franchise agreement. See S 1 sv "franchise agreement"; and the discussion of the application of the Act and the definitions in the Act in 2.5–2.6 in the article.

111 S 1 sv "consumer agreement".

112 S 7(1).

113 S 7(1)(a).

- (b) it must include any prescribed information or address any categories of information as prescribed; and<sup>114-115</sup>
- (c) it must comply with the requirements of Section 22 on plain and understandable language.<sup>116</sup>

One of the controversial rights of a franchisee in terms of the Act is that it may cancel a franchise agreement (for any reason) without incurring any cost or penalty within ten business days after signature of the agreement by giving written notice to the franchisor.<sup>117</sup> Such cancellation may have far-reaching implications for the franchise industry in South Africa.<sup>118</sup>

Agreements often include a clause that each party will be responsible for its own legal costs and disbursements incurred in the negotiation, preparation and signature of the agreement. In the event of cancellation by the franchisee in terms of Section 7(2), the franchisor would, for example, not be able to hold the franchisee accountable for its (the franchisor's) own legal costs incurred in negotiating, preparing or signing the agreement, nor for any penalties or spilled costs due to the cancellation of the contract. Would a franchisee be liable to pay its own legal fees if it cancels the agreement in terms of Section 7(2), or would the franchisor be liable for those costs as well? Should the franchisee have appointed, and given instructions to, its own legal advisor, it is the authors' opinion that the franchisee should carry any legal costs so incurred.

Franchisors are well advised to wait ten business days after the signature of the franchise agreement before executing the franchise agreement (and thereby incurring further costs), as no costs or penalties would be recoverable from the franchisee in the event of cancellation in terms of Section 7(2). Section 7(2) of the

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114 S 7(1)(b).

115 S 7(3). The Minister may prescribe information to be set out in franchise agreements generally, within specific categories or industries.

116 S 7(1)(c). Also see S 22; and the discussion of S 22 in 3.4.1 in the article.

117 See S 7(2).

118 See Du Preez 2009 *TSAR* 77 for a concise summary of the important concerns raised against the CPA Bill in regard to franchises. The same objections may be raised by the franchise industry against the provisions of the Act dealing with franchises.

Act therefore provides the franchisee with a cooling-off right of ten days after signature of the franchise agreement.

### 3 Fundamental consumer rights: A critical overview and analysis

It is peculiar that the first eight of the umbrella fundamental consumer rights are worded in the positive (namely the right to: equality in the consumer market;<sup>119</sup> privacy;<sup>120</sup> choice;<sup>121</sup> disclosure and information;<sup>122</sup> fair and responsible marketing;<sup>123</sup> fair and honest dealing;<sup>124</sup> fair, just and reasonable terms and conditions;<sup>125</sup> and fair value, good quality and safety),<sup>126</sup> but that the ninth is worded in the negative<sup>127</sup> (namely the supplier's accountability to consumers).<sup>128</sup>

#### 3.1 The right of equality in the consumer market<sup>129</sup>

##### 3.1.1 Protection against discriminatory marketing

Protection against discriminatory marketing is the first consumer right that is provided for under the right of equality in the consumer market. Section 8 of the Act is important in South Africa's new constitutional dispensation, in which the state is committed to the goal of achieving equality.<sup>130</sup> However: "[t]he idea of equality is a difficult and deeply controversial social ideal. At its most basic and abstract the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly".<sup>131</sup>

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119 S 8–10.

120 S 11–12.

121 S 13–21.

122 S 22–28.

123 S 29–39.

124 S 40–47.

125 S 48–52.

126 S 53–61.

127 Some legal experts distinguish between the eight fundamental consumer rights on the one hand and the sections dealing with supplier's accountability to consumers on the other hand. See Dinnie *Financial Mail* 112 where he commented on one of the consumer protection bills.

128 S 62–67.

129 See Chp 2 Part A paras 8–10.

130 S 1(a) of the Constitution. S 8 of the Act is also in accordance with the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000.

131 Currie and De Waal *Bill of Rights Handbook* 230. Also see S 9 of the Constitution on the right to equality.

Section 8 of the Act confirms the right to equality by prohibiting the supplier of goods and services to discriminate unfairly against a person or category of persons in relation to access, priority, supply and pricing, and even in relation to the enforcement of judgment or termination of an agreement.

### 3.1.2 *Reasonable grounds for differential treatment in specific circumstances*

Section 9 of the Act provides for reasonable grounds for differentiation in specific circumstances. A supplier may, for example, refuse to provide access or to supply certain goods, such as tobacco or liquor, to a minor in accordance with public regulations or on the grounds of taking reasonable precautions to protect the health of a minor.<sup>132</sup>

It is further not a contravention of the consumer right of equality to market any goods or services in a way that gives preference to a particular group of consumers if those goods or services are reasonably intended to satisfy a specific need of that group of consumers.<sup>133</sup> The marketing of a combination of vitamins for older persons may, for instance, be targeted at an older segment of the population and would therefore not amount to discriminatory marketing.<sup>134</sup>

### 3.1.3 *Jurisdiction of the equality court*

Section 9 of the Act does not limit the authority of a court to assess the reasonableness of any conduct<sup>135</sup> or to determine the fairness thereof in a transaction.<sup>136</sup> In an alleged breach of the equality provisions, a party may institute proceedings before an equality court<sup>137</sup> or file a complaint with the Commission and, should the complaint appear to be valid, the Commission must refer it to the equality

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132 S 9(1)(a)(i)–(ii).

133 Also see S 9(3) of the Constitution.

134 S 9(3).

135 S 9(4)(a).

136 S 9(4)(b).

137 S 10(1)(a).

court.<sup>138</sup> There is a presumption that any differentiation prohibited by Section 8 of the Act is unfair discrimination unless it is established that the discrimination is fair.<sup>139</sup>

### 3.2 *The consumer's right to privacy*<sup>140</sup>

The right to privacy in terms of the Act eventuates from Section 14 in the Constitution. According to Kirby,<sup>141</sup> "[t]he Act presents the most comprehensive set of consumer rights relating to privacy. Careful consideration must be given to the nature of the interaction between suppliers and consumers to ensure a wide field of application".

The Act entrenches the consumer's right to refuse or accept the advances of direct marketing.<sup>142</sup> "Direct marketing" means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, goods or services to that person in the ordinary course of business. Direct marketing also includes a request for donation of any kind.<sup>143</sup>

Consumers now have a right to restrict unwanted direct marketing.<sup>144</sup> A cooling-off period for contracts concluded as a result of direct marketing has also been introduced.<sup>145</sup> Consumers may now terminate transactions resulting from direct marketing without reason or penalty.<sup>146</sup> The consumer may cancel an agreement within five business days after the date on which he/she concluded the agreement or on which he/she received the goods, whichever date is the latest. The agreement may be cancelled by written notice of cancellation to the supplier or in any other recorded form, such as by way of an e-mail. In terms of Section 16(1), this cooling-

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138 S 10(1)(b).

139 S 10(2)(a).

140 Chp 2 Part B para 11.

141 Kirby 2009 *Without Prejudice* 28.

142 S 11(1)(a).

143 S 1 sv "direct marketing".

144 S 11(1).

145 S 16(3). Also see 3.5.4 in the article, in which this cooling-off right is discussed and further see 3.3.6 in the article on the consumer's right to return goods.

146 S 16(3)(a)–(b). Also see 3.5.4 in the article on direct marketing and the cooling-off right.

off period does not apply to a transaction to which Section 44 of *the Electronic Communications and Transactions Act*<sup>147</sup> applies.

The right to privacy includes the right to refuse to accept any communication for the purpose of direct marketing and includes the right to require another person to discontinue unwanted direct marketing.<sup>148</sup> A consumer may also, in advance, block any communication primarily for the purposes of direct marketing, other than communication in person.<sup>149</sup> A consumer, for example, has a right to block the receipt of flyers or brochures in his/her letterbox or unsolicited phone calls pre-emptively. The Commission may establish a registry in which a consumer may register such a pre-emptive block.<sup>150</sup>

Direct marketers have to consult the registry, and should the consumer's name appear in the register, they may not address any direct marketing to that consumer, within the range of the block.<sup>151</sup> No person may charge a consumer a fee for demanding a supplier refrain from initiating any further direct marketing or for registering a pre-emptive block.<sup>152</sup> This places a heavy burden on suppliers who make use of direct marketing. It entails extra costs to prevent the infringement of a consumer's right to privacy where he/she has registered pre-emptive blocks or has demanded not to receive further direct marketing.

The Act also provides for a prohibited period during which direct marketers may not contact a consumer at home for promotions, unless the consumer has requested or agreed to the contrary. The Minister may prescribe these periods by notice in the *Government Gazette*.<sup>153</sup> Section 12 relates to direct marketing to a consumer at home. "At home" is not defined in the Act, and the question arises whether it will apply to direct marketing over a cell phone. Should direct marketing be conducted by a cell phone, it will be difficult to prove that the consumer is indeed at home or

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147 25 of 2002 (hereafter the ECTA).

148 S 11(1)(a)–(b).

149 S 11(1)(c).

150 S 11(3).

151 S 11(4).

152 Ss 11(2) and 11(5).

153 S 12(1)–(2).

elsewhere. However, this provision should be interpreted to the benefit of the consumer, keeping in mind the purpose of the Act.<sup>154</sup>

### 3.3 ***The consumer's right to choose***<sup>155</sup>

#### 3.3.1 *Consumer's right to select suppliers*

In terms of Section 13(1), a supplier may not group or bundle goods by requiring, as a condition of entering into an agreement, that the consumer must buy other goods or services from that supplier,<sup>156</sup> or enter into an additional agreement or transaction with the same supplier or designated third party,<sup>157</sup> or agree to purchase any specific goods from a third party.<sup>158</sup> Bundling, for example, refers to a case in which a pair of shoes is offered for sale together with a pair of socks and in which the supplier requires the consumer to buy them in combination. Bundling is not entirely prohibited by the Act, but is merely regulated.

For bundling to be allowed, the supplier must prove that:<sup>159</sup>

- (a) the convenience of the bundling outweighs the limitation on the freedom of choice;<sup>160</sup> or
- (b) the bundling is to the economic benefit of the consumer;<sup>161</sup> or
- (c) the supplier also offers these bundled goods separately and at individual prices.<sup>162</sup>

#### 3.3.2 *Expiry and renewal of fixed-term agreements*

Section 14 regulates the expiry and renewal of fixed-term agreements, but it is not applicable to transactions between juristic persons, regardless of their annual

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154 See 2.2 in the article.

155 Chp 2 Part C par 13.

156 S 13(1)(a).

157 S 13(1)(b).

158 S 13(1)(c).

159 S 13(1)(i)–(iii). These provisos in S 13(1)(i)–(iii) are in the alternative.

160 S 13(1)(i).

161 S 13(1)(ii).

162 S 13(1)(iii).

turnover or asset value.<sup>163</sup> Fixed-term agreements may not exceed the maximum period prescribed by the Minister for the different categories of consumer agreements.<sup>164</sup> Section 14 has an enormous impact on a large number of entities that use fixed-term agreements, such as gym membership or cell phone contracts. These contracts have to be redrafted to align them with this section.

In terms of this section, a consumer may cancel a fixed-term agreement on the expiry of its fixed term without penalty or charge.<sup>165</sup> However, the consumer will still be liable for any amount owed in terms of the agreement up to the date of cancellation.<sup>166</sup> Alternatively, a consumer may cancel a fixed-term agreement before the expiry date of its fixed term by giving twenty business days' notice. This notice must be given in writing or in any other recorded manner.<sup>167</sup> Again, the consumer will be liable for any amount owed in terms of the agreement up to the date of cancellation and in addition the supplier may impose a reasonable cancellation penalty.<sup>168</sup> Cancellation clauses in fixed-term agreements that require a longer cancellation period than 20 days will no longer be enforceable. This provision is therefore to the benefit of the consumer. However, the supplier is also protected by the Act as it may cancel a fixed-term agreement by twenty business days' written notice in the event of material failure by the consumer, unless the consumer has remedied his/her failure.<sup>169</sup>

A supplier must notify the consumer not more than eighty days or less than forty days before the expiry date, of the impending expiry date of a fixed-term agreement. The notice must be in writing or in any other recordable form.<sup>170</sup> The Act makes provision for the automatic renewal of a fixed-term agreement. After a fixed-term contract has expired, the agreement will automatically continue on a monthly

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163 S 14(1).

164 S 14(2)(a). See S 14(4) on the Minister's notice in the *Government Gazette*.

165 S 14(2)(b)(i)(aa).

166 S 14(3)(a).

167 S 14(2)(b)(i)(bb). It is uncertain whether recorded notice includes recorded telephone conversations.

168 S 14(3)(a)–(b). The supplier must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation. Also see S 14(4)(c) on the reasonableness of credits and charges as to be prescribed by the Minister.

169 S 14(2)(b)(ii).

170 S 14(2)(c).

basis,<sup>171</sup> unless the consumer expressly terminated the agreement on the expiry date or agreed to the renewal of the agreement for a further fixed term.<sup>172</sup>

### 3.3.3 *Pre-authorisation of repair or maintenance services*

A further protective mechanism introduced by Section 15 deals with the pre-authorisation of repair or maintenance services. This is to counteract the practice that existed of repair or maintenance work being done without the prior approval of an estimate by a consumer. The supplier then sometimes kept the goods in his, her or its possession until the repairs or services were fully paid for.

Section 15 applies to transactions or agreements with a price value above the threshold prescribed by the Minister.<sup>173</sup> It is applicable to maintenance and repair services in a case in which the provider takes possession of the property or in which the consumer has asked for a quote before the services are to be performed or goods are to be supplied.<sup>174</sup>

A service provider may not charge a consumer for the supply of goods or services unless a quote that satisfies the prescribed requirements has been provided and the consumer has authorised the work.<sup>175</sup> The supplier may further charge a consumer for the goods or services should an offer of an estimate have been declined (note that this implies that the supplier must have offered an estimate to a consumer) and the consumer authorised the work or should the consumer have pre-authorised the charges up to a specific amount.<sup>176</sup> The fee charged may not exceed the maximum pre-authorised amount or estimate, unless the consumer consented thereto. A service provider may not charge a consumer for preparing an estimate, unless it disclosed the price for preparing that estimate beforehand and the consumer approved it.<sup>177</sup>

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171 S 14(2)(d).

172 S 14(2)(d)(i)–(ii).

173 S 15(1)(a).

174 S 15(1)(b)(i)–(ii).

175 S 15(2)(a).

176 S 15(2)(b)(i)–(ii) and S 14(4)(a)–(b).

177 S 15(3). Also see S 15(3)(a)–(b).

### 3.3.4 *Consumer's right to cancel advance reservation, booking or order*

Section 17 regulates the right to cancel advance reservations, bookings or orders. It does not apply to a franchise agreement or special-order goods.<sup>178</sup> Therefore, if a consumer orders custom-made goods, the consumer will not be able to cancel the order in terms of Section 17.

In terms of the Act, the consumer will not necessarily forfeit the full amount or deposit paid for an advance booking, but the supplier may impose a reasonable cancellation fee. Cancellation charges may not exceed a fair amount in the circumstances.<sup>179</sup> Section 17(4)(a)–(d) lists the factors to be taken into account in determining whether a cancellation charge is reasonable. It may be inferred that suppliers are prohibited from advertising or selling a product at a lower price, with the provision that no refund will be given upon cancellation. This section may also impact on advocates, attorneys and doctors. It will, for example, influence an advocate's full day fees if a matter is settled before or during the trial.

Consumers enjoy further protection in so far as no cancellation fee may be charged in a case in which a consumer is unable to honour the agreement on account of hospitalisation or death of the person for whom or for whose benefit the booking was made.<sup>180</sup>

### 3.3.5 *Consumer's right in respect of delivery of goods or supply of services*

Section 19 provides for the rights that a consumer enjoys in respect of the delivery of goods or supplying of services. Section 19 does not apply to goods or services ensuing from a franchise agreement, or in a case in which the performance of that transaction is governed by Section 46 of the ECTA.<sup>181</sup>

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<sup>178</sup> "Special-order goods" are defined in S 1 as "goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the consumer's requirement".

<sup>179</sup> S 17(3)(b).

<sup>180</sup> S 17(5).

<sup>181</sup> S 19(1)(a)–(b).

The place and time of the delivery and the risk involved in respect thereof are regulated by this section. Unless agreed to the contrary, it is an implied condition of an agreement that the supplier must deliver the goods on the agreed date and time, or otherwise, within a reasonable time at the agreed place of delivery and at the cost of the supplier.<sup>182</sup> In the alternative, the agreed place of delivery is the supplier's place of business and by the lack of such an address, the supplier's residence.<sup>183</sup> The Act expressly states that "... it is an implied condition ... that the supplier is responsible to deliver ... on the *agreed* date ... time ... place".<sup>184</sup> It is uncertain why the Act refers to *implied terms* because such terms do not relate to terms expressly agreed upon.

In terms of Section 19(2)(c), risk will only pass to the consumer upon acceptance of delivery by the latter, unless the parties agreed to the contrary. Since risk will generally pass to the consumer upon delivery, it is of utmost importance for a supplier to obtain proof of the time and place of delivery, for example, an acknowledgement of receipt will be sufficient proof. The consumer is regarded to have accepted delivery of the goods in the circumstances as set out in Section 19(4) and must allow the consumer a reasonably opportunity to examine the goods.<sup>185</sup>

Should a supplier contravene Section 19 of the Act, a consumer has different remedies, depending on the circumstances of the case:<sup>186</sup>

- (a) should the supplier have tendered delivery at a location, date or time other than as agreed, the consumer may either accept such delivery, require delivery at the agreed location, date and time should that time have not yet passed, or cancel the agreement without penalty and treat any goods or services as unsolicited in accordance with Section 21; or
- (b) should the supplier have delivered a larger quantity of goods than the consumer has agreed to buy, the consumer may either reject the whole delivery, or accept delivery of the goods and pay for the agreed

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<sup>182</sup> S 19(2)(a)(i)–(iii).

<sup>183</sup> S 19(2)(b).

<sup>184</sup> Emphasis added.

<sup>185</sup> Ss 19(4)(a)–(b)(ii) and 19(5).

<sup>186</sup> S 19(6)–(8). Also see 3.3.7 in the article.

quantity at the agreed rate, but treat the excess as unsolicited goods in accordance with Section 21; or

(c) if goods that the consumer has agreed to buy are on delivery mixed with goods of a different description than contemplated in the agreement, the consumer may either reject all of the delivered goods, or accept the delivery of the goods that are in accordance with the agreement and reject the rest.

Owing to the extensive consequences of incorrect delivery under the Act, suppliers are well advised to monitor delivery of goods in future diligently.

### 3.3.6 *Consumer's right to return goods*

Section 20 does not substitute the right that every consumer has in respect of the return of unsafe or defective goods, nor does it substitute any other right that exists between a supplier and consumer to return goods for a refund.<sup>187</sup> It makes provision for an additional right, to the benefit of the consumer, to return goods within ten business days.<sup>188</sup> This includes goods in terms of an agreement arising out of direct marketing, in a case in which the consumer rescinded the agreement during the cooling-off period (which may be returned at the consumer's risk and expense) and goods that the consumer did not have the opportunity to examine before delivery and then rejected delivery; a mixture of goods in a case in which the consumer refused delivery, as well as a case in which goods intended to satisfy a particular purpose were then found to be unsuitable for that particular purpose (the latter three categories of goods may be returned at the supplier's risk and expense).<sup>189</sup> However, certain goods may not be returned under this section. Under Section 20(3), certain goods may not be returned in a case in which, *inter alia*, public health or a public regulation prohibits the return of goods to a supplier once they have been supplied, for example, medicine that has been dispensed to a customer by a pharmacy.

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<sup>187</sup> S 20(1)(a)–(b). Also see 3.8.4 in the article in respect of unsafe or defective goods.

<sup>188</sup> S 20(4).

<sup>189</sup> S 20(2)(a)–(d). Also read Ss 16, 19(5), 19(8) and 55(3) in conjunction with S 20(2).

Upon return of the goods, the supplier must refund the consumer the price paid for the goods, less any amount that he, she or it may charge. Should the goods not have been opened and should they still be in their original packaging, the consumer may not be charged an amount in respect of the goods.<sup>190</sup> In a case in which the original goods were opened but repacked in their original packaging, the supplier may charge a reasonable amount. The amount charged will be for the actual use of the goods or any consumption or depletion of the goods.<sup>191</sup> In addition, the supplier may charge a reasonable amount for restoration costs to make the goods fit for restocking,<sup>192</sup> unless it was necessary for the consumer to open the packaging to determine whether the goods conformed to the description, or whether they were fit for their intended purpose.<sup>193</sup>

### 3.3.7 *Unsolicited goods or services*

A consumer has no obligation to pay for unsolicited goods or service and may retain such goods lawfully. Section 21(1)(a)–(e) lists the circumstances under which goods or services will be regarded as unsolicited, subject to the conditions in Section 21(2).<sup>194</sup> There is some uncertainty regarding these provisions.

In the event of delivery of unsolicited goods or services, the supplier has ten business days to notify the consumer of any incorrect delivery. These goods will only become unsolicited should the supplier then fail to recover the goods within twenty business days after he, she or it has informed the consumer of the incorrect delivery.<sup>195</sup>

In a case in which it is clear that goods were delivered incorrectly (for example, in a case in which the goods were addressed to another person) or in which it is clear to the ordinary consumer under the circumstances that goods were incorrectly delivered, those goods will again not be classified as unsolicited goods

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<sup>190</sup> Ss 20(5) and 20(6)(a).

<sup>191</sup> S 20(6)(b)(i)–(ii).

<sup>192</sup> S 20(6)(c)(ii).

<sup>193</sup> S (20)(6)(c)(ii)(aa)–(bb).

<sup>194</sup> Also see 3.5.4 and 3.5.5 in the article.

<sup>195</sup> S 21(2)(a).

immediately.<sup>196</sup> The goods will only become unsolicited goods after the consumer has informed the supplier of the apparent misdelivery and the supplier has not recovered the goods within twenty business days after being so informed.<sup>197</sup> The Act does not make provision for the manner in which the consumer should notify the supplier. Should the notification not be in writing, the consumer should keep a record of the manner in which he/she notified the supplier as proof thereof. This section does not place a duty on a consumer to inform the supplier of an apparent misdelivery, but makes provision for the instance in which a consumer does inform the supplier of the misdelivery.

The question arises whether the goods will become unsolicited should the consumer not inform the supplier of the misdelivery. A further question arises as to the date at which goods that were delivered purposely to the consumer without being requested will become unsolicited, for example, books sent by book clubs without the consumer's request or prior knowledge (such as goods referred to in terms of Section 21(1)(e)). The prerequisites in Section 20(2) cater for instances in which goods were misdelivered or delivered in error, whereas goods that were delivered purposely to the consumer without being requested are not provided for.

In a case in which a consumer has paid for unsolicited goods or services, the consumer is entitled to be refunded by the supplier, and the refund must include interest from the date that the amount was paid to the supplier.<sup>198</sup>

### **3.4      *The right to disclosure and information*<sup>199</sup>**

#### **3.4.1    *The right to information in plain and understandable language***

A specific right embedded under the umbrella right of information and disclosure is the right to information in plain and understandable language. Agreements should be drafted in a way that enables consumers to make informed choices and to understand the terms of the agreement into which they are entering.

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196 S 21(2)(b)(i)–(ii).

197 S 21(2)(b)(i)–(ii).

198 S 21(9).

199 Chp 2 Part D paras 22–28.

The legislature considers the principle of plain language in a serious light, as it is also required by the *National Credit Act*.<sup>200</sup> Unlike the *National Credit Act*, the *Consumer Protection Act* does not require that information should be provided in one of the official languages. An official language requirement would have placed an enormous burden on the supplier. The requirement of plain and understandable language may provide sufficient protection to the consumer.<sup>201</sup>

It is uncertain what the position will be in respect of foreigners in South Africa with permanent residence status, should they only speak a foreign language. How would the requirements of plain and understandable language be complied with? This matter might be addressed in the regulations to the Act.

Any notice, document or visual representation that is required in terms of the Act or any other law should be in the form prescribed in the Act. If no form is prescribed, it must be in plain language.<sup>202</sup> Plain language is language that enables an ordinary consumer (for whom a notice, document or representation is intended), with average literacy skills and minimal experience as a consumer, to understand the contents without undue effort.<sup>203</sup>

Section 22 applies to all consumers. Whether dealing with consumers who are more educated or consumers with no education, the document or representation must be in plain language. However, to determine whether a document is in plain language, the class of persons for whom a document is intended is considered.

In order to further determine whether a document or representation is in plain and understandable language, the following factors may be taken into account:

- (a) the context, comprehensiveness and consistency of the document or representation;<sup>204</sup>

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200 S 64.

201 See Du Preez 2009 *TSAR* 76.

202 S 22(1)(a)–(b).

203 S 22(2).

204 S 22(2)(a).

- (b) the manner in which the representation is done or the style of the document;<sup>205</sup>
- (c) the manner in which the sentences are structured and the types of words used in the document; and<sup>206</sup>
- (d) the aids used to assist the consumer in the reading and understanding of the document or representation.<sup>207</sup>

Section 22 will compel many suppliers to redraft their contracts to meet the plain language requirements. These requirements are in line with international practice.<sup>208</sup> The Act provides for the Commission to publish guidelines for methods of assessing plain language.<sup>209</sup> Therefore, consumers can look forward to more user-friendly agreements and representations.

### 3.4.2 *Disclosure of price of goods or services*

Section 23 regulates matters regarding the price of goods or services, and does not apply should Section 43 of the ECTA apply to the transaction.<sup>210</sup> Retailers are prohibited from displaying any goods for sale without showing the price of these goods.<sup>211</sup> Section 23(5) lists the manner in which to display a price adequately. Should goods be displayed for the main purpose of advertising or should they be in an area to which the public does not normally have access, the supplier will not be required to display the price,<sup>212</sup> for example, in the display window of a shop or in the dispensary of a pharmacy.

Subject to certain exceptions, a supplier may not demand that a consumer should pay a higher price than the displayed price. Should more than one price be displayed, the lowest price applies.<sup>213</sup> This provision will not apply should the price

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205 S 22(2)(b).

206 S 22(2)(c).

207 S 22(2)(d).

208 See Moosajee *Financial Mail* 113.

209 S 22(3).

210 S 23(1)(b).

211 S 23(3).

212 S 23(4).

213 S 23(6)(a)–(b). This section is subject to Ss 23(7)–23(10).

have been determined by public regulation,<sup>214</sup> should the first price have been fully concealed by a second price,<sup>215</sup> should the supplier have corrected an obvious error and taken reasonable steps to inform consumers,<sup>216</sup> and, lastly, should an unauthorised person have removed or altered the price.<sup>217</sup> It is uncertain whether the instance in which a consumer (ie an unauthorised person) moves bar-coded goods to another shelf where a lower price has been displayed falls under any of these exemptions. It appears that Section 23(6) will apply to such an instance.

The shelf price of goods advertised at a discount is deemed to include the discount, unless the discounted price and original prices are recorded next to the goods.<sup>218</sup>

### 3.4.3 *Product labelling and trade description*

Section 24 protects the consumer against any misleading trade descriptions or trade descriptions that have been tampered with. No person may apply a trade description knowing that it is likely to mislead the consumer, or tamper with a trade description in a manner that might mislead a consumer.<sup>219</sup> A "trade description" is defined in the Act.<sup>220</sup> Goods, such as medicines already have labels. They would have to be scrutinised for any potential misleading information, such as "Lose ten kg in four weeks" and "Anti-ageing effects guaranteed".

The Minister may prescribe categories of goods that must have a trade description applied to them,<sup>221</sup> or rules to be used in accordance with any international agreement for the purpose of determining the country of origin of the goods.<sup>222</sup> A producer, importer, packager or supplier must disclose genetically modified ingredients or components.<sup>223</sup> This duty has a wide field of application because it

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214 S 23(7). S 23(6), eg, does not apply to the price of petrol, which is determined by public regulation.

215 S 23(8).

216 S 23(9).

217 S 23(10).

218 S 23(11).

219 S 24(2)(a)–(b).

220 S 1 sv "trade description". Trade description excludes trademarks, but, eg, include a statement as to the ingredients of which any goods consist.

221 S 24(4)(a).

222 S 24(4)(b).

223 S 24(6).

also applies to a packager, who might not be aware of such ingredients or components.

#### 3.4.4 *Disclosure or reconditioned and grey-market goods*

In terms of Section 25, a person offering or supplying goods, bearing the trademark of the original producer or supplier, and that have been re-built, re-conditioned or remade, must apply a notice to those goods stating that they have been so altered. A person who markets grey-market goods (namely goods imported without the approval or licence of the registered trademark owner) must apply a conspicuous notice to those goods in the prescribed manner and form.

#### 3.4.5 *Sales records*

Section 26 provides that a written record of each transaction must be given to the consumer.<sup>224</sup> The Act further provides for the type of information that should be included in the written record, for example, the supplier's full name or registered business name and VAT registration number.<sup>225</sup> Section 26 does not apply should Section 43 of the ECTA apply to the transaction.<sup>226</sup> The Minister may also exempt suppliers of certain goods or services from this obligation by a notice in the *Government Gazette*.<sup>227</sup>

#### 3.4.6 *Identification of deliverers and installers*

In terms of Section 28, should a person be engaged in direct marketing at the premises of a consumer while performing services, delivering or installing goods, that person must visibly wear an identification device such as a badge to provide suitable identification when the consumer requests so.

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224 S 26(2).

225 See S 26(3)(a)–(i) for other information that should be in the written record.

226 S 26(1)(a).

227 S 26(4).

### 3.5 *The right to fair and responsible marketing*<sup>228</sup>

The aim of this right is, *inter alia*, to create fair business practices in respect of advertising and selling. One of the most important business practices is to be truthful in advertising and selling. Creating fair business practices in this regard will ensure that real competition between suppliers is made possible, which in turn leads to lower prices and better products. It will also lead to greater trust by consumers and better relationships between consumers and suppliers in the supply of goods and services.<sup>229</sup>

As stated *supra*, the Act excludes credit agreements in terms of the *National Credit Act* from its ambit,<sup>230</sup> but does not expressly exclude credit marketing. Therefore, the *National Credit Act* and the *Consumer Protection Act* should apply to credit advertisements and marketing of credit. This leads to a duplication of a regulatory scheme and one could accept that the National Credit Regulator could apply for the credit industry to be exempted from the marketing provisions of the *Consumer Protection Act* in terms of Section 5(3).

However, it is reiterated that should there be any inconsistency between any provisions of the *Consumer Protection Act* and any other act, the provisions of both acts apply concurrently to the extent that it is possible. If it is not possible to apply the provisions of the Act concurrently, the provision that extends the greater protection to consumers must prevail.<sup>231</sup>

#### 3.5.1 *General standards for marketing of goods or services*

In general, a producer's, importer's, distributor's, retailer's or service provider's marketing of any goods or service may not be misleading, fraudulent or deceptive.<sup>232</sup>

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228 Chp 2 Part E paras 29–39.

229 GN 1957 in GG 26774 of 9 September 2004 para 25.

230 S 5(2)(d).

231 S 29.

232 S 29(b).

The marketing of services or goods must not be misleading, fraudulent or deceptive in any way, including in respect of the following:

- (a) the nature, properties, advantages or uses of the services or goods;
- (b) the conditions or manner in which the services or goods may be supplied;
- (c) the price of goods,<sup>233</sup> the existence of a relationship of the price to a previous price or a competitor's price for the same or comparable goods or services;<sup>234</sup>
- (d) the sponsoring of an event; or
- (e) any other material aspect of the services or goods.<sup>235</sup>

A producer, importer, distributor, retailer or service provider may also not market any goods or service in a manner that is reasonably likely to imply a misleading or false representation concerning the goods or service as contemplated in Section 41.<sup>236</sup> Section 41 prohibits false, misleading or deceptive representations to a consumer, either by direct or indirect, expressly or implied representation of material facts to a consumer,<sup>237</sup> by the use of exaggeration, innuendo or ambiguity as to a material fact or failure to disclose facts that will amount to deception,<sup>238</sup> or by failure to correct a misapprehension.<sup>239</sup> Praising by a supplier of goods or services, sales talk or so-

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233 S 29(b)(iii) provides that a supplier "must not market any goods or services in manner that is misleading, fraudulent or deceptive ... including in respect of (iii) *the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or service*". Emphasis added. The word "services" is omitted from the part of this provision that refers to price. However, this prohibition will prohibit, for example, suppliers or retailers from, amongst others, comparing in a fraudulent, deceptive or misleading manner the current price of goods or services with previous prices.

234 Therefore, for example, the practice of advertising a fifty per cent discount on certain products would be prohibited if the discount is not fifty per cent when compared with the previous price of that product.

235 S 29(b)(i)–(v).

236 S 29(a).

237 S 41(1)(a).

238 S 41(1)(b).

239 S 41(1)(c). Also see S 41(3)(a)–(k) for specific prohibitions of false, misleading or deceptive representations or failures to correct misapprehensions on the part of consumers regarding goods, services, the status of a supplier, land or other immovable property, maintenance, repair facilities, parts, prices, charges, terms of agreements, solicitations and benefits. Also see S 51 regarding prohibited transactions, agreements, terms or conditions. S 51 applies to court proceedings in terms of S 41. The court in terms of S 52 has the power to ensure fair and just terms and conditions. See S 53 for the powers of a court.

called "puffing" has no binding effect,<sup>240</sup> but it could be affected or even prohibited by this provision. An example of puffing would be an advertisement stating: "You will lose ten kilograms in four weeks. Guaranteed results!". However, a representation that goods are new or unused in terms of Section 41(3)(b)(iii) will not be false, misleading or deceptive in a case in which the goods have been used only by or on behalf of the producer, importer, distributor or retailer for the purposes of reasonable testing, service, preparation or for delivery.<sup>241</sup> This exclusion covers, for example, the situation in which a car retailer imports cars and sells the cars in Gauteng, and then has to drive the cars from a harbour to Gauteng in order to deliver the cars. Furthermore, the Act regulates specific types of marketing, such as bait, direct or catalogue marketing, trade coupons, customer loyalty programmes, alternative work schemes and referral selling.<sup>242</sup>

### 3.5.2 *Bait marketing*

Bait marketing is marketing or advertisements aimed at luring or persuading consumers to go to a specific place or shop to buy something other than the goods or services that were advertised or marketed. The Act prohibits suppliers from advertising goods or services as being available at a specific price and manner that will mislead or deceive in relation to the actual availability of those goods and services.<sup>243</sup> Should a supplier have expressly stated in an advertisement that a limited amount of goods or services would be available at a specific price, those goods or services must be made available to the extent of the expressed limits.<sup>244</sup> It will not be bait marketing should a supplier have offered to procure another person to supply a consumer with the same or similar goods or services of the kind advertised within a reasonable time and quantity, and the consumer unreasonably failed to accept the offer.<sup>245</sup> The bait marketing prohibition therefore ensures availability of advertised goods or services, and it prevents consumers from being induced by false

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240 See Christie *Law of Contract* 155, 158, 273–274, in which it is indicated that puffing has no legal effect, but that it is difficult to draw the line between mere puffing and misrepresentation. Also see Van der Merwe *et al* *Contract* 112.

241 S 40(4).

242 See 3.5.2–3.5.10 in the article.

243 S 30(1).

244 S 30(2).

245 S 30(3). These exclusions also, with the necessary changes, apply to trade coupons and similar promotions and customer loyalty programmes.

advertisements to go to a supplier, while the supplier had no intention to sell the advertised goods or services but merely to persuade consumers to go to a specific shop. This provision does not compel a supplier to state a specified limited quantity, time and price in an advertisement, but he, she or it cannot advertise goods or services in a manner that may result in consumers being misled in respect to the actual availability at the advertised price.<sup>246</sup> In effect, the supplier must therefore, after advertising goods or services, have a sufficient quantity of those goods or services available in order to satisfy the demand.

### 3.5.3 *Negative option marketing*

Negative option marketing is the promotion of goods or services to consumers on the basis that an agreement automatically comes into existence unless the consumer declines an inducement or offer. The Act prohibits negative option marketing, and, therefore, agreements entered into as a result of negative option marketing are void.<sup>247</sup> A typical example of this would be a case in which a supplier sends a book *via* post to a consumer when the consumer did not request this action, and an agreement then automatically comes into existence unless the consumer declines the offer by returning the book. A modification of an agreement agreed to as result of negative option marketing is also void.<sup>248</sup> Would that apply, for example, to a situation in which a consumer, in terms of an agreement, places a limit on his/her monthly cell phone costs and the cell phone provider then automatically increases the limit or cap placed on the monthly costs should the consumer does not respond to the offer? It appears that this could be a modification of an agreement as a result of negative option marketing.

### 3.5.4 *Direct marketing to consumers*

Direct marketing is marketing in a case in which a person is approached in person, by mail or by electronic communication for the purpose of promoting or offering to supply goods or services or requesting a person to make a donation of any kind for

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246 S 30(1).

247 Ss 31(1) and 31(2).

248 S 31(3).

any reason.<sup>249</sup> Direct marketing is regulated by the Act. The Act provides that should a person (not only a supplier) directly market goods or services and as a result conclude an agreement or enter into a transaction, the person then has a duty to, in the prescribed form and manner, inform the consumer of his/her cooling-off right in terms of the Act.<sup>250</sup>

The cooling-off right provides that after a transaction or agreement has been concluded or after goods subject to a transaction have been delivered as a result of direct marketing, a consumer has five business days after the latest date to, by written or any recorded notice, rescind the transaction, without reason or penalty.<sup>251</sup> This cooling-off right therefore applies to a "transaction" that resulted from direct marketing, but also to donations. The enforcement of the cooling-off right in respect of donations can be problematic in practice, especially in a case in which the person asking for donations is not known to the consumer. Furthermore, the supplier must then, within fifteen business days after receiving notice of the rescission (should no goods have been delivered to the consumer) or after receiving the goods from the consumer, return payment received to the consumer.<sup>252</sup> It is uncertain whether this provision caters for instances in which perishable goods have been purchased as a result of direct marketing.

Should a direct marketer have left goods with a consumer without requiring or arranging payment for it, those goods are unsolicited goods and the consumer then has no obligation to pay for those goods.<sup>253</sup> The cooling-off period does not apply to a transaction should the Section 44 cooling-off right in terms of the ECTA<sup>254</sup> apply to that transaction.<sup>255</sup>

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249 S 1 sv "direct marketing".

250 S 32(1).

251 S 16(3).

252 S 16(4). In terms of S 16(4)(b), no payment can be collected for a rescinded transaction, except as permitted in S 20(6).

253 Ss 21 and 32(2).

254 Also see 3.3.7 in the article.

255 S 16(1).

### 3.5.5 *Catalogue marketing*

Catalogue marketing refers to an agreement for the supply of goods or services that is not entered into in person, and includes agreements concluded telephonically or by postal order or fax or in any similar manner in which, with respect to goods, a consumer does not have the opportunity to inspect the goods prior to conclusion of an agreement.<sup>256</sup> Prior to entering into an agreement as a result of catalogue marketing, a supplier must disclose certain information to the consumer, having regard to the manner in which the supplier and consumer communicate in concluding the transaction.<sup>257</sup> This information includes the following:

- (a) the supplier's name and licence or registration number, if any;
- (b) the supplier's physical business address and contact details;
- (c) the written sales record of each transaction;<sup>258</sup>
- (d) the currency in which money is payable under the agreement;
- (e) the supplier's delivery arrangements;<sup>259</sup>
- (f) the cancellation, exchange and refund policies of the supplier, if any;
- (g) the manner and form in which complaints may be lodged; and
- (h) any other information.<sup>260</sup>

This provision ensures that the consumer is provided with sufficient information before he/she enters into an agreement as a result of catalogue marketing. It appears that marketing in a case in which a person is approached by post or by electronic communication will sometimes constitute direct and catalogue marketing. The difference can be that, in the case of catalogue marketing, the consumer never had an opportunity to inspect the goods prior to conclusion of an agreement. This provision of the Act will not apply to an electronic transaction should Chapter 7 of the

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256 S 33(2).

257 S 33(3).

258 Required in terms of S 26.

259 In terms of S 33(3)(e), delivery arrangements include the identity of the shipper, mode of transportation and the place of delivery.

260 S 33(3)(a)–(h).

ECTA on consumer protection apply to it,<sup>261</sup> and it also does not apply to franchise agreements.<sup>262</sup>

### 3.5.6 *Trade coupons and similar promotions*

The Act does not contain a definition of "trade coupons". A "promotional offer" is, however, defined as an offer or promise, expressed in any manner, of any prize, reward, gift, free goods or services, price reduction, concession or enhancement of the quality or quantity of goods and services even should the offer be subject to the offeree entering into any other transaction.<sup>263</sup> Accordingly, a person must not make a promotional offer without the intention of fulfilling it or with the intention of fulfilling it in a way other than that offered.<sup>264</sup> Furthermore, a document setting out a promotional offer must set out the nature of the prize, reward, gift, free goods or services, price reduction, concession or enhancement of the quality or quantity of goods or discount or free item being offered.<sup>265</sup> The document must furthermore, *inter alia*, clearly state to which goods or service the promotional offer relates, and the steps required by a consumer to accept the offer or receive the benefits, and the person from whom, the time and the place at which the prize, reward and gift may be received.<sup>266</sup> A sponsor of a promotional offer must also ensure that the supply of the thing offered is sufficient to fulfil anticipated demands resulting from the offer, must not require consumers to accept inferior quality of goods or services than those usually available to other consumers who tender a different form of consideration on the same date, and no monetary charge may be imposed for administration, processing and handling of transactions in respect of which the consumer tenders a trade coupon.<sup>267</sup> The same grounds of justification or exclusions that apply to bait marketing also apply to trade coupons and promotional offers.<sup>268</sup>

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261 S 33(1)(b).

262 S 33(1)(a). It is uncertain whether franchise agreements are excluded from the application of the catalogue marketing provisions.

263 S 34(2). In terms of S 34, S 34(1) does not apply to a franchise agreement, a loyalty programme in terms of S 35 or promotional competitions in terms of S 36.

264 S 34(3).

265 S 34(4)(a).

266 S 34(4)(b)–(d).

267 S 34(5).

268 S 34(6). Also see 3.5.2 in the article.

### 3.5.7 *Customer loyalty programmes*

A "loyalty programme" is any arrangement or scheme in the ordinary course of business in terms of which a supplier or an association of suppliers or any person on behalf of a supplier or association of suppliers grants or offers loyalty awards or credit in connection with an agreement or transaction.<sup>269</sup> A "loyalty credit or award" is any benefit or rights to goods or services accruing to a consumer; or any benefit being granted or points, tokens, devices or any tangible or intangible thing which can be accumulated and which entitles the holder to request or assert a claim for goods, services or benefits in terms of a loyalty programme.<sup>270</sup> Loyalty credits or awards are a legal medium of exchange that can be tendered or offered as consideration for any goods or services offered in terms of a specific loyalty programme.<sup>271</sup> Therefore, a person may exchange loyalty credits or awards for services or goods. It is uncertain whether the loyalty credits or awards could expire, and whether an agreement may make provision for an expiry date.<sup>272</sup> A distinction must be drawn between loyalty credits, awards or vouchers and prepaid vouchers in terms of Section 63.<sup>273</sup> The last-mentioned refer to vouchers obtained in exchange for consideration, or prepaid vouchers. Prepaid vouchers may not expire until the date on which its full value was redeemed or three years after the date on which the voucher was issued.<sup>274</sup>

Furthermore, a person is not allowed to offer participation in a loyalty programme or offer loyalty credits or awards should he/she have no intention to provide it or should he/she have the intention of providing it in a manner other than offered.<sup>275</sup> Before a consumer joins a loyalty programme, the documented offer of the programme must disclose sufficient information to the consumer.<sup>276</sup> The following information must be clearly set out in the offer: the nature of the programme, credit or award, the goods or service the offer relates to, the steps required of the consumer to participate in the programme or to receive the programme's benefits, and any person through whom,

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269 S 1 sv "loyalty programme".

270 S 1 sv "loyalty programme".

271 S 35(1).

272 A provision stating that loyalty credits or awards expire after a certain time could possibly constitute an unfair contract term under S 48.

273 Also see 3.9.2 in the article.

274 S 63(2).

275 S 35(2).

276 S 35(3).

place and time at which the consumer may get access to the programme, credits or awards.<sup>277</sup> The sponsor of a loyalty programme or supplier who is willing to accept loyalty credits or rewards in consideration for goods or services has, *inter alia*, a duty to ensure that goods or services are available in a sufficient quantity in order to meet the anticipated demand as a result of such a programme, that the goods or services are not of an inferior quality, not to charge administration or processing fees, and not to place an obligation on a consumer to purchase any other goods or services.<sup>278</sup> The availability of goods or services under a loyalty programme may only be restricted by a supplier should the programme consumers have received written notice<sup>279</sup> of that restriction at least twenty business days before the restriction begins, and the total period of that restriction must not exceed ninety days per year.<sup>280</sup> The same ground of justification or exclusion that applies to bait marketing and trade coupons and promotional offers applies to loyalty programmes.<sup>281</sup>

### 3.5.8 *Promotional competitions*

A "promotional competition" is any competition, game, scheme, arrangement, system, plan or device distributing a prize by lot or chance, that is conducted in the ordinary course of business,<sup>282</sup> for the purposes of promoting, and in which the prize exceeds the threshold prescribed by the Minister in terms of Section 36(11).<sup>283</sup> The Act prohibits a person from directly or indirectly informing a consumer that he/she has won a competition should no competition have been conducted; that he/she has in fact not won a competition, in which the competition is subject to an undisclosed condition; or in a case in which the consumer is required to offer further consideration for the prize after the competition results had already been announced.<sup>284</sup> The Act further prohibits a person from directly or indirectly informing a consumer that he/she has a right to a prize if the person in fact has no right, should

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277 S 35(3)(a)–(d).

278 See 34(4)(a)–(f) for all the duties.

279 The notice may be given directly or indirectly. An example of an indirect notice could be a notice on the door or walls of the supplier's business. However, an indirect written notice may never come to the attention of a consumer and would therefore, in some cases, serve no purpose.

280 S 35(5). These periods in terms of S 36(10) also apply, with the necessary changes, to promotional competitions. Also see 3.5.8 in the article.

281 S 34(6). See 3.5.2 and 3.5.6 in the article.

282 Once-off promotional competitions will therefore fall outside the application of this provision.

283 S 36(1)(d). S 36(1) also contains the definitions of "participant", "prize" and "promoter".

284 S 36(2)(a).

the prize have been offered to all similarly situated persons or a class of persons, or, should the consumer, before becoming eligible to receive the prize, be required to offer further consideration or to purchase goods or services.<sup>285</sup> It appears that this provision also prohibits a supplier from informing a consumer that he/she has won a competition but has to attend a meeting or visit a specific place to claim his/her prize or to become eligible to receive the prize. Generally, a promoter must not require a consumer to pay any consideration in a promotional competition, except for reasonable costs of posting or transmitting an entry form.<sup>286</sup> Consideration here refers to any consideration paid directly or indirectly for an opportunity in or access to a promotional competition, requiring a consumer to buy goods or services at a higher price than the ordinary price in order to participate in a promotional competition.<sup>287</sup> Therefore, a promotional competition requiring consideration from a consumer in order to participate is prohibited. The Act also prohibits promoters from awarding a prize to certain persons such as directors, members, suppliers or agents of the promoter or the promoted goods or services.<sup>288</sup> In order to ensure transparency, a promoter must, before a competition begins, prepare competition rules and make them available to the Commission and to any participant on request and without cost.<sup>289</sup> A copy of these rules must also be retained for a prescribed period after the end of the competition.<sup>290</sup> In order to ensure sufficient disclosure of information to a consumer, the Act requires that certain minimum information must be disclosed and stated in an offer to participate in a promotional competition.<sup>291</sup> The minimum information includes the basis on which results will be determined and the medium through which the results will be made known. This further prevents promoters from conducting promotional competitions without announcing the winners. These disclosure requirements do not imply that promotional competitions must only be in writing. The information may be disclosed directly on any medium through which

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285 S 36(2)(b).

286 S 36(3)(a). In terms of Ss 36(7) and 36(8), the right to participate in a promotional competition or the right to any benefit should not be deferred or made subject to further conditions by a promoter, such as paying consideration.

287 S 36(4).

288 S 36(3)(b)(ii).

289 S 36(3)(c).

290 S 36(3)(c).

291 S 36(5).

consumers participate or in any accompanying document or in advertisements associated with the competition and published during the time of the competition.<sup>292</sup>

### 3.5.9 *Alternative work schemes*

In general terms, Section 37 prohibits any person from making false representations in respect of the availability, actual or potential profitability, risk or any material aspect of work, business or an activity involved in any arrangement for gain.<sup>293</sup> In terms of this provision, an advertisement, for example, stating "Work from home: R25 000 guaranteed" is prohibited, unless it contains the minimum required information. These arrangements are arrangements in terms of which a person invites, solicits or requires persons to conduct work or business from their homes, represents to others as being practicable to conduct the business or work from their homes, or invites, solicits or requires persons to perform work or business or invest money from their homes.<sup>294</sup> Advertisements promoting these arrangements must be accompanied by a cautionary statement in the prescribed wording and form.<sup>295</sup> The cautionary statement must disclose the uncertainty of the extent of the work, business or activity and the income or benefit to be derived from it.<sup>296</sup> The full name or registered business name of the promoter, as well as the address and contact number of his, her or its primary place of business and the nature of the work, business or activity must be disclosed in the advertisement.<sup>297</sup> A consumer may not be charged fees, except to the extent that the supplier performed the work or business activity, or made or received the contemplated investment.<sup>298</sup> Should a consumer, for example, be offered a business opportunity in which an income of R25 000 per month is guaranteed, no fees may be charged before the consumer in fact received the money.

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292 S 36(6).

293 S 37(1).

294 S 37(1).

295 S 37(2).

296 S 37(2)(a)(i)–(ii).

297 S 37(2)(b).

298 S 37(4). This provision refers to "person" rather than consumer and supplier in order to ensure the wide application of this provision. However, for the sake of convenience and for purposes of explaining this provision, the authors referred to consumer and supplier.

### 3.5.10 *Referral selling*

Referral selling is, for example, a case in which a consumer accepts an offer to buy goods or services on the representation that he/she will receive a benefit if he/she gives the names of other consumers to a supplier or assists the supplier in supplying the goods or services to other consumers and the receipt of the benefit is made subject to a further event occurring after the consumer agreed to the transaction. An example is a case in which a consumer receives a discount on accommodation if he/she supplies the contact details of ten other consumers to the supplier. This type of marketing is prohibited.<sup>299</sup> However, this provision does not prohibit a supplier from obtaining from the consumer the contact details of other consumers, so long as it is not a requirement for receiving the promised rebate, commission or discount. Although a consumer can therefore not be forced to supply the contact details of other consumers, the consumer can voluntarily, on request, provide the information to a supplier. It is uncertain whether this provision has the aim of protecting a consumer's right to privacy. If it is indeed the aim, its execution will be prevented, since this provision in effect allows violation of a consumer's right to privacy. Furthermore, the question may be asked whether a consumer who provides, on request, the contact details of another consumer to a supplier is not violating or enabling the violation of the other consumer's right to privacy.

### 3.5.11 *Agreements with persons lacking legal capacity*

An agreement with, or an agreement to enter into a transaction for the supply of goods or services to or at the direction of a consumer who, subject to a court order, is mentally unfit, is void should the supplier have known or could have reasonably determined that the consumer was subject to such order.<sup>300</sup> One may ask if a consumer then enters into an agreement with a mentally unfit person and the supplier did not know or could not have reasonably determined that a person is subject to such court order, whether the contract would be valid. In terms of the common law, the position is the same in respect of an agreement being void should

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<sup>299</sup> S 38. This section does not apply to franchise agreements.

<sup>300</sup> S 39(1)(a).

one contract party be mentally unfit. However, in terms of the common law, it makes no difference should the supplier have known or not have known of the other person's mental illness, since the requirement of *ratio* or reason is then missing.<sup>301</sup> The agreement is voidable at the option of the consumer should the consumer have been an unemancipated minor at the time the agreement was concluded, in which the agreement was concluded without the consent of an adult responsible for the minor, and in which the agreement was not ratified by the adult or the consumer after being emancipated or becoming an adult.<sup>302</sup> This provision does not apply should the consumer or someone acting on behalf of the consumer, directly or indirectly, by act or by omission, have induced a supplier to believe that the consumer had legal capacity to contract, or have attempted to suppress the fact that the consumer did not have full legal capacity to contract.<sup>303</sup>

### 3.6 ***The right to fair and honest dealing***

One of the aims of the *Consumer Protection Act* is to protect consumers from unconscionable, unfair, unreasonable, unjust or improper trade practices and any deceptive, misleading, unfair or fraudulent conduct.<sup>304</sup> This is done, *inter alia*, by regulating unconscionable conduct, false, misleading or deceptive representations, fraudulent schemes and offers, pyramid schemes, auctions, waivers, deferrals, substitution of goods, and over-selling and over-booking.<sup>305</sup>

#### 3.6.1 *Unconscionable conduct*

Unconscionable conduct in essence means 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>306</sup> Section 40 prohibits the use of physical force against consumers; coercion; undue influence; pressure; duress or harassment; unfair tactics; or any

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301 Christie *Law of Contract* 247.

302 S 39(1)(b). This is also the common law position. See Davel and Jordaan *Law of Persons* 75–90.

303 S 39(2). The common-law position in respect of fraudulent minors is also the same. See Davel and Jordaan *Law of Persons* 75–90 and Christie *Law of Contract* 239–243.

304 S 3(1)(d).

305 Chp 2 Part F.

306 S 1 sv "unconscionable".

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 of or collection of payment for goods or services or recovery of goods from consumers.<sup>307</sup> In terms of common law, duress and undue influence are also prohibited.<sup>308</sup> 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.<sup>309</sup> Section 40 therefore codifies common law, but has a wider ambit. 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 it influences a person's will and leads to improper obtaining of consensus. However, Section 40 of the Act deals not only with consensus obtained by improper means, but also with other improper or unethical conduct in marketing, supply, negotiation, execution, enforcement, and so forth.<sup>310</sup> In effect, Section 40 reinforces the idea that parties to a contract should act in good faith, and that their conduct should not be improper, unconscionable and against the *boni mores*.<sup>311</sup> The Act further expands the ambit of the unconscionable conduct provision by stating that it is also unconscionable for suppliers to knowingly take advantage because a consumer was unable to protect his/her own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement or any similar factor.<sup>312</sup> This provision therefore, in effect, places a heavy burden on suppliers to ensure that consumers understand agreements.

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307 S 40(1); also see S 51.

308 Christie *Law of Contract* 301–311 and Van der Merwe *et al* *Contract* 117–129. See *Broodryk v Smuts* 1942 TPD 47 for an example of duress. Also see *Preller v Jordaan* 1956 1 SA 483 (A).

309 Christie *Law of Contract* 301–311 and Van der Merwe *et al* *Contract* 117–129.

310 In *Plaaslike Boereldienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) para 848, in which the court, for the first time, pointed out that rescission should not be restricted to the three traditional grounds of undue influence, duress and misrepresentation. Also see Van der Merwe *et al* *Contract* 130–135.

311 Van der Merwe *et al* *Contract* 131–135 for a discussion of one general ground for the rescission of agreements.

312 S 40(2).

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

As stated above,<sup>313</sup> 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.<sup>314</sup> A representation 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 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.<sup>315</sup> 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.<sup>316</sup>

### 3.6.3 *Fraudulent schemes and offers*

In essence, Section 42 prohibits any person from directly or indirectly promoting, knowingly joining or participating in a fraudulent currency scheme,<sup>317</sup> a fraudulent financial transaction,<sup>318</sup> fraudulent transfer of property or legal rights<sup>319</sup> or any other scheme declared fraudulent by the Minister in terms of Section 42(8).<sup>320</sup> The authors are familiar with the existence of numerous such schemes in South Africa, especially multiplications schemes, and several cases that involved these schemes are currently before the courts. Whether this provision will prevent such schemes from arising remains to be seen.

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313 See 3.5.1 in the article.

314 S 41(1). Is this the same as common law misrepresentation? Misrepresentation in terms of the common law is where a prospective contract party bases his/her decision to conclude an agreement on a false representation by the other party to the negotiations. See Van der Merwe *et al Contract* 105–117.

315 S 41(3)(a)–(b). This list is not exhaustive.

316 S 41(3)(c). This list is not exhaustive

317 Ss 42(2)(a) and 42(3). For example, representing, with the intention of defrauding a person, that someone is capable of increasing a sum of money.

318 Ss 42(2)(b) and 42(4). For example, a transaction that involves the proceeds of an unlawful activity.

319 Ss 42(2)(c) and 42(5). For example, fraudulently obtaining property from a person.

320 Ss 42(2)(d) and 42(8) and the regulations to this Act in terms of S 120.

### 3.6.4 *Pyramid and related schemes*

In terms of Section 43(2), a person is prohibited from directly or indirectly or knowingly joining, promoting or entering into a multiplication scheme,<sup>321</sup> a pyramid scheme,<sup>322</sup> a chain letter scheme<sup>323</sup> or any scheme declared by the Minister as such in Section 43(6) and in terms of Section 120 and the regulations to the Act.<sup>324</sup> It appears that so-called "network marketing schemes" do not constitute pyramid schemes because compensation is usually derived primarily from the sale of goods and services, and not only from recruitment of new participants.

### 3.6.5 *The consumer's right to assume that a supplier is entitled to sell goods*

In terms of Section 44(1), every consumer has a right to assume that a supplier will have a legal right or the authority of the owner to supply, sell or lease goods.<sup>325</sup> The consumer also has a right to assume that between a supplier and a consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of third parties, for example outstanding debt on a car.<sup>326</sup> Furthermore, a consumer has a right to assume that the supplier guarantees that he/she will have

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321 S 43(3). A multiplication scheme exists when a person offers, promises or guarantees to a consumer (or investor or participant) an effective interest rate that is at least twenty per cent above the repurchase rate determined by the Reserve Bank at the date of investment or commencement of participation. It will still constitute a multiplication scheme even should the consumer, investor or participant become a member of the lending party. In terms of S 43(1), the definition of "participant" is any person who is admitted to a scheme for consideration.

322 S 43(4). An arrangement, agreement, practice or scheme is a pyramid scheme if: (a) a participant to the scheme receives compensation that is derived primarily from his/her recruitment of other participants rather than from the sale of goods or services; or (b) the emphasis in the promotion of the scheme indicates an arrangement contemplated in subparagraph (c).

323 S 43(5). An arrangement, agreement, practice or scheme will be a chain letter scheme if it has various levels of participation, existing participants recruit new participants, and each newly recruited participant is required, upon joining the scheme, to pay certain consideration, which is distributed to one or some of the previously existing participants, irrespective of whether the new participant received goods or services in exchange for consideration, and each newly recruited participant is, upon joining, assigned to the lowest level of participation in the scheme. Then, upon recruiting new participants, these participants may participate in distribution of the consideration paid by new recruits and may move to higher levels within the scheme until being removed from the scheme after reaching the highest level.

324 S 43(2)(a)–(d).

325 S 44(1)(a)–(b).

326 S 44(1)(c). The supplier will not be liable to a third party if the charge or encumbrance is disclosed in writing to a consumer before an agreement is concluded, or if the supplier and consumer have colluded to defraud the third party.

and enjoy quiet possession of the goods, subject to any charge or encumbrance.<sup>327</sup> These rights are implied provisions in every transaction and agreement.<sup>328</sup> Should any transaction or agreement for the supply of goods to a consumer infringe a right or claim of a third party pertaining to those goods, the supplier is liable to the third party to the extent of the infringement, except in a case in which a charge or encumbrance was disclosed to the consumer before entering into an agreement.<sup>329</sup>

Goods include a legal interest in land,<sup>330</sup> and one could therefore ask whether contracts of lease will be influenced by Section 44 should a lessor decide to sell leased property. Further, would this provision influence the common law "*huur gaat voor koop*" rule? As stated above, in terms of Section 44(1)(c), a consumer has a right to assume that between a supplier and a consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of third parties. Does that mean that a lessee will no longer be able to rely on the "*huur gaat voor koop*" rule should the owner of the leased land sell it, and that the lessee will no longer be protected against the new owner of the land? Section 44(2) provides that should any transaction or agreement for the supply of goods to a consumer infringe a right or claim pertaining to those goods by a third party, the supplier is liable to the third party to the extent of the infringement. It is therefore uncertain whether this provision of the Act will affect contracts in respect of lease of land. It appears that Section 44 does not have any effect on the "*huur gaat voor koop*" rule, because in terms of this rule, hire takes precedence over sale, and in terms of Section 44(2), the supplier is not liable to a third party (the new owner) should the encumbrance have been disclosed before they entered into an agreement.

It appears that Section 44 also corresponds with a purchaser's common law warranty against eviction,<sup>331</sup> a lessor's duty to ensure the lessee's undisturbed use and enjoyment of the leased property, and the common law warranty by the lessor that no one with a better title will interfere with the lessee's use and enjoyment of the leased property.

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327 S 44(1)(d).

328 S 44(1).

329 S 44(2).

330 See 2.5 in the article.

331 See *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A) and *Mdakane v Standard Bank of South Africa Ltd* 1999 1 SA 127 (W) for analyses of the warranty against eviction.

### 3.6.6 *Auctions*

In cases in which goods are put up for sale by auction in lots, each lot is regarded to be the subject of a separate transaction, unless there is evidence to the contrary.<sup>332</sup> A sale by auction is only complete when an auctioneer announces its end by the fall of the hammer or any other customary manner.<sup>333</sup> Before the end of any auction, a bid may be retracted.<sup>334</sup> Should an auction be subject to a reserved or upset price or a right to bid by or on behalf of the owner or auctioneer, notice of this must be given in advance.<sup>335</sup> Should this notice not have been given in advance, the owner or auctioneer must not bid or employ any person to bid at the auction and knowingly accept any bid from such person.<sup>336</sup> Should an auctioneer violate this subsection by bidding by or on behalf of himself, herself, itself or an owner without giving the required advance notice, a consumer may approach a court to declare the transaction fraudulent.<sup>337</sup> An auction in terms of this section includes a sale in execution by auction pursuant to a court order.<sup>338</sup> The Minister has the power to prescribe further requirements to be complied with by auctioneers or different categories of auctioneers in respect of conduct at an auction, records to be maintained with respect to property placed for auction, and the sale of such property by auction.<sup>339</sup> *Inter alia*, this section will prevent auctioneers of execution sales bidding at auctions and abusing their positions or power. It also prevents an owner from bidding at his, her or its own auction and thereby artificially increasing the price of the goods subject to the auction should he, she or it have not in advance disclosed the fact that he, she or it will bid at the auction. It, however, appears that banks or other financial institutions will not be prevented from bidding at land repossession auctions (execution auctions) of property they had repossessed, as a bank is at that moment not the auctioneer or the owner of the repossessed property.

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332 S 45(2).

333 S 45(3).

334 S 45(3).

335 S 45(4).

336 S 45(5)(a)–(b).

337 S 45(5)(c).

338 S 45(1).

339 S 45(6).

### 3.6.7 *Changes, deferrals, waivers and substitution of goods*

Should goods or services be supplied as a result of a change to an existing agreement, or a deferral or waiver of a right under an existing agreement, it must not be treated as a new agreement for the purposes of this Act, should the change, deferral or waiver be made in accordance with the agreement or this Act.<sup>340</sup> Furthermore, should, after delivery of goods to a consumer, a consumer and supplier agree to substitute other goods for all or part of the goods sold, the transaction applies to the substituted goods rather than the original goods from the date of delivery of the substituted goods.<sup>341</sup> Should this transaction have been subject to a written agreement or sales record, the supplier has to prepare and deliver to the consumer an amended agreement or sales record, describing the substituted goods, without making any other changes to the original document.<sup>342</sup>

### 3.6.8 *Over-selling and over-booking*

In terms of the Act, a supplier is not allowed to accept payment or any consideration for goods or services should he, she or it have no reasonable intention to supply those goods or services or should he, she or it intend to supply goods or services that are materially different from the goods or services in respect of which payment was accepted.<sup>343</sup> Furthermore, should a supplier make a commitment or accept a reservation to supply goods or services at a specific date or time and should he, she or it then fail to do so because of insufficient stock or capacity to supply those, similar, better or comparable goods or services, the supplier has to refund the consumer the amount, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement. In addition, the consumer must be compensated for costs "directly incidental" to the supplier's breach of contract.<sup>344</sup> In terms of the common law, a consumer is able to claim all general damages and only special damages that flow from breach of contract should the law presume that the parties contemplated that those damages would result from

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340 S 46(1).

341 S 46(2)(a).

342 S 46(2)(b).

343 S 47(2).

344 S 47(3)(a)–(b).

such breach of contract.<sup>345</sup> However, in terms of Section 47(3)(a)–(b), it appears a supplier will not be liable for consequential damages because consequential damages are not directly incidental to the breach of contract.

Furthermore, a supplier will not be liable for the additional costs of the consumer should the shortage of stock or capacity be due to circumstances beyond the supplier's control and the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as he, she or it was able to do so in the circumstances.<sup>346</sup> To prevent the supplier from raising the "beyond the supplier's control" defence, a shortage of stock or capacity will not be "due to circumstances beyond the supplier's control" should the shortage result partially, completely, directly or indirectly from a failure on the part of the supplier to diligently carry out any routine matter in his, her or its business.<sup>347</sup> For example, an airplane that cannot take off on the scheduled time due to technical errors caused by the supplier's failure to service or to clean the airplane on time will not be circumstances beyond the supplier's control. Therefore, in terms of this section, a supplier is prohibited from over-booking and over-selling goods or services. For example, the practice of airlines over-selling and over-booking air tickets is prohibited.

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

Freedom of contract forms the basis of the South African contract law. The reason is that the parties have come to an agreement, and the basis of the law of contract is that the law will enforce their agreement.<sup>348</sup> Therefore, no paternalistic intervention by courts on the basis that an agreement or a clause appears to be unreasonable existed in a previous era in which contracts were negotiated and parties were in an equal bargaining position.<sup>349</sup> This absolute principle was, however, whittled away by the common law, which will not enforce a contract if it is contrary to public policy.<sup>350</sup>

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345 *Shatz Investments (Pty) Ltd v Kalovynas* 1976 2 SA 545 (A) 550.

346 S 47(5).

347 S 47(6).

348 See Christie *Law of Contract* 14 in which *Burger v Central South African Railways* 1903 TS 571 is referred to.

349 Christie *Law of Contract* 14.

350 Christie *Law of Contract* 14. See, for example, law of contract regarding restraint of trade in *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 4 SA 847 (A).

South Africa has a long history of law moving from not accepting any limitation of freedom of contract to the Act that regulates law regarding fair, just and reasonable contract terms. One can observe progression in the development of measures addressing contractual unfairness from the day the case of *Bank of Lisbon and South Africa Ltd v De Ornelas*<sup>351</sup> was decided until now, in this era, where non-negotiated and standard term contracts are used. In the *Bank of Lisbon* case, the court held that there had to be strict adherence to the terms of a contract, and that the *exceptio doli generalis* could not be used to deal with unfairness, since it did not form part of the South African law.<sup>352</sup> The court, however, held in the minority judgement that freedom of contract and the principles of *pacta sunt servanda* were not absolute principles, and that the *exceptio doli* formed a substantive defence against contractual unfairness.<sup>353</sup> Thereafter, in the case of *Sasfin (Pty) Ltd v Beukes*,<sup>354</sup> the court held that it has the power to refuse to enforce contracts that were against public policy or contrary to good morals,<sup>355</sup> a power that was applied sparingly. Nine years later, the Law Commission, in its report,<sup>356</sup> proposed unfair contract legislations against contractual unfairness, unreasonableness, and unconscionability in all the contractual phases.<sup>357</sup> In 2004, the DTI, in its Draft Green paper,<sup>358</sup> proposed that rather than enacting separate unfair contracts legislation, general provisions regarding unfair contracts had to be inserted into consumer law. The aim was to enact law to provide not only what the rights and responsibilities of the parties were, but also to promote the use of plain language in consumer contracts, and, in addition, to give examples of unfair contract terms through guidelines that build on international precedents.<sup>359</sup> In Part G of Chapter 2, the Act now contains measures dealing with unfair, unreasonable or unjust contract terms. One of the aims of the Act is to protect consumers against unconscionable, unfair, unreasonable, unjust or improper practices.<sup>360</sup>

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351 1988 3 SA 580 (A) – hereafter *Bank of Lisbon*.

352 *Bank of Lisbon* 605.

353 *Bank of Lisbon* 612.

354 1989 1 SA 1 (A) – hereafter *Sasfin*.

355 *Sasfin* paras 7–9.

356 South African Law Commission *Unreasonable Stipulations* xiii.

357 Where the contract came into existence, when executed and when enforced.

358 GN 1957 in GG 26774 of 9 September 2004 paras 30–31.

359 GN 1957 in GG 26774 of 9 September 2004 paras 30–31.

360 S 3(1)(d).

### 3.7.1 *Unfair, unreasonable or unjust contract terms*

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>361</sup> Secondly, a supplier is not allowed to market any goods or services, or negotiate, or enter into a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.<sup>362</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>363</sup>

A transaction, an agreement, a term or condition or a notice is unfair, unreasonable<sup>364</sup> or unjust (a) should it be excessively one-sided in favour of any person other than a consumer;<sup>365</sup> (b) should the terms of the agreement or transaction be so adverse to the consumer that it is inequitable;<sup>366</sup> or (c) should a consumer have relied to his/her detriment on a false, misleading or deceptive representation<sup>367</sup> or a statement of opinion provided by or on behalf of a supplier.<sup>368</sup> A "statement of opinion" includes any opinion, and not only false, misleading or

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361 S 48(1)(a). One could ask whether the abolished *laesio enormis* doctrine is being revived again in respect of price. See Van der Merwe *et al* *Contract* 132 for a discussion of the *laesio enormis* doctrine.

362 S 48(1)(b).

363 S 48(1)(c).

364 In *Barkhuizen v Napier* 2007 5 323 (CC) para 36, the court held that in an instance in which a court has to decide whether the terms of a contract are contrary to public policy, the considerations of reasonableness and fairness must be considered. In para 56, the court held that there are two questions to ask 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 ... clause." In para 57, the court held that the question of reasonableness involves the weighing-up of two considerations: "On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity." The other consideration is the specific fundamental right involved in a case.

365 S 48(2)(a).

366 S 48(2)(b).

367 S 41.

368 S 48(2)(c).

deceptive opinions, since "statement of opinion" is not qualified here. A term or agreement can therefore be declared unfair, unreasonable or unjust should a consumer have relied on an opinion of the supplier, and suppliers, such as attorneys, advocates and medical practitioners, should take notice of this. Furthermore, it will also be unfair, unreasonable or unjust (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).<sup>369</sup>

The court will consider several factors in order to decide whether an agreement or transaction will be unfair, unreasonable, or unjust.<sup>370</sup> These factors include

- (a) the fair value of the goods and services;
- (b) the nature of the parties to the agreement or transaction;
- (c) the parties' relationship to each other;
- (d) the parties' relative capacity, education, experience, sophistication and bargaining position;
- (e) the circumstances of the agreement or transaction that existed or were reasonably foreseeable at the time of the transaction, agreement or conduct, irrespective of whether the Act was in force at that time;<sup>371</sup>
- (f) the conduct of the supplier and of the consumer;
- (g) whether the parties negotiated, and if they did, the extent of the negotiation;
- (h) whether a consumer was required to do anything that was not reasonably necessary for the legitimate interest of the supplier;
- (i) whether, and the extent to which, the Section 22 plain and understandable language requirements were complied with;<sup>372</sup>
- (j) whether a consumer knew or ought reasonably to have known of the existence of a provision of the agreement that is alleged to have been unfair, unreasonable or unjust when having regard to custom of trade and previous dealings between the parties;

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369 S 48(2)(d).

370 S 52(2). The same factors apply to Ss 40 and 41.

371 It is uncertain whether this part of the Act then applies to pre-existing agreements.

372 See 3.4.1 in the article. With regard to negotiation as a factor, see 3.7.5 in the article where the influence of taking into account negotiations on the parol evidence rule is mentioned.

- (k) the amount for and the circumstance under which a consumer could have acquired the same or equivalent goods or service from another supplier; and
- (l) where goods were supplied, whether the goods were manufactured or adapted to a consumer's special order.<sup>373</sup>

### 3.7.2 *Notice required for certain terms and conditions*

This section prevents a consumer from entering into an agreement that contains provisions that could affect his/her rights or that could be unexpected, should the consumer not be aware of its existence.<sup>374</sup> Therefore, should an agreement contain specific terms and conditions as set out in Section 49(1), these must be brought to the attention of the consumer in the prescribed form and manner.<sup>375</sup> These types of terms are terms 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; and that impose an obligation on a consumer to indemnify the supplier or someone else for any cause, and an acknowledgment of any fact by the consumer.<sup>376</sup> These terms would include clauses to the effect that no representations were made to a consumer, as well as indemnity clauses and exemption clauses. Furthermore, should a provision concern any activity or facility that is subject to risk of an unusual character or nature, or risks of which the consumer could not reasonably be expected to be aware of, or which could result in serious injury or death, the supplier has to specifically draw the fact, nature and potential effect of the risk to the attention of the consumer in the prescribed form and manner.<sup>377</sup> Furthermore, the consumer has to assent to that provision or notice by signing or initialling the provision.<sup>378</sup> In respect of form and manner, such notice or provision must be in plain and understandable language as contemplated in Section 22, and the consumer must be given sufficient time and opportunity in the circumstances to receive and

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<sup>373</sup> S 52(2)(a)–(j).

<sup>374</sup> Also see *Mercurius Motors v Lopez* 2008 3 572 (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. In this regard, also see Stoop 2008 SA Merc LJ 499–501.

<sup>375</sup> S 49(3) and (5).

<sup>376</sup> S 49(1)(a)–(d).

<sup>377</sup> S 49(2). The form and manner are prescribed in Ss 49(3) and 49(5). Also see 3.8.6 in the article for a discussion of S 58.

<sup>378</sup> S 49(2).

comprehend the provision or notice.<sup>379</sup> The Act further places a duty on a supplier or other person to draw the attention of a 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.<sup>380</sup> 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.<sup>381</sup> A supplier can therefore minimise his, her or its 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.

### 3.7.3 *Written consumer agreements*

In terms of Section 50(1), the Minister may prescribe categories of agreements that should be in writing. If an agreement between a supplier and consumer is in writing, as required in terms of the Act or voluntarily, the agreement is valid, irrespective of whether the consumer signed the agreement.<sup>382</sup> This provision works against the consumer and may be exploited by fraudulent suppliers who pretend that agreements were concluded with suppliers. The supplier must, however, still provide a free copy of the agreement to the consumer.<sup>383</sup> In terms of this section, the copy can also be free electronic access to a copy of the agreement. This can be to the detriment of vulnerable consumers who do not have access to computers.

The agreement also has to be in plain and understandable language in terms of Section 22, and it must set out an itemised break-down of the financial obligations of the consumer under the agreement.<sup>384</sup> Should an agreement not be required to be in writing, a supplier must at least, as prescribed, keep a record of transactions entered into over the telephone or another recordable form.<sup>385</sup>

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379 S 49(3) and (5).

380 S 49(4)(1)(a).

381 S 49(4)(1)(b).

382 S 50(2)(a).

383 S 50(2)(b).

384 S 50(2)(b).

385 S 50(3).

### 3.7.4 *Prohibited transactions, agreements, terms or conditions*

In terms of Section 51, the Act prohibits agreements or terms that have the purpose of defeating the purpose of the Act, misleading or deceiving a consumer, or terms that subject the consumer to fraudulent conduct.<sup>386</sup>

A term or an agreement may also not directly or indirectly purport to waive or deprive consumers of their rights<sup>387</sup> in terms of the Act, avoid a supplier's duty in terms of the Act, or authorise a supplier to do something that is unlawful in terms of this Act or fail to do something that is required in terms of the Act.<sup>388</sup>

Section 51(1)(c) prohibits a supplier from using exemption or indemnity agreements or terms that limit or exempt a supplier from liability for any loss attributable<sup>389</sup> to the gross negligence of the supplier or someone on his, her or its behalf.<sup>390</sup> It also prohibits the use of agreements or terms that constitute an assumption of risk or liability by the consumer for these damages. Lastly, an agreement or term may not impose an obligation on a consumer to pay for damage to goods displayed by a supplier.<sup>391</sup> Therefore, a notice in terms of which a consumer will be liable for the damage to goods displayed will not be permitted in terms of this section.

Furthermore, Section 51 has several prohibitions, such as agreements or terms resulting from an offer prohibited in Section 31;<sup>392</sup> requiring consumers to enter into supplementary contracts;<sup>393</sup> purporting to cede or set off a consumer's right to claim against the Guardian Fund;<sup>394</sup> falsely expressing an acknowledgement by a consumer that no representations or warranties were made before an agreement

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386 S 51(1)(a). It is therefore void *ab initio*.

387 Chp 2 contains the consumer's fundamental rights in terms of this Act.

388 S 51(1)(b).

389 This includes direct or indirect loss.

390 In *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 35, the court remarked that liability for gross negligence (medical) could possibly be excluded. In terms of the Act, it is now prohibited.

391 A consumer is not responsible for any loss to goods displayed by a supplier, unless the loss results from a consumer's gross negligence, malicious behaviour or criminal conduct (see S 18(1)).

392 S 51(1)(d).

393 S 51(1)(e).

394 S 51(1)(f). Also see S 86 of the *Administration of Estates Act* 66 of 1965.

was made, or that a consumer has received goods, services or a required document,<sup>395</sup> requiring a consumer to forfeit money to a supplier should the consumer exercise his/her rights in terms of this Act or to which the supplier is not entitled to,<sup>396</sup> expressing an authorisation for the supplier or someone on his, her or its behalf to enter any premises for the purpose of taking possession of goods, undertaking to sign in advance documents relating to enforcement, or a consent to a predetermined value of costs relating to enforcement;<sup>397</sup> expressing an agreement by the consumer to deposit a bank card or identity document or provide a pin code or number to be used to access an account.<sup>398</sup>

A supplier is also not allowed to require a consumer to enter into a supplementary agreement or sign any document in terms of which the consumer enters into an agreement that contains a prohibited term in terms of Section 51(1),<sup>399</sup> or gives temporary or permanent possession of his/her bank card or identification document or reveals his/her pin or other access number to an account to a supplier.<sup>400</sup>

Any agreement or term that contravenes Section 51 is void to the extent that it contravenes Section 51.<sup>401</sup>

### 3.7.5 *Powers of the court to ensure fair and just conduct, terms and conditions*

If unconscionable conduct in terms of Section 40, false, misleading or deceptive representations in terms of Section 41, or unfair, unreasonable or unjust contract terms in terms of Section 48 are alleged in court proceedings, or if the Act does not give a sufficient remedy to correct the prohibited conduct, unfairness, injustice or unconscionability, the court has to consider the factors listed in Section 52(2)<sup>402</sup> and the principles, purposes and provisions of the Act before a court order can be made

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395 S 51(1)(g). Such terms may therefore still be used but they may not be false.

396 S 51(1)(h).

397 S 51(1)(i).

398 S 51(1)(i).

399 S 51(2)(a).

400 S 51(2)(b). However, this does not preclude a supplier from requiring a pin number or identity document in order to facilitate a transaction in the normal course of business.

401 S 51(3).

402 See 3.7.1 in the article in which these factors are listed.

in terms of Section 52(3).<sup>403</sup> One of the factors that the court must consider in terms of Section 52(2)(e) is whether there was any negotiation between the supplier and the consumer, and if so, the extent thereof. This will affect the parol evidence rule because, in terms of the parol evidence rule, a contract reduced to writing is generally the exclusive record of the transaction, and no evidence is admissible to prove the terms of the contract.

In terms of this section, the court has the power to declare a transaction, wholly or partly, unconscionable, unjust, unreasonable or unfair, or to make any reasonable or just order in the circumstances, including an order to compensate the consumer for losses or expenses relating to the transaction or the proceedings of the court, to restore money or property to the consumer, or to require the supplier to cease or alter any practice, form or document in order to prevent repetition of that conduct.<sup>404</sup>

If an agreement, notice or terms are void in terms of the Act, or the requirement of written notice in terms of Section 49 was not satisfied, the court may declare the agreement, notice or terms void and sever the relevant part to render it lawful or declare the entire agreement, provision or notice *ab initio* void, or if the Section 49 requirements were not satisfied, the court may sever the relevant part from the rest or declare it to have no force or effect in respect of the transaction.<sup>405</sup> The court may also make any just or reasonable order in the circumstances.<sup>406</sup>

In terms of the definition of "court" in Section 1, a consumer court is not a court. In terms of Section 1, a "consumer court" is defined as a body with that name or a consumer tribunal that has been established in terms of applicable provincial consumer legislation. Accordingly, the orders contemplated in Section 52 can only be made by a normal court of law and not by a consumer tribunal. However, in terms of Section 100(1), the Commission may issue a compliance notice to any person who engaged in conduct prohibited by the Act. Should the person then fail to comply with a compliance notice, the Commission may refer the matter to the National Prosecuting Authority for prosecution in terms of Section 110(2), or apply to the

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403 S 52(1).

404 S 52(3)(a)–(b).

405 S 52(4)(a).

406 S 52(4)(b).

Tribunal for the imposition of an administrative fine.<sup>407</sup> In order to enforce any right in terms of the Act or to resolve any dispute with a supplier, a consumer<sup>408</sup> may refer the matter directly to the Tribunal should the Act permit it,<sup>409</sup> or refer the matter to the relevant ombud, apply to a court, refer the matter to an alternative dispute resolution agent in terms of Section 70, file a complaint with the Commission in terms of Section 71, or approach a court with jurisdiction should all other remedies available in terms of legislation have been exhausted.<sup>410</sup> Therefore, Sections 52 and 69 are in a way contradictory. In terms of Section 69, a court should only be approached in order to enforce consumer rights should all other remedies be exhausted, while in terms of Section 52, the right to fair, just and reasonable terms and conditions, and the right to honest and fair dealings can only be enforced by a court. It is problematic that only courts have jurisdiction in disputes regarding so-called "unfair" contracts, and this will increase the amount of court disputes and litigation. It is generally expensive for individual consumers to enforce their rights in court, and suppliers are well aware of this fact. Furthermore, should only courts have jurisdiction in unfair contract disputes, there will be no official body or tribunal with the authority to hear complaints and apply proactive preventative measures<sup>411</sup> in order to ensure that unfair terms, contracts and unconscionable conduct are prevented in accordance with the principle that prevention is better than cure.<sup>412</sup>

### 3.8 *The right to fair value, good quality and safety*<sup>413</sup>

#### 3.8.1 *Applicable definitions*<sup>414</sup>

Part H of Chapter 2 of the Act contains its own definitions for the words "defect", "failure", "hazard", and "unsafe", which apply to that part of the Act in those instances

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407 S 100(6).

408 Or any other party in terms of S 4(1).

409 S 69(a).

410 S 69(b)–(d).

411 See Naudé 2007 *SALJ* 128–164, in which grey and black lists as proactive preventative measures are discussed. In terms of a grey list, certain clauses or terms are regarded as unfair.

412 Also see Naudé 2006 *Stell LR* 379–380, in which the inherent limits of judicial control of unfair contracts are discussed.

413 Chp 2 Part H paras 53–61.

414 S 53.

in which they are used in respect of any goods, components of goods, or services.<sup>415</sup> A proper understanding of these definitions is necessary to determine whether Part H of Chapter 2 of the Act applies to a transaction. Unfortunately, not all the definitions are equally and sufficiently clear.

A "defect"<sup>416</sup> includes:

- (a) any material imperfection in the manufacture of goods (or components thereof), or in the performance of services, that causes the goods or the results of the services to be less acceptable than persons generally would reasonably be entitled to expect in the circumstances;<sup>417</sup> or
- (b) any characteristic of goods (or components thereof) that results in the goods (or their components) being less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.<sup>418</sup>

A material imperfection refers to a "relevant, pertinent, applicable, ... vital, essential, key"<sup>419</sup> fault. It is peculiar that the acceptability of goods or the result of services and the usefulness, practicability or safeness of goods (or components thereof) for purposes of determining whether they are defective are determined by what "persons generally would be reasonably entitled to expect in the circumstances"<sup>420</sup> and not by what a "reasonable consumer or a consumer generally would reasonably expect".<sup>421</sup> What is the significance of this, if any? The exact extent of the tests for defective goods or services will have to be determined on a case-by-case interpretation by our courts, taking all the relevant circumstances into account.<sup>422</sup>

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415 S 53(1).

416 S 53(1)(a) sv "defect".

417 S 53(1)(a)(i).

418 S 53(1)(a)(ii).

419 Waite *Little Oxford* 289 sv "material".

420 Emphasis added.

421 S 1 sv "consumer" and "person". Again, see the discussion of the definitions in the Act in 2.6 in the article. Emphasis added.

422 See *Loubser and Reid 2006 Stell LR* 424–431 regarding "what persons generally would expect". They consider the European experience of the "consumer expectations" or "legitimate expectations" approach, and suggest that the definition of "defect" (in the *Draft Consumer Protection Bill* of 2006) had to be amended to do away with the "consumer expectations" test. Loubser and Reid propose that defectiveness has to be assessed in terms of a general standard of reasonableness with hindsight. Unfortunately, the definition of a defect in the Act still contains the "consumer expectations" test. Also, see Neethling, Potgieter and Visser *Law of Delict* 293 for comments on defective products under the common law.

"Failure" entails "the inability of goods to perform in the intended manner or to the intended effect".<sup>423</sup> In contrast to the tests provided for a "defect", it is not clear to whose intention the "intended manner" or the "intended effect" refers. It may refer to the intention of the consumer, the supplier, persons generally, persons in the supply chain (the producer, importer, distributor or retailer), or to the joint intention of the consumer and the supplier in a transaction.

A "hazard"<sup>424</sup> refers to a characteristic that:

- (a) has been identified or declared as a hazard in terms of any other law;<sup>425</sup> or
- (b) poses a significant risk of personal injury to any person, or damage to property, when the goods are used.<sup>426</sup>

Note that goods are regarded as hazardous even if they pose a significant risk when the goods are used in their normal course. It is not necessary for the goods to present a significant risk when they are used for purposes for which they are not generally intended. What extent of risk is required to qualify as a "significant", as opposed to an ordinary, risk?<sup>427</sup> The following may, *inter alia*, qualify as hazards: medicine, alcohol, tobacco, firearms and motor vehicles. The significant risk of personal injury is not limited to consumers, but extends to any person. Equally, the damage to property should not be confined to a consumer's property, but to any property.

"Unsafe"<sup>428</sup> means that goods pose an extreme risk of personal injury or property damage to consumers or to other persons owing to a characteristic, "failure", "defect" or "hazard". It is expressly provided that the risk of personal injury or damage to property extends to both consumers and other persons. An "extreme risk" may be

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423 S 53(1)(b) sv "failure".

424 S 53(1)(c) sv "hazard".

425 S 53(1)(b)(i).

426 S 53(1)(c)(ii).

427 Waite *Little Oxford* sv "significant": "adjective 1 a *significant fact*: notable, noteworthy, remarkable, important, of consequence. 2 a *significant increase*: large, considerable, sizeable, appreciable, conspicuous, obvious, sudden ...".

428 S 53(d) sv "unsafe".

regarded as the highest degree of risk, and definitely presents a higher risk than a "significant risk".<sup>429</sup> It appears that the legislature intended to make provision for different degrees of risk in these definitions.

### 3.8.2 *The consumer's rights to demand quality service*<sup>430</sup>

The consumer has a right to demand quality service when a supplier undertakes to perform any services for or on his/her behalf. The right includes:<sup>431</sup>

- (a) punctual performance and completion of the services; timely notice of any unavoidable delay in performance (it is uncertain what would constitute "timely notice");<sup>432</sup>
- (b) that the services are performed in a manner and quality that persons (not merely consumers) are generally entitled to expect (again, the degree of performance that is required is a factual question);<sup>433</sup>
- (c) that, should any goods be required for the performance of the services, goods that are free of defects and of a quality that persons (not merely consumers) are generally entitled to expect (what kind of quality is this?) will be used, delivered or installed;<sup>434</sup>
- (d) the return of property (or control thereof) in at least the same condition as it was when the consumer made it available to the supplier to perform the services (it may be a difficult burden for the consumer to prove that the supplier returned the property in a worse condition than when it was made available to him/her).<sup>435</sup>

In the instance in which a consumer's right (to demand) quality service is assessed, the circumstances of the supply and any specific criteria or conditions agreed on between the consumer and the supplier should be taken into account.<sup>436</sup> Should a supplier infringe a consumer's right (to demand) quality service (for example, by

429 Waite *Little Oxford* sv "extreme": "**adjective 1** extreme danger: **utmost**, (very) great, greatest (possible), maximum, great, acute, enormous, severe, serious".

430 S 54.

431 S 54(1).

432 S 54(1)(a).

433 S 54(1)(b).

434 S 54(1)(c).

435 S 54(1)(d).

436 S 54(1).

failing to perform a service to the standards as contemplated by Section 54(1)(a)–(d)), the consumer may demand that the supplier:<sup>437</sup>

- (a) rectify any defect in the quality of the services rendered or the goods supplied;<sup>438</sup> or
- (b) reimburse the consumer with a reasonable portion of the price paid for the services rendered and goods supplied, having regard to the extent of the failure (it may be difficult to calculate the amount to be refunded to the consumer).<sup>439</sup>

The consumer may choose a remedy. Unlike other sections of the Act,<sup>440</sup> it does not appear that Section 54 limits the consumer to exercise his/her remedy within a specific period, and the normal period of prescription would apply. Was this an oversight, as it leaves room for much abuse by the consumer?

### 3.8.3 *The consumer's rights to safe, good quality goods*<sup>441</sup>

Goods bought at an auction are expressly excluded from the ambit of Section 55.<sup>442</sup> The consumer's right to safe quality goods includes the right to receive goods that:<sup>443</sup>

- (a) are reasonably suitable for the generally intended purposes;<sup>444</sup> and
- (b) are of good quality,<sup>445</sup> in working condition<sup>446</sup> and free of any defects.<sup>447</sup> (Note that this subsection pertains to any defect and not only to material ones.)

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437 S 54(2).

438 S 54(2)(a).

439 S 54(2)(b).

440 A consumer has to exercise his/her remedies under S 56 within six months after the delivery of the goods. See S 56(2); and the discussion of S 55(6) in 3.8.4 in the article.

441 S 55.

442 S 55(1).

443 S 55(2).

444 S 55(2)(a). See Kerr *Law of Sale and Lease* 205–215 for a summary on the seller's warranty of fitness for purpose under the common law; and Nagel *et al* *Kommersiële Reg* paras 14.65–14.66.

445 See Kerr *Law of Sale and Lease* 215–217 on the residual common-law warranty that goods sold are of a reasonable quality. Also see Kerr *Law of Sale and Lease* 218–219 on the manufacturer's and seller's warranty on the skill of their art.

446 See Kerr *Law of Sale and Lease* 215–217 on the residual common-law warranty that goods sold are of a reasonable quality. Also see Kerr *Law of Sale and Lease* 218–219 on the manufacturer's and seller's warranty on the skill of their art.

447 S 55(2)(b). See Kerr *Law of Sale and Lease* 219 on the seller's "implied warranty" against latent defects. Kerr is of the opinion that the warranty is residual and not implied, and that it is advisable

However, Section 55(6) provides that these requirements are not applicable to a transaction should the consumer:

- (a) have been expressly informed that particular goods were offered in a specific condition;<sup>448</sup> and
- (b) have expressly agreed to accept the goods in that condition, or knowingly acted in a way compatible with accepting the goods in that condition.<sup>449</sup>

This raises the question of what the impact of Section 55(6) on the effect of a *voetstoots* clause is. The position prior to the commencement of the Act may be summarised as follows. The seller's implied warranty against latent defects is one of the natural elements (*naturale*)<sup>450</sup> of a contract of sale, and the seller (supplier) may be held liable for latent defects in goods sold with the *actio redhibitoria* or the *actio quanti minoris*.<sup>451</sup> The implied warranty against latent defects can be expressly excluded by a *voetstoots* sale. The seller may rely on the *voetstoots* clause as a defence to relief claimed under the aedilian actions, unless he/she knew about the latent defect at the time of conclusion of the contract and concealed it *dolo malo* with the intention of defrauding the purchaser.<sup>452</sup> *Voetstoots* clauses are often contained in contracts of sale and usually provide as follows: "The goods are sold *voetstoots*. The seller shall not be responsible for any defects latent or patent or any damage resulting therefrom and the purchaser agrees to accept the goods as they stand with all faults".

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to rather speak of liability under the aediles edict than of a warranty. Also see Cornelius *Principles* 158 on the distinction between tacit and implied contract terms.

448 S 55(6)(a).

449 S 55(6)(b).

450 Christie *Law of Contract* 159; and Nagel *et al* *Kommersiële Reg* para 14.49.

451 See Harms *Amler's Precedents* 215–216 for a discussion on latent defects and the requirements to allege and prove the aedilian actions. The *actio redhibitoria* and the *actio quanti minoris* are aedilian actions. With the *actio redhibitoria*, the purchaser may claim repayment of the purchase price and interest. With the *actio quanti minoris*, the purchaser is entitled to claim a price reduction, which is determined by the difference between the purchase price and the value of the goods with their defect.

452 *Van der Merwe v Meades* 1991 2 SA 1 (A); Christie *Law of Contract* 295 n 141; Harms *Amler's Precedents* 215–216 and Lötz and Nagel *Besondere Kontrakte in die Hof* 40–50. Also note that fraud does not remove the *voetstoots* clause from the contract, and that the seller may rely on it to the extent that he/she acted honestly. See *Trumen v Leonard* 1994 4 SA 371 (SE); Harms *Amler's Precedents* 215–216; and Lötz and Nagel *Besondere Kontrakte in die Hof* 48–49.

The use of the *voetstoots* clause will be severely curbed after the commencement of the Act. Under the Act, the implied warranty against latent defects is only excluded if the requirements of Section 55(6) are met, namely should the seller (supplier) expressly inform the consumer of the specific condition of the goods and the consumer expressly agree to accept the goods in that condition, or knowingly act in a way compatible with accepting the goods in that condition (for example, by accepting and using the goods without complaining).

The consumer's right to receive safe, good quality goods also includes the right to receive goods that:<sup>453</sup>

- (a) will be useable and durable for a reasonable time, taking into account their normal use and all the circumstances surrounding their supply;<sup>454</sup> and
- (b) meet the mandatory standards of the *Standards Act*,<sup>455</sup> or any other public regulation.<sup>456</sup>

There is no doubt that these requirements are very widely worded.

Further with reference to the consumer's right to receive goods that are reasonably suitable for the generally intended purposes,<sup>457</sup> a consumer who has specifically informed the supplier of a particular purpose for which he/she wishes to acquire or use the goods has a right to expect that the goods are reasonably suitable for that particular purpose if the supplier:<sup>458</sup>

- (a) offers to supply such goods in its ordinary course of business;<sup>459</sup> or
- (b) acts as if he/she is well informed about the use of the goods.<sup>460</sup>

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453 S 55(2).

454 S 55(2)(c).

455 29 of 1993.

456 S 55(2)(d).

457 S 55(2)(a).

458 S 55(3).

459 S 55(3)(a).

460 S 55(3)(b).

In order to determine whether specific goods satisfy the requirements of Sections 55(2) and 55(3), all circumstances of the supply of the goods have to be considered.<sup>461</sup> These circumstances include, but are not limited to:

- (a) the way in which and the purposes for which the goods were marketed, packaged and displayed; the use of trade descriptions or marks; any directions for or cautions with respect to the use of the goods;<sup>462</sup>
- (b) the scope of things that might reasonably be expected to be done with or in relation to the goods;<sup>463</sup> and
- (c) the time of production and supply of the goods.<sup>464</sup>

For the sake of more certainty in applying these criteria<sup>465</sup> to determine whether goods satisfy the requirements of Sections 55(2) and 55(3), Section 55(5) provides that:

- (a) it may not be deduced that there is a product failure or defect solely on the grounds that more advanced goods have subsequently become available<sup>466</sup> (at last a provision in favour of the supplier!); and
- (b) it is beside the point whether a product failure or defect was latent or patent, or whether the consumer could have detected the failure or defect prior to taking delivery of the goods.<sup>467</sup>

The current position (the position before the commencement of the Act) is that a seller is deemed to have warranted to the purchaser that the goods are sold free from any defect that may render them completely or significantly unfit for their normal purpose, or should a specific purpose have been contemplated by the parties, for that purpose.<sup>468</sup> However, should the purchaser have inspected the goods before delivery, the seller's warranty covers only latent defects.<sup>469</sup>

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461 S 55(4).

462 S 55(4)(a).

463 S 55(4)(b).

464 S 55(4)(c).

465 S 55(4).

466 S 55(4)(b).

467 S 55(5)(a).

468 De Beer *Butterworths Forms and Precedents Commercial Transactions 2* 610–611. Also see SA *Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 para 413; *Naude v Harrison*

Under the Act, it becomes irrelevant whether a defect is patent or latent or whether the consumer could have detected the failure or defect prior to taking delivery of the goods. What would the position be should the consumer have indeed examined the goods and detected the defect prior to delivery, but still accepted delivery? Would such a consumer still be entitled to rely on the remedies in Section 56? The authors assume so (except in so far as Section 55(6) applies),<sup>470</sup> as the wider interpretation gives more protection to the consumer.

Section 56(1) confirms the existence of an implied warranty that goods that are supplied comply with the standards and requirements contemplated in Section 55. A question that arises is whether Section 55 has any force without, and independent of, Section 56.<sup>471</sup>

### 3.8.4 *The implied warranty of quality*<sup>472</sup>

Section 56 poses many interpretational problems and is one of the most controversial sections in the Act in view of its potential extensive impact on the common law.

Section 56(1) provides that there is an implied warranty in every transaction or agreement pertaining to the supply of goods to a consumer, and that the producer<sup>473</sup> or importer,<sup>474</sup> the distributor<sup>475</sup> and the retailer<sup>476</sup> each warrants that the goods comply with the requirements and the standards contemplated in Section 55. This is

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1925 CPD 84; *Young's Provision Stores (Pty) Ltd v Van Ryneveld* 1936 CPD 87 para 91; *Dibley v Furter* 1951 4 SA 73 (C). Also see Kerr *Law of Sale and Lease* 205–211; and Nagel *et al* *Kommersiële Reg* para 14.65 on the warranty of fitness for purpose.

469 *De Beer Butterworths Forms and Precedents Commercial Transactions* 611.

470 See the discussion of S 55(6) in 3.8.3 in the article.

471 See Loubser and Reid 2006 *Stell LR* 424, in which they comment on S 61 of the *Draft Consumer Protection Bill* of 2006 (one of the predecessors of S 55, although not identical). They are of the opinion that S 61 of the Bill (not the Act) set out contractual rights between suppliers and consumers, rather than created general rules for strict liability outside a contractual relationship. S 61 on product liability again does not require a contractual nexus between the supplier and the consumer. See the discussion of S 61 in 3.8.9 in the article.

472 Ss 55(2)–55(3).

473 S 1 sv "producer" and the discussion of the definitions in the Act in 2.6 in the article.

474 S 1 sv "importer" and the discussion of the definitions in the Act in 2.6 in the article.

475 S 1 sv "distributor" and the discussion of the definitions in the Act in 2.6 in the article.

476 S 1 sv "retailer".

the position except when the goods have been changed contrary to the instructions, or after leaving the control of the producer, importer, distributor or retailer involved.

Cross-references to Section 55 make Section 56 difficult to comprehend. Section 55 must be read with Section 56. As has been said,<sup>477</sup> the standards and requirements contemplated in Section 55 cover a broader spectrum than the quality of the goods. These standards and requirements also pertain to the safety of the goods and their suitability for the purposes they are generally intended for or the specific purpose that the customer has indicated.

On the one hand, the implied warranty under Section 56(1) is more comprehensive than the title of Section 56 suggests and more extensive than the implied warranties under the common law.<sup>478</sup> The implied warranty under Section 56(1) is extended to the producer or importer and the distributor and the retailer,<sup>479</sup> but requires that a transaction<sup>480</sup> or an agreement<sup>481</sup> pertaining to the supply of goods should exist. The inconsistent use of terminology in Section 56 is another contributing factor to the many interpretational problems of Section 56. Section 56(1) refers to specific terms "producer", "importer", "distributor" and "retailer" (who are suppliers in the supply chain)<sup>482</sup> instead of the general term "supplier" that is used in the remainder of Sections 56(2) and 56(3) and in the majority of the other sections in the Act. What is

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477 See 2.5 in the article.

478 The implied warranties under common law referred to here are the implied warranty against latent defects, the warranty of fitness for purpose, the warranty of reasonable merchantable quality and the warranty of the skill of art.

479 S 56(1). Note the use of "or" between producer and importer. The implied warranty is given by either the producer or the importer, and by the distributor and the retailer. The implied warranty cannot pertain to the producer and importer simultaneously. See S 1 sv "producer" and "importer"; and the discussion of the definitions in the Act in 2.6 in the article. A producer may, for instance, produce the goods within South Africa (but he, she or it does not necessarily need to reside or have his, her or its principle office in South Africa). Alternatively, an importer may bring goods from outside the Republic of South Africa into the Republic. There would either be an importer or a producer in a particular supply chain and that explains the use of the word "or" in S 56(1) between producer and importer. The same explanation applies to S 61. Note that the Act applies to every transaction inside the Republic of South Africa (save for the exempted transactions in S 5) and that it is irrelevant whether the supplier resides or has his, her or its principle office outside the Republic of South Africa. This is another example of how extensive the application is.

480 S 1 sv "transaction"; and see the discussion of the application of the Act and the definitions in the Act in 2.4–2.6 in the article.

481 S 1 sv "agreement"; and see the discussion of the application of the Act in 2.5 in the article.

482 S 1 sv "supply chain"; and see the discussion of the application of the Act in 2.5 in the article. Note that service providers (although members of the supply chain) have been omitted from S 56(1), as S 56 deals with the supply of goods, not services.

the reason for and practical implications of the use of these specific terms for each type of supplier? It is the authors' opinion that the implied warranty may, for example, apply respectively between the retailer, the distributor, the producer or importer and the consumer. Furthermore, the implied warranty may, for example, apply between the distributor (as supplier) and retailer (as consumer); between the distributor (as supplier) and another distributor (as consumer); and between the importer or producer (as supplier) and the distributor (as consumer); and even between the importer or producer (as supplier) and the retailer (as consumer), so long as the transactions are not exempted from the Act under Section 5.<sup>483</sup>

On the other hand, the warranty under Section 56(1) is curbed by the limitation in Section 55(6). Should the supplier have expressly informed the consumer of the specific condition of the goods, and should the consumer have expressly agreed to accept the goods in that condition, or knowingly acted in a way compatible with accepting the goods in that condition, the implied warranty of quality may (depending on the facts), for example, not include that the goods are reasonably suitable for the generally intended purposes, or the warranty may not include that the goods are of good quality, in working condition and free of any defects.

Should the goods fail to comply with the standards and the requirements contemplated in Section 55, the consumer may return the goods to the supplier without penalty and at the supplier's risk within six months after the delivery of the goods.<sup>484</sup> This subsection may have huge cost implications for the supplier. The consumer has a choice to claim that the supplier must *either* repair or replace the failed, unsafe or defective goods<sup>485</sup> or refund the consumer the price paid for the goods.<sup>486</sup> Does the six-month period set in Section 56(2) limit the implied warranty of goods under Section 56(1) of the Act itself to six months, or does the reference to six months only limit the consumer to exercise his/her remedies under Section 56(2) within a time period of six months?

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483 For a discussion of the exemptions from the Act, see 2.5 in the article.

484 S 56(2).

485 S 56(2)(a).

486 S 56(2)(b).

Under the former interpretation, the implied warranty of quality will be limited to a period of six months after delivery of the goods. The consumer's remedies under Section 56(2) would furthermore have to be enforced within six months after delivery of the goods. It may entail that a supplier is prohibited from selling goods *voetstoots* for the first period of six months, but that *voetstoots* may apply thereafter.<sup>487</sup> How would it work in practice?

Under the latter interpretation, the consumer's remedies under Section 56(2) would still have to be enforced within six months after delivery of the goods, but the implied warranty of good quality will exist indefinitely, and the consumer would be able to rely on his/her common-law rights to claim damages where breach of the implied warranty of quality occurred six months or longer after the delivery of the goods. The normal period of prescription for the institution of a claim for damages would apply. It is the authors' opinion that the latter interpretation would be followed, as it provides better protection to the consumer. Section 56(1) does not impose a time limit on the implied warranty of good quality, and neither does Section 55 (which sets out the consumer's right to safe, good quality goods) contain time limitations. As with other sections of the Act, Section 56(2) and its possible wide interpretation leaves room for much abuse by the consumer to the detriment of the supplier.

Should the supplier repair goods or any component thereof in terms of Section 56(2)(a), and within three months after the (attempted) repair the failure, defect or unsafe feature has not been remedied, or another failure, defect or unsafe feature turns up (presumably also within three months after the repair of the first failure, defect or unsafe feature), the supplier is obliged to *either* replace the goods<sup>488</sup> or refund the consumer the price paid for the goods.<sup>489</sup> Whereas Section 56(2) clearly states that the remedies provided for in that section are at the discretion of the consumer, Section 56(3) does not contain a similar provision.<sup>490</sup> It is proposed that the remedies contained in Section 56(3) are also available at the discretion of the

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<sup>487</sup> Note that the consumer rights that are created under the Act apply in addition to any common-law rights that the consumer may have. Also see S 56(4) and the discussion of S 56(4) in 3.8.4 in the article.

<sup>488</sup> See S 56(3)(a).

<sup>489</sup> See S 56(3)(b).

<sup>490</sup> See Ss 56(2)–56(3).

consumer and that the consumer has a choice of the remedy on which he/she wishes to rely.

Section 56(4) confirms that the implied warranty in respect of quality under Section 56(1) and the right to return goods under Section 56(2) exist in addition to:

- (a) any other implied warranty or condition imposed by the common law, the Act or any other public regulation;<sup>491</sup> and
- (b) any express warranty or condition provided by the producer or importer, the distributor or the retailer.<sup>492</sup>

Section 56(4)(b) does, for example, not refer to tacit warranties or conditions by the supplier, and this omission by the legislature may be an oversight, as tacit and implied terms are sometimes confused.<sup>493</sup>

The legal fraternity has raised concerns over the possible application of Section 56 to the sale of land and immovable property.<sup>494</sup> Whereas *voetstoots* clauses have been used extensively in contracts of sale of land and immovable property prior to the commencement of the Act, *voetstoots* clauses might not be effective after the commencement of the Act. If immovable property is, for example, sold with a defect such as a leaking roof, the consumer may exercise the remedy of his/her choice under Section 55(2). Repair of the roof (if possible) does not pose a problem, but replacement or a refund does, as ownership of the immovable property may already have passed to the consumer by registration of the title deed in the consumer's name in a deeds office. Such a transaction cannot be undone readily or without a huge cost implication (to the supplier). And what is to be done should the supplier have already purchased a new home on which a bond has been registered and the previous transaction has to be reversed?

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491 See S 56(4)(a).

492 See S 56(4)(b).

493 Again, see Cornelius *Principles* 158 on the distinction between tacit and implied contract terms.

494 Campbell "Consumer Protection Bill".

Whether the implied warranty of quality applies to the sale of land and immovable property may largely depend on an interpretation of the definitions of "goods",<sup>495</sup> "retailer",<sup>496</sup> "transaction"<sup>497</sup> and "agreement".<sup>498</sup> It is relevant that the definition of "goods" includes "a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service"<sup>499</sup> in Section 1. It appears that the consumer's (buyer's) legal interest in the immovable property may be regarded as goods. The definition of "retailer" poses more uncertainty and may be a possible hurdle for the implied warranty to be applicable to once-off transactions. Section 1 defines a "retailer" as a person who supplies particular goods to a consumer in the ordinary course of business. What does "ordinary course of business" mean? Can it be said that a private seller of a home sells it in the ordinary course of his/her business, and that such a seller is therefore a "retailer" for purposes of that agreement? Or does "ordinary course of business" require the seller to be in the business of selling homes, for example, a developer, before he/she will qualify as a retailer, if at all? Section 56(1) pertains to both transactions and agreements.<sup>500</sup> A "transaction" is required to be entered into in the ordinary course of business, but ordinary course of business is not a requirement of an "agreement". The courts or the legislature would have to clarify whether Section 56 also applies to immovable property.

Should the implied warranty of quality apply to the sale of land and immovable property, it is important to remember that it would not apply to any transaction in terms of which the consumer is a juristic person<sup>501</sup> whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of Section 6 of the Act.<sup>502</sup> Consumers who buy land or immovable property in the names of juristic persons may be denied the

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495 S 1 sv "goods"; and see the discussion of the definitions in the Act in 2.6 in the article.

496 S 1 sv "retailer"; and see the discussion of the definitions in the Act in 2.6 in the article.

497 S 1 sv "transaction"; and see the discussion of the application of the Act in 2.5 in the article.

498 S 1 sv "agreement"; and see the discussion of the application of the Act in 2.5 in the article.

499 S 1 sv "service". The interest that falls within the definition of service refers to "a right of occupancy of, or power or privilege over or in connection with, any land or immovable property, other than in terms of a rental; and ...".

500 Is it significant that the Act applies to transactions only? See S 5; and the discussion on the application of the Act in 2.5 in the article.

501 S 1 sv "juristic person"; and see the discussion of the definitions in the Act in 2.6 in the article.

502 S 5(2)(d); and see the discussion of the application of the Act in 2.5 in the article.

protection of the Act should the transaction be exempted from the Act in terms of Section 5(2)(d).

### 3.8.5 *The warranty on repaired goods*<sup>503</sup>

Section 57(1) provides that a service provider<sup>504</sup> warrants new or reconditioned parts installed during repair or servicing, as well as the labour to install the part(s), for three months, calculated from the date of installation, or for a longer period, as the supplier may stipulate in writing.

Section 57(2) confirms that the warranty on repaired goods:

- (a) is concurrent with any other deemed, implied or express warranty;<sup>505</sup> (It is uncertain what the legislature meant by a "deemed" warranty? What is the difference between a deemed and an implied warranty, if any? Like Section 56(4), this subsection also does not refer to tacit warranties. Is this another omission or an instance in which implied and tacit terms are incorrectly equated?)<sup>506</sup>
- (b) is void should the consumer have subjected the part, or the goods or property in which it was installed, to misuse or abuse;<sup>507</sup> (This is one of the few express provisions in the Act in favour of suppliers. The use of the word "property" is peculiar and superfluous here, as the word "goods" is used throughout the Act and the definition of "goods" also includes a legal interest in land or immovable property.)<sup>508</sup>
- (c) does not apply to ordinary wear and tear of the parts, having regard to the intended circumstances in which the goods are generally to be used.<sup>509</sup>

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503 S 57.

504 S 1 sv "service provider"; and see the discussion of the definitions in the Act in 2.6 in the article.

505 S 57(2)(a).

506 See the discussion on S 56(4) in 3.8.4 in the article. Again, see Cornelius *Principles* 158 on the distinction between tacit and implied contract terms.

507 S 57(2)(b).

508 S 1 sv "goods" and the discussion of the definitions in the Act in 2.6 in the article.

509 S 57(2)(c).

### 3.8.6 *The warning concerning fact and nature of risks*<sup>510</sup>

Section 58 addresses hazardous<sup>511</sup> and unsafe<sup>512</sup> goods or services and has a wide application. Section 58(1) provides that the supplier of any activity or facility<sup>513</sup> that is subject to: (a) risk of uncommon character or nature;<sup>514</sup> (b) risk of which the consumer could not reasonably be expected to be aware; or which an ordinarily attentive consumer could not reasonably be expected to foresee;<sup>515</sup> or (c) risk that may lead to serious injury or death<sup>516</sup> must specifically forewarn the consumer of the fact, nature and potential effect of that risk. The manner and form of the notice must meet the standards set out in Section 49.<sup>517</sup>

The notice must be given at the earliest of the following times: prior to entering into the agreement or transaction; prior to the consumer entering into the facility or engaging in the activity; or prior to the consumer tendering consideration. The notice must comply with the requirements of Section 22<sup>518</sup> in respect of information in plain and understandable language to enable an ordinary consumer with average literacy skills and minimum consumer experience to understand the notice.<sup>519</sup> Although no specific languages are prescribed for the notice,<sup>520</sup> warnings in foreign languages on imported goods will have to be translated into English or the dominant language(s) of the region for which the goods are intended. The question arises whether suppliers would also have to translate the warnings on locally produced goods to cater for foreign residents in South Africa.<sup>521</sup> The costs involved in translating and re-writing warnings would be significant. As the Act only applies to transactions within the Republic of South Africa, suppliers of locally produced goods would not have to

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510 S 58

511 S 53(1)(c) sv "hazard"; and see the discussion in 3.8.1 in the article.

512 S 53(1)(d) sv "unsafe"; and see the discussion in 3.8.2 in the article.

513 S 1 sv "facility": a facility "means any premises, space or equipment set up to fulfil a particular function, or at, in, or on which a particular service is available".

514 S 58(1)(a).

515 S 58(1)(b).

516 S 58(1)(c).

517 Ss 49 and 58(1); and see the discussions in 3.7.2 and 3.8.6 in the article.

518 See the discussion of S 22 in 3.4.1 in the article.

519 Also see S 24 on product labelling and trade description that may be relevant here.

520 In contrast to the Act, the *National Credit Act* prescribes official language requirements in S 63.

The omission of official language requirements may be a possible shortcoming in the Act.

521 See Narsigan *Business Brief* 13.

translate and re-write warnings for foreign consumers overseas under the Act, but they may be subject to foreign consumer protection legislation in the countries to which their goods are exported.

The notice required under Section 58(1), read with Section 49, must be conspicuous so that it would be likely to attract the attention of an ordinarily attentive customer.<sup>522</sup> The consumer must be given a reasonable opportunity to receive and comprehend the notice,<sup>523</sup> and must assent to the notice by signature, initialling or by otherwise acting in a manner that acknowledges receipt of the notice, awareness of the risk and acceptance of the risk.<sup>524</sup>

Adventure activities, such as cage diving and bungee jumping, and facilities, such as gyms, shooting ranges or theme parks, will definitely fall under Section 58(1) because the risk can result in serious injury or death. Compliance with and monitoring of Section 58 would be very time-consuming and place a heavy burden on suppliers.<sup>525</sup> Take a pharmacy, for example, in which all of the above provisions might have to be complied with before a sick (and perhaps hurried patient) may receive his/her medicine. Further, how would Section 58(1) be complied with before an emergency operation? The subsection does not provide exemption from compliance with the provisions in emergency situations, but the common-law defence of necessity may be invoked by a supplier. It would have far-reaching implications should Section 58 also apply to health professionals and hospitals.

A packager of hazardous or unsafe goods must display a notice on or with the packaging that provides the consumer with adequate instructions for the safe handling and use of the goods.<sup>526</sup> The packager of goods (who may actually be a person other than the supplier of the goods) bears this very onerous duty. Why is the

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522 S 49(4)(a).

523 S 49(5).

524 S 49(2).

525 See Narsigan *Business Brief* 13 in which she gives the example of a cashier who has to explain the potential hazard of items in a trolley full of groceries to the consumer. The cashier may, for example, have to do that in relation to all goods that contain nuts, as nuts may be hazardous or unsafe goods because they could cause serious injury or death to consumers who are allergic to nuts. This would require more and better-trained staff, as well as extensive liability insurance for the supplier (and his, her or its employees).

526 S 58(2).

duty to provide the customer with adequate instructions not placed directly on the producer or importer, the distributor and the retailer and the person who installs hazardous or unsafe goods (all the members of the supply chain) under Section 58(2)? This may again be an oversight as all the members of the supply chain may be held jointly and severally liable under Section 61 of the Act for any harm caused as a consequence of inadequate instructions or warnings to the consumer in respect of hazardous goods.<sup>527</sup> The duty to inform the consumer of hazardous (and unsafe goods)<sup>528</sup> thus applies to all members of the supply chain, as well as to packagers of hazardous or unsafe goods. The notice under Section 58(2) must comply with the requirements of Section 22 on information in plain and understandable language, as well as with any other applicable standards. What will be regarded as "other applicable standards"? "Other applicable standards" is a very vague term, but may, for example, refer to Section 24 on product labelling and trade descriptions.<sup>529</sup>

Section 58(3) provides that Section 58(2) does not apply should a largely similar label or notice have been applied in terms of any other regulation. Medicine issued with patient information leaflets (more readily understandable than ordinary pharmaceutical leaflets) may be one such example in which the packager does not bear the onus to display adequate instructions on or in the packaging.<sup>530</sup>

A service provider that installs hazardous or unsafe goods for a consumer, or supplies any such goods to a consumer in addition to performing any services, must supply the consumer with the original copies of:

- (a) documents that provide the consumer with adequate instructions for the safe handling and use of those goods;<sup>531</sup> or
- (b) any similar documents applied to those goods under another public regulation.<sup>532</sup>

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527 See Ss 61(1)(a), 61(2), 61(3) and 61(5) on the liability for damage caused by goods.

528 S 61 provides that the producer or importer, distributor or retailer of goods may be held jointly and severally liable for any harm caused as a consequence of inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods. It does not expressly mention unsafe goods. See S 53(1)(c) sv "hazard"; see S 53(1)(d) sv "unsafe"; and see the discussion in 3.8.1 in the article.

529 See again the discussion on the consumer's right to information in plain and understandable language in 3.4.1 in the article; and, as regards S 58(2), see the discussion in 3.8.6 in the article. Also see *Narsigan Witness Weekend* 19 for some examples on the effect of S 58(2).

530 S 58(3).

531 Ss 58(2) and 58(4)(a).

Suppliers would have to train their staff to comply with the extensive provisions of the Act. A service provider who installs hazardous or unsafe goods will have to train its employees to abide by the provisions of Section 58(4).<sup>533</sup> Its administrative procedures (for example, ensuring that it has the required documentation at hand and at the installation site at the time of installation) will have to be streamlined. The implementation costs of the Act for suppliers may be huge, and it is presumed that the costs would eventually be filtered back to the consumer.<sup>534</sup>

### 3.8.7 *The recovery and safe disposal of designated products or components*

Section 59(1)(a) provides that the person who, in the ordinary course of business, supplies designated products (products prohibited from being disposed or deposited in a common waste system by national legislation) to consumers must accept the return of any such goods, components, remnants, containers or packaging from the consumer without any charge, irrespective of whether that person supplied those particular objects to the consumer. Section 59(1)(a) provides that the producer, importer or distributor of any such goods must again receive the same from the person contemplated in Section 58(1)(b). This subsection does not provide that the producer, importer or distributor may not levy a charge for the disposal on behalf of the retailer.

Alternatively, the consumer may dispose of or deposit designated products at a collection facility provided for in any regulation or waste management plan.<sup>535</sup>

Products to be disposed of safely by the consumer may, for example, include the return of used injection needles to a pharmacy or the remainder of poisonous pesticide to a nursery or hardware store. Again, the suppliers have to carry the costs of the safe disposal of the designated products. It seems reasonable that they should bear the onus of disposing of the product, as they should be more competent to do

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532 S 58(4)(b).

533 See Pile *Financial Mail* 114.

534 Maphosa 2009 *Without Prejudice* 36–37.

535 S 59(2).

so than a consumer. That suppliers must bear the costs of the safe disposal alone is, however, questionable.

### 3.8.8 *Safety monitoring and recall*<sup>536</sup>

Section 60(1) provides that the Commission must promote industry-wide codes<sup>537</sup> of practice within the framework of Section 82 to sustain systems to receive notice of product failures,<sup>538</sup> monitor the sources of such information,<sup>539</sup> carry out investigations,<sup>540</sup> notify consumers of risks,<sup>541</sup> and recall goods.<sup>542</sup> The Commission may, by written notice, require that a producer must: (a) conduct an investigation;<sup>543</sup> or (b) carry out a recall programme on the Commission's terms<sup>544</sup> should there be reasonable grounds to suggest that goods may be unsafe, or should there be a potential of risk to the public from the continued use of or exposure to the goods, and the producer or the importer of those goods has not taken the steps required by its industry code under Section 60(1).<sup>545</sup>

Section 60(3) provides that a producer or importer who is prejudiced by a notice to investigate or recall goods under Section 60(2) may apply to the Tribunal to set the notice aside completely or partially. This subsection provides no right to appeal for a retailer or a distributor who may be affected by a notice to a producer to investigate or recall goods. This may be the case because they should be able to claim their damages and expenses as result of investigation or recall from the producer. It is uncertain why Section 60(3) provides the right to appeal to the importer as well,

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536 S 60.

537 S 82 sv "industry code".

538 S 60(1)(a)(i)–(iv). Systems should be sustained to receive notice of: consumer complaints or reports of product failures, defects or hazards; the return of goods due to a failure, defect or hazard; personal injury, illness or damage to property as a result of a product failure, defect or hazard; and other indications of failure, defect or hazard.

539 S 60(1)(b) provides that systems should be sustained to monitor the sources of the information in S 60(1)(a) and analyse that information to detect or identify previously undetected or unrecognised potential risk to the public by the use of or exposure to those goods.

540 S 60(1)(c). Systems should also be sustained to carry out investigations into the nature, causes, extent and degree of the risk to the public.

541 S 60(1)(d). Systems should further be sustained to notify consumers of the risk as contemplated in S 60(1)(c).

542 S 60(1)(e). Systems should lastly be sustained to recall goods that are unsafe for repair, replacement or refund.

543 S 60(2)(a).

544 S 60(2)(b).

545 S 60(2).

because the producer (not the importer) is the member of the supply team who may be tasked with the investigation or recall programme under Section 60(2), and the importer should also be able to claim his, her or its damages and expenses from the producer. The buck stops at the producer of the goods.

3.8.9 *Liability for damage caused by goods: "Manufacturers" or "products liability"<sup>546</sup>*

Section 61 deals with so-called "manufacturers" or "product liability". It is one of the (if not the) most controversial sections<sup>547</sup> of the Act, as it appears to introduce no-fault or strict product liability.<sup>548</sup>

Prior to the commencement of the Act, manufacturers' liability could be established either under the law of contract or under the law of delict.<sup>549</sup> Contractual liability requires a contractual nexus between the supplier of the defective product and the party suffering the harm as a result of the defect.<sup>550</sup> There is seldom a contractual nexus between the producer (manufacturer) of the product and the consumer (as retail client). Apart from his/her contractual remedies against the retailer (the seller), the consumer may find recourse under the law of delict. All the elements of a delict have to be proven to establish the manufacturers' liability under the law of delict.<sup>551</sup> In general, it is very difficult for a consumer to prove fault on the part of the producer, because there may, for instance, not be fault present in the production process, or the consumer could obtain proof of fault because he/she does not have insight into

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546 S 61.

547 Owing to the many controversies regarding S 61 and space constraints, it is not possible to provide a comprehensive critique on this section. The authors provide a number of comments that they consider to be particularly relevant. Many other aspects and details of S 61 and product liability remain to be explored.

548 Dinnie *Financial Mail*; Maphosa 2009 *Without Prejudice* 36–37; Dinnie *Healthcare Review* 59–60; Donneley *Mail & Guardian* 15; Narsigan 2009 <http://bit.ly/eDy9QU>; Dinnie 2009 *HASA* 8–9; Dinnie 2009 <http://bit.ly/fm2fPi>; Du Preez 2009 *TSAR* 79; Reed 2008 <http://bit.ly/enAgHr>; Dinnie 2007 <http://bit.ly/gdrzfu>; Maphosa 2009 <http://bit.ly/i92Mhx>; and Loubser and Reid 2006 *Stell LR* 412.

549 Weston 2007 <http://bit.ly/i7ZbJ2>.

550 Weston 2007 <http://bit.ly/i7ZbJ2>. A seller of goods is strictly liable for any consequential damage caused by a latent defect in a case in which the seller publicly professes to have attributes of skill and expert knowledge relating to that type of goods, even should the seller have been unaware of the defect. Also see *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A).

551 Neethling, Potgieter and Visser *Law of Delict* 292.

the production process<sup>552</sup> or is unable to identify the producer.<sup>553</sup> In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*,<sup>554</sup> the Supreme Court of Appeal was not prepared to recognise strict product liability, and confirmed the fault requirement for product liability.<sup>555</sup> The court concluded that in cases in which strict product liability is to be imposed,<sup>556</sup> it is a task for the legislature.<sup>557</sup>

Section 61<sup>558</sup> now provides that the producer or importer, distributor or retailer of goods is liable for harm caused because of:

- (a) the supply of unsafe goods;<sup>559</sup>
- (b) a product failure, defect or hazard in goods;<sup>560</sup> or
- (c) insufficient instructions or warnings to the consumer pertaining to any hazard arising from or associated with the use of goods.<sup>561</sup>

Negligence is not required to establish liability on the part of the producer, importer, distributor or retailer, as the case may be.<sup>562</sup>

Strict product liability applies to any producer, distributor, importer or retailer. The legislature failed to use the generic word "supplier" here.<sup>563</sup> Section 61(3) imposes

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552 Neethling, Potgieter and Visser *Law of Delict* 294.

553 Loubser and Reid 2006 *Stell LR* 431.

554 2003 4 SA 285 (SCA) – hereafter *Wagener*.

555 See Neethling, Potgieter and Visser *Law of Delict* 329–330 on the justification for liability without fault; Loubser and Reid 2006 *Stell LR* 415–423 on the policy considerations underlying strict liability and the appropriateness of reform of the existing structure of the law; and Weston 2007 <http://bit.ly/i7ZbJ2> on the reasons for strict liability.

556 For a summary of the comprehensive objectives in respect of strict product liability as envisaged by the court (*Wagener* paras 298–300), see Loubser and Reid 2006 *Stell LR* 415.

557 See 300G–H/I. See Neethling, Potgieter and Visser *Law of Delict* 392–336 on the forms of liability without fault recognised by our law of delict.

558 See Maphosa 2009 *Without Prejudice*, in which he distinguishes between three major types of liability claims that suppliers may face, namely manufacturing defects, design defects and failure to warn of defects under the Act. Manufacturing defects mostly occur due to inadequate quality control, substandard quality materials and deficient workmanship. Design defects may render goods dangerous or ineffective. Failure to warn of defects relates to Ss 22, 24 and 58. See again the discussions in 3.4.1, 3.4.3 and 3.8.6 in the article.

559 S 61(1)(a). Also see S 53(1)(d) sv "unsafe".

560 S 61(1)(b). Also see S 53(1)(a)–(c) sv "defect", "failure" and "hazard".

561 S 61(1)(c). Also see S 22 on the consumer's right to information in plain and understandable language, S 24 on product labelling and trade description, S 58 on warnings concerning fact, and nature of risks and the discussions in 3.4.3 and 3.8.6 in the article.

562 S 61(1).

joint and several liability on all the persons who may be liable in terms of Section 61.<sup>564</sup> There would either be a producer or an importer of particular goods, but it is not clear why the legislature used the word "or" between distributor and retailer, as they may both be involved in the same supply chain, and they may both be liable to the customer at the same time.

Section 61(2) provides that a supplier of services, who in conjunction with performing the services, applies, supplies, installs or provides access to any goods, is regarded as a supplier of those goods to the consumer for the purposes of Section 61. This subsection attempts to impose strict product liability on, for example, an electrician who installs a defective geyser. It may also, for example, impose strict liability on a surgeon who implants a defective pacemaker or a defective prosthetic.<sup>565</sup> The purpose of Section 61(2) is to protect customers against defective and inferior goods installed by suppliers, as they often do not have a choice from amongst goods and have to rely on the supplier's choices. However, owing to the omission of the word "supplier" in Section 61(1), an amendment may be necessary before strict product liability as contemplated in Section 61(2) may be imposed on service providers. It does not appear that Section 61(1) extends to service providers because it only refers to producers, importers, distributors and retailers. Alternatively, the legislature may have intended that service providers should be treated as retailers<sup>566</sup> under Section 61(1).<sup>567</sup> If so, why was this not clearly stipulated?

Not only consumers, but all injured persons may claim under Section 61. Should the defective geyser, in the example *supra*, burst and cause damage to the consumer's home and belongings, the consumer may claim. Should the consumer have happened to have guests and they sustained water damage to, for example, their luggage, they may also claim under Section 61. Small businesses, including juristic

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563 The word "supplier" was used in S 71(1) on product liability in the *Draft Consumer Protection Bill* of 2006: see Loubser and Reid 2006 *Stell LR* 431–432. Also see their discussion on who is liable under the strict product liability provisions in the UK and Europe.

564 See Loubser and Reid 2006 *Stell LR* 432–433, in which they allude to the position of joint and several liability of participants in the retail chain in other jurisdictions.

565 Dinnie *Healthcare Review* 59–60; and Dinnie 2009 <http://bit.ly/fm2fPi>.

566 See again S 1 sv "retailer"; and the discussion of the definitions in the Act in 2.6 in the article.

567 Dinnie 2009 <http://bit.ly/fm2fPi>.

persons that are not exempted from the Act under Section 5, may also rely on Section 61.<sup>568</sup>

In most jurisdictions, product liability is regarded as a sub-area of the law of delict.<sup>569</sup> In order to be successful in his/her product liability claim, a plaintiff will have to prove that (a) goods that are (b) unsafe, defective, or have failed or are hazardous, or contained inadequate instructions pertaining to a hazard (c) caused (d) harm (e) wrongfully.<sup>570</sup>

A few comments are necessary in respect of *goods* to clarify the application of Section 61 to certain kinds of goods. Section 61 would apply to land and buildings.<sup>571</sup> Structural or design defects that render buildings unsafe, and hazards on land sold may result in huge strict liability claims.<sup>572</sup> Section 61 would also apply to information itself (for example, a recipe in a cookbook that contains poisonous herbs or plants as ingredients)<sup>573</sup> and to the medium on which information is written (for example, the defective software that causes a computer to malfunction). Some suppliers produce inherently dangerous products. An example would be the South African National Blood Service that supplies blood or blood products. The blood may, for instance, be contaminated by HIV. Blood and blood products should fall under the definition of goods<sup>574</sup> and are not exempted from strict product liability.<sup>575</sup> Pharmaceuticals, which are by nature hardly ever completely safe, are also subject to strict product liability,

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568 See Loubser and Reid 2006 *Stell LR* 431–432, in which they explain that A 9 in the European Council Directive 85/374/EEC OJ 1985 L210 relates only to goods of a type ordinarily intended for private use or consumption and used by the harmed person mainly for private use or consumption. S 61 applies to a wider category of goods.

569 Loubser and Reid 2006 *Stell LR* 414.

570 Loubser and Reid 2006 *Stell LR* 418.

571 S 1 sv "goods" that include an interest in land or in other immovable property.

572 See Loubser and Reid 2006 *Stell LR* 433 referring to A 2 in the European Council Directive 85/374/EEC OJ 1985 L210, which includes only movable property. S 61 applies to a wider category of goods.

573 Loubser and Reid 2006 *Stell LR* 433–434 for a critical discussion on strict liability relating to information. Also see S 1 sv "goods" that include "any medium on which anything is written or encoded; ... information ...".

574 S 1 sv "goods"; and see the discussion of the definitions in the Act in 2.6 in the article.

575 See Loubser and Reid 2006 *Stell LR* 434–435 for a critical discussion of strict product liability and blood or blood products. Loubser and Reid also refer to the position under other jurisdictions. In some of these jurisdictions, blood and blood products are excluded from strict product liability.

despite the problems that may occur when establishing causation.<sup>576</sup> The definition of goods does not provide directly for components, although they may be included under "any tangible object".<sup>577</sup> Section 61(1) provides for strict product liability caused wholly or partly as a consequence of, for example, a defect. The definition of a defect<sup>578</sup> provides for components of goods. The supplier of a defective component (for example, the brakes of a truck) that caused a complex product (for example, a truck) to fail, is liable, as is the supplier of the complex product. This is another example of the very wide application of the Act.<sup>579</sup>

*Unsafe, defective, failed or hazardous goods and inadequate instructions pertaining to a hazard* have already been discussed.<sup>580</sup> As regards causation, the plaintiff carries the burden to prove a material factual link between the product defect or the inadequate instructions and the harm suffered.<sup>581</sup>

*Harm* for which a person may be held liable under Section 61 includes:<sup>582</sup>

- (a) death or injury of a natural person;<sup>583</sup>
- (b) illness of a natural person;<sup>584</sup>
- (c) loss or physical damage to any property (movable or immovable);<sup>585</sup> and
- (d) any economic loss that results from the harm contemplated above (for example, should a small business be the consumer, it may claim for loss of profit; a natural person may claim for loss of earnings).<sup>586</sup>

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576 Loubser and Reid 2006 *Stell LR* 437–438 on the manner in which other jurisdictions provide for strict product liability and pharmaceuticals, and 440–446 on causation. Also see Dinnie 2009 <http://bit.ly/fm2fPi>.

577 S 1 sv "goods".

578 S 53(1)(a)(i)–(ii) sv "defect".

579 See Loubser and Reid 2006 *Stell LR* 438–439 on strict product liability and defective components.

580 See the discussions in 3.8.1 and 3.8.6 in the article.

581 See Loubser and Reid 2006 *Stell LR* 440–446 on causation in the realm of strict product liability. In this regard, especially note the complexities relating to manufacturing defects, defects giving rise to non-traumatic injury, and warnings issued with products.

582 S 61(5).

583 S 61(5)(a).

584 S 61(5)(b).

585 S 61(5)(c).

586 S 61(5)(d). See Loubser and Reid 2006 *Stell LR* 439–440 on the damages that may be compensated.

Section 61 provides more extensive compensation than the consumer would have been able to claim from a retailer under the law of contract.

As regards *wrongfulness*, the plaintiff also carries the burden to prove wrongfulness (with the defectiveness of the product playing an important part).<sup>587</sup>

Section 61(4) provides a number of defences against liability for damage caused by goods:

- (a) if the unsafe product characteristic, failure, defect or hazard causes harm that is wholly attributable to compliance with any public regulation;<sup>588</sup>
- (b) if the alleged unsafe product characteristic, failure, defect or hazard:<sup>589</sup>
  - (i) did not exist in the goods when the goods were supplied by that person to another person, alleged to be liable; (this appears to be a defence that will often be raised by suppliers)<sup>590</sup> or
  - (ii) was wholly attributable to compliance by that person (which appears to refer to the consumer) with instructions provided by the person who supplied the goods (for example, where a biltong slicer in good working condition was supplied with clear instructions for use, but was not used accordingly by the consumer).<sup>591</sup>
- (c) if it is unreasonable to expect that the distributor or retailer should have detected the unsafe product characteristic, failure, defect or hazard, with regard to their role in marketing the goods to consumers;<sup>592</sup> or
- (d) if the claim for damages is brought more than three years after the:
  - (i) death or injury of any natural person harmed or injured as a consequence of the goods or inadequate instructions or warnings;<sup>593</sup>

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587 Loubser and Reid 2006 *Stell LR* 418–423 on wrongfulness and defectiveness. Also see Neethling, Potgieter and Visser *Law of Delict* 293 as regards wrongfulness as a requirement to establish manufacturers' liability.

588 S 61(4)(a).

589 S 61(4)(b).

590 S 61(4)(b)(i).

591 S 61(4)(b)(ii).

592 S 61(4)(c). Also see Loubser and Reid 2006 *Stell LR* 447 where they argue that a subjective test is adopted to establish whether the distributor or retailer acted reasonably.

593 S 61(4)(d)(i) read together with S 61(5)(a).

- (ii) the earliest time at which a person had knowledge<sup>594</sup> about an illness of any natural person;<sup>595</sup>
- (iii) the earliest time at which a person with an interest in any property had knowledge of the material facts about the loss of or damage to that property;<sup>596</sup>
- (iv) the latest date on which a person suffered economic loss.<sup>597</sup>

The last defence makes provision for prescription. It is not clear which prescription period would apply if more than one option is available. The latest date should apply.<sup>598</sup>

Some legal experts argue that Section 61 does not in actual fact concern strict product liability, as Section 61(4)(c) (the South African version of the so-called "development risk" defence in Europe) indirectly brings fault into play.<sup>599</sup> Section 61(4) provides for exemption from liability of particular persons who may otherwise be liable in terms of Section 61 (that is, the producer or importer, distributor, retailer and possibly a service provider). Section 61(4)(c) contains an exemption when "it is unreasonable to expect the distributor or retailer to have discovered the unsafe product ...", but does not mention the other members of the supply chain. The intention of the legislature is unclear. Is it the intention to exempt the producer or the importer from liability (even should it have been reasonable for them to have discovered the defect), but where it was unreasonable for the distributor or the retailer to have discovered it?<sup>600</sup> Or is it the intention to reserve the Section 61(4)(c) defence for distributors or retailers (because they, for instance, do not have as much control over the production of the product), and to exclude producers and importers

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594 As regards knowledge, *Van Zijl v Hoogenhout* 2005 2 SA 93 (SCA) held that prescription runs from the date on which a plaintiff acquired *meaningful* knowledge that a defendant is to be blamed. Prior to this case prescription started running the moment when a fact was first brought to a plaintiff's knowledge.

595 S 61(4)(d)(ii) read together with S 61(5)(b).

596 S 61(4)(d)(iii) read together with S 61(5)(c).

597 S 61(4)(d)(iv) read together with S 61(5)(d).

598 See Loubser and Reid 2006 *Stell LR* 451–452 on prescription.

599 Loubser and Reid 2006 *Stell LR* 446–451 on the "development risk" defence.

600 Loubser and Reid 2006 *Stell LR* 447 on the "development risk" defence with special reference to the technical problem of how the exemption in S 71(3)(c) of the *Draft Consumer Protection Bill* of 2006 was worded. The wording changed, but the uncertainty still remains in the Act.

from the defence? And if so, it is uncertain why importers are also excluded from the defence, as they have less control over the production process than producers.

Section 61(6) confirms the authority of a court to:

- (a) determine whether any harm has been proven and adequately mitigated;<sup>601</sup>
- (b) assess the extent and monetary value of any damages, including economic loss;<sup>602</sup> or
- (c) apportion liability amongst persons who are jointly and severally liable under Section 61.<sup>603</sup>

The Act does not make provision for contributory negligence on the part of the consumer.<sup>604</sup>

A supplier may be limited or exempted from liability for loss caused by his, her or its negligence, but not for loss caused by his, her or its gross negligence.<sup>605</sup> However, a supplier cannot contract himself, herself or itself out of strict product liability. As mentioned *supra*, negligence is not required on the part of the supplier to establish liability under Section 61.<sup>606</sup>

Apart from all the other precautions that suppliers would have to take into consideration in view of the soon-to-be-implemented strict product liability, it would be imperative to take out sufficient product liability insurance.<sup>607</sup> Only time will tell whether strict product liability as imposed by the Act meets the objectives set out in the *Wagener* case.<sup>608</sup>

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601 See S 61(6)(a).

602 See S 61(6)(b).

603 See S 61(6)(c).

604 See Loubser and Reid 2006 *Stell LR* 452 on contributory negligence. Their remarks are also relevant to S 55(5)(a) should consumers have blatantly ignored patent defects.

605 S 51(1)(c); and see the discussion in 3.7.4 in the article. Moosajee *Financial Mail* 113.

606 S 61(1); and see the discussion in 3.8.9 in the article.

607 Maphosa 2009 *Without Prejudice* 36–37.

608 Paras 298–300. Again, see Loubser and Reid 2006 *Stell LR* 415.

### 3.9 ***The supplier's accountability to consumers***<sup>609</sup>

#### 3.9.1 ***Lay-by sales***<sup>610</sup>

A "lay-by" refers to an agreement in which the supplier agrees to sell goods to a consumer, accept the purchase price in periodic instalments, and retain the goods until the full price has been paid.<sup>611</sup> Until the consumer takes possession of the goods, the instalments paid remain the property of the consumer<sup>612</sup> subject to Section 65 of the Act<sup>613</sup> and the supplier bears the risk of such goods.<sup>614</sup> The money may not, for example, be used to sustain the supplier's cash flow, because the instalments are to be held in trust for the consumer. Suppliers may have to insure goods sold under lay-by until the consumer takes delivery thereof in view that the supplier bears the risk of the goods until they are delivered to the consumer.

If the supplier is unable to deliver the goods when the consumer has paid the full purchase price, he, she or it must (at the option of the consumer) either:

- (a) supply the consumer with a corresponding amount of goods that are similar or better,<sup>615</sup> or
- (b) refund the consumer
  - (i) all the monies paid, with interest<sup>616</sup> should the supplier have been unable to supply the goods owing to circumstances beyond his, her or its control<sup>617</sup> (this does not apply in cases in which the shortage results from a failure by the supplier to sufficiently and diligently carry out ordinary or routine

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609 Chp 2 Part I paras 62–67.

610 S 62. The predecessor is the Lay-by Regulations under the *Sale and Services Matters Act* 25 of 1964, GN in GG 7068 R1234 of 13 June 1980 as amended by GN R1814 in GG 7200 of 29 August 1980. See also the discussion in Otto 1992 *De Jure*.

611 S 62(1).

612 S 62(1)(a).

613 See S 65 on the supplier's duty to hold, and account for, the consumer's property, and the discussion in 3.9.4 in the article.

614 S 62(1)(b).

615 S 62(2)(a).

616 S 62(2)(b)(i). Interest is to be paid in accordance with the *Prescribed Rate of Interest Act* 55 of 1975.

617 S 62(2)(b)(i).

matters in regard to his, her or its business, for example, failing to order stock);<sup>618</sup>

(ii) double the amount paid by the consumer as compensation for breach of contract in all circumstances in which the inability to supply was not due to circumstances beyond the supplier's control.<sup>619</sup>

This is an example of the manner in which the Act expands the consumer's rights that existed under the common law for breach of contract by the supplier.

Should the consumer cancel the lay-by agreement before full payment of the purchase price, or default by not paying the full purchase price within sixty business days after the anticipated date of completion:<sup>620</sup>

(a) the supplier may charge a termination penalty, provided that the supplier informed the consumer of the fact and the extent of the penalty before the consumer entered into the lay-by agreement;<sup>621</sup> (The penalty may not be charged should the consumer's failure have been due to death or hospitalisation of the consumer.<sup>622</sup> The Minister may prescribe a formula for calculating the maximum amount of the penalty.)<sup>623</sup>

(b) the supplier may deduct the cancellation penalty from the monies already paid by the consumer and must then refund the consumer the remainder of the money.<sup>624</sup>

The supplier must allow the consumer who defaults by not paying the full purchase price sixty days after the anticipated date of completion before he, she or it imposes a cancellation fee. That is a long period to wait for finalisation of the matter.

### 3.9.2 *Prepaid certificates, credit and vouchers*<sup>625</sup>

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618 S 62(3).

619 S 62(2)(b)(ii).

620 S 62(4).

621 S 62(5)(b).

622 S 62(5)(a).

623 S 62(6).

624 S 62(4)(b).

625 S 63.

Section 63 applies to a transaction in which a supplier:

- (a) accepts consideration<sup>626</sup> from a person (which is a wider term than the term "consumer")<sup>627</sup> in exchange for a prepaid certificate, card, credit, voucher or similar device,<sup>628</sup> and
- (b) expressly or implicitly agrees (it appears that "implicitly" should have been "tacitly" because it is unclear how one can agree to do something implicitly)<sup>629</sup> to provide goods or services to any person who tenders the above-mentioned devices up to the value represented by it.<sup>630</sup>

The section does not apply in respect of a device referred to in Section 63(1), or the value represented by it, after the total value of the device has been exchanged for goods, services or future access to services.<sup>631</sup>

Section 63(2) provides that a prepaid certificate, card, credit, voucher or similar device does not expire before the earlier of:

- (a) the date on which its total value has been redeemed in exchange for goods or services or future access to services (these devices may no longer contain a term that provides that no change is given);<sup>632</sup> or
- (b) three years after date of issue, or at the end of a longer or extended period agreed by the supplier at any time.<sup>633</sup> (Many devices on the market today expire within six months of date of issue, which will no longer be acceptable under the Act.)

Suppliers who issue these devices must hold the consideration received in trust for the benefit of the bearer of the device to the extent that the device has not yet been

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626 S 1 sv "consideration".

627 S 1 sv "consumer"; and "person".

628 S 63(1)(a).

629 See Cornelius *Principles* 158 on the distinction between tacit and implicit contract terms.

630 S 63(1)(b).

631 S 63(1).

632 S 63(2)(a).

633 S 63(2)(b).

redeemed in exchange for goods, services or future access to services.<sup>634</sup> The consideration remains the property of the person in possession of the device. Section 63(3) does not contain a direct reference to Section 65. The supplier's duty to hold and account for the consumer's property under Section 65 would be applicable here, although Section 63(3) refers to the wider term "bearer of the ... device" and not to the term "consumer" that is again used in Section 65.<sup>635</sup>

### 3.9.3 *Prepaid services and access to service facilities*<sup>636</sup>

In a case in which a consumer, in terms of an agreement, must pay (a) a once-off or periodic membership fee or any similar levy;<sup>637</sup> or (b) an amount for services or access to services to be provided at a date more than twenty-five business days after the payment is made (this subsection excludes prepayment devices contemplated in Section 63),<sup>638</sup> such amount remains the property of the consumer until the supplier makes a charge against it as contemplated in Section 64(2).<sup>639</sup> A membership contract at a gym is an example of where Section 64 would apply.<sup>640</sup> Section 64(1) does not contain a direct reference to Section 65, but the supplier's duty to hold and account for the consumer's property would again be applicable here.<sup>641</sup> Section 64(2) provides that a supplier may make a pro-rata charge against the consumer's money once a month, as required to pay for the following month's membership or service.

In a case in which a facility to which the supplier contractually undertook to provide future access to a consumer is going to close down, and the supplier does not make available a reasonably accessible alternative facility, the supplier is obliged to:<sup>642</sup>

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634 S 63(3).

635 S 65; and see the discussion in 3.9.4 in the article.

636 S 64.

637 S 64(1)(a).

638 S 64(1)(b).

639 S 64(1).

640 A few years ago, many consumers lost their (prepaid) membership fees when a major group of gyms ran into financial difficulty and were closed down.

641 See S 65 and the discussion in 3.9.4 in the article.

642 S 64(3).

- (a) give the consumer at least forty days' written notice of the intended closure;<sup>643</sup> and
- (b) refund to the consumer any money belonging to him/her in terms of Section 64 within five business days after closure of the facility.<sup>644</sup>

This would apply irrespective of whether it is an involuntary closure of the facility, for example, due to sequestration, liquidation or insolvency.<sup>645</sup> If a supplier is, for instance, liquidated, the liquidator of the estate would have to comply with Section 64(3)(b).<sup>646</sup> It is uncertain whether this would be feasible in practice.

It appears that the notice of closure and refund is not necessary in a case in which the supplier makes available a reasonably accessible alternative facility to the consumer. "Reasonably accessible" appears to refer to the fact that the alternative facility must be within a reasonable distance from the facility to be closed. The section does not require that the alternative facility be of similar or superior nature to the facility to be closed, and this may be to the detriment of the consumer, who might then have to continue with the service agreement (for at least some period) at the inferior facility.

### 3.9.4 *The supplier's duty to hold and account for the consumer's property*<sup>647</sup>

Section 65(2) provides that in the instance in which a supplier has possession of any prepayment, deposit, membership fee, other money or any other property belonging to, or usually under the control of the consumer,<sup>648</sup> the supplier:

- (a) must not deal with the property as if it is his, her or its own;<sup>649</sup> (The supplier therefore keeps the property in trust for the consumer. Must a separate trust account be opened? Would the supplier be expected to pay any interest

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643 S 64(3)(a).

644 S 64(3)(b).

645 S 64(4).

646 S 65(3) and the discussion in 3.9.4 and 3.9.5 in the article.

647 S 65.

648 Ss 62–64; also see the discussions of these sections in 3.9.2, 3.9.3 and 3.9.4 for examples in which a supplier has possession of prepayments, deposits, membership fees, other money or any other property belonging to, or usually under the control of, the consumer.

649 S 65(2)(a).

accumulated on that money to the consumer? This subsection places a heavy administrative burden on the supplier, and one that would also be accompanied by many extra costs towards banking and bookkeeping.)

- (b) must exercise the care, diligence and skill that can reasonably be expected of person managing property belonging to another person;<sup>650</sup> and (It is uncertain whether a supplier would be expected to act in the same manner as a financial intermediary, a trustee, an administrator, an executor or a liquidator; a very high degree of skill seems to be expected of the supplier.)
- (c) is liable to the owner of the property for any loss resulting from a failure to comply with Section 65(2)(a)–(b).<sup>651</sup>

Section 65(2) does not apply<sup>652</sup> to a supplier that is a bank,<sup>653</sup> a mutual bank,<sup>654</sup> or any other financial institution that is similarly licensed and authorised to conduct business and take deposits from the public under national legislation.<sup>655</sup>

Section 65(3) deals with persons who assume control of a supplier's property as administrator, executor or liquidator of an estate (was it in oversight that a trustee is not mentioned? It is uncertain whether a trustee would also have these duties).<sup>656</sup>

Such persons have a duty to the consumer:

- (a) to carefully investigate whether there is any money or other property belonging to the consumer that is in the possession of the supplier;<sup>657</sup> and
- (b) to oversee that such money or property is dealt with in compliance with Section 65 to the benefit of the consumer.<sup>658</sup>

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650 S 65(2)(b).

651 S 65(2)(c).

652 S 65(1).

653 As defined in the *Banks Act* 94 of 1990; see S 65(1)(a).

654 As defined in the *Mutual Banks Act* 124 of 1993; see S 65(1)(b).

655 S 65(1)(c). Attorneys, who may collect trust funds under the *Attorneys Act* 53 of 1979 would, eg, be exempted from S 65(2).

656 S 65(3)(a).

657 S 65(3)(a)(i).

658 S 65(3)(a)(ii).

The person in control of the supplier's estate is also liable for any loss to the consumer,<sup>659</sup> unless he, she or it acted in good faith<sup>660</sup> and without knowing of the existence of the consumer's interest.<sup>661</sup>

### 3.9.5 *Deposits in respect of containers, pallets or similar objects*<sup>662</sup>

The Minister may prescribe a minimum or maximum deposit that a supplier must or may require a consumer to pay in respect of the return of a container or similar object used for the packaging or delivery of goods.<sup>663</sup>

If a person (note, again the use of the wider term "person" instead of "consumer") returns a container or object contemplated in Section 66(1), the supplier must pay that person the amount of the deposit:

- (a) if any, that is required to be charged under any public regulation on the date on which the object is returned to the supplier,<sup>664</sup> or
- (b) that the supplier charged for that object, or ordinarily charges for such an object.<sup>665</sup>

The person returning the container may return the object to any supplier and receive the deposit paid, irrespective of whether such person paid a deposit to that supplier.<sup>666</sup> This is another section that entails a cost implication for the supplier.

### 3.9.6 *The return of parts and materials*<sup>667</sup>

When a service provider is authorised to perform a service to goods or property of the consumer or ordinarily under the control of the consumer, he, she or it must:<sup>668</sup>

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659 S 65(3)(b).

660 S 65(3)(b)(i).

661 S 65(3)(b)(ii).

662 S 66.

663 S 66(1).

664 S 66(2)(a).

665 S 66(2)(b).

666 S 66(2).

667 S 67.

668 S 67(1).

- (a) keep the parts or components that he, she or it removed from the goods;<sup>669</sup>
- (b) store the parts or components separate from parts that were removed from other goods; and<sup>670</sup>
- (c) return the parts or components to the consumer in a reasonably clean container,<sup>671</sup>
- (d) unless the consumer rejected the return of the parts or components.

It is not clear why the Act in addition to goods refers to property. This appears unnecessary, as property is included under the definition of "goods".

Section 67 provides for the return of the parts and materials to the consumer. Firstly, the parts remain the consumer's property, and it is, for example, the consumer's right to sell the parts to a second-hand dealer. Secondly, when the service provider returns the parts to the consumer, it may serve as a confirmation to the consumer of the service/s that was/were performed. A supplier may, before the service is performed, obtain the consumer's consent not to return the parts.<sup>672</sup> It appears that a supplier does not need to comply with Section 67(1) should the consumer have declined the return of the parts.

Section 67(2) confirms that Section 67 does not apply to any part, substance or component that is required:

- (a) in terms of a warranty under which the service was performed, to be returned to or disposed of according to the instructions of the producer or distributor;<sup>673</sup>
- (b) in terms of an insurance claim under which the service was performed, to be returned to or disposed of according to the instructions of the insurer;<sup>674</sup> or
- (c) in terms of any public regulation, to be recovered or disposed of in a safe manner in the interests of environmental safety or public health and safety.<sup>675</sup>

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669 S 67(1)(a).

670 S 67(1)(b).

671 S 67(1)(c).

672 S 67(1).

673 S 67(2)(a).

674 S 67(2)(b).

#### 4 Conclusion

The article has illustrated that the Act is written in favour of the consumer. Various provisions of the Act make inroads into the common-law position to strengthen the position of the consumer *vis-à-vis* the supplier. Undoubtedly, suppliers are facing an onerous task to prepare to comply, and eventually attempt to comply, with the Act.<sup>676</sup> Reviewing current practices and agreements and replacing them with new ones hold a huge cost implication for suppliers. Add to that the cost of training staff and employing extra staff to enforce the Act, as well as more extensive liability insurance. In addition, suppliers' product and service costs would no doubt also increase. Such increases would eventually filter through to the consumer. From a consumer's point of view, the Act is, however, to be welcomed, as it will contribute to the eradication of many exploitative practices in the marketplace.

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675 S 67(2)(c). Also see S 59 on the recovery and safe disposal of designated products or components; and the discussion in 3.8.7 in the article.

676 See Maphosa 2009 *Without Prejudice* 36–37.

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***List of abbreviations***

DTI	Department of Trade and Industry
ECTA	Electronic Communications and Transactions Act
HASA	Hospital Association of South Africa
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

## FUNDAMENTAL CONSUMER RIGHTS UNDER THE CONSUMER PROTECTION ACT 68 OF 2008: A CRITICAL OVERVIEW AND ANALYSIS

**W Jacobs\***

**PN Stoop\*\***

**R van Niekerk\*\*\***

### **Summary**

South Africa was in need of a comprehensive framework of legislation, policies and government authorities to regulate consumer-supplier interaction. The *Consumer Protection Act* 68 of 2008, which was signed by the President of the Republic of South Africa on 29 April 2009 and published in the *Government Gazette* on 29 April 2009, now provides an extensive framework for consumer protection and aims to develop, enhance and protect the rights of consumers and to eliminate unethical suppliers and improper business practices. Certain areas of the common law regarding consumer rights have been codified by the Act and certain unfair business practices that were previously unregulated are now governed by the Act. The Act has a wide field of application. It applies to every transaction occurring within South Africa for the supply of goods or services or the promotion of goods or services and the goods or services themselves, unless the transaction is exempted from the application of the Act. The Act also specifically regulates aspects of franchise agreements. In terms of the Act, consumers obtain several new rights and some existing rights are broadened and reinforced. These rights are: the right to equality in the consumer market; privacy; choice; disclosure and information; fair and responsible marketing; fair and honest dealing; fair, just and reasonable terms and conditions; and fair value, good quality and safety. The last right in terms of the Act deals with a supplier's accountability to consumers. The authors critically analyse and discuss these rights. It is clear that the Act is written in favour of the consumer.

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\* Wenette Jacobs. BLC LLB (UP) LLM (UNISA) Dip ADR (UP and AFSA). Senior lecturer, Department of Mercantile Law, School of Law, University of South Africa, South Africa (jacobw@unisa.ac.za).

\*\* Philip N Stoop. BCom LLB (UP). Senior lecturer, Department of Mercantile Law, School of Law, University of South Africa, South Africa (stooppn@unisa.ac.za).

\*\*\* René van Niekerk. BProc LLB LLM (RAU). Senior lecturer, Department of Mercantile Law, School of Law, University of South Africa, South Africa (rvanniek@unisa.ac.za).

Various provisions of the Act make inroads into the common-law position to strengthen the position of the consumer *vis-à-vis* the supplier and suppliers are undoubtedly facing an onerous task to prepare to comply, and eventually attempt to comply, with the Act. Although the Act has its own interpretation clause, which provides that it must be interpreted in a manner that gives effect to the purposes of the Act, the Act poses many uncertainties and interpretational and practical challenges. Many questions are therefore raised, some of which remain unanswered. These questions illustrate some of the uncertainties concerning the scope and possible interpretation of the fundamental consumer rights.

### **Keywords**

Contract law; consumer protection; consumer rights; equality; privacy; choice; disclosure and information; fair and responsible marketing; fair and honest dealing; fair or unfair contract terms; fair value; quality and safety; product liability.