CASES / VONNISSE

JUDICIAL GUIDANCE ON THE APPLICATION OF SECTION 49 OF THE CONSUMER PROTECTION ACT 68 OF 2008

Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd [2020] 1 All SA 857 (WCC)

1 Introduction

> "A significant portion of consumer law development can indeed be ascribed to legislative responses to business' disclaimers of accountability for negative consequences attendant upon their dealings with consumers." (Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) 3)

In South Africa, the legislature's response to the negative consequences resulting from the pervasive use of disclaimers by suppliers has been to regulate the use of these terms through the enactment of a number of provisions in the Consumer Protection Act 68 of 2008 (CPA), including sections 48, 49 and 51. A number of publications have considered the meaning of these provisions and the impact they may have on the use of disclaimers in consumer contracts. (See, for instance, Naudé "The Consumer's 'Right to Fair, Reasonable and Just Terms' Under the New Consumer Protection Act in Comparative Perspective" 2009 *SALJ* 505; Mupangavanhu "Fairness as a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 116; Mupangavanhu "Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)" 2014 *PELJ* 1168; Tait and Newman "Exemption Provisions and the Consumer Protection Act, 2008: Some Preliminary Comments" 2014 35(3) *Obiter* 629.) As a consequence of the widespread use of disclaimers and the adverse consequences they may hold for consumers, any judicial pronouncement on the impact of the CPA on these clauses is significant. In *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa* ([2020] 1 All SA 857 (WCC) (*Skydive v UPS*)), the Western Cape High Court was afforded the opportunity to consider the impact of aspects of section 49 specifically on the use of a clause in a consumer agreement excluding the risk or liability of suppliers (referred to as an "exemption clause" in this note).

Section 49 of the CPA applies to four distinct types of clause enumerated in section 49(1) – namely, clauses limiting the risk or liability of suppliers in respect of any other person; clauses constituting an assumption of risk or liability by the consumer; clauses imposing an obligation on the consumer to indemnify the supplier for any cause; and clauses requiring a consumer to

acknowledge a particular fact. As indicated, in *Skydive v UPS*, the contentious clause was one excluding the risk or liability of the supplier. The focus of this note then is on the interpretation and application by the court in *Skydive v UPS* of the relevant provisions of section 49 of the CPA to an exemption clause.

2 Facts and legal question

The plaintiff, who operates a skydiving business under the name "Skydive Mossel Bay", instituted action against the defendant for payment of an amount of R386 140,30 plus interest (par 1). The plaintiff had sent an aircraft engine to the United States of America (USA) for an overhaul and subsequently obtained the services of the defendant to collect and transport the engine from the USA to an address in George, South Africa. In terms of the agreement between the parties, the engine was delivered to the agent of the defendant, who had accepted delivery (par 5). The defendant failed to deliver the engine as agreed or at all and in fact informed the plaintiff that the engine had been damaged while in transit resulting in a total loss to the value of the amount claimed (par 6 and 32).

In securing the services of the defendant for the transport of the engine, the parties had negotiated via email. As part of the negotiating process, the defendant had required the plaintiff to complete and sign a credit application form, which was duly done and provided to the defendant (par 27). Although the plaintiff disputed whether this credit application form signed by him (and the terms it contained) formed part of the agreement between the parties, the plaintiff was "constrained to concede that it [the credit application] was a requirement for the agreement between himself and the defendant, and for the delivery of the aircraft engine to eventuate, for him to sign the credit application" (par 66) and that "no agreement could have come into existence without the [p]laintiff having signed the credit application" (par 67). The relevance for current purposes of whether the credit application formed part of the agreement between the parties is that the form signed by the plaintiff contained an exemption clause excluding the liability of the defendant in respect of the plaintiff in certain instances. It is on this clause of the contract excluding his liability that the case of the defendant largely rested. The defendant raised a number of defences, including a special plea in respect of the jurisdiction of the court, but for current purposes the exclusion of liability and the application of section 49 to such an exemption clause are the pertinent issues. Another defence raised – that the CPA does not apply to the agreement between the parties because it is a credit agreement – is considered later.

The defendant relied on the exemption clause contained in the credit application form and signed by the plaintiff. The clause provided that the defendant shall not be liable in respect of the plaintiff for any loss or damage of the goods transported, be it on the grounds of a breach of contract or due to negligence, unless the goods were in the actual possession of the defendant at the time of the loss occurring. It was the defendant's case that the engine was not in the actual possession of the defendant at the time of the loss and that the defendant was therefore not liable for the loss, as provided for in the contract (par 11). In the alternative, the defendant argued

that should it be found that the engine was in the possession of the defendant at the time of the loss, then the defendant cannot be held liable for the loss as the contract excluded the liability of the defendant for such loss unless the defendant was found to be grossly negligent – in respect of which the defendant pleaded that it was not negligent, alternatively not grossly negligent, nor that its negligence caused the damage to the engine (par 12).

At this point, it is relevant to point out that the plaintiff's view in respect of the completed and signed credit application form was that it was

> "a formality required of the [p]laintiff for the purpose of allocation to him, by the [d]efendant, of an account number (which was a requirement of the US authorities), and not for the purposes of seeking any credit." (par 20 and 72)

The plaintiff testified that he never had the intention of entering into a credit agreement with the defendant nor to exclude the liability of the latter for the loss the plaintiff had suffered but, in completing and signing the credit application form, he had hoped to "facilitate and expedite the process" of having the aircraft engine returned to him from the USA (par 65). It was the version of the plaintiff that the terms of the relevant exemption clause were not pointed out to him nor were they explained to him before signing the document and he did not understand these terms and conditions to be incorporated into or be part of the contract between the parties (par 21 and 43). The plaintiff, however, during cross-examination had to acknowledge:

> "he had agreed to the terms and conditions therein, and that all the business would be governed by and be subject to the terms of the standard trading conditions and the terms of the conditions of carriage printed overleaf, and that he had agreed to be bound thereby." (par 71)

Perhaps foreseeing that the completed credit application would be found to constitute the agreement between the parties (or at least be a fundamental part thereof), the plaintiff argued that the agreement between the parties was regulated by the CPA and that, as the agreement between the parties incorporated terms:

> "purporting to limit the risk of liability of the [d]efendant, the [p]laintiff was at no relevant time aware thereof and these clauses were not drawn to the [p]laintiff's attention by the [d]efendant, in a manner and/or form satisfying the requirements of section 49(3) to 49(5) of the CPA." (par 7 and 68)

The plaintiff thus asked for an order in terms of section 52(4)(*a*)(ii) of the CPA to sever from the agreement between the parties the clause limiting the risk of liability of the defendant (par 8).

In response, the defendant denied that the CPA applied to the agreement and submitted that the plaintiff, as a businessperson and the owner of a skydiving business, had signed the agreement and should accordingly be held to the terms thereof (par 15). Also, the defendant averred that the clauses in question were written in plain language, were "sufficiently conspicuous in the circumstances to attract the attention of an ordinary alert consumer, such as the [p]laintiff" (par 16), and that

> "the [p]laintiff, as a businessman and owner of a skydiving business, would have understood the meaning and import of the terms and conditions of the

agreement, and specifically those limiting the liability of the [d]efendant." (par 16)

The court held that the credit agreement did indeed form an integral part of the written agreement that existed between the parties (par 69). The question for decision then was simply whether the agreement between the parties complied with the requirements of the CPA (par 70). Stated differently, did the clause in the agreement purporting to limit the liability of the defendant in respect of the plaintiff comply with the requirements contained in section 49(3) to (5) of the CPA?

3 Finding of the court

The court found that the defendant was not entitled to rely on the exemption clause in the agreement and consequently made an order in terms of section 52(4)(*a*)(ii) of the CPA severing the clause from the contract. Consequently, the defendant was held to be liable to the plaintiff in the amount claimed because of the loss of the engine the former had undertaken to transport from the USA and to deliver to the plaintiff in George (par 95 and 116).

4 Reasoning of the court and discussion

The court held that the relevant clause of the agreement between the parties fell within the ambit of agreements to which section 49(1)(*a*), (*b*) and (*c*) are applicable, as the clause on which the defendant relied clearly sought to limit exposure to, or indemnify the defendant against, any liability for damages sustained by the plaintiff due to the loss of the aircraft engine (par 89). Having concluded thus, the court considered the purpose of section 49 and then analysed it with a view to ascertaining the legal obligations imposed by the section and how these obligations in turn were, or were not, complied with in the context of the particular facts of this case.

The relevant provisions of section 49 read as follows:

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

(2) …

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, the nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer–
  (a) in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer, having regard to the circumstances; and
  (b) before the earlier of the time at which the consumer–

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1)."

The court expressed the fundamental purpose of section 49 as one of ensuring improved access to quality information, which, in turn, will allow consumers to make informed choices based on individual circumstances (par 80). The court later emphasised the importance of informing the consumer "properly, and in practical terms, … where the provisions in an agreement as stated in subsections (49)(1)(*a*)–(*d*) would be applicable" as it would enable consumers to understand the nature and import of the clauses referred to in section 49(1)(*a*)–(*d*) when used in a contract (par 85). As a result, consumers would be protected from "a situation where the consumer is caught off-guard, or where a consumer would be tripped up by an unscrupulous or indifferent supplier" (par 88). It is exactly for this reason, the court states, that section 49 was "necessary and long overdue" (par 86). Section 49 serves to ameliorate "the unjust and unfair application of the *caveat subscriptor* rule" (par 81) and also to "prevent the formalistic application and harsh consequences thereof, as happened in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), which applied the principle that was laid down in *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A)" (par 82). (The principle enunciated by the Appeal Court in the latter case provides that when a person is required to append his or her signature to a document, the person assents to whatever words appear above such signature and a failure to familiarise himself or herself with the contents of such document cannot serve later to form the basis of a claim of *iustus error* (472 A–473 A).)

Section 49 (applied in the present context and excluding the obligations imposed by subsection (2), which are not relevant for current purposes) provides for four distinguishable obligations with which a supplier must comply in order for a clause falling within the ambit of section 49(1)(*a*)–(*d*) to pass the so-called incorporation requirements set out in section 49(3), (4) and (5) (see Naudé 2009 *SALJ* 505, as well as Tait and Newman 2014 *Obiter* 632–636). These are that the clause: (1) must be written in plain language (s 49(3)); (2) that the clause must be drawn to the attention of the consumer in a conspicuous manner (s 49(4)(*a*)); (3) that the consumer's attention must be so drawn to the clause before the advent of the actions specified in section 49(4)(*b*); and (4) the consumer must be given an adequate opportunity to receive and comprehend the clause (s 49(5)). (See also Naudé 2009 *SALJ* 508 and Naudé "Section 49" in Naudé and Eiselen *A Commentary on the Consumer Protection Act* (Original service, 2014) 49–2. The learned author refers to three requirements, reading the provisions of section 49(4)(*a*) and (*b*) as one requirement consisting of two aspects. It is submitted that nothing turns on these slightly different approaches.)

4 1 Section 49(4)(a) and the requirement of conspicuousness

Of particular relevance in the present context is the requirement posed in section 49(4)(*a*). As indicated, section 49(4)(*a*) requires that the fact, nature and effect of the relevant clause are to be drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances.

In this regard, the court stated that section 49 imposes an obligation on a supplier, wishing to rely on an exemption clause, "to explain the existence, the content and the consequences of such clauses" to the consumer (par 83). It is submitted that the words "existence", "content" and "consequences" are a clearer and simpler version of the terms used in section 49(4)(*a*) – namely, "fact", "nature" and "effect" – and may assist suppliers in better understanding what is expected of them when making use of an exemption clause.

Noteworthy is the fact that the court stated that suppliers are to ensure these aspects are to be *explained* to the consumer. Requiring the clause to be explained to the consumer gives rise to the question whether it is the duty of the supplier in a one-on-one type situation to explain verbally to a consumer the fact, nature and effect of the exemption clause. Practically, this may certainly not be possible in a vast majority of situations and to read such a meaning into the provision may well be an "insensible or unbusinesslike" interpretation. In this regard, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 4 SA 593 (SCA)), the SCA in setting out the proper approach for interpreting legal texts, including legislation and contracts, stated the following:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation." (par 18)

The dictionary meaning of "explain" means "to tell somebody about something in a way that makes it easy to understand" (Wehmeier *Oxford Advanced Learner's Dictionary of Current English* (2005) 513) and to "tell", in turn, means "to give information to somebody by speaking or writing" (Wehmeier *Oxford Advanced Learner's Dictionary of Current English* 1522). Considering these meanings, it seems that the court should not be understood to require anything more of a supplier, in terms of section 49(4)(*a*), than for the supplier to provide the consumer with information – in a conspicuous manner and form and which may be in writing – about the existence, content and consequences of the relevant exemption notice or clause.

The court *in casu* proceeded to state that the CPA "now clearly places a legal duty upon a supplier of goods or services to bring such clauses clearly and unambiguously to the attention of a consumer when it concludes a transaction with such a consumer" to which the CPA applies (par 84); the court explained that before the CPA came into effect such a legal duty only existed if the clause was considered to be "unexpected" in the particular contract (see par 83 and *Afrox Healthcare Bpk v Strydom supra* par 36; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); see also the discussion in Christie and Bradfield *Christie's The Law of Contract in South Africa* (2011) 181–186). The benefit introduced by section 49(4)(*a*) specifically is to require that an exemption clause be brought to the attention of the consumer whenever it is sought to be incorporated into an agreement between the supplier and the consumer and not just in cases where it might be considered, for instance, to be unexpected.

It then seems clear that the expression used by the court for the supplier to explain the existence, the content and the consequences of an exemption clause to the consumer, means to bring "such clauses clearly and unambiguously to the attention of the consumer" (par 84). The court thus understands the duty imposed by section 49(4)(*a*) to require that a supplier must first provide the consumer with enough information so as to be aware of the existence of the exemption clause. The court further explains that such a clause cannot be

> "concealed in an obscure and opaque section of the agreement which the consumer is not aware of, or in a provision of an agreement which would be meaningless to the ordinary consumer. The supplier must be open, transparent, and honest in its dealings with a consumer, if it wants to rely on such a provision in a consumer agreement." (par 87)

Section 49(4)(*b*) requires that the bringing of the exemption clause to the attention of the consumer must be done before the agreement is concluded, takes effect or the consumer starts to engage in an activity as a consequence of the transaction (par 87).

As indicated, the court expressed the view that one of the purposes of section 49 is to prevent a situation where a consumer is caught unawares of the existence of such a clause or notice by an indifferent or unscrupulous supplier and that may as a result lead to undue hardship and prejudice "if not properly explained or brought to the attention of the consumer" (par 88). The court found:

> "The [p]laintiff was furthermore presented with two full pages, which was not very conspicuous or clearly delineated, and in relation to which no effort was made to draw [p]laintiff's attention to any of the provisions. It was furthermore written in extremely small font, which even this court on the original document found extremely difficult to read, and which contains the very clauses mentioned in section 49(1), against which the act seeks to protect the consumer." (par 89)

Naudé (in Naudé and Eiselen *A Commentary on the Consumer Protection Act* (Revision service 5, 2020) 49–3) points out that it is unclear what would be regarded as sufficiently conspicuous, but that if the relevant clause "is

printed in contrasting typeface close to the primary terms of the contract, and must therefore be noticed by any consumer who reads the primary terms, this may be sufficient." One may argue that where a supplier has drawn the consumer's attention to the clause in a manner such as by physically pointing it out in the contract and specifically then verbally explaining or mentioning it, such action should be considered sufficiently conspicuous for purposes of the CPA, irrespective of where in the contract the exemption clause appears and in what typeface it is. (Of course, proving such a course of action may potentially pose problems for the supplier.) Drawing the clause to the attention of the consumer in a conspicuous manner does not mean that the supplier is obliged orally to explain the clause, its content and consequences to the consumer but, if this is done, this should in all but the most exceptional cases constitute compliance with the requirement that the clause or notice is to be drawn to the attention of the consumer in a conspicuous manner.

In the situation of, for example, a shopping mall where a notice board is employed to convey the exemption clause, different techniques will have to be employed and suppliers must carefully consider the manner and form used to ensure that the exemption clause is conspicuous. Suppliers must think of: the size of the notice board and the font size used for writing the clause; where and how the notice board and the clause thereon are positioned (see *Hanson v Liberty Group Ltd* (4633/2009) [2011] ZAGPJHC 195); whether the notice is in a well-lit place (see *Naidoo v Birchwood Hotel supra*); as well as the correct use of headings (see *Stearns v Robispec* (*Pty*) *Ltd* (27949/2017) [2020] ZAGPJHC).

The whole notice (understood here to be terms and conditions including the exemption clause, as well as other information, often written on a notice board and usually placed at the entrance to a facility such as a shopping mall) may be very conspicuous while the exemption clause is hidden. In this regard, in *Stearns v Robispec (Pty) Ltd* (*supra*), the court found that although the notice containing the exemption clause was "prominently displayed" (par 31), the "disclaimer should be pertinently brought to the attention of the consumer and not by an inconspicuous clause" (par 32). (It must be noted that this case deals with the use of an exemption clause, but does not consider the application of the CPA to such clause.) Simply put, a supplier may have a large notice board that is very conspicuous in itself, but when the notice board contains a variety of information such as trading hours and that the keys to the safe are not kept on the premises, the exemption clause may easily be hidden inconspicuously in the midst of this information.

However, it is not just the fact (existence) of the exemption clause that must be made conspicuous; section 49(4)(*a*) requires also that the nature (content) and the effect (consequences) of the exemption clause be brought to the attention of the consumer. The wording of the clause or notice must be in a format and manner that enables the consumer to understand and appreciate the content and consequences of such a clause or notice (see also Van Eeden and Barnard *Consumer Protection Law in South Africa* 245). An exemption clause may be very conspicuous without the content or consequences necessarily being so. Ensuring that the existence of the exemption clause is made conspicuous is not the same as ensuring the

content and consequences of the exemption clause are made conspicuous. It is suggested that the court *in casu* was sensitive to this – hence the emphasis on suppliers having to be open, transparent and honest in their dealings with a consumer. As the existence of the clause must be conspicuous to a reasonably alert consumer, so too must the content and consequences thereof be easy to ascertain. It may entail, depending on the context, that the exemption clause must, at a first reading and even a cursory one at that, inform the consumer that certain risks are imposed on the consumer or certain liabilities of the supplier are limited or excluded. This may often be the case. In *Stearns v Robispec (Pty) Ltd* (*supra*), the court was of the view that the exemption clause contained in the notice and which read "Pick n Pay will not be held responsible for any loss, damage or injury sustained on its premises" (par 30) was "simple, unambiguous and makes it plain that the defendant will not be liable for any loss, damage or injury sustained by anyone on its premises" (par 26). In this matter, the content and consequences of the clause were conspicuous; however, the fact or existence of the clause was found to be inconspicuous. On the other hand, the opposite may also be the case. In *Skydive v UPS*, for instance, the court said about the exemption clause in this matter:

> "I am furthermore in agreement with the submission that even the most experienced business person is unlikely to understand the nature and effect of the clauses in question, without explanation." (par 93)

Clearly, the content and consequences of the exemption clause were not conspicuous, clear and transparent. Ensuring that the content and the consequences of an exemption clause are conspicuous must of necessity pertain to the language employed by the supplier in the clause, which makes the interplay between this requirement and the plain and understandable language requirement contained in section 49(3) particularly relevant.

Enabling the consumer to understand the contents and appreciate the consequences of an exemption clause is largely dependent upon the language used – hence the requirement in section 49(3) that the clause or notice must be written in plain and understandable language as provided for in section 22 of the CPA (par 85). (For more on plain language see the discussion by De Stadler *Consumer Law Unlocked* (2013) 104–112, as well as Stoop "Section 22" in Naudé and Eiselen *A Commentary on the Consumer Protection Act* (Revision service 3, 2018) 22-1–22-17. See also Otto "A Consumer's Right to Plain Language and to be Informed in an Official Language That He Understands as Required by the National Credit Act: *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZD)" 2014 *THRHR* 162–163; Newman "The Application of the Plain and Understandable Language Requirement in Terms of the Consumer Protection Act: Can We Learn From Past Precedent?" 2012 33(3) *Obiter* 637; Louw "Simply Legal" 2011 *De Rebus* 22–25; Gouws "A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act" 2010 *SA Merc LJ* 79.)

At the heart of the right to plain and understandable language is the right to information and disclosure. Receiving information in plain and understandable language improves consumer awareness, informed decision-making and greater consumer responsibility (Stoop in Naudé and

Eiselen *A Commentary on the Consumer Protection Act* 22–2). The learned author points out that the requirement of plain language promotes procedural fairness in the process of contracting, thereby enabling "consumers to look after their own interests when dealing with suppliers" (Stoop in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-2–22-3). Plain language facilitates transparency, which is vital to procedural fairness (Stoop in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-3). The critical role of plain language in the context of conveying information to the consumer to make the existence, content and consequences of an exemption clause conspicuous cannot be over-emphasised. Making language plain is not as plain as it may sound and Stoop (in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-5–22-10) points out various problematic aspects with the definition of plain language and its implementation. For a notice or document to be in plain language requires, among other things, that a consumer understand the content of a clause and its effect on the consumer. Stoop (in Naudé and Eiselen *A Commentary on the Consumer Protection Act* 22-7) states that "the consumer must at least clearly understand the legal consequences of a document or terms, and its express and implied meaning". *In casu*, the court stated in the context of the plain language requirement that it

> "places an obligation on a supplier to properly, and in practical terms, inform a consumer where the provisions in an agreement as stated in subsections (1)(*a*)–(*d*) would be applicable." (par 85)

It is not immediately clear exactly what the court is referring to when it talks of *where* the relevant provisions would be applicable. It may be that the court is referring to the potential legal consequences that an exemption clause may hold for the consumer and that, as explained above, the consumer must at least be able to understand and appreciate the legal consequences of such a clause.

The argument by the defendant that the plaintiff is an experienced businessman, and thus should have been aware of the exemption clauses in the agreement (par 90), was rejected by the court when it stated that a supplier cannot be exempted from the obligations imposed by the CPA (par 91), which obligations the court found to be "absolute" (par 93). It does not follow, according to the court, that even people experienced in business would necessarily expect this type of clause in a particular context (par 92). As mentioned, the court expressed the view that even an experienced businessperson would have been unlikely to understand the clauses of the agreement in question, without explanation. (The clauses in question were not quoted in the judgment, thus not allowing for a consideration thereof.)

From the above, it is clear that the formal requirements contained in section 49(3) to (5) are to be tested objectively and that the level of education and experience of a consumer will not be considered as factors influencing that determination.

4 2 Section 49 and credit agreements

In a final attempt by the defendant to avoid liability, it was argued that in terms of section 5(2)(*d*) of the CPA, the Act was not applicable to the

agreement as it was in fact a credit agreement, and therefore subject to the provisions of the National Credit Act 34 of 2005 (NCA). Section 5(2)(*d*) of the CPA provides that the CPA does not apply to a transaction if it is a credit agreement in terms of the NCA, "but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act". The court held that the agreement between the parties did constitute a credit agreement, but what was at stake here was the supply of a service for consideration, and that service – the transportation of an aircraft engine – was not excluded from the ambit of the CPA in terms of section 5(2)(*d*) (par 97–98).

Section 5(2)(*d*) seems to provide a relatively simple formula for determining whether the CPA or the NCA applies in a context where goods or services are supplied in terms of a credit agreement. However, a number of authors have pointed out that this is not as simple as it may seem. (See for instance Melville and Palmer "The Applicability of the Consumer Protection Act to Credit Agreements 2010 *SA Merc LJ* 272; Stoop "The Overlap Between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A Comparison with Australian Law" 2014 *THRHR* 135; De Stadler *Consumer Law Unlocked* 14; Otto, Van Heerden and Barnard "Redress in Terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement" 2014 *SA Merc LJ* 247; De Stadler "Section 5" in Naudé and Eiselen *Commentary on the Consumer Protection Act* (Original service, 2014) 5–32).

In the specific context of the application of section 49, De Stadler in Naudé and Eiselen *Commentary on the Consumer Protection Act* (Revision service 1, 2016) (5–33) submits that Part G of the CPA, which is the part providing for the consumer's right to fair, just and reasonable terms and conditions and includes section 49, does not apply to credit agreements. Melville and Palmer also suggest (2010 *SA Merc LJ* 274–275) that section 49 of the CPA would relate to the agreement for the supply of goods or services and would not apply to a credit agreement. The learned authors argue (2010 *SA Merc LJ* 274 and 278) that if the credit agreement and the agreement for the supply of goods or services (for eg., a sale agreement) are contained in separate agreements then the NCA and CPA may apply to the two agreements respectively – the NCA to the credit agreement and the CPA to the agreement of sale (see also Stoop 2014 *THRHR* 136). But what if there is one document containing both? Melville and Palmer (2010 *SA Merc LJ* 274) suggest that where the two agreements are contained in the same document, then the NCA would apply.

It is not clear why (only) the NCA should apply where a single document contains both credit agreement and agreement of purchase and sale (or agreement for the provision of a service, as *in casu*). Melville and Palmer (2010 *SA Merc LJ* 274) themselves suggest that "[t]o identify those CPA provisions that do not apply to transactions falling within the NCA, one must start by deciding whether a provision relates to the transaction itself or to the goods and services supplied in terms thereof. The NCA applies to the former, and the CPA applies to the latter" (2010 *SA Merc LJ* 274). Such an approach, it is submitted, will allow for an assessment on whether a specific

clause in the agreement (and when applied in a specific context) is governed by the CPA or the NCA.

It is submitted that this is what transpired *in casu*. The court considered the exemption clause and the context within which it was sought to be applied and found that it related to the service the parties had contracted for – the delivery of the engine – and not to the credit agreement of which it formed part. The defendant tried to exempt itself from any and all liability that might arise from the loss, damage or non-delivery of the goods it undertook to transport and deliver to the plaintiff while they were not in the actual possession or control of the defendant (par 11), or if in the actual possession or control of the defendant, then liability should only arise where the defendant were found to have been grossly negligent (par 12). It seems clear that these provisions of the agreement pertain to the actual service that was contracted for (in the written email exchanges) and had nothing to do with the credit agreement (contained in the credit application form signed by the plaintiff). It is submitted that the court *in casu* correctly found that the fact that the clauses exempting the defendant of liability were contained in a document titled “credit application” or “credit agreement” should not change the fact that they related to the service contracted for and that the CPA should therefore find application.

The necessary consequence of this is that an agreement may have to be analysed on a clause-by-clause basis if it comprises both a credit agreement and an agreement for the sale of goods or the provision of a service. Arguably, this may mean that a particular clause, such as an exemption clause, in a given contract and context, may be both subject to and not subject to the CPA (particularly s 49), depending on the end to which the supplier is relying on the exemption clause. If the exemption clause is relied upon to exclude liability for any loss or damage resulting from the performance or non-performance of the service, as in the present case, the CPA will apply and the clause can be tested against the requirements of section 49. However, the clause may also be relied upon to exclude liability on the part of the credit provider for losses or damages resulting for the credit receiver from the manner in which the credit agreement was administered by the credit provider. In such a case, the CPA will not apply and Chapter 5 of the NCA will regulate the situation.

The pragmatic approach of the court *in casu*, it is submitted, may provide greater clarity on how to address the uncertainty of whether the CPA finds application in a situation involving a credit agreement.

5 Concluding remarks

In *Skydive v UPS*, the court had the opportunity to consider the interpretation and application of the formal incorporation requirements contained in section 49 of the CPA to exemption clauses. The widespread use of these clauses in consumer agreements makes the courts’ interpretation and application of these provisions greatly significant for suppliers and consumers alike.

In *Skydive v UPS*, the court explained that the aim of section 49 is to ensure that consumers are provided with improved access to quality information, which in turn will allow consumers to make informed choices,

thus avoiding a situation where consumers are caught unawares by the existence, content or consequences of an exemption clause, and which in turn may lead to harsh consequences for the consumer. To give effect to this end, section 49(4) of the CPA provides that the fact, nature and effect of an exemption clause must be brought to the attention of a consumer in a conspicuous manner and form. What will be considered conspicuous will depend on the facts of the case and one must remember that regard must be had to the particular circumstances prevailing at the time of the conclusion of the agreement. In the final analysis, it will be objectively determined whether the consumer was provided with enough information so as to be aware of the existence of the exemption clause and enough information to allow the consumer to understand the content and appreciate the consequences of the exemption clause. The exemption clause itself, but also its content and consequences, must be open and transparent – that is, conspicuous – to the consumer. Although the clause may itself be conspicuous, the content and consequences of the exemption clause may not be – and *vice versa*. Making the content and consequences of the exemption clause transparent will depend largely on the effective use of plain and understandable language.

As judicial guidance increasingly assists a better understanding of how to use exemption clauses to ensure compliance with the requirements of the CPA, suppliers will learn and adapt their practices to ensure that their use of exemption clauses are (almost) immune to legal challenge. This will eventually result in the consumer again being in a position where he or she has little protection against the negligence of the supplier. For instance, if all supermarkets comply with the requirements of section 49 when using exemption clauses, consumers will be aware of these clauses and will even understand its content and appreciate its consequences, but will have no choice but to accept these clauses. The consumer could then be said to be informed but not protected. The grey-listing of certain contract clauses may provide some comfort to consumers, in that the onus to prove that the use of such a clause is fair in terms of section 48 of the CPA rests on the supplier. In particular, regulation 44(3)(a) of the Regulations to the CPA provides that clauses exempting suppliers from liability for death or personal injury of consumers are presumed unfair; it would be very interesting to see under what circumstances using an exemption clause to exclude liability for death or personal injury would be fair. In the meantime, could it be that ignorance is bliss?

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