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Ethical Business Practices: Transformation and the Consumer Protection Act in South Africa

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Abstract

The new Consumer Protection Act 68 of 2008 that has come into effect in South Africa as from 1 April 2011, lays the basis for consumer protection in this country and is the first of its kind. It promotes a fair, accessible and sustainable marketplace for consumer products and services and for this purpose to establish national norms and standards relating to consumer protection; to provide for improved standards of consumer information; to prohibit certain unfair marketing and business practices; to promote responsible consumer behavior; and to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements (DTI, 2011).

It is the social responsibility of business owners, or suppliers, to ensure that they carry out good trade practices. This will include preparing terms and conditions in plain and understandable language, having effective policies in place to regulate disgruntled consumers, advertise correctly, market their goods and services correctly, honestly and without misrepresentation. Thus, a new relationship unfolds between the consumer and business and **respect for the customer** becomes more evident, by dealing honestly and making products and services accessible within a sustainable market, without encroaching on consumers' right to privacy and choice.

The preamble to the Consumer Protection Act recognizes that apartheid and discriminatory laws have resulted in “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality” and there is therefore a need to develop the means to assist historically disadvantaged individuals in realizing their full participation as consumers. In addition, the need to develop the means to protect the interests of *all* consumers, as well as to “give effect to internationally recognized consumer rights”, is also acknowledged. Consumers from disadvantaged communities were previously excluded from participation in fair business transactions in many sectors. Access to goods and services was problematic. Apart from certain common law rights for consumers generally, consumer protection was unclear and not codified. In addition, a significant proportion of consumers in the country, have low literacy levels, and as a result are seriously disadvantaged when it comes to understanding the content and effect of business contracts. It also seriously hampers their ability to negotiate on an equal footing with business, especially since most businesses use standard form contracts. In addition, disadvantaged consumers become easy targets for unfair business practices because of their lack of understanding of their rights or the means to acquire legal assistance.

The Consumer Protection Act addresses these problems. Among other things it codifies consumer rights and sets out nine fundamental consumer rights, which includes equality in the consumer market; the right to disclosure and information (which encompasses the right to “plain and understandable language”), the right to fair just and reasonable terms and conditions and the right to fair value, good quality and safety. This article explores specific provisions of the Act, with a focus on the role of business in transformation as far as consumer protection is concerned, including the significance of plain and understandable language in contracts and in communication with the consumer.

This paper uses a descriptive approach to reveal the social responsibility of business in a transforming society as far as consumer rights are concerned. It concludes that the impact of the Consumer Protection Act for business is far-reaching; that business has a significant role to play with regard to consumer protection and transformation of a historically disadvantaged society, and that the law does play a role in placing pressure on businesses to act in a socially responsible manner.

Key words: Consumer Protection, Transformation, Business Practices, Contracts, Consumer rights

1. INTRODUCTION

Engelbrecht and Rousseau (2007, 354) define “consumerism” as a set of activities on the part of independent organizations, government, and business organizations, designed to protect the consumer. Until recently, consumer protection was unclear and not codified in South Africa. There were certain common law rights for consumers generally and legislation did provide limited protection to the customer in terms of legislation. The new Consumer Protection Act (CPA) (Republic of South Africa 2009) that came into effect from 1 April 2011, lays the foundation for the consumer era in South Africa and is the first legislation of this kind (Havenga 2010, 483). The primary focus of the Act is to promote a fair and accessible market for consumer products and services while it also sets out national norms for consumer protection and minimum standards which all consumer transactions and agreements have to adhere to. The CPA does provide alternative means to resolve consumer problems.

This paper uses a descriptive approach to reveal the social responsibility of business in a transforming society as far as consumer rights are concerned. It, firstly, examines the significance of ethical business practices and unfolds the role of business in transformation in South Africa. Secondly, it examines specific fundamental rights of the consumer set out in the CPA. Thirdly, it focuses on the right to information in plain and understandable language.

2. ETHICAL BUSINESS PRACTICES

Do customers care about ethics? Can doing good help businesses do better? Results from a recent study suggests that ethical behaviour helps the bottom line of a company (Doane, 2005). Increased sensitivity to ethical reputation is a major advantage in South Africa and businesses are realizing that good ethics and social responsibility are good business practices which will contribute to profitability and growth. Ethical reputation and customer satisfaction and loyalty are critical predictors for South African business and provides an edge over the competition.

2.1 What are business ethics?

Business ethics has an external emphasis considering the gap between organizations’ ethical actions and behaviour in ongoing business practices and the marketplace’s or society’s perceptions of the organization’s ethical actions and behaviour in their business practices. “Corporate ethics”, on the other hand, has an internal emphasis considering the gap between the management’s ethical actions and behaviour and the staff’s perception of the management’s ethical actions and behaviour in on-going business practices (Svensson and Wood, 2004).

2.2 Why should business engage in ethical business practices? What’s in it for business?

Society and marketplace stakeholders no longer judge an organization’s performance on profit alone. Consideration of the ethical and socially responsible actions underlying profitability, should lead organizations to aspire to being better corporate citizens in order to achieve

ethically long term profit. As the social conscience of many in the developed world became more acute in the latter years of the twentieth century, then so too was there a corresponding rise in the expectations of organizations to be better corporate citizens and to invest in making the society a better place (Campbell et al., 2002; Rondinelli, 2003).

Do the ethical structures and processes in place assist the bottom line of an organization? Today it would appear that the stakeholders of first world economies look more deeply at such profit declarations. The declaration of a profit or a loss is only the first of a set of criteria upon which the marketplace and society evaluates the performance of the organization. This is where ethical business practices become crucial and may benefit the organization in both the short and the long term.

There are expectations and perceptions that vary between organizations, the marketplace and societies that surround organizations, and that influence the predominant belief or conviction of what may, or may not, be seen as ethical business practices. One of the contributing factors is that of government legislation, which may frame and define the criteria of ethical business practices across organizations. Developed western style democracies have laws that govern the expected and perceived actions and behaviours in business practices as they tend not to be self-regulatory (Carson, 2003; Davies, 2001; Piety, 2004; Rondinelli, 2003).

Historically, they have been able to impact societies' and their citizenry's expectations and perceptions of organizations' business practices (Grit, 2004; Whawell, 1998). Organizations are also confronted with societal expectations and perceptions beyond purely economic issues, such as environmental and social change responsibilities (Handelman, 2000; Handelman and Arnold, 1999).

With the awakening of globalization has come a realization in first world economies that there are organizations who appear to have diverse sets of actions and behavioural standards depending upon the country in which they find themselves at the time (McMurtry, 2002; Sørensen, 2002). There is a need for ethical structures that surround the modes in which organizations strive to inculcate corporate and business ethics. Without them there are no supports in place to create ethical processes and evaluate ethical performance. This area serves as a support that the organization and its staff should be able to relate to at the strategic, tactical and operational levels of business practices. It is a point of reference to other stakeholders in the marketplace and society. It is therefore important for the internal environment to be educated on the code of ethics. This therefore necessitates ethical audits, and an ethics committee, which forms an integral part of the process of developing trust within the internal and external environments. "Within this integrated system of ethics management in the organization, ethics auditing can respond to the basic objective of ethics management, which is simply to integrate economic benefit with social and environmental benefit" (Garcia-Marza, 2005: 211).

There is also a need to support the staff of the organization in different ways, otherwise they will not know the corporate standpoint on ethical business practices. In particular, staff may not

know how to act and behave in situations requiring ethical considerations. Organizations need to be aware that ethical values and principles change over time and vary across contexts. It is therefore crucial to create processes that contribute to regulating organizations' ethical business practices, but also there must be structures in place to support staff in their ethical actions and behaviours. The ethical performance appraisal and staff education is one such area and contributes to strengthening corporate efforts in managing and monitoring ethical business practices across the organisation (Fraedrich, 1992).

It is also important for customers and other stakeholders, who are seen as partners in the process of developing organizational wealth, to be informed about the organisations code. Many suppliers rely extensively on the continued goodwill of the organization. The power in the relationship usually resides with the organization. In most industries, a range of alternate suppliers can be sourced. This organizational flexibility places pressure upon the incumbent supplier to abide by the rules of the employing organization (Crane *et al.*, 2004). They should be seen as partners in a mutually inclusive mission to create value for everyone across organizations. It is advisable to get suppliers to embrace and contribute to the organization's values and ethical viewpoints – in extension, ethical business practices.

The sentiments and views of other stakeholders are important to any organization as they may be affected by the success and/or failure of the organization (Heath and Norman, 2004). Good organizations do not differentiate between institutional stakeholders and other stakeholders in the marketplace and society. The welfare of all stakeholders should be treated equally regardless of the monetary value that they represent to the organization. In sum, all stakeholders of the organization are important to consider when one is to develop, manage and monitor ethical business practices.

The South African customer today is therefore interested in whether the organization made a profit or a loss and how its business practices in the marketplace have impacted upon its shareholders. The Companies Act 71 of 2008 (Section 7) has put pressure on business practices and therefore requires a different focus, in respect to the ethical aspects of the organization's business practices. Triple bottom line, corporate governance, corporate social responsibility, and BBBEE indicate a major change from the belief in previous eras that organizations are only in existence to make profits.

So what obligations does legislation impose on business? Legislation compels companies to act socially responsibly. This dictates that corporate social responsibility should be aimed at social conduct where stakeholders' interests are taken into account be it by way of indirect legislation or by way of voluntary conduct.

The effect of the BBBEE Act is that companies and directors are forced to take into account the interests of the previously disadvantaged South Africans into account. The BBBEE Act is but one example of the use of legislation to guide the corporate conscience. The Act confronts companies with the political and socio-economic reality in the country within which they operate and involves them in the process of reform and reconciliation. It is crucial that the

corporate conscience and Government efforts for reforms are combined and coordinated to ensure that it functions to the benefit of the country at large (Esser and Dekker, 2008).

A positive ethical climate promotes job attitudes and customer oriented behaviours and increases customer satisfaction. A company providing ethical reputation accentuates customers feelings of self-esteem (Schneider and Bowen, 1999). Customers will then see ethical reputation as a surrogate for reliability and quality of service in selecting providers.

From a marketing perspective, suppliers consider ethical behaviour as a way of differentiating themselves as well as a means to gain competitive advantage. Recognizing this, Nike, GAP and Dell, to name a few firms, are setting ethical guidelines to increase their corporate and brand image. To buttress their ethical image, firms support popular social causes such as education, job creation, health, hunger eradication and protection of the environment. They are also placing greater emphasis on implementation of ethical codes in their domestic and international operations. This is consistent with the belief that measures of company success must go beyond revenue and profit and should also include intangible aspects like empathy, the ability to understand and relate to the needs of stakeholders and society at large (Natale and Sora, 2009).

3. THE ROLE OF BUSINESS IN TRANSFORMATION

South African company law dictates that, directors have a fiduciary duty towards all shareholders and a wider range of interests should be protected, such as employees, consumers, suppliers, the community, and the environment (Esser and Dekker, 2008: 159-160). The recent Companies Act 71 of 2008 (Section 7) recognises the broader social role of companies and re-affirms the company structure as a means of achieving economic and social benefits in a manner that enhances the economic welfare of South Africa. In terms of the Act (Section 72), companies have to elect a social and ethics committee to monitor and report on their activities with regard to social and economic development, promotion of equality and development of the communities in which they operate (Deloitte, 2010). In terms of the core principles of the King III report, social injustice has to be eradicated. Further, social transformation and redress is important and needs to be integrated within the broader transition to sustainability (Pwc, 2011). King III, therefore directs companies to “proactively manage the relationship with its stakeholders” and strive to achieve the correct balance between its various stakeholder groupings, in order to advance the interests of the company (Olson, 2010: 222-3).

CSR has evolved into three areas of the triple bottom line, namely, economic, social and environmental. While the economic dimension is about profitability, the social dimension means that companies have to go beyond fulfilling their legal responsibilities and invest in human capital, as well as take actions to contribute to the welfare and interests of the staff and community. In South Africa, the social aspect of CSR contributes toward the upliftment of society (Terry, 2010: 18).

The equality clause in the South Africa Constitution (1996: Section 9) provides for the equal protection and benefit of all persons and allows for legislative or other measures that are designed to advance or protect persons disadvantaged by unfair discrimination. The CPA therefore lays the foundation in this respect for the consumer. The CPA is the first piece of legislation to set out the rights of consumers and the responsibilities of suppliers. This Act will develop a means to protect the interests of all consumers, more specifically the disadvantaged consumer. Business therefore has a socially responsible role to play as far as consumer protection and transformation of historically disadvantaged societies in South Africa are concerned.

Armed with information, customers are becoming more sophisticated and demanding, and this makes business realise the need for trust and commitment as a means to developing customer loyalty.

4. ETHICAL BUSINESS PRACTICES, TRANSFORMATION AND CONSUMER PROTECTION IN SOUTH AFRICA

Consumers from disadvantaged communities were previously excluded from participation in fair business transactions in many sectors. Access to goods and services was problematic. Apart from certain common law rights for consumers generally, consumer protection was unclear and not codified. In addition, a significant proportion of consumers in the country, have low literacy levels, and as a result are seriously disadvantaged when it comes to understanding the content and effect of business contracts. It also seriously hampers their ability to negotiate on an equal footing with business, especially since most businesses use standard form contracts. In addition disadvantaged consumers, because of their lack of understanding of their rights or the means to acquire legal assistance, result in them being easy targets for unfair business practices.

4.1 The problem of discrimination and inequality

The preamble to the Consumer Protection Act recognizes the far reaching and devastating effects that apartheid has had in burdening the nation with “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality”. In view of the ravages of discrimination, particularly on the basis of race and gender, equality and the prevention of discrimination have played a significant role in post-apartheid South Africa. Clearly, apartheid resulted in discrimination in almost every aspect of social, political and economic life. Black people were prevented from becoming owners of property or even residing in areas classified as “White”, senior jobs and access to universities were denied to them, civic amenities, including transport, and many shops were closed to them and instead, separate and inferior facilities were provided (*Brink v Kitshoff*, 1996: 768). Hence, with the adoption of the 1996 constitution, there has been much discussion and debate about correcting these discriminatory practices. Since much of these inequalities were as a result of unjust legislation from the past, it is not surprising that the attainment of the ideals of equality and a fair and just society has been directed towards the state. Clearly, the state had to carry much of the responsibility in

removing the unjust legislation and introducing measures to prevent inequalities in the future and to redress injustices of the past.

However, the attainment of the ideals of a society free of discrimination and injustice is not attainable without the application of such ideals to the private sector, i.e. individuals and business. The apartheid system also supported, encouraged and even demanded discrimination and unfair treatment of customers by business entities. Madladla J has observed in the judgement in *Du Plessis v De Klerk* (1996: 732) that the extent of the oppressive measures in South Africa was not confined to government/individual relations, but applied equally to individual/individual relations.

In the past there have been glaring differences in the service quality and access to goods and services that were offered to different groups of customers. These discriminatory businesses practices existed not only with regard to retail business, but were also rife with service provision.

4.2 Problems associated with contracts

For the average consumer, contracts are an essential part of life, something that cannot be avoided if one wants to participate in the commercial world. The principle of *pacta sunt servanda* followed in South Africa with respect to contracts, implies the freedom to contract. Parties are free to contract with whomever they wish to and they are also free to negotiate the terms applicable to such contract. If the parties to a contract adhere to this principle it would mean that there would be a fair degree of certainty regarding the contract and the parties would be aware of their rights and duties. They are also aware that such rights are enforceable (Newman, 2010: 735). Newman (2010: 735-6), however, reminds that this is hardly the situation in the real world as a large proportion of the population have very little experience at contracts and even those they do have such experience have no control over the terms that are included in the contract since businesses often use “standard form contracts”. He defines a standard form contract as a contract where the terms and conditions applicable are contained in a standardized document, which has been drawn up in advance by one of the parties and the contract is available for acceptance in that form only. Since customers lack the bargaining power when standard form contracts are used, some customers fail to read the provisions as they feel they will be bound by the terms anyway.

Further, the standard-form contracts include terms that are not negotiated and are generally one sided and over-protective of business, so as to minimize its risk and exempt it from as much liability as possible. According to Sharrock (2010: 296), businesses generally adopt a “take-it-or-leave-it stance if a customer requests a change in the standard terms. These standard form contracts also include terms that are unfair to the consumer. Although the consumer has the option not to agree to the terms and conditions, or to look elsewhere for better terms, customers generally agree with the pre-formulated terms without questioning them or requesting that they be amended (Sharrock 2010, 295-6). In addition customers become easy targets for unfair business practices due to their inability to understand the contents of such

contracts or obtain legal assistance. An added challenge for consumers is that businesses are able to enforce disclaimers that are excessively one-sided.

Further, a fair number of consumers in South Africa have low literacy levels. This seriously hampers them when it comes to understanding the terms included in a business contract and the implications they will have. The low literacy level also means that they are unable to negotiate with business on equal terms particularly since most businesses use standard form contracts. This lack of understanding means that they are unaware of their rights and are not in a position to enforce them. However, even those customers who have a fair literacy level may have little contractual experience or expertise to understand the nature and consequences of the terms and conditions included. Legal assistance is costly and a fair proportion of customers are able to afford it. In addition, contracts are worded in language and in a format that dissuades customers from reading them (Newton, 2010: 735).

4.3 The need for consumer protection legislation

In a free market economy state intervention should be minimal. Hence, there is the danger that the protection of consumer rights through the law can go too far and it could interfere with the consumer's free choice (Woker, 2010: 218). Woker (2010: 230-1) rejects the view that consumer protection legislation, such as the CPA, is unnecessary and that it will further burden the South African economy. The reasons she advances in support of such protective measures include:

- Much of the consumer law in South Africa that existed prior to the introduction of the CPA, was fragmented and outdated;
- South African consumers were denied the protection of internationally accepted consumer principles, such as the right to transparent and advertising practices;
- Widespread unfair practices existed in consumer transactions;
- Marketing of goods and services is highly sophisticated in comparison to traditional markets, and untrained consumers are unable to compete with suppliers who convince them to contract on terms that protect the suppliers' interests;
- Consumers are placed in an 'unequal bargaining position' and when it comes to confronting suppliers with problems, they are usually ignored;
- Consumers do not have the resources to take the matter to court, especially since litigation is relatively expensive and the amounts generally involved in consumer-related disputes, are relatively small;
- There is a need for checks, balances and safety nets, to make the free market work by protecting the interests of both business and consumers; and
- With the opening up of international trade, there is a need to ensure that South Africa does not become a dumping ground for unsafe and substandard products, and the consequent exploitation of consumers is avoided.

4.4 The Consumer Protection Act (68 of 2008)

The preamble to the Consumer Protection Act recognizes that apartheid and discriminatory laws have resulted in “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality” and there is therefore a need to develop the means to assist historically disadvantaged individuals in realizing their full participation as consumers. In addition, the need to develop the means to protect the interests of *all* consumers, as well as to “give effect to internationally recognized consumer rights”, is also acknowledged.

4.4.1 Fundamental consumer rights in terms of the Consumer Protection Act (South Africa)

Chapter 2 of the CPA sets out nine fundamental consumer rights: equality in the consumer market; the right to privacy; the right to choose; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions; the right to fair value, good quality and safety; and the right to hold the supplier accountable.

4.4.1.1 The Right of equality in the consumer market

In terms of Section 8, businesses must not unfairly discriminate against consumers on the grounds set out in the South African Constitution (Section 9), such as race, gender, disability, age and pregnancy. Business is not allowed to *unfairly* exclude any person from access to goods or services or grant anyone exclusive access; unfairly supply different quality of goods or services to consumers or unfairly charge different prices for any goods or services. Unfairly excluding certain communities or market segments, or targeting certain communities or market segments, is also prohibited. These provisions do not imply that businesses may not differentiate between different consumers or groups of consumers. Fair discrimination is allowed (Reddy, 2005: 133). The Consumer Protection Act makes exceptions for certain cases that may be viewed as fair discrimination, such as refusing to supply a minor with any particular goods or services without consent from the parent or guardian (Section 9).

4.4.1.2 The consumer’s right to privacy

The use of technology to market goods or services, such as the cell phone or even the telephone, could infringe on the consumer’s privacy or the time chosen to market such goods or services, could be unreasonable. The Act therefore places certain restrictions on direct marketing. “Direct marketing” is defined as approaching the consumer in person, by mail or electronic communications for the purpose of promoting or offering goods or services or for requesting a donation (Section 1). Section 11 of the Act gives the consumer the right to restrict unwanted marketing by refusing to accept such marketing, by requesting that it be discontinued or by pre-emptively blocking such communication. The consumer who has been approached for the purpose of direct marketing may demand that the person responsible for such direct marketing, desist from any further communication. To protect the privacy of consumers, Section 12 also prohibits direct marketing at the consumer’s home during certain days, dates, public holidays or times of the day which are prescribed by the Minister responsible for consumer protection matters (Havenga, 2010: 488).

4.4.1.3 The consumer's right to choose

The consumer has the right to choose in respect of the following:

- *Right to select suppliers:* Supplier may sometimes make it a condition of the contract, for instance when buying something, that the consumer has to buy other goods or services, or enter into additional agreements, or agree to buy any goods from other businesses or persons. This is also referred to as “bundling”. These conditions are prohibited in terms of Section 13 unless the supplier can show that the bundling is convenient or cost effective for the consumer.
- *Rights relating to expiry or renewal of fixed-term agreements:* Consumers could be liable to unreasonable penalties or charges if they choose to cancel a contract before expiry. The Act now prohibits such practice (Section 14). The consumer has a right to cancel before expiry and may be liable to a reasonable cancellation penalty.
- *Right to pre-authorization of repair or maintenance:* Suppliers may not charge consumers for repairs or maintenance unless the consumer was supplied with an estimate and the consumer has authorized the work (Section 15).
- *Right to cooling-off period in the case of direct marketing:* Where the goods are sold by direct marketing, the consumer has a cooling-off period of five business days to cancel the agreement (Section 16).
- *Right to cancel advance reservations or booking:* The consumer has the right to cancel advance reservations or bookings (Section 17). Suppliers may impose a reasonable charge for cancellation.
- *Right to choose or examine goods:* Where the consumer buys from open stock, he or she may select or reject any item (Section 18).
- *Rights in respect of delivery of goods or supply of services:* It is an implied condition of every contract for the supply of goods services that the seller agrees to deliver the goods or services at the agreed place and time, at his own cost and that the risk in the goods remains with the seller until delivered to the consumer (Section 19). The parties may agree to change these terms.
- *Right to return goods:* The consumer will have the right to return the goods and claim a full refund in the following cases: where the agreement arose out of direct marketing and the consumer has cancelled; where the customer did not have an opportunity to examine the goods before delivery and has rejected delivery; and where the goods are unsuitable for the purpose intended and the supplier was aware of that (Section 20).

4.4.1.4 The consumer's right to disclosure

- **The right to information in plain and understandable language**

Newman (2010, 745) states that the literacy levels in South Africa are so low that the drafters of contracts have to accept the responsibility for making contracts more readable for consumers. He also states that contracts may contain onerous clauses written in fine print in unintelligible language and are inaccessible for the literacy level of most South Africans. Gouws (2010: 81)

mentions that agreements may contain technical language which is incomprehensible for the consumer and that terms included are non-negotiable, usually one-sided, favouring the supplier.

The CPA (Section 22) has responded to these problems experienced by consumers regarding unreadable contracts. These provisions compel suppliers to draft contracts in “plain language”. Consumers have a right, in terms of Section 22, to information in plain and understandable language. In terms of this provision, any notice, document or visual presentation required by the Act must be in the form prescribed and if no form is prescribed, it must be in plain language. This would apply not only to contracts, but also to advertising material and notices displayed to consumers, particularly indemnity notices (Newman 2010, 737).

- **Disclosure of price**

Retailers may not display any goods for sale without displaying the price of the goods (Section 23). A supplier may not require the consumer to pay a higher price than the displayed price. If there is more than one price, the consumer will pay the lowest price.

- **Product labeling and trade descriptions**

Suppliers are prohibited from using trade descriptions (which includes description, number, weight, manufacturer, ingredients, or place of origin) that could mislead consumers (Section 24).

4.4.1.5 The consumer’s right to fair and responsible marketing

The provisions relating to the right to fair and responsible marketing aim to create fair business practices in respect of advertising. They set out general standards relevant to marketing, as well as rules for specific types of marketing. Section 29 prohibits service providers from marketing goods in a way that is fraudulent, misleading or deceptive. Section 30 prohibits bait marketing. In terms of this section, a supplier must not advertise services as being available at a specific price and manner that will mislead or deceive the consumer as to the actual availability of those services (Havenga, 2010: 495). Advertising in these respects must be clear so as not to mislead or deceive. Section 31 prohibits “negative option marketing”. Negative option marketing involves a practice where the supplier promotes goods or services on the basis that they will be supplied or the agreement will automatically come into existence *unless the consumer declines such offer*. E.g. books are mailed to a consumer with a letter stating that unless the books are returned within 30 days, a contract of sale will come into existence. Such transactions are now not allowed.

Where the goods are marketed through direct marketing, the consumer must be informed of the right to cancel within 5 days, i.e. the cooling off right (Section 32). Section 33 places certain obligations on the supplier where goods or services are offered through catalogue marketing. The supplier has to disclose information including the supplier’s name, licence, registration number, physical business address, currency in which amounts are payable, supplier’s delivery arrangements, and cancellation, return and exchange policies. Section 34 prohibits promotional

offers using trade coupons where the person making the offer does not intend fulfilling it or fulfilling it other than as offered. A promotional offer is one where any prize, gift, free good or service, price reduction or concession, is offered (Section 34 (2)). Section 35 contains a similar provision relating to customer loyalty programmes.

4.4.1.6 Right to fair and honest dealing

Certain acts which are regarded as “unconscionable conduct”, are disallowed by Section 40. The supplier is not allowed to use physical force against the consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or similar conduct in marketing, concluding the contract or claiming the return of goods. Where the consumer who defaults, signs a voluntary repossession declaration under duress, for instance, this would be invalid. The supplier must not take advantage of the consumer’s physical or mental disability, illiteracy, ignorance, inability to understand the language of the contract or any other similar factor.

In the marketing of goods or services, the supplier must not use false or misleading representations, exaggerations, innuendo or ambiguity relating to a material fact concerning the contract (Section 41 (1)).

4.4.1.7 Right to fair, reasonable and just terms and conditions

The supplier is prohibited from offering, supplying or agreeing to supply goods or services at a price or on terms that are unfair, unreasonable or unjust. Even the marketing of goods or services in an unfair, unreasonable or unjust manner, is prohibited (Section 48; Naudé, 2009: 514-9). Section 48 also prohibits the supplier from requiring the consumer to waive any rights.

A term, agreement, condition or document will be regarded as unfair, unreasonable or unjust if it adversely affects the consumer in that it is:

- Excessively one-sided in favour of the supplier;
- So adverse to the consumer as to be inequitable; or
- A false or misleading statement or to the detriment of the consumer (Section 48 (2)).

In light of these provisions, Businesses would have to re-examine their institutional rules, and terms and conditions of agreement, in order to determine whether they are fair or not. Such rules and terms would include breach of contract implications, such as penalties imposed on the consumer.

What factors then would assist businesses in determining whether such provisions are unfair or not? Sharrock (2010, 308) indicates that a term or condition is not unfair because it is “one-sided” or favours the supplier in some way. It has to do this “excessively”. He further maintains that a contract cannot be classified unfair simply because one party held a superior bargaining position and was able to dictate terms. The fairness of the contract or term depends on whether one party obtained consensus (agreement) by taking advantage of the inability of the other party to protect his or her interests, such as being unable to take independent advice, or

make an informed judgement, or conclude the contract elsewhere on better terms (Sharrock, 2010: 311). The list of “unfair prohibitions” set out in the CPA (Section 51) includes terms which: defeat the purposes of the Act; mislead or deceive the consumer; limit or exempt the supplier from liability in certain circumstances; limit the rights of the consumer in the event the supplier fails to perform or the performance is inadequate; exclude or hinder the consumer’s right to take legal action; unfairly prevent the parties from having equal rights (e.g. where the supplier has unilateral decision making powers); or authorise the supplier to do anything that is unlawful in terms of the Act or fail to perform some duty required by the Act.

Unfair clauses could also take the form of a disclaimer. Generally, disclaimers are included in contracts to exclude or limit one of the parties from liability in certain circumstances. According to McGee (2010: 20), parties to contracts will not be able to contract out of liability for gross negligence or death, injury or illness, or the loss of or physical damage to, movable or immovable property, as well as any economic loss. She states that although the CPA does not prohibit the use of disclaimers, their scope of application is limited and it makes it more difficult for a party to implement or rely on. She states further, that suppliers will have to spell out any limitation of liability in simple language which is understandable by the consumer, and it has to be drawn to the consumer’s attention before the consumer concludes the transaction, starts participating in any activity or is required to make payment. In addition the consumer has to be given adequate time to read and understand the disclaimer.

Prohibited transactions, terms or conditions

Some provisions in an agreement between businesses and consumers would be invalid in terms of Section 51 of the CPA. These include:

- Terms that defeat the purpose of the Act;
- Terms that mislead or deceive;
- Terms that result in the consumer waiving his/her rights;
- Terms that exempts Businesses from liability for any loss directly or indirectly attributable to the gross negligence of the HEI or the person acting for it;
- Terms that require the consumer to enter into a supplementary agreement; and
- Terms that require the consumer to forfeit any mone if the consumer exercises his/her right in terms of the Act

4.4.1.8 Right to fair value, good quality and safety

Firstly, the consumer has a right to timely performance and completion of those services, and timely notice of unavoidable delays. Secondly, the consumer has a right to performance of the services in a manner and quality that a person is generally entitled to expect, having regard to the circumstances of the supply and the specific criteria and terms agreed upon (Section 54 (1)).

4.4.1.9 The right to hold the supplier accountable

These provisions regulate lay-by agreements, pre-paid certificates, credits and vouchers (such as airtime vouchers for cellphones) and pre-paid services (such as gymnasium membership fees) (Havenga, 2010: 507).

4.5 Protection of consumer rights

The Consumer Commission may issue a compliance notice to any person that has engaged in a prohibited conduct in terms of the CPA. If the person fails to comply with such notice then the Commission may either apply to the Consumer Tribunal for the imposition of an administrative fine, or refer the matter to the National Prosecuting Authority for prosecution. The Consumer Commission created in terms of the Act, is responsible for promoting dispute resolution between consumers and suppliers and receiving complaints relating to prohibited conduct or offences. The Consumer Tribunal conducts hearings into complaints relating to the CPA and may impose penalties in respect of prohibited or required conduct (Havenga, 2010: 508-9).

4.6 Penalties/Administrative fines

For disclosing any personal or confidential information, the penalty is a fine or imprisonment up to 10 years. For other offences, a fine or imprisonment up to 12 months may be imposed. Administrative fines may be imposed by the Tribunal up to one million rand or 10% of the respondent's annual turnover, whichever is greater. How these provisions will apply in the context of Businesses is not clear. The provision on vicarious liability (Section 113) confirms that if an employee or agent is liable in terms of the Act, then the employer is also liable, although this does not apply to criminal liability.

5. A FOCUS ON THE RIGHT TO INFORMATION IN PLAIN AND UNDERSTANDABLE LANGUAGE

Plain language is on the rise. Legal requirements for plain language are proliferating in the US, Canada, Europe and Australia. South Africa is no exception: new legislation, including the Consumer Protection Act, the Companies Act and the National Credit Act, makes plain language obligatory in many business and consumer documents (Gordon and Burt, 2010: 59).

Respect for the consumer has become important in South Africa since the launch of the consumer protection act on the 1st April 2011. A new relationship has unfolded between the consumer and business. This relationship sees the consumer as being empowered, and therefore necessitates all documentation to be written in plain and understandable language.

In South Africa, even before the Act was passed, Parliament recognised the need for legislation dealing specifically with plain language and adopted several consumer protection statutes. Independent bodies such as the Banking Association of South Africa were also required to write their documentation in plain language (Gouws, 2010).

An apparent problem in South Africa is that consumers seldom read important terms when entering into a contract. A common reason is that consumers are more interested in obtaining the purchased product, rather than acknowledging the consequences of the purchase. They

simply do not bother to read the long drawn out contract, because they trust the supplier or in most instances are in too much of a hurry to bother to read.

With the introduction of two very important pieces of consumer legislation, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008, legislators have given effect to the widely held perception of unreadable contracts by including a section compelling drafters to write in “plain language” (s 64 of the National Credit Act and s 22 of the Consumer Protection Act; Newman, 2010: 737).

Apart from the fact that consumers do not take the time to read contracts prior to signing, there is also the issue of the disadvantaged consumer whose literacy levels are so low, that they cannot understand the content of contracts. Gouws (2010, 81) comments that agreements may contain technical language which is incomprehensible for the consumer and that terms included are non-negotiable, usually one-sided, and favours the supplier. This puts this category of the consumer at a disadvantage. Gordon and Burt (2010, 59) demonstrate why plain language requirements in our law is necessary, through the case of *Mathole v Mothle* (1951 (1) SA, 257 T).

Mothle was a farmer in the 1950s who was involved in a court case about a debt owed by his son-in-law. Mr Mothle had guaranteed the debt. The plaintiff (a businessman) sued the semi-literate Mothle based on the guarantee contract. The contract was in English (except for a few Latin phrases). English was not Mothle’s home language.

In court, Mothle attempted to raise the defence that the businessman must first proceed against the son-in-law to recover the debt. However, Mothle had given up the right to raise this defence when he signed the contract. In particular, Clause 5 reads:

I renounce all benefits from the exceptions of *‘excussionis et divisionis, non causa debiti and non numeratae pecunia’*. Mothle told the court that he had not read the contract. This argument did not hold sway with the court (at 258):

...A man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.

Mothle then told that court that even if he had read the contract, he would not have known the meaning of the clause. However, the court held that the obligation to find out what the words meant was on Mothle (at 258):

The ... mere fact that one of the parties did not, through his own ignorance or mistake, appreciate the full import of the agreement he made, is no ground for setting the contract aside. This case is typical of many judgements where the caveat *subscriptor* principle was applied.

This case highlights the issue of compliance versus communication. Is it not the duty of the company to ensure that the customer understands the language in the contract?

At a 1995 seminar called *Plain language, the law and the right to information*, the then Minister for Justice, Dullah Omar, spoke about the transformation of justice. Omar called for '*plain, simple and understandable language*' in the country's laws, in court judgements, in consumer documents, and in radio and television broadcasts. He referred to plain language as '*democratising language*.' Since then, we have seen plain language, and plain language requirements, in many of our laws: the Constitution of the Republic of South Africa (108 of 1996), Bill of Rights, Long-term insurance Act (52 of 1998), Short-term insurance Act (53 of 1998), National Credit Act (34 of 2005), Consumer Protection Act, Companies Act (71 of 2008)(Gordon and Burt 2010, 59).

So, what does this mean for business from a communications perspective? It is evident from the above, that plain language has already been embedded in our laws. In South Africa the level of literacy is so low, thus making it essential for those responsible for drafting contracts to accept responsibility for making these contracts readable. This demands that business is obliged to inform and educate the disadvantaged consumer and to take responsibility for ensuring that they comply with plain language requirements. This therefore, necessitates the need for proper communication strategies to be introduced. Such strategies would firstly ensure that a communication practitioner is involved in the process. Secondly, it would ensure that the ordinary consumer, with average literacy skills and minimal experience as a consumer, understands a contract. This would mean simplifying communication.

6. CONCLUSION

The need to develop the means to assist historically disadvantaged individuals in South Africa to realize their full participation as consumers is a very dire one. The "unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality" recognized by the CPA, now makes it imperative for business to act in a socially responsible manner by following trade practices that are ethical, fair and reasonable. They have a legal duty to ensure that the terms and conditions in contracts are set out in plain and understandable language. Their marketing and advertising practices need to be fair and honest, and should facilitate access to goods and services, particularly for disadvantaged individuals. In the past it was sufficient if the business organization complied with the letter of the law regarding business contracts, i.e. the emphasis lay on *compliance* with the law, whether or not the buyer understood its contents. The emphasis now is on *communication*, i.e. the consumer must understand the meaning and impact of the contract. Further, the freedom to choose the content of a business contract is now a thing of the past, with legislative protection compensating for the weaker negotiating position of the consumer.

Business certainly has a role to play in ensuring that social and economic transformation change takes place in a society such as South Africa. Business needs to understand the provisions of the Act and how they apply to them. They need to scrutinize their current practices, policies and documentation to ensure that they comply with the Act. A failure to comply can prove costly. Yet, ethical and socially responsible business practices can contribute to profitability and

growth, as well as to businesses gaining an ethical reputation and enhancing customer satisfaction and loyalty.

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