

## **Revisiting the right to information in plain and understandable language in the Consumer Protection Act**

### **1. Introduction**

Peter is an average and hypothetical South African consumer. He is working at the local municipality as an assistant-electrician. He is literate and has many things on his mind such as sport, his boss, money, politics and his favourite TV programs.

He enters into several contracts on a daily basis. Buying a bread at a supermarket, petrol at a filling station, and meat at a butchery are just a few examples of contracts that he enters into on daily basis. Buying a car on credit, entering into a lease and buying a house are examples of more complex contracts that he often enters into.

The common law of contract governs all the contracts that Peter enters into and will enter into. He, like many other consumers, will probably enter into thousands of contracts throughout his life.

All goods and services that Peter use, and their distribution, have at heart a contract. Without contracts, Peter cannot exist. In fact, the law of contract underpins our society, and without it, ordinary life cannot exist.

Peter, has in recent years entered into standard-form contracts of which he often does not understand the contents. He, for example, bought a TV from a local furniture store and it malfunctioned after 6 months. Based on a contract clause that Peter does not understand, the furniture store refuses to replace or repair the TV. So, Peter is upset and no one wants to assist him. Peter has been informed that section 22 of the Consumer Protection Act makes provision for a right to plain and understandable language in consumer contracts.

The aim of this lecture is to revisit section 22 and more specifically the definition of plain and understandable language in the Consumer Protection Act.

In broad terms I will address the following questions:

1. What is plain language?
2. Is plain language attached to a specific language?
3. How is plain language assessed?

### **2. Common-law requirements for the formation of a valid contract**

Before I continue with my discussion of the right to plain and understandable language, it is important briefly to mention some of the basic aspects of the common law of contract, just as background.

This first aspect is the requirements for the formation of a valid contract. They are –

- First, there must be **consensus** between the parties. In other words, each of the parties to a contract must have the serious intention to create contractual duties and rights and to be legally bound. The parties must be aware of each other's intention. In Peter's case one can ask if there was indeed consensus between him and the furniture store if Peter did not understand the terms of the contract between them.
- Secondly, each party to the contract must have **capacity to act**. This means that he or she must be legally capable of performing the particular act that gave rise to the formation of the contract.
- Thirdly, the agreement must be **legally possible**. This means that the agreement, as well as the rights and duties that are created must be permitted by the law, in other words, it must be lawful or legal.
- Fourthly, the agreement must be **physically possible**. It must be possible to receive the rights and perform the duties arising from the contract.
- Lastly, if **formalities** are prescribed for the formation of the contract by the parties or by the law, they must be observed. In Peter's case one may ask if the right to plain and understandable language creates formalities, or in other words, must the plain and understandable language requirements be satisfied to create a valid contract?

The second aspect is freedom of contract. Freedom of contract is considered the cornerstone of the modern law of contract. It means that a person is generally free to choose with who and on what grounds one wants to contract.

The third aspect is the principle called *pacta sunt servanda*. In terms of this principle the courts will enforce contracts entered into on a voluntary basis. This, however, does not leave much room for taking into consideration any unfairness that may exist. Why is this the case?

Traditionally the common-law of contract merely provides a framework within which contracts are enforced,<sup>1</sup> without much concern for context and fairness.<sup>2</sup> That is because the traditional law of contract assumes a world of traders who meet briefly on the market

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<sup>1</sup> See, for example, *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A); *National Chemsearch (SA) (Pty) Ltd v Borrowman and another* 1979 (3) SA 1092 (T) at 1107. Before the decision in *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) it had also been accepted that the *exceptio doli generalis* provided a remedy against the enforcement of an unfair contract in unfair circumstances but the then Appellate Division reviewed the authorities on the *exceptio doli generalis* and concluded that it is not part of South African law (at 607B). The *exceptio doli generalis* could therefore no longer be used to give relief against the enforcement of an unfair contract.

<sup>2</sup> The taking into consideration of context at the formation of a contract or pre-contractually, is not foreign to the South African law of contract. See for example the rules on misrepresentation and fraud, duress, undue influence, mistake and illegality, which aim at curbing unfairness at the formation of a contract. In these instances context (at the formation of a contract) plays a role. The question is, however, whether the common-law rules and principles cover the ground sufficiently or whether there are gaps that need to be filled to curb unfairness. See also Christie & McFarlane *Law of Contract* 14.

floor, where they engage in transactions and where they can choose what contract they want, with whom and on what terms.<sup>3</sup>

In a modern world, this is, however, no longer the case. Contract parties, such as Peter, seldom have any say in the contents of standard-form contracts, and parties no longer negotiate.

Unfair situations are then often created where there is in fact no consensus, where consumers are often not aware of the existence of certain contractual terms or risks, and where they cannot negotiate more favourable terms.<sup>4</sup> So, to address these imbalances, fairness legislation, such as the Consumer Protection Act, is then promulgated.

### 3. How does fairness-legislation work?

Fairness in consumer protection legislation is usually approached from two dimensions, namely substantive and procedural fairness.

As the aim of these two interdependent approaches, and the moment at which unfairness is relevant, differ, it makes sense to distinguish between them.

Measures aimed at procedural fairness usually address conduct during the bargaining process, before entering into a contract, and generally aims at ensuring transparency.<sup>5</sup>

Transparency on its turn has two elements:

- (a) transparency in relation to the terms of a contract, and
- (b) transparency in the sense of not being positively misled, pre-contractually or during the performance of a contract.

Transparency in relation to the terms of a contract relates to

- whether the contract terms are accessible,
- in clear language,
- well-structured,
- and cross-referenced,

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<sup>3</sup> P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 4-5; A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40 at 41-42; S Lukes *Individualism* (2006) 17-18.

<sup>4</sup> T Wilhelmsson & C Willet 'Unfair Terms and Standard Form Contracts' in G Howells, I Ramsay, T Wilhelmsson & D Kraft *Handbook of Research on International Consumer Law* (2010) 161-162.

<sup>5</sup> See, generally, Lawson *Exclusion Clauses* 219; Naudé 2006 *Stell LR* 361 at 377.

- with prominence being given to terms that are detrimental to the consumer or because they grant important rights.<sup>6</sup>

This is where section 22 of the Consumer Protection Act comes into play.

The Consumer Protection Act came into effect on 1 April 2011 and section 22 introduced a right to information in plain and understandable language, often just referred to as the right to plain language.

Section 22 is, in light of the our own context, probably the most important pro-active procedural fairness measure contained in the Consumer Protection Act.

#### 4. What does the wording of section 22 of the Consumer Protection Act say?

Section 22 provides that –

(1) The producer of a notice, document or visual representation [document] that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation [document]—

- (a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation [document]; or
- (b) in plain language, if no form has been prescribed for that notice, document or visual representation [document].

(2) For the purposes of this Act, a notice, document or visual representation [document] is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation [document] is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation [document] without undue effort, having regard to—

- (a) the context, comprehensiveness and consistency of the notice, document or visual representation [document];
- (b) the organisation, form and style of the notice, document or visual representation [document];
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation [document]; and

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<sup>6</sup> Willet *The Yearbook of Consumer Law 2008* (2008) 67 at 75. See also Paterson (2003) 33 *Melbourne University Law Review* 934 at 949, where the author analyses elements of transparency: a term is in transparent where it is (a) expressed in reasonably plain language, (b) legible, (c) presented clearly, and (d) readily available to any party affected by the term.

- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.

(3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation **[document]** satisfies the requirements of subsection (1)(b).

(4) Guidelines published in terms of subsection (3) may be published for public comment.<sup>7</sup>

## 5. The interpretation, structure and purpose of section 22

The right to information in plain and understandable language<sup>8</sup> is embedded under the umbrella **right of information and disclosure** in the Act.<sup>9</sup>

Section 2(1) provides that every provision of the Act, must be interpreted to give effect to the purposes of the Act set out in section 3. So, the right to plain language should therefore also be interpreted in light of section 3.

So, what are the relevant purposes of the Consumer Protection Act?

The most relevant purpose is –

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers –

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- (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented'.<sup>10</sup>

<sup>7</sup> The National Credit Act 34 of 2005 was the first South African piece of legislation that required agreements to be drafted in plain language (s 64). The Companies Act 71 of 2008 in s 6(4) and (5) has a definition of plain language with regard to the drafting of a prospectus, notice, disclosure or other document that does not have a prescribed form. The definition is similar to the definition of plain language in the Consumer Protection Act. See Stoop & Chürr 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' 2013 (16) *Potchefstroom Electronic Law Journal* 515 for a discussion of s 22 of the Consumer Protection Act.

<sup>8</sup> Section 22 does not merely require the use of plain and understandable language; the plain language requirement is elevated to a fundamental consumer right (see the heading of s 22 where the word 'right' is used). See also Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' 2010 (22) *SA Merc LJ* 79 at 85.

<sup>9</sup> Ch 2, Part D of the Consumer Protection Act.

<sup>10</sup> Section 3(1)(b)(iv). See also *Draft Green Paper on the Consumer Policy Framework (09/04)* in GenN 1957 in GG 26774 of 9 September 2004 at 31.

## 6. Which documents must be in plain language?

Section 22(1) provides that any document required in terms of the Act or any other law should be in the form prescribed by the Act.<sup>11</sup> If the Act does not prescribe any form, a document must be in plain language.<sup>12</sup>

Therefore, this section only applies to documents required by legislation, visual representations and written agreements and obviously not oral agreements.<sup>13</sup>

Section 50 deals with written consumer agreements and it states that the Minister of Trade and Industry may prescribe categories of agreements required to be in writing. It also states that even where an agreement between a supplier and a consumer has been put in writing voluntarily, it must satisfy the plain language requirements.<sup>14</sup>

## 7. What is plain language in terms of section 22?

According to the first part of section 22(2), **plain language** is

- language that enables an **ordinary consumer** (of the class of persons for whom a document is intended),
- with **average literacy skills** and
- **minimal experience as a consumer** of the relevant goods or services,
- to understand the content, significance and import of a document **without undue effort**.<sup>15</sup>

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<sup>11</sup> Section 22(1)(a). The Consumer Protection Act requires certain information to be made available to consumers, and the required notices, provisions or agreements should be written in plain and understandable language: see s 24 read with regs 6–7 (prescribed product labelling and trade descriptions; in this regard see also s 15 of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972); s 25 read with reg 8 (notice disclosing reconditioned or gray market goods); s 27 read with reg 9 (notice disclosing prescribed information in respect of intermediaries); s 37 read with reg 12 (cautionary statement disclosing prescribed information in respect of alternative work schemes); s 49 (notice required for certain terms and conditions); s 50(1) (categories of agreements required to be in writing)

<sup>12</sup> Section 22(1)(b).

<sup>13</sup> See Du Preez 'The Consumer Protection Bill: A few Preliminary Comments' (2009) 1 *TSAR* 58 at 75–76.

<sup>14</sup> Section 50(2)(a)–(b). *Contra* Gouws 2010 (22) *SA Merc LJ* 79 at 86 where it is stated that '[a]lthough signature of an agreement signifies the parties' assent to it, subsection (2)(a) is an exception with a view to protecting the consumer, and not the supplier. However, to avoid creating a "ticket case" and because the Act contemplates an agreement signed by both the consumer and the supplier, an agreement that is not signed by the supplier has to be signed by the consumer for s 22 to apply'.

<sup>15</sup> Section 64 of the NCA and s 22 of the CPA have identical plain language requirements. In *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD), a case which dealt, among others, with the plain language requirements of the NCA the court concluded (at paras [48]–[50]) that strictly interpreted neither s 63 nor s 64 of the NCA assists an illiterate. However, purposively interpreted they (the plain language and official language provisions of the NCA) embody the right

In terms of the second part of section 22(2) certain factors must be taken into consideration when determining whether a document is in plain language.<sup>16</sup>

Gordon and Burt in 2010 analysed the definition of plain language and they state that the definition has been lauded internationally, because it involves grammar and wording as well as structure, content, design and style of the document.<sup>17</sup> De Stadler and Van Zyl have re-analysed the definition of plain language in the 2017 SA Merc LJ.<sup>18</sup>

The definition of plain language is a very broad definition because it does not give much direction to drafters as to what is specifically required of them.<sup>19</sup> So, sense can only be made out of it, if meaning is given to the words used in section 22.

#### The first part of the definition:

The phrase 'an **ordinary consumer**' indicates that not only lawyers and judges should be able to understand a document.<sup>20</sup> 'An ordinary consumer of the class of persons for whom a document is intended' indicates that suppliers will have to draft more than one set of standard contracts for a specific situation in order to cater for the consumers for whom it is intended. So, suppliers must know their 'target audience' in advance and must write for the reader.<sup>21</sup> It is also advisable to test proposed wording of the document on a part of the target audience. The result may unfortunately be that a particular type of agreement which complies with section 22(2) in one instance may fail to do so in another instance.<sup>22</sup> To some extent this may restrain predictability for the drafters of contracts.

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of the consumer to be informed by reasonable means of the material terms of the documents he signs. Furthermore, the supplier bears the onus to prove that it took reasonable measures to inform the consumer of the material terms of the agreement. Unfortunately the court did not indicate what the material terms are that have to be explained to a consumer, nor did the court consider the impact of its findings on suppliers (credit providers), eg, that suppliers will need to be trained to explain the material terms of an agreement to a consumer. See 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 Card Act — *Standard Bank of South Africa v Dlamini* 2014 (77) *THRHR* 155.

<sup>16</sup> See Gouws 2010 (22) *SA Merc LJ* 79 at 89 where he states that the features listed in s 22(2)(a)-(d) are merely guidelines and that non-compliance with them will not without more ado render the agreement not plain. For further discussion, see also Newman 'The influence of plain language and structure on the readability of contracts' 2010 (31) *Obiter* 735.

<sup>17</sup> Gordon & Burt 'Plain Language' (2010) 10.4 *Without Prejudice* 59–60. See also Melville *The Consumer Protection Act Made Easy* (2010) at 157–170.

<sup>18</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95-127.

<sup>19</sup> Louw *The Plain Language Movement and Legal Reform in the South African Law of Contract* (unpublished LLM thesis, University of Johannesburg, 2010) at 137. See also Barnard Fall 2014 (18) *Journal of Consumer and Commercial Law* 2 at 5.

<sup>20</sup> Gordon & Burt 59–60; Stoop 'Plain Language and the Assessment of Plain Language' (2011) 4 *International Journal of Private Law* 329 at 333; Melville 161; Barnard Fall 2014 (18) *Journal of Consumer and Commercial Law* 2.

<sup>21</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 104.

<sup>22</sup> See Barnard Fall 2014 (18) *Journal of Consumer and Commercial Law* 2 at 5. For arguments against a distinction between classes of consumers see again Barnard Fall 2014 (18) *Journal of Consumer and Commercial Law* 2 at 5 and Gouws 2010 (22) *SA Merc LJ* 79 at 88.

'Average literacy skills' implies that documents must cater for the average South African consumer from the target audience.<sup>23</sup> De Stadler and Van Zyl are of the opinion that one should not attach too much significance to literacy statistics, because the supplier only has to consider the average literacy of the class of persons to whom goods or services are promoted and supplied.<sup>24</sup> The average literacy of South African consumers is therefore according to them not relevant.

Other scholars and the National Consumer Tribunal are of the opinion that 'average literacy skills' refers to the average literacy skills of the entire country, and general statistics should therefore be considered.<sup>25</sup>

Information produced by UNESCO states that:

- A total of 99% of South Africans between 15 and 24 are literate
- 95% between 25 and 64 and
- 71% older than 65 are literate.

'Literacy' means that they have at least some basic reading and writing skills.<sup>26</sup> But, mere literacy does not necessarily equip consumers to understand business and legal documents.<sup>27</sup>

Another thorny question which I will also discuss later is whether the literacy of the target audience is attached to a specific language?<sup>28</sup> In other words, is the 'average literacy skills' of consumers measured in only one South African language or is it measured in the language of the consumer?

Section 4(3) provides that if any provision of this Act can be construed to have more than one meaning, the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights must be preferred especially if the consumer is vulnerable. It will therefore make no sense to interpret the phrase 'average literacy skills' to mean that it should only be measured in one language.

<sup>23</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 107.

<sup>24</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 107.

<sup>25</sup> See De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at n43 on 107 where they refer to toop & Chürr 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' 2013 (16) *Potchefstroom Electronic Law Journal* 515 at 534, Gordon & Burt 'Plain Language' (2010) 10.4 *Without Prejudice* 59–60. Stoop in Naudé & Eiselen *Commentary on the Consumer Protection Act* (2014 Juta) at para 8, Gouws 2010 (22) *SA Merc LJ* 79 at 87 and Newman 'The influence of plain language and structure on the readability of contracts' 2010 (31) *Obiter* 735 at 738, and *Lazarus and Another v RDB Project Management CC t/a Solid and Another* (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016) where the National Consumer Tribunal referred to general literacy.

<sup>26</sup> According to UNESCO's Institute for Statistics in 2015, available at <http://data.uis.unesco.org/Index.aspx?queryid=166> (accessed on 29 November 2016). See also Melville 161.

<sup>27</sup> Gordon & Burt 59–60; Stoop 333.

<sup>28</sup> See para 8 below.

The use of a specific language by a consumer surely has an impact on the question whether a document is understandable, and is therefore a compelling reason to make documents available in more than one South African language.<sup>29</sup>

The next relevant phrase used in section 22 is '**minimal experience as a consumer of the relevant goods or services**'. This indicates that drafters should write for first-time consumers of the particular goods or services.<sup>30</sup> In other words, drafters should focus on the consumer with the least experience and not just the average consumer.<sup>31</sup> But I must make it clear the Act refers to 'minimal experience' and not to 'no experience'.<sup>32</sup> This part of the definition of plain language is contradicted by the use of the word 'context' in the second part of the definition of plain language. The second part of the definition of plain language provides that the context of a document should also be taken into account.<sup>33</sup> The level of experience of the target audience will form part of the context, and it may therefore be the case that the average consumer of the target audience will have experience and not minimal experience.<sup>34</sup>

'**Content, significance and import**' indicates that consumers must not only understand what the document says, but also how it applies to them, its significance and effect.<sup>35</sup> In other words, the consumer must at least clearly understand the legal consequences of a document or terms, and its express and implied meaning.

'**Without undue effort**' indicates that, if consumers need to consult an advisor or perhaps a dictionary to understand the terms of a document it would be considered that their understanding cost them undue effort and the document would then not be in plain language.<sup>36</sup> Van Zyl and De Stadler are of the opinion that 'undue' means 'excessive' and that requiring a certain amount of effort does not make the effort 'undue'.<sup>37</sup>

#### The second part of the definition:

The second part of the plain-language definition lists aspects that must be taken into account when assessing whether a document is in plain language. The first aspect is context.

As I have indicated '**context**' indicates that it is necessary to take account of how and when consumers read a document or how the document is used.<sup>38</sup> Therefore, it can be

<sup>29</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 108.

<sup>30</sup> Gordon & Burt 59–60; Stoop 333.

<sup>31</sup> Melville 162.

<sup>32</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 108-109.

<sup>33</sup> S 22(2)(a).

<sup>34</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 108-109.

<sup>35</sup> Gordon & Burt 59–60; Stoop 333.

<sup>36</sup> Gordon & Burt 59–60; Stoop 333; Gouws 2010 (22) *SA Merc LJ* 79 at 88–89; Melville 162.

<sup>37</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 110-111.

<sup>38</sup> Gordon & Burt 59–60; Stoop 333.

taken into account what the consumer would reasonably be expected to know from previous transactions. Gordon and Burt use the example of a DVD: with a DVD rental contract it would be reasonable to expect that a consumer would know what a DVD is.<sup>39</sup> As I have said before, the level of experience of the target audience will form part of the context, and it may therefore be the case that the average consumer of the target audience will have experience.<sup>40</sup>

'**Comprehensiveness**' indicates that the document must give full information.<sup>41</sup> It further indicates that it is not only necessary to take account of how a document is written, but also of what is written. The contents of a document should therefore be considered and enable a consumer to make an informed choice.

'**Consistency**' indicates that the terminology and style must be consistent throughout a document.<sup>42</sup> It also indicates that it is necessary to take account of how a document is written. Aspects such as the consistent use of terminology, headings, and sentence structure are examples of factors that may be considered.

'**Organisation, form and style**' refers to how a document is structured, for example, no hidden small print should be used and important information should be given at the top of a document or important sections should be highlighted in text boxes.<sup>43</sup>

'**Vocabulary, usage and sentence structure**' refers to general readability principles, such as using short sentences, the active voice, personal pronouns and short words, and avoiding technical jargon.<sup>44</sup>

The last aspect that must be taken into account when assessing whether a document is in plain language is '**illustrations, examples, headings or other aids to reading and understanding**'. This factor refers to devices to make a document more inviting and to good techniques for communicating complex information.<sup>45</sup>

Now that we have analysed the plain-language definition I shall return to the question whether documents should be provided in the language of the consumer to comply with the plain language requirements.

## **8. Must information be provided in the official language of the consumer to comply with section 22?**

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<sup>39</sup> Gordon & Burt 59–60; Melville 163.

<sup>40</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 108-109.

<sup>41</sup> Gordon & Burt 59–60; Stoop 333; Melville 163.

<sup>42</sup> Gordon & Burt 59–60; Stoop 333; Melville 163.

<sup>43</sup> Gordon & Burt 59–60; Stoop 333–334; Melville 163.

<sup>44</sup> Gordon & Burt 59–60; Stoop 334; Melville 163; Newman2010 (31) *Obiter* 735 at 741–745.

<sup>45</sup> Gordon & Burt 59–60; Stoop 334; Melville 163.

Unlike s 63 of the National Credit Act,<sup>46</sup> no provision of the Consumer Protection Act requires information to be provided in more than one of the official languages.

In terms of s 63(1) of the NCA:

- (1) a consumer has a right to receive any document that is required in terms of this Act in an official language that he reads or understands, to the extent that this is reasonable, having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the person required to deliver that document.

The Consumer Protection Act does not contain a similar provision. One can therefore on the face of it conclude that the Consumer Protection Act does not furnish a consumer with a right to receive any document that is required in terms of the CPA in an official language.

However, the Constitution provides that we have a multilingual country with 11 official languages.<sup>47</sup> The Constitution also provides that all official languages must enjoy parity of esteem and be treated equitably.<sup>48</sup>

In light of this, it is difficult to argue that one language will be preferred over other all other languages. English is sometimes regarded as the *lingua franca* of South Africa and is therefore the language commonly used in agreements. This is so despite the most recent census indicating that isiZulu does not only have the most first language speakers, but is also the most commonly spoken language in South Africa, with Xhosa and Afrikaans in the second and third places.

It is so that an official language requirement places an enormous burden on suppliers and drafters of contracts. But the question remains: what will the position be in respect of consumers who do not understand the language used in contracts. Another valid question is what will the position be of foreigners in South Africa who only speak a foreign language?<sup>49</sup>

The crux is: How would the requirements of plain language ever be complied with if consumers do not understand the language used in agreements or other communications? These consumers presumably have to consult an advisor or perhaps a dictionary and it would be considered that their understanding cost them undue effort and a document would then not be in plain language.

However, a foreigner will probably not be regarded as an 'ordinary consumer of the class of persons for whom the document is intended', and accordingly the requirements of plain language will not require the document to be made available in a foreign language.<sup>50</sup>

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<sup>46</sup> 34 of 2005.

<sup>47</sup> Section 6.

<sup>48</sup> Section 6(4). See also Alberts 'Plain Language in a Multilingual Society' in Viljoen & Nienaber (eds) *Plain Language for a New Democracy* (2001) at 89–118.

<sup>49</sup> See the discussion in Stoop 334.

<sup>50</sup> Section 22(2).

Section 40(2) may also shed some light on the abuse of a consumer as a result of not being able to protect himself because of language inabilities. It provides that it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect his own interests because of the inability to understand the language of an agreement. So, if a supplier realises that a consumer is unable to understand the language of the agreement, and abuses the inability, the agreement may be subject to challenge on the basis of s 40.

So, on the one hand, one can conclude that a document does not need to be written in the language of the consumer in order for it to be in plain language. On the other hand, plain language is language that enables an ordinary consumer of the class of persons for whom a document is intended, with average literacy skills and minimal experience as a consumer, to understand the document.

When a drafter considers the class of persons for whom a document is intended and their literacy skills, language should certainly be taken into account. It will therefore, be to a supplier's advantage to translate documents into the official languages spoken by the class of persons for whom they are intended.

## 9. Guidelines that may be published or taken into account

This brings us to section 22(3), which provides that the Consumer Commission may publish guidelines for methods of assessing whether a document is written in plain language.<sup>51</sup> No guidelines have been published, and in the absence of guidelines, it will be difficult to tell whether suppliers meet the requirements.

It is a concern that the definition of plain language is too flexible and is subject to discretion and interpretation.<sup>52</sup> Again, guidelines on the assessment of plain language might solve these concerns and will help in pro-actively testing compliance with the plain language provisions.

The NCC may consider examples of **assessment guidelines on plain language in foreign legislation** when drafting the proposed guidelines for South Africa. Very good examples of formal, general and visual style guidelines can be found in the law of the

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<sup>51</sup> See below, ss 92–98 for a discussion on the functions of the National Consumer Commission. See also Gouws 2010 (22) *SA Merc LJ* 79 at 86–90 where he states that an agreement would be in plain language if the language used is semantically clear and coherent and contains at least some of the features listed in the Act, resulting in the agreement being legible.

<sup>52</sup> Stoop 333.

states of Pennsylvania<sup>53</sup> and Connecticut<sup>54</sup> in the United States.<sup>55</sup> The Pennsylvania Plain Language Consumer Contract Act contains broad guidelines to determine whether the plain language standard has been met. The guidelines are:

- the contract should use short words, paragraphs and sentences and active verbs;
- it should not use technical legal terms other than commonly understood legal terms;
- Latin and foreign words may not be used;
- if the document defines words, it must be defined by using commonly understood meanings;
- when the contract refers to the parties to the contract, the reference should use personal pronouns, or the actual or shortened names of the parties;
- sentences may not contain more than one condition;
- cross-references may not be used, except cross-references that briefly and clearly describe the substance of the item to which reference is made; and
- the contract should not use sentences with double negatives or exceptions to exceptions.

The Pennsylvania Plain Language Consumer Contract Act also contains visual guidelines. These guidelines, among others, require that

- the contracts should have type size, line length, column-width margins and
- spacing between lines and paragraphs that make the contract easy to read,
- that the contract should have captioned sections typed in bold and
- that the contract should use ink that contrasts sharply with paper.

In Connecticut, very similar guidelines to those that apply in Pennsylvania are used, but a more objective approach may also be followed.<sup>56</sup> An objective test is specific because it stipulates specific numbers and sizes to which words, sentences and syllables should adhere.<sup>57</sup> The Connecticut statute provides that a consumer contract is also written in

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<sup>53</sup> Pennsylvania Plain Language Consumer Contract Act (Pa Stat Ann Tit. 73 (1997)). Section 2205(a) requires that 'all consumer contracts . . . shall be written, organized and designed so that they are easy to read and understand'. See also the discussion in Tiersma *Legal Language* (1999) 224–225; Stoop 336 and Louw 140–141; Barnard Fall 2014 (18) *Journal of Consumer and Commercial Law* 2 at 9-10.

<sup>54</sup> Connecticut General Statutes (Conn Gen Stat s 42–152 (2012)). Section 152(a) requires that all consumer contracts 'shall be written in plain language'. See also Stoop 336–337 and Louw 139–140.

<sup>55</sup> See also Viljoen 'The Plain Language Experience in the USA' in Viljoen & Nienaber (eds) *Plain Language for a New Democracy* (2001) at 45–51.

<sup>56</sup> See Tiersma 225 and Stoop 336–337.

<sup>57</sup> See also Louw 140.

plain language if it fully meets the requirements of the alternative objective test. The objective test requires the following:

- (1) the average number of words per sentence must be less than 22;
- (2) no sentence in the contract may exceed 50 words;
- (3) the average number of words per paragraph must be less than 75;
- (4) no paragraph in the contract may exceed 150 words;
- (5) the average number of syllables per word must be less than 1.55;
- (6) the contract must use personal pronouns, the actual or shortened names of the parties, or both;
- (7) no typeface of less than eight points in size may be used;
- (8) at least 0.5 centimetre of blank space must be allowed between every paragraph and section;
- (9) at least 1.3 centimetre blank space must be allowed at all borders of every page;
- (10) if the contract is printed, every section must be captioned in bold of at least 10 points in size. If the contract is typewritten, every section must be captioned and the captions underlined; and
- (11) the average line length in the contract must be no more than 65 characters.

The advantage of this alternative approach is that it can be applied easily and computers can be used to do the required calculations. The disadvantages are that an objective test rather predicts readability than measuring a consumer's understanding and it does not consider the context or the target audience. For the same reason **readability tests** such as the **Flesch reading ease test** used in Microsoft Word is not suitable for assessing compliance with the plain language requirements.<sup>58</sup>

In order to proactively give effect to the requirements of plain language, to improve levels of disclosure and to increase procedural fairness, assessment guidelines must be put in place. Without guidelines the courts will also struggle to measure compliance with the plain language provisions. In *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD), the court had, for the first time to interpret the plain language requirements of the NCA.

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<sup>58</sup> See eg Florida's requirements on readable language in insurance policies, where a minimum score of 45 on the Flesch reading ease test is required (Florida Stats Ann s 627.4145). See also Stoop 338. See also Tiersma 226 and Klare 62–102 for an analysis of readability formulas.

## 10. The first case law on plain language

The court in this case concluded (at paras [48]–[50]) that strictly interpreted the right to plain and understandable language and to information in an official language do not assist an illiterate.

Therefore, purposively interpreted these rights embody the right of the consumer to be informed by reasonable means of the material terms of the documents he signs.

If a consumer is therefore unaware of the existence of a material term or if the consumer does not understand the term, one may conclude that the term does not comply with the plain language requirements because it was not pointed out or explained to the consumer.<sup>59</sup>

Although many aspects of the court's judgment can be criticised, it at least recognised the social and commercial benefits of clear communication, something that has not been fully realised by legal practitioners and businesses.<sup>60</sup>

## 11. Concluding remarks

So to conclude:

The Consumer Protection Act has made the use of plain language compulsory in contracts and documents intended for consumers. It contains a detailed definition of plain language, which contains elements pertaining to grammar, text, visual aspects, and illustrations.

The following general observations can be made:

- One aspect that stands out from the definition of plain language is that one should have a clear understanding of the target audience and purpose of a document to comply with section 22.<sup>61</sup> The plain language test is therefore always contextual. A consumer's literacy level and choice of language forms part of the context and will therefore have an impact on compliance or non-compliance with section 22.
- The use of a specific language has an impact on the question whether a document is understandable, and is therefore a compelling reason to make documents available in more than one language. Unfortunately the failure by law faculties to

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<sup>59</sup> See the recommendation of the Consumer Goods and Services Ombud in (201512-0005391) [2016] ZACGSO 7 of 22 January 2016 available at [http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACGSO/2016/7.html&query=plain and understandable](http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACGSO/2016/7.html&query=plain+and+understandable). However, for criticism against the view of the court in *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) see Otto 2014 (77) *THRHR* 155.

<sup>60</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 127.

<sup>61</sup> De Stadler & Van Zyl 'Plain-language contracts: challenges and opportunities' 2017 (29) *SA Merc LJ* 95 at 112.

provide multilingual legal education to future drafters of contracts may be or become a barrier to full compliance with the plain language requirements.

- The Act makes provision for the publication of guidelines on assessing whether a document is in plain language or not but to date, no guidelines have been published by the National Consumer Commission. Without these guidelines it will remain difficult, if not impossible, to accomplish pro-active compliance with section 22.

In conclusion, it must be emphasised that plain language has substantial benefits and advantages for consumers as well as for businesses. Of course the exact value of these benefits and advantages cannot be determined, but there are enough compelling reasons to believe that these benefits and advantages outweigh the costs.

Most importantly, using plain language increases transparency, openness and the extent of disclosure, and contributes to higher levels of procedural fairness. It may also save money and time by reducing the amount of unnecessary disputes and litigation.

The use of plain and understandable language in consumer contracts results in transparency and clear and effective communication - nothing more and nothing less.

I conclude with the words of Dave Skinner, a translator at the European Commission.

#### CLARITY

Frequently, though we talk about transparency,

We proliferate opacity

When what we need is clarity.

Nowadays, there's an ever-growing tendency

To obfuscate with much prolixity,

When what we need is clarity.

You wrote something long; that is wrong, it will not do.

Keep it plain and short and the message will get through.

Just write with ...

Clarity means abandoning obscurity

And preferring more simplicity.

Write English as it ought to be.

Yes, what we need is clarity.