



## Fair and just terms: let's leave it to the courts!

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Don't be left in the dark when the new Consumer Protection Act comes into full effect.

The Consumer Protection Act 68 of 2008 ("the Act") will compel courts to consider the justice and fairness of agreements concluded between consumers and suppliers. As a result, evidence which falls outside the actual terms of an agreement may be examined even if it contradicts the terms of the agreement.

The Act is scheduled to commence on 1 April 2011. The Act neatly consolidates the rights of consumers and the obligations of suppliers into one piece of legislation. It will align South Africa with practice in foreign jurisdictions and will no doubt set a precedent for the type of legislation that will be enacted in the future. It will be a forerunner to a broader genus of legislation that holds, at its core, the protection of the consumer. It is legislation with which all South Africans, and foreigners involved with transactions in the Republic, should become accustomed.

Section 52 of the Act, in the most definitive terms, places an obligation on a court to consider a list of factors when determining whether or not agreements concluded between consumers and suppliers embody fair and just terms and conditions, and the extent to which the conduct flowing therefrom is equitable.

### Section 52 of the Act

Section 52 of the Act states that "If in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that (a) the supplier contravened Section 40, 41 or 48; and (b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3)".

Sections 40, 41 and 48 of the Act, broadly speaking and respectively, state that a supplier is:

- ▶ not to display any unconscionable conduct (e.g. duress or undue influence) towards a consumer
- ▶ not to mislead or fail to correct a misapprehension of fact in relation to a consumer
- ▶ to ensure that the agreement concluded with a consumer is not unfair, unreasonable or unjust.

Section 52(2) sets out the factors that a court must take into account when making its decision, including:

- (a) the fair value of the goods or services in question;
- (b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- (c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;
- (d) the conduct of the supplier and the consumer, respectively;
- (e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
- (f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- (g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of Section 22 (this section pertains to the right of the consumer to receive information in plain and understandable language);
- (h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any:
  - (i) custom of trade; and
  - (ii) any previous dealings between the parties;

- (i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- (j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

Section 52(3) of the Act further states that if a court finds that a "transaction or agreement was, in whole or part, unconscionable, unjust, unreasonable or unfair" the court may make a declaration to that effect and make an order it deems just and reasonable including, but not limited to, restoring money or property to the consumer, compensating the consumer for losses or expenses relating to the agreement or court proceedings and it may require the supplier to cease any conduct in order to prevent the repetition of similar conduct.

### **Consideration of extrinsic evidence**

Taking into account the abovementioned list of factors and the power granted to a court in terms of Section 52(3), the court will be obligated to consider the justice and fairness of an agreement concluded between a consumer and a supplier. As a result, and due to the wide range of factors that the court must take into account when making a determination of the "fairness" of an agreement, we are of the view that Section 52, will oblige a court to consider extrinsic evidence (i.e. evidence which falls outside the actual terms of the agreement) in order to determine the efficacy of the terms of the agreement.

The court will be forced to take cognizance of the circumstances which existed, or which were reasonably foreseeable, at the time of,

and perhaps leading up to, the conclusion of the agreement. This examination may reveal facts which contradict the terms of the agreement.

A court will consider the course of conduct and manner of negotiation between the consumer and the supplier in order to establish the intention on the part of both parties to conclude an agreement perhaps completely at odds with what is set out in the written terms of the agreement. In such circumstances, the court may very well rule that such agreement should not be enforced.

Furthermore, in examining the extent to which a consumer was aware, or ought reasonably to have known, that a term in the agreement was in fact unfair, based on past dealings with the supplier or due to trade custom, a consumer may lead extrinsic evidence to prove that he or she was not aware of certain terms set out in the agreement. While evidence of this nature may shed light on the true nature of the agreement between the parties, it may also introduce evidence which contradicts the terms of the agreement and, in turn, the intention of the parties.

### **Conclusion**

It is clear that the introduction of the Act, which requires a court, in the most definitive of terms, to consider evidence outside of the written agreement, to ascertain the equity and fairness of the terms and conditions of the agreement, will no doubt have a profound impact on the manner in which parties transact subsequent to 1 April 2011.

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Lauren Barnett joined Werksmans Attorneys as a candidate attorney at the beginning of 2010. She is currently completing her articles with the firm's Business Recovery, Insolvency & Restructuring practice. During the course of the year she has been exposed to the legal aspects of this field of law as well as the provisions of the National Credit and Consumer Protection Acts. Lauren is an academic achiever and received the Philip Friedland Prize for the Most Successful Candidate in the Attorneys Admission Examination (2009/2010) and was acknowledged for the Best Overall Performance at the School for Practical Legal Training (2009). She has BA and LLB degrees, both awarded with distinction, from the University of the Witwatersrand.

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