Price discretions and consumers’ right to disclosure and information in terms of the Consumer Protection Act 68 of 2008∗

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OPSOMMING

Prysdiskresies en verbruikers se reg op openbaarmaking en inligting ingevolge die “Consumer Protection Act” 68 van 2008

Hierdie artikel ondersoek die effek van verbruikers se reg op openbaarmaking en inligting ingevolge die “Consumer Protection Act” 68 van 2008 op die gemeenregtelike reël wat die eensydige vastelling van die prys in ’n koopkontrak verbied. Daar word spesifiek gekyk na die verbruiker se reg op openbaarmaking van die prys (artikel 23), ’n verkoopsrekord (artikel 26) en inligting in eenvoudige en verstaanbare taal (artikel 22).

1 INTRODUCTION

Prior to the enactment of the Consumer Protection Act 68 of 2008 (“CPA”), the unilateral determination of price was governed by common law principles and it has been an established rule of South African law that “[t]here can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them”.1 Firstly, the unilateral determination of price was considered as falling short of the requirement of certainty of price. This was due to a failure to distinguish between the unilateral determination of price and pure potestative conditions2 and was based on the views of the Roman-Dutch writers.3

∗The article is a summary and adaptation of my LLM dissertation The unilateral determination of price in contracts of sales governed by the Consumer Protection Act 68 of 2008 (UP 2012). It is also an adaptation of an unpublished paper, “The unilateral determination of price in contracts of sale governed by the Consumer Protection Act 68 of 2008”, presented at a conference of the Society of Law Teachers of Southern Africa (July 2012). Special recognition is given to Prof Chris Nagel (my LLM supervisor) for his expert guidance, support, encouragement and patience in writing my dissertation from which this article has been adapted.

1 Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 2 SA 555 (A) 574.

2 See eg Dawidowitz v Van Drimmelen 1913 TPD 672 672; Dharumpal Transport (Pty) Ltd v Dharumpal 1956 1 SA 700 (A) 707; Theron v Joynt 1951 1 SA 498 (A) 506 (obiter). See further Du Plessis LLM dissertation 58–62.

3 See eg Deary v Deputy Commissioner of Inland Revenue 1920 CPD 541 548; Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd 1964 1 SA 669 (W) 670; Shell SA (Pty) Ltd v Corbitt 1986 4 SA 523 (C) 525. See further Du Plessis LLM dissertation 41–44.
Furthermore, unilateral price determinations were considered too vague to be enforceable.4

These views were criticised by the Supreme Court of Appeal in Benlou Properties v Vector Graphics.5 Subsequently, in NBS Boland Bank v One Berg River Drive, the court questioned whether this rule should still form part of South African law.6 Furthermore, alongside case law prohibiting the unilateral determination of price, there emerged case law that supported a qualified version of the rule.7 These judgments require that the discretion to determine the price should not be unfettered and should be subject to some objective standard. This can be done expressly or tacitly in the contract or an objective standard (in the form of reasonableness) may be implied by law.8

From these requirements it is possible to determine the real reason for the rule, namely, that allowing a discretion to determine the price would result in a greater possibility that the party with the discretionary power would abuse it.9 Therefore, whether a unilateral determination of price should be allowed must rather be assessed with reference to public policy (and not certainty of price).10 On the one hand, public policy considerations such as contractual autonomy and practical considerations necessitating the use of price discretions in a modern society where prices are constantly subjected to market fluctuations would indicate that price discretion should be enforced, provided that such a discretion is not unfettered and should be subject to an external objective standard or reasonableness.11 On the other hand, in cases where an unfair bargaining position is present, public policy may dictate otherwise.12

4 See eg Dawidowitz v Van Drimmelen supra 675; Dharumpal Transport v Dharumpal supra 70; Westinghouse Brake & Equipment v Bilger Engineering supra 574; Shell SA v Corbit supra 525–526; Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 1 SA 508 (A) 514; Boland Bank Bpk v Steele 1994 1 SA 259 (T) 274; NBS Bank Ltd v Badenhorst-Schnetler Bedryfdisdienste BK 1998 3 SA 729 (W) 736; H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd 1996 2 SA 225 (A) 233. See further Du Plessis LLM dissertation 62–64.
5 Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 1 SA 179 (A) 185–186.
6 NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd 1999 4 SA 928 (SCA) para 16.
7 Murray & Roberts Construction v Finat Properties supra 515. However, Hawthorne “The contractual requirement of certainty of price” 1992 THRHR 642 argues that the judgment has indicative (but not authoritative) value because the court dealt with the specific facts only and refused to lay down a general rule. See also Stead v Conradie 1995 2 SA 111 (A) 123. The courts have also been prepared to follow such an interpretation in respect of contracts of lease. See eg Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd 1991 3 SA 738 (A) 747; Genac Properties JHB (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd) 1992 1 SA 566 (A) 579; Benlou Properties v Vector Graphics supra 184; Engen Petroleum Ltd v Kommandonek (Pty) Ltd 2001 2 SA 170 (W) 173–174. See further Du Plessis LLM dissertation 66–76.
8 Hawthorne 1992 THRHR 641.
11 For a detailed discussion of how these policy considerations should be applied to the unilateral determination of price, see Du Plessis LLM dissertation 82–89.
12 For a detailed discussion on how this policy consideration should be applied to the unilateral determination of price, see Du Plessis LLM dissertation 86–87.
Occasionally, the legislature will enact legislation to give effect to public policy. This is the case with the CPA. The CPA aims to address unequal bargaining relationships in certain consumer contracts. The purpose of this article is to investigate the effect of the consumer’s right to disclosure and information in terms of the CPA on the common law rule prohibiting unilateral price determinations in contracts of sale.

2 HISTORICAL BACKGROUND AND OVERVIEW OF THE CPA

2.1 Historical background

While the Supreme Court of Appeal questioned the application of the rule against unilateral price determination, the existing consumer protection measures in South African law were criticised by scholars who recognised the need to protect consumers against unfair contractual terms. Traditionally, contract law was based on the assumption that the parties have negotiated the terms of the contract and are on an equal footing during negotiations. In practice, this is not the case, as businesses use standard contracts that benefit them and are not open to negotiation. In addition, common law remedies to address unfair contract terms were not sufficient. Previous legislative control in South Africa was limited to a few terms in specific contracts and contained in different pieces of legislation. The different pieces of legislation were uncoordinated, unknown to consumers and did not provide good protection. Therefore, consumer law in South Africa was incomprehensive and fragmented. The courts were also hesitant to develop the common law to address these problems on a case-by-case basis. As pointed out by Van Eeden, “the courts have repeatedly stressed that they are simply not equipped for the task of legislation”. Finally, after years of debate and legal developments in consumer law, the CPA was promulgated.

14 Woker “Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 Obiter 230.
18 Naudé 2006 Stell LR 362; Sharrock 2010 SA Merc LJ 296.
20 Woker 2010 Obiter 219.
22 Van Eeden Guide to the CPA 2.
23 Ibid.
24 Van Huyssteen et al Contract 39; Woker 2010 Obiter 228.
The CPA became fully operational on 31 March 2011. The Act consolidates most previous consumer legislation in South Africa and attempts to accommodate consumer legislation still in force. The Act aims to deal with unfair contract terms at a more general level in order to provide better protection to consumers. The Act follows a global trend in general consumer protection and gives effect to South Africa’s international law obligations. The CPA follows a rights-based approach, granting specific rights to consumers.

2.2 Purpose of the CPA

The main purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa. This must be accomplished by the establishment and maintenance of a fair, accessible, efficient and sustainable consumer market; also by promoting fair business practices and protecting consumers from unfair trade practices and conduct. Specifically, the CPA aims to protect the rights of vulnerable persons. These would include persons from low-income and remote communities, minors, seniors, illiterate persons or persons with a low literacy level, the visually impaired and persons who have limited language skills in the language in which the advertisement, agreement or other visual representation is presented. Therefore, “[t]he more vulnerable the consumer is, the more protection is required.”

2.3 Application of the CPA

2.3.1 Introduction

The CPA applies to every transaction occurring in South Africa unless it is exempted from the operation of the Act. A “transaction” is defined as:

“[I]n respect of a person acting in the ordinary course of business . . . (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration.”

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25 The CPA was supposed to come into full operation on 24 October 2010 (s 122 read with item 2(2) of Schedule 2) but the Minister deferred the date to 31 March 2011 in terms of item 2(3)(a) of Schedule 2 (see GN 917 in GG 33581 of 23 September 2010).
29 Preamble to the CPA.
31 S 3(1).
32 S 3(1)(a).
33 S 3(1)(c).
34 S 3(1)(d).
35 S 3(1)(b).
36 Ibid.
37 Du Preez 2009 TSAR 63.
38 S 5(1)(a).
39 S 1 sv “transaction”; my emphasis.
“Supply” includes the sale of goods and therefore contracts of sale are governed by the Act. From the above it is clear that a contract of sale will qualify as a consumer sale if it complies with the following requirements:

(a) the contract of sale must occur in South Africa;
(b) the contract of sale must be concluded in the ordinary course of business; and
(c) the contract of sale must not fall under any exemptions.

Each of these requirements is dealt with separately below.

2.3.1.1 Contract of sale must occur in South Africa
Section 5(1)(a) provides that the transaction must occur in South Africa. Does this, for example, refer to the conclusion or execution of the contract? Du Preez refers to the dictionary meaning of “occur”, which means “come to pass”, “to be found to exist”, “to happen”, “to take place”, “to come about”, “to present itself” or “to befall”, and concludes that the term is susceptible to more than one interpretation. Therefore, the meaning of “occur” in this context is unclear. However, it would probably include contracts of sale concluded in South Africa.

2.3.1.2 Contract of sale must be concluded in ordinary course of business
Only contracts of sale in the ordinary course of the supplier’s business will be governed by the CPA. What would constitute “in the ordinary course of business” is not defined in the Act, but it must be considered from the viewpoint of the supplier’s business. As pointed out by Otto, consumers acting within and/or outside the ordinary course of their businesses are protected by the Act. The test is “whether the making of the contract falls within the scope of that business and whether ordinary business persons would have concluded the contract”. This means that once-off sale agreements are not subject to the Act. Sharrock argues that where a supplier dealing exclusively in certain goods agrees to supply other goods to a consumer as a once-off transaction, the agreement will not be governed by the Act.

2.3.1.3 Contract of sale must not fall under any exemptions
Section 5(2)(b) provides that the CPA does not govern contracts of sale where the consumer is a juristic person whose asset value or annual turnover at the time of the transaction equals or exceeds the threshold determined by the

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40 S 1 sv “supply” and “agreement”.
41 Du Preez 2009 TSAR 67–68.
42 Jacobs et al 2010 PELJ 309 fn 51; Du Preez 2009 TSAR 68.
44 Otto 2011 THRHR 536. See also Sharrock Business law 576.
45 Sharrock 2010 SA Merc LJ 302 referring to Amalgamated Banks of South Africa Bpk v De Goede 1997 4 SA 66 (SCA) and the further case law cited in fn 43.
47 Sharrock 2010 SA Merc LJ 302.
48 A juristic person includes a body corporate, partnership, association or trust (see s 1 sv “juristic person”).
A “consumer” is defined as a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business. A “supplier” is defined as a person who markets any goods or services. “Market” refers to the promotion or supply of goods. As already pointed out, the supply of goods includes the sale of goods. Therefore, in a contract of sale, “supplier” refers to the seller and “consumer” refers to the buyer. The Act will, of necessity, therefore apply only where the buyer is an individual or a juristic person with a turnover below the determined threshold.

Furthermore, specific exemptions that can be mentioned include goods sold to the state or where the Minister exempts the specific transaction from the application of the Act. Credit sales governed by the National Credit Act are also excluded from the ambit of the CPA, but not the goods that are the subject of such a credit sale agreement. The CPA also does not apply to transactions or agreements concluded and goods supplied to a buyer before the general effective date.

The CPA also provides that certain contracts will always be governed by the Act. The sale of goods to a franchisee in terms of a franchise agreement will always be regarded as a transaction. Therefore, the threshold determination does not apply to such transactions.

2.3.2 Conclusion

The CPA is applicable to certain contracts of sale only. Therefore, the CPA divides contracts of sale into sales governed by the CPA (“consumer sales”) and sales not governed by the CPA (“commercial sales”). Therefore, where a seller concludes a contract of sale with a buyer who is an individual or a juristic person (whose annual turnover is below the determined threshold) in the course of the

49 The current threshold is R2 million (see GN 294 in GG 34181 of 1 April 2011). The Minister also prescribed a method for the calculation of the value and annual turnover for purposes of the threshold determination.
50 S 1 sv “consumer”.
51 S 1 sv “supplier”.
52 S 1 sv “market”.
53 Cf fn 40 supra.
54 S 5(2)(a). The meaning of “state” is unclear. As pointed out by Jacobs et al 2010 PELJ 209 fn 52, “state” is not defined in the CPA, although “organ of state” is defined in s 1 of the Act as an organ of state as defined in s 239 of the Constitution of the Republic of South Africa, 1996.
55 S 5(2)(c).
56 Act 34 of 2005.
57 S 5(2)(d). Otto 2011 THRHR 535 543; Sharrock Business law 578. In respect of issues arising from this exemption, see Otto and Otto The National Credit Act explained (2010) 135; Melville and Palmer 2010 SA Merc LJ 272; Jacobs et al 2010 PELJ 310 fn 55. See also s 5(2)(e)–(g) for further exemptions that are not relevant for the purposes of this discussion.
58 Item 3(1) of Schedule 2 to the CPA. The general effective date is 31 March 2011 (see fn 25 supra).
59 S 5(6)(e). The unilateral determination of price in a franchise agreement governed by the CPA is outside the scope of this article as it warrants a separate investigation and analysis.
60 Jacobs et al 2010 PELJ 312-313. Jacobs et al submit that the reason for this inclusion is that franchise agreements are mostly concluded between a large franchisor (as the seller) and a smaller juristic person or an individual (as the buyer)
61 Van Eeden Guide to the CPA 2; Van Huyssteen et al Contract 216.
seller’s business and in South Africa, that contract of sale is governed by the CPA. The unilateral determination of the price in consumer sales is considered below.

2.4 Focus on promotion and protection of consumer rights
The CPA promotes and protects specific fundamental consumer rights. Therefore, the CPA focuses on buyers’ rights. As such, in the context of the CPA, the question arises whether the seller can be granted the discretion to determine the price in a consumer sale. The focus of this article is on the effect of the consumer’s right to disclosure and information on the unilateral determination of price by the supplier in a contract of sale governed by Act.

3 Consumers’ right to disclosure and information
The consumers’ right to disclosure and information includes the right to disclosure of the price of the goods and the right to a sales record for each transaction with a supplier.

3.1 Right to disclosure of price
3.1.1 Introduction
The consumers’ right to disclosure of information includes the right to disclosure of the price of goods. Section 23(3) of the CPA prohibits a retailer from displaying any goods for sale without displaying a price in relation to those goods. This prohibition requires the investigation of four separate issues: first, the definition of retailer; secondly, what would qualify as a display of goods for sale; thirdly, what constitutes a display of price; and, fourthly, the consequences of displaying the price.

3.1.2 Definition of retailer
A “retailer” is defined as a person who, in the ordinary course of business, supplies the particular goods to a consumer. “Supply” would include the sale of goods. Therefore, “retailer” would refer to the seller of the goods.

3.1.3 Display of goods for sale
“Display” in respect of goods is defined as placing, exhibiting or exposing goods before the public in the ordinary course of business in a manner consistent with

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62 They are the following: the right to equality in the consumer market (ss 8–10); the right to privacy (ss 11–12); the right to choose (ss 13–21); the right to disclosure and information (ss 22–28); the right to fair and responsible marketing (ss 29–39); the right to fair and honest dealing (ss 40–47); the right to fair, just and reasonable terms and conditions (ss 48–52); and the right to fair value, good quality and safety (ss 53–61).
63 The effect of the consumer’s right to fair, just and reasonable terms and conditions (ss 48–52) on the unilateral determination of price is outside the scope of this article. For more on this issue see Du Plessis LLM dissertation 108–130.
64 Ss 22, 23 and 26 respectively.
65 S 23.
66 S 23 does not apply to a transaction where an estimate was given for repair and maintenance services in terms of s 15 of the CPA or a transaction governed by s 43 of the Electronic Communications and Transactions Act 25 of 2002.
67 S 1 sv “retailer”.
68 S 1 sv “supply”.

an open invitation to members of the public to inspect and select those or similar goods for supply to a consumer. Therefore, goods will be displayed only if they are placed before the public and provided they are displayed in the ordinary course of business as an open invitation to the public to inspect and select the goods. As such, it would not seem to indicate that the retailer must make an offer to sell, but a mere invitation to sell would suffice and, therefore, this would probably cover all advertisements and forms of marketing used for most goods. However, it would not cover goods that are not placed before the public as an open invitation. Such goods could include goods specifically requested by a consumer or special-order goods.

A further exception is contained in section 23(4). It provides as follows:

“A retailer is not required to display a price for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier’s premises to which the public does not ordinarily have access” (my emphasis).

Section 23(4) refers, on the one hand, to a retailer and, on the other hand, to a supplier. It would seem that the legislature wanted to indicate that it is referring to different persons, which is problematic. Under what circumstances would a retailer display goods in another supplier’s premises and do so in an area to which the public does not usually have access? A closer look at the definitions of “retailer” and “supplier” indicates that they can refer to the same person.

A supplier is the person who markets the goods. “Market” is defined as the promotion or supply of any goods. Supply of goods includes the selling of the goods. Therefore, a supplier can refer to the seller of the goods. As indicated above, a retailer will also refer to the seller of the goods. However, “retailer” will not refer to the person promoting the goods. In short, the supplier is the person who markets and/or sells the goods. A retailer is the person who sells the goods. Thus, where the retailer and the supplier are the same person, this will not create any problems. However, where they are different persons, this would mean that the retailer (the seller) does not have to display a price for the goods in the supplier’s (the marketer’s) premises to which the public does not normally have access. This does not make sense and it is suggested that the last reference to supplier should in fact refer to the retailer.

If it is accepted that retailer and supplier refer to the same person, there is still a difference of opinion as to the meaning of this provision. First, it is interpreted to refer to goods that are displayed (as an advertisement of the supplier or the

69 S 1 sv “display”.
70 This is indicated by the words “open invitation to the public”. In Crawley v R 1909 TS 1105 1108 the court held that where a tradesman advertises the price at which he sells the goods it would not amount to an offer to sell, but “simply to an announcement of his intention to sell”. See further Christie and Bradfield Christie’s The law of contract in South Africa (2011) 41–44 for a discussion of this case and the common-law rules applicable to advertisements.
71 “Special-order goods” are defined as goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the consumer’s requirements (s 1 sv “special-order goods”).
72 S 1 sv “supplier”.
73 S 1 sv “market”.
74 S 1 sv “supply”.
75 See para 3 1 2 supra.
goods) in an area within the supplier’s premises to which the public does not ordi-


narily have access. \(^76\) Secondly, it is interpreted to refer to goods that are dis-


played for advertising or where they are in an area to which the public does not nor-


mally have access. \(^77\) If the first interpretation is followed, this exception


seems to be unnecessary in the light of the specific definition given to a display


of goods. As the goods are displayed in an area to which the public does not ordi-


narily have access, it is difficult to see how it could be argued that the goods


are placed before the public as an open invitation. Rather, section 23(4) then


seems to be an example of when goods would not be considered as displayed for


the purposes of section 23(3). However, if the second interpretation is followed,


section 23(4) would exempt goods where they are displayed “predominantly as a


form of advertisement”. This indicates that the legislature intended a difference


in meaning between placing “goods before the public in the ordinary course of


business in a manner consistent with an open invitation to members of the public
to inspect, and select, those or similar goods for supply to a consumer” \(^78\) and


goods displayed “predominantly as a form of advertisement”. “Advertisement” is
defined as follows:


“[A]ny direct or indirect visual or oral communication transmitted by any medium,
or any representation or reference written, inscribed, recorded, encoded upon or
embedded within any medium, by means of which a person seeks to—


(a) bring to the attention of all or part of the public—


(i) the existence or identity of a supplier; or


(ii) the existence, nature, availability, properties, advantages or uses of any

goods or services that are available for supply, or the conditions on, or

prices at, which any goods or services are available for supply;


(b) promote the supply of any goods or services; or


(c) promote any cause.” \(^79\)


The fact that an advertisement includes any type of representation to “bring to
the attention of all or part of the public” the conditions under or the prices at
which the goods are available is similar to the meaning given to a price adver-
tisement at common law, \(^80\) which is similar in meaning to “goods placed before
the public as an open invitation to inspect, and select, those or similar goods for
supply to a consumer”. It becomes even more confusing when considering the
meaning of “promote”. \(^81\) As such, the meaning of this provision is unclear.

3.1.4 Display of price

Once it has been established that a retailer is displaying goods for sale, he must
display a price for those goods. “Display” in relation to price refers to the placing

\(^76\) Sharrock Business law 631.

\(^77\) Jacobs et al 2010 PELJ 331; Van Eeden Guide to the CPA 203.

\(^78\) S 1 sv “display” as discussed above.

\(^79\) S 1 sv “advertisement”.

\(^80\) See Crawley v R as discussed in fn 70 supra.

\(^81\) “Promote” includes “advertise, display or offer to supply any goods or services in the ordi-
nary course of business, to all or part of the public for consideration”, to “make any repre-
sentation in the ordinary course of business that could reasonably be inferred as expressing
a willingness to supply any goods or services for consideration” or to “engage in any other
conduct in the ordinary course of business that may reasonably be construed to be an in-
ducement or attempted inducement to a person to engage in a transaction” (cf s 1 sv “pro-
mote”). It is unclear how this differs from placing goods before the public as an open invi-
tation to inspect, and select, those or similar goods for supply to a consumer.
or publishing of anything in a manner that reasonably creates an association between that price and any particular goods.\textsuperscript{82}

For the purposes of interpreting section 23, “price” includes any mark, notice or visual representation that may reasonably be inferred to indicate or express an association between any goods or services and the value of the consideration for which the supplier is willing to sell those goods.\textsuperscript{83} Therefore, the price displayed should indicate the value of the consideration for the goods. “Consideration” is defined as anything of value given in exchange for goods, and will include almost anything (for example, money, property, labour and credit).\textsuperscript{84} However, the value of the consideration must be given.\textsuperscript{85} This is clear from section 23(5), which provides that a price is adequately displayed if it is expressed in the currency of the Republic.

Furthermore, the price must be affixed to or stamped on the goods, applied to the shelf where the goods are displayed, published in a catalogue or brochure or represented in any way as long as it may reasonably be inferred that the price represented is the price applicable to the goods in question.\textsuperscript{86} If the price is displayed in a brochure or catalogue and the brochure or catalogue states that the price is applicable for a certain time only, then the price is considered as the displayed price for that time only.\textsuperscript{87} If no time is stated, the price in the brochure or catalogue will be the displayed price for as long as it may reasonably not be regarded as out of date.\textsuperscript{88}

\subsection*{3.1.5 Consequences of a displayed price}

What is considered as the displayed price is very important, since section 23(6)(a) provides that the supplier may not require a consumer to pay a higher price than the displayed price.\textsuperscript{89} It is important to note that section 23(6) applies to all prices whether or not the supplier is obliged to display a price.\textsuperscript{90} There are a few exceptions to this rule: first, where the price is determined by public regulation;\textsuperscript{91} secondly, where the price is covered completely by a second displayed price;\textsuperscript{92} thirdly, where the displayed price contains an inadvertent and obvious error, provided the error has been corrected and reasonable steps were taken to inform consumers;\textsuperscript{93} finally, if the displayed price was altered, covered or removed by an unauthorised person.\textsuperscript{94}

\begin{itemize}
\item \textsuperscript{82} S 1 sv “display”.
\item \textsuperscript{83} S 1 sv “price”. Furthermore, a price would include a unit price (s 23(2)).
\item \textsuperscript{84} S 1 sv “consideration”.
\item \textsuperscript{85} “Value” refers to material or monetary worth (The Dictionary Unit for SA English (ed) South African Concise Oxford dictionary (2006) 1298 sv “value”).
\item \textsuperscript{86} S 23(5).
\item \textsuperscript{87} S 23(5)(c)(i).
\item \textsuperscript{88} S 23(5)(c)(ii).
\item \textsuperscript{89} Here again, the legislature deviates from the wording used in s 23(3) and refers to supplier. However, in this context, the supplier would probably always refer to the seller.
\item \textsuperscript{90} S 23(6) refers to “a price for any goods or services”.
\item \textsuperscript{91} S 23(7).
\item \textsuperscript{92} S 23(8).
\item \textsuperscript{93} S 23(9). This section also refers to supplier.
\item \textsuperscript{94} S 23(10). This section also refers to supplier.
\end{itemize}
3 1 6 Conclusion

Once a retailer displays his or her goods, the price must be displayed. The price must indicate the value of the consideration for which the seller is willing to sell the goods. The value must be expressed in South African rands and this implies that a numerical value is required. The retailer is bound to the displayed price (whether obliged to display a price or not), and may not require the consumer to pay a higher price than the one displayed.\footnote{S 23(6)(a).} If two prices are displayed concurrently in respect of the same goods, the retailer is bound to the lower displayed price.\footnote{S 23(6)(b).}

It would seem that this provision has extensively amended the common-law requirements of price in most consumer sales.\footnote{S 23 is not applicable to estimates for repair governed by s 15 or sales governed by s 43 of the Electronic Communications and Transactions Act (see para 0 supra).} The price must be fixed by the seller prior to the sale being concluded,\footnote{Van Huyssteen \textit{et al} \textit{Contract} 215.} and the buyer has the right to insist on paying this price.\footnote{\textit{Contra} Sharrock \textit{Business law} 631–632. Sharrock 55 argues that s 23 has not amended the common law rule that a display of goods with a price is only an invitation to the customer to submit offers. He argues that if a seller requires a consumer to pay a higher price than the displayed price this would constitute a contravention of s 30(1) of the CPA and should be dealt with accordingly. As such, the seller should not “be compelled to sell at that [displayed] price” (632). Considering that the legislature specifically uses the word “bound” in ss 23(9) and 23(10), it would seem that it was the intention of the legislature that the seller would be bound to the displayed price. The meaning of “bind” seems clear, namely, to “impose a legal or contractual obligation” (see \textit{The Dictionary Unit for SA English} (ed) \textit{SA Oxford dictionary} 109 sv “bind”).} This would seem to exclude the possibility that the price can be determined by the seller exercising an objective or reasonable discretion. This could be problematic where the price might be subject to escalation due to factors outside the control of the seller. For example, a supplier supplying goods to a small business may need to include a price escalation clause in the supply agreement to make provision for possible fluctuations in delivery costs. However, it should be noted that it is possible for a consumer to waive a right provided such a waiver is not on unfair terms or such unfair terms are not imposed as a condition for entering into the transaction.\footnote{S 48(1)(c)(i). See also Du Preez 2009 \textit{TSAR} 76.} As such, the inclusion of a term granting the seller the discretion to determine or adjust the price could be seen as a waiver of the buyer’s right to a displayed price in terms of section 23.\footnote{Whether the waiver would be regarded as fair or not would have to be determined with reference to the consumer’s right to fair, just and reasonable terms and conditions as set out in ss 48–52 and is therefore outside the scope of this article. For more on this issue see Du Plessis \textit{LLM dissertation} 108–130.}

3 2 Right to a sales record for every transaction with a supplier

Section 26 of the CPA requires that each supplier must provide a written record (sales record) of each transaction to the relevant consumer.\footnote{S 26(2). S 26 does not apply to transactions in terms of s 43 of the Electronic Communications and Transactions Act or other transactions exempted by the Minister in terms of s 26(4). The Minister exempted hawkers and suppliers where the consumer expressly does not require a sales record from the application of s 26(2)–(3) (see GN R293 in \textit{GG} 34180 of 1 April 2011).} This sales record...
must include the unit price, the total price (before any applicable taxes), the amount of the applicable taxes and the total price (including any applicable taxes). This information is required for goods that are supplied or are to be supplied. “Price” has a different meaning than the meaning given to it in section 23 above. In all the other provisions of the CPA, “price” is defined as the total amount paid or payable by the consumer to the supplier in terms of that transaction, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation. The definition refers to the “total amount paid or payable”, which indicates that a numerical value must be given. In practice, a sales record would probably take the form of an invoice or a receipt for a specific transaction. The information required is the minimum information that must be contained on the sales record and it does not preclude the inclusion of any other terms or conditions. Therefore, although the sales record must include a specific price, it does not seem to preclude the inclusion of a discretionary power to the supplier to amend the price stated in the sales record. Furthermore, where the consumer expressly does not require a sales record, the supplier does not have to provide one.

3 Right to information in plain and understandable language

Both rights discussed above require the provision of information to the consumer. First, the seller must provide the price of the goods that are displayed. Secondly, the seller must provide the consumer with a sales record for every transaction. The information provided to the consumer must meet the requirements for plain language in section 22 of the CPA. Therefore, if a discretion to determine the price were included in either of these documents, it would have to meet the plain language requirements set out in section 22.

Section 22(1)(b) provides that if a document must be provided to the consumer, such document must be in plain language. A document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant goods, could be expected to understand the content, significance and import of the document without undue effort.

Gouws argues that whether the document requires “undue effort” to be understood

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103 Ss 26(3)(e), (g)–(i).
104 Ibid.
105 S 1 sv “price”.
106 Such transactions are exempt from the provisions in s 26(2)–(3). See fn 1022 supra.
107 Gouws 2010 SA Merc LJ 82 argues that the need for plain language is based on the “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality of consumers in the country”. This would accord with the purpose of the CPA (cf para 2 2 supra). See further Louw The plain language movement and legal reform in the South African law of contract (LLM dissertation UJ 2010) 123–124 129 where the author discusses the need for language protection in consumer contracts.
108 Gouws 2010 SA Merc LJ 87 refers to the UNESCO definition of literacy, namely “the ability to identify, understand, interpret, create, communicate, compute and use printed and written materials associated with varying contexts”. Newman “The influence of plain language and structure on the readability of contracts” 2010 Obiter 738 argues that these concepts should be interpreted “at a very basic level” due to the low literacy levels prevalent in South Africa.
109 S 22(2).
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will depend on the facts of the case. However, he proposes that “the consumer must be able to understand the content, significance and import of the [document] by merely reading the [document]”. If the consumer must take any further action to understand the document, for example by obtaining advice from an attorney, that would be considered as “undue effort”. Factors to be taken into account are:

(a) the context, comprehensiveness and consistency of the notice;
(b) the organisation, form and style of the notice;
(c) the vocabulary, usage and sentence structure of the notice, and
(d) the use of any illustrations, examples, headings or other aids to reading and understanding.

The requirements and factors set out in section 22 are very general and do not provide clear guidance on how a document should be assessed, although the National Consumer Commission may publish guidelines for methods of assessing whether a document satisfies these requirements. It has not done so yet, but hopefully it will and such guidelines will provide better assessment methods for determining whether a document meets the requirements of plain language.

Furthermore, section 22 is silent on the consequences of non-compliance (that is, where the discretion is not drafted in plain language). Non-compliance with a statutory provision usually renders the term or transaction void. However, Naudé argues that the Act seems to indicate otherwise, because non-compliance with section 22 is listed as a mere factor that must be considered when assessing whether a term is unfair.

4 Conclusion

It was shown that once a retailer displays his or her goods, section 23 of the CPA requires that he or she must display the price. The price must indicate the value of the consideration for which the seller is willing to sell the goods. The retailer

111 Idem 88–89.
112 Ibid.
113 S 22(2)(a)–(d). Gouws 2010 SA Merc LJ 89 argues that as these factors are guidelines, non-compliance with them will not necessarily mean that the document does not meet the requirements of plain language.
114 Louw LLM dissertation 137.
115 S 22(3).
116 Gouws drafted comprehensive guidelines in respect of how to draft in plain language (see Gouws 2010 SA Merc LJ 91–94). See also Newman 2010 Obiter 738–745 for further guidelines that could be used. In addition Newman argues that the courts have considered some of the factors listed in the CPA in other contexts (737–738). It is submitted that these guidelines and judgments could be used to assess whether or not a document is written in plain language.
118 See s 52(2)(g); Naudé 2009 SALJ 513. See further Louw LLM dissertation 142 where the author mentions the following consequences of not complying with s 22: “Consumers might be able to get out of the agreements, [suppliers] might be found guilty of unconscionable conduct, or might be sued.”
is bound to the displayed price and may not require the consumer to pay a higher 
price than the one displayed. If two prices are displayed concurrently in respect 
of the same goods, the retailer is bound to the lower displayed price. This means 
that the price must be fixed by the seller prior to the sale being concluded, and 
the buyer has the right to insist on paying this price. Although this would seem to 
exclude the possibility that the price can be determined by the seller exercising 
an objective or reasonable discretion, it is argued that it is possible for a consumer 
to waive a right, provided such a waiver is not on unfair terms or such unfair 
terms are not imposed as a condition for entering into the transaction. Furthermore, it was shown that section 26 of the CPA requires that each supplier must 
provide a written record (sales record) of each transaction to the relevant con-
sumer, which would include the price payable. It was argued, however, that this 
provision does not seem to preclude the inclusion of a discretionary power to the 
supplier to amend the price stated in the sales record. Finally, it was noted that 
the price discretion would have to meet the requirements of plain and under-
standable language as set out in section 22.

Therefore, it is clear that the CPA has made substantial amendments to the 
common law principles applicable to contracts of sale. Specifically, the common 
law rules dealing with certainty of price have been amended substantially and 
this has influenced the rules governing the unilateral determination of price.