

The impact of section 14 of the Consumer Protection Act on fixed term lease agreements

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ABSTRACT

The impact of section 14 of the *Consumer Protection Act* 68 of 2008 (CPA) on fixed term lease agreements of immovable property is discussed and the manner in which section 14 must be interpreted is determined.

The impact of section 14 of the CPA on fixed term lease agreements of immovable property is analysed by determining the application of the CPA to these agreements. The CPA applies to lease agreements entered into by landlords letting immovable property in the ordinary course of business to a tenant, except where the tenant is the State or a juristic person with an asset value or annual turnover of two million rand or more at the time of entering into the agreement. It is shown that the scope of application of section 14 creates ambiguity as the application has some unusual and unintended consequences for the law of lease. Some important aspects raised by scholars are highlighted, which include, inter alia, early cancellation, duration limitations for commercial tenants, allowing repeated breach, delays in eviction, difficulties of the landlord in retaking possession of the leased premises and empowering consumers to act deceitfully or to exploit suppliers.

In the discussion it is illustrated that the CPA must be interpreted in a manner that gives effect to its purpose, which includes the promotion of fair business practices and the protection of consumers from unconscionable, unfair, unreasonable, unjust and improper trade practices. It is further argued that the manner in which the EU and Ontario deals with residential and commercial lease agreements in consumer protection legislation, should be adopted as these lease agreements are excluded from the legislation which deals with consumer protection specifically.

It is against this background that the research findings indicate that section 14 has some unusual and perhaps unintended consequences for the law of lease. Applying section 14 to fixed term leases complicate the law of lease, particularly as a result of the collective impact on the common law principles governing

leases. The impact of section 14 on fixed term residential and commercial leases result therein that the purpose is not attained as the application of these leases does not give effect to the purpose which the CPA aims to achieve.

Key words: Consumer protection, lease, residential lease, commercial lease, fixed term agreement, interpretation of statutes.

OPSOMMING

In die verhandeling word die impak van artikel 14 van die *Verbruikersbeskerming Wet 68 of 2008* (VBW) op vastetermyn huurooreenkomste van onroerende eiendom bespreek en die wyse waarop artikel 14 interpreteer moet word, word bepaal.

Die impak van artikel 14 van die VBW op vastetermyn huurooreenkomste van onroerende eiendom is geanaliseer deur die toepassing van die *VBW* hierop te bepaal. Die VBW is van toepassing op huurooreenkomste tussen verhuurders wat onroerende eiendom verhuur in die normale loop van sake aan huurders, behalwe waar die huurder die Staat of 'n regspersoon is met 'n batewaarde of jaarlikse omset van meer as twee miljoen rand, ten tye van kontraksluiting. Daar word aangetoon dat die toepassing van artikel 14 op huurwetgewing tot onduidelikhede lei, vanweë die ongewone en moontlik onvoorsiene gevolge wat dit inhou vir huurwetgewing. Belangrike aspekte wat deur skrywers geopper word, soos vervroegde kansellasië, termyn beperkings vir kommersiële huurders, moontlikmaking van herhaalde kontrakbreuk, uitsetting verdragings, implikasies van die verhuurder om her-besit van die perseel te neem en bemagtiging van verbruikers om bedrieglik op te tree en verskaffers te misbruik, is uitgelig.

Die bespreking toon dat die VBW interpreteer moet word op 'n wyse wat effek gee aan die doel van die VBW, naamlik die bevordering van billike sakepraktyke, beskerming van verbruikers teen gewetenlose, onbillike, onredelike, onregverdige en onbehoorlike handelspraktyke. Daar word geargumenteer dat die wyse waarop die Europese Unie en Ontario residensiële en kommersiële huurooreenkomste in verbruikersbeskerming wetgewing hanteer, aangeneem moet word, deur hierdie huurooreenkomste uit te sluit van wetgewing wat spesifiek geskoei is op verbruikersbeskerming.

Teen die agtergrond bevind die studie dat artikel 14 sekere ongewone en moontlik, onvoorsiene gevolge inhou vir huurwetgewing. Die toepassing van artikel 14 op vastetermyn huurooreenkomste kompliseer huurwetgewing, weens

die gesamentlike impak op gemeenregtelike beginsels van huurkontrakte. Die impak van artikel 14 op vastetermyn residensiële en kommersiële huurooreenkomste het tot gevolg dat die doel waarna die VBW streef, nie bereik word nie.

Sleutelwoorde: Verbruikersbeskerming, huurooreenkoms, residensiële huurooreenkoms, kommersiële huurooreenkoms, vastetermyn ooreenkoms, interpretasie van wetgewing.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AU	African Union
CESR	Center for Economic and Social Rights
Constitution	<i>Constitution of the Republic of South Africa</i> 1996
CPA	<i>Consumer Protection Act</i> 68 of 2008
DTI	Department of Trade and Industry
ECC	European Economic Community
ECOSOC	Economic and Social Council
ECSC	European Coal and Steel Community
EJIL	European Journal of International Law
ESTA	<i>Extension of Security of Tenure Act</i> 62 of 1997
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
LTB	Landlord and Tenant Board
NAFTA	North American Free Trade Agreement
NCA	<i>National Credit Act</i> 34 of 2005
NCC	National Consumer Commission
NCT	National Consumer Tribunal
Ontario CPA	<i>Ontario Consumer Protection Act</i> 2002
PELJ	Potchefstroom Electronic Law Journal
PER	Potchefstroomse Elektroniese Regsblad

PIE	<i>Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998</i>
RHA	<i>Rental Housing Act 50 of 1999</i>
RHAA	<i>Rental Housing Amendment Act 35 of 2014</i>
RHT	Rental Housing Tribunals
RTA	<i>Residential Tenancy Act 2006</i>
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPOA	South African Property Owners Association
Stell LR	Stellenbosch Law Review
TFEU	Treaty on the Functioning of the European Union
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
UNGCP	United Nations Guidelines on Consumer Protection
WILJ	Wisconsin International Law Journal

Chapter 1 Introductory observations

1.1 Problem Statement and Introduction

1.1.1 Introduction

Consumer protection entails protective measures preventing the exploitation of consumers by businesses, protecting vulnerable groups within a community, levelling the playing field between suppliers and consumers and promoting the social and economic welfare of consumers globally.¹ Consumer protection is particularly important in the South African context, due to vulnerable and exposed consumers.² In South Africa, many consumers experience high levels of poverty, social and economic inequality, live in remote or low-density population areas, are minors or seniors and have low literacy skills and language barriers.³ Consumer protection in South Africa starts with the *Constitution of the Republic of South Africa*, 1996 (the Constitution) as it integrates certain constitutional rights and values. The Constitution regulates consumer protection in broad terms and has an effect on how consumers exercise their rights. The *Consumer Protection Act* 68 of 2008 (the CPA) acknowledges the reality South African consumers face and aims to protect consumers.⁴

On 1 April 2011, the CPA became fully operational and introduced a new era of substantially improved consumer rights for those conducting business in South Africa.⁵ The purpose of the CPA is the promotion and development of "social and

¹ Howells, Ramsay and Wilhelmsson "Consumer Law" 4.

² Du Preez 2009 *TSAR* 63; Mokorosi *The Role of Alternative Dispute Resolution* 4.

³ Preamble of the CPA; Du Preez 2009 *TSAR* 63; Barnard 2015 *International Journal of Consumer Studies* 223. Woker 2010 *Obiter* 217; Melville "The Consumer Protection Act" 4; The CPA highlights the position of vulnerable consumers in consumer agreements, and how this vulnerability is directly related to the socio-economic position the vulnerable hold in the community. Bauling and Nagtegaal 2015 *De Jure* 151.

⁴ Bauling and Nagtegaal states: "In line with its purpose, the CPA implicitly addresses the notion of the poor as vulnerable, and the protection it aims to provide the vulnerable in an attempt to address poverty, is of importance and should be evaluated and approached from within the constitutional framework". Bauling and Nagtegaal 2015 *De Jure* 151.

⁵ The CPA came into force on 31 March 2011 (the general effective date published in GN 917 in GG 33581 of 23 September 2010); Erasmus *Consumer Protection* 26; Melville *The Consumer Protection Act* 15.

economic welfare of consumers in South Africa".⁶ The broader aim relates to the transformative goals of the Constitution and the desire to bring about social and economic transformation across the greater South African society.⁷ Section 4(2)(b)(i) of the CPA expressly states that it must be interpreted to protect the most vulnerable consumers in the socio-economic community.⁸ In an attempt to protect vulnerable consumers and consumers in general, and to ensure certainty on fixed term agreements, section 14 of the CPA regulates the expiry and renewal of fixed-term agreements. Section 14 reads as follows

14. (1) This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.
- (2) If a consumer agreement is for a fixed term—
 - (a) that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;
 - (b) despite any provision of the consumer agreement to the contrary—
 - (i) the consumer may cancel that agreement—
 - (aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or
 - (bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or
 - (ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;
 - (c) of not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of—
 - (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and

⁶ Section 3(1).

⁷ The construction of the CPA echoes that of the Constitution in some aspects. An example is seen in s 2(2) of the CPA, which provides that appropriate international law and foreign law may be taken into account in the interpretation of the CPA and s 4(2) of the CPA provides that a court must develop the common law to improve the enjoyment and realisation of consumer rights; Van Eeden *Consumer Protection Law* 17.

⁸ Section 3(1)(b).

- (ii) the options available to the consumer in terms of paragraph (d); and
- (d) on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly—
 - (i) directs the supplier to terminate the agreement on the expiry date; or
 - (ii) agrees to a renewal of the agreement for a further fixed term.
- (3) Upon cancellation of a consumer agreement as contemplated in subsection (1)(b)—
 - (a) the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and
 - (b) the supplier—
 - (i) may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and
 - (ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation, as prescribed in terms of subsection (4).
- (4) The Minister may, by notice in the Gazette, prescribe—
 - (a) the maximum duration for fixed-term consumer agreements, generally, or for specified categories of such agreements;
 - (b) the manner and form of providing notices to the consumer in terms of subsection (2)(c);
 - (c) the manner, form and basis for determining the reasonableness of credits and charges contemplated in subsection (3); and
 - (d) other incidental matters as required to provide for the proper administration of this section.

The contents of these provisions have a substantial impact on a number of industries that enter into fixed term agreements, in particular, lease agreements for immovable property for commercial and residential purposes. For purposes of this study, the category of fixed term agreements that will be discussed is fixed term lease agreements of immovable property for residential and commercial purposes. For purposes of uniformity, the mentioned lease agreements shall be referred to as 'leases' or 'lease agreements', which shall be the main focus of the study.

Some commentaries have been levied upon whether or not the fixed term provisions of section 14 apply to lease agreements, in instances where the landlord is a supplier⁹ and the tenant is a consumer,¹⁰ as defined in the CPA. It is imperative to have a proper understanding of the relevant definitions contained in the CPA and how the definitions play a central role in determining whether the CPA applies to a specific transaction.¹¹

1.1.2 Application of the Consumer Protection Act

Section 5 deals with the application of the CPA and provides for an extensive scope of application. Generally the CPA applies to every transaction¹² occurring within South Africa for the supply¹³ or promotion¹⁴ of goods¹⁵ or services¹⁶ to a

⁹ Section 1 Supplier means "a person who markets any goods or services".

¹⁰ Section 1 Consumer means "(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3); (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)".

¹¹ The definitions contained in an Act are intended to provide clarity for purposes of interpretation, as is the case of the CPA. However, the extensive use of definitions can become unclear and confusing, which increases the difficulty of interpretation, particularly where terms are given extended meaning or meanings that do not accord to their literal meaning. Eiselen "Interpretation, Purpose and Application" 1-1.

¹² Section 1 Transaction means "(a) in 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; or (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a)".

¹³ Section 1 Supply, when used as a verb means "(a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or (b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

¹⁴ Section 1 Promote means to "(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction".

¹⁵ Section 1 Goods include "(a) anything marketed for human consumption; (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded; (c) any literature, music, photograph, motion picture, game,

consumer, for consideration¹⁷ in the ordinary course of business, unless the transaction is exempted from the application of the CPA.¹⁸ With regard to the aforesaid, it is at this point that the question arises as to whether a lease agreement falls within the ambit of the CPA.¹⁹ To determine the field of application, the most important definitions given in section 1, as contained in section 5, should be analysed in the context of lease agreements.²⁰

The CPA shall apply to a landlord if he meets the requirements of being a 'supplier' who provides 'services' in the 'ordinary course of business'. Uncertainty as to the applicability arises in cases where the landlord has not previously leased the premises, where it is a once-off lease or the landlord does not lease any other premises. To the extent that a supplier leases immovable property in the ordinary

information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and (e) gas, water and electricity".

¹⁶ Section 1 Service includes, but is not limited to "(a) any work or undertaking performed by one person for the direct or indirect benefit of another; (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the *Financial Advisory and Intermediary Services Act 37 of 2002*; (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service- (i) constitutes advice or intermediary services that is subject to regulation in terms of the *Financial Advisory and Intermediary Services Act 37 of 2002*; or (ii) is regulated in terms of the *Long-term Insurance Act 52 of 1998*, or the *Short-term Insurance Act 53 of 1998*; (d) the transportation of an individual or any goods; (e) the provision of- (i) any accommodation or sustenance; (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product; (iii) access to any electronic communication infrastructure; (iv) access, or of a right of access, to an event or to any premises, activity or facility; or (v) access to or use of any premises or other property in terms of a rental; (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service".

¹⁷ Section 1 Consideration means "anything of value given and accepted in exchange for goods or services, including- (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; (b) labour, barter or other goods or services; (c) loyalty credit or award, coupon or other right to assert a claim; or (d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer".

¹⁸ Section 5(1)(a), subsections 2, 3 and 4 allows for certain transactions to be exempted; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 309; Van Eeden *A Guide Act* 36; Monty 2011 *Without Prejudice* 46.

¹⁹ De Stadler *Consumer Law* 29.

²⁰ Section 5(1)(a)–(d).

course of business, the question is whether it would fall under the definition of goods or under the definition of services for purposes of application of section 14. With regard to the definitions it is noted that services²¹ include "access to or use of any premises or other property in terms of a rental". In addition, paragraph (f) of the definition of services includes:

...a right of occupancy of, or power or privilege over or in connection with any land or other immovable property, other than in terms of a rental.

In turn, 'rental' is defined as an agreement:

...in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer but does not include a lease within the meaning of the National Credit Act.²²

When the above definitions are considered, one view offered is that the description of rental in the definition of service is wide enough to encompass a lease.²³ In this case the lease of premises to an individual, in the ordinary course of business, may be subject to the protective remedies provided in the CPA.²⁴ The definition of goods²⁵ supports the view in that it includes "a legal interest in land or any other immovable property", other than an interest that falls within the definition of 'service'²⁶ in section 1. There is an alternative view which asserts that the phrase 'other than a rental'²⁷ from the definition of 'service', implies that the

²¹ The definitions of "goods" and "services" are very broad and they encompass virtually every conceivable good or service. Naudé and Eiselen *Commentary* 5-4.

²² To clarify, a lease agreement in terms of the *National Credit Act* 34 of 2005 (hereafter the *NCA*), would be an agreement for the lease of movable goods in terms of which ownership of those goods passes to the lessee in due course, and in respect of which there is a deferral of payment and an interest or a charge payable. Monty 2011 *Without Prejudice* 47.

²³ Van Eeden *Consumer Protection Law* 462; Monty 2011 *Without Prejudice* 47.

²⁴ Van Eeden *Consumer Protection Law* 462.

²⁵ Goods includes "(d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section...".

²⁶ "Service" includes "(v) access to or use of any premises or other property in terms of a rental; (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental...".

²⁷ Subsection (f) of the definition of services.

CPA does not apply to leases of immovable property and may result in the exclusion of lease agreements from the application.²⁸

The CPA does not refer to specific agreements to which section 14 applies.²⁹ From this, an inference could be made that the legislature intended to leave the application open to encapsulate an array of fixed-term agreements would include lease agreements.³⁰ Most authors³¹ are of the view that section 14 applies to fixed term lease agreements while others are hesitant to state categorically that it does.³² What will become clear is that the application of section 14 to fixed term lease agreements has resulted in fixed term leases being subjected to various undesirable restrictions, unfair preferences and allowances of repeated breach and automatic continuation of these agreements.

The definitions discussed are important when one determines whether a consumer or supplier may exercise their right to cancel or renew the fixed term agreement in terms of section 14. The lack of clarity on certain definitions contained in the CPA may unduly limit the rights afforded and is the main reason why different authors are rendering diverse opinions on the applicability of section 14 to leases. The absence of case law regarding these definitions further hinders legal certainty, especially about the meaning of new terms or concepts that are used in the CPA. The questions that stand out for purposes of the present study are: what is the impact of section 14 of the CPA on fixed term lease agreements and how should section 14 be interpreted. In the remaining chapters of this dissertation these questions are addressed.

²⁸ Le Roux "Correct and Incorrect Methods" 2-3; Smit "The Consumer Protection Act" 3; Bracher 2011 *Business Day Business Law and Tax Review*.

²⁹ Apart from that the agreement must fall within the definition of a consumer agreement, entered into for a fixed term. The CPA does not refer to lease agreements of immovable property *per se*.

³⁰ Steyn 2014 *De Rebus* 25.

³¹ Steyn 2014 *De Rebus* 25-26; Van Eeden *Consumer Protection Law* 462; Werksmans Attorneys 2016 <http://www.werksmans.com>; Natalie Lubbe and Associates 2013 <http://natalielubbe.co.za>; Esselaar Attorneys 2011 <http://www.esselaar.co.za>.

³² Michalsons Attorneys 2011 <http://www.michalsons.co.za>; SAPOA 2011 <http://www.commercial-property.co.za>; Delpont 2014 *Obiter* 61.

1.1.3 Law of Lease

Any transaction that falls outside the ambit of the CPA, continues to be governed by the common law.³³ Under the common law the courts have always approached the issue of enforceability of leases on the basis of contractual freedom. This traditional view has influenced the approach of the courts to refrain from interfering with contracts as they are expressions of free will between two consenting parties.³⁴ Through legislation, the legislature has intervened to fill in the gap in situations where the superior counterparts abused contracting parties in the weaker bargaining position.³⁵

The common law of lease underwent statutory reform with the adoption of the Constitution and the promulgation of the *Rental Housing Act* 50 of 1999 (hereafter RHA), the *Rental Housing Amendment Act* 35 of 2014, (hereafter RHAA), the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter PIE) and the *Extension of Security of Tenure Act* 62 of 1997 (hereafter ESTA).³⁶ In light of the fact that the common law and statutory law interact, statutory law must promote the spirit purported and objects of the Bill of Rights and the law of lease must follow this pattern.³⁷

³³ Melville *The Consumer Protection Act* 22.

³⁴ Kanamugire and Chimuka 2014 *Mediterranean Journal of Social Sciences* 168.

³⁵ The CPA creates a general standard of fairness by listing prohibited terms and terms which are presumed to be unfair for the benefit of consumers thereby altering the common law.

³⁶ Bradfield, Kahn and Lehmann *Principles* 136. The RHA is primarily concerned with the letting and hiring of residential property that affects the rights and duties of landlords and tenants. "Supplier" is the word used in the CPA, but "landowner" is the equivalent of supplier in the context of the RHA and "tenant" will be used throughout this dissertation. "Consumer" is the word used in the CPA, but "tenant" is the equivalent of consumer in the context of the RHA and the word tenant will be used throughout this dissertation.

³⁷ The common-law principles continue to inform the law, but only to the extent that it is consistent with the Constitution, as confirmed in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44. The Constitution is founded on the values of human dignity, equality and freedom and therefore the common law of contract must embrace these constitutional values. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) requires the consideration of the circumstances in which the Constitutional Court "should intervene to infuse the law of contract with constitutional values". The majority of judges found that "it cannot be gainsaid that the Court should have developed good faith to become enforceable as an independent rule so as to actively promote contractual fairness". It emphasised the importance of the principle of good faith and the desirability to fill the law of contract with constitutional values. Mupangavanhu 2015 *De Jure* 119.

1.1.4 Foreign Law

In section 2 the CPA provides, when interpreting or applying the CPA, a court, Tribunal or Commission may consider appropriate foreign law, international law, protocols relating to consumer protection and any decision of a consumer court, ombud or arbitrator in terms of the CPA.³⁸ In order to find a possible answer to the research question posed, how the EU and the state of Ontario in Canada deal with the general principles of consumer protection will be examined. The reason for this selection can be attributed to the fact that both the EU and Ontario have a longer history of consumer protection and the regulation thereof than South Africa and both have well developed consumer protection legislation. Many of South Africa's legislation, including the CPA, were influenced by the EU and Canadian legal framework, which were largely influenced by Canadian consumer protection.³⁹ The EU and Ontario follow a related legal system to South Africa, but there remains differences which are found in their legislation, explicitly designed to govern landlords and tenants, real estate and lease agreements.⁴⁰ It should be noted that a comparative analyses will not be done. The specific provisions of the mentioned jurisdictions that deal with the topic under discussion will be analysed to assist in evaluating the South African position.

Furthermore, international and regional instruments on consumer protection and fixed term lease agreements, with specific reference to the related topics contained in section 14 will be examined.

1.1.5 Interpretation

Legal interpretation refers to the judicial understanding of South African legislation, case law and the rules and principles used to construct meaning for judicial purposes. To resolve the possible ambiguity regarding the application of

³⁸ As such there are numerous examples of "legal borrowing and international cross-pollination" in the consumer protection area; Delpont 2014 *Obiter* 61; Van Eeden *A Guide* 105; Naudé and Eiselen *Commentary* 5.

³⁹ The *Competition Act* 89 of 1998 fundamentally reformed South African competition legislation and strengthened the powers of the competition authorities in line with the EU and Canadian models. An example is the plain language movement incorporated in s 22 of the CPA.

⁴⁰ Jansen Van Vuuren *A Legal Comparison* 35.

section 14 to fixed term lease agreements, it is essential to determine what the correct interpretation of section 14 is. The CPA has its own interpretation clause,⁴¹ which contains explicit indications about the interpretation of the wording. The CPA must be interpreted in a manner giving effect to its purpose, which includes the promotion of fair business practices, the protection of consumers from unconscionable, unfair, unreasonable, unjust and improper trade practices, as set out in section 3.⁴² Where any inconsistency arises between the provisions of the CPA and any other legislation, section 2(9) requires that both Acts must be applied concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.⁴³ This will however only be possible where the inconsistent provision extends greater protection to a consumer than a provision contained in the CPA or if the same level of protection is provided, but by other means.⁴⁴ Further, the provisions of the CPA must not be interpreted to preclude a consumer from exercising rights afforded in terms of the common law.⁴⁵

In addition to the interpretation clauses, there are general theories of interpretation that may be applied to interpret the provisions of the CPA. A distinction should be drawn between conventional theories of statutory interpretation that allow for legislation to be interpreted according to the ordinary grammatical meaning of words, and contextual interpretation, which involves interpretation of the meaning the words have ascertained in their broader legal context, and purposive interpretation, which is to interpret the words in accordance with the purpose of the Act.⁴⁶

Since the advent of our constitutional democracy in 1994, the rules of legal interpretation have transformed. The Constitution sets the standard for the

⁴¹ Section 2. A number of sections of the CPA specifically deal with interpretation clauses, but they do not override the general approach to be followed. The interpretation provisions underscore the purposive method of interpretation by setting out certain factors to be taken into account in the process of interpreting the CPA.

⁴² Sections 2(1) and 3; Melville *The Consumer Protection Act 28*; Van Eeden *A Guide* 37.

⁴³ Section 2(2)(a).

⁴⁴ Naudé and Eiselen *Commentary* 2-8.

⁴⁵ CPA s 2(10).

⁴⁶ Botha *Wetsuitleg* 117.

construction of statutory provisions.⁴⁷ The crux is that the advent of our constitutional democracy has brought with it the notion that legislative enactments are interpreted in conformity with the Constitution and constitutional values and not just the intention of the legislature.⁴⁸ The predicament is that there is no judgment in favour of an interpretation for either the exclusion from or the inclusion of leases in the CPA.

1.1.6 Constitutional aspects of residential and commercial lease agreements

The Constitution is based on the values of human dignity, equality and freedom.⁴⁹ These values have a direct influence on contract law and therefore a direct influence on residential and commercial lease agreements.⁵⁰ To achieve these constitutional values, the CPA may assist as there is a nexus between these constitutional values and consumer protection.⁵¹ In the case of residential leases, the Constitution recognises the right of access to adequate housing as a significant human right. This right is also recognised internationally, in a number of international human rights instruments and treaties.⁵² Section 26(1) of the Constitution provides that "everyone shall have the right of access to adequate housing".⁵³ The application of section 14 to lease agreements may possibly limit

⁴⁷ Section 39(2) of the Constitution provides "When interpreting any legislation, and when developing the Common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

⁴⁸ Van Eeden *A Guide* 20. This implies that the "democratic values", "fundamental human rights" and "social justice" that form the basis of our society, must always be in the foreground of the mind during the interpretation process; Van der Schyff 2003 *PELJ* 152.

⁴⁹ Chapter 1 of the Constitution.

⁵⁰ Bauling and Nagtegaal 2015 *De Jure* 150; Barnard *A critical legal argument* 229.

⁵¹ Mupangavanhu 2015 *De Jure* 117.

⁵² Universal Declaration of Human Rights, 1948, a 25; European Convention on Human Rights and Fundamental Freedoms, 1950, a 8(1); International Convention relating to the status of Refugees, 1951, a 21; European Social Charter, 1961, aa 16, 19(4) and a 4 of Additional Protocol; International Covenant on Economic, Social and Cultural Rights, 1966, a 11; International Convention on the Elimination of All forms of Racial Discrimination, 1966, a 5(e)(iii); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, aa 11(b) and (d); International Convention on the Elimination of All Forms of Discrimination against Women, 1979, a 14(2)(h); International Convention on the Rights of the Child 1989, a 27(3).

⁵³ The meaning attributed to accessibility implies that the State must create conducive conditions for all its citizens, irrespective of their economic status, to access affordable housing. S 26(3) of the Constitution prohibits evictions of persons from their homes without a court order. A court of law ordering such eviction must do so after taking into account all relevant factors. Legislation permitting arbitrary evictions is also prohibited by the same provision.

the right of access to adequate housing and therefore encroach on the constitutional values of human dignity, equality and freedom.

The constitutional aspects relating to commercial leases include, *inter alia*, equality⁵⁴ and freedom.⁵⁵ From the consumer law perspective, the protection against discriminatory marketing is a consumer right provided for under the right of equality in the consumer market, which is contained in section 8 of the CPA.⁵⁶ The application of the value of equality is extended to the commercial market, as the provisions of section 8 of the CPA apply in respect of a consumer that is an association or juristic person.⁵⁷ This means that tenants under both residential and commercial leases may not be discriminated against and must, from a

⁵⁴ Section 9 of the Constitution states that "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

⁵⁵ Section 22 of the Constitution: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

⁵⁶ Protection against discriminatory marketing "(1) Subject to section 9, a supplier of goods or services must not unfairly (a) exclude any person or category of persons from accessing any goods or services offered by the supplier; (b) grant any person or category of persons exclusive access to any goods or services offered by the supplier; (c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons; (d) supply a different quality of goods or services to any person or category of persons; (e) charge different prices for any goods or services to any persons or category of persons; (f) target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or (g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier, on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act."

⁵⁷ Section 8(3) of the CPA provides that "Subsections (1) and (2) also apply in respect of a consumer that is an association or juristic person, to prohibit unfair discrimination against that association or juristic person based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person. (4) Nothing in this section is intended to limit the authority of a court to (a) consider any conduct between a supplier and a consumer that is not contemplated in this section; or (b) find that any such conduct constitutes unfair discrimination within the meaning of the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act".

consumer protection perspective, be treated equally. In addition, the freedom to partake in the economic market is extended to small and medium enterprises.

The Constitution also provides other rights which are relevant for purposes of consumer protection, such as 'privacy',⁵⁸ 'access to information',⁵⁹ and 'enforcement of rights'.⁶⁰

1.2 Objectives of the proposed study

The objective of this study is to determine what the correct interpretation of section 14 of the CPA is, what the influence of such interpretation has on fixed term lease agreements of immovable property and whether this provision should be amended.

1.3 Structure of the Dissertation

In order to frame the discussion and to answer the research question, this dissertation is organised into 6 chapters, followed by a concluding chapter. The point of departure in the first chapter is an introduction that includes a discussion of the problem statement and objectives of the study. The second chapter provides a discussion on consumer protection in order to extract the applicable principles of consumer protection and to determine whether the international and regional principles are similar to the consumer protection principles in South Africa. Chapter three relates to the interpretation of statutes and will include a discussion on the theories of interpretation, the presumptions and how it is dealt with by the courts.

Chapter 4 deals with the law of lease with specific reference to consumer protection in the case of fixed term lease agreements. Chapter 5 is devoted to how the EU and Ontario deal with the general principles of consumer protection and fixed term lease agreements. In chapter 6 the previous chapters are applied

⁵⁸ The right to privacy is dealt with in s 14 of the Constitution and s 11 of the CPA.

⁵⁹ The right of access to information is dealt with in s 32 of the Constitution and s 22 of the CPA.

⁶⁰ The right to enforcement is dealt with in s 38 of the Constitution and Chapter 3 of the CPA.

to the CPA. In the final chapter, a conclusion is reached on the application and interpretation of section 14 to fixed term leases of immovable property and recommendations are made on how to deal with the issues and ambiguities identified in previous chapters.

1.4 Research methodology

The research methodology employed was desktop research in the form of a literature study. Primary and secondary resources were explored and included textbooks, law journals, legislation, case law, monographs and electronic resources mainly in respect of fixed term lease agreements of immovable property, and an in-depth investigation of section 14 of the CPA and its interpretation clauses. A comparison was made between the South African legal position and that of the EU and Ontario in Canada. The legal positions in these jurisdictions were evaluated to determine whether South Africa might learn from these jurisdictions in how they deal with the protection of their consumers when entering into fixed term leases of immovable property.

1.5 Conclusion

In view of the uncertainty with regard to the interpretation and application of section 14 of the CPA the purpose of this study is to determine how section 14 of the CPA should be interpreted and what the effect of section 14 of the CPA on fixed term lease agreements of immovable property is.

Chapter 2 Consumer Protection

2.1 Introduction

The purpose of this chapter is to discuss consumer protection in order to extract the applicable principles of consumer protection and to determine whether the international and regional principles are similar to the consumer protection principles in South Africa.

The history of consumer protection can be ascribed to the role of the consumer in the development of the market.⁶¹ Ever since human beings traded, there has been a need for protection of the consumer, who are often in a more vulnerable position, especially in view of the propensity of the provider of the goods or services to seek to gain the utmost advantage in all transactions.⁶² The development of consumer law has been significantly influenced by the phenomenon of consumerism, which originated in the struggle against capitalism.⁶³ Consumerism and consumer protection are phenomena of the nineteenth century.⁶⁴ Although many legal systems had some laws that, prior to this era, could be characterised as limited forms of consumer protection, there was no real conception of consumers as a class that needed protection.

Over the last half-century, legislatures worldwide have enacted consumer protection legislation.⁶⁵ The rationale behind the development of consumer law was the discriminatory and unfair market practices, proliferation of low-quality and unsafe products, lack of awareness of consumer rights, limited redress for consumers and weak enforcement capacity.⁶⁶ The basis for the development of consumer law as a distinct field of law, is the emergence of the consumer

⁶¹ Howells, Ramsay and Wilhelmsson "Consumer Law" 4.

⁶² Howells, Ramsay and Wilhelmsson "Consumer Law" 4.

⁶³ Van Eeden *The Regulation of Trade Practices* 12.

⁶⁴ The rise of consumerism is a direct product of the modern mass production age starting with the industrial revolutions of the eighteenth century and nineteenth centuries. The industrial revolution marks a period where there was an unprecedented rise in average income and population on a sustained basis. The industrialisation of the western world also led to improved infrastructure; Van Eeden *The Regulation of Trade Practices* 12.

⁶⁵ Van Eeden *Consumer Protection* 1.

⁶⁶ Van Eeden *Consumer Protection Law* 3; Eiselen and Naudé "Introduction and Overview" 13.

society.⁶⁷ This emergence was created owing to the expansion of the market, the anonymisation of the suppliers and competition between suppliers. As the market expanded, consumers dealt with different suppliers who competed against each other. It resulted in an increase in the choices available to consumers and necessitated regulation by law.⁶⁸ The growth and development of consumer protection have contributed towards the establishment of consumer protection as a recognised legal principle, internationally, on regional levels and also in South Africa.

In the South African context, the aim of the CPA is stated in its preamble.⁶⁹ The CPA recognises the international and regional principles on consumer protection and aims to align itself therewith. In order to interpret the wording of section 14 and determine the impact of section 14 on fixed term lease agreements, these principles must be evaluated. The structure that follows is firstly to give a background on the history of consumer protection and how it has evolved internationally, regionally and in South Africa.

2.2 International consumer protection

2.2.1 History and background

From the outset it must be stated that there are no universal or international legal systems of norms, international consumer law developed by international

⁶⁷ Howells, Ramsay and Wilhelmsson "Consumer Law" 4.

⁶⁸ Howells, Ramsay and Wilhelmsson "Consumer Law" 4-10.

⁶⁹ Preamble of CPA "The people of South Africa recognise that apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality; That it is necessary to develop and employ innovative means to (a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers; (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and (c) to give effect to internationally recognised customer rights... For the reasons set out above, and to give effect to the international law obligations of the Republic, a law is to be enacted in order to promote and protect the economic interests of consumers; improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs; protect consumers from hazards to their well-being and safety; develop effective means of redress for consumers; promote and provide for consumer education, including education concerning the social and economic effects of consumer choices; facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers". (Own emphasis added.)

legislature and enforced by international agencies that are internationally recognised by all countries.⁷⁰ Each country has its own legal system and autonomy within which it functions in terms of consumer rights that are protected and governed.⁷¹ Despite the aforesaid, the international consumer protection movement has been influenced by various instruments. A landmark document in the history of international consumer protection was the Final Report of the Committee on Consumer Protection in the United Kingdom.⁷² It had a significant influence on countries far beyond the borders of England.⁷³

The international consumer movement developed as a result of the question whether society's legal norms, legislation and courts served the interests of consumers commensurately with the interests of the business community, and sufficiently constrained the exploitation of the weaker by the stronger.⁷⁴ Therefore, international legislatures have enacted consumer protection legislation, which globally is the product of the twentieth century.⁷⁵

2.2.2 Consumer rights and responsibilities

In the past, 'consumer protection' was not formulated as such. This led to the prevailing notion to give the concept a concentrated, more meaningful formulation. As a result, the modern consumer movement developed a vision with a set of eight basic consumer rights, later named the Consumer Bill of Rights.⁷⁶

⁷⁰ Howells, Ramsay and Wilhelmsson "Consumer Law" 13.

⁷¹ Eiselen and Naudé "Introduction and Overview" 1; Howells, Ramsay and Wilhelmsson "Consumer Law" 13.

⁷² It was known as the Molony Committee and appeared in 1962. Van Eeden *The Regulation of Trade Practices* 21.

⁷³ It resulted in the enactment of consumer protection legislation and legislation relating to misleading advertisements and unfair or standard terms of contract in France (1978), Australia (1979), Sri Lanka (*Consumer Protection Act 1 of 1979*), Portugal (1981) and in Israel (*Consumer Protection Law 5741 - 1981*), Netherlands (1980), Germany (*The German Standard Contracts Act 1976*) and the United Kingdom (*Unfair Contract Terms Act 1977*).

⁷⁴ Van Eeden *Consumer Protection Law* 1.

⁷⁵ In the second half of the twentieth century, the focus in the world economy shifted from a production-orientated viewpoint to a more consumer-orientated perspective. Eiselen and Naudé "Introduction and Overview" 1.

⁷⁶ The origin of these rights was from a declaration of a former US President, JF Kennedy, in 1962, in terms whereof four basic consumer rights were identified, being "the right to safety, the right to be informed, the right to choose and the right to be heard." Since this pronouncement in 1962, the International Organisation of Consumer Unions has added four

The eight basic consumer rights include: the right to satisfaction of basic needs,⁷⁷ the right to safety,⁷⁸ the right to be informed,⁷⁹ the right to choose,⁸⁰ the right to be heard,⁸¹ the right to redress,⁸² the right to consumer education⁸³ and the right to a healthy environment.⁸⁴ These consumer rights were elevated to a position of international recognition and legitimacy, and acknowledged by developing and developed countries who informally undertook to adhere to basic consumer rights and its standards.⁸⁵ These rights impose compliance and other burdens on suppliers, who must respect and give effect thereto.⁸⁶

When the basic consumer rights were established, eyebrows were raised by the commercial industry regarding the effect that it would have on the economy, because it was believed to be a communist approach.⁸⁷ This led to the National Consumer Forum that established consumer responsibilities during the 1980's and accordingly, a set of consumer responsibilities were introduced.⁸⁸ The reason for the incorporation of consumer responsibilities was the debate on the impact

additional basic consumer rights, which include: "the right to redress; the right to satisfaction of basic needs; the right to consumer education; and the right to a healthy environment".

⁷⁷ "To have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water and sanitation."

⁷⁸ "To be protected against the marketing of goods which are hazardous to health or life."

⁷⁹ "To be protected against fraudulent, deceitful, or grossly misleading information, advertising, labelling, or other practices, and to be given the facts one needs to make an informed choice."

⁸⁰ "To be assured, wherever possible, of access to a variety of products and services at competitive prices; and in those industries in which competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and service at fair prices."

⁸¹ "To be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals."

⁸² "To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services."

⁸³ "To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them."

⁸⁴ "To live and work in an environment that is non-threatening to the well-being of present and future generations."

⁸⁵ These rights were endorsed by the United Nations and the endorsement finally gave the consumer movement international legitimacy. The United Nations through the United Nations Guidelines for Consumer Protection expanded these rights into eight basic rights, and thereafter Consumers International adopted these rights as a charter.

⁸⁶ Woker 2010 *Obiter* 217.

⁸⁷ Investopedia 2015 <http://www.investopedia>.

⁸⁸ The National Consumer Forum is an organisation which raises awareness about consumer rights and issues.

consumer rights would have on the commercial industry. The idea was that Government should avoid a scenario where consumers go beyond the rights afforded and ensure that the rights are exercised responsibly, to avoid misuse on a political level. The set of consumer responsibilities remain crucial principles for many consumer rights organisations. They include critical awareness,⁸⁹ involvement or action,⁹⁰ social responsibility,⁹¹ ecological responsibility⁹² and solidarity.⁹³ Although the set of consumer responsibilities play an integral part in complementing the basic consumer rights, the scope of this study does not necessitate a detailed discussion of all the responsibilities. Relevant for purposes of this study is social responsibility. It provides that consumers must act:

...with concern and sensitivity to the impact of their actions on other citizens, in particular, in relation to disadvantaged groups in the community and in relation to the economic and social realities prevailing.⁹⁴

This entails that consumers have the responsibility to conduct themselves in a manner that understands the effect of their actions on other citizens, particularly on disadvantaged groups with regard to the economic and social realities prevailing in their community. Although the consumer responsibilities were not legally enforceable as it was woven into the notion of consumer protection, it is expected that consumers act responsibly. The gist is that consumers themselves

⁸⁹ "Consumers must be awakened to be more questioning about the provision of the quality of goods and services."

⁹⁰ "Consumers must assert themselves and act to ensure that they get a fair deal."

⁹¹ "Consumers must act with social responsibility, with concern and sensitivity to the impact of their actions on other citizens, in particular, in relation to disadvantaged groups in the community and in relation to the economic and social realities prevailing."

⁹² "There must be a heightened sensitivity to the impact of consumer decisions on the physical environment, which must be developed to a harmonious way, promoting conservation as the most critical factor in improving the real quality of life for the present and the future."

⁹³ "The best and most effective action is through cooperative efforts through the formation of consumer/citizen groups who together can have the strength and influence to ensure that adequate attention is given to the consumer interest."

⁹⁴ The horizontal application of the consumer responsibilities is as a result of the common law, which regulates the commercial relationship between consumers in the commercial market. By enactment of the CPA, the common law is revived, but this does not mean that consumers are afforded more rights than what they would have under the common law. The rights, however, must be exercised in a responsible manner. Van Eeden *Consumer Protection Law* 63 - 67.

also have behavioural responsibilities in the manner in which they exercise their rights, especially with regard to sustainable consumption.⁹⁵

2.2.3 United Nations Guidelines on Consumer Protection

The United Nations Charter established the Economic and Social Council (ECOSOC), which is the central platform of the United Nations coordination and recommendations on economic, social and environmental issues and the implementation of the internationally agreed development goals on sustainable development.⁹⁶ As mentioned in the introduction of the current discussion, a universal instrument that contains explicit rules vis-à-vis international consumer protection, does not exist.⁹⁷ By virtue of such absence, during the late 1970's, the ECOSOC called upon the United Nations Secretary General to continue consultations on consumer protection in an effort to expound a set of general guidelines, taking into account the needs of developing countries in particular.⁹⁸

On 9 April 1985 the United Nations General Assembly unanimously proposed the 1985 United Nations Guidelines on Consumer Protection (hereafter UNGCP).⁹⁹

⁹⁵ The predicament is that when consumers do not exercise their consumer rights responsibly, especially in terms of the manner in which they consume goods, the effect will be that the price of such goods will increase, resulting in an undesired financial implication for other consumers who are already vulnerable and disadvantaged. For consumers who earn a low-income, even a small price increase would impact adversely on their standard of living. This ultimately increases the burden on the State to realise these rights. United Nations Conference on Trade and Development Manual on Consumer Protection 2016 161.

⁹⁶ The United Nations Charter established the Economic and Social Council (ECOSOC) was established in by the United Nations Charter in 1945 and consists of 54 members of the United Nations elected by the General Assembly; United Nations 2016 <http://www.un.org>. South Africa is one of the member of the ECOSOC elected by the General Assembly. In terms of Article 10 and Article 14 of the United Nation Charter, ECOSOC merely formulates policy recommendations and resolutions to member states and are consider to be non-binding and recommendatory in nature. However, some General Assembly decisions which deals with internal, organisational matters of the United Nations are binding on their addressees. Öberg 2005 *EJIL* 883; Therefore, in the context of South Africa, the recommendations have no enforcement mechanisms and are considered in general to have no binding effect under international law, but impose a general duty to co-operate.

⁹⁷ Eiselen and Naudé "Introduction and Overview" 1; Howells, Ramsay and Wilhelmsson "Consumer Law" 13.

⁹⁸ General Assembly resolution 39/248 of 16 April 1985.

⁹⁹ Resolution 39/248 of 16 April 1985. A list of objectives described as "legitimate needs" of consumers was set out in Article 3, which includes: "(a) The protection of consumers from hazards to their health and safety; (b) The promotion and protection of the economic interests of consumers; (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs; (d) Consumer education,

Since the adoption of the 1985 UNGCP and the expansion in 1999,¹⁰⁰ new challenges to consumer protection have been identified, such as in e-commerce and financial services.¹⁰¹ The latest version of the UNGCP of 2015 was adopted by the General Assembly on 22 December 2015.¹⁰² In terms of this resolution, the revised guidelines for consumer protection were adopted and the list of legitimate needs which the guidelines wish to address are:

- (a) Access by consumers to essential goods and services;
- (b) The protection of vulnerable and disadvantaged consumers;
- (c) The protection of consumers from hazards to their health and safety;
- (d) The promotion and protection of the economic interests of consumers;
- (e) Access by consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (f) Consumer education, including education on the environmental, social and economic consequences of consumer choice;
- (g) Availability of effective consumer dispute resolution and redress;
- (h) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
- (i) The promotion of sustainable consumption patterns;
- (j) A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce;

including education on the environmental, social and economic impacts of consumer choice; (e) Availability of effective consumer redress; (f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them (g) The promotion of sustainable consumption patterns".

¹⁰⁰ Resolution E/1999/INF/2 of 26 July 1999. The 1985 United Nations Guidelines on Consumer Protection were later expanded to include a new section on the promotion of sustainable consumption patterns by the ECOSOC in resolution E/1999/INF/2 of 26 July 1999 and governments were required to develop and maintain strict consumer protection policy; Du Preez 2009 *TSAR* 62.

¹⁰¹ UNCTAD - Implementation Report on the UN Guidelines on Consumer Protection 2013 19.

¹⁰² United Nations Guidelines on Consumer Protection of 2015 is contained in United Nation Resolution 70/186 on Consumer protection adopted by the General Assembly on 22 December 2015 (on the report of the Second Committee (A/70/470/Add.1)). Resolution 70/186 reaffirms: "the Guidelines as a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems, and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States". It goes on to recognize that: "consensus exists on the need for common principles that establish the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems".

- (k) The protection of consumer privacy and the global free flow of information.¹⁰³

The 2015 UNGCP constitutes an important reference to consumer protection in the international field.¹⁰⁴ It is not the purpose of this study to provide a comprehensive discussion of all the general principles stated above, but rather to extract the applicable principles of consumer protection for purposes of the research question. The most relevant guidelines, for purposes of this study, are the guidelines on the "protection of vulnerable and disadvantaged consumers", the "availability of effective consumer dispute resolution and redress"¹⁰⁵ and the "promotion of sustainable consumption patterns".¹⁰⁶

The 2015 UNGCP set out a conventional definition of 'consumer' while it recognises the need for flexibility.¹⁰⁷ Whether a juristic person qualifies as a consumer in the international consumer arena, differs in various countries.¹⁰⁸

¹⁰³ A comparison between the 1985 UNGCP and the 2015 UNGCP indicate that the revised guidelines extend their scope to enterprises owned by the state. Four new legitimate needs are introduced into Guideline 5, which are (a) Access by consumers to essential goods and services; (b) The protection of vulnerable and disadvantaged consumers; (j) A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce and (k) The protection of consumer privacy and the global free flow of information; United Nations Conference on Trade and Development Manual on Consumer Protection 2016 13. New sections have been introduced on principles for Good Business Practices (s IV, Guideline 11), National Policies for Consumer Protection (Guideline 14-15), Electronic Commerce (Guideline 63-65), and Financial Services (Guideline 66-68). The previous section on "availability of effective consumer redress" (s E), has been renamed "availability of effective consumer dispute resolution and redress" (now s F).

¹⁰⁴ It is important because no universal or concrete formulation of consumer protection, which is inserted into legislation or international legal instruments exists. Eiselen and Naudé "Introduction and Overview" 1; Howells, Ramsay and Wilhelmsson "Consumer Law" 13.

¹⁰⁵ The guideline on the "availability of effective consumer dispute resolution and redress" will not assist in the interpretation of s 14, but will assist in reaching a solution to the problems created by the application of s 14 to fixed term lease agreements.

¹⁰⁶ The guidelines will be dealt with in the order in which they are reflected in the UNGCP and such order do not necessarily reflect the order of relevance or importance for purposes of this study.

¹⁰⁷ "Consumer generally refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes, while recognizing that Member States may adopt differing definitions to address specific domestic needs."

¹⁰⁸ In EU law, for example, a consumer is a natural person, who is acting outside the scope of an economic activity. A 2(b) of Directive 93/13/EEC must be interpreted as referring solely to natural persons and does not extend to legal persons. In the South African context, some juristic persons do qualify as consumers and accordingly are afforded the protection in terms of the CPA. S 5(2)(b) of the CPA "This Act does not apply to any transaction-in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of

Firstly, Guideline 5(b) states that vulnerable and disadvantaged consumers must be afforded protection. Vulnerable consumers include individuals such as children, the poor and illiterate, and those with particular needs such as persons with disabilities.¹⁰⁹ In the commercial sense, small businesses such as those of sole proprietors, are equally vulnerable in the market place and equally deserving of protection as they may also face challenges that make them vulnerable within a community.

Secondly, sustainable consumption is acknowledged as an aspect of consumer policy.¹¹⁰ The "promotion of sustainable consumption patterns" means that Member States should develop indicators to measure progress towards achieving sustainable consumption. It requires Member States to develop and implement policies to ensure the promotion of sustainable consumption practices within government, by consumers and businesses.¹¹¹ This should be done in partnership with civil society organizations and businesses through a combination of policies that include regulation, economic and social instruments and sectoral policies in areas such as land use, housing and information and education programmes.¹¹² 'Sustainable consumption patterns' stems from the term 'sustainable development', which implies sustainable supply. According to the Brundtland Report,¹¹³ sustainable development is:

...development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

In terms of guideline 5(i), Member States are required to develop and implement sustainable consumption principles to their own operations in order to satisfy the

section 6." The Minister of Trade and Industry has determined the monetary threshold to the size of a juristic person at R2 million in Reg 5(1) in GN 294 in GG 34181 of 1 April 2011.

¹⁰⁹ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 3.

¹¹⁰ Ramsay *Consumer law and policy* 101.

¹¹¹ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 13-14.

¹¹² United Nations Conference on Trade and Development Manual on Consumer Protection 2016 15.

¹¹³ Report of the World Commission on Environment and Development: Our Common Future, Brundtland Report, 1987.

basic needs of consumers and to improve quality of life.¹¹⁴ This is regarded as a long term goal to protect consumers in future.¹¹⁵ The relationship between production and consumption is vital to any strong economy.¹¹⁶ Therefore, no economy is sustainable if everyone, including small and medium enterprises, do not have access to basic rights.

The United Nations Sustainable Development Goals provide a framework for the 2015 UNGCP to be effectively implemented, especially with regard to the right to access to adequate housing.¹¹⁷ The significance of this guideline is the requirement by Member States to develop and implement policies to ensure the promotion of sustainable 'housing'. International human rights law recognises the right of every person to an adequate standard of living, including access to adequate housing.¹¹⁸ The Universal Declaration of Human Rights of 1948 (UDHR)¹¹⁹ and the two comprehensive international covenants¹²⁰ in which its

¹¹⁴ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 159.

¹¹⁵ In 1996 the Hungarian Office of the Hungarian Ombudsman for Future Generations institution was established, as a body to investigate issues that may impact on the long-term sustainability in the broadest sense. A bill was adopted in 2007 that established the Parliamentary Commissioner for Future Generations, which has an independent status.

¹¹⁶ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 165.

¹¹⁷ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 168; In addition, the United Nations Sustainable Development Goals, goal 11 (to make cities inclusive, safe, resilient and sustainable) in particular, include adequate safe and affordable housing and slum upgrades.

¹¹⁸ Even though the right to housing is firmly protected internationally, there is a disagreement currently on the exact content of this right. This is attributed to various factors in different countries, but essentially being the scale of the problems experienced by a specific country, the availability of resources and the different approaches of countries. However, despite the disagreement on the precise content of the rights pertaining to housing there is an increasing consensus on the minimum basic obligations for states to ensure the implementation of the most essential elements of this right, which core elements must be fulfilled; Kucs, Sedlova and Pierhurovica *The Right to Housing* 101; Office of the United Nations High Commissioner for Human Rights Fact Sheet No 21 - The Right to Adequate Housing 1.

¹¹⁹ Universal Declaration of Human Rights 1948 UN General Assembly Resolution 217 A (III) (adopted 10 December 1948). Article 25. The Universal Declaration of Human Rights of 1948 can be accessed at <http://watchlist.org/wordpress/wp-content/uploads/Universal-declaration-of-human-rights.pdf>

¹²⁰ International Covenant on Economic, Social and Cultural Rights UN General Assembly Resolution 2200 A (XXI) (adopted 16 December 1966). Available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed on 12 August 2016) and The International Covenant on Civil and Political Rights

principles were translated into law, are the inevitable starting point when one has to consider international human rights.¹²¹ Article 25(1) of the UDHR reads:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The United Nations International Covenant on Economic, Social and Cultural Rights of 1966 (hereafter ICESCR)¹²² recognises the right to adequate housing as part of the right to an adequate standard of living.¹²³ Article 11(1) of the ICESCR reads:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Though using slightly different terminology, housing rights are found in a number of other international instruments.¹²⁴ The central objective in these instruments is

¹²¹ Hohmann *The Right to Housing* 1.

¹²² International Covenant on Economic, Social and Cultural Rights UN General Assembly Resolution 2200 A (XXI) (adopted 16 December 1966). Available at <http://www2.ohchr.org/english/law/cescr.htm>; 993 UNTS 3. See Craven MCR *The International Covenant on Economic, Social and Cultural Rights -A Perspective on its Development* (1995) 16-22 for the drafting history of the ICESCR ('Craven The ICESCR'). United Nations. Article 11(1). International Covenant on Economic, Social and Cultural Rights, 16.12.1966. Available at <http://www2.ohchr.org/english/law/cescr.htm>.

¹²³ Benghoune *The legal protection* 21; Kingisepp 2012 *Juridica International* 50; Craven *The ICESCR* 24. The rights included in the ICESCR are the right to work (a 6); the right to fair conditions of employment (a 7); the right to join and form trade unions (a 8); the right to social security (a 9); the right to protection of the family (a 10); the right to an adequate standard of living (a 11); the right to health (a 12); the right to education (a 13) and the right to culture (a 15). The ICESCR is important because it is one of the earliest and foremost international law treaties which deals specifically with economic, social and cultural rights. The right to housing as one element in a more holistic right to an adequate standard of living, is explicitly included in Article 25 of the UDHR as an aspect of the right to an adequate standard of living. Hohmann *The Right to Housing* 1.

¹²⁴ Article 17 of the ICCPR, which protects persons from arbitrary or unlawful interference with their home. A 27(3) of the Convention on the Rights of the Child provides that "States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Article 14(2)(h) of the Convention on

the protection of the right of access to adequate housing and the obligation of the state to ensure that the right is protected. It is therefore required that State Parties take instantaneous measures aimed at extending legal security of tenure to those persons currently requiring such protection.

Thirdly, the "availability of effective consumer dispute resolution and redress" is a further guideline on consumer protection and it entails that effective consumer dispute resolution and redress must be available to consumers.¹²⁵ Consumers are reticent to pursue claims against suppliers due to the high costs involved in litigation, the prolonged time periods in bringing a matter to court and their ignorance of the law and legal procedures.¹²⁶ The necessity for dispute resolution and redress arises as a consequence of the need for appropriate, cost effective and efficient methods of resolving consumer disputes.¹²⁷ The 2015 UNGCP¹²⁸ does not specifically refer to the organization of consumer protection forums or agencies,¹²⁹ however, guideline 4 states that Member States should "provide or maintain adequate infrastructure to develop, implement and monitor consumer

the Elimination of All Forms of Discrimination Against Women. Article 8 of The European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221. Article 31 of the Revised European Social Charter is relevant to the context of housing. The nature of the right to adequate housing is clarified mainly in the general comments of the Committee on Economic, Social and Cultural Rights, general comments No 4 (1991) on the right to adequate housing and general No 7 (1997) on forced evictions (General comments are adopted by the treaty bodies based on their monitoring experience. General comments offer expert guidance to States on their responsibilities arising under a specific treaty). These general comments have been exceedingly influential in creating consensus, internationally, on the content of the right to housing. Nations Special Rapporteurs, Raquel Rolnik, issued a Report on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (UN General Assembly Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik 30 December 2013 A/HRC/25/54). In this report, Rolnik, recommends a set of guiding principles to provide assistance to States and other relevant actors to address "the current tenure insecurity crisis faced by the urban poor in an increasingly urbanized world".

¹²⁵ The previous section on "availability of effective consumer redress" (section E on measures enabling consumers to obtain redress), has been renamed "availability of effective consumer dispute resolution and redress" (now s F). This guideline involves measures enabling consumers to obtain redress. A notable shift in the domain of dispute resolution and redress is notable in the 2015 UNGCP. The extension of this guideline suggests an intention to place more emphasis on the development of alternative dispute resolution methods.

¹²⁶ Mokorosi *The Role of Alternative Dispute Resolution* 4.

¹²⁷ Mokorosi *The Role of Alternative Dispute Resolution* 4.

¹²⁸ The previous section on "availability of effective consumer redress" (s E), has been renamed "availability of effective consumer dispute resolution and redress" (now s F).

¹²⁹ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 26.

protection policies". In addition, guideline 41 refers to the role of consumer associations in dispute resolution and redress mechanisms. It can be deduced that the interests of consumers are protected by involvement of forums such as consumer courts, consumer commissions, industry mediation bodies and alternative dispute resolution mechanisms, in the resolution of consumer disputes.

The 2015 UNGCP embraces an approach that encourages countries to design their own legislation and policies regarding consumer protection in accordance with the needs of their own, unique, economic, social and environmental circumstances, as opposed to a universal approach based on harmonisation of laws and policies across all countries.¹³⁰ The overriding idea is that the 2015 UNGCP is considered a valuable set of principles which sets out the main characteristics of effective consumer protection legislation. These international guidelines are accepted worldwide.¹³¹

2.2.4 Conclusion

The 2015 UNGCP merely contains a set of recommendations to Member States. It must be borne in mind that although the UNGCP is given the legal status of 'soft law', the moral force of an undertaking made in the United Nations General Assembly by all Member States, which has taken place three times in 1985, 1999 and 2015, should not be underestimated.¹³² Informal evidence of the force of the obligations encompassed by the UNGCP is found in the method in which they are negotiated with the same seriousness of purpose as if they were binding obligations.¹³³ Irrespective of the non-binding nature of the UNGCP, the general consensus from various sources suggests it has made a substantial contribution to

¹³⁰ Although the guidelines are not mandatory, they do provide a set of basic consumer protection goals upon which governments have consented, thereby providing a policy framework for implementation at national level; Kingisepp 2012 *Juridica International* 51. A/RES/70/186 Preamble.

¹³¹ United Nation Resolution 70/186 on Consumer protection adopted by the General Assembly on 22 December 2015 (on the report of the Second Committee (A/70/470/Add.1)); Kingisepp 2012 *Juridica International* 51.

¹³² United Nations Conference on Trade and Development Manual on Consumer Protection 2016 11.

¹³³ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 11.

consumer protection across the world as it provides a direction of what is accepted on an international level.¹³⁴

Important guidelines, relevant to this study, extracted are the "protection of vulnerable and disadvantaged consumers", the "promotion of sustainable consumption patterns" and the "availability of effective consumer dispute resolution and redress".

2.3 Regional level consumer protection and consumer protection

2.3.1 Introduction and background

Consumer protection policy often includes a regional integration process.¹³⁵ There are different regional federations and bodies that have developed agreements, resolutions and directives that affect consumer protection and which set up different priorities in the field of consumer protection.¹³⁶

¹³⁴ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 17.

¹³⁵ Ramsay *Consumer law and policy* 39.

¹³⁶ These include the European Union, where the European Consumer Agenda was adopted by the European Commission which aims to maximize consumer participation and trust in the single market by virtue of the Charter of Fundamental Rights of the European Union, 2010/C 83/02. The EU directives are applicable to Member States. The Americas and OEA: International Consumer Protection from a regional perspective. The Southern Common Market (Mercosur) sets an aim of harmonizing basic concepts (such as provider and consumer) regarding consumer protection adopted by members. The North American Free Trade Agreement gives each member state the freedom to impose restrictions due to public policy purposes, as there is no common consumer policy nor primary objective to harmonize consumer protection laws. The Association of Southeast Asian aims to achieve a common consumer protection framework, a higher level of consumer empowerment, a higher consumer confidence and cross-border commercial transactions. The Asia-Pacific Economic Cooperation develop and implement consumer protection and only operates in non-binding commitments and consensus among its member states. The Trans-Pacific Strategic Economic Partnership Agreement. United Nations Conference on Trade and Development Manual on Consumer Protection 2016 11. However, South Africa is not a member of these regional bodies or federations and it is therefore not relevant to South Africa.

2.3.2 Consumer protection

At the regional level, there are many initiatives which promote cooperation between member states in the area of consumer protection.¹³⁷ The initiatives to which South Africa is a member will be discussed.

2.3.2.1 African Union

The African Commission was established by conventions to regulate the functioning of the African Union (hereafter AU).¹³⁸ The AU recognises the UDHE on regional level. South Africa became a member of the AU on 6 June 1994. The AU adopted Agenda 2063, which is a strategic framework for the socio-economic transformation of the continent over the next 50 year period.¹³⁹ It builds on, and seeks to increase the implementation of past and existing continental initiatives for growth and sustainable development. The first aspiration of Agenda 2063 is a "prosperous Africa based on inclusive growth and sustainable development". The second aspiration is an "Africa of good governance, democracy, respect for human rights, justice and the rule of law", which includes a culture of democratic values, gender equality and respect for human rights. The third aspiration is focused on "the potential of African people, especially its women and youth, and caring for children" which means that no child, woman or man will be left behind or excluded, on the basis of gender, political affiliation, religion, ethnic affiliation, locality, age or other factors.

¹³⁷ Examples of the initiatives which promote cooperation between member states include The Organization of American States with its Inter-American Rapid Alert System, the Committee on Consumer Protection of the Association of Southeast Asian Nations, the Central American Council on Consumer Protection, the Union of South American Nations, the Southern African Customs Union and the Southern African Development Community; the European Union Council on Consumer Protection Cooperation and European Commission initiatives. United Nations Conference on Trade and Development Manual on Consumer Protection 2016 60.

¹³⁸ On May 25 1963, 32 independent African states that agreed to establish the Organization of African Unity, where after a further 21 members joined gradually, reaching a total of 53 by the time of the AU's creation in 2002. South Sudan became the 54th member on 9 July 2011.

¹³⁹ Agenda 2063 was adopted in 2015. United Nations 2015 <http://www.un.org>.

2.3.2.2 Southern African Development Community

The Southern African Development Community (SADC) was established in 1992 after which the Member States signed the Declaration and Treaty establishing SADC.¹⁴⁰ The SADC is a regional organisation and development community striving towards regional integration and the establishment of a free trade area and consists of 15 Member Countries, which includes South Africa.¹⁴¹ The purpose of SADC is to:

...promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy.¹⁴²

It encourages self-sustaining development in Southern Africa, which is based on shared self-reliance and inter-dependence of Member States. The SADC is built on the principle of achieving sustainable consumption of natural resources and effective protection of the environment. Each Member State is allocated a sector to coordinate and the sector allocated to South Africa is finance, investment and health. The African agenda of South Africa is more embodied in the initiative and the New Partnership for Africa's Development in the African Union.¹⁴³

2.3.3 Conclusion

The legitimate needs set out by the 2015 UNGCP stem from the empirical observation that there is an unbalanced relationship between the consumer and the supplier, which is evident from their respective bargaining powers and their uneven knowledge base. On regional level, the unmitigated free markets and

¹⁴⁰ In Africa, the Southern African Development Community (SADC) accepted a draft declaration on regional cooperation in consumer policies. Southern African Development Community 2012 <http://www.sadc.int>.

¹⁴¹ The Member Countries of SADC includes South Africa, Namibia, Angola, Democratic Republic of Congo, Botswana, Swaziland, Malawi, Lesotho, Mauritius, Mozambique, Seychelles (still in the process of ratifying the SADC Treaty), Tanzania, Zambia and Zimbabwe and Madagascar. South Africa is the most developed and advanced economy in SADC and acceded to the Treaty on 29 August 1994. Amos 2010 *Journal of International Commercial Law and Technology* 124.

¹⁴² Southern African Development Community 2012 <http://www.sadc.int>.

¹⁴³ Amos 2010 *Journal of International Commercial Law and Technology* 128.

contractual freedom between the parties are insufficient to guarantee the protection of the consumer. This legitimised the need for regulation of consumer protection on regional level, where consumers are particularly vulnerable due to their illiteracy. Consumer protection on regional level echoes the protection given on international level to some extent, especially with regard to the guidelines extracted in the 2015 UNGCP in the discussion on international consumer protection. It also extends protection to vulnerable and disadvantaged consumers and the promotion of sustainable and equitable economic growth and development.¹⁴⁴

2.4 Consumer protection in South African

2.4.1 History and background

Consumer legislation in South Africa is influenced by historical, economic, social and political considerations.¹⁴⁵ Briefly, Colonialism began in South Africa in 1652 where after two 'Boere Republieke' was established and in the year 1910, the Union of South Africa was created.¹⁴⁶ The 1930s and 1940s saw the rapid industrialisation of South Africa and in 1948, a government was elected that introduced the policy of apartheid, aimed to allow different racial groups to develop in their own separate areas.¹⁴⁷ As a result of apartheid, international sanctions were imposed. The imposition of international sanctions on South Africa began economic pressure that saw the unravelling of apartheid.¹⁴⁸

In 1990 the president Frederik Willem de Klerk recognised the economic unsustainability of the apartheid system and released Nelson Mandela and unbanned the African National Congress that Nelson Mandela led. De Klerk and

¹⁴⁴ In respect of the guideline on "availability of effective consumer dispute resolution and redress", it remains one of the biggest challenges of the SADEC, due to the limited access to justice. It makes consumer redress costly, long, difficult and sometimes almost impossible for consumers to exercise their rights in case of abuse.

¹⁴⁵ Otto 2010 *Fundamina* 259.

¹⁴⁶ Four areas were unified by joining the two former independent Boer Republics of the South African Republic (Zuid-Afrikaansche Republiek) and the Orange Free State (Oranje Vrystaat) with the British dominated Cape Province and Natal.

¹⁴⁷ Faulkner and Loewald 2008 *National Treasury of the Republic of South Africa* 4-9.

¹⁴⁸ During the period 1970 to 1980. Faulkner and Loewald 2008 *National Treasury of the Republic of South Africa* 4-9.

Mandela guided the country to democratic elections in 1994 with Mandela as president of South Africa. The African National Congress maintained the mixed economy and encouraged the market economy, including relaxing foreign exchange controls. These historical occurrences are important historical factors which attributed and led to the present consumer legislative framework, especially with regard to the racial discrimination evident during these periods.

The Constitutional Court approved the Constitution on 4 December 1996, marking its approval as the supreme law of South Africa. The pre-amble of the Constitution confirms the recognition of the injustices of the past and in an effort to address the social and economic inequalities brought about by apartheid and the discriminatory laws, it aims to rectify same by establishing the rights contained in Chapter 2, the Bill of Rights.¹⁴⁹

2.4.2 Constitution

The Constitution is based on the values of human dignity, equality and freedom.¹⁵⁰ These values have a direct influence on contract law and therefore has a direct influence on a contract of lease.¹⁵¹ To ultimately achieve these constitutional values, the CPA may assist, as there is a nexus between these constitutional values and consumer protection. The constitutional values which are relevant and which will be discussed include equality, human dignity and freedom and are utilised as methods to import fairness into contractual relations.¹⁵²

The first constitutional value is equality, which is dealt with in section 9 of the Constitution.¹⁵³ From the consumer law perspective, the protection against

¹⁴⁹ Mupangavanhu 2015 *De Jure* 129.

¹⁵⁰ Chapter 1 of the Constitution. The Constitution is the supreme law of the Republic of South Africa and therefore it is important to establish at the outset whether the Constitution contains any provisions relating to consumer protection, because all other law and actions in South Africa are subject to thereto. The aspect of substantive equality affects consumer protection. Although the constitutional values does not have a direct impact on consumer protection, it conforms to the international principles of consumer protection.

¹⁵¹ Bauling and Nagtegaal 2015 *De Jure* 150; Barnard *A critical legal argument* 229.

¹⁵² Mupangavanhu 2015 *De Jure* 117.

¹⁵³ Section 9 of the Constitution states that "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal

discriminatory marketing is a consumer right provided for under the right of equality in the consumer market, which is contained in section 8 of the CPA.¹⁵⁴ This section is important in the constitutional dispensation of South Africa, in which the state is committed to achieving the objective of equality.¹⁵⁵ Consumer protection is particularly important if there are inequalities in bargaining power between the supplier and the consumer.¹⁵⁶ Generally, the overreaching idea of equality is that consumers who are equally situated should receive equal treatment. The right to equality prohibits the supplier of goods and services to discriminate unfairly against a consumer.¹⁵⁷ The application of the value of equality is extended to the commercial market, as the provisions of section 8 of the CPA apply in respect of a consumer that is an association or juristic person.¹⁵⁸ This means that tenants under both residential and commercial leases may not be

enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

¹⁵⁴ Protection against discriminatory marketing "(1) Subject to section 9, a supplier of goods or services must not unfairly (a) exclude any person or category of persons from accessing any goods or services offered by the supplier; (b) grant any person or category of persons exclusive access to any goods or services offered by the supplier; (c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons; (d) supply a different quality of goods or services to any person or category of persons; (e) charge different prices for any goods or services to any persons or category of persons; (f) target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or (g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier, on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act."

¹⁵⁵ Chirwa *Compliance with the Consumer Protection Act* 20.

¹⁵⁶ Mupangavanhu 2015 *De Jure* 129.

¹⁵⁷ Jacobs, Stoop and Van Niekerk 2010 *PER* 21.

¹⁵⁸ Section 8(3) of the CPA provides that "Subsections (1) and (2) also apply in respect of a consumer that is an association or juristic person, to prohibit unfair discrimination against that association or juristic person based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person. (4) Nothing in this section is intended to limit the authority of a court to (a) consider any conduct between a supplier and a consumer that is not contemplated in this section; or (b) find that any such conduct constitutes unfair discrimination within the meaning of the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act".

discriminated against and must, from a consumer protection perspective, be treated equally.

The second value is human dignity, reflected in section 10 of the Constitution, which provides that "everyone has inherent dignity and the right to have their dignity respected and protected." According to Barnard,¹⁵⁹ in order to respect the right to human dignity when contracting, the common law right to freedom of contract must be exercised in good faith.¹⁶⁰ In endeavouring the realisation of the right to dignity of the consumer, the ethical contract concluded in good faith becomes a vital tool.¹⁶¹

The third constitutional value is freedom, which is dealt with in section 22 of the Constitution.¹⁶² It includes the freedom to partake in the economic market and is extended to small and medium enterprises. With regard to the 2015 UNGCP, Davis¹⁶³ equates poverty to inequality and lack of power. He links it directly to an infringement of the constitutional rights to dignity and freedom.¹⁶⁴ The CPA can assist in attaining substantive equality, particularly in respect of vulnerable societies who are particularly important in the context of South Africa.

The Constitution also provides other rights which are relevant for purposes of consumer protection, such as 'privacy',¹⁶⁵ 'access to information',¹⁶⁶ and 'enforcement of rights'.¹⁶⁷

Reference to 'consumer protection' is made in Schedule 4¹⁶⁸ of the Constitution.¹⁶⁹ It prescribes that the area of consumer protection is "a functional area of

¹⁵⁹ Barnard *A critical legal argument* 237.

¹⁶⁰ Bauling and Nagtegaal 2015 *De Jure* 160.

¹⁶¹ Bauling and Nagtegaal 2015 *De Jure* 160.

¹⁶² Section 22 of the Constitution: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

¹⁶³ Davis 2011 *Stell LR* 845, 857.

¹⁶⁴ Bauling and Nagtegaal 2015 *De Jure* 165.

¹⁶⁵ The right to privacy is dealt with in s 14 of the Constitution and s 11 of the CPA.

¹⁶⁶ The right of access to information is dealt with in s 32 of the Constitution and s 22 of the CPA.

¹⁶⁷ The right to enforcement is dealt with in s 38 of the Constitution and Chapter 3 of the CPA.

¹⁶⁸ Part A.

concurrent national and provincial legislative competence".¹⁷⁰ This entails that national and provincial governments have the authority to legislate on the area of consumer protection and also to provide associated services within its jurisdiction. The wording of this particular competence is supplementary in nature, but does not detract from the competence of national government to legislate on national level. This merely means that both spheres of government may pass legislation on consumer protection.¹⁷¹ The inclusion of the area of consumer protection in the Constitution and the mandate to perform consumer protection functions accentuate that the municipal governments must strive to achieve the constitutional objects within its capacity, to ensure sufficient consumer protection.

In terms of section 25(6) of the Constitution:

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

With regard to the history of South Africa,¹⁷² it cannot be ignored that the above provision may be applicable to holders of short-term residential tenancies, which would result in tenants whose current position is particularly vulnerable due to

¹⁶⁹ In addition, various Constitutions has entrenched consumer protection provisions. For example Article 38 of the Charter of Fundamental Rights of the European Union. Further examples include The *Constitution of the Portuguese Republic Seventh Revision 2005*, in Article 60(1) "Consumers have the right to the good quality of the goods and services consumed, to training and information, to the protection of health, safety and their economic interests, and to reparation for damages."; Article 51 of The *Spanish Constitution* of 1978 reads: "(1)The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate financial interests. (2) The public authorities shall make means available to inform and educate consumers and users, shall foster their organisations, and shall provide hearings for such organisations on all matters affecting their members, under the terms to be established by law."; Article 76 of the *Constitution of the Republic of Poland* of 2nd April, 1997 states as follows: "Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute." and Article 46(5) of *Constitution of the Republic of Lithuania* provides: "The State shall defend the interests of the consumers." United Nations Conference on Trade and Development Manual on Consumer Protection 2016 19; Benöhr and Micklitz "Consumer Protection and Human Rights" 26; Eiselen and Naudé "Introduction and Overview" 17.

¹⁷⁰ Van Eeden *Consumer Protection* 444.

¹⁷¹ Craythorne *Municipal Administration* 154.

¹⁷² The apartheid land laws resulted therein that the majority of the urban black population were reduced to the status of tenants occupying state housing with insecure permits.

past racial discrimination. If it cannot be shown that the development of the newly promulgated landlord-tenant legislation improved the tenure security of these groups and individuals still affected by the socio-economic legacy of apartheid housing laws, it could be contended that the state has not fulfilled its obligations in terms of section 25(6) of the Constitution.¹⁷³ In the same way, tenants whose tenure is legally insecure because of their general socio-economic status, may argue that the State has an obligation to provide access to housing in terms of section 26(2) of the Constitution.¹⁷⁴ Section 26(2) includes a landlord-tenant system that ensures secure tenure for socio-economically weak tenants, to accomplish the realisation of this right within its available resources.¹⁷⁵ Therefore, when the rights in section 25 and 26 of the Constitution are taken into account, it is clear that a balance should be struck to ensure the right to property and that the State realises both these rights.

2.4.3 Common law

In general, consumer protection is not discussed as common law legal principles. However, it does affect aspects of the common law relating to various disciplines of law, such as law of property, law of persons and law of contract and in particular, law of lease.

The law of lease regulates a contract of lease between a landlord and tenant. From a common law perspective it relates to reasonableness and fairness in contracts and the *boni mores*.¹⁷⁶ Because the *boni mores* are still part of the common law, it also forms part of consumer protection, which involves a balance in the relationship between the parties. Such balance is required owing to the fact

¹⁷³ Maass and Van der Walt 2012 *TSAR* 35.

¹⁷⁴ "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

¹⁷⁵ Van der Walt and Maass 2012 *TSAR* 35.

¹⁷⁶ In the case of *Ismail v Ismail* 1983 1 SA 1006 (A) the court stated that the *boni mores* can be defined as "the accepted customs and usages of a particular social group that are usually morally binding upon all members of the group and are regarded as essential to its welfare and preservation" at para 1025G-H; According to Sharp, *boni mores* can be described as "the legal, economic, ethical, moral, and social values of society, which takes the society's ideas of justice, equity and reasonableness into consideration, which requires a minimum standard of conduct in line with such standards and which the people of that society consider to be binding". Sharp *A critical analysis of the role of the boni mores* 10.

that the unmitigated free markets and contractual freedom are insufficient to guarantee the protection of the consumer.

In order to determine whether the above provision may be applicable to holders of short-term residential tenancies, it is essential to first determine the nature of tenants' rights in terms of the common law, in other words, how secure tenants' rights are under the common law.¹⁷⁷ In the case of short-term leases the intention of the parties is usually to award the tenant an ordinary personal right to occupy the leased premises for a limited period, not to establish real rights. In respect of the enforcement of the rights of tenants against third parties, it is necessary to consider the effect of the *huur gaat voor koop* rule, which in principle is also aimed at the protection of the tenancy rights of tenants.¹⁷⁸ The conclusion is that in terms of the common law, the rights of tenants are personal in nature and their rights cannot be enforced against third parties, despite the limited protection of the *huur gaat voor koop* rule.

¹⁷⁷ For this purpose an important question that must be answered, is whether the rights of tenants are real rights or personal rights? A fundamental distinction should be drawn between real rights and personal rights, because in private law the two categories are exercised, protected and acquired in a different manner. Personal rights can only be enforced against a specific person or persons who are bound by an obligation, while real rights can be enforced against all third parties. Another difference is that proprietary remedies protect real rights, while contractual remedies protect personal rights. Delictual remedies also protect personal rights. Lastly, personal rights are transferred by cession, while real rights are transferred either through delivery (in the case of movable property) or registration (in the case of immovable property). In constitutional property law both personal rights and real rights could enjoy more or less the same constitutional protection, once they qualify as constitutional property. Van der Walt and Maass 2012 *TSAR* 37-39; It is trite law that a real right or limited real right is a right in an object, while a personal right is a right against a person, although a personal right can indirectly also pertain to an object. Ownership is the only real right with regard to a person's own property (*ius in re propria*), while a right in an object which belongs to another person is known as a limited real right (*ius in re aliena*). Both personal rights and real rights are property rights for purposes of constitutional property law, even in instances where they do not qualify as real rights in terms of private-law doctrine. Van der Walt and Pienaar *Introduction to the Law of Property* 23.

¹⁷⁸ This rule developed in Roman law and Roman-Dutch law and its purpose and effect was to allow the lease to continue for the initially agreed period in the case where the personal right of the lessee was opposed by a stronger third party (the new owner) right. It is crucial to understand that the mere fact that the tenant under a short-term lease can enforce the lease agreement against some third parties (the new owners) as a result of the operation of *huur gaat voor koop* does not alter the nature of the tenant's personal right and transforms it to real rights. One can therefore conclude that short-term tenants who occupy the leased premises acquire only personal rights which can be enforced against some third parties for the initially agreed period of the lease if *huur gaat voor koop* applies. Van der Walt and Maass 2012 *TSAR* 241.

2.4.4 Statutory law on consumer protection

Consumer protection legislation is not novel in South African law in the sense that there were and still are many measures relating to consumer protection in legislation.¹⁷⁹ The growth and development of consumer protection have contributed towards the establishment of consumer protection as a recognised legal principle, also in South Africa.¹⁸⁰

On 24 April 2009 the CPA was assented to by the President of South Africa, on 29 April 2009 it was promulgated,¹⁸¹ and on 1 April 2011 it came into effect.¹⁸² When the CPA came into effect, it brought about significant changes to the commercial field and effectively introduced some important changes to consumer law. The prominence of the CPA lies in the protection afforded to the consumer by aiming to:

...promote a fair, accessible and sustainable marketplace for consumer products and services and, for that purpose, to establish national norms and standards relating to consumer protection.¹⁸³

The guideline on the protection of vulnerable and disadvantaged consumers is of particular importance in the South African context, because of the history in our country.¹⁸⁴ The CPA highlights the position of the vulnerable consumers in consumer agreements, as well as how this vulnerability is directly related to the

¹⁷⁹ The previous legislation which related to consumer protection included the *Merchandise Marks Act* 17 of 1941 (ss 2 – 13 and 16 – 17. Ss 14 and 15 remains enforce.), the *Business Names Act* 27 of 1960, the *Sale and Service Matters Act* (previously known as the *Price Control Act*) 25 of 1964, *Trade Practices Act* 76 of 1976 and the *Consumer Affairs (Unfair Business Practices Act)* 71 of 1988. The previous consumer protection measures provided in the aforementioned acts were outdated and fragmented, which necessitated the consumer protection framework of South Africa to be reviewed to ensure that the reality of consumers in South Africa is recognised. Jacobs, Stoop and Van Niekerk 2010 *PELJ* 303.

¹⁸⁰ The legislative prescripts relating to consumer protection include the Constitution, national legislation and provincial legislation. Van Eeden *Consumer Protection Law* 3; The realisation and enforcement of consumer rights in ss 4 and 69; Van Heerden "Consumer Protection Act" 3.

¹⁸¹ Government Notice R526 in Government Gazette 32186 of 29 April 2009.

¹⁸² Tennant *The National Credit Act and Consumer Protection Act* 145.

¹⁸³ Preamble of the CPA.

¹⁸⁴ The vulnerability of consumers is considered a reason for consumer protection. Mokorosi *The Role of Alternative Dispute Resolution* 4.

socio-economic position these vulnerable person hold in the community.¹⁸⁵ The reality is that many consumers experience high levels of poverty, experience social and economic inequality, live in remote or low-density population areas, are minors or seniors,¹⁸⁶ and have limited ability to read, low literacy skills or language barriers.¹⁸⁷ Therefore, the CPA refers to the need to:

...fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers.

The CPA is the most recent legislation that pertinently deals with the protection of consumers as it addresses disparities found in the relationship between the consumer and supplier. It includes bargaining power, knowledge, resources and aims to protect the consumer against unfair business practices that were previously unregulated.¹⁸⁸ The CPA can be regarded as a culmination of numerous decades of debate and legal development that resulted in a single piece of legislation. It comprises the major body of consumer protection, substituting previous legislation.¹⁸⁹ The CPA codified the common law relating to consumer rights and also altered the common law in certain aspects. This codification resulted in South Africa not only following in the footsteps of many first-world countries, but is also aligning itself with the 2015 UNGCP and international consumer rights.¹⁹⁰

¹⁸⁵ Bauling and Nagtegaal 2015 *De Jure* 151 states that "In line with its purpose, the CPA implicitly addresses the notion of the poor as vulnerable, and the protection it aims to provide the vulnerable pin an attempt to address poverty, is of importance and should be evaluated and approached from within the constitutional framework. In order to achieve its transformative goal the Act provides additional objectives: creating and supporting a fair, accessible, efficient and sustainable consumer market; promoting fair business practices; and shielding consumers from suppliers' unfair trade practices and conduct."

¹⁸⁶ The elderly is recognised as a vulnerable group in South Africa, whose consumer rights to equality and the right to fair and honest dealing where goods and services are supplied to them by suppliers must be protected through appropriate consumer policy that is provided in terms of the CPA. Barnard 2015 *International Journal of Consumer Studies* 227.

¹⁸⁷ Preamble of the CPA; Du Preez 2009 *TSAR* 63.

¹⁸⁸ It primarily protects consumers by codifying consumer rights whilst establishing duties and obligations of suppliers towards consumers.

¹⁸⁹ Van Eeden Consumer Protection Law 23, 24; Fritz *The Effect of the Consumer Protection Act* 27.

¹⁹⁰ The enactment of the CPA is a clear indication that the legislature recognised the international trends in the consumer protection arena, and has endeavoured to bring South African law in line with international consumer law and practice; Van Eeden *Consumer*

The South African National Consumer Commission (the NCC), the National Consumer Forum and the DTI refer to the eight basic consumer rights¹⁹¹ in South Africa, which are:

...the right to equality, the right to privacy, the right to choose, the right to disclosure of information, the right to fair and responsible marketing, the right to fair and honest dealing, the right to fair, just and reasonable terms and conditions, the right to safe and good quality goods and the right to satisfaction of basic needs.

One of the eight basic consumer rights is the right of a consumer to basic goods and services, which includes adequate food, clothing, shelter, health care, education and sanitation. Relevant for purposes of this study is the inclusion of the consumer's right to shelter and the right to basic goods and services. It is not the aim of this dissertation to provide an elaborate discussion on the consumer's right to shelter. However it is necessary to consider this right as a basic consumer right in light of the right of access to adequate housing, which is also provided for in the Constitution.

The CPA further requires provinces to play an integral part in the enforcement of the CPA and strong emphasis is placed on cooperative governance between the different provinces and the National Consumer Commission. The government has set up Provincial Consumer Affairs Offices in all nine provinces to provide consumers with protection, information and advice and to investigate consumer complaints. Further, it empowers the office to provide such services, which are

Protection Law 5; Meumann White Attorneys 2010 <http://www.meumannwhite.co.za/news-details/25>.

¹⁹¹ The National Consumer Commission <http://www.thencc.gov.za>; When one considers the fundamental consumer rights contained in Chapter 2 of the CPA, (the fundamental consumer rights include the right to equal access to the consumer market (ss 8–10, Part A) the right to confidentiality and privacy (ss 11–12, Part B), the consumer's right to choose (ss 13–21, Part C), the consumer's right to disclosure and information (ss 22–28, Part D), the right to fair and responsible marketing and promotion (ss 29–39, Part E), right to honest dealings and fair agreements (ss 40–47, Part F), right to fair, just and reasonable terms and conditions (ss 48–52, Part G), right to fair value, good quality and safety (ss 53–61, Part H) and the supplier's obligation to account to consumers (ss 62–67, Part I).) the impression is given that the legislator responded to the supremacy of the Constitution and the rights entrenched in the Bill of Rights. The reason for this inclination is because the majority of the fundamental consumer rights contained in Chapter 2 of the CPA give effect to aspects of certain fundamental rights enshrined in the Bill of Rights, such as the right to equality, the right to choose, the right to privacy and the right to information.

necessary for the effective implementation of consumer protection. Therefore, each province has provincial legislation relating to consumer protection within that province.¹⁹² These provinces include Western Cape,¹⁹³ Eastern Cape,¹⁹⁴ Free State,¹⁹⁵ Gauteng,¹⁹⁶ Mpumalanga,¹⁹⁷ Northern Cape,¹⁹⁸ Northern Provinces¹⁹⁹ and North West.²⁰⁰

The international consumer protection guidelines identified in the study above, include the "availability of effective consumer dispute resolution and redress".²⁰¹ As stated previously, in terms of the 2015 UNGCP, "effective consumer dispute resolution and redress" must be available to consumers in order to ensure that their disputes are resolved effectively. In line with this principle, South Africa has developed agencies who are tasked with performing many of the functions associated with consumer protection. The CPA seeks to ensure that consumers have access to effective and economical redress for disputes by providing consumers with other, less costly and cumbersome avenues of redress.²⁰² The NCC is an administrative agency that has jurisdiction throughout the entire South Africa.²⁰³ It is primarily an investigation and enforcement body that has to discharge its duties in the most cost-effective and efficient manner.²⁰⁴ The NCC must exercise its functions in line with the values and principles enshrined in the Constitution.²⁰⁵ The National Consumer Tribunal (hereafter the NCT) is a

¹⁹² Section 84 of the CPA.

¹⁹³ *Western Cape Consumer Affairs (Unfair Business Practices) Act* 10 of 2002.

¹⁹⁴ *Eastern Cape Province Consumer Affairs (Unfair Business Practices Act) Act* 5 of 1998.

¹⁹⁵ *Free State Consumer Affairs (Unfair Business Practices Act) Act* 14 of 1998.

¹⁹⁶ *Gauteng Consumer Affairs (Unfair Business Practices Act) Act* 7 of 1996.

¹⁹⁷ *Mpumalanga Consumer Affairs Act* 6 of 1998.

¹⁹⁸ *Northern Cape Province Consumer Affairs (Unfair Business Practices Act) Act* 7 of 1996.

¹⁹⁹ *Northern Province Consumer Affairs (Unfair Business Practices Act) Act* 8 of 1996, as amended by the *Consumer Affairs (Unfair Business Practices Act) Act* 2 of 2003.

²⁰⁰ *North West Province Consumer Affairs (Unfair Business Practices Act) Act* 4 of 1996 and *Suspension of certain Provinces of the North West Consumer Affairs Act* 13 of 1995.

²⁰¹ As mentioned previously, the guideline on the "availability of effective consumer dispute resolution and redress" will not contribute to the interpretation of s 14, but will assist in reaching a solution to the problems created by the application of s 14 to fixed term lease agreements.

²⁰² Preamble of the CPA; Mupangavanhu 2012 *PELJ* 322.

²⁰³ Section 85(2)(a) of the CPA.

²⁰⁴ Mupangavanhu 2012 *PELJ* 322.

²⁰⁵ Especially s 195, which constitutes the basic values and principles governing public administration, which include: the promotion of high standards of professional ethics; the efficient, economic and effective use of resources; that services must be promoted

regulatory body in terms of the CPA.²⁰⁶ A consumer may refer a matter directly to the NCT if such direct referral is permitted under section 69(a), in the case of the particular dispute.²⁰⁷ The NCT must make appropriate orders to give practical effect to the consumer's right of access to redress.

Further, consumer courts are established in all provinces. Section 84(c) of the CPA authorises a provincial consumer protection authority to refer disputes to a provincial consumer court. Provincial consumer courts are regulated by the provincial legislation of each province. The establishment of consumer courts in all provinces is regarded to be a step towards better service delivery for consumer disputes. In addition, the CPA provides that an aggrieved consumer may seek redress in respect of a transaction with a supplier by referring the matter to an ADR agent.²⁰⁸ This discussion is indicative of the fact that the CPA makes provision for various forums that a consumer may approach for relief and redress, which is in line with the 2015 UNGCP. There are also other individual acts that protect consumers, particularly in respect of the leases for residential purposes, such as the RHA.

The RHA confirms the constitutional right of access to adequate housing, including housing for residential purposes.²⁰⁹ Section 2 of the RHA,²¹⁰ provides that government has to develop a growing market among historically disadvantaged persons by introducing measures that improve the conditions in the rental housing market. This provision strengthens the protection of the

impartially, fairly, equitably and without bias; and that public administration must be accountable.

²⁰⁶ Section 26(1)(c) of the CPA; Van Eeden *A Guide* 279.

²⁰⁷ Mupangavanhu 2012 *PELJ* 325.

²⁰⁸ Section 70 of the CPA. In terms of the CPA, an 'agent' could be an ombudsman with jurisdiction, an industry ombudsman accredited in terms of s 82(6), or a person or entity providing conciliation, mediation or arbitration services to consumer disputes.

²⁰⁹ Preamble of the RHA.

²¹⁰ "The government has to promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that improve conditions in the rental housing market; encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas. Facilitate the provision of rental housing in partnership with the private sector. National Government must introduce a policy framework, including norms and standards, on rental housing to give effect to the above."

tenants' rights relating to housing. Although section 4(5)(c)²¹¹ (regulating the right of a landlord to terminate a lease on grounds which do not constitute "an unfair practice and are specified in the lease") may also provide some form of tenure security, it is not sufficient to overcome the shortcomings of the common law relating to security of tenure, at least as far as previously disadvantaged short-term tenants are concerned. In fact, the RHA has been found to play no significant role in cases involving the protection of previously disadvantaged short-term tenants.²¹² In principle, these tenants might challenge the present landlord-tenant legislation for being insufficient, to the extent that the legislation does not give effect to their constitutional right to secure tenure.

In addition, further protection for consumers in respect of accommodation is given in the PIE. The provisions of PIE and the procedures prescribed under it are important to the manner in which a tenant who rents residential property,²¹³ fails to return the property at the expiration of the lease and remains in unlawful occupation. The tenant may be evicted by the landlord. PIE affords tenants statutory protection against arbitrary eviction as is discussed in chapter 4. The *Broad Based Black Economic Empowerment Act*²¹⁴ aims to promote the achievement of the constitutional right to equality and addresses the concept of previously disadvantaged people, but does not deal with the core of the relevancies of this study. Despite the legislation above, there are no other national or provincial statutes which address the core issues relating to consumer protection for purpose of this study.

²¹¹ "The landlord's rights against the tenant include his or her right to terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease."

²¹² *The Occupiers, Shulana court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) and *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA).

²¹³ The provisions of PIE apply specifically to residential leases, but do not apply to commercial lease agreements; Glover *Leases* 12.

²¹⁴ 53 of 2003. The aim is to "establish a legislative framework for the promotion of black economic empowerment, to empower the Minister to issue codes of good practice and to publish transformation charters, to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith."

2.4.5 Conclusion of consumer protection in South African

The Constitution, Common Law, CPA and RHA make provision for the right to satisfaction of the basic needs of a consumer, the protection of vulnerable and disadvantaged consumers, consumer dispute resolution and redress and sustainable consumption. This includes the right to adequate housing as provided by the guidelines in the 2015 UNGCP.

2.5 Conclusion

There is no globally recognised consumer protection law. By recommending the use of general guidelines to protect consumers as a principle, the role that national and international law play to provide a minimum level of consumer protection in the globalised world is highlighted. Consumers have certain protected consumer rights, but have responsibilities too, such social responsibility including recognition of vulnerable and disadvantaged groups in the community.

The 2015 UNGCP provides valuable guidelines on consumer protection and is aimed to achieve effective protection for consumers at the international, regional and national levels. The most significant guidelines include the protection of vulnerable and disadvantaged consumers and sustainable consumption patterns. State members are also required to establish mechanisms for effective consumer dispute resolution and redress mechanisms to ensure that the interests of consumers are protected. The applicable guidelines of consumer protection extracted on international level, correspond to some extent with the protection given on regional levels, which are in turn similar to the consumer protection principles in South Africa. By virtue of its approach that encourages countries to design their own legislation and policies regarding consumer protection in accordance with the needs of their own populations, social, economic and environmental circumstances, South Africa has adopted the CPA. It may be prudent to regard the 2015 UNGCP when one considers the consumer protection provided for in the CPA, as it has been implemented widely by Member States of the United Nations, including South Africa.

Chapter 3 Interpretation of Statutes

3.1 Introduction

Interpretation of statutes involves the principles and rules which are utilised to construct the correct meaning of legislative provisions to be applied in practical situations.²¹⁵ According to De Ville,²¹⁶ the objective of interpretation is to ascertain the correct meaning of the words used, which is lost in the language of the act, and to extract the correct meaning through the aid of the rules of interpretation. The rules of interpretation are significant because it appraises interpreters of what factors and values to take cognisance of when dealing with legislative text. The rules of interpretation also source the language in which texts are scrutinised and explained and they outline the arguments used by different interpreters in preserving their preferred interpretation.²¹⁷ This discussion include the theoretical positions that South African courts have assumed as well as theories of interpretation that the courts have invoked in practice. In addition to the conflict between general laws and special laws applicable to a specific areas of law the effect of the Constitution and presumptions on statutory interpretation will also be discussed The applicability of the theories on legal interpretation in cases of ambiguity and unambiguity is also dealt with.

3.2 Section 2 and section 39(2) of the Constitution

Section 2 of the Constitution confirms the supremacy of the Constitution and any law or conduct inconsistent with it is invalid. The Constitution sets the standard for the construction of statutory provisions in section 39.²¹⁸ The Constitution does not expressly prescribe a contextual or purposive approach to statutory interpretation. Section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of

²¹⁵ De Ville 1999 *THRHR* 374.

²¹⁶ De Ville 1999 *THRHR* 374 and confirmed by Botha *Statutory Interpretation* 2.

²¹⁷ Sullivan *Statutory Interpretation* 30.

²¹⁸ Currie and De Waal *Constitutional and Administrative Law* 74.

Rights.²¹⁹ This provision does not stipulate that the Bill of Rights should be referred to exclusively in instances where the wording used in the statute is not clear or if a strict textual interpretation would be inconsistent with the Constitution. In fact, this provision effectively entrenches the technique of recognising the importance of context in statutory construction as it requires the interpreter to consider the external context of legislation, which includes the values and principles in the Bill of Rights from the outset.²²⁰ This means that at present, legislation in South Africa has to be interpreted against the Constitution and particularly against the values²²¹ enshrined in the Bill of Rights.²²²

As stated in chapter 2, the Constitution is based on the values of human dignity, equality and freedom, which are important and relevant for purposes of this study. The CPA, as social justice legislation, has as objective the transformative constitutional aspiration to drive socio-economic change in the impoverished South African society. The reality of the inequality of bargaining power and the

²¹⁹ Chapter 2 of the Constitution; Du Plessis 2011 *PER* 92; S 39(2) of the Constitution obliges a court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation; Swanepoel *An Analysis of the Purposive Approach* 3; This subsection is applicable at all times to the determination of the contents of all rules, and its application is not restricted to the contemplation of the constitutionality of a statute or rule; In this regard see the remarks of Joubert and Faris in the *Law of South Africa* at para 204 where it was opined that the provisions will most probably only apply in instances where the constitutionality of legislation is not in question; In *Ngcobo v Salimba CC; Ngcobo v Van Rensburg* 1999 8 BCLR 855 (SCA) at para 11 it was highlighted that legislation must be interpreted in line with the objects of the Bill of Rights where the presiding judge stated that: "the interpretation of the section will be unreasonable, inconsistent or unjust or that the result will be absurd or, I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights." In *SS v Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) the court found that the interpretation of the statute at hand must be in accordance with Section 39(2) of the Constitution and "in keeping with the spirit, purport and the objects of the Bill of Rights..." para 7.

²²⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 72. This judgment was applied in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd* 2011 2 BCLR 207 (CC) para 29, which emphasised the "mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights"; *Corpco 2290 cc t/a U-Care v The Registrar of Banks* 2012 ZASCA 156 para 20; Delpont 2014 *Obiter* 66; Kafesu *Interpretation of Fiscal Statutes by the Courts* 28.

²²¹ The preamble of the Constitution refers to a society based on democratic values, social justice and fundamental human rights. The democratic values refer to "freedom, equality and human dignity, the achievement of equality, advancement of human rights and freedoms, non-racialism and non-sexism".

²²² Currie and de Waal *Constitutional and Administrative Law* 334; In *Minister of Safety and Security v Sekhoto* 2011 5 SA 367 (SCA) at para 375 – 377 a reminder was set that legislation must be interpreted in terms of s 39(2) of the Constitution.

consequences thereof lie at the heart of the considerations, which is to be taken into account in terms of the CPA.²²³ The required and desired change in society demanded by the fall of apartheid can only be achieved by recognising the constitutional values. Only once this is achieved, can an attempt be made to rectify the socio-economic injustices caused by such a systemically and fundamentally unjust system.²²⁴ Consequently, when the provisions of section 14 are interpreted and should they be found to be not in line with the spirit, purpose and objects of the Bill of Rights, they will be invalid. The interpretation of the CPA is dealt with in chapter 6.²²⁵

3.3 Theories of statutory interpretation

There are different theories of legal interpretation in South Africa varying from the narrow, formalists approach to the broad purposive approach.²²⁶ The different theories which exist in practice are discussed below.

3.3.1 Textual or literal approach

3.3.1.1 Introduction

This approach refers to the written text which can assist in determining the meaning of any statutory provision.²²⁷ According to Du Plessis,²²⁸

...clear and unambiguous language is commonly held to be the prime candidate for this preferential role. The intention of the legislature is a close contender, but then usually a formalised and hence presumably controllable version of it. The degree of certainty ascribed to the disclosure of legislative intent is, for instance, made dependent upon the clarity and unambiguity of the language of the legislative instrument believed to publicise such intent.

In terms of the traditional 'golden rule' of interpretation,²²⁹ the key objective is to ascertain the true meaning of a statutory provision, with regard to only the words

²²³ Bauling and Nagtegaal 2015 *De Jure* 150.

²²⁴ Bauling and Nagtegaal 2015 *De Jure* 151.

²²⁵ In accordance with s 39(2) of the Constitution, when interpreting the provisions of the CPA, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights and any conduct inconsistent therewith, is invalid.

²²⁶ Du Plessis *Re-interpretation* 100.

²²⁷ Du Plessis *Re-interpretation* 101.

²²⁸ Du Plessis *Re-interpretation* 101.

used in the Act, giving the expression its plain, ordinary meaning.²³⁰ The interpreter should concentrate primarily on the literal meaning of the provision to be interpreted. The interpretation process adopted by utilising the textual approach is described hereunder.

The primary rule of interpretation entails that if the words are unambiguous it must be put into effect and effect must be given to their ordinary, grammatical meaning, unless this leads to some absurdity, inconsistency, hardship or anomaly which the legislature could not have intended regarding the Act as a whole.²³¹ The clarity of these words must then be equated with the intention of the legislator.²³² If the plain meaning of the words are ambiguous and fails to clear up the ambiguity or vagueness, or if a strict literal interpretation would result in absurdity, then this rule is departed from to avoid absurdity and then the words must be interpreted in a manner whereby effect is given to the policy and the object of the statute in question.²³³ Such purposive construction is, however, not permitted where the words are unambiguous.²³⁴ The court may then revert to

²²⁹ Generally referred to as the textual or literal approach to legal interpretation.

²³⁰ Kafesu *Interpretation of Fiscal Statutes by the Courts* 14-15; Botha *Wetsuitleg* 48; Delpont 2014 *Obiter* 65.

²³¹ *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA); *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129. As applied in *Fish Hoek Primary School v G W* 2009 ZASCA 144, where the "cardinal rule of construction of a statute" was confirmed in para 6; *S v Tieties* 1990 2 SA 461 (A); *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1997 4 All SA 121 (A) page 22; These judgements is indicative thereof that there was an extensive recognition of the strict interpretation school, which stood for the view that a grammatical construction of a statute had to be followed in instances where there was no ambiguity, irrespective of how unjust the outcome would be.

²³² Botha *Wetsuitleg* 48.

²³³ This is also known as the golden rule of interpretation; Botha *Wetsuitleg* 48; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 543; *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A) 942; That Innes J was a supporter of a multi-facetted approach towards interpretation of statutes is borne out from a reading of the judgment handed down in *Venter v Rex* 1907 TS 910 914, confirming the statement in the text; See the dicta in *CIR v George Forest Timber Co* 1924 AD 516 and *CIR v Delfos* 1933 AD 242 where it was confirmed that a statutory provision must be interpreted in its ordinary meaning, if the provision is clear; Benson *The Interpretation Game* 12.

²³⁴ The rationale behind this assertion is based on the thought that a presiding officer has authority to interpret. A presiding officer does not have the authority to legislate, and therefore he cannot do violence to the language of the legislator, by conferring upon the words a meaning of which it is not reasonably capable, to give effect to what the presiding officer may contemplate to be the policy or object of the particular measure. *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 para 543; Swanepoel *An Analysis of the Purposive Approach* 34.

secondary aids of interpretation to find the intention of the legislature.²³⁵ If the intention of the legislature cannot be determined by utilising these secondary aids, then the courts will have recourse to tertiary aids to construction, namely the common law presumptions.²³⁶

3.3.1.2 Development of the textual or literal approach

The literal approach was prevalent in legal systems which were influenced by English law and certain factors led to the implementation of the textual approach in England.²³⁷ The golden rule and the plain meaning approach were introduced into the South African legal system from English law. In the matter of *De Villiers v Cape Divisional Council*²³⁸ the legal rules were interpreted in accordance with the English rules of legal interpretation. The recent judgment by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*²³⁹ could be regarded as giving strong support to this approach. The court set out the appropriate approach to interpretation of documents, including statutes and held that the inescapable starting point would be the language of the provision itself based on the normal rules of syntax and grammar, however, from the start the language must be considered together with the context.²⁴⁰ Therefore, the literal

²³⁵ The secondary aids may include the long title of the statute, the text in the other official language, headings to sections and chapters; Botha *Wetsuitleg* 48.

²³⁶ Botha *Wetsuitleg* 49.

²³⁷ Firstly, the misapprehensions about separation of powers and sovereignty of Parliament resulted in acceptance of the idea that the courts function should be restricted to the interpretation and application of the will of the legislature as noted in the text of the legislation. It was argued that the will of the legislature is solely to be found in the words of the legislation. Secondly, the doctrine of legal positivism had an influence on the literal approach, in that the positivist idea is based on the validity of the decree that what is decreed by the state, is law. In these circumstances, the role of the court is limited to the exploration of the law as it is, not as it should be. A strict distinction is made between the black letter law and morality, because value judgements by the courts would lead to the justiciability of policy issues. The third factor which led to the implementation of the literal approach was the common law tradition in England, where the courts traditionally fulfilled a more inventive role in regard to common law principles. Legislation was regarded as the exception to the rule, modifying the common law as little as possible. Finally, for the sake of legal certainty, English legislation had been drafted to be as defined and comprehensive as possible. The famous maxim that the legislator prescribed everything it intended to prescribe is derived from this approach; Botha *Wetsuitleg* 49.

²³⁸ *De Villiers v Cape Divisional Council* 1875 Buch 50 in the judgment of De Villiers J.

²³⁹ 2012 4 SA 539 (SCA) para f.

²⁴⁰ Paragraph 604 C; *Brink v Premier, Free State* 2009 4 SA 424 (SCA) para d.

approach appears to remain part of the South African jurisprudence of interpretation.²⁴¹

3.3.1.3 Criticism against the literal approach

The literal approach has been subject to criticism.²⁴² The approach has been criticised by scholars encouraging the introduction of a more modern hermeneutic view as an essential part of statutory interpretation. The issue is that the dominant role portrayed by the common law presumptions during the interpretation process is reduced to a last resort and the common law presumptions may only be applied in circumstances where the text is vague.²⁴³ This constricted approach results therein that the literal meaning of words are regarded the primary indication of the intention of the legislature.²⁴⁴ Other internal and external aids to interpretation, which are usually applied to establish contextual meaning, are not taken into account.²⁴⁵ The result is that the legislature's intention is eventually dependent on the interpreter's decision on the clarity of the particular legislative text. The predicament is that few texts are so clear that only one interpretation is conceivable.²⁴⁶

When this narrow approach is followed, little room is allowed for judicial law making as the courts are only permitted to diverge from the literal meaning of the legislation in exceptional circumstances to apply modification of the text. This creates the impression that once the legislature has spoken, the law-making

²⁴¹ In the matter of *S v Zuma* 1995 4 BCLR 401 (SA) paras 17-18 Kentridge AJ confirmed that "...it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination... I would say that a constitution "embodying fundamental rights should as far as its language permits be given a broad construction". *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) para 811G-H; Du Plessis *Re-interpretation* 102.

²⁴² Kafesu *Interpretation of Fiscal Statutes by the Courts* 17-18; Du Plessis *Re-interpretation* 100.

²⁴³ Botha *Wetsuitleg* 50.

²⁴⁴ *R v Hildick-Smith* 1924 TPD 69 para 81.

²⁴⁵ Botha *Wetsuitleg* 50.

²⁴⁶ Botha *Wetsuitleg* 50.

function of the court is terminated, which results therein that the courts are regarded mere mechanical interpreters of the law.²⁴⁷

Despite the criticism on this approach, some courts still follow this traditional approach. The importance of the words used was emphasised by the court in *South African Airways (Pty) Ltd v Aviation Union of South Africa*.²⁴⁸ In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd*²⁴⁹ presiding Judge Smalberger came to the conclusion that even though the intention of the legislature is regarded the primary rule of interpretation, it must be accepted that the literal interpretation principle is confidently entrenched in South African law.

3.3.1.4 Conclusion

Interpreters regard the literal meaning as what the legislature intended and then confer a literal or grammatical meaning.²⁵⁰ The rules of construction of Acts of Parliament clearly state that the Acts must be construed according to the intention of the legislature expressed in the Acts themselves.²⁵¹ The various shortcomings that cloud the road of the textual approach and the result of political and constitutional transformation in South Africa has resulted in the adoption of new approaches, which are discussed hereunder.

3.3.2 Contextual approach

3.3.2.1 Introduction

In contrast to the exaggerated emphasis on the legislative text, the contextual approach to the interpretation of statutes places less prominence on the literal meaning of the words and concentrates more on the context in which the words

²⁴⁷ Botha *Wetsuitleg* 50-51.

²⁴⁸ 2011 3 SA 148 (SCA) paras 25 to 30.

²⁴⁹ 1990 1 SA 925 (A) para 943I; In this matter the feature of contextual interpretation was recognised, even prior to the new constitutional era in South Africa.

²⁵⁰ In *Union Government v Mack and Farrars Estate v CIR* 1917 AD 731, it was held that "the intention of the legislature should be deduced from the particular words or phrases used in the legislation"; In *Ensor v Rensco Motors (Pty) Ltd* 1981 1 SA 815 (A) it was held that "if the legislature had a specific intention, it would be reflected in the clear and unambiguous words of the text"; Botha *Wetsuitleg* 49.

²⁵¹ *Engels v Allied Chemical Manufacturers (Pty) Ltd* 1993 4 SA 45 (Nm).

are used in a provision.²⁵² The 'context' includes the language of the rest of the statute, the matter of the statute, its purpose and scope, and, within limits, its background.²⁵³ This approach looks at the words in the context to attain the meaning of the provision.²⁵⁴ The legislative purpose, which is determined from the context, is often also equivalent with legislative intent.²⁵⁵

3.3.2.2 Language in context and the broader context

The process to be followed in legal interpretation was explained in the renowned minority judgment in *Jaga v Donges*²⁵⁶ which marked one of the first actual attempts in South African case law to exploit the broader context, to move beyond the plain grammatical meaning of the words. Schreiner JA honoured the exigencies of both language and context and averred that although it is important for the words in a statute to be interpreted according to their ordinary meaning, it is equally important that the words used must be interpreted in their context.²⁵⁷ This line of reasoning was adopted in *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd*²⁵⁸ where the 'proper' approach to statutory interpretation was expressed.²⁵⁹ It was held that:

...it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which

²⁵² Delpoort 2014 *Obiter* 65.

²⁵³ *Corpclo 2290 cc t/a U-Care v The Registrar of Banks* 2012 ZASCA 156 para 20.

²⁵⁴ Du Plessis *Re-interpretation* 111.

²⁵⁵ This approach was approved in the matter of *Hoban v Absa Bank Ltd t/a United Bank* 1992 2 SA 1036 (SCA) para 1045B; Du Plessis *Re-interpretation* 111-112.

²⁵⁶ *Jaga v Donges* 1950 4 SA 653 (A).

²⁵⁷ "It is however useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as casting light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning confining a consideration of the context only to cases where the language appears to allow for more than one meaning. Alternatively, one may from the beginning consider the context and the language to be interpreted together". Thus a balance is to be struck between the grammatical meaning and the overall context; Delpoort 2014 *Obiter* 65.

²⁵⁸ 1962 1 SA 458 (A) 476E-G.

²⁵⁹ Swanepoel *An Analysis of the Purposive Approach* 40; Delpoort 2014 *Obiter* 66.

involves consideration of the language of the rest of the statute, as well as the 'matter of the statute, its apparent scope and purpose, and within limits, its background'. In the ultimate result the Court strikes a proper balance between various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.

Another example of a case which concerned the contextual approach is *Mjuqu v Johannesburg City Council*,²⁶⁰ which is viewed as a model of the contextual approach, since the court exploited the entire continuum of available aids and surrounding circumstances to establish the purpose and scope of the relevant legislation, including the intention of the legislature.²⁶¹ In *Corpco 2290 cc t/a U-Care v The Registrar of Banks*²⁶² it was stated that a primary rule of statutory construction is that "words in a statute must be given their ordinary grammatical meaning in light of their context". Therefore, when a court interprets the words in a statute, it must, from the outset, consider the language in combination with the context.²⁶³

3.3.2.3 Conclusion

When one considers the decisions of the appellate division during the last two decades, it becomes clear that the courts swung like a pendulum between the different approaches to statutory interpretation. The most ostensible criticism on the contextual approach is that the redundant effort to determine purpose of intent of the legislature can result in a negation of the meaning of the expressed words used in a specific statute.²⁶⁴

²⁶⁰ 1973 3 SA 421 (A).

²⁶¹ The internal aids includes the legislation and all its parts and the external aids includes other legislation, dictionaries, commission reports etc.

²⁶² 2012 ZASCA 156 para 20.

²⁶³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 89; *Jaga v Donges* 1950 4 SA 653 (A) para 662G-663A.

²⁶⁴ Swanepoel *An Analysis of the Purposive Approach* 48.

3.3.3 Purposive approach

3.3.3.1 Introduction

The legislative role is seen as a purposive activity, in terms whereof the purpose or object of the legislation is the fundamental factor in interpretation.²⁶⁵ Du Plessis²⁶⁶ describes the purposive method as one which attributes meaning to a legislative provision in light of the purpose, which it seek to achieve in the context of the instrument of which it forms part.²⁶⁷

3.3.3.2 Mischief rule

The mischief rule is a sign of purposivism as is the assertion that statutory provisions are to be construed in light of the purpose they seek to achieve. The historical context of the particular legislation is used to place the provision in question in its proper perspective. The use of these surrounding circumstances is also known as the mischief rule.

The mischief rule has been met with response in South African case law and was confirmed by the court, which confirmed the questions to be asked to establish the meaning of legislation.²⁶⁸ Firstly, it must be asked what the legal position was before the legislation was adopted. Secondly, it must be asked what the mischief or defect was, which had not been provided for by existing legislation or common law. Thirdly, what remedy was provided by the legislature to resolve this problem? Finally, what was the true reason for the remedy? Under the mischief rule, the aim of interpretation is to examine the circumstances leading to the measure in question, to suppress the mischief and to promote the remedy designed for its elimination, without applying measures that go beyond than what is necessary to remedy the mischief in question.²⁶⁹ Due to the aforesaid, the mischief rule has been applied in constitutional interpretation too, holding that the

²⁶⁵ Botha *Wetsuitleg* 51.

²⁶⁶ Du Plessis *Re-interpretation* 116.

²⁶⁷ The context of the legislation, including political policy directions social factors, are also taken into account to determine the purpose of the legislation; De Stadler "Interpretation, purpose and application" 2-3.

²⁶⁸ *Hleka v Johannesburg City Council* 1949 1 SA 842 (A) para 852-853.

²⁶⁹ Du Plessis *Re-interpretation* 117.

previous system in South Africa was the fundamental mischief to be remedied by the application of the Constitution.²⁷⁰ Therefore, the Constitution is "a remedial measure that must be construed generously in favour of addressing the mischief of the past".²⁷¹

In the judgment of *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*,²⁷² Moseneke DCJ confirmed that when constitutional issues are at stake, the interpreter must seek to promote the spirit, purport and objects of the Bill of Rights. In such cases, the generous construction must be preferred over a merely legalistic or textual one in order to afford claimants the fullest possible protection of their constitutional guarantees. While searching for the purpose, the mischief sought to be remedied must also be identified. That is partially why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation.

3.3.3.3 Conclusion

In *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*²⁷³ it was confirmed that "our law is an enthusiastic supporter of purposive construction". It has been recognised in case law on statutory interpretation that giving effect to the policy, objects or purpose of legislation is an accepted strategy of constitutional interpretation.²⁷⁴ However, it has been stated that this approach may only be used in cases where the language of a provision is ambiguous.

²⁷⁰ Du Plessis *Re-interpretation* 117.

²⁷¹ Du Plessis *Re-interpretation* 117.

²⁷² 2007 6 SA 199 (CC) para 53.

²⁷³ 2008 4 All SA 117 (SCA) para 1, as it referred to the judgment in *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) paras 942I-944A "Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity".

²⁷⁴ *Stopforth v Minister of Justice; Veenendaal v Minister of Justice* 2000 1 SA 113 (SCA) para 21; *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd* 1962 1 SA 458 (A) para 473F.

3.4 Presumptions

Traditionally, the presumptions of statutory interpretation were examples or efficacious conduits of foundational norms, which reflected communal mores embedded in tradition.²⁷⁵ The common law presumptions are tertiary aids of construction and are used to interpret legislation.²⁷⁶ Prior to the Constitution, it was contended that the presumptions played a significant value-regulative role in the interpretation of statutes, as they are seen as verbalised diverse values.²⁷⁷ Over the years, the courts have attributed a more modest role to the presumptions of statutory interpretation,²⁷⁸ owing to the introduction of the Constitution and the values entrenched therein. The character and role of the presumptions have changed fundamentally by the introduction of the Constitution.²⁷⁹ The supremacy of the Constitution on the one hand and the nature of the presumptions being reduced to tertiary aids of legal interpretation on the other hand, add to the modesty in the application of the presumptions.²⁸⁰ The courts and other interpreters may continue to rely on these common-law presumptions insofar as they are not subsumable with the values entrenched in the Constitution.

There are various presumptions of statutory interpretation that exist in South African law, which can be divided into three categories that are either seemingly included in the Constitution, inconsistent therewith or that have no effect on the

²⁷⁵ Du Plessis 1998 *SALJ* 750.

²⁷⁶ As stated in the discussion of the theories of interpretation, the primary source of the intention of the legislature is the clear and unambiguous language of a statute, followed by information obtained through reliance on other principles of construction. The other canons of constructions serve as secondary, objective sources of deduction. If the primary source and secondary aids to interpretation prove insufficient to ascertain the intention of the legislature, then the courts will have recourse to tertiary aids to construction. The common law presumptions are tertiary aids of construction and are used to interpret legislation.

²⁷⁷ Du Plessis *Re-interpretation* 150.

²⁷⁸ Du Plessis *Re-interpretation* 149.

²⁷⁹ A comparison between the fundamental rights in the Bill of Rights and the presumptions, is an indication of the fact that many of the values underpinning the presumptions of statutory interpretation are now to a large extent replicated in the Bill of Rights.

²⁸⁰ The introduction of the Constitution and the values entrenched in the Bill of Rights are vital for the continued existence of the presumptions of statutory interpretation in South Africa.

Constitution.²⁸¹ The scope of this study does not allow for a discussion of all the presumptions and it also does not serve the aim. However, there are presumptions of statutory interpretation that appear to be more relevant to this study. One such presumption is that no enactment seeks to achieve unjust, unreasonable and inequitable results. One of the areas in which the presumption has traditionally held sway is a restrictive interpretation and application of onerous statutory provisions. It includes provisions encroaching on existing rights and imposing burdens on such rights.²⁸²

This means that an Act should not be interpreted in such a manner whereby the existing rights of people are being encroached upon. In the sense of consumer rights, it is necessary to determine whether the provisions of section 14 encroach on existing rights and impose burdens on such rights. This is particularly significant when one considers the maximum duration of a fixed term lease agreement in terms of section 14(2) of the CPA, being twenty four months from date of signature by the consumer.²⁸³ The limitation of the right to enter into extended lease agreements of immovable property for extended periods may restrict the rights of a consumer to partake actively in the economic market.

Further, the presumption that an enactment does not operate retroactively is also relevant in cases pertaining to the CPA. The aforesaid is emphasised by the recent

²⁸¹ The presumptions which are seemingly subsumed under the Constitution are the presumption that no enactment seeks to achieve unjust, unreasonable and inequitable results, the presumption that an enactment applies to general and not to particular instances, the presumption that an enactment seeks to promote the public interest, the presumption that an enactment does not interfere with the jurisdiction of the court, the presumption that an enactment does not interfere with or violate the rules of international law. The presumptions seemingly inconsistent with the Constitution, which include the presumption that an enactment does not bind the state and the presumption that an enactment does not amend the existing law beyond necessity. In addition there are presumptions which, in principle, are seemingly unaffected by the Constitution and they include the presumption that an enactment does not obtain retroactively, the presumption that no enactment contains invalid or purposeless provisions, the presumption that references in an enactment to conduct are references to legally valid modes of conduct, the presumption that an enactment does not obtain extraterritorially and the presumption that the same words and phrases in the same enactment bear the same meaning throughout.

²⁸² Du Plessis 1998 *SALJ* 753; Du Plessis *Re-interpretation* 156.

²⁸³ Reg 5(1) in GN 294 in GG 34181 of 1 April 2011.

decision by the NCT in *Motswai v House and Home*²⁸⁴ where the NCT confirmed a general rule in the construction of statutes "that a deliberate change of expression is *prima facie* taken to import a change of intention".²⁸⁵ The NCT held that the specific provisions of section 75(1)(b) of the CPA and the requirement of the granting of leave to refer contained therein is a "deliberate change of expression". The implication is that, in this particular matter, the transaction complained of occurred prior to the general effective date of the CPA, being 1 April 2011.²⁸⁶ Despite the provisions of the CPA and the presumption that an enactment does not apply retroactively, the NCT found that the matter may be entertained.

The common law principles under the CPA, section 2(10) and section 4(2)(a) emphasise the importance to develop the common law in line with the presumption that the legislature has no intention to alter the common law principles, unless such object is clearly stated in the particular statute.²⁸⁷ This indicates that although some of the traditional common law presumptions can be held to have been abrogated under the Constitution, a number of the presumptions have remained, mostly adjusted to the requirements of the Constitution. They remain vested with a degree of common-law authority.

3.5 Conflict between general and special laws

In broad terms, the Latin term, *maxim generalia specialibus non derogant*, means that "the provisions of a general statute must yield to those of a special one".²⁸⁸

²⁸⁴ *Motswai v House and Home* (NCT33263/2015/75(1)(b)CPA) 2016 ZANCT 20 (7 July 2016) para 29.

²⁸⁵ *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) para 15.

²⁸⁶ In terms of ss 53 and 58 of the CPA, the CPA shall apply to pre-existing transactions only with respect to goods and services supplied to the consumer in terms of the agreement, on or after the effective date.

²⁸⁷ De Stadler "Interpretation, purpose and application" 2-9.

²⁸⁸ *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* 1996 4 SA 1098 (CC) para 28; Du Plessis 2008 *Speculum Juris* 7; The Constitutional Court found in, *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 49, that "The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict." It is also known as the rule of implied exception.

Therefore this maxim shall be applied to resolve conflicts between general and special laws.²⁸⁹ In terms of this maxim, subsequent, general legislation does not revoke prior, special legislation dealing with the same matter unless the general legislation professes to deal with this subject matter exhaustively.²⁹⁰ The gist is that when an Act deals with an issue specifically, it must be preferred over an Act that deals with the same issue in general terms.

The manner in which the *generalalia specialibus non derogant maximis* is applied was indicated *New Modderdam Gold Mining Co v Transvaal Provincial Administration*²⁹¹ to the effect that:

...if this Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions,...

which is the preferred application.²⁹² According to Du Plessis,²⁹³ this maxim prescribes preference for the preservation of the previous provision in its

²⁸⁹ The application of *generalalia specialibus non derogant maxim* was explained in *R v Gwantshu* 1931 EDL 29 para 31 as follows: "When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms... Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation that earlier and special legislation is not to be held indirectly. ... altered ... merely by force of such general words, without any indication of a particular intention to do so"; Devenish 2005 *SALJ* 73.

²⁹⁰ *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2014 6 SA 403 (GP) para 53; Du Plessis *Re-interpretation* 73; *S v Senye* 1978 3 SA 59 (T) paras 61G-62D.

²⁹¹ 1919 AD 367 para 397; Devenish 2005 *SALJ* 75.

²⁹² A further example of the application of the maxim can be seen in *Sasol Oil (Pty) Ltd v Metcalfe* 2004 5 SA 161 (W) which mainly related to environmental matters. In this particular matter the court had to make a finding on the applicable legislation and ultimately determine whether the provisions of the *Environment Conservation Act* 73 of 1989 must be applied in the application before the court, as opposed to the more general provisions of the *Promotion of Administrative Justice Act* 3 of 2000, which is regarded a general statute. The respondents argued *in limine* that the applicants were out of time in bringing their application because they had done so outside the thirty day period prescribed s 36(2) of the *Environment Conservation Act* 73 of 1989. In response to the arguments raised by the respondents, the applicants argued that the applicable time period was one hundred and eighty days, as provided for in s 7(1) of the *Promotion of Administrative Justice Act* 3 of 2000. It was argued that the *Promotion of Administrative Justice Act* 3 of 2000, being a general statute, could not derogate from the provisions of the *Environment Conservation Act* 73 of 1989, which relates specifically to environmental matters. Willis J rejected this argument (at paras 165E-F), holding that the *Promotion of Administrative Justice Act* 3 of 2000 was constitutional legislation by virtue of the fact that the Constitution required national legislation to give effect to the rights to administrative justice as set out in ss 33(1) and (2) of the Constitution.

specificity, preserving it against being engulfed by the later provision in its generality.

3.6 Applicability in cases of ambiguity or unambiguity

Despite the recognition of the purposive approach it has not always been clear whether such a method should be applied exclusively in cases where the words used were ambiguous, or whether it should be applied even if the plain meaning of the words were clear and unambiguous.²⁹⁴ In cases of unambiguity, the court held, in *University of Cape Town v Cape Bar Council*,²⁹⁵ that in order to arrive at the true intention of the legislature, the words of an Act, irrespective of whether the words appear to be clear and unambiguous, should be read in light of the subject matter with which they are concerned. It was further held that the court has to examine all the contextual factors in determining the intention of the legislature, irrespective of whether or not the words of the legislation are clear and unambiguous.²⁹⁶ In cases of ambiguity, however, in *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd*,²⁹⁷ the court preferred a purposive interpretation solely in cases of vagueness. The court regarded the fact that the primary aim of statutory interpretation is to establish the legislature's intention, but stated that the purpose of a statutory provision can provide a "reliable pointer to such intention where there is ambiguity".²⁹⁸ De Ville²⁹⁹ echoes sentiments in favour of an approach where a reluctance to implement a contextual approach in cases where the wording of a specific provision is clear and unambiguous.

The Supreme Court of Appeal eventually answered this question unequivocally by stating that the days of narrow-minded examining of an isolated provision in a

²⁹³ Du Plessis 2008 *Speculum Juris* 7.

²⁹⁴ Katzmann 2014 *Harvard Law Review* 2135; Delport 2014 *Obiter* 66.

²⁹⁵ 1986 4 SA 903 (A) as referred to in *Armstrong v Sehadow Oree t/a Oree's Cartage & Plant Hire* 2003 ZASCA 116 at para 24, to clear the ambiguity, it is necessary "because the Act does not define the expression "mineral", to have regard to the normal meaning of the word in the context in which it is used".

²⁹⁶ *University of Cape Town v Cape Bar Council* 1986 4 SA 903 (A).

²⁹⁷ 1990 1 SA 925 (A) para 942.

²⁹⁸ Katzmann 2014 *Harvard Law Review* 2135; *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) para 942.

²⁹⁹ De Ville *Constitutional and Statutory Interpretation* 249.

statute are long past, when it was thought to be the only legitimate method of interpretation and seemed on the face of it, to have an obvious meaning.³⁰⁰ This in turn prompted the Constitutional Court to recognise that the emerging trend in statutory construction should regard the context in which the words appear, even when the words to be interpreted are clear and unambiguous.³⁰¹

3.7 Interpretation in recent times

Traditionally, the preferred approach to statutory interpretation was to only seek the literal meaning of a statute. However, as time passed, the courts have accepted that the textual approach can be insufficient and unsatisfactory. Instead, judges have been progressively influenced by the European approach to statutory interpretation, which concentrate on giving effect to the purpose of the legislation. Based on the foregoing, Goldswain³⁰² is of the opinion that since the advent of the constitutional dispensation, advice against the continuous application of the literal rule have gained momentum. The Constitution conveyed a paradigm shift in the manner in which legislation should be interpreted, as with the advent of the constitutional democracy in 1994, the rules of legal interpretation were transformed. It has brought with it the notion that legislative enactments are interpreted in conformity with the Constitution and constitutional values.³⁰³ This is in line with the constitutional imperative of a court having the

³⁰⁰ *Thoroughbred Breeders' Association v Price, Waterhouse* 2001 4 SA 551 (SCA); The judgment in the aforementioned case was supported by the judgment in *University of Cape Town v Cape Bar Council* 1986 4 SA 903 (A).

³⁰¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

³⁰² Goldswain 2009 *Tax Planning* 70.

³⁰³ The other shift was the shift from parliamentary supremacy to the supremacy of the Constitution. The pre-1994 era was categorised by the doctrine of parliamentary supremacy. Parliamentary supremacy provides that courts (or another body) do not possess the power to review or strike down unfair or ultra vires legislation which was enacted by Parliament, irrespective whether the said legislation violated a person's rights. This was the situation until the Interim Constitution came into effect (the *Interim Constitution of the Republic of South Africa* 200 of 1993, which came into effect on the 27 April of 1994). With the *Interim Constitution of the Republic of South Africa* 200 of 1993 marking the democratic dispensation, much weight was given to the current Constitution. The constitutional dispensation ousted the doctrine of parliamentary sovereignty with constitutional supremacy, which increased the power of judges; Klare 1998 *SAJHR* 147; Kafesu *Interpretation of Fiscal Statutes by the Courts* 27.

power and authority to declare any law or conduct that is inconsistent with the Constitution or its values invalid, owing to its inconsistency.³⁰⁴

The different methods of statutory interpretation applied by the courts may lead to interpreters questioning which approach to legal interpretation is in fact preferred. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*³⁰⁵ Wallis J confirmed that the present state of the law can be expressed as follows:

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

According to Murphy,³⁰⁶ in current practice, judges follow the design or purpose which lies behind the words. When they come across a situation which in their minds is within the spirit, but not the letter of the legislation, they solve the problem with regard to the purpose of the legislation, and the effect which it was required to accomplish. Judges then interpret the legislation to yield the preferred effect. This gives rise to the question of what the sensible way of dealing with the situation is, in order to give effect to the accepted purpose of the legislation. Then the law is laid down accordingly.³⁰⁷ This exposition pronounces the correct method which must be applied generally to the interpretation of all statutes, including the CPA.³⁰⁸

In the matter of *Aktiebolaget Hassle v Triomed (Pty) Ltd*,³⁰⁹ it was confirmed that the textual approach to legal interpretation is no longer in line with the approach to interpretation adopted by South African courts in relation to statutory

³⁰⁴ Sections 172(1)(a) and 2 of the Constitution; In the modern era the South African approach to legislative interpretation should commence with reference to the omission of the *Constitution* of a provision whereby it is directed that when legislation can be interpreted in more than one manner, at least one which amounts to a reasonable interpretation that is not in conflict with the Bill of Rights, such interpretation must be followed; Swanepoel *An Analysis of the Purposive Approach* 2-3.

³⁰⁵ 2012 4 SA 539 (SCA) para 18.

³⁰⁶ Murphy 2011 *Advocate SA Bar Journal* 30.

³⁰⁷ *James Buchanan & Co Ltd v Babco Forwarding & Shipping Co Ltd* 1977 1 All ER 518 para 523.

³⁰⁸ Delpont 2014 *Obiter* 67.

³⁰⁹ 2003 1 SA 155 (SCA) paras 8 and 9.

instruments.³¹⁰ The highest courts of South Africa have, in recent times, left no doubt that contextual interpretation is not only permitted, but possibly compulsory with prevailing consequences.³¹¹ It is important to appreciate that purposive interpretation does not ignore or postulate a total departure from the language used in the text, because language remains significant.³¹² However, to enter into meaning, one must consider the text and the language, therefore it remains an important consideration. In some cases, however, true meaning can only be ascertained "not by lingering in the hallway but by venturing into the inner chambers and outer courtyards"³¹³ which, when appropriate to do so, requires consideration of more than the mere text.

By virtue of the aforesaid and according to Delpont,³¹⁴ it is submitted that the literal approach to the interpretation of statutes is no longer the 'golden rule'³¹⁵ it previously was, and now a contextual or purposive interpretation should be adopted even if the words used in a statute are clear and unambiguous with regard to their ordinary meaning.³¹⁶ The meaning of this statement was explained in the matter of *James Buchanan & Co Ltd v Babco Forwarding & Shipping Co Ltd*,³¹⁷ where Lord Denning, referring to modern European methods of interpretation of statutes, answered his critics thus:

All it means is that the judges do not go by the literal meaning of the words, or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come on a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislation – at the effect which it was sought to achieve. They then interpret the legislation so as to produce the

³¹⁰ *Bothma Batho Transport v S Bothma & Seun Transport* 2013 ZASCA 176 para 12.

³¹¹ Even to the point of implementing an organic construction altering the plain textual meaning in order to advance the real purpose. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 90; *Thoroughbred Breeders Association v Price Waterhouse* 2001 4 SA 551 (SCA) para 12; *S v Tieties* 1990 2 SA 461 (A); Swanepoel *An Analysis of the Purposive Approach 2*; There is a move to adopt a purposive approach to interpretation of statutes in Du Plessis *Re-interpretation* xii.

³¹² Murphy 2011 *Advocate SA Bar Journal* 30.

³¹³ Murphy 2011 *Advocate SA Bar Journal* 30.

³¹⁴ Delpont 2014 *Obiter* 67.

³¹⁵ The golden rule prescribes that when the literal meaning leads to absurdities, then one may deviate from the literal approach.

³¹⁶ Delpont 2014 *Obiter* 67.

³¹⁷ 1977 1 All ER paras 518; 522-523. (Bear in mind that this is an English judgment, where parliament is sovereign.)

desired effect. This means that they fill the gaps, quite unashamedly, without hesitation. They ask simply: What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly.³¹⁸

Despite the above provisions supporting a departure from the textual approach, there are still judgments that give strong support to the textual approach, as is the case in the recent judgment by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.³¹⁹ The importance of the words used was emphasised by the court in *South African Airways (Pty) Ltd v Aviation Union of South Africa*.³²⁰ This makes it clear that the courts are still switching between the different approaches to be followed when confronted with statutory interpretation. A definitive theory of statutory interpretation that must be used in South Africa is non-existent.

3.8 Conclusion

There are different theories of statutory interpretation, namely the textual approach, the contextual approach and the purposive approach. From recent case law it has been shown that the literal approach to statutory interpretation still enjoys considerable support in South Africa. It is contended that due to the criticism of the literal approach, as referred to above in various judgments and other academic sources, an approach that is too strict towards the interpretation of legislation can give rise to unjust determinations. The more recent influences and judgments are predominantly indicative of a less strict, purposive approach towards interpretation of legislation. The contextual approach is not as restrictive as the literal approach, but it is also not quite as wide as the purposive approach. The diversion from a purely linguistic and strict word based methodology of interpretation of legislation, towards a methodology that makes use of the determination of the intention of the legislature, constitutes an approach that is more coherent with the current constitutional era.³²¹ Where the courts are faced with interpretation challenges, they may still make use of the common law rules

³¹⁸ Murphy 2011 *Advocate SA Bar Journal* 30; Delpont 2014 *Obiter* 67.

³¹⁹ 2012 4 SA 539 (SCA) para f.

³²⁰ 2011 3 SA 148 (SCA) paras 25 to 30.

³²¹ Swanepoel *An Analysis of the Purposive Approach* 35.

of interpretation and the common law presumptions, provided that they are consistent with the Constitution.

It has also been confirmed that in determining the applicable legislation of a specific matter, relating to a specific issue or area of law, it is necessary to consider whether an Act regulates the relevant issue in general or specific terms. It has been established that a general Act could not derogate from the provisions of an Act that specifically relates to matters being determined. In such an instance, the Act that provides for special regulation of the issue at hand must be preferred over the Act that deals with the issue in general terms.

It is of particular importance to differentiate between those situations where no ambiguity exists in a particular statutory provision and those situations where there is a clear ambiguity that compromises the specific statutory interpretation.³²² The Constitutional Court has confirmed that the emerging trend in statutory construction is to consider the context in which the words appear and the purpose of the Act, even where the words to be interpreted are unambiguous.

³²² Swanepoel *An Analysis of the Purposive Approach* 65.

Chapter 4 Law of Lease in South Africa

4.1 Introduction

The purpose of this chapter is to determine the legal position of lease agreements with specific reference to consumer protection in the case of fixed term lease agreements of immovable property. The goal is further to determine the consumer protection offered by the common law of lease. In order to achieve this goal, the discussion of the common law principles of lease is necessitated. After having established the common law principles, it will be necessary to consider whether the statutory provisions of the law of lease offer additional consumer protection. In order to determine this, the legislation impacting on the consumer protection afforded by the statutory provisions is discussed.

Lease agreements are defined as contracts for the lease of property, which are reciprocal agreements between landlords and tenants, in terms of which the landlord binds himself to give the tenant the temporary use and enjoyment of the property, wholly or in part, and the tenant binds himself in turn to pay a sum of money as compensation for that use and enjoyment.³²³ When one deconstructs the aforementioned definition of a lease, the common law *essentialia* can clearly be identified, which will be discussed later in this chapter. It is imperative to provide a discussion of the common law position on leases, as the common-law principles remain the primary source of the rights and duties of landlords and tenants.

On 1 August 2000 the South African government introduced the RHA in all the provinces.³²⁴ However, the RHA is not the only legislation that applies to the contractual relationship between landlords and tenants as the Constitution, RHAA, CPA, PIE and ESTA are also applicable. In this part of the chapter, the writer will discuss the statutory law regulating lease agreements and the effect it has on the common law. Reference to the relevant statutory law on law of lease, which

³²³ Glover *Leases* 9; Bradfield, Kahn and Lehmann *Principles* 137; Kerr *Sale and Lease* 245; De Wet and Van Wyk *Kontraktereg* 313.

³²⁴ Mohamed *Tenant and Landlord in South Africa* 2.

includes the Constitution, RHA, RHAA, CPA, PIE and ESTA will be made. This will be done to ultimately evaluate whether the statutory provisions contained in the mentioned acts afford sufficient protection to consumers.

The focus of this study is on fixed term lease agreements of immovable property, which include lease agreements of residential and commercial immovable property. There is a distinction to be made between commercial and residential immovable property, especially with regard to the legislation applicable thereto.³²⁵ This distinction is important as the legislation applicable has certain implications for both parties. Therefore, the discussion will deal with both commercial and residential lease agreements.

4.2 Common Law relating to law of lease

The law based on tradition and usage that governs the relationship of people is known as the common law, and is therefore regarded as the part of the law that is not found in statutory law.³²⁶ In South Africa, the common law originated in the legal principles, concepts and rules of the Roman-Dutch law, which was also influenced by English law.³²⁷ By virtue of the nature of a contract of lease, the common law dictates the essential elements of a lease³²⁸ to be an agreement in terms whereof the landlord undertakes to give the lessee the use and enjoyment of the property.³²⁹ Such use and enjoyment will be temporary³³⁰ and for which the

³²⁵ The prevailing thought is that in circumstances where the rights of parties concerns a person's residential home, the Constitution (specifically s 26), PIE, ESTA and the RHA will be applicable to residential lease agreements. *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) para 470E. In the case of a commercial lease, the lease agreement does not concern a tenant's residence, which results therein that the requirements of the aforementioned legislation are not applicable (and also because commercial lease agreements are excluded from the application thereof). The provisions of the CPA, to a limited extent, will apply to commercial lease agreements. Smith *Eviction and Rental Claims* 2-12(2).

³²⁶ Mohamed *Tenant and Landlord in South Africa* 4 – 5. Some authors refer to the Common law as "non-statutory" law to distinguish it from statutory law; Kerr *Sale and Lease* 287.

³²⁷ Mohamed *Tenant and Landlord in South Africa* 5.

³²⁸ Bradfield, Kahn and Lehmann *Principles* 137.

³²⁹ The landlord's primary undertaking is to give the tenant the use and enjoyment of the property let, therefore the landlord's first duty is to deliver the property to the tenant on the date agreed upon. Glover *Leases* 32; Kerr *Sale and Lease* 245.

³³⁰ Due to the fact that a contract of lease has a temporary nature, it means that a lease cannot run indefinitely and a lease that is to run forever is not possible and not known in South African law. That does not mean that a contract in which one person grants the use and enjoyment of property to another in perpetuity will be invalid, it simply means that such a

lessee agrees to pay a sum of money (the rent) in return.³³¹ The *naturalia* of a lease are the provisions that flow automatically from the contract as a result of the law. The *naturalia* contribute an element of fairness by ensuring that certain terms apply to a particular class of contract.³³² In terms of a contract of lease, the *naturalia* define the duties and responsibilities of the landlord and tenant.³³³ The *naturalia* provide consumer protection when the parties have not specifically agreed thereto.³³⁴

4.2.1 Fixed-term leases in terms of the common law

In terms of the common law, a fixed-term lease shall terminate on expiration of the agreed period.³³⁵ The period of a fixed term lease is generally conclusively determined from the wording of the agreement where it is set out.³³⁶ If, after expiration of the fixed term period, the tenant remains in occupation of the property, the general rule is that the parties decided for the lease to continue as a monthly lease. In such a case, the lease can be terminated by either party giving the other party one month's notice, or any other notice period which they may

contract is not one of lease but of some other type. Having established that a lease agreement cannot run forever, it is, on the other hand, not a requirement for the validity of a lease that it be entered into for a definite period.

³³¹ Harms *Amler's* 231; Kahn *et al Principles* 71; Glover *Leases* 21, 41; In the matter of *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) at paras 746G–H, it was confirmed that it is an *essentialia* in a lease agreement "that the rent agreed upon by the parties should be fixed in a definite amount (*merces certa*) or be determinable ... "; Bradfield, Kahn and Lehmann *Principles* 140; Kerr *Sale and Lease* 245; Van Eeden *Consumer Protection Law* 463.

³³² Mupangavanhu 2015 *De Jure* 124.

³³³ Examples of the *naturalia* of a lease is the tenant's right to undisturbed enjoyment (*commodus usus*) of the property, the list of defects registered which must be affixed to the lease agreement, the obligations of the tenant and the landlord and the maintenance obligation of the landlord.

³³⁴ A typical example will be in the case where the parties have not agreed to a specific period of notice in the case of rectifying breach of a material term. In such case the *naturalia* will be applicable and the parties will be required to give a reasonable period notice to each other.

³³⁵ Cooper *Landlord and Tenant* 61-65; Maass 2012 *PER* 43.

³³⁶ An example would be the duration term in the agreement being from 1 January 2016 to 31 December 2015 or for a fixed period of one year commencing on 1 February 2016 or for fixed period commencing on 1 February 2016 and extending to 31 January 2017.

have agreed upon in the initial agreement.³³⁷ The notice must be reasonable and will usually depend on periodic payments.³³⁸

4.2.2 *Periodic leases in terms of the common law*

If no definite duration of the lease is specified, but the rent is payable periodically,³³⁹ the lease is referred to as a periodic lease. In such a case the lease runs from period to period.³⁴⁰ The lease period of a periodic lease is definite and may be daily, weekly, monthly or yearly. Either the tenant or landlord can end a periodic lease by notice.³⁴¹ If no notice period has been agreed upon, a reasonable notice period must be given.³⁴² It has been accepted that in the case of a weekly lease, a week's notice would be reasonable.³⁴³ In the case of a monthly lease, a month's notice would be reasonable³⁴⁴ and in the case of an annual lease, three months' notice shall be regarded as reasonable.³⁴⁵

4.2.3 *Breach and cancellation in terms of the Common Law*

In terms of the common law either party may elect to cancel the lease where the other party commits a fundamental breach of contract, or where the lease contains a cancellation clause permitting the aggrieved party to cancel for a particular or specified breach of contract.³⁴⁶ The right to cancel in these circumstances is accepted under general principles of the law of contract.³⁴⁷ When

³³⁷ Cooper *Landlord and Tenant* 61-65; Maass 2012 *PER* 43; Le Roux "Correct and incorrect methods" 4-6.

³³⁸ Glover *Leases* 50(18).

³³⁹ For example daily, weekly, monthly or yearly.

³⁴⁰ Le Roux "Correct and incorrect methods" 4-7; Delpont *South African Property Practice* 253; Cooper *Landlord and Tenant* 61-65; Maass 2012 *PER* 43.

³⁴¹ Cooper *Landlord and Tenant* 61-65; Maass 2012 *PER* 43.

³⁴² What constitutes reasonable notice, shall be contingent on the merits and circumstances of each case. As a general rule the notice must expire at the end of a period for which rent is payable and must afford the lessor a reasonable time to re-let the premises or afford the lessee a reasonable time to find an alternative premises. Bradfield, Kahn and Lehmann *Principles* 186.

³⁴³ Kahn *et al Principles* 85.

³⁴⁴ *Ngwenya v Hindley* 1950 1 SA 839 (C) para 847.

³⁴⁵ *Theron v Joynt* 1950 3 SA 758 (O) para 762B.

³⁴⁶ The aggrieved party must place the defaulting party *in mora*. '*In mora*' is a Latin term used in civil law, which means to be 'in default'. It is used to denote the fact that a party to a contract who is obliged to do something has neglected to perform, and is therefore 'in default'.

³⁴⁷ Kerr *Sale and Lease* 501.

a party fails to perform its contractual obligations or performs late, the aggrieved party may cancel the lease should it be a material breach.

4.2.4 Automatic termination and its consequences in terms of the Common Law

A lease for a fixed period terminates automatically when that period comes to an end. In *Tiopaizi v Bulawayo Municipality*,³⁴⁸ it was stated that:

If the parties agree upon a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time and with it the relationship of lessor and lessee ceases.

A further instance relevant to the automatic termination of fixed term leases and periodic leases is seen in the case of the death of one of the parties. The general rule is that the death of a party does not terminate a lease.³⁴⁹ The rights and obligations of the deceased party pass first to the executor and then to the legatee if he accepts the inheritance or the heir.³⁵⁰

4.2.5 Common law protection and defences

The principle of freedom of contract is rooted in the political and economic philosophies of *laissez-faire* liberalism and individualism.³⁵¹ This traditional model of law is based on the notion that parties generally have the freedom to choose and that parties enjoy more or less the same bargaining power.³⁵² The law of lease, in particular, remains a field where individual autonomy finds prominent expression.³⁵³ One of the problems facing modern law of contract, and especially lease agreements, remains the establishment of the correct balance between freedom and sanctity of contract, and considerations of fairness.³⁵⁴

³⁴⁸ *Tiopaizi v Bulawayo Municipality* 1923 AD 317 325.

³⁴⁹ *Glover Leases* 50(20).

³⁵⁰ *Lorentz v Melle* 1978 3 SA 1044 (T) 1058C. The parties may also include a clause in the lease agreement that the lease shall terminate on the death of one of the parties, in which case, the aforementioned general rule will not be applicable.

³⁵¹ Mupangavanhu 2015 *De Jure* 116; Hutchison and Pretorius *The Law of Contract* 23.

³⁵² Hutchison and Pretorius *The Law of Contract* 24.

³⁵³ Mupangavanhu 2015 *De Jure* 117.

³⁵⁴ Hutchison and Pretorius *The Law of Contract* 22.

For a long time, there was no South African legislation that dealt with unconscionable conduct. There was, however, a need for legislative intervention to protect the interests of the South African citizens when entering into agreements. Due to the fact that South Africa has numerous vulnerable and disadvantaged people, it was necessary to ensure that their rights are adequately protected. The South Africa Law Commission recognised that parties contract with each other with specific expectations, however, despite the expectations, the reality is that the resultant contracts entered into are often unjust or unconscionable. Consequently, in 1998, the South Africa Law Commission had to establish whether any relief could be granted to unfortunate contract parties. The South Africa Law Commission recommended that a court should be able to intervene in a contract where the contract or certain provisions thereof are unreasonable or unconscionable.

This poses the question whether the common law of contract has fully embraced the values of the Constitution to include fairness into contractual relations and to what extent a court should intervene to ensure that fairness and reasonableness of a contract are considered. There is no clear answer to this question. In addition, the common law does not recognise agreements that are contrary to public policy and a court may declare contracts invalid if they are contrary to public policy. Public policy is generally used to balance sanctity of contract and fairness.³⁵⁵ Based on freedom of contract and party autonomy, it is required that there be minimal state intervention in the area of contract law as a result thereof. This interference, according to Bhana and Pieterse,³⁵⁶ is qualified to infuse contract principles with values underlying the Constitution.

In terms of the common law, an agreement should be reasonable and fair. The matter of *Maphango v Aengus Lifestyle Properties (Pty) Ltd* (hereafter *Maphango*),³⁵⁷ concerned fifteen poor tenants, who were reliant on their lease agreements with the landlord for their access to adequate housing. The landlord terminated the lease agreements in terms of the termination clauses contained in

³⁵⁵ Mupangavanhu 2015 *De Jure* 124.

³⁵⁶ Bhana and Pieterse 2005 *SALJ* 889.

³⁵⁷ 2011 5 SA 19 (SCA).

the lease agreements.³⁵⁸ The Supreme Court of Appeal confirmed that an agreement should be reasonable and fair, in finding that reasonableness and fairness are not free-standing requirements for the exercise of a contractual right.³⁵⁹ In order to exercise a contractual right, the terms whereby such rights are given, must constitute fair terms and must be reasonable.³⁶⁰ Fairness and reasonableness can be attained by developing the principle of good faith as it has an active role to play in making sure that the law remains sensitive to the needs of society and with regard to public policy.³⁶¹ However, the Constitutional Court decided that a tenant may legally dispute termination of the lease agreement if the landlord's grounds for termination of the lease establishes an unfair practice, since the tenant's rights or interests are being prejudiced.³⁶² As confirmed by Cameron J, it is the task of the Rental Housing Tribunals to adjudicate all unfair practice disputes, to determine whether termination of the lease should be overturned or upheld, and set aside the termination of the lease.³⁶³ Therefore, a court cannot decline to give effect to the implementation of an agreement merely because that implementation is regarded by the individual judge to be unreasonable and unfair.³⁶⁴

In addition, a tenant has certain defenses in terms of a lease, whereby the rights of a tenant are protected.³⁶⁵ The common law defenses include *huur gaat voor koop*,³⁶⁶ loan for use,³⁶⁷ lien,³⁶⁸ prescription³⁶⁹ and estoppel.³⁷⁰

³⁵⁸ De Villiers 2014 *PELJ* 2167.

³⁵⁹ Paragraph 23. It should be noted that this is not to be construed as a general rule applicable to all contracts.

³⁶⁰ Mupangavanhu 2015 *De Jure* 123.

³⁶¹ The *naturalia* of a contract also contribute an element of fairness by ensuring that certain terms are applicable to a particular class of contract by operation of law; Mupangavanhu 2015 *De Jure* 123.

³⁶² *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 paras 47, 50, 52. This is specific to RHA and not a general rule of the law of contract.

³⁶³ The consequence of this judgment is that the Rental Housing Tribunals are authorized to declare contractually agreed termination clauses null and void, reverse the termination of leases, and restore tenants as lawful occupiers.

³⁶⁴ Paragraph 25.

³⁶⁵ Smith *Eviction and Rental Claims* 1-9.

³⁶⁶ This rule developed in Roman law and Roman-Dutch law and its purpose and effect was to allow the lease to continue for the initially agreed period in the case where the personal right of the lessee was opposed by a stronger third party (the new owner) right. A tenant of a short term lease agreement is protected for the entire duration of the lease, if he is in

4.2.6 Deficiencies of the common law

When dealing with a lease, it is required that the essential elements of a lease be present, where-after the prevailing issue in terms of the common law of lease is the reality of party autonomy and the fact that parties exploit each other to gain the utmost financial advantage in these agreements. The parties are free to decide what terms they wish to include in the lease agreements, which will govern the relationship between them. Certain aspects of consumer protection are built in under the common law and are relevant when a common law lease agreement is terminated, which protects the tenant in some cases.

Though the common law does provide some form of protection and defenses to the tenant, the common law protection does not create real rights to the tenant in all instances. In terms of the common law, a fixed-term lease terminates on expiration of the period of the lease, while in the case of a periodic lease, either the landlord or the tenant can end a periodic tenancy by serving a notice of

occupation of the property leased or if the creditor or successor of the landlord was aware of the lease agreements when such creditor or successor acquired his real right in the property. On the sale of the property the new owner is obliged to recognise the right of occupation of the tenant and to permit the tenant to occupy the leased premises for the full duration of the lease. If the landlord infringe on the rights of the tenant, the tenant may enforce its rights against such third parties by means of *huur gaat voor koop*.

³⁶⁷ A tenant may occupy the lease premises with the owner in terms of a loan for use agreement. The loan should be free from any agreement for reward in terms of an agreement for letting the premises. The position is similar in the case where the tenant occupies the premises in terms of a personal servitude of habitation, in terms whereof he is the holder of the right of habitation.

³⁶⁸ A lien entails a real right in property which entitles the holder of the property to possess or withhold the property from the owner as security until the owner settles the outstanding debt in respect of maintenance or improvement of the property. Two main categories of liens exist, namely an enrichment lien and debtor-creditor liens. A debtor-creditor lien is founded on a contractual debt and is only enforced against a specific debtor. On the other hand, an enrichment lien may be enforced against any person who is the owner of the property and is based on unjustified enrichment. South African tenants have the right to retain possession of the property after the lease is terminated and refuse to vacate the property until the landlord has compensated the tenant for the costs of useful and necessary improvements.

³⁶⁹ The tenant is protected by prescription in terms of the common law. In instances where the tenant has occupied the leased premises for an uninterrupted period of thirty years. The possession of the tenant must be *nec vi nec clam nec precario*. This means that the possession must have been open and not by virtue of a precarious consent or permission.

³⁷⁰ A further common law defence available to the tenant in terms of a lease agreement is estoppel. If an owner of an immovable property institute action to terminate the lease agreement, a tenant may plead that the "owner" has made a representation to the effect that a third party is the owner of the leased property and thereby defeat the claim of the real owner based on the *rei vindicatio*.

termination on the other party.³⁷¹ Unless the parties agree to renew the lease after termination thereof, the legally recognised right of the tenant would automatically end and the status of the tenant's occupation would become unlawful, in both cases.³⁷² This automatic termination of a lease limits the rights of a tenant as the tenant may be evicted from the premises when it is in unlawful occupation of the property. By virtue of the insufficient protection afforded to the residential tenants under the common law, the government enacts statutory law to ensure that the rights of tenants are strengthened.

4.3 Statutory provisions relating to law of lease

Statutory protection for residential tenants existed in South Africa even prior to the adoption of the Constitution, in fact, since 1920, which is when the first of a series of rent control acts were adopted, such as the *Tenants Protection (Temporary) Act 7* of 1920 and *The Rents Act 13* of 1920.³⁷³ Originally, these acts were intended as temporary measures to protect tenants from exorbitant rent increases and eviction due to the severe housing shortages which in turn necessitated protection of tenants by way of additional statutory provisions. Later, it was evident that these acts specifically restricted landlords to increase rentals or to evict tenants and were extremely biased towards the protection of the rights of tenants.³⁷⁴ The *Rent Control Act 80* of 1976 placed even further restrictions on the landlord regarding notices to vacate which must be provided to tenants. The mechanisms used for controlling rent proved controversial, rather than to improve the housing shortages experienced. In fact, it was considered to have exacerbated shortages, because it was recognised that rent control limited market mechanisms that provide an incentive for investors to contribute to the available rental housing stock.³⁷⁵ After extensive public consultation, the *Rent Control Act*

³⁷¹ *Cooper Landlord and Tenant* 61-65.

³⁷² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) paras 7 and 10; Kerr *Sale and Lease* 435.

³⁷³ These acts were modelled on English statutes; Le Roux "Commentary on the Rental Housing Act" 1-3.

³⁷⁴ The *Rent Control Act*, which was aimed at protecting tenants, and the *Group Areas Act 41* of 1950, which forced people to live in categorised "race groups", were later adopted.

³⁷⁵ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) para 36.

80 of 1976 was repealed by and replaced with the RHA.³⁷⁶ The RHA is primarily aimed at the promotion of the provision of rental housing in the housing market in South Africa.³⁷⁷

The RHA is not the only legislation that applies to the contractual relationship between landlords and tenants. The Constitution, RHAA, CPA, PIE, and ESTA are also applicable to the contractual relationship between landlords and tenants. The Constitution grants a progressive right to adequate housing, and enjoins the State to take "legislative and other measures to achieve the progressive realisation of this right".³⁷⁸ The aim of the RHAA confirms the responsibility of government to promote rental housing.³⁷⁹ By virtue of the provisions of PIE and ESTA, tenants are provided statutory protection against arbitrary eviction. The CPA is a form of statutory protection of consumer rights and has an impact on the law of lease. The prevailing aim of all these statutes, with the exception of the CPA, are directed at the protection of rental housing in South Africa.

4.3.1 Constitution and the law of lease

South Africa follows a "one system of law" rule, meaning exactly that, there is only one system of law. This means that the common law and statutory law that interacts with the common law, must promote the spirit purport and objects of the Bill of Rights.³⁸⁰ Accordingly, with regard to the contract of lease, the implication is that the law pertaining to the contract of lease must follow this pattern.³⁸¹ Although the Constitution does not explicitly provide for its influence

³⁷⁶ De la Harpe 2012 *PER* 2.

³⁷⁷ Preamble.

³⁷⁸ Section 26; Glover *Leases* 10.

³⁷⁹ Subsections 2(5) and (6) of the RHAA.

³⁸⁰ The common-law principles continues to inform the law, but only to the extent that it is consistent with the Constitution, as confirmed in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44.

³⁸¹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) requires the consideration of the circumstances in which the Constitutional Court "should intervene to infuse the law of contract with constitutional values". The majority of judges found that "it cannot be gainsaid that the Court should have developed good faith to become enforceable as an independent rule so as to actively promote contractual fairness". It emphasised the importance of the principle of good faith and the desirability of fill the law of contract with constitutional values. Mupangavanhu 2015 *De Jure* 119.

on or application to the law of lease, it has been affected in general terms by the Constitution and legislation enacted under it.

The majority judgment in the matter of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*³⁸² confirmed that it is highly desirable and necessary to infuse the law of contract with constitutional values.³⁸³ In the case of the law of lease, the constitutional value of equality is of particular importance, due to the inequalities in bargaining power in South Africa which are underscored by deeply entrenched social and economic inequalities, occasioned by apartheid and patriarchy.³⁸⁴ Further, the constitutional value of freedom of contract has been observed in the matter of *Afrox Healthcare Bpk v Strydom*³⁸⁵ and expressed in the maxim *pacta sunt servanda*.³⁸⁶ Consequently, there is a necessity for an incremental development of contract principles to achieve a balance between the values of freedom and equality.³⁸⁷

The constitutional provisions which are *in casu* also relevant are section 25 and section 26. In terms of section 25, no one may be deprived of property except if

³⁸² *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71.

³⁸³ The law of contract must be developed in line with the Constitution in order to further the interests of justice. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) the court held that "the constitutional values emphasise the communal nature of society and carries in it the ideas of humaneness, social justice and fairness and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity". Para 71.

³⁸⁴ Mupangavanhu 2015 *De Jure* 118; Interestingly, in the matter of *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2015 ZACC 34, which related to a commercial lease and the constitutional issues of public interest, the right to freedom of trade, occupation and profession (para 17) the court came to a different finding, because of the distinct facts of the case. The Constitutional Court refused to grant leave to appeal because under the common law of lease Mighty Solutions does not have the authority to question the title of Engen as a defence in eviction proceedings after the lawful termination of the lease agreement between the parties. It was confirmed that the facts of this particular case do not call for the development of the common law position, because the rule does not offend the values of our constitutional democracy or the spirit, purport and objects of the Bill of Rights (para 56).

³⁸⁵ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 38.

³⁸⁶ This common law principle demands that contracts entered into voluntarily should be respected and the obligations thereto should be fulfilled. Ramaphoko *The Balance* 6; Party autonomy means that the decision-maker must accept the responsibility of binding himself to a contract. Mupangavanhu 2015 *De Jure* 119.

³⁸⁷ Mupangavanhu 2015 *De Jure* 119.

such deprivation is in terms of law of general application.³⁸⁸ Section 26(1) and section 26(2) of the Constitution grant a progressive right to adequate housing, and enjoins the state to take "legislative and other measures to achieve the progressive realisation of this right".³⁸⁹ In *Maphango*, the Constitutional Court explained the role of government as follows:

The statute..., placing responsibility on government to "promote a stable and growing market" in rental housing that "progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons." This is to be done "by the introduction of incentives, mechanisms and other measures" that improve conditions in the rental housing market, encourage investment and correct distorted patterns of residential settlement.³⁹⁰

The underlying idea is that government should adopt measures to realise this right progressively, which accords to the international guideline on sustainable consumption of housing, or rather sustainability in this case, as explained in chapter 2. It has been submitted that rental housing could play an integral role in the eradication of the housing shortage and ensure sustainability in the housing market in South Africa.³⁹¹ Statutory enactments, such as the RHA, RHAA, PIE and ESTA, are measures that have been adopted as part of the constitutional obligation of the State to progressively realise the right of access to adequate housing.³⁹²

Section 26(3) of the Bill of Rights states that no person may be evicted from his home without a court order, and that no legislation may allow arbitrary evictions.³⁹³ By virtue of the aforesaid, evictions have been an area of particular focus in view of the explicit indicators. The focus on evictions is as a result of the

³⁸⁸ Section 25(1) of the Constitution provides that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

³⁸⁹ Glover *Leases* 10.

³⁹⁰ At para 36, referring to s 2(1)(a) of the RHA; The role of Government is dealt with in chapter 2 of the RHA, which sets out the responsibilities of Government to promote rental housing; Le Roux "Commentary on the Rental Housing Act" 1-6.

³⁹¹ Le Roux "Commentary on the Rental Housing Act" 1-6.

³⁹² Section 26 of the Constitution; In *Kendall Property Investments v Rutgers* 2005 4 All SA 61 (CC), the court held that "it is apparent from its preamble and a reading of the *Rental Housing Act* as a whole, that this legislation is enacted in pursuance of the State's constitutional mandate, as referred to in section 26(2) of the Constitution"; Le Roux "Commentary on the Rental Housing Act" 1-5.

³⁹³ Glover *Leases* 10.

fact that legislation governing leases makes provision for the eviction of tenants. As a result, the courts and the legislature together have created a comprehensive jurisprudence on evictions since the new constitutional dispensation in 1996, which is aimed at balancing the competing interests of landlords and tenants in light of constitutional requirements.³⁹⁴

4.3.2 Rental Housing Act 50 of 1999

The discussion of the two most relevant acts dealing with rental housing will be done separately. The reason for the separate discussion of the RHA and the RHAA is attributed to the important changes which will be brought by the RHAA.

The government has acknowledged the need to promote the provision of rental housing in the housing market in South Africa, and has elected to secure statutory guidelines for contracts of lease of dwellings for residential purposes in the form of the RHA. The objectives of the RHA, as set out in its preamble, are *inter alia*, to require Government to promote the provision of rental housing and the growth of the rental housing market.³⁹⁵ This would facilitate sound relationships between tenants and landlords³⁹⁶ and put Rental Housing Tribunals (hereafter RHT) in place, which must govern conflict resolution in the rental housing sector and deal with unfair practices between landlords and tenants.³⁹⁷

The RHA applies to leases between landlords and tenants and is primarily concerned with the letting of residential property that affects the rights and duties of landlords and tenants.³⁹⁸ The pivotal definition of the RHA is the definition of lease, which is defined as:

...an agreement of lease concluded between a tenant and a landlord in respect of a dwelling for housing purposes.

The term 'landlord' is commonly used to indicate the person who is the owner of a leased dwelling and the term 'tenant' is used to indicate the person who hires a

³⁹⁴ Glover *Leases* 10.

³⁹⁵ Chapter 2 of the RHA.

³⁹⁶ Chapter 3 of the RHA.

³⁹⁷ Chapter 4 of the RHA.

³⁹⁸ Section 1 of the RHA.

dwelling which is leased by a landlord.³⁹⁹ It is immaterial whether the landlord acts in the course of business or not.⁴⁰⁰ A broad definition is given to the word 'dwelling' as it includes:

...any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease.⁴⁰¹

With regard to the definitions used in the RHA, as set out above, it is evident that the application of the RHA is limited to the lease of a dwelling for purposes of housing, being residential purposes.⁴⁰² The objectives of the RHA also emphasise the word 'housing'.⁴⁰³ This means that the RHA does not apply to leases of property for other reasons, such as commercial leases and as such, a commercial lease will not be subject to the provisions of the RHA.⁴⁰⁴ A tenant who leases a property for commercial purposes will accordingly not be afforded the protection in terms of the RHA.

By virtue of the fact that the preamble of the RHA confirms the protection of both tenants and landlords against unfair practices, the crux of consumer protection revolves around the concept of unfair practice. The words of Somyalo JP in the matter of *Bekker v Jika*,⁴⁰⁵ indicate that the RHA seeks to protect both parties from unfair practices and exploitation:

The *Rental Housing Act*, a post-Constitution statute, is also clearly intended to protect the vulnerable. Its preamble clearly embraces the fundamental rights entrenched in the Constitution (ss 25 and 26). It seeks, inter alia, to protect parties from unfair practices and exploitation.

³⁹⁹ In terms of s 1, landlord means "the owner of a dwelling which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sub-lease it" and tenant means "the lessee of a dwelling which is leased by a landlord".

⁴⁰⁰ As opposed to the requirements set in the CPA where it is required that a supplier acts in the ordinary course of business.

⁴⁰¹ Section 1 of the RHA.

⁴⁰² Bradfield, Kahn and Lehmann *Principles* 199.

⁴⁰³ Preamble of the RHA "To define the responsibility of Government in respect of rental housing property; to create mechanisms to promote the provision of rental housing property; to promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market...".

⁴⁰⁴ Glover *Leases* 11.

⁴⁰⁵ 2002 4 SA 508 (E) para 22.

Unfair practice is defined as a "practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord".⁴⁰⁶ The RHA makes provision for remedies in respect of disputes of an unfair practice.⁴⁰⁷ In terms of section 15 of the RHA, regulations may be made regarding certain unfair practices. Based on this provision, regulations and legislation have been made in a number of provinces in order to incorporate provisions in respect of unfair practices⁴⁰⁸ and procedural matters in terms of the RHA.⁴⁰⁹ In terms of section 4(5)(d)(ii) of the RHA, the landlord may, when the lease is terminated, repossess the rental housing property if the tenant refuses to vacate the property, after having obtained a court order. It is required that the termination must be on grounds that do not constitute an unfair practice, as defined above, and must be specified in the lease.

However, if the landlord fails to adhere to these provisions and terminates the agreement on grounds that constitute an unfair practice or on grounds which are not stipulated in the lease, the tenant may challenge the termination of the lease. If the RHT finds that the landlord contravened these provisions, then the RHT is empowered to declare contractually agreed termination clauses null and void, overturn the termination of leases and restore tenants as lawful occupiers.⁴¹⁰ This has brought about that tenants are afforded protection against unfair termination of their leases.

⁴⁰⁶ Section 1 of the RHA.

⁴⁰⁷ Van Eeden *Consumer Protection Law* 459.

⁴⁰⁸ Western Cape Unfair Practices, regulations PN 22 of 2002 1 February 2002, *Western Cape Consumer Affairs (Unfair Business Practices) Act* 10 of 2002, *Eastern Cape Province Consumer Affairs (Unfair Business Practices Act) Act* 5 of 1998, Free State Unfair Practices, regulations, PN 152 of 2003 25 July 2003, *Free State Consumer Affairs (Unfair Business Practices Act) Act* 14 of 1998, Gauteng Unfair Practices, regulations, GN 4004 of 2001, as amended by GN 1472 of 2002, *Gauteng Consumer Affairs (Unfair Business Practices Act) Act* 7 of 1996, *Mpumalanga Consumer Affairs Act* 6 of 1998, *Northern Cape Province Consumer Affairs (Unfair Business Practices Act) Act* 7 of 1996., *Northern Province Consumer Affairs (Unfair Business Practices Act) Act* 8 of 1996, as amended by the *Consumer Affairs (Unfair Business Practices Act) Act* 2 of 2003, *North West Province Consumer Affairs (Unfair Business Practices Act) Act* 4 of 1996 and *Suspension of certain Provinces of the North Wes Consumer Affairs Act* 13 of 1995, *Western Cape Consumer Affairs (Unfair Business Practices) Act* 10 of 2002, *Eastern Cape Province Consumer Affairs (Unfair Business Practices Act) Act* 5 of 1998.

⁴⁰⁹ Free State Rental Housing Tribunal Procedural Regulations, PN 153 of 2003 25 July 2003; North-West Province Rental Housing Tribunal Procedural Regulations, PN 210 of 2001, 5 October 2001; Western Cape Rental Housing Tribunal Procedural and Staff Duties Regulations, PN 22 of 2002, 1 February 2002.

⁴¹⁰ Maass 2012 *PER* 44.

As stated above, the RHA establishes a dispute resolution and redress forum by virtue of the RHT.⁴¹¹ The RHT must govern conflict resolution in the rental housing sector and deal with unfair practices between landlords and tenants. The question that must be answered therefore remains whether the rights of a tenant, in terms of sections 26 and 25(6),⁴¹² would be met if Tribunals were left to decide unfair practice disputes on a case by case basis, in the absence of any actual statutory guidance regarding the legitimate grounds of the landlord for termination and consequential eviction.⁴¹³

In South Africa, previously disadvantaged, low-income tenants in both the private sector and social housing face a housing shortage, because they are unable to access affordable alternative private rental housing once their leases terminate.⁴¹⁴ As the duty to accommodate low-income households remains a state duty, the state should be involved in providing housing for these low-income tenants, either directly as the public landlord or indirectly through the mechanism of social housing, because the evictees can afford to pay rent.⁴¹⁵ Therefore, provinces must adopt a national housing policy which caters specifically for members and groups in society who are vulnerable.⁴¹⁶ Such a national housing policy must be set out in legislation that gives effect to the right to housing. The creation of a framework to develop the content and scope of the right of access to adequate housing will assist in how South African courts can interpret the statutory obligations that flow from the RHA, RHAA, PIE and ESTA to achieve its full potential.

⁴¹¹ Chapter 4 of the RHA.

⁴¹² Section 25(6) states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure which is legally secure.

⁴¹³ Maass 2012 *PER* 47.

⁴¹⁴ *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA) para 2; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 4 SA 337 (SCA) paras 1 and 6 and *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

⁴¹⁵ Maass 2012 *PER* 46; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 224; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 97.

⁴¹⁶ Muller *The Impact of Section 26 of the Constitution* 166.

4.3.2.1 Fixed-term leases in terms of the Rental Housing Act

In the case where a lease has been terminated, and the tenant remains in occupation of the property with the consent of the landlord, the provisions of section 5(5) of the RHA will be applicable, which reads:

If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease.

In light of the fact that it quite often occurs that a tenant remains in occupation of the dwelling after the expiration of the lease, this provision will ensure legal certainty on how to deal with the scenario.⁴¹⁷

4.3.2.2 Periodic leases in terms of the Rental Housing Act

The RHA defines a periodic lease as "a lease for an undetermined period, subject to notice of termination by either party". Mohamed⁴¹⁸ criticises the word 'undetermined' which is used in this definition. According to Mohamed,⁴¹⁹ reference to 'undetermined' is contrary to the legal requirement of a lease agreement under the common law, as discussed above. Because a lease cannot be for an undetermined period, a periodic lease may therefore be defined as:

...a lease that is for a definite period whereby the parties decide, either expressly or tacitly that the period would be daily, weekly, monthly or a yearly lease. There is no lease if the lease period is undecided, undetermined or indefinite. In other words, a lease does not exist if the period is without limit or restriction of time.⁴²⁰

⁴¹⁷ De la Harpe 2012 *PER* 13.

⁴¹⁸ Mohamed *Tenant and Landlord in South Africa* 16.

⁴¹⁹ Mohamed *Tenant and Landlord in South Africa* 16.

⁴²⁰ Mohamed *Tenant and Landlord in South Africa* 112.

The landlord and tenant are entitled to terminate a periodic lease on reasonable notice. This right is absolute and the motive of the lessor for terminating the lease is irrelevant.⁴²¹

4.3.3 Rental Housing Amendment Act 35 of 2014

The RHA has been criticised for its shortcomings relating to enforcement, more specifically, the enforcement of the orders of the RHT.⁴²² The RHAA aims to address the shortcomings of the RHA and will come into effect on a date to be determined by the president in the Government Gazette.⁴²³

In terms of the RHAA, the government is responsible to promote rental housing.⁴²⁴ Similar to the RHA, the RHAA is not applicable to commercial leases for the same reasons provided above. The Minister of Human Settlements must, through means, develop programmes, directives, guidelines and measures to promote rental housing, and monitor and assess the impact of the RHAA on landlords and tenants, particularly on vulnerable and poor tenants.⁴²⁵ In terms of sections 3(5) and 3(6), the government is obliged to fund and develop programmes, to train members of the RHT and other officials appointed in terms of the RHAA. Provincial governments must assist local municipalities that have not yet attained level three accreditation, in establishing Rental Housing Information Offices.⁴²⁶ The newly inserted sections 4A and 4B, respectively, regulate the rights

⁴²¹ Le Roux "Commentary on the Rental Housing Act" 5-2; Bradfield, Kahn and Lehmann *Principles* 186.

⁴²² Bapela and Stoop 2016 *De Rebus* 18; Mohamed 2008 *Property Law Digest* 3; Stoop 2008 *Annual Survey of South African Law* 891; De la Harpe 2012 *PER* 15; According to Mohamed, the RHT are said to have no "teeth" because it the enforcement of its rulings poses certain challenges; Mohamed 2008 *Property Law Digest* 1.

⁴²³ Section 22 of the RHAA; The president has assented to the RHAA. The Preamble of the RHAA states "to amend the *Rental Housing Act, 1999*, so as to substitute and insert certain definitions; to set out the rights and obligations of tenants and landlords in a coherent manner; to require leases to be in writing; to extend the application of Chapter 4 to all provinces; to require MEC's to establish Rental Housing Tribunals; to extend the powers of the Rental Housing Tribunals; to provide for an appeal process; to require all local municipalities to have Rental Housing Information Offices; to provide for norms and standards related to rental housing; to extend offences; and to provide for matters connected therewith".

⁴²⁴ Subsections 2(5) and (6) of the RHAA.

⁴²⁵ This is an amendment of s 2 of the RHA.

⁴²⁶ This is an amendment of s 3 of the RHA.

and obligations of tenants and landlords.⁴²⁷ The provisions pertaining to leases include that all leases must be in writing and failure to reduce a lease to writing constitutes an offence.⁴²⁸ Chapter 4 of the RHAA regulates all aspects of the RHT in terms whereof the application is extended to all provinces of South Africa.⁴²⁹ Section 13 of the RHAA regulates complaints to the RHT and the power of the tribunal with respect to orders has been expanded. In the case of an unfair practice, the tribunal may make any ruling that is fair and just to terminate any unfair practice.⁴³⁰

The RHAA will have an effect on the rights and duties of landlords and tenants, amend certain requirements that lease agreements must comply with, and improve the enforcement of orders by the RHT. These improvements will address the shortcomings of the RHA and in particular, the statutory rights and obligations of landlords and tenants, as well as the provisions of a lease agreement and the powers of the RHT. When the RHAA comes into operation, its provisions are expected to contribute to the realisation of the rights of tenants and promote consumer protection.

4.3.4 Consumer Protection Act

It is not the purpose of this chapter to provide a comprehensive discussion on the CPA and the consumer protection provided in terms thereof, however it is important to bear in mind that the CPA does provide statutory protection to tenants.

Many governments, including South Africa, have introduced mechanisms to deal with consumer exploitation in the form of unfair deceptive market practices and

⁴²⁷ Chapter 3 of the RHA which regulates the relationships between tenants and landlords has been amended substantially by the insertion of ss 4A and 4B of the RHAA. Ss 16(aA) and (aB) of the RHAA provide that interference with the rights and duties of a landlord or tenant in terms of ss 4A and 4B, is an offence punishable with a fine or imprisonment not exceeding two years or both.

⁴²⁸ Subsection 5(1) of the RHA has been replaced; Bapela and Stoop 2016 *De Rebus* 18. A person failing to reduce a lease to writing will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or both such fine and imprisonment.

⁴²⁹ This is an amendment of s 6 of the RHA.

⁴³⁰ Section 13(4)(c) of the RHAA.

contractual exploitation.⁴³¹ The CPA as an instrument is intended to promote fair business practices and to protect consumers from conduct which are unconscionable, unreasonable or unjust.⁴³² The CPA creates a general standard of fairness in section 51, by listing various prohibited terms and terms which are assumed to be unfair thereby amending the common law position.⁴³³ This implies that fixed term lease agreements must be fair and may not contain unfair or prohibited terms. In terms of section 51(1)(h) a contract may not be subject to a provision whereby the consumer forfeits money to the supplier "to which the supplier is not entitled in terms of any other law", which is relevant to the unjust retention of deposits by the supplier or landlord. Further, section 51(1)(i)(i) prohibits a clause in an agreement authorising the entry of any premises for the purposes of taking possession of goods, as such a clause will not have any effect.⁴³⁴ This provision is relevant when the landlord's hypothec for rent comes into play.⁴³⁵ The matter of *Maphango* as discussed above, is a recent case concerning reasonableness and fairness of a lease agreement. Although the CPA prohibits unfair, unreasonable or unjust terms in consumer agreements, it is interesting that the CPA was not considered by the court when determining the matter of fairness and reasonableness.

In respect of the common law, sections 2(10) and 4(2)(a) of the CPA, emphasise the importance to develop the common law in line with the presumption that the legislature has no intention to alter the common law principles, unless such object

⁴³¹ These countries include, *inter alia*, USA (s 5 of the *Federal Trade Commission Act of United States of America* of 1914 prohibits unfair or deceptive acts or practices in or affecting commerce" and s 2-302 of the Uniform Commercial Code relating to unconscionable contracts or clauses), Canada (ss 52-55 and part 7 of the *Canada Competition Act* 1985, including the various Canadian provincial consumer protection laws) and South Africa; Van Eeden *Consumer Protection Law* 5.

⁴³² Part F s 40-47 of the CPA; Mupangavanhu 2015 *De Jure* 118.

⁴³³ Glover *Leases* 14.

⁴³⁴ "An authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates."

⁴³⁵ It is however submitted that this prohibition cannot be considered to affect the exercise of the hypothec of a landlord for arrear rent, which is a process carefully regulated by s 31, automatic rent interdicts and s 32, attachments, of the *Magistrates' Court Act* 32 of 1994. The black list terms are to be read with the grey list terms of *prima facie* unreasonable terms, which are reflected in Regulation 44(3) of the Consumer Protection Regulations. These terms are generally applicable to other types of contracts other than the contract of lease; Glover *Leases* 15; De la Harpe 2012 *PER* 13.

is clearly stated in the particular statute.⁴³⁶ An example of where the CPA acknowledges a common law principle is found in section 2(10), read with section 4(2)(a), where a prohibition of any provision exists, which results in the limitation of any common law remedy that may have been available to the consumer. The duty of the supplier to deliver services at the appropriate time are referred to in section 19 and are in essence the same as the duty under the common law of lease. The provision in section 23 prescribing how fees for services must be described, dovetails with the requirements for rent in terms of the common law.⁴³⁷

The application of the CPA is extended to commercial lease agreements when a tenant is a consumer for purposes of the CPA, who enters into a consumer agreement with a supplier, in the normal course of business and meets the requirements set out in section 5. The CPA will indeed have some unusual, perhaps unintended, consequences for the law of lease. One highly problematic section for the law of lease is section 14, which refers to fixed-term agreements and in this case, fixed term lease agreements for commercial purposes.

The implementation of the CPA has resulted therein that contracting parties can no longer require their agreement to be allowed to function in a legal sphere of its own, outside the encompassing influence of the Constitution and other relevant statutes such as the CPA.

4.3.5 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

The enactment of PIE flows from section 26(1) of the Constitution in the housing and eviction context, which includes a right that guarantees everyone the right of access to adequate housing. The objective of PIE is to ensure that evictions are legalised, sufficient procedural protections are put in place to avoid arbitrary evictions and substantive rights are included for courts to consider whether it will be 'just and equitable' in the circumstances to issue an order for eviction. PIE and

⁴³⁶ De Stadler "Interpretation, purpose and application" 2-9.

⁴³⁷ Glover *Leases* 14.

its procedures are critical to the manner in which lessees who rent residential property⁴³⁸ but fail to return the property at the expiration of the lease and remain in unlawful occupation, may be evicted. By virtue of the provisions of PIE, tenants are therefore provided statutory protection against being arbitrarily evicted.

4.3.6 Extension of Security of Tenure Act 62 of 1997

The *Extension of Security of Tenure Act*⁴³⁹ (ESTA) provides for the protection of an occupier that has had consent⁴⁴⁰ or another right in law to occupy the land in question,⁴⁴¹ in contrast to unlawful occupiers.⁴⁴² ESTA is only applicable to non-urban land or land in an urban area that has been designated for agricultural use.⁴⁴³ Therefore, the rights of occupiers of non-urban land or land in an urban area that has been designated for agricultural use are protected by ESTA, which has a bearing on the statutory provisions of the law of lease.⁴⁴⁴ By virtue of the definitions stated above, the provisions of ESTA are not applicable to commercial leases.

⁴³⁸ The provisions of PIE apply specifically to residential leases, but do not apply to commercial lease agreements; Glover *Leases* 12.

⁴³⁹ *Extension of Security of Tenure Act* 62 of 1997.

⁴⁴⁰ As of 4 February 1997 or thereafter.

⁴⁴¹ Section 1 of ESTA.

⁴⁴² Smith *Eviction and Rental Claims* 4-1. The aim of ESTA is "to provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith".

⁴⁴³ Section 2(1) of ESTA provides "(1) Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established approved, proclaimed or otherwise recognised as such in terms of any law or encircled by such a township or townships. but including— (a) any land within such a township which has been designated for agricultural purposes in terms of any law; and (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment approval proclamation or recognition".

⁴⁴⁴ Mention should also be made to *The Land Reform (Labour Tenants) Act* 3 of 1996 in terms whereof a person provides labour to a landowner in exchange for residential and farming rights on the land. *The Land Reform (Labour Tenants) Act* 3 of 1996 protects labour tenants from arbitrary evictions and provide means in terms whereof the tenant are able to acquire ownership of the land they have lived on. Smith *Eviction and Rental Claims* 6-1.

4.3.7 Efficiency of statutory protection

In general terms, the law of lease as it applies to commercial leases is the common law and to a limited extent, the CPA. The law of lease as it applies to residential leases is the common law, as modified by the RHA, CPA, PIE and ESTA.⁴⁴⁵

It is necessary to determine whether the statutory law addresses the shortcomings of the common law and ultimately whether the tenant is provided adequate protection under the statutory law. Section 2 of the RHA,⁴⁴⁶ provides that the government has to develop a growing market among historically disadvantaged persons by introducing measures that improve the conditions in the rental housing market. This provision strengthens the statutory protection of the tenants' rights relating to housing. Section 4(5)(c)⁴⁴⁷ of the RHA limits the right of a landlord to terminate a lease. It provides that the landlord may only terminate the lease on grounds which do not constitute "an unfair practice and are specified in the lease". This provision may also provide some form of tenure security. The interpretation of the RHA in the matter of *Maphango* highlights a substantial departure from the common law right of the landlord to unilaterally terminate a lease, because the Tribunals are now empowered to scrutinise the landlord's reasons for termination of the lease and in effect, provide essential tenure protection for tenants.⁴⁴⁸

However, it is not sufficient to overcome the shortcomings of the common law relating to security of tenure, at least as far as previously disadvantaged short-

⁴⁴⁵ Bradfield, Kahn and Lehmann *Principles* 137.

⁴⁴⁶ "The government has to promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that improve conditions in the rental housing market; encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas. Facilitate the provision of rental housing in partnership with the private sector. National Government must introduce a policy framework, including norms and standards, on rental housing to give effect to the above."

⁴⁴⁷ "The landlord's rights against the tenant include his or her right to terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease."

⁴⁴⁸ Paragraphs 29-31.

term tenants are concerned.⁴⁴⁹ In the recent cases related to security of tenure, it has been found that the RHA has played no significant role in cases involving the protection of previously disadvantaged short-term tenants.⁴⁵⁰ In principle, these tenants might challenge the present landlord-tenant legislation for being ineffective, to the extent that the legislation does not give effect to their constitutional right to secure tenure envisaged in section 25(6) of the Constitution. In addition, the shortcomings of the common law relating to commercial leases are also not adequately enhanced by statutory law, as the statutes applicable to leases applies to residential leases only.

The consumer protection related to the law of lease as provided by the CPA is confirmed by the right of the consumer to cancel a consumer agreement upon the expiry of its fixed term or at any time by giving the supplier twenty days' written notice of the cancellation, without penalty or charge.⁴⁵¹ The fact that the supplier may cancel the agreement only in circumstances where there has been material breach and the tenant has rectified the failure to remedy that breach in terms of section 14(b)(ii), complements the consumer protection provided by the CPA. Despite the protection afforded to the tenant, certain provisions may however limit the rights of the consumer, which impacts consumer protection negatively. The fact that a lease agreement between two juristic persons, regardless of their asset value or annual turnover, is excluded from the provisions of section 14, results therein that small juristic consumers do not enjoy the protection afforded to consumers who are natural persons.⁴⁵² Further, the limitation of the duration of a fixed term agreement to a period of 24 months, also limits the rights of tenants

⁴⁴⁹ In terms of s 25(6) of the Constitution: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

⁴⁵⁰ *The Occupiers, Shulana court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA).

⁴⁵¹ Section 14(2)(b) of the CPA.

⁴⁵² Section 14(1) of the CPA.

and infringe on their consumer protection rights.⁴⁵³ With respect to the common law protection provided under the CPA, it has been indicated that the CPA acknowledges the common law principles as is seen in section 2(10) and section 4(2)(a).⁴⁵⁴ It must be borne in mind that any transaction that falls outside the ambit of the RHA and CPA for purposes of this study, remains to be governed by the common law.⁴⁵⁵ The predicament in this regard is that, as stated above, the consumer protection measures relating to leases under the common law are insufficient and ineffective to provide adequate protection to tenants.

4.4 Conclusion

In this chapter the consumer protection offered by the common law was discussed in line with the common law principles of lease, which remain the primary source of the rights and duties of landlords and tenants. The statutory provisions of the law of lease offers additional consumer protection and therefore the legislation impacting on the consumer protection afforded by the statutory provisions were discussed. The legal instruments of statutory protection of the rights of tenants are, in a broad sense, the Constitution and the constitutional values. The specific regulation of the rental housing market, which regulates the rights of tenants and the relationship between a landlord and tenant, are specific in the form of the RHA, RHAA, PIE and ESTA. By generally applicable consumer protection legislation, the CPA also contains statutory provisions regulating consumer protection relating to lease agreements of immovable property.

In the main, the RHA constitutes the principal legislation dealing with residential leases and the rights of tenants and landlords and provides for dispute resolution by the RHT, while it also functions as a mechanism to balance the rights of

⁴⁵³ Regulation 5 of the Consumer Protection Regulations; S 14(2)(a) provides that "if a consumer agreement is for a fixed term that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement".

⁴⁵⁴ De Stadler "Interpretation, purpose and application" 2-9. Ss 2(10) and 4(2)(a) emphasise the importance to develop the common law in line with the presumption that the legislature has no intention to alter the common law principles, unless such object is clearly stated in the particular statute; The duty of the supplier to deliver services at the appropriate time are referred to in s 19, are in essence the same as the duty under the common law of lease. The provision in s 23 prescribing how fees for services must be described, dovetails with the requirements for rent in terms of the common law.

⁴⁵⁵ Melville *The Consumer Protection Act* 22.

landowners and tenants.⁴⁵⁶ The RHA does to a limited extent, restate some of the common law rights and duties of landlords and tenants. However, it amended the common law as set out in section 4 of the RHA.⁴⁵⁷ The RHA does have some shortcomings that will be addressed by the RHAA when it comes into effect. The RHAA will have a substantial impact on the rental industry, the rights and duties of landlords and tenants, amend certain requirements that lease agreements must comply with and will improve the enforcement of orders by the RHT.

⁴⁵⁶ Bapela and Stoop 2016 *De Rebus* 18.

⁴⁵⁷ Bradfield, Kahn and Lehmann *Principles* 199; Mohamed *Tenant and Landlord in South Africa* 7.

Chapter 5 Consumer Protection in the European Union and Ontario

5.1 Introduction

In what follows, the aim is a discussion of how the EU and Ontario deal with the general principles of consumer protection, international and regional instruments on consumer protection, lease agreements of immovable property and also fixed term lease agreements. In order to achieve this goal, it must be considered how consumer protection is dealt with in context of the guidelines of consumer protection identified in chapter 2, and more specifically, vulnerable consumers, consumer redress and sustainable consumption. A distinction will be made between lease agreements for residential purposes and lease agreements for commercial purposes. The jurisdictions selected for purposes of this study are the EU and Ontario, which is a state in Canada. The reason for this selection can be attributed to the fact that both the EU and Canada have a longer history of consumer protection and the regulation thereof than South Africa. Both have well developed consumer protection legislation. The South African consumer protection legislation was influenced by the EU and Canadian legal frameworks.⁴⁵⁸

5.2 An Overview of Consumer Law and Law of Lease in the European Union

5.2.1 Introduction and background of the European Economic Community, the European Community and the European Union

During 1939 and 1945, Europe was particularly divided and the growing antagonism among the victorious allies were largely attributed to the effects of

⁴⁵⁸ The *Competition Act* 1998 fundamentally reformed South African competition legislation and strengthened the powers of the competition authorities in line with the European Union, United States of America and Canadian models. An example is the plain language movement incorporated in s 22 of the CPA.

the Second World War.⁴⁵⁹ One year after the Second World War, Churchill proposed a 'sovereign remedy' to recreate the European family and to provide a structure under which it could dwell in peace, freedom and safety to ensure economic cooperation.⁴⁶⁰ The notion was that countries that trade with one another become economically interdependent, which would lead to less conflict between such countries.⁴⁶¹ In 1951, the Treaty of Paris was signed, which created the European Coal and Steel Community (ECSC). The ECSC was an international community based on supra nationalism and international law, and was intended to assist the economy of Europe and inhibit future war by integrating its members.⁴⁶² In 1956, the Intergovernmental Conference on the Common Market and Euratom was held, during which the Treaty of Rome was discussed.⁴⁶³

Consequently, in 1958, the European Economic Community (EEC) was created by the Treaty of Rome of 1957.⁴⁶⁴ The EEC was a regional organisation which had the objective to create economic integration among its Member States. The EEC commenced as a purely economic union and evolved into an organisation spanning different policy areas.⁴⁶⁵

After the Resolution,⁴⁶⁶ the European Commission published a White Paper on the completion of the internal market in 1985.⁴⁶⁷ It identified legislative proposals and set a timetable for implementation of the proposals for the attainment of the internal market.⁴⁶⁸ To ensure implementation of the proposals of the White Paper,

⁴⁵⁹ European Union 2016 <https://europa.eu>. The war was triggered by conflicts between European states. At the heart of the war was the conflict between Germany and its European neighbours.

⁴⁶⁰ Speech of Winston Churchill on 19 September 1946.

⁴⁶¹ Ramsay *Consumer law and policy* 41.

⁴⁶² The six founding countries are Belgium, France, West Germany, Italy, Luxembourg and the Netherlands.

⁴⁶³ European Union 2016 <https://europa.eu>.

⁴⁶⁴ The Treaty of Rome 1957 was renamed by the Lisbon Treaty, as the Treaty on the functioning of the European Union, and is still enforce.

⁴⁶⁵ Such as climate, environment and health, external relations and security, justice and migration.

⁴⁶⁶ Council Resolution on Completion of the Internal Market COM/85/0310 of 14 June 1985.

⁴⁶⁷ Lockett and Egan *Unfair Terms* 2.

⁴⁶⁸ The governments of all member states approved the White Paper and had to implement the measures identified therein within a reasonable time.

the *Single European Act*⁴⁶⁹ was introduced and ratified by each Member State.⁴⁷⁰ With the acceptance of the *Single European Act*⁴⁷¹ in 1987, all activities of the European Community were required to support a high level of consumer protection for European consumers.⁴⁷² The *Single European Act*⁴⁷³ deals with the position of the consumer in the Treaty establishing the European Coal and Steel Community. In terms of Article 100(A)⁴⁷⁴ the Commission is entitled to propose methods to protect consumers to ensure that all activities of the European Community support a 'high level of protection'.⁴⁷⁵ These methods involve action programmes that include consumer representation, consumer information, product safety and transactions.

Due to the expansion of the policy areas, the name of the ECC changed to the EC in 1993 to indicate that it covered a broader range than economic policy.⁴⁷⁶ The EC was abolished by the 2009 Treaty of Lisbon. The EU⁴⁷⁷ was formed in 1993 and developed to achieve peace and social justice for its people and the global community. It was confirmed that the EU must take measures to achieve the goals set out in the Directives and to support, enhance and monitor the policy pursued by the Member States.⁴⁷⁸ To assist herewith, a decision was taken to set up a Consumer Committee.⁴⁷⁹

⁴⁶⁹ *Single European Act* 25 I.L.M. 506, [O.J. 87 (L 169) 1], 17 February 1986.

⁴⁷⁰ The real normative breakthrough in the EU came with the *Single European Act*, which modified the Treaty of Rome by strengthening the role of the Economic and Social Committee, to whom were attributed powers to protect the consumers.

⁴⁷¹ Article 18 of the *Single European Act* (OJ L 169, 1987), signed on 28 February 1986, and entered into force on 1 July 1987.

⁴⁷² Fischer 2014 *Wisconsin International Law Journal* 317.

⁴⁷³ The *Single European Act* (OJ L 169, 1987).

⁴⁷⁴ Subsequently a 95 and today a 114.

⁴⁷⁵ Lockett and Egan *Unfair Terms* 2.

⁴⁷⁶ This name change was as a result of the enforcement of the Maastricht Treaty in 1993.

⁴⁷⁷ Article 1 of the Constitution established the EU, reflecting the will of the citizens and States of Europe to build a common future. The EU is an economic and political union of its Members. It is based on the rule of law, which entails that all its functions are based on treaties, which are voluntarily and democratically agreed to by its Member States.

⁴⁷⁸ This was confirmed by Council Resolution on Union Consumer Policy 1999 O.J. C296/1. The measures taken on by the Union must be adopted by Parliament and Council in accordance with the normal legislative procedure set out in Article 294 TFEU, after consultation with the ESC.

⁴⁷⁹ Decision of 13 June 1995 O.J. L162/37; Mathijsen *A Guide* 499.

The history of consumer protection in the EEC starts with the Council Resolution of 15 April 1975.⁴⁸⁰ It concerned a preliminary programme of the EEC for an information and protection policy for consumers, which was followed by an action programme on this consumer policy.⁴⁸¹ This Council Resolution made reference to an extensive field of operation.⁴⁸² It was during 2002 that the Commission issued the Consumer Policy Strategy, duly endorsed by the Council, which aimed to achieve a high level of consumer protection, enforce consumer protection rules in an effective manner and involve consumer organisations in Union policies.⁴⁸³ In 2009, the institutions of the EC were absorbed into the wider framework of the EU and the EC ceased to exist. In addition, during 2009, the Commission established a European Consumer Consultative Group which had to be consulted on all issues relating to consumer interests at Union level.⁴⁸⁴

It is evident that consumer policy has developed substantially to a Union policy, whereby the interests of consumers constitute a major part of the responsibilities and activities of the Union. Consumer protection is important in the EU because it aims to protect consumers in the EU with the goal to reduce inequalities, abolish unfair practices, promote safety and to improve the living standards of EU consumers in general.⁴⁸⁵

⁴⁸⁰ Council Resolution 1975 O.J. C92/1 of 14 April 1975; Mathijsen *A Guide* 496; The European Council generally makes decisions by means of reaching consensus. In some specific cases outlined in the EU treaties, the European Council makes decisions by unanimity or by qualified majority.

⁴⁸¹ Mathijsen *A Guide* 496.

⁴⁸² Some of the areas were introduced into the EC Treaty by the EU Treaty by virtue of Article 169 of the TFEU, such as the protection of health, safety (Directive 88/378 on safety of toys 1988 O.J. L187/1) and economic interests of the consumer, and the right to information and education and to organise in order to safeguard the interests of consumers. Directive 98/27 on injunctions for the protection of consumers' interests 1998 O.J. L166/51, which was repealed by Directive 09/22 2009 O.J. L110/30 on the protection of the collective interests of consumers. There are also other areas which have not been explicitly referred to in the Treaty such as the protection of the economic interests (misleading advertising (Unfair Commercial Directive 2005 O.J. L149/23), unfair commercial practices (Directive 2005/29 2005 O.J. L149/22), distance contracts and termination rights (Directive 97/7 1997 O.J. L144/19 as amended by Unfair Commercial Practices Directive 2009 O.J. L187/5), sale of consumer goods and associated guarantees (Directive 99/44 1999 O.J. L171/12), electronic commerce (Directive 2000/31 2000 O.J. L178/1), redress. Mathijsen *A Guide* 496-297.

⁴⁸³ 2002 O.J. C137/2 and the endorsement by the Council in terms of 2003 O.J. C11/1.

⁴⁸⁴ 2009 O.J. L244/21.

⁴⁸⁵ Mathijsen *A Guide* 496.

5.2.2 European Union and International Consumer Protection

It is generally agreed that the origins, powers and objectives of the EU are to be found in public international law.⁴⁸⁶ The EU is influenced by international instruments and bodies,⁴⁸⁷ which contribute to ensuring that there is increasing cross-border co-operation between public agencies within the EU.⁴⁸⁸ These international bodies may not be directly concerned with consumers, but its initiatives concern the protection of consumers on international level. In the absence of any international instruments regulating consumer protection in the context of lease agreements, a discussion of consumer protection on regional level is necessitated.

5.2.3 European Union and Regional Consumer Protection

The European Union is not founded on a constitution, but on two international treaties. The founding constitutional⁴⁸⁹ documents in the EU are the Treaty

⁴⁸⁶ Moorhead 2012 *European Journal of Legal Studies* 13-142; International treaties.

⁴⁸⁷ Such as the World Trade Organization, OECD Committee on Consumer Protection, the United Nations Commission on International Trade Law, International Consumer Protection and Enforcement Network and Consumers International. The World Trade Organization is the only global international organization dealing with the rules of trade between nations and was designed to encourage freer trade among its members with its focus on harmonizing regulatory standards to facilitate international trade. Howells, Ramsay and Wilhelmsson "Consumer Law" 14-15; International bodies such as the OECD Committee on Consumer Protection has issued guidelines on electronic commerce and dispute resolution. The United Nations Commission on International Trade Law is not directly concerned with consumers, but its initiatives concerns consumers, such as electronic commerce. International networks of experts like International Consumer Protection and Enforcement Network develops best practices in enforcement norms or international bodies which exemplify an increasingly salient approach in which domestic regulators play the central role. International Consumer Protection and Enforcement Network is an organization composed of consumer protection authorities from over 60 countries, which aims to: "Protect consumers' economic interests around the world, share information about cross-border commercial activities that may affect consumer welfare and encourage global cooperation among law enforcement agencies". <https://www.icpen.org/> Ramsay *Consumer law and policy* 49. Consumers International is an international group which represents the interest of consumers, which brings together the politics of necessity and the politics of affluence in consumer policy.

⁴⁸⁸ Regulation 2006/2004 of the EC requires substantial information exchange and co-operation between public agencies within the EU. This should be set within the context of the international network of enforcers such as the International Consumer Protection and Enforcement Network. Howells, Ramsay and Wilhelmsson "Consumer Law" 13.

⁴⁸⁹ The two treaties are not referred to as constitutions, but they do provide for a primary corpus of law that incorporates constitutional principles.

establishing the European Economic Community⁴⁹⁰ and the Treaty on the Functioning of the European Union.⁴⁹¹ Both these constituting legal sources have been agreed to by all the Member States. They establish the institutions of the EU, list their powers and responsibilities, and describe the areas in which the EU can legislate with Regulations or Directives. The Treaty establishing EEC proposed to create a single market for goods, services and capital across the member states of the EEC. It focuses primarily on principles of democracy and human rights.

The core values of the EU is promoting consumer rights, prosperity and wellbeing and these values are reflected in the laws of the EU.⁴⁹² This is also confirmed by Article 38 of the Charter of Fundamental Rights of the European Union,⁴⁹³ which sets out a high level of consumer protection.⁴⁹⁴ There are other rights relevant to the legitimate needs of consumers, which are set out in the Charter.⁴⁹⁵ This means that Member States should provide a high level of consumer protection in their own legislation and authorities in each Member State are responsible for

⁴⁹⁰ Also known as the Treaty of Rome was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. It came into force on 1 January 1958 and remains one of the two most important treaties in the modern-day EU.

⁴⁹¹ The Treaties are the primary legislation, which form the basis or ground rules for all EU action.

⁴⁹² United Nations Conference on Trade and Development Manual on Consumer Protection 2016 20.

⁴⁹³ 2007/C 303/01; Article 38 concerns the protection of consumers.

⁴⁹⁴ "Union policies shall ensure a high level of consumer protection." Article 169 and Article 153 of the European Union Consolidated Treaty on the Functioning of the European Union set out a high level of consumer protection. (Article 169.1 of the consolidated version of the Treaty on the Functioning of the European Union; 26.10.2012 C 326/47. "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests" and Article 153 outlines additional consumer protection for EU citizens of the European Union Consolidated Treaty on the Functioning of the European Union. It states that the EU must contribute to the protection of the safety and economic interests of consumers and promote their right to information, education and to organize themselves. It appears to create a standard of protection to all European consumers, while individual Member States are allowed to provide additional protection. This extension is given to Member States because national consumer protection laws may in some instances provide a higher level of protection to consumers, which confirms the goals of the instruments discussed above; Fischer 2014 *Wisconsin International Law Journal* 317.

⁴⁹⁵ Such as "Respect for Privacy (Article 7), Protection of Personal Data (Article 8), Freedom of Association (Article 12), Access to Health Services (Article 35) and Public Utility Services (Article 36)". United Nations Conference on Trade and Development Manual on Consumer Protection 2016 20.

implementing EU legislation in national law and enforcing it properly.⁴⁹⁶ Thereby, each Member State is, in addition to their own legal systems, also bound by EU law and international law. While the EU has played a major role in promoting and harmonising consumer law, nation states have also contributed to the establishment of consumer protection.⁴⁹⁷

Residential tenancy law, by virtue of the historical context, is one of the areas famous for containing mandatory provisions, which are aimed at the protection of residential tenants.⁴⁹⁸ The historical development of housing tenures in the EU can be ascribed, in the first instance, to industrialization, as it triggered shifts in demand and consequently, supply of housing tenure. Secondly, World War II resulted in shortages of supply due to the destruction of dwellings as well as limited construction during that period. The modern EU housing policy was severely influenced by social and political developments, particularly confronting a dismal housing situation in many EU countries and the rise and fall of state socialism in most European Countries. Private tenancy law affects the lives of European citizens, who do not own their own houses and are dependent on rented housing on a daily basis. In the EU, tenants enjoy two types of protection, firstly as dwellers, based on the protection of homes from interference by others, and secondly as tenants, which is based on the protection in terms of a tenancy agreement. Neither of these types of protection provide an absolute right to stay in the premises. Moreover, they cannot provide such an absolute right within the system created by the ECHR because this system aims to achieve a fair balance

⁴⁹⁶ Therefore, each EU Member State has its own law and legal system.

⁴⁹⁷ Hondius 2006 *Sydney Law Review* 93.

⁴⁹⁸ In the Republic of Ireland, the private rented sector is regulated by the *Republic of Ireland's Residential Tenancies Act 27 of 2004* (hereafter IRTA) which sets out a detailed legislative framework governing private residential tenancies. In terms of s 5(1) of the IRTA, private landlords may grant fixed term or periodic tenancies. In terms of the IRTA leases may provide greater security of tenure for tenants, but a lease cannot detract from the security of tenure measure specified in the IRTA. The Unfair Terms in Consumer Contracts Regulations are applicable to lease agreements in Ireland by virtue of the European Directive on Unfair Terms In Consumer Contracts, Council Directive 93/13/EEC of 5 April 1993, which was transposed into Irish law by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27/1995) as amended by S.I. No. 307/2000 and S.I. No. 160/2013).

between various rights and public interests.⁴⁹⁹ This necessitates a discussion of 'housing' in the EU context.

Housing⁵⁰⁰ and housing rights as such are not officially an EU competence. However, there are still several tools at EU level which relate in one way or another to the right of access to housing.⁵⁰¹ These include the Charter of Fundamental Rights of the European Union,⁵⁰² Treaty of the EU,⁵⁰³ Anti-discrimination legislation⁵⁰⁴ and the EU Agency for Fundamental Rights.⁵⁰⁵ The primary protection for housing rights in the EU is contained in the Charter of Fundamental Rights of the European Union.⁵⁰⁶ While the right of access to

⁴⁹⁹ Altes 2016 *Elsevier* 83.

⁵⁰⁰ The CESCR specified those requirements in a General Comment (1991) by introducing seven conditions in respect of housing. It states that housing is required to be safe for the tenant; equipped with working basic amenities; affordable; habitable; accessible; located allowing access to employment, public services and other social facilities; and suitable for size and culturally for the occupant and family

⁵⁰¹ Olds 2010 *WILJ* 173.

⁵⁰² Charter of Fundamental Rights of the European Union was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. The Charter of Fundamental Rights of the European Union did not have full legal effect until the entry into force of the Treaty of Lisbon on 1 December 2009. All EU Member States signed and ratified the Charter of Fundamental Rights of the European Union. Article 31 of the European Social Charter, provides the most explicit right to housing within Europe and endorses the right to housing. It states that, to ensure the effective implementation of the right to housing, the parties undertake to take the necessary steps to provide adequate housing, reduce homelessness and provide housing to those who cannot afford it.

⁵⁰³ The Treaty of the EU is an international treaty between the EU member states which sets out the constitutional basis of the EU. The Treaty of the EU established the various EU institutions, procedures and objectives.

⁵⁰⁴ The International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171, the International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 660 UNTS 195, the Convention on the Elimination of Discrimination Against Women (CEDAW) 1249 UNTS 13, the Convention Against Torture 1465 UNTS 85, the Convention on the Rights of the Child (CRC) 1577 UNTS 3 and the most recently created human rights treaty at UN level, the 2006 Convention on the Rights of Persons with Disabilities UN Doc. A/61/611, 13 December 2006; One of the most persistent missions of the EU is the fight against discrimination and therefore discrimination, whether direct or indirect, is considered a crime under European law. Originally the emphasis was placed on preventing discrimination on grounds of gender or nationality. However, since 1999, discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation have also been prohibited; Fribergh and Kjaerum *European Non-Discrimination Law* 14.

⁵⁰⁵ The EU Agency for Fundamental Rights is a body of the European Union established in 2007, which purpose is to provide the relevant institutions and authorities of the Community and its Member States when implementing Community law with assistance relating to fundamental rights.

⁵⁰⁶ 2007/C 303/01. This housing right has now been incorporated into the Treaty of Lisbon under Article 6. While it does not contain a specific right to housing, the preamble confirms the

housing has been recognised throughout Europe in international and regional human rights agreements,⁵⁰⁷ it must be enforced nationally in order to ensure that it has real significance, which entails enforcement by the Member States.⁵⁰⁸ Even though national governments⁵⁰⁹ have recognised their duty to ensure that all citizens have adequate housing by signing and ratifying instruments,⁵¹⁰ there are numerous countries in the EU that recognise the right to adequate housing in their constitution.⁵¹¹ The inclusion of the right to housing in the constitutions of some Member States ensures that the right to housing has real significance. The implication hereof will be explained when linked with consumer protection in the

necessity to strengthen the protection of fundamental rights as it is devoted to social security and social assistance. Article 34(3) on social security and social assistance states "In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the Rules laid down by Community law and national laws and practices".

⁵⁰⁷ The International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171, the International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, Treaty of the EU.

⁵⁰⁸ Olds 2010 *WILJ* 171; Article 2 of the ICESCR recognize the need for action at the national level to realise the right to housing.

⁵⁰⁹ Netherlands has one of the most impressive housing policies in Europe and was one of the first countries that introduced the right to housing in its constitution whereby the right is enforced (a 22(2) of the *Constitution of the Kingdom of the Netherlands* 2008). The Netherlands has taken steps within its financial resources to sustain the right to housing by virtue of the *Housing Allowance Act* 1997, which provides a way that all those in need can get the financial assistance to find housing and by means of the *Rent Tribunal Act*, which empowers citizens to contest unreasonable rents. Both these acts clearly articulate rights, which guarantee affordable housing to citizens and make it possible for Dutch courts to interpret the right to housing broadly. Carliner and Marya 2016 *Joint Center for Housing Studies of Harvard University* 5; Olds 2010 *WILJ* 183 -186; Priemus 2004 *International Journal of Urban and Regional Research* 708.

⁵¹⁰ The International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171, the International Covenant on Economic Social and Cultural Rights (ICESCR) 993 UNTS 3, Treaty of the EU.

⁵¹¹ Oxley and Smith *Housing Policy and Rented Housing in Europe* 15; S 47 of the *Spanish Constitution* 1978 establishes the right of all Spanish citizens to decent and adequate housing and public authorities are required to create the essential conditions and issue appropriate regulations to ensure that this right can be realised. "All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town-planning policies of public bodies."; A 22(2) of the *Constitution of the Kingdom of the Netherlands* 2008 states " It shall be the concern of the authorities to provide sufficient living accommodation."; A 65 of the *Constitution of the Portuguese Republic* Seventh Revision, 2005 states "Everyone shall possess the right for themselves and their family to have an adequately sized dwelling that provides them with hygienic and comfortable conditions and preserves personal and family privacy."

following paragraph when the relevant Regulations and Directives are discussed.⁵¹²

As opposed to the significant protection measures of residential leases, very limited protection is provided in respect of commercial leases in the EU. The rules on commercial leases are considerably more liberal as the perceived need to protect the weaker party is not required for transactions between businesses.⁵¹³ Instead, both landlord and tenant are seen as equally strong partners who are presumed to understand the law and have equal power when negotiating the terms and conditions of the commercial lease agreement.⁵¹⁴ The definition of consumer in various instruments adds to the exclusion of many commercial lease agreements from consumer protection, as will be discussed hereunder. However, fundamental rights are laid down in the European Convention on Human Rights and although many of these rights are available exclusively to humans, the right to property is available to a juristic person too.⁵¹⁵ The right to a home under Article 8⁵¹⁶ has been held to apply to business premises and therefore commercial tenants may well be able to take advantage of a number of rights contained in the European Convention on Human Rights.⁵¹⁷

*5.2.4 Regulations, Directives and Recommendations*⁵¹⁸

Regulations are adopted by the Council and must be applied in its entirety across the EU.⁵¹⁹ Due to the binding nature of Regulations, they are directly applicable in

⁵¹² In this case the Directive 2000/43/EC of 29 June 2000 OJ L 180, 19.7.2000.

⁵¹³ UIPI 2013 <http://uipi.com>.

⁵¹⁴ UIPI 2013 <http://uipi.com>.

⁵¹⁵ *National & Provincial B.S. v U.K.* 1998 25 E.H.R.R. 127.

⁵¹⁶ Article 8 states Right to respect for private and family life. It confirms "Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

⁵¹⁷ Sparks *A New Landlord and Tenant* 638.

⁵¹⁸ Regulations, directives and decisions are referred to as secondary legislation and are derived from the principles and objectives set out in the Treaties.

⁵¹⁹ A regulation issued by the EU will have immediate force of law without the need to put in place implementing legislation however member states may have to amend other laws in order to make sure that there are not contradictions.

all Member States and implemented automatically on a national basis.⁵²⁰ Due to the fact that Member States have no discretion whether to apply the Regulations or not, they are regarded as the most powerful legislative measures to give effect to the EU's institutions. In order to give further effect to the EU Consumer Rights Directive, Directive 2011/83/EU on Consumer Rights of the European Parliament and of the Council of 25 October 2011 on Consumer Rights (hereafter the Consumer Directive), the European Parliament and the Council established The EU Regulations on Consumer Information, Cancellation and Other Rights 2013 (hereafter the Consumer Regulations), which came into force on 13 June 2014.⁵²¹ Member States must, so far as is reasonable, consider what is done in other Member States to implement the Consumer Directive, which is discussed below. The Consumer Regulations apply to contracts between traders and consumers. In terms of the Consumer Regulations, 'trader' means:

...a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.⁵²²

And 'consumer' means:

...an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.⁵²³

In terms of the Consumer Regulations, the consumer must be an individual (a natural person) and a juristic person can never be a consumer. The individual must be acting for purposes wholly or mainly outside that individual's trade, business, craft or profession.

The Consumer Regulations do not apply to a contract, to the extent that it is "for the creation of immovable property or of rights in immovable property".⁵²⁴ According to the Implementing Guidance, the creation of rights in immovable

⁵²⁰ Lockett and Egan *Unfair Terms* 5.

⁵²¹ The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (hereafter the Regulations) Part 1, s 1(2) these Regulations apply in relation to contracts entered into on or after that date.

⁵²² Part 1, s 4.

⁵²³ Part 1, s 4.

⁵²⁴ Part 1, s 6(1)(c)

property exclusion, applies to contracts between the landlord and tenant.⁵²⁵ However, the Consumer Regulations do apply to associated services such as marketing, vetting and inventory listing by estate agents. The Consumer Regulations do also not apply to a contract, to the extent that it is "for rental of accommodation for residential purposes".⁵²⁶

Directives are legislative acts that set out objectives that all EU Member States must achieve.⁵²⁷ The process through which Directives are adopted is either by way of the consultation procedure or the co-operation procedure.⁵²⁸ However, it is up to the individual countries to devise their own laws on how to reach these minimum objectives.⁵²⁹ Even though Directives do not have direct application, they have direct effect. What this means is that national legislation that complies with Directives must be promulgated in the country and that Member States must implement their own national legislative or administrative procedures to give effect to the Directive.⁵³⁰

The EU Consumer Directive, which was adopted on 25 October 2011, is applicable to Member States since 13 June 2014. It strengthens consumer rights by

⁵²⁵ These exclusions reflect those in the Consumer Rights Directive Article 3(3)(e) Consumer Rights Directive). BIS Implementing Guidance 8.

⁵²⁶ Part 1, s 6(1)(d)

⁵²⁷ A directive is minimum harmonisation and does not have direct force of law. This means that each member state issues implementing legislation in their country which can go further than the directive but must contain the minimum requirements set out in the Directive. In most areas the Directive is a maximum harmonisation measure, which means that member states cannot introduce rules which are more, or less, stringent.

⁵²⁸ The procedure followed is dependent on the Treaty of Rome article upon which the Directive is based. In terms of the consultation procedure a Directive is initially proposed by either the Commission or Council where after the Council requests the European Parliament and the ESC for an opinion on the proposed legislation. Once the opinions have been obtained, it is produced to the Council, who has the authority to adopt it. The co-operation procedure is initially the same as the consultation procedure, but the opinions are obtained from the European Parliament and the ESC on the draft legislation presented to it in the initial process. The Commission then has the opportunity to amend it, where after the Council, if in agreement, adopts the common position on the draft legislation. The common position on the draft legislation is then sent to the European Parliament for a second reading. This process repeats itself once more and finally the draft Directive is returned to the Council, which has three months to make a final decision on the acceptance thereof. Lockett and Egan *Unfair Terms* 6.

⁵²⁹ Ramsay *Consumer law and policy* 47.

⁵³⁰ Lockett and Egan *Unfair Terms* 5.

providing consumers with the same rights across the EU.⁵³¹ It is crucial that consumers are afforded the same rights, because not affording all consumer the same rights will lead to inconsistencies owing to the prevailing unequal bargaining power between a consumer and a supplier.⁵³² In terms of this Consumer Directive, certain types of contracts are exempt from the scope of the application of the Consumer Directive and are listed under Article 3(3).⁵³³ It confirms that the Consumer Directive shall not apply to contracts "for the creation, acquisition or transfer of rights in immovable property"⁵³⁴ and "for rental of accommodation for residential purposes."⁵³⁵ In the case of commercial leases, rights are created and acquired in immovable property and are therefore also excluded from the application of the Consumer Directive.⁵³⁶

The rental of accommodation for residential purposes is also excluded from the scope of the Consumer Directive.⁵³⁷ However, the rental of accommodation for non-residential purposes is covered by the Consumer Directive, but it should not be confused with rental for commercial purposes.⁵³⁸ A commercial lease is further

⁵³¹ Directive 2011/83/EU on consumer rights. The goal of these regulations is to implement Directive 2011/83/EU of the European Parliament and of the Council of the 25 October 2011 on consumer rights which amends Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repeals Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁵³² The Directive strikes a balance between consumer protection and business competitiveness, which is crucial in light of the inconsistencies apparent in the market. There are often various reasons why the supplier and the consumer are not in an equal bargaining position. One of the reasons may be the very structure of the market. For example, when there are monopolies such as parastatals, or few suppliers in that specific market due to excessive dominance by a private supplier, the consumer is often disadvantaged by lack of choice. There may also be disparate levels of knowledge or consumer literacy specific to certain sectors in the market. The Directive was issued because the unmitigated free markets and contractual freedom were not sufficient to guarantee the protection of the consumer. The European Commission 2014 <http://ec.europa.eu>; Official Journal of the European Union 2011 <http://eurlex.europa.eu>.

⁵³³ The exception under subparagraph (e) concerns the general category of immovable property, including land, whilst subsection (f) deals with buildings.

⁵³⁴ Article 3(3)(e) of the Directive "for the creation, acquisition or transfer of immovable property or of rights in immovable property" (own emphasis added).

⁵³⁵ Article 3(3)(f) of the Directive "for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes" (own emphasis added).

⁵³⁶ Sparks *A New Landlord and Tenant* 638.

⁵³⁷ Weatherill *EU Consumer Law and Policy* 111.

⁵³⁸ European Commission, DG Justice 2014 <http://ec.europa.eu>. The Directorate-General for Justice of the European Commission published DG Justice Guidance Document concerning the Consumer Rights Directive on 13 June 2014 (Commission Guidance). The non-application of

excluded by virtue of the definition of a consumer⁵³⁹ in article 2(1). It is excluded because contracts of this nature are unsuited for regulation by the wide EU laws along the lines proposed in the Consumer Directive and more suited to regulation tailored to circumstances and requirements in individual Member States.⁵⁴⁰ A further reason is because housing, as a concept, is different in each country, resulting therein that the needs and recourses to fulfil those needs within a specific country may differ.⁵⁴¹

Owing to the coordination of national laws effected by the Consumer Directive, it is reiterated that Member States may apply legislative provisions similar to those in the Consumer Directive to contracts that fall outside the scope of the Consumer Directive.⁵⁴² Member States may accordingly adopt legislation with respect to agreements for rental of accommodation for residential purposes and legislation with respect to agreements for commercial property, which accords with the provisions in the Consumer Directive.⁵⁴³ Therefore, there is no Directive governing residential or commercial lease agreements in the EU and the Member States are required to adopt their own legislation to govern this specific area of law.

Directive 2000/43/EC⁵⁴⁴ promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin. It specifically

the Directive to contracts for the rental of residential accommodation does not cover rentals for non-residential purposes. For example, renting a parking space or a party hall is subject to the Directive.

⁵³⁹ "Consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

⁵⁴⁰ Recital 26 of Directive 2011/83/EU on Consumer Rights confirms that "contracts related to the transfer of immovable property or of rights in immovable property or to the creation or acquisition of such immovable property or rights, ... as well as contracts for the rental of accommodation for residential purposes are already subject to a number of specific requirements in national legislation. Those contracts include for instance sales of immovable property still to be developed and hire-purchase. The provisions of this Directive are not appropriate to those contracts, which should be therefore excluded from its scope."... (own emphasis added); Department of Jobs, Enterprise and Innovation 2013 <https://www.djei.ie>.

⁵⁴¹ European Commission, DG Justice 2014 <http://ec.europa.eu>.

⁵⁴² This is in line with Article 153 of the Consolidated Treaty on the Functioning of the European Union, mentioned previously.

⁵⁴³ European Commission, DG Justice 2014 <http://ec.europa.eu>. See the judgment of the Court of Justice of the European Union of 26 November 2015 in *SIA 'Maxima Latvija' v Konkurences padome* Case C-345/14 para 9, 12 not yet reported, ECLI:EU:C:2015:784. Available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=993640>.

⁵⁴⁴ Directive 2000/43/EC of 29 June 2000 OJ L 180, 19.7.2000

applies to all persons, including the public and private sectors and public bodies. Article 3(1)(h) of the Directive is applicable in relation to "access to and supply of goods and services which are available to the public, including housing".⁵⁴⁵ Here, the right of access to adequate housing discussed earlier is linked to consumer protection. Regarding the previous paragraph, Member States can adopt their own legislation to govern the implementation of the principle of equal treatment in the access to and supply of goods and services.

The guideline on effective dispute resolution and redress was discussed as one of the principles of the 2015 UNGCP. The rationale for dispute resolution and redress flows from the idea that the substantive consumer protection laws alone are not sufficient to protect consumers, as consumers need the ability to access the rights enshrined by these laws.⁵⁴⁶ The EU provides for a Directive on Alternative Dispute Resolution, Directive 2013/11/EU of 21 May 2013 (ADR Directive).⁵⁴⁷ In terms of the ADR Directive, consumers can settle a dispute out-of-court through an Alternative Dispute Resolution procedure.⁵⁴⁸ The objective of the ADR Directive is to ensure that consumers have access to ADR, and to assist consumers and traders the opportunity to resolve their contractual disputes out-of-court at a low cost in a quick and easy way.⁵⁴⁹

In addition to Regulations and Directives, the EU has the power to adopt Recommendations. The Recommendations do not have binding force and are intended to influence Member States in their regulatory approaches. Recommendations may be adopted by the Commission and the Council.⁵⁵⁰ When the Commission issues a Recommendation to an EU country, the authorities of that EU country may adopt the Recommendation to improve and assist judicial

⁵⁴⁵ Article 3(1)(h) of Directive 2000/43/EC "shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: ... (h) access to and supply of goods and services which are available to the public, including housing.

⁵⁴⁶ Spiller and Tokeley "Individual Consumer Redress" 482.

⁵⁴⁷ The ADR Directive is in line with the 2015 UNGCP on the "availability of effective consumer dispute resolution and redress".

⁵⁴⁸ Such procedures are an alternative to resolving disputes before a court. The consumer may still approach a court should it wish to do so.

⁵⁴⁹ The EU consumer policy protects the rights of consumers through legislation and assist consumers in resolving disputes with suppliers fast and efficiently through alternative dispute resolution and European Consumer Centres.

⁵⁵⁰ Lockett and Egan *Unfair Terms* 6.

services across borders. A recommendation allows the EU to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed.

5.2.5 Notion of 'consumer' and lease agreements of immovable property in the EU

It is important to note that under EU law, the notion of 'consumer' found in the vast majority of EU legislation, despite being phrased in different ways, defines a consumer as a natural person who is acting outside the scope of an economic activity.⁵⁵¹ The majority of EU directives define the consumer as a "natural person who is acting for the purposes which are outside his trade, business and profession".⁵⁵² Therefore, the notion of consumer does not generally extend to legal persons. The European Court of Justice⁵⁵³ found that the term 'consumer' refers exclusively to 'physical persons'.⁵⁵⁴ Consequently, it was held that EU definitions of consumer must not be given a broader interpretation. However, this does not preclude Member States from adopting a wider definition in national legislation in areas covered by minimum harmonisation.

A major concern is the position of small and medium enterprises, because, generally, small and medium enterprises are not treated as consumers under EU law.⁵⁵⁵ However, some Member States extend consumer protection rules to cover small and medium enterprises too.⁵⁵⁶ It is argued by some Member States that

⁵⁵¹ Article 2(b) of Directive 93/13/EEC must be interpreted as referring solely to natural persons; Mathijssen *A Guide* 498. The Package Travel Directive has a more far-reaching exception which uses a broad notion of "consumer", whereby companies and business travellers are included as consumers.

⁵⁵² Such a definition can be found in the consumer sale, unfair terms, e-commerce, distance marketing of consumer financial services and payment services directives as well as in the new consumer credit directive.

⁵⁵³ The European Court of Justice is the supreme judicial body which interprets EU law, and develops it through precedent.

⁵⁵⁴ *Cape and Idealservice MN RE* (Joined Cases C-541/99 *Cape Snc v Idealservice Srl* and C-542/99 *Idealservice MN RE Sas v OMAI Srl*) 2001 E.C.R. I-9049.

⁵⁵⁵ Mańko 2013 *Library of the European Parliament* 2

⁵⁵⁶ In Netherlands the application is extended, as small enterprises with up to 49 employees may rely on certain rules on unfair terms in contracts on an equal footing with consumers. In France, courts grant consumer protection to sole traders, as long as the contract in question does not relate directly to the business activity of the trader. In the United Kingdom,

some juristic persons such as associations, must be treated as consumers owing to their lack of bargaining power and experience. This assertion is made because in many instances, these juristic persons are in the same position as individual consumers, having no expertise on many issues. The consumer which the Legislature had in mind is a vulnerable person with limited or no literacy skills and in need of information. However, this is not the consumer defined in the European Directives, and especially not decided in the case-law of the European Court of Justice.⁵⁵⁷ This has encouraged a number of Member States to extend the definition of consumer and to include legal persons.⁵⁵⁸

The difference between how State Members regulate residential and commercial tenancies is vast. Residential tenancies are often the subject of protective provisions designed to assist the weaker party, being the tenant, in contractual negotiations with their landlords. In the case of commercial tenancies, they are much more liberal with more contractual freedoms for both parties.⁵⁵⁹ The rationale between the distinctions is that commercial tenants are presumed to be in a much stronger position in tenancy negotiations than tenants of residential property and therefore residential tenants require additional legislative protection by virtue of the importance of right of access to housing.⁵⁶⁰ The limiting definition of consumer by the European Court of Justice has the effect that vulnerable juristic persons, who are also in need of protection, are excluded from the consumer protection measures.

companies may rely on consumer protection against unfair terms when goods are purchased which they do not ordinarily deal with.

⁵⁵⁷ In the matter of *Gruber v Bay Wa AG* C-464/01: 2005 ECR I-439; 2005 I L Pr 12, the Court adopted a limiting consumer notion. The Court defined a consumer transaction as "a transaction which is concluded by a natural person, who is acting for purposes outside his or her trade or profession, on the one hand, and a party, who is acting for purposes within his or her trade or profession, on the other". This definition is in line with the consumer notion in the several consumer protection Directives of the EU; Hondius 2006 *Sydney Law Review* 94.

⁵⁵⁸ In Austria and Czech Republic, if an association acquiring goods or services for private use they will be regarded as a consumer. In Greece and Spain, if an association acts as a final user, they will be regarded as a consumer.

⁵⁵⁹ <http://www.eui.eu>.

⁵⁶⁰ European Policy Brief 2015 <https://ec.europa.eu>; UIPI 2013 <http://uipi.com>.

5.2.6 Conclusion

The Consumer Regulations apply to contracts between traders and consumers, as defined. The consumer must be an individual (a natural person) and a juristic person is therefore excluded. The Consumer Regulations do not apply to a contract for the creation of immovable property or of rights in immovable property, as in the case of commercial leases, or for rental of accommodation for residential purposes in the case of residential leases. Further, in terms of the Consumer Directive the rental of accommodation for residential purposes and commercial lease agreements are also excluded as agreements for the creation, acquisition or transfer of rights in immovable property and for rental of accommodation for residential purposes. In the EU, as stated above, small juristic persons acting outside their area of expertise are generally not included in the definition of consumer, and this is a major concern, as these small enterprises also need protection.

5.3 An Overview of Consumer Law and Law of Lease in Ontario, Canada

5.3.1 Introduction and Background

Canada is a federal state, established by virtue of the *British North America Act* 1867, which was amended by the Canadian supreme law, the *Constitution Act*.⁵⁶¹ The Federation consists of ten provinces⁵⁶² and three territories⁵⁶³ governed independently, with legislative authority to endorse legislation binding upon that particular jurisdiction.⁵⁶⁴

The history of consumer protection in Canada is characterised by a strong consumer movement aimed at reducing and preventing competition.⁵⁶⁵ As a

⁵⁶¹ *Canada Constitution Acts, 1867 to 1982* and specifically s 52(1) of the *Constitution Act* 1982; Jansen Van Vuuren *A Legal Comparison* 35.

⁵⁶² Ontario, British Columbia, Alberta, New Brunswick, Manitoba, Newfoundland and Labrador, Nova Scotia, , Prince Edward Island, Quebec and Saskatchewan.

⁵⁶³ Yukon and Northwest Territories from which Nunavut was separated in 1999.

⁵⁶⁴ Jansen van Vuuren *A Legal Comparison* 35.

⁵⁶⁵ This consumer movement was indicated by the *Combines Investigation Act* 1910 covered trusts, mergers and monopolies operating to the common detriment.

result, the need developed to regulate and maintain the resale price of goods and to prohibit collusive agreements.⁵⁶⁶ This later resulted in the necessity to regulate misleading advertisements and other deceptive practices in the area of consumer protection.⁵⁶⁷ The current consumer protection legislative framework comprises a multitude of federal and provincial statutes. On Federal level, the main instrument relevant to consumer protection is, inter alia, the *Canadian Competition Act* 1985.⁵⁶⁸ On provincial level, consumer protection legislation in the form of consumer protection acts is enacted.⁵⁶⁹

In Ontario, the government introduced mechanisms to deal with unfair or deceptive market practices and contractual exploitation, whereby consumers, including vulnerable consumers, are protected.⁵⁷⁰ This is analogous to what the CPA aims to do in South Africa.⁵⁷¹ The significant challenges that are experienced

⁵⁶⁶ In 1923, a new *Combines Investigation Act* was passed, which was directed against "preventing, limiting or lessening unduly the manufacture or production of an article, or to enhance unreasonable the price thereof, to restrain or injure trade or commerce in relation to any article formation of a merger or monopoly and discrimination as between purchasers". Towards the end of World War I there was strong public demand to regulate rising prices because consumers were being exploited by suppliers. This demand resulted in the enactment of the *Board of Commerce Act* 1919 and the *Combines and Fair Prices Act* 1919. Khemani and Stanbury *Historical Perspectives* 255.

⁵⁶⁷ The *Combines Investigation Act* 1976 dealt with misleading advertisements, other deceptive practices and made the provisions of Unfair Trade Practices more stringent.

⁵⁶⁸ It forbids misleading advertising and deceptive marketing practices and other practices that are offensive to fair competition among businesses and to the interests of consumers. In addition to the *Competition Act*, the *Criminal Code*, the *Food and Drugs Act* and the *Trade-Marks Act* all contain provisions aimed at protecting consumers from false advertising, fraud and similar practices.

⁵⁶⁹ In addition to the Consumer Protection Acts adopted by the provinces, it also adopted legislation which relates to consumer protection in the form of Sales of Goods Acts, Consumer Protection Acts, Unfair Business Practices or Fair Trading Acts, Direct Sales Acts, Prepaid Services Acts and Unconscionable Transactions Acts.

⁵⁷⁰ In this regard, government has taken action and introduced legislation to deal with unfair or deceptive market practices and contractual exploitation to ensure that consumers are protected from these unfair or deceptive market practices and contractual exploitation. The types of action include "the provision or regulation of information, the creation of civil liability rules, the use of taxes or subsidies (in the case tenancy agreements), direct regulation or standard-setting and the direct provision of the product or service by the government" as confirmed by Yee 1989 *Journal of Law and Social Policy* 49.

⁵⁷¹ In Canada this is regulated by ss 52-55 part 7 of the *Canadian Competition Act* 1985, and various Canadian provincial consumer protection laws, including Chapter III of *Ontario's Consumer Protection Act*, prohibiting false, misleading, deceptive and unconscionable representations (s 14), unconscionable representation (s 15). To bring the discussion in line with the discussion on the EU, in the EU, this is noted in the European Union, Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 5 April 1993. European Parliament and Council, Directive 2005/29/EC concerning unfair business to consumer commercial practices in the internal market; Regulation (EC) No 2006/2004 of the European

by the vulnerable populations in Canada include poverty, limited education, disability, and limited social capital.⁵⁷² Each challenge creates specific issues in relation to consumer protection as it results in increased potential for financial abuse to arise and limits access to financial autonomy.

Historically there was insufficient regulation of both residential and commercial tenancies in Canada.⁵⁷³ The lack of regulation of tenancies is confirmed by the fact there has been a longstanding appreciation in Canada legislation of the uneven power relationship between landlords and tenants.⁵⁷⁴ This legislative reform has established the foundation for the continuous residential tenancy legislation that was derived from the initial *Landlord and Tenant Amendment Act* 1994 that was followed by the previous *Tenant Protection Act* 1997 to finally, the current *Residential Tenancy Act* 2006 (RTA). Owing to this legislative reform, several Canadian provinces have adopted legislation that regulates residential tenancy that have, as a principal focus, the protection of security of tenure of residential tenants.⁵⁷⁵ According to Fleming,⁵⁷⁶ prior to the enactment of Part IV of the *Landlord and Tenant Act* in 1969, tenancies law was the same for residential and commercial tenancies.⁵⁷⁷ The split between residential tenancies

Parliament and of the Council, Article 6 (misleading actions) and Article 7 (misleading omissions) of the EU's Unfair Commercial Practices Directive. Following the principle that contracts should be fair to consumers, unfair contractual terms are prohibited in the European Union.

⁵⁷² Churchill "What is insurance for the poor?" 12.

⁵⁷³ Historically, landlord and tenant law grew out of the old English feudal system that has had an immense impact on social ordering to this day. Is that Legal 2005 <http://www.isthatlegal.ca>.

⁵⁷⁴ In light of the fact that the position in Ontario will be discussed, it is only prudent to reflect on the lack of regulation in Ontario. This notion commenced with the publication of the Ontario Law Reform Commission's investigation and subsequent report in 1968, the "Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies, Ontario Law Reform Commission, 1968" which lead to the introduction of legislative reform in 1970.

⁵⁷⁵ *Amicus Curiae* heads of argument in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) 35. Available at <http://blogs.sun.ac.za/seraj/files/2013/10/AM-Maphango.pdf>.

⁵⁷⁶ Fleming *Residential Tenancies* 2-3.

⁵⁷⁷ In terms of the *Landlord and Tenant Act* 1969 tenants in Ontario could only be evicted after the opportunity for a hearing, and they could not be evicted for attempting to enforce their legal rights. Prior to the enactment of Part IV of the *Landlord and Tenant Act*, a tenancy could be terminated by the expiry of a lease (whether or not any other grounds for termination existed) and a landlord could often retake possession for breach of covenant without bothering to first obtain a court order. Following the 1972 revisions, further significant changes were made to Part IV in 1975 (anticipating the final 1976 report of the OLRC), which included extending the protection in Part IV to mobile home sites, and requiring 90 days' written notice of a rent increase. Most importantly, the 1975 changes restricted

law and the law pertaining to commercial tenancies was as a result of the introduction of security of tenure for tenants. Today, commercial leases are governed by separate statutes, which cater specifically for the nature of commercial lease agreements and commercial tenancies.⁵⁷⁸

5.3.2 Ontario and International Consumer Protection

The Canadian Supreme Court developed an approach in terms whereof international law and human rights norms are embraced,⁵⁷⁹ particularly in the course of defining the guarantees contained in the Canadian Charter of Rights and Freedoms⁵⁸⁰ (hereafter the Charter) and have adhered to the various main human rights treaties of the United Nations system.⁵⁸¹ Canada, as a party to the international human right treaties, agreed to take appropriate steps to ensure the realisation of the rights contained therein.⁵⁸² Canada is a dualist state, which means that the international treaties to which Canada has adhered do not alter

termination of a tenancy to specific allowable grounds. Real security of tenure for residential tenants arrived with the 1975 reforms; Benghoune *The legal protection* 21.

⁵⁷⁸ The *Commercial Tenancies Act* 1990 regulates commercial lease agreements.

⁵⁷⁹ Bayefsky *International Human Rights Law* 317-318; Oliphant 2014 *Appeal* 105.

⁵⁸⁰ Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

⁵⁸¹ The date of Canada's ratification or accession to each instrument is indicated in brackets. These instruments include the Convention on the Prevention and Punishment of the Crime of Genocide (1952), the International Convention on the Elimination of All Forms of Racial Discrimination (1970), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976), the International Covenant on Civil and Political Rights (ICCPR) (1976), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1981), the Optional Protocol to CEDAW (complaint mechanism) (2002), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), the Convention on the Rights of the Child (CRC) (1991), the Optional Protocol to the CRC on the Involvement of Children in armed conflict (2000), the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2005) and the Convention on the Rights of Persons with Disabilities (2010). These international instruments have all created treaty bodies, which are committees in the various human rights fields. The treaty bodies make non-binding decisions and are tasked to monitor state compliance with the rights set out in the international treaties.

⁵⁸² Treaty-making in Canada is an Executive act, which is derived from the Royal Prerogative and approval by Parliament is not required for Canada to enter into international treaties. It merely requires signature by diplomatic representatives and ratification by the Governor in Council. These international treaties were adopted in an attempt to make more specific the far-reaching principles expressed in the Universal Declaration of Human Rights, GA Res. 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71. The general rule is that on ratification of a treaty by a State, its provisions are legally binding on that State as a matter of international law as it creates a binding international law obligation on the State to ensure that the treaty is implemented throughout the State at every level. Van Ert *Using International Law* 234.

the domestic law of Canada. In order to have direct legal effect, international treaty law must be incorporated into Canadian domestic law through legislation. Thus, even though Canada has signed and ratified international covenants, it may give the illusion of compliance therewith, but in reality it has no legal effect on its domestic law. There are no international treaties which, in the main, regulate consumer protection. With respect to housing rights, Canada has made efforts and progress regarding the right of access to adequate housing.⁵⁸³ This was done to ensure that Canadians are afforded a recognised right of access to adequate housing.

5.3.3 Ontario and Regional Consumer Protection

The North American Free Trade Agreement (hereafter NAFTA) between the United States, Canada and Mexico makes a few references to consumer protection as an area of competency for NAFTA institutions.⁵⁸⁴ The most significant provision in NAFTA for consumers is contained in the Basic Rights and Obligations set out in Article 904. It allows Member States to adopt standards-related measures relating to the protection of consumers, which must be non-discriminatory and essential for pursuing legitimate objectives.⁵⁸⁵ NAFTA

⁵⁸³ The UDHR (signed by Canada on 10 December 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)) and ICESCR (ratified by Canada in 1976 (993 U.N.T.S. 3, Can. T.S. 1976 No. 46) recognise a right to housing, which were adopted by Canada.

⁵⁸⁴ The North American Free Trade Agreement (NAFTA) came into effect on 1 January 1994. It created one of the largest free trade zones and lays down the foundations for strong economic growth the United States, Canada and Mexico. Nehf "Principles of Consumer Protection in the North American Free Trade Agreement" (August 6, 2008) 1. References to consumers protection are made in eleven sections of NAFTA and are found in in Annexure 311 (country of origin marking), Annexure 314 (export taxes), Article 415 (sales promotion, marketing, and consumer rebates), Annex 803.3 (administration of emergency action proceedings), Chapter 9, Article 904 (basic rights and obligations of member states), Article 906 (compatibility and equivalence), Article 909 (notification, publication, and provision of information), Article 913 (Committee on Standards-Related Measures); Article 915 (which defines "legitimate objective" to include consumer protection), Chapter 12, Annex 1210 (it provides that licensing standards can take into account consumer protection concerns) and Chapter 21, Article 2101 (general exceptions that allow member states to adopt or maintain non-discriminatory measures that may be non-tariff barriers). These references are relevant for the integration and consumer protection on regional level.

⁵⁸⁵ "1. Each member state may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another member state or the provision of a service by a service provider of another member state that fails to comply with the applicable requirements of

institutions do not have authority to create binding laws, nor do they have the authority to adopt other legal measures that apply directly in the three NAFTA countries.⁵⁸⁶ Therefore, their ability to take consumer initiatives at the regional level is limited to enabling discussion and reaching agreements that national authorities can implement by modifying their national laws, regulations and policies. There are no specific goals of regional consumer policy set forth in NAFTA, other than general encouragement to harmonize consumer policy.⁵⁸⁷ The primary focus of the treaty relates to food safety, transport safety (cross-border transport of goods), labeling requirements, working conditions, and environmental issues. To the extent that reference is made to consumer protection, it is mentioned as an area in which Member States have freedom to impose their own limits on trade as a legitimate public policy objective.⁵⁸⁸

On regional level, there are no specific provisions relating to the issues crucial to this dissertation. The issue of sustainable consumption is however addressed in general terms as it provides for, 'sustainability', which has not been an important area of discussion for NAFTA institutions. However, the concept of 'sustainability' is contained in Article 915, which provides that Member States are allowed to adopt or maintain national laws for the purpose of achieving 'sustainable development'.⁵⁸⁹

those measures or to complete the member state's approval procedures."; And "2. Notwithstanding any other provision of this Chapter, each member state may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers, establish the levels of protection that it considers appropriate in accordance with Article 907(2)."; And "4...(a) the demonstrable purpose of the measure is to achieve a legitimate objective; and..."

⁵⁸⁶ Nehf "Principles of Consumer Protection in the North American Free Trade Agreement" (August 6, 2008) 4.

⁵⁸⁷ The harmonization of consumer protection is encouraged in general terms if there is a barrier to trade, to seek agreements on mutual recognition of standards and to see that those efforts are consistent with international standards.

⁵⁸⁸ Nehf "Principles of Consumer Protection in the North American Free Trade Agreement" (August 6, 2008) 1.

⁵⁸⁹ Article 915 "(c) sustainable development, considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification but does not include the protection of domestic production"; Nehf "Principles of Consumer Protection in the North American Free Trade Agreement" (August 6, 2008) 8.

5.3.4 Ontario and National Consumer Protection

The previous Constitution of Canada, *Constitution Act 1867*, did not include a Bill of Rights that governments had to adhere to. In 1960, the Federal Government passed the Canadian Bill of Rights,⁵⁹⁰ which was also not incorporated into the *Constitution Act 1867*, with the result that the Canadian Bill of Rights had no more power than any other law and it only applied to legislation on federal level, not provincial level. These shortcomings subsequently led to the Charter of Rights and Freedoms being adopted and included in the *Constitution Act 1982*. The Canadian Charter of Rights and Freedoms was established as a clear constitutional Bill of Rights for all Canadians and governed the application of both federal and provincial law in Canada.⁵⁹¹ Due to the similarities in wording between the Canadian Charter of Rights and Freedoms and the international human rights instruments, which were discussed in chapter 2, it can be argued that section 15 may be understood as providing for the implementation of legislation with the purpose of fulfilling the international obligations of Canada under a particular convention.⁵⁹²

Canadian provinces do not have provincial constitutions, but other statutes could be used to establish a right to assistance with respect to the right to accommodation.⁵⁹³ This right reflects the notion of sustainable consumption, which includes the sustainable consumption of housing. There is a responsibility on the federal government to enter into agreements with any province to ensure that every person in need will be provided with adequate assistance.⁵⁹⁴ In an

⁵⁹⁰ The Canadian Bill of Rights was enacted by Parliament of Canada on 10 August 1960.

⁵⁹¹ Under the Canadian Charter of Rights and Freedoms, the individual interests are more directly protected than in the *Constitution Act 1982*.

⁵⁹² The recent history of the Canadian Charter of Rights and Freedom and ICESCR coupled with the similarity of subject matter and language, support the belief that the Canadian Parliament did not intend to deviate from the international legal obligations pertaining to the right to housing. Parkdale Community Legal Services 1988 *Journal of Law and Social Policy* 57; Cohen and Bayefsky 1983 *The Canadian Bar Review* 303.

⁵⁹³ The *General Welfare Assistance Act* R.S.O. 1980, c.188 or Regulations do not contain any provisions which explicitly state that homeless people should not receive assistance. In fact, s 7(1) states "a municipality shall provide assistance in accordance with the regulations to any person in need who resides in the municipality and who is eligible for assistance".

⁵⁹⁴ The Canada Assistance Plan R.S.C. 1966, C. 45 stipulates that the Federal government will enter into an agreement with any province to ensure that every person in need will be provided with adequate assistance. The agreements shall provide that the province will

effort to further protect rights relating to accommodation, residential tenancy legislation has been adopted by various provinces.

At federal level, the Department of Consumer and Corporate Affairs is mandated to promote the fair and efficient operation of the marketplace in Canada. Within this Department, the Bureau of Consumer Affairs establishes and enforces regulations and promotes policies to protect the interest of consumers and promote fairness in the marketplace.⁵⁹⁵ It operates within various branches, one being the general description of consumer protection that is a division of its competence.

In conclusion, the regulation of consumer protection and leases on national level are not significant. Functionally, the regulation of these areas of law must be done within each individual state.⁵⁹⁶ This calls for a reflection on the position of consumer protection and the regulation of fixed term lease agreements in the state of Ontario.

5.3.5 Province of Ontario

The development of the laws and increased social pressure led politicians to realize that comprehensive human rights legislation needed to be set up to safeguard the rights of individuals. Ontario became the first jurisdiction in Canada to officially recognise the moral, social and economic effects of discrimination by enacting a Human Rights Code and establishing a human rights commission, which expressly includes provisions relating to discrimination in the provision of 'accommodation'.⁵⁹⁷ Similar in scope to the anti-discrimination provisions of the

provide financial aid or other assistance to any person in need in an amount that takes into account his or her basic needs, budgetary requirements, and available resources. Budgetary requirements are defined in s 2(a) and includes shelter.

⁵⁹⁵ Campbell *International Consumer Protection* CAN I-4.

⁵⁹⁶ The British Columbia Court of Appeal, in the matter of *Unlu v Air Canada* 2013 BCCA 112 (CanLII), decided that the British Columbia provincial government was within its legislative competence to legislate in the generally federally regulated airline business in the practice of airlines and taxes in respect thereof; Law 2013 *Travel Law Quarterly* 189.

⁵⁹⁷ Section 2(1) "Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance." S 2(2) "Every person who occupies accommodation has a right to freedom from harassment by the landlord

Canadian Charter of Rights and Freedom,⁵⁹⁸ is the Ontario Human Rights Code.⁵⁹⁹ The Ontario Human Rights Code is quasi-constitutional legislation which has primacy over all other legislation in Ontario, unless the other legislation explicitly states that it applies despite the provisions of the Ontario Human Rights Code.⁶⁰⁰

Ontario is one of the Canadian provinces that has tenancy legislation with the primary focus as the protection of security of tenure of residential and commercial tenants.⁶⁰¹ The reasoning behind tenancy regulation was the recognition of the natural imbalance in power between landlords and residential and commercial tenants, who are normally the weaker party in the relationship. Secondly, tenants should enjoy security of tenure because, in the case of a residential lease, it is a crucial part of adequate accommodation and in the case of a commercial lease, it is important on economic grounds in order to earn an income.⁶⁰² Thirdly, the grounds on which a landlord is permitted to terminate a lease may justifiably be restricted in order to give effect to the right to housing in the case of residential tenancies and security of tenure in the case of commercial tenancies. The above themes, taken together, seek to achieve a balance between the rights and interests of the landlord and the tenant, while acknowledging the fundamental right to a home of a residential tenant, the occupation rights of commercial tenants and the property rights of the landlord.

or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance."

⁵⁹⁸ Parkdale Community Legal Services 1988 *Journal of Law and Social Policy* 61; Cohen and Bayefsky 1983 *The Canadian Bar Review* 303.

⁵⁹⁹ Human Rights Code, R.S.O. 1990, c. H.19 as proclaimed on 15 June 1962.

⁶⁰⁰ *Ontario Human Rights Commission v Simpson Sears Ltd* 1985 SCC; *Ontario Human Rights Commission v Zurich Insurance Company* 1992 SCC.

⁶⁰¹ In the case of commercial tenants, the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 applies and in the case of residential tenancies, the RTA applies. In respect of residential tenancies, the protection thereof was confirmed in the Amicus Curiae heads of argument in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) 35.

⁶⁰² According to Yee, security of tenure for a tenant is important and entails "security from being forced to leave, whether the reason is the landlord's threats, the expiry of the lease, a court order, an unaffordable rent increase or intolerable living conditions". Further, security of tenure can be seen as a matter of dignity and something that reduces the status gap between landlord and tenant. Yee 1989 *Journal of Law and Social Policy* 47, 48.

In an effort to protect consumer rights, the *Ontario Consumer Protection Act 2002* (Ontario CPA) was enacted. The Ontario CPA and its regulations are the main legislation that set out the rights of consumers and govern most consumer transactions in the marketplace. In terms of section 1, 'consumer' means:

...an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes.

In the case of commercial lease agreements of immovable property, the definition of 'consumer' in terms of the Ontario CPA, as set out above, excludes a juristic person and therefore does not extend protection to business entities nor to an individual who is engaged in a business-to-business transaction.⁶⁰³

In the case of residential leases, section 2(2) of the Ontario CPA provides a list of transactions which will be exempt from the application of the Act. A "consumer transactions for the purchase, sale or lease of real property..." is excluded from the application of the Act.⁶⁰⁴ Section 2(g) provides that the Ontario CPA does not apply in respect of consumer transactions regulated under the RTA. Further, Part 8 of the Ontario CPA⁶⁰⁵ relates to leasing. However, in the Ontario CPA, the reference to 'lease' is defined as a consumer agreement for the lease of goods, other than a consumer agreement for the lease of goods in respect of a residential tenancy agreement.⁶⁰⁶ Therefore, the Ontario CPA does not regulate lease agreements of immovable property, as consumer transactions regulated under the RTA are specifically excluded from the operation of the Ontario CPA.

The protection of tenants and landlords are highly regulated in Ontario.⁶⁰⁷ In the case of residential leases, several related pieces of legislation and policy comprise the regulation of access to housing in Ontario, that is, state involvement in the

⁶⁰³ In s 1, a consumer "means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes".

⁶⁰⁴ Section 2(f) *Ontario Consumer Protection Act 2002*.

⁶⁰⁵ *Ontario Consumer Protection Act, 2002, ss 86-90*.

⁶⁰⁶ Lease, in terms of s 86 *Ontario Consumer Protection Act 2002* means "a consumer agreement for the lease of goods, other than a consumer agreement for the lease of goods in connection with a residential tenancy agreement, and "lessor" and "lessee" have a corresponding meaning".

⁶⁰⁷ Benghoune *The legal protection* 21.

otherwise private ordering of shelter.⁶⁰⁸ The *Residential Tenancies Act*, 2006 (RTA) was proclaimed to protect residential tenants, assist landlords and promote investment in the rental housing market of Ontario.⁶⁰⁹ The RTA regulates most rental housing in Ontario and was introduced as it was believed to be balanced and fair legislation that would provide more protection to tenants, who are often most vulnerable, while keeping the rental housing market in Ontario strong.⁶¹⁰ In terms of the RTA, the landlord and tenant may enter into a periodic lease⁶¹¹ or a fixed term lease.⁶¹² The RTA also regulates the renewal⁶¹³ and termination⁶¹⁴ of residential leases stating when and the manner in which residential leases may be renewed and terminated. In Ontario, there is also a Landlord and Tenant Board (hereafter LTB).⁶¹⁵ The LTB is tasked with the duty to provide information regarding the RTA and settle disputes between tenants and landlords.

In the case where a tenant leases commercial premises for business purposes, such tenant is considered to be a commercial tenant who enters into a

⁶⁰⁸ Ries *Rational Reform* 1.

⁶⁰⁹ The RTA came into effect on 31 January 2007 and replaced the *Tenant Protection Act*, Boiron and Boiron *Commercial Real Estate* 481

⁶¹⁰ Boiron and Boiron *Commercial Real Estate* 481; In terms of s 2(1) of the RTA, a "tenancy agreement" means a written, oral or implied agreement between a tenant and a landlord for occupancy of a rental unit. This means that a lease agreement may be in writing, oral or implied.

⁶¹¹ A "periodic" tenancy is agreed to automatically renew itself after the expiry of a fixed period of time, usually a month or a week.

⁶¹² The landlord and tenant will enter into a "fixed term" tenancy if the parties agree that the tenancy will last for a specific period of time. This will be in the case where both the start and end date are set out in the lease agreement.

⁶¹³ In terms of Section 38(1), when a tenancy agreement for a fixed term expires and the lease has not been renewed or terminated, the landlord and tenant shall be deemed to have renewed it as a monthly tenancy agreement on the same terms and conditions that are contained in the expired tenancy agreement and subject to any increases in rent charged in accordance with the RTA. When a periodic tenancy ends and the tenancy has not been renewed or terminated, the landlord and tenant shall be deemed to have renewed it for another day, week or month, as the case may be, with the same terms and conditions that are contained in the expired tenancy agreement and subject to any increases in rent charged in accordance with the RTA. This would also have been inferred under the common law.

⁶¹⁴ In terms of Section 37 a landlord can only terminate a lease for the reasons specified in the RTA, which include: termination by notice, by agreement, the voluntary vacation by the tenant, the death of the tenant and finally termination by an order of the LTB after the landlord's notice or an agreement to terminate.

⁶¹⁵ Formerly known as the Ontario Rental Housing Tribunal. The *Tenant Protection Act* 1997, predecessor of the RTA, established the transference of the jurisdiction from the Ontario Superior Court to a tribunal. The LTB is the equivalent of the South African Rental Housing Tribunal.

commercial lease.⁶¹⁶ Several legal sources apply to commercial lease agreements.⁶¹⁷ Commercial tenancies in Ontario are mainly governed by two separate, yet interacting, legal frameworks, one statutory, and the other common law. In the case of the statutory framework, the *Commercial Tenancies Act* 1990 applies to all tenancy agreements that are not governed by the RTA.⁶¹⁸ Generally, when compared to residential property, Ontario offers less protection to tenants of commercial property and the law gives substantially more rights to residential tenants.⁶¹⁹

5.3.6 Conclusion on the Overview of Consumer Law and Law of Lease in Ontario

The *Constitution Act* 1982 provides for separation of powers between the federal and provincial governments, whereby the individual provinces have taken on measures to ensure the protection of consumers across Canada. By virtue of the aforesaid, Ontario has enacted the Ontario CPA to protect the interests of consumers and the RTA to regulate rental housing in Ontario. Canada acknowledges the principle of sustainable consumption of housing. The predicament is that the most vulnerable consumers in Canada face difficulties such as illiteracy or disability, which in combination with low income and lack of access to services, deprive many vulnerable consumers of fair treatment. Consequently, many vulnerable consumers are denied equal access to government-funded services intended to assist consumers.

⁶¹⁶ Legal Line 2016 <https://www.legalline.ca>.

⁶¹⁷ Which include the *Commercial Tenancies Act* 1990, the law of contract, the Common Law, and different provincial statutes. Benghoune *The legal protection* 21.

⁶¹⁸ Section 2 of the *Commercial Tenancies Act* 1990 states that the Act "does not apply to tenancies and tenancy agreements to which the *Residential Tenancies Act*, 2006 applies". Therefore, the *Commercial Tenancies Act* 1990 will apply to all commercial tenancy agreements that are of a non-residential nature.

⁶¹⁹ Legal Line 2016 <https://www.legalline.ca>; Benghoune *The legal protection* 18. This contrast can be attributed to the right to accommodation, which is a right recognised in the UDHR (Article 25) and ICESCR (Article 11(1)) as discussed in chapter 2; This is because the law regulating commercial leases is mostly about negotiation between the parties and the landlord and tenant may agree to the terms of the lease, which terms will be enforceable and binding on both parties. In certain instances, the landlord may re-take possession of the premises and terminate a commercial lease without having to obtain a court order, whereby the rights of commercial tenants are substantially less than that of residential tenants.

5.4 Conclusion

Consumer protection in the EU is comprehensive and mirrors a policy priority whereby the playing field between the supplier and consumer is levelled. The wellbeing of the consumer is regarded as the key objective in any transaction. Whilst the Canadian equivalent generally appears to be more engaged with the protection of the interests of suppliers, the rights of tenants are afforded great protection.

Residential and commercial tenancies are regulated differently. Residential tenancies are often the subject of protective provisions designed to assist the tenant, being the weaker party, in contractual negotiations with the landlord. In the case of commercial tenancies, a much more liberal approach is adopted with greater contractual freedoms for both parties. Regarding the position on the respective consumer laws applicable in both jurisdictions, it has been established that the EU Consumer Regulations apply to contracts between traders and consumers, as defined. As the consumer must be an individual (a natural person), a juristic person is therefore excluded. The Consumer Regulations do not apply to a contract that is for the creation of immovable property or of rights in immovable property, as in the case of commercial leases, or for rental of accommodation for residential purposes, in the case of residential leases. Further, in terms of the EU Consumer Directives, the rental of accommodation for residential purposes and commercial lease agreements are also excluded as agreements for the creation, acquisition or transfer of rights in immovable property and for rental of accommodation for residential purposes.

In Ontario, the Ontario CPA does not regulate residential or commercial lease agreements, as consumer transactions regulated under the RTA are specifically excluded from the Ontario CPA, and by virtue of the definition of 'consumer'.

The most important conclusion that can be made from the above discussion is that in both the EU and Ontario, the legislation pertaining to residential lease agreements are withdrawn from the legislation dealing with consumer protection.

Chapter 6 The Interpretation and Application of section 14

6.1 Introduction

In this chapter, it will be discussed what the correct interpretation of section 14 of the CPA is and how it should be applied to leases of immovable property. Reference will be made to the opinions of different writers. The possible unintended consequences in the application of the provisions of section 14 on fixed term lease agreements of immovable property will also be discussed. The reference to section 14 in this chapter must be read to mean section 14 of the CPA.

6.2 Consumer Protection Act

6.2.1 Purpose

The CPA provides a broad spectrum justification for its enactment, as is apparent from a reading of the long title, preamble and Part B of Chapter 1⁶²⁰ of the CPA.⁶²¹ The golden thread is the aim of promoting and advancing "the social and economic welfare of consumers in South Africa".⁶²² The preamble of the CPA states that apartheid, historically discriminatory laws, high levels of poverty, illiteracy and other forms of social and economic inequality have hampered the notion of consumer protection. As a result, it was necessary to develop and employ novel means to accomplish the rights of historically disadvantaged persons and to encourage their full participation as consumers in the marketplace, protect the interests of all consumers against exploitation and to give effect to internationally recognised consumer rights.⁶²³ The CPA aims to achieve this objective through, inter alia, establishing a legal framework for maintaining a fair, accessible and efficient marketplace for consumers, reducing the disadvantages

⁶²⁰ "Purpose, policy and application of Act."

⁶²¹ Van Eeden *Consumer Protection Law* 5.

⁶²² Section 3(1) of the CPA; Van Eeden *Consumer Protection Law* 40; *Joroy 4440 CC v Potgieter* 2016 3 SA 465 (FB) para 1.

⁶²³ Preamble of the CPA, Eiselen and Naudé "Introduction and Overview" 4; Van Eeden *Consumer Protection Law* 41-43.

experienced in accessing goods or services by vulnerable consumers, protecting consumers from unfair trade practices, encouraging responsible consumer behaviour, promoting consumer empowerment and providing an efficient system of redress for consumers.

6.2.2 Defining the terms relevant to lease agreements

For purposes of this discussion it is essential to repeat some of the relevant definitions of the CPA. Even though the discussion of the definitions fits the discussion of the interpretation of section 14, the definitions have a profound effect on the application of the CPA and will therefore be discussed at this stage of the dissertation. This is done to consider how the statutory provisions must be applied to fixed term lease agreements of immovable property. To understand the concept, one has to consider the undermentioned definitions.

'Business',⁶²⁴ in terms of the CPA, means the 'continual marketing' of any goods or services. Section 1 of the CPA does not contain a definition for the phrase 'continual marketing'. 'Goods',⁶²⁵ include amongst others, anything marketed for human consumption, a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section. 'Services'⁶²⁶ are defined in the CPA as including, amongst others, "the provision of

⁶²⁴ Section 1 of the CPA, business means "the continual marketing of any goods or services".

⁶²⁵ In terms of section 1 of the CPA, goods include "(a) anything marketed for human consumption; (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded; (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and (e) gas, water and electricity".

⁶²⁶ Section 1 of the CPA "Service includes, but is not limited to- (a) any work or undertaking performed by one person for the direct or indirect benefit of another; (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service- (i) constitutes advice or intermediary services that is subject to regulation in terms of the *Financial Advisory and Intermediary Services Act* 37 of 2002; or (ii) is regulated in terms of the *Long-term Insurance Act* 52 of 1998, or the *Short-term Insurance Act* 53 of 1998; (d) the transportation of an individual or any goods; (e) the provision of - (i) any accommodation or sustenance; (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product; (iii) access to any electronic communication infrastructure; (iv) access, or of a right of access, to an event or to any premises, activity or

access to or use of any premises or other property in terms of a rental" and "a right of occupancy of, or power or privilege over or in connection with any land or other immovable property, other than in terms of a rental". 'Premises'⁶²⁷ include land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container. Relevant in this instance, is the reference to 'building', 'structure' and 'land', which is included in the definition of 'premises'. 'Rental'⁶²⁸ is defined as an agreement:

...in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer but does not include a lease within the meaning of the *National Credit Act*.⁶²⁹

A 'consumer'⁶³⁰ is a person to whom goods or services are marketed in the ordinary course of the supplier's business, who has entered into a transaction with a 'supplier'⁶³¹ in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the CPA by section 5(2)⁶³² or in

facility; or (v) access to or use of any premises or other property in terms of a rental; (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of s 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service".

⁶²⁷ Section 1 Premises includes "land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container."

⁶²⁸ Section 1 of the CPA "rental means an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the NCA".

⁶²⁹ To clarify, a lease agreement in terms of the NCA, would be an agreement for the lease of movable goods in terms of which the ownership of those goods passes to the lessee in due course, and in respect of which there is a deferral of payment and an interest or a charge payable. Monty 2011 *Without Prejudice* 47.

⁶³⁰ In terms of section 1 of the CPA, consumer means "(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3)...".

⁶³¹ Section 1 of the CPA "Supplier means a person who markets any goods or services".

⁶³² With reference to the definition of "Consumer" it must be borne in mind that the CPA does not apply to any transaction in terms of which services or goods are supplied to the State and therefore the State is not regarded as a consumer in terms of the CPA. Also, "a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6" is not a consumer for purposes of the CPA. Section 5(2)(b), read with s 6(1) and GN 294 in GG 34181 of 1 April 2011.

terms of section 5(3).⁶³³ An important phrase to define, is 'in the ordinary course of business'. Despite the comprehensiveness of the definition clause, regrettably, no definition is provided for the expression 'in the ordinary course of business'. A 'transaction'⁶³⁴ is defined in the CPA to mean, in respect of a person acting in the ordinary course of business, amongst others, an agreement between that person and one or more other persons for the supply of any goods or services in exchange for consideration.⁶³⁵

The definition of 'supply',⁶³⁶ when used as a verb in relation to goods, includes (and, hence, is not limited to) sell, rent, exchange and hire in the ordinary course of business for consideration, or in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration. A 'supplier'⁶³⁷ is a person who markets any goods or services. To be a 'supplier' under the CPA, such supplier must be acting in the ordinary course of business.⁶³⁸

⁶³³ "A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation; or any treaty, international law, convention or protocol."

⁶³⁴ In terms of section 1 of the CPA "Transaction means- (a) in 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; or (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a)".

⁶³⁵ In terms of section 1 of the CPA "Consideration means anything of value given and accepted in exchange for goods or services, including- (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; (b) labour, barter or other goods or services; (c) loyalty credit or award, coupon or other right to assert a claim; or (d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer".

⁶³⁶ In terms of section 1 of the CPA "Supply, when used as a verb- (a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or (b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

⁶³⁷ Section 1 of the CPA "Supplier means a person who markets any goods or services."

⁶³⁸ Glover *et al Leases* 13.

The definitions stated above creates ambiguity, which leads to uncertainty in the application to and interpretation of section 14 on fixed term lease agreements. The definition of 'goods' is poorly drafted and creates uncertainty.⁶³⁹ The uncertainty is created in the sense that in terms of the South African law of things, land is a tangible object and obviously falls within the category of tangible objects. However, the last part of the definition of goods limits goods to a legal interest in land, other than that contained in the definition of 'services', which explicitly includes rental agreements in respect of immovable property.⁶⁴⁰

Further uncertainty is created when the definitions of rental and services are considered. There are different views on the application and interpretation of these definitions where fixed term lease agreements of immovable property are concerned. One view offered is that the description of 'rental' in the definition of 'service'⁶⁴¹ is wide enough to encompass a lease of immovable property.⁶⁴² This means that a lease of premises to an individual, in the ordinary course of business, is subject to the protective remedies provided for in section 14.⁶⁴³ The view of Smith⁶⁴⁴ is that the various sub-clauses of the definition of services are not mutually exclusive and that the phrase 'other than in terms of a rental' merely extends the application of the CPA to other modes of occupation (other than and in addition to a rental) as well as agreements not for consideration. He avers that

⁶³⁹ If a contract of sale of land is concluded in the normal course of the seller's business, it will be governed by the CPA. An interest in land may also qualify as a "service", because a service includes a right of occupancy of or power or privilege over or in connection with any and or other immovable property, other than in terms of a rental; Sharrock "Judicial Control of Unfair Contract Terms" 121-122.

⁶⁴⁰ The question whether the object of a lease is either "service" or "goods" is particularly relevant in view of the variable limitations of the landlord's (the supplier's) rights in section 54, which relates to the quality of service and section 61, relating to liability of defects. If the object of a lease includes goods, as it seems it may, taking into account the vague formulation of the definition, the position of a landlord is much more onerous due to the provisions of section 61, with reference to goods, relating to strict liability for injury or death of tenants. Smit "The Consumer Protection Act" 2.

⁶⁴¹ Section 1 of the CPA "Service includes... (v) access to or use of any premises or other property in terms of a rental,..."

⁶⁴² Van Eeden *Consumer Protection Law* 462.

⁶⁴³ Van Eeden *Consumer Protection Law* 462.

⁶⁴⁴ Smit "The Consumer Protection Act" 3.

this phrase must be seen as inclusive of and means 'in addition to' rather than 'but not'. There is agreement with this view.⁶⁴⁵

There is an alternative view that asserts that the phrase 'other than a rental',⁶⁴⁶ in the definition of 'goods'⁶⁴⁷ and in the definition of 'service',⁶⁴⁸ implies that section 14 does not apply to leases of immovable property and result in the exclusion of lease agreements of immovable property from the application of section 14.⁶⁴⁹ The rationale is that a 'service' under the CPA excludes a right of occupancy of immovable property in terms of a rental.⁶⁵⁰ Bracher⁶⁵¹ states that a rental is a lease, being an agreement where temporary possession of a premises or immovable property is delivered to a consumer for consideration. He implies that if the CPA states that a service does not include a rental, then section 14 does not apply to leases.

In the case of a lease agreement, the consumer is a tenant and the supplier is the landlord. A landlord leases to a tenant the premises and a tenant hires the premises from a landlord. As discussed above, from the definition of consumer,⁶⁵² it is indicated that a consumer is a person to whom goods or services is marketed in the ordinary course of the supplier's business. This poses the question, what is meant by the phrase 'in the ordinary course of the supplier's business'? In other words, when will the supplier be acting 'in the ordinary course of business'? To determine this, it is of particular importance to consider the different scenarios

⁶⁴⁵ Monty 2011 *Without Prejudice* 47; Smit "The Consumer Protection Act" 2.

⁶⁴⁶ Section 1 of the CPA "Services include (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental."

⁶⁴⁷ Section 1 of the CPA "Goods include ... (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section..."

⁶⁴⁸ Section 1 of the CPA "Service includes... (v) access to or use of any premises or other property in terms of a rental,..."

⁶⁴⁹ "Services" includes... (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental...; Le Roux "Correct and Incorrect Methods" 2-3; Smit "The Consumer Protection Act" 3. Bracher 2011 *Business Day Business Law & Tax Review*.

⁶⁵⁰ Section 1 of the CPA "services include (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental."

⁶⁵¹ Bracher 2011 *Business Day Business Law & Tax Review*.

⁶⁵² Section 1 of the CPA, consumer means "(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3)..."

where the landlord is a property developer, investor or owner of numerous properties, who rents premises out as a business, as opposed to the situation where the landlord is a natural person who is not engaging in a business venture and lets his premises once off, or not in the ordinary course of the supplier's business.⁶⁵³

The preferred view⁶⁵⁴ is that section 14 will only apply to suppliers whose business it is to lease immovable property.⁶⁵⁵ Therefore, individuals who lease premises in their private capacity would not be subject to the provisions of the CPA, and such landlords will be subjected to the ordinary, common law of lease.⁶⁵⁶ This is so because the reference to the 'ordinary course of business' in the definitions of 'consumer', 'rental', 'supply' and 'transaction', inter alia, is a constant underpinning of any transaction in terms of the CPA, in that the supplier must be acting 'in the ordinary course of business'.⁶⁵⁷ With regard to the avowed purpose of the CPA, the above view may not necessarily be accepted by the courts. It may be prudent to consider the interpretation of the phrase as it applies to other statutes.

The phrase 'in the course of business' (note that it is not in the ordinary course) has been interpreted by the Appellate Division in *AA Mutual Insurance Association Ltd v Biddulph*⁶⁵⁸ as it applies in another statute as meaning an agreement that would be entered into between ordinary business people regardless of whether the parties are 'business people'. The instructive decision of the Supreme Court of

⁶⁵³ Despite the comprehensiveness of the definition clause, unfortunately no definition is provided for the expression "in the ordinary course of business". However, it is clear from the definition of "consumer" that what is significant here is not the ordinary course of business in the general sense of the phrase, but rather the ordinary course of business of the particular supplier; *Glover et al Leases* 13.

⁶⁵⁴ Smith "The Consumer Protection Act" 5.

⁶⁵⁵ For example in the commercial sense owners of a property scheme like shopping centres which leases out its premises, estate agencies, property developers etc.

⁶⁵⁶ *Glover et al Leases* 13.

⁶⁵⁷ *Glover et al Leases* 13.

⁶⁵⁸ 1976 1 SA 725 (A) para 739. It was held that the phrase "in the course of business" can relate to even a single, isolated activity, enterprise, or pursuit. This wide interpretation may possibly be analogous with the position of a supplier in terms of the CPA in order to bring the particular transaction within its scope. However, the test in the CPA appears to be stricter as it refers to "ordinary" and the definition of "business" clearly contemplates repeated activity.

Appeal in *Amalgamated Banks of SA v De Goede*⁶⁵⁹ confirmed that the ordinary course of business does not require that the person conducts such business constantly or on a daily basis. The court confirmed that the question that must be posed is whether the person performs a transaction⁶⁶⁰ or juristic act with ordinarily used terms that ordinary persons would ordinarily have entered into in the circumstances.⁶⁶¹ In terms of this interpretation, the lease of the premises by a landlord to supplement his or her income would constitute an act in the ordinary course of business and the provisions of the CPA would accordingly apply to the lease agreement.⁶⁶²

In determining what constitutes in 'the ordinary course of business', the Supreme Court of Appeal held in *Gazit Properties v Botha*⁶⁶³ that one first has to have regard to "the nature of the obligation in terms of which the disposition or payment was made". This is an objective test that considers the circumstances⁶⁶⁴ under which the disposition was made and the actions of both parties, as it will assist in establishing whether the agreement is one that would ordinarily be entered into between solvent business people.⁶⁶⁵

As stated above, these cases do not deal with the CPA, but assist in the interpretation of the phrase 'in the ordinary course of business', which has caused

⁶⁵⁹ 1997 4 SA 66 (A) para 75-78. Although this case does not relate to the CPA, it does assist in the interpretation of the phrase 'in the ordinary course of business', especially in light of the fact that no definition is provided for this phrase in the CPA.

⁶⁶⁰ Even a once or transaction.

⁶⁶¹ *Glover et al Leases* 13.

⁶⁶² *Glover et al Leases* 13. This will be the case in respect of a lease for residential and commercial purposes, as both types of leases are covered by the CPA.

⁶⁶³ *Gazit Properties v Botha* 2012 2 SA 306 (SCA) para 8. Even though this case does not relate to the CPA, it does assist in the interpretation of the phrase 'in the ordinary course of business', especially in light of the fact that no definition is provided for this phrase in the CPA.

⁶⁶⁴ *Doyle v Killeen* CT/12984/2014/75(1)(b)CPA para 59, for purposes of a sale of immovable property, the relevant factors to be taken into account will include "whether the person has a registered business, the nature of the business that the person engages in, the nature of the goods normally sold by the person, the frequency with which the goods are sold by the person and whether the person advertises or markets his goods on a frequent or ongoing basis".

⁶⁶⁵ *Van Zyl v Turner* 1998 2 SA 236 (C) paras 33 to 42 at para 34. *Al-Kharafi & Sons v Pema* 2008 ZAGPHC 273 paras 25-26; *Gore v Shell South Africa (Pty) Ltd* 2003 4 All SA 370 (C) paras 373-374.

uncertainty. The National Consumer Tribunal⁶⁶⁶ has, very recently, addressed the issue of the meaning of 'ordinary course of business' in the definition of transaction in the matter of *Doyle v Killeen*.⁶⁶⁷ In this case it was contended that the CPA was not applicable to the sale of immovable property, because it was not done in the normal course of business of the seller.⁶⁶⁸ In deciding the meaning of the phrase, the Commissioner considered section 3 of the CPA, the definition of 'transaction' and the various references in the CPA to 'suppliers', 'course of business', 'business' and 'market' and concluded that:

...it is clear that the intention of the legislature was that the Act would not apply to persons selling goods as once-off transactions, as distinct from the selling of goods as a continual enterprise. This would appear correct as it would be unreasonable to expect of every person selling his personal property in a once-off transaction to know every relevant provision of the Act and to take the necessary steps to ensure complete compliance with the Act.⁶⁶⁹

In addition, the reason for the reference to rent and hire in the definition of 'supply'⁶⁷⁰ is unclear. One cannot refrain from posing the question why the legislator does not rather use the words sell and buy instead. However, from the definitions, it should be noted that lease is treated as the supply of services for purposes of the CPA and not the supply of goods. Even though immovable

⁶⁶⁶ The parties will be bound by the decision of the National Consumer Commission, but it does not have general binding authority. The decisions of the National Consumer Commission should rather be considered as persuasive. In the sense of the phrase in the ordinary course of business, it may occur that the practice evolve by setting guidelines on how the National Consumer Commission deals with this particular issue. The orders of the Tribunal on the other hand have the same status as orders of the High Court. Any decision, judgement or order of the Tribunal is binding on the National Credit Regulator, Provincial Credit Regulators, Consumer Courts, Alternative Dispute Resolution Agents or Ombuds, Debt Counsellors, and Magistrates' Courts. National Consumer Tribunal <http://www.thenct.org.za/faq.aspx>.

⁶⁶⁷ *Doyle v Killeen* CT/12984/2014/75(1)(b)CPA. The argument of the Applicant is that the agent and agency were both acting in the ordinary course of their business. This submission was based on the definition of "transaction" in Section 1 of the CPA read with section 5 of the CPA and the definition of "business" in section 1 of the CPA. Further it was argued that the agent and agency fall within the definition of "supplier" in section 1 of the CPA since they marketed the property (the goods) and services (the introduction of the purchaser to the buyer). Para 34.

⁶⁶⁸ Paragraph 37.

⁶⁶⁹ Paragraph 55.

⁶⁷⁰ In terms of section 1 of the CPA "Supply, when used as a verb- (a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or (b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

property is included under the definition of 'goods' and 'supply', 'goods' is defined as including 'rent' and 'hire' in the ordinary course of business for consideration.

Taking the above into account, it would appear to be accurate to state that the description of 'rental' in the definition of 'service' is wide enough to encompass a lease of immovable property. Further, to exclude fixed term lease agreements of immovable property from the application of section 14, by reason of the definition of services, sub-clause (e)(v) of the definition of services would result in an absurdity apart from being meaningless. Taking the preferred view into account, it is agreed that, for purposes of the CPA, the word 'business' is defined and therefore contains an important limitation to the application of the CPA, and therefore section 14, to lease agreements as is seen from the definition of 'supplier,' 'supply' and 'transaction', which have been discussed above. The conclusion reached is that only those leases that are entered into in the 'continual marketing' sense or 'in the ordinary course of the supplier's business' are subject to the CPA and therefore subject to section 14.

The definitions contained in legislation fulfil a valuable interpretation function, as is the case in the CPA.⁶⁷¹ The definitions stated above will now be considered when determining the application of section 14 of the CPA to fixed term lease agreements of immovable property.

6.3 Application of the CPA

By virtue of the difficulties in applying the CPA, it has been criticised by many authors. According to Lerm and Van den Bergh:⁶⁷²

the CPA is a law of general application to a wide range of agreements regulating the relationship between "supplier" and "consumer". However, it is also one of the worst pieces of legislation as far as the standard of drafting is concerned. It is a supreme example of an Act where the wording of the legislation is unclear, ambiguous and at times meaningless and even absurd. Sentence constructions are at times disjointed and the meaning of the legislature not understood.

⁶⁷¹ Eiselen "Interpretation, Purpose and Application" 1-1.

⁶⁷² Le Roux "Correct and Incorrect Methods" 5-9, where Lerm and Van den Bergh Legal Interpretation seminar presented by LEAD May 2014 3 was quoted.

6.3.1 General application of the CPA

The application of the CPA is provided for in section 5, which provides for a broad scope of application.⁶⁷³ The CPA will apply to every 'transaction'⁶⁷⁴ occurring within South Africa for the 'supply'⁶⁷⁵ or 'promotion'⁶⁷⁶ of 'services'⁶⁷⁷ or 'goods',⁶⁷⁸

⁶⁷³ Jacobs, Stoop and Van Niekerk 2010 *PELJ* 309; Van Eeden *A Guide Act* 36; CPA s 5(1)(a), subsection 2, 3 and 4 allows for certain transactions to be exempted.

⁶⁷⁴ In terms of section 1 of the CPA "Transaction means- (a) in 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; or (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a)".

⁶⁷⁵ In terms of section 1 of the CPA "Supply, when used as a verb- (a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or (b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

⁶⁷⁶ Section 1 of the CPA promote means to "(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction".

⁶⁷⁷ Section 1 of the CPA "Service includes, but is not limited to- (a) any work or undertaking performed by one person for the direct or indirect benefit of another; (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service- (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002; or (ii) is regulated in terms of the Long-term Insurance Act 52 of 1998, or the Short-term Insurance Act 53 of 1998; (d) the transportation of an individual or any goods; (e) the provision of - (i) any accommodation or sustenance; (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product; (iii) access to any electronic communication infrastructure; (iv) access, or of a right of access, to an event or to any premises, activity or facility; or (v) access to or use of any premises or other property in terms of a rental; (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of s 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service".

⁶⁷⁸ Section 1 of the CPA goods include "(a) anything marketed for human consumption; (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded; (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and (e) gas, water and electricity". Which includes the goods or services so promoted or supplied. The definitions of "goods" and "services" are very broad

in the ordinary course of business,⁶⁷⁹ provided that the transaction is not exempted from the application of the CPA.⁶⁸⁰ It is imperative to bear in mind that the CPA is not applicable to transactions for the supply or promotion of goods or services to the State⁶⁸¹ or where the consumer is a juristic person with an asset value or annual turnover, at the time of the transaction, that equals or exceeds the threshold value as determined by the Minister of Trade and Industry.⁶⁸²

6.3.2 Application to lease agreements

The above stated provisions deal with the general rules regarding the application of the CPA. The application of the CPA specifically to fixed term lease agreements, is now determined. The application of the definitions of the CPA essentially entails that the CPA applies to lease agreements entered into by landlords letting immovable property in the ordinary course of business, except where the tenant is the state or a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6.⁶⁸³

6.3.2.1 Categories of leases subject to section 14

The application to different categories of lease agreements, which are subject to section 14 is discussed hereunder.

6.3.2.1.1 Once-off leases

In respect of lease agreements, it has been confirmed above that the CPA shall apply to a landlord if he meets the requirements of being a 'supplier'⁶⁸⁴ who provides services in the 'ordinary course of business' to a consumer. Lease

and they encompass virtually every conceivable good or service. De Stadler "Interpretation, purpose and application" 5-4.

⁶⁷⁹ Because of the definition of transaction.

⁶⁸⁰ Section 5 of the CPA; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 309.

⁶⁸¹ Section 5(2)(a); Jacobs, Stoop and Van Niekerk 2010 *PELJ* 309.

⁶⁸² In terms of GN 294 in GG 34180 of 1 April 2011, the threshold amount is two million rand.

⁶⁸³ Section 5(2)(b) (Currently R2 million calculated as prescribed by GN 293 in GG 34180 of 1 April 2011. The conclusion which can therefore be reached is that the CPA does not apply to leases where the State is the consumer (lessee). Therefore no lease agreement will be subject to the CPA, where the lessee falls in the categories stated aforesaid.

⁶⁸⁴ Section 1 of the CPA "Supplier means a person who markets any goods or services".

agreements entered into by landlords who do not let in the ordinary course of business are not subject to the CPA.⁶⁸⁵ The CPA will also not be applicable to once-off transactions, where goods and services are not supplied in the ordinary course of business.⁶⁸⁶ Although a lease agreement is continuous in nature, when a landlord leases a premises, which lease does not constitute his business and is therefore not in the normal course of the landlord's business, such landlord will not be regarded a supplier for purposes of the CPA. Therefore, the CPA does not apply to 'once-off' leases not entered into in the landlord's course of business, as it is not regarded as being the continual marketing of goods and services from the landlord's point of view.⁶⁸⁷

6.3.2.1.2 Fixed term leases

Section 14 of the CPA deals with fixed term agreements and the impact of these agreements lies in the cancellation, renewal and breach provisions.⁶⁸⁸ The provisions of section 14 do not apply to agreements entered into between juristic persons.⁶⁸⁹ If a consumer agreement is for a fixed term, that term must not exceed twenty four months, unless a longer period is expressly agreed to and the supplier can indicate a 'demonstrable financial benefit' to the consumer in extending the agreement.⁶⁹⁰ The consumer may cancel the agreement upon expiry of its fixed term, without penalty or charge, or at any other time,

⁶⁸⁵ Characteristically the CPA regulates lease agreements entered into by property developers, speculators and investors letting property on a continuous basis, subject to the exceptions mentioned. A once-off lease agreement concluded by a landlord is therefore not governed by the CPA, irrespective of whether or not such lease has been negotiated by an estate agent acting for one of the parties. It is uncertain, however, at what stage the repeated letting of a house by a home owner can be described as the continual marketing of the property, evidently each case will have to be treated on its own having regard to the particular circumstances.

⁶⁸⁶ Glover *et al Leases 12*; Doyle *v Killeen* CT/12984/2014/75(1)(b) CPA para 55. However, if goods are supplied in terms of a transaction that are exempted from the application of the CPA, as set out in section 5, such goods remain subject to the provisions of section 60 and section 61, which deal with unsafe goods, safety-monitoring, recall and damage caused by such goods. Where a juristic person, for example, does not qualify as a consumer in terms of the CPA, ss 60 and 61 will apply to the goods purchased by it and to the supplier of the goods. Jacobs, Stoop and Van Niekerk 2010 *PELJ* 311.

⁶⁸⁷ Jacobs, Stoop and Van Niekerk 2010 *PELJ* 312. This is due to the definitions of "business", "consumer", "supplier", "supply" and "transaction" read together with s 5 of the CPA.

⁶⁸⁸ The established practice in consequence of these provisions as applied to fixed term leases were discussed at length in Chapter 4.

⁶⁸⁹ Section 14(1); Monty 2011 *Without Prejudice* 46.

⁶⁹⁰ Section 14(2)(a); Reg 5(1) in GN 294 in GG 34181 of 1 April 2011.

notwithstanding the period agreed upon, by giving the supplier twenty business days' notice in writing, subject to section 14(3)(a) and 14(3)(b).⁶⁹¹ Under these circumstances, the consumer is liable for any amounts owed to the supplier on the remainder of the agreement up to the date of cancellation.⁶⁹² Despite the fact that consumers may cancel a fixed-term agreement at any time, the supplier is entitled to impose a reasonable cancellation penalty in contemplation of the agreement enduring for its indented term.⁶⁹³ The supplier may cancel the agreement twenty business days after written notice to the consumer of a material failure to comply with the agreement, unless the consumer has rectified such failure within that time.⁶⁹⁴

A consumer must receive notice in writing of the approaching expiry date, at least forty, but not more than eighty business days before expiry.⁶⁹⁵ Such notification must include any material changes that would apply should the agreement be renewed or may otherwise continue beyond the expiry date and the options available to the consumer in terms of section 14(2)(d).⁶⁹⁶ On the expiry of the fixed term, it will be automatically continued on a month-to-month basis, subject to any material changes, as contemplated in section 14(2)(c), unless the consumer expressly directs the supplier to terminate the agreement on the expiry date or agrees to renew the agreement for a further fixed term.⁶⁹⁷

⁶⁹¹ Section 14(2)(b).

⁶⁹² Cancellation by the consumer is contemplated in s 14(2)(b). Irrespective of the reason for cancellation, the consumer will not be liable for amounts up to the end of the agreement.

⁶⁹³ Regulation 5(2) specifies factors that are required to be taken into account when determining a reasonable amount in terms of s 14(4)(c), such as "the value of the transaction up to cancellation; the amount which the consumer is still liable for to the supplier up to the date of cancellation; the value of the transaction up to cancellation; the value of the goods which will remain in the possession of the consumer after cancellation; the value of the goods that are returned to the supplier; the duration of the consumer agreement as initially agreed; losses suffered by or benefits accrued to the consumer as a result of the consumer entering into the agreement; the nature of the goods or services; the length of notice of cancellation provided by the consumer; the reasonable potential for the service provider, acting diligently, to find an alternative consumer; and the general practice of the relevant industry". The penalty may not negate the rights granted to the consumer. Monty 2011 *Without Prejudice* 46.

⁶⁹⁴ Section 14(2)(b)(ii); Van Eeden *Consumer Protection Law* 358.

⁶⁹⁵ Section 14(2)(c); Van Eeden *Consumer Protection Law* 358.

⁶⁹⁶ Sections 14(2)(c)(i) and 14(2)(c)(ii).

⁶⁹⁷ Section 14(2)(d).

Although 'fixed-term agreements' are not defined in section 1 of the CPA, it is clear from the wording of the section that a fixed-term agreement is an agreement that provides for its operation for a definite period and expires on a fixed date. The wording of the section also indicates that an agreement for a fixed term is to be distinguished from a month-to-month agreement that does not fall within the ambit of section 14.⁶⁹⁸ In light of the aforesaid, it is submitted that leases are considered to be fixed term agreements when the period of the leases is determinable from the agreement.⁶⁹⁹

When considering the exclusionary provisions of section 14, where an agreement concluded between two 'juristic persons',⁷⁰⁰ regardless of the juristic persons' respective turnover or asset value, is excluded, the exclusion of most commercial lease agreements come to mind.⁷⁰¹ According to the definitions contained in the CPA, a juristic person includes a body corporate, a partnership, an association and a trust. This broad definition of juristic person is pertinent as this results in a category of fixed term agreements in respect of which the whole of the CPA applies, with the exception of section 14.⁷⁰² Even where a small juristic person with an asset value or annual turnover of less than two million rand hires a premises from another juristic person, the provision of section 14 will not be applicable. Considering that most commercial properties in the commercial market are hired by juristic persons for commercial purposes, when leased by a juristic person, such commercial lease concluded between these juristic persons will not be governed by section 14.

In terms of the Regulations,⁷⁰³ the maximum duration for fixed-term consumer agreements, for purposes of section 14(4)(a) of the CPA, is twenty four months from date of signature by the consumer, unless such longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial

⁶⁹⁸ Smith *Eviction and Rental Claims* 17-18.

⁶⁹⁹ Typically where it has a specified date of commencement and expiry thereof.

⁷⁰⁰ Section 1 of the CPA 'juristic person' includes (a) a body corporate; (b) a partnership or association; or (c) a trust as defined in the Trust Property Act, 1988 (Act No. 57 of 1988).

⁷⁰¹ Section 14(1) of the CPA.

⁷⁰² Steyn 2014 *De Rebus* 25-26.

⁷⁰³ Regulation 5(1)(a) of GN 293 in GG 34180 of 1 April 2011.

benefit to the consumer. For purposes of section 14(3), Regulation 5(2) provides that a reasonable cancellation penalty⁷⁰⁴ may not exceed a reasonable amount.⁷⁰⁵ In determining such reasonable amount, the supplier must take into account, *inter alia*, the amount that the consumer is still liable to the supplier up to the date of cancellation, the duration of the consumer agreement initially agreed, the length of notice of cancellation provided by the consumer, the reasonable potential for the supplier to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation, and the general practice of the relevant industry or trade.⁷⁰⁶

Notwithstanding the aforesaid, the supplier may not charge a cancellation fee which would have the effect of negating the consumer's right to cancel a fixed term agreement as afforded to the consumer by the CPA. The cancellation penalty may be charged in instances where the supplier supplied goods, provided services or granted discounts to the consumer. As discussed previously, letting of immovable property is regarded as the supply of services. Therefore, the landlord may impose a reasonable penalty because services are supplied to the tenant.⁷⁰⁷

⁷⁰⁴ As contemplated in s 14(4)(c).

⁷⁰⁵ Unfortunately the CPA does not define a "reasonable cancellation penalty" and one will have to be guided by the Regulations as aforementioned. In South African Law however and also in practice, a person who suffers damages as a result of the actions of another person, is only entitled to recover those damages which he has actually sustained and can be proved. *Kerr Principals* 737-338; It must be shown that loss has been suffered; *Visagie v Gerryts* 2000 3 SA 670 (C) para 682C-F; The plaintiff bears the onus of proving the damages which he claims to have suffered; *SM Goldstein and Co (Pty) Ltd v Gerber* 1979 4 SA 930 (A) para 937G; A party who is desirous to claim damages from another party, must prove the extent of his damages, which means that such a party must also quantify the extent of his losses; *Scott v Poupard* 1971 2 SA 373 (A) para 381E.

⁷⁰⁶ In terms of s 14(4)(c) the Minister may, by notice in the Government Gazette, prescribe the manner and form for determining the reasonable cancellation penalty; Regulation 5(2)(a)-(j).

⁷⁰⁷ Should the tenant terminate the fixed term agreement early, and where the landlord unsuccessfully attempts to find a new lessee, the landlord may impose a reasonable cancellation penalty.

6.3.3 Different views on the application of the section 14 to fixed term lease agreements of immovable property

In light of the fact that the CPA does not explicitly refer to agreements to which section 14 applies,⁷⁰⁸ it is possible to deduce that the legislature intended to leave the application open to include an array of fixed-term agreements.⁷⁰⁹ Regarding the application of the CPA to lease agreements, two different views prevail. Most authors⁷¹⁰ hold the view that section 14 of the CPA applies to fixed term lease agreements of immovable property, while others do not necessary support this view.⁷¹¹ When the relevant definitions in the CPA are considered, one view offered is that the description of 'rental'⁷¹² in the definition of 'services'⁷¹³ is wide enough to encompass a lease in respect of immovable property. There is an alternative view that asserts that the express exclusion of 'a rental' from the definition of 'services', in subsection (f),⁷¹⁴ may result in the exclusion of lease agreements of immovable property from the application of section 14.⁷¹⁵ The reason for the alternative view, being that a lease agreement can be encapsulated under the definition of 'rental',⁷¹⁶ as an agreement in terms of which temporary possession

⁷⁰⁸ Apart from that the agreement must fall within the definition of a consumer agreement, which is entered into for a fixed term. In fact, the CPA does not refer to lease agreements of immovable property *per se*.

⁷⁰⁹ Steyn 2014 *De Rebus* 25.

⁷¹⁰ Steyn 2014 *De Rebus* 25, 26; Van Eeden *Consumer Protection Law* 462; Werksmans Attorneys 2016 http://www.werksmans.com/virt_media/1729/; Natalie Lubbe and Associates 2013 <http://natalielubbe.co.za/online/node/12>; Esselaar Attorneys 2011 <http://www.esselaar.co.za/legal-articles/lease-and-consumer-protection-act-68-2008-lets-set-record-straight>.

⁷¹¹ Michalsons Attorneys 2011 <http://www.michalsons.co.za/the-consumer-protection-act-does-not-apply-to-all-lease-agreements/9814>; SAPOA 2011 http://www.commercial-property.co.za/3766_news_SAPOA-seeks-clarity-on-Consumer-Protection-Act.html.

⁷¹² "An agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the *National Credit Act*."

⁷¹³ "service" includes, but is not limited to- (v) access to or use of any premises or other property in terms of a rental; (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental...

⁷¹⁴ "Services" includes... (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental...

⁷¹⁵ Le Roux "Correct and Incorrect Methods" 2-3; Smit "The Consumer Protection Act" 3.

⁷¹⁶ 'Rental' means an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the

of the premises or property is delivered to the consumer. Further, because in terms of a lease agreement a consumer is granted a right to use the premises or property, which provision is also included in the definition of rental.

De Stadler⁷¹⁷ is of the opinion that subsection (f) of the definition of services, as stated above, is not the only section to be taken into account when considering the application of the CPA to fixed term lease agreements of immovable property. She confirms the application of the CPA to lease agreements by virtue of the provisions of subsection (e)(v) of the definition of services, which includes "access to or use of any premises or other property in terms of a rental".

Bracher⁷¹⁸ is of the view that the CPA is not applicable to leases of immovable property because of the phrase 'other than a rental',⁷¹⁹ in the definition of 'goods'⁷²⁰ and in the definition of 'service'.⁷²¹ According to Stoop,⁷²² section 44 of the CPA does not assist in relieving the confusion relating to the application of section 14 to fixed term lease agreements of immovable property. In terms of section 44, a consumer has the right to, in the case of an agreement to supply goods, assume that the supplier will have a legal right to lease the goods at the time the lessee takes possession of the leased goods. The reference to the words 'lease' and 'leased goods' contributes to the school of thought that avers that section 14 of the CPA is applicable to fixed term leases of immovable property.⁷²³

direction of, or to the consumer, but does not include a lease within the meaning of the *National Credit Act*.

⁷¹⁷ Esselaar Attorneys 2011 <http://www.esselaar.co.za/legal-articles/lease-and-consumer-protection-act-68-2008-lets-set-record-straight>.

⁷¹⁸ Bracher 2011 *Business Day Business Law & Tax Review*.

⁷¹⁹ Section 1 of the CPA "services include (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental."

⁷²⁰ Section 1 of the CPA "Goods include ... (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section...".

⁷²¹ Section 1 of the CPA "Service includes... (v) access to or use of any premises or other property in terms of a rental,...".

⁷²² Stoop *Annual Survey of South African Law* 861.

⁷²³ Stoop: "Contracts of lease are expressly mentioned in section 44(1): every consumer has a right to assume, and it is an implied provision, that a supplier has a legal right or the authority of the owner to supply, sell, or lease goods." As stated previously, 'goods' include a legal interest in land. Stoop *Annual Survey of South African Law* 861.

However, Delport⁷²⁴ challenges the validity and general applicability of section 14 to lease agreements. He states that this application has resulted in fixed term leases being subjected to various undesirable restrictions, unfair preferences and allowances of repeated breach and automatic continuation of these agreements. The complexity may be resolved by interpreting the provisions of the CPA as will be done hereunder.

6.4 Interpretation of the CPA

This part of the chapter deals with the interpretation of the CPA to determine the correct manner in which its provisions must be applied, with regard to fixed term leases.

6.4.1 Interpretation sections of Consumer Protection Act

A number of sections of the CPA specifically deal with the interpretation of the *Act*. In amplification, the CPA has its own interpretation clause,⁷²⁵ which contains explicit provisions about the interpretation of the wording. For present purposes sections 2, 3, 4(2) and 4(3) are relevant.

To achieve the main goal of consumer protection, section 2(1)⁷²⁶ requires the CPA to be interpreted in a manner that gives effect to the purpose provision in section 3(1)⁷²⁷ of the CPA.⁷²⁸ Section 2(2)(a) provides that, when interpreting or applying

⁷²⁴ Delport 2014 *Obiter* 61.

⁷²⁵ Section 2 of the CPA; A number of sections of the CPA specifically deal with interpretation clauses, but they do not override the general approach to be followed. The interpretation provisions underscore the purposive method of interpretation by setting out certain factors to be taken into account in the process of interpreting the CPA.

⁷²⁶ Section 2(1) stipulates that the CPA must be interpreted in a manner "that gives effect to the purposes set out in section 3".

⁷²⁷ Section 3 of the CPA "Purpose and policy of Act (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers- (i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (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; (c) promoting fair business practices; (d) protecting consumers from (i)

the CPA, foreign law may be considered.⁷²⁹ Should any inconsistency arise between the provisions of the CPA and the provisions of any other legislation, section 2(9) obliges that both acts be applied concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second provision.⁷³⁰ This will however only be possible where the inconsistent provision extends greater protection to a consumer or if the same level of protection is provided, but by other means.⁷³¹ Further, the provisions of the CPA must not be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.⁷³²

Section 4⁷³³ confirms the realisation of consumer rights. Therefore section 4(2) also has consequences for how the CPA must be interpreted as the Tribunal or

unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) deceptive, misleading, unfair or fraudulent conduct; (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour; (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers. (2) To better ensure the realisation of the purposes of this Act, and the enjoyment of the consumer rights recognised or conferred by this Act, the Commission, in addition to its responsibilities set out elsewhere in this Act, is responsible to (a) take reasonable and practical measures to promote the purposes of this Act and to protect and advance the interests of all consumers...".

⁷²⁸ CPA s 2(1) and s 3; Melville *The Consumer Protection Act 28*; Van Eeden *A Guide 37*.

⁷²⁹ The use of the word "may" indicates that this section is permissive rather than mandatory. The international consumer protection trend has resulted in a growing appreciation of the effects and consequences of the doctrine of unsupervised freedom of contract, internationally. International trends coupled with the unique situation in South Africa in the consumer protection arena, have brought about the enactment of the CPA, which is a clear indication that the legislature has recognised these trends and has endeavoured to bring South African law in line with international consumer law and practice. Van Eeden *Consumer Protection Law 5*.

⁷³⁰ CPA s 2(2)(a).

⁷³¹ De Stadler "Interpretation, purpose and application" 2-8. When one considers the aim of the CPA, which is primarily aimed at consumers, it will be difficult to imagine a situation where the CPA will not prevail. In light of the fact that the CPA is in essence the only legislation dealing with consumer protection specifically, substituting all previous legislation, it is an interesting thought indeed.

⁷³² CPA s 2(10).

⁷³³ Section 4 of the CPA "(1)Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring: (a) A person acting on his or her own behalf; (b) an authorised person acting on behalf of another person who cannot act in his or her own name; (c) a person acting as a member of, or in the interest of, a group or class of affected persons; (d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be;

court must promote the spirit and purpose of the CPA.⁷³⁴ As previously stated, section 4(2)(b)(i)⁷³⁵ of the CPA explicitly states that the CPA must be interpreted to provide protection to the most vulnerable of consumers in our socio-economic community.⁷³⁶ Section 4(3) states that where the CPA is vague, the "Tribunal or court must prefer the meaning that best promotes the purpose and spirit of the CPA" and which will generally best improve the apprehension of consumer rights.⁷³⁷ It further provides that where a provision in the CPA can be interpreted to have more than one meaning, the meaning that best promotes the spirit and purposes of the CPA and the meaning that will best improve the realisation and enjoyment of consumer rights, must be preferred.⁷³⁸

and (e) an association acting in the interest of its members. (2) In any matter brought before the Tribunal or a court in terms of this Act (a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (1) (b); and (b) the Tribunal or court, as the case may be, must- (i) promote the spirit and purposes of this Act; and (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to (aa) any order provided for in this Act; and (bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act. (3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (1) (b). (4) To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer (a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to (i) the content of the document; (ii) the manner and form in which the document was prepared and presented; and (iii) the circumstances of the transaction or agreement. (5) In any dealings with a consumer in the ordinary course of business, a person must not (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act; (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.

⁷³⁴ De Stadler "Interpretation, purpose and application" 2-2.

⁷³⁵ "In any matter brought before the Tribunal or a court in terms of this Act, the Tribunal or court, as the case may be, must (i) promote the spirit and purposes of this Act..."

⁷³⁶ Section 3(1)(b) of the CPA. These vulnerable persons include poor individuals, those who live in remote communities, minor children, seniors, those who are illiterate and those with impaired visual functionality.

⁷³⁷ De Stadler "Interpretation, purpose and application" 2-2.

⁷³⁸ Section 4(3) of the CPA; Steyn 2014 *De Rebus* 26.

6.4.2 Application of the approaches to statutory interpretation on section 14

6.4.2.1 A textual interpretation of section 14 of the *Consumer Protection Act*

There is a continued reoccurrence of the textual approach in South African courts as not all courts have moved on from this approach. It is believed that the reason for the continued reoccurrence is that the courts diverge from the so-called 'plain meaning' of the text only in instances where the provision is unclear or ambiguous, and the subsequent application of the other rules of interpretation is contingent on how clear the text may seem to the particular interpreter.⁷³⁹ This can be seen from the recent judgment of *Joroy 4440 CC v Potgieter*,⁷⁴⁰ where Reinders J was not of the view that section 69(d) of the CPA could reasonably be understood to have more than one meaning.⁷⁴¹ Owing to the wording of the said section being clear and unambiguous and the legislature being very specific, he failed to see how any other interpretation could be given to the words in this section.

Lease agreements of immovable property may be entered into on a periodical basis, for example from month-to-month, alternatively the period of the lease may be fixed by the parties, for example one or two years. The question now arises whether these agreements are fixed-term agreements as contemplated in section 14. This question may be answered when one considers the definition of a fixed-term lease. The terms 'fixed term agreement' is used throughout the CPA, but unfortunately the CPA fails to provide for a definition of what precisely is meant by the term.⁷⁴² In a literalist approach, giving the expression its plain,

⁷³⁹ Kafesu *Interpretation of Fiscal Statutes by the Courts* 35.

⁷⁴⁰ *Joroy 4440 CC v Potgieter* 2016 3 SA 465 (FB). The basis for the Applicant's claim resorted under the CPA, and more specifically the provisions of ss 55 and 56, which deals with the consumer's right to good quality goods. The court also had to deal with section 69 of the CPA, which concerns the enforcement of the rights of consumers. The question to be decided by the court was whether it had jurisdiction to adjudicate the matter in view of the wording of Section 69(d) of the CPA. Reinders J held that the wording of the section was unambiguous and clear and referred to what is specifically stated in the section. It was further stated that the legislature was very precise in prescribing the recourse that a consumer had in terms of the section in that the consumer had to exhaust his remedies in terms of the section first prior to approaching the court for redress; Matlala 2016 *De Rebus* 38.

⁷⁴¹ 2016 3 SA 465 (FB) para 8.

⁷⁴² In the absence of a clear definition, the common law meaning of a fixed term lease will be applicable, as discussed in chapter 4.

ordinary meaning, a fixed-term agreement is any agreement where the duration of the agreement is set between two dates, namely a commencement date and an expiry date.⁷⁴³ In that sense a seven-day car rental agreement is a fixed-term agreement, as is a two-year mobile telephone contract and a one-year gym contract. The same applies to fixed-period lease agreements, irrespective of the duration.⁷⁴⁴

According to De Stadler, the definition of a lease,⁷⁴⁵ as defined by Bracher⁷⁴⁶ to be an agreement in terms of which 'temporary possession of any premises or other immovable property is delivered to the consumer for consideration', is presumably gathered from the definition of 'rental' in section 1 of the CPA. She states that it is important to note that the definition goes further to exclude 'lease' in terms of the NCA, which denotes to movable property bought in terms of a credit agreement. In such instances, ownership of the property passes to the consumer at the end of the term of the agreement. On a textual approach, she reaches the conclusion that it is therefore inevitable that on the plain wording of the CPA, leases for immovable property are included within its ambit.

However, section 14 appears to not apply to all fixed-term agreements. When interpreting the provisions of section 14, the textual approach to legal interpretation has been criticised by Delport.⁷⁴⁷ There is merit in the criticism raised, by virtue of the provisions contained in section 14(2)(c), providing that the supplier party to a fixed-term agreement must, at least forty business days before the expiry of the agreement, notify the consumer of the impending expiry date. Logically, in a literal approach, it would not be possible to comply with this except provision where the period of the fixed term agreement is at least forty business days. In contrast, the wording of the CPA does not provide for a required minimum duration of a fixed term agreement. Accordingly, based on its own

⁷⁴³ Delport 2014 *Obiter* 73; The period between the two dates could be any number of days, weeks, months or years as long as it is fixed.

⁷⁴⁴ Delport 2014 *Obiter* 72.

⁷⁴⁵ As stated in chapter 4, leases can be defined as an agreement in terms whereof temporary possession of a premises or immovable property is delivered to the consumer for consideration.

⁷⁴⁶ Bracher 2011 *Business Day Business Law & Tax Review*.

⁷⁴⁷ Delport 2014 *Obiter* 72, 73.

wording, on a textual approach, section 14 appears not to apply to short fixed-term agreements, but only to agreements having a minimum fixed period of forty business days.⁷⁴⁸

Even though it may be valuable to determine the plain meaning of a provision, and in this case the plain meaning of a fixed-term agreement, such meaning may not necessarily be the correct interpretation of the expression in the context of section 14, as it could lead to absurdity.

6.4.2.2 A contextual interpretation of section 14 of the *Consumer Protection Act*

According to Delpont,⁷⁴⁹ section 4(3) expressly provides for a contextual interpretation of the CPA. It stipulates that, if any provision of the CPA read in context, can reasonably be understood to have more than one meaning, the court or Tribunal must favour the meaning that best upholds the spirit and purposes of the CPA, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons intended in section 3(1)(b).⁷⁵⁰ According to Delpont,⁷⁵¹ it is not to be understood that a contextual interpretation is to be adopted only in cases of uncertainty or vagueness, but rather that, if a contextual interpretation depicts that a provision can be read in more than one manner, the choice between those meanings must be made by implementing the provisions of section 4(3), as discussed above.⁷⁵²

De Stadler⁷⁵³ states that due to the ambiguities and contradictions in the CPA, the conclusion is that the contextual approach will often be applied when the substantive provisions of the CPA are interpreted. Thus, when interpreting the CPA, the emphasis falls not on the literal meaning of the words but rather on the

⁷⁴⁸ Delpont 2014 *Obiter* 72-73.

⁷⁴⁹ Delpont 2014 *Obiter* 68.

⁷⁵⁰ These persons include consumers who are low-income persons, who live in remote, isolated or low-density population areas or communities, minors, seniors or other similarly vulnerable consumers, or illiterate; Steyn 2014 *De Rebus* 26.

⁷⁵¹ Delpont 2014 *Obiter* 68.

⁷⁵² Delpont 2014 *Obiter* 68.

⁷⁵³ De Stadler "Interpretation, purpose and application" 2-3.

broad policy, purpose and spirit of the CPA, and the aim is to give effect thereto.⁷⁵⁴

6.4.2.3 A purposive interpretation of section 14 of the *Consumer Protection Act*

In the recent judgment of *Halstead-Cleak v Eskom Holdings Ltd*⁷⁵⁵ the court was confronted with the perplexing task to interpret certain definitions of the CPA. It was confirmed that the interpretation of the CPA should be in accordance with the spirit and purpose of the CPA. As confirmation of the purposive approach, the decision in the matter of *Vousvoukis v Queen Ace*⁷⁵⁶ is considered to be of importance. After considering the interpretation clauses of the CPA, Pickering J, concluded that the purpose of the CPA is generally to promote and advance the social and economic welfare of consumers and, in the event of any ambiguity in the provisions of the CPA, a court interpreting same must prefer the meaning referred to in section 4(3) of the CPA. According to Pickering J, this means that any ambiguous provision contained in the CPA must be interpreted in favour of the consumer, particularly any consumers who are 'vulnerable' as a result of poverty, illiteracy, old age or any other similar disability.⁷⁵⁷

Delport⁷⁵⁸ is of the view that the effect of section 14(1) creates difficulties in adopting a purposive interpretation. He opines that the situation is ameliorated to the extent that the section is not applicable to leases entered into between juristic persons regardless of their annual turnover or asset value.⁷⁵⁹ Even when one considers the purpose of the CPA, he still contends that, in a purposive interpretation of section 14, one must bear in mind that landlords can escape from the application of the CPA by giving preference to tenants who too are juristic persons.⁷⁶⁰ His conclusions are that one could conceivably end up with the

⁷⁵⁴ De Stadler "Interpretation, purpose and application" 2-2.

⁷⁵⁵ 2016 2 SA 142 (T) para C.

⁷⁵⁶ 2016 3 SA 188 (ECG) para 91.

⁷⁵⁷ *Vousvoukis v Queen Ace* 2016 3 SA 188 (ECG) para 91. As confirmed by De Stadler in De Stadler "Interpretation, purpose and application" 2-4.

⁷⁵⁸ Delport 2014 *Obiter* 73-74.

⁷⁵⁹ Section 14(1) of the CPA; Delport 2014 *Obiter* 73.

⁷⁶⁰ Having regard to the aforesaid, it may be advisable for landlords to enter into leases with juristic persons rather than natural persons, in order to escape the adverse consequences of

absurd situation where individuals are obliged to form legal entities merely for the sake of entering into lease agreements.⁷⁶¹ This cannot be seen to promote the purpose of the CPA.⁷⁶²

Further, the Regulations⁷⁶³ promulgated under the CPA relating to the maximum period of a fixed-term agreement has a substantial effect in circumstances where a landlord cannot discharge the onus and demonstrate a financial benefit to the tenant.⁷⁶⁴ It results therein that the maximum period of a lease agreement will be twenty four months, irrespective of whether the tenant wishes to enter into a lease for a longer period. According to Bracher,⁷⁶⁵ it is not always possible to indicate a demonstrable financial benefit as such benefit may not always exist for a consumer having a lease of a few months longer than twenty four months. Furthermore he states that by setting a maximum term for leases of twenty four months, it creates 'absurdity', especially given the fact that the limitation has been extended to the commercial letting market. Credit providers may be disinclined to grant credit to consumers to start up a business if their leases are limited to a period of two years as the period is too short to enable consumers to recover the start-up costs of a new business.⁷⁶⁶ To limit the period of a lease agreement to twenty four months, could, particularly on the commercial letting market, have serious financial implications for small and medium enterprises, which is not believed to be in line with the purpose of the CPA.

section 14 of the CPA. A lease with a tenant which is a juristic person as defined in the CPA is more favourable if the landlord is also a juristic person.

⁷⁶¹ Portfolio Property Investments 2016 <http://www.portfolio-property.com>.

⁷⁶² The *Companies Act* 71 of 2008 contains a procedure referred to as "business rescue" which curtails a landlord's right under a lease. Whilst therefore, section 14 of the CPA can be avoided by contracting with a juristic person, the downside from the landlord's point of view is that the adverse consequences of a possible business rescue process, then comes into play. Further, should a landlord insist on a juristic person being established for the tenant in order to avoid the application of section 14 of the CPA, it may be problematic in light of the provisions of Section 51.

⁷⁶³ Regulation 5(1) in GN 294 in GG 34181 of 1 April 2011.

⁷⁶⁴ The maximum duration of a fixed term agreement is twenty four months from date of signature by the consumer. Reg 5(1) in GN 294 in GG 34181 of 1 April 2011.

⁷⁶⁵ Bracher 2011 *Business Day Business Law & Tax Review*.

⁷⁶⁶ Delpont 2014 *Obiter* 73-74; http://www.commercial-property.co.za/3766_news_SAPOA-seeks-clarity-on-Consumer-Protection-Act-.html.

It is submitted that this predilection of entering into fixed term lease agreements with juristic persons and limitations coupled therewith will not promote the purpose of the CPA, which is to prevent exploitation of consumers and to avoid harm suffered as a result of unfair business practices.⁷⁶⁷ It remains unclear whether the application of section 14, even when adopting a purposive approach, promotes the objectives of the CPA. According to Delport,⁷⁶⁸ section 14 is poorly drafted, which makes it problematic to establish the scope and application of this section, even when a purposive interpretation is applied, as mandated by the CPA.

As previously stated, where a provision can be construed to have more than one meaning, the court should prefer the meaning that promotes the spirit and the purpose of the CPA.⁷⁶⁹ What this entails is that any clause which is not in favour of the consumer will be interpreted to provide rights to the consumer rather than to deprive such rights. This is a codification of the common law *contra-preferentem* rule of interpretation and its inclusion results in legal certainty.⁷⁷⁰ This gives rise to a very important question, which is whether an ambiguous provision in the CPA should then be interpreted against the supplier even where such an approach would cause unnecessary hardship to the supplier.⁷⁷¹ Considering the aforesaid, it is not the purpose of the CPA to distort sound business practices, to exploit suppliers or to empower consumers to act deceitfully.⁷⁷² It is not a requirement for promoting fairness that consumers be afforded extreme protection, or that consumers, in all instances, be given the right to escape from the consequences of their business transactions simply because they had a change of mind.⁷⁷³ Such an interpretation of the CPA would most definitely not be in line with the purpose that the CPA aims to achieve.

⁷⁶⁷ Section 3(1) of the CPA; Delport 2014 *Obiter* 68.

⁷⁶⁸ Delport 2014 *Obiter* 80.

⁷⁶⁹ CPA s 4(3); Kanamugire and Chimuka 2014 *Mediterranean Journal of Social Sciences* 173.

⁷⁷⁰ Naudé 2009 *SALJ* 506.

⁷⁷¹ A more balanced approach is called for, but difficult to sustain on the wording of the CPA; Van Eeden *Consumer Protection Law* 40.

⁷⁷² Delport 2014 *Obiter* 68.

⁷⁷³ Delport 2014 *Obiter* 68.

Consensus is evolving around the recognition that consumer protection concerns both rights and responsibilities. This trend intensified since the 1999 UNGCP were expanded to include a section on sustainable consumption and the 2015 UNGCP have further acknowledged the Sustainable Development Goals.⁷⁷⁴ This adds the notion of consumer responsibilities to their rights, as discussed in chapter 2. There is nothing in the CPA that suggests that it has to be interpreted in a manner whereby consumers are not accountable for their actions in circumstances where no unfair or unreasonable conduct is attributable to suppliers.⁷⁷⁵ It is therefore necessary for a balance to be struck between the legitimate expectations of consumers and suppliers and *vice versa*.⁷⁷⁶ Essentially it means that consumers need not be overprotected to the detriment of suppliers.

6.4.3 Conclusion

Taking the different theories of interpretation into account it has been indicated that, depending on the theory adopted to interpret the provisions of section 14, there will be a difference in outcome when applied. This difference in outcome creates the ambiguity.

The solution on the interpretation is found in section 2, read with sections 3(1) and 4(3).⁷⁷⁷ Section 2(1)⁷⁷⁸ provides that the provisions of the CPA must be interpreted in a manner that gives effect to the purposes set out in section 3. Section 3(1) sets out the purposes of the CPA.⁷⁷⁹ Therefore, a clear injunction is

⁷⁷⁴ United Nations Conference on Trade and Development Manual on Consumer Protection 2016 10.

⁷⁷⁵ Delpont 2014 *Obiter* 68.

⁷⁷⁶ Delpont 2014 *Obiter* 71.

⁷⁷⁷ Section 2(1) provides for a purposive interpretation. It is reiterated that the purpose of the CPA is to promote the fair and responsible treatment of consumers in their business relations in the market; De Stadler "Interpretation, purpose and application" 2-2.

⁷⁷⁸ Section 2(1) of the CPA states "This Act must be interpreted in a manner that gives effect to the purposes set out in section 3."

⁷⁷⁹ Section 3(1) of the CPA "The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers- (i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (iv) whose ability to read and

contained in section 2 to interpret the provisions purposively.⁷⁸⁰ Section 4(3)⁷⁸¹ states that where any provision of the CPA "can reasonable be constructed to have more than one meaning", the provision that will prevail is the meaning of the provision that will "best promote the spirit and purpose" of the CPA. Alternatively, the provision which will prevail is the provision which will "best improve the realisation and enjoyment of consumer rights" of vulnerable consumers. In light of the fact that the CPA contains various uncertainties and ambiguities, it is not probable that by following a textual approach will assist in interpreting its provisions.⁷⁸² Therefore, when the substantive provisions of the CPA are interpreted, such as in the case of lease agreements, the purposive approach to statutory interpretation will often be applied and any unclear or ambiguous provision must be interpreted in favour of the consumer.⁷⁸³

6.5 Constitutional implications

The consumer protection measures in the CPA may be regarded as protecting the dignity of consumers, which is a fundamental right enshrined in the Bill of Rights.⁷⁸⁴ It has a direct effect on the access to adequate housing, but also has

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; (c) promoting fair business practices; (d) protecting consumers from- (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) deceptive, misleading, unfair or fraudulent conduct; (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour; (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers".

⁷⁸⁰ De Stadler "Interpretation, purpose and application" 2-2.

⁷⁸¹ Section 4(3) of the CPA If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).

⁷⁸² Regarding the textual approach to statutory interpretation, it should be remembered that the language of a statute remains important. Where the language of a statute is clear and unambiguous, it is not necessary to revert to a purposive interpretation. *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) para 810D; Du Plessis *Re-interpretation* 96.

⁷⁸³ De Stadler "Interpretation, purpose and application" 2-3.

⁷⁸⁴ Section 10 of the Constitution; Van Eeden *Consumer Protection Law* 17.

an indirect effect on other constitutional rights, like equality, freedom, privacy, access to information and enforcement. By virtue of the fact that rental of immovable property is recognised as a method of providing access to housing, the interconnections extant in the foundation of the right to housing were illustrated.⁷⁸⁵ The danger is that the provisions of the CPA may possibly limit the right to security of tenure and ultimately infringe upon the constitutional right of access to adequate housing.⁷⁸⁶

In the commercial leasing market the constitutional effects are seen in the exclusion of the provisions of section 14, where a fixed term agreement entered into between two juristic persons are excluded from the protection afforded to natural consumers.⁷⁸⁷ This limitation infringes on the right to equality of small and medium enterprises, which should also be protected by the CPA.⁷⁸⁸ Further, the limitation of a tenant's lease to a maximum period of twenty four months, as

⁷⁸⁵ In terms of s 25(6) all previously disadvantaged persons who currently occupy land with insecure tenure are entitled to legally secure tenure in terms of appropriate legislation. In terms of Section 26 of the Constitution, all South Africans have a constitutional right to have access to adequate housing. Short-term tenants who are financially sound and who can look after their own interests in the free market possibly enjoy sufficient protection from the common-law principles. However, those tenants whose interests are particularly targeted by ss 25(6) and 26(2) of the Constitution are not adequately protected by the common law, and the Constitution evidently requires statutory action to remedy the situation. S 25(6) of the Constitution must also have some effect on the present landlord-tenant framework. Although the extent of its application is fundamentally restricted due to the section's focus on the lasting effects of apartheid law. The reality in South Africa is that the majority of tenants do not own immovable property and are therefore left with no other alternative than to enter into lease agreements, to lease immovable property.

⁷⁸⁶ The international instruments discussed above can be considered by South African courts in their effort to develop and ensure that the constitutional right to housing of lessees are afforded adequate protection. Most of the fundamental consumer rights are constructed on international precedents and correspond in most aspects to the UNGCP discussed above.

⁷⁸⁷ Section 14(1).

⁷⁸⁸ The provisions of section 36 of the Constitution should be kept in mind. In terms of section 36 of the Constitution "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

indicated above, may infringe on the right to freedom to partake in the economic market, which is extended to small and medium enterprises.⁷⁸⁹

6.6 Effect of the Consumer Protection Act on lease agreements

The purpose of this paragraph is to elaborate on the effect the CPA has on lease agreements. The specific issues dealt with in section 14, which contributes to the uncertainty, is the manner in which fixed terms agreements are terminated and renewed. This discussion should be read in consideration with the discussion of the common law and RHA in chapter 4.

6.6.1 Termination of the lease

There are various ways in which a lease can be terminated. These methods include termination by notice, effluxion of time, cancellation by either party or by mutual agreement. Cancellation by notice pertains to periodic leases and effluxion of time pertains to fixed-term leases. As the scope of this study relates to fixed term lease agreements, termination of a fixed term agreement of immovable property will be discussed.

6.6.1.1 Termination of a fixed term lease by effluxion of time

Section 14(2)(d) of the CPA stipulates that on the expiry of the fixed term agreement, the agreement will automatically continue on a month-to-month basis, subject to any material changes of which the lessor has given notice, unless the lessee specifically directs the lessor to terminate the agreement on the expiry date thereof or agrees to a renewal of the agreement for a further fixed term.⁷⁹⁰

6.6.1.2 Termination by cancellation

Section 14(2)(b) provides for the cancellation of fixed-term agreements by the consumer (tenant) and the supplier (landlord). In the case of cancellation by the tenant, the tenant may cancel the lease upon the expiry of its fixed term, without

⁷⁸⁹ Section 22 of the Constitution.

⁷⁹⁰ Le Roux "Commentary on the Rental Housing Act" 5-2.

penalty or charge,⁷⁹¹ or at any other time, by giving the landlord twenty business days' written notice.⁷⁹² The early cancellation of the lease by the tenant is subject to payment of a reasonable cancellation penalty.⁷⁹³ If section 14 is applicable to the lease agreement, from a practical perspective, this means that an early cancellation of a lease agreement by the tenant, who cancels the lease prior to the termination date of the agreement, and follows the procedure contained in section 14(2)(b), such early termination does not amount to a breach of the agreement.⁷⁹⁴ The early termination of the lease agreement is a right afforded to the lessee in terms of the CPA, provided that the tenant complies with the cancellation requirements provided in section 14.⁷⁹⁵ The tenant must give the lessor twenty business days' notice in writing and the rental for the twenty business day period remains payable by the tenant.⁷⁹⁶

In the case of cancellation by the landlord, the position is dramatically different, as the landlord's right to cancel is qualified under the CPA. The landlord may cancel the lease twenty business days after giving written notice to the tenant of a material failure by the tenant to comply with the agreement, unless the tenant has rectified the failure within that time.⁷⁹⁷ The effect of section 14 on leases,

⁷⁹¹ Section 14(2)(b)(i)(aa) of the CPA.

⁷⁹² Section 14(2)(b)(i)(bb) of the CPA.

⁷⁹³ Section 14(3)(a) and (b) of the CPA. The "reasonable cancellation penalty" for early cancellation of the lease is not to be regarded as a means to penalise the lessee, but is rather intended to allow the lessor to recover any losses he may have suffered as a result of the early cancellation of the lease agreement by the lessee and the lessee vacating the premises before the termination date of the lease agreement. The "reasonable cancellation penalty" must be based on the actual financial damages suffered by the lessor, whom may not gain financially or benefit from such penalty costs. The Legal Advice Office 2015 <http://www.legaladviceoffice.co.za>. This may possible be regarded as a codification of breach of contract, but ameliorating the tenant's position as the landlord can now not seek specific performance.

⁷⁹⁴ The Legal Advice Office 2015 <http://www.legaladviceoffice.co.za>.

⁷⁹⁵ Section 14(2)(b)(bb) "the consumer may cancel that agreement at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b)".

⁷⁹⁶ This inference can be drawn from the provisions of section 14(3)(a) where it is clear that upon the cancellation of a consumer agreement, the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation. Once the landlord receives the written notice of cancellation from the tenant, the landlord should endeavour to take the necessary action to ensure that the property is advertised to new prospective tenants. The costs coupled with such advertisements can be charged to the lessee tenant as part of the "reasonable cancellation penalty" that the landlord is entitled to charge as a result of the early cancellation of the lease agreement.

⁷⁹⁷ Section 14(2)(b)(ii) of the CPA; Le Roux "Commentary on the Rental Housing Act" 5-5.

when cancellation is concerned, is that a tenant is placed in a far more advantageous position than a landlord, irrespective of the reasonable cancellation penalty payable by the tenant. Whilst a tenant may cancel the lease at any given time by giving twenty business days' written notice to the landlord, the landlord is not afforded such right, as the landlord's right of cancellation is restricted to a material breach of the lease by the tenant.⁷⁹⁸ In which event, the landlord may only cancel the lease if the tenant remains in default after having been given twenty business days' written notice to rectify the material breach.⁷⁹⁹

The tenant's right to cancel a fixed term lease with twenty business days' notice has a profound effect on the property sector. De Stadler⁸⁰⁰ states that it would be 'irresponsible' to conclude that the CPA does not apply to leases, merely because of the unfortunate effect which a 20 business days' notice of termination will have on the property sector. The fact that a provision of an Act has an unfortunate effect, does not mean that such provision is not applicable. An interesting point made by De Stadler⁸⁰¹ is that it is possible for the Minister of Trade and Industry to grant an exemption from section 14 in respect of leases of immovable property. However, in light of the absurdity of the application of the CPA to

⁷⁹⁸ Smith *Eviction and Rental Claims* 18-19.

⁷⁹⁹ The effect, according to Smith, is that all cancellation clauses in leases governed by the provisions of the CPA, providing for immediate cancellation of the lease on failure by the tenant to pay the rent on due date, shall be unenforceable. The provisions in leases that require a calendar months' notice of cancellation are also unenforceable. The overriding reach of s 14(2)(b), which enforces cancellation modes of agreements that are subject to s 14 regardless of provisions to the contrary, prevents the incorporation into such leases of any other conditions or time frames (other than those provided for in the section) in respect of cancellation. However, a claim against the lessee for arrear rent is not affected by s 14. S 14(2)(b)(ii) limits the giving of 20 days' written notice of a breach by the tenant to proceedings for cancellation of the agreement. The section does not require that notice must be given prior to the commencement of legal action for recovery of arrear rent. Smith *Eviction and Rental Claims* 18-23, 24. The lessor may issue a summons to enforce payment of arrear rent and the summons is not subject to giving 20 business days' written notice of default to the lessee, provided that the lease permits immediate institution of legal action on failure by the lessee to pay the rent and does not require that the lessor place the lessee in mora prior to the issuing of a summons. The lessor shall also have other remedies available such as attachment of movable property to secure the landowner's tacit hypothec in terms of s 32 of the *Magistrates' Courts Act* 32 of 1944, as well as proceedings by way of a rent interdict summons, all of which are unaffected by the provisions of s 14.

⁸⁰⁰ Esselaar Attorneys 2011 <http://www.esselaar.co.za/legal-articles/lease-and-consumer-protection-act-68-2008-lets-set-record-straight>.

⁸⁰¹ Esselaar Attorneys 2011 <http://www.esselaar.co.za/legal-articles/lease-and-consumer-protection-act-68-2008-lets-set-record-straight>.

leases, pointed out repetitively during the drafting process, and the fact that the RHA does not give analogous rights to consumers, makes this doubtful. The DTI has been approached by the South African Property Owners Association (hereafter SAPOA), who raised concerns regarding section 14, in order to obtain certainty regarding the application of the CPA to the property industry in general, given that the CPA applies to leases.⁸⁰² One of the concerns raised by SAPOA resorted around the short twenty business days' cancellation notice period, as discussed above.

6.6.1.3 Termination by mutual agreement

A lease agreement can also be terminated by mutual agreement between the landlord and tenant. Even where there is a written agreement, a written notice to terminate by agreement, is not required where section 14 applies to the lease.⁸⁰³

6.6.2 Renewal of the lease

The general rule is that, prior to the termination of a lease, the landlord and tenant may agree that the lease agreement be renewed. The principles applicable to the renewal of lease agreements shall now be discussed.

6.6.2.1 Notice requirements for the renewal of a lease

Sections 14(2)(c)⁸⁰⁴ and 14(2)(d)⁸⁰⁵ of the CPA regulates the renewal of fixed-term agreements. Section 14(2)(c) provides that a landlord is obliged to deliver a

⁸⁰² SAPOA press release dated 11 May 2011.

⁸⁰³ Le Roux "Correct and Incorrect Methods" 5-4.

⁸⁰⁴ Section 14(2)(c) "of not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and (ii) the options available to the consumer in terms of paragraph (d)". On a reading of these two subsections, it appears that the first sentence of subsection 14(2)(c) does not follow subsection (2) grammatically and may cause confusion. However, the intention to provide for a notice coupled to certain time frames can be deduced from the general context of the wording.

⁸⁰⁵ Section 14(2)(d) "on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly (i) directs the supplier to terminate the agreement on the expiry date; or (ii) agrees to a renewal of the agreement for a further fixed term".

written notice to the tenant between forty and eighty business days before the expiry date of the fixed term agreement, including a notice of any material changes that would apply if the agreement were to be renewed or otherwise continue beyond the expiry date. Such notice must, in addition, state the options available to the lessee in terms of section 14(2)(d). In terms of section 14(2)(d) the lessee has two options.⁸⁰⁶ The tenant must expressly direct the landlord to terminate the lease on the expiry date, alternatively, agree to a renewal for a further fixed term on the basis of the 'material changes' suggested by the landlord in the notice delivered to the tenant.⁸⁰⁷ Section 14(2)(d) also provides that, should the landlord not expressly exercise one of the available options above, the lease agreement will be automatically continued on a month-to-month basis, subject to any material changes of which the landlord has given notice, as stated in subsection 14(2)(c)(i).⁸⁰⁸

The renewal provisions of section 14 have been subject to criticism. According to Smith:⁸⁰⁹

The impact of the renewal provisions of section 14 on leases of immovable properties is mainly that tenants may to some extent dictate the renewal and expiry of leases. It seems, on a strict interpretation of the provisions, that a landlord cannot terminate the agreement on its "expiry", and has to notify the tenant of the impending expiry, after which the tenant has the right to either continue with the lease on the terms suggested by the landlord, or to terminate the lease. The purpose of an expiry date is therefore uncertain. A further

⁸⁰⁶ Le Roux "Correct and Incorrect Methods" 5-8.

⁸⁰⁷ The lessor may now increase the rent to an extortionate amount, making it difficult for the lessee to pay the rent, which would result in the lessee not renewing the lease and elect to cancel same, rather than having to meet the new material changes provided by the lessor, which would be applicable to the lease, should it be renewed.

⁸⁰⁸ The procedure for the renewal of a lease under the CPA is subject to a number of conditions, namely that the lessor must notify the lessee of the imminent termination date, any material changes to the lease if it is to be renewed and the options available to the tenant. There are thus three possible scenarios under the CPA. The first scenario is if the lessee does not expressly exercise the available options above, the lease will automatically continue on a month-to-month basis, in which case the lease will be a "periodic lease". The second scenario is that the lessee may terminate the lease, which will result therein that there will be no renewal of the lease. The third and final scenario is that the lessee may elect to renew the lease, but only for a further fixed term. As already indicated, the procedure for the renewal of a fixed-term lease under the provisions of the CPA is extremely one-sided in favour of the lessee, and outright unfair towards the lessor. As a strict interpretation of the CPA would appear to indicate that the lessor has been deprived of his common-law right to terminate a fixed-term lease. It is contrary to the spirit of the RHA, as already indicated above.

⁸⁰⁹ Smith Eviction and Rental Claims 18-20, 21.

consequence of the wording of these provisions is that the landlord can apparently only terminate the lease on its expiry by proposing unacceptable renewal provisions. It is submitted that the legislature could not have intended to deprive the landlord of his or her right to discontinue the lease on its expiry and that an indication to this effect is one of the "material changes" the landlord may include in the section 14(2)(c) notice, although the literal interpretation of the wording may suggest otherwise.

The effect of depriving the landlord of the right to terminate the lease would result in an irrational situation where landlords are forced to continue leases at the demand of tenants, which in the absence of a clear indication in the wording of the section, cannot be held to have been the intention of the legislator. It is further suggested that sections 14(2)(c) and 14(2)(d) of the CPA do not reflect the spirit of the RHA, namely that the rights and obligations of both parties must be pursued "within the context of broader national housing policy in a balanced and equitable manner...".⁸¹⁰

6.2.1.2 Similarities and contradictions between section 5(5) of the RHA and sections 14(2)(c) and 14(2)(d) of the CPA

The ambiguity, unfairness and absurdity in the CPA are further compounded by contradictions with a similar provision in the RHA. The provisions of section 5(5) of the RHA, sections 14(2)(c) and 14(2)(d) of the CPA have been discussed and to avoid prolixity, the reader is referred to the discussion above.

The similarities of these provisions are that both deal with the automatic renewal of leases after the expiry date of a fixed-term lease. A further similarity that can be detected is that both provide for the automatic conversion of a fixed-term lease in the case of the RHA to a 'periodic lease' and in the case of the CPA, to a 'month-to-month' lease⁸¹¹ or to a 'fixed-term lease'.⁸¹² The contradictions in these sections are noted where the RHA provides for the 'automatic' renewal and conversion of a fixed-term lease to a periodic lease where the "tenant remains in the dwelling with the express or tacit consent of the landowner". In such instance, no formalities are required. The only two conditions (formalities) are that the

⁸¹⁰ Preamble and s 2(4) of the RHA.

⁸¹¹ Where the tenant does not exercise one of his statutory prescribed options.

⁸¹² Where the lessee agrees to renew the lease.

lease continues on the same terms and conditions as the lease that expired and that either party must give at least one month's written notice of the intention to terminate the lease. In contradiction, the CPA provides for the 'automatic' renewal of a fixed-term lease as a 'periodic lease' (a month-to-month lease)⁸¹³ or for the 'express' renewal of a fixed-term lease as a further fixed-term lease.⁸¹⁴ Regarding contradictions, the CPA applies concurrently with the RHA and where the statutes overlap, the provisions affording the greater protection for a consumer takes precedence.⁸¹⁵

6.2.1.3 Breach and cancellation

When a party fails to perform with its contractual obligations or performs late, the aggrieved party may cancel the lease for reasons of a material breach. If the tenant cancels, for example because the landlord refuses to carry out repairs to the property, the lease is cancelled. The landlord's refusal to acknowledge or accept the cancellation for breach does not have an effect on the lease that is terminated. Similarly, if the landlord cancels the lease for late payment of rental, the tenant's acceptance or rejection of the cancellation is not required for the termination to be effective. The lease is cancelled and the relationship between the parties is terminated.⁸¹⁶ In terms of section 14, there is no obligation on the tenant to place the landlord *in mora* in order to cancel the lease.⁸¹⁷ However, there is an obligation on the landlord to place the tenant *in mora* for twenty business days before the lease can be cancelled.

6.6.3 Specific acts regulating specific issues

It is submitted that the legislation governing lease agreements should ideally reflect the circumstances of a particular jurisdiction in order to determine the

⁸¹³ In instances where there is no response from the tenant to the notice given by the landlord and he fails to exercise the options to either terminate or renew the lease.

⁸¹⁴ In instances where the tenant agrees to renew the lease subject to any material changes to the agreement which the landlord have given in his notice.

⁸¹⁵ Section 2(9) of the CPA; De Stadler "Interpretation, purpose and application" 2-7.

⁸¹⁶ Mohamed *Tenant and Landlord in South Africa* 41.

⁸¹⁷ "*In mora*" is a Latin term used in civil law, which means to be "in default". It is used to denote the fact that a party to a contract who is obliged to do something has neglected to perform, and is therefore "in default".

delicate balance between the property rights of the landlords and the tenants' occupation interest, with an aim to protect the interests of both parties.⁸¹⁸ Therefore, in order to determine the legislation to be applied on lease agreements in South Africa, the interests of both parties should be taken into account. In order to achieve this balance, it may be prudent to draw a distinction between residential and commercial leases. The application of section 14 to residential and commercial leases, both, entail various difficulties, as have been indicated. Residential leases and housing are, however, catered for explicitly in the Constitution and regulated by the RHA.⁸¹⁹ In the case of commercial leases its operation is left to be governed by consumer protection legislation and the common law. The fact that no clear distinction is made in respect of residential and commercial leases in the CPA causes various unintended consequences and a more balanced approach is required.

The CPA does not contain any specific reference to an attempt to overturn the common law or the provisions of the RHA.⁸²⁰ The RHA is a form of consumer protection legislation devoted to a specific market, the market for residential housing. The CPA, however, having a more general application that is aimed at regulating the general consumer market, also impacts on the relationship between a landlord and tenant.⁸²¹ However, not specifically, as it provides for more general consumer protection measures it is not a specific impact. Consideration should be given to the *maxim generalia specialibus non derogant*, as discussed in chapter 3. It is however, actually only a presumption which may be rebutted by a clear expression of intent in a later general act, in this case the

⁸¹⁸ In respect of contracts of lease, this line of reasoning reflects in the judgment in *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2, where the court sates that the Rental Housing Tribunals must ensure "an equitable balance between the interests of landowners and tenants when deciding unfair practice disputes. However, the Tribunals have to adjudicate these disputes in an unguided manner since the Rental Housing Act 50 of 1999 does not give detail regarding justifiable grounds for termination. It merely states that the ground for termination may not constitute an unfair practice, while an unfair practice is defined as a practice that unreasonably prejudices the rights or interests of the tenant: ss 1 and 4(5)(c) *Rental Housing Act* 50 of 1999." Maass 2012 *PER* 72.

⁸¹⁹ This may be the reason why the Constitutional Court, in *Maphango*, did not take the CPA into consideration when making its order.

⁸²⁰ Glover *et al Leases* 13.

⁸²¹ Van Eeden *Consumer Protection Law* 460.

CPA.⁸²² Observing the issue more closely, this will also be an instance where a later "(sweepingly) general provision will be inconsistent with an earlier (narrowly crafted) specific provision" *in pari materia*, which provides for a textbook opportunity for reliance on the maxim *generalia specialibus non derogant*.⁸²³

Bracher⁸²⁴ maintains the view that South Africa already has legislation to protect consumers in the housing rental industry, in the form of the RHA, which, in his opinion, should rather deal with residential leases. It is presumed that his assertion will be more beneficial to both parties if the RHA is applied to fixed term lease agreements, because the landlord's right to terminate is not restricted to breach, but can be for any other good reason, specified in the lease.

Considering the rights and interests of both parties, the decision in *Maphango*⁸²⁵ provides for an interpretation of the RHA, and presented a tool for strengthening the rights of tenants.⁸²⁶ It was held that a tenant can contest termination of the lease agreement on the basis that the lessor's reasons or grounds for termination constitutes an unfair practice since the lessee's rights or interests are being prejudiced.⁸²⁷ Owing to the fact that the Tribunals are now empowered to scrutinise the landlord's reasons for termination of a lease by virtue of the interpretation of the RHA, it highlights a substantial departure from the landlord's common law right to unilaterally terminate leases in an effort to provide protection to tenants.⁸²⁸ It is significant that the Constitutional Court, in this matter, accentuated the extensive variety of rights and interests of both parties,

⁸²² Devenish 2005 *SALJ* 73.

⁸²³ Du Plessis 2008 *Speculum Juris* 7.

⁸²⁴ Bracher 2011 *Business Day Business Law & Tax Review*.

⁸²⁵ 2012 ZACC 2 paras 47, 50 and 52.

⁸²⁶ In this matter the common law principle that a private property owner is entitled to an eviction order once the lease has been terminated, has been confirmed by the court. The eviction order must be just and equitable and therefore in line with s 26(3) of the Constitution and the provisions of PIE. This principle was also confirmed in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011 5 SA 19 (SCA).

⁸²⁷ Maass 2012 *PER* 44.

⁸²⁸ Maass 2012 *PER* 44. Take note that the landlord can still terminate the lease unilaterally depending on circumstances.

which the Tribunals must take into account in determining whether the grounds for termination resulted in an unfair practice.⁸²⁹

Irrespective of the powers conferred upon the Tribunal to investigate whether the termination of a lease by the landowner establishes an unfair practice, it is unclear at this stage whether or not this development is sufficient to meet the basic housing needs of low-income tenants.⁸³⁰ It is also not certain whether the Tribunals would be able to sufficiently balance the interests of both parties. The question that must be answered therefore remains if the rights of a tenant in terms of sections 26 and 25(6)⁸³¹ of the Constitution would be met if Tribunals were left to decide unfair practice disputes on a case by case basis. Furthermore, would the rights of the tenant be met in the absence of any actual statutory guidance regarding the legitimate grounds of the landlord for termination and consequent eviction?⁸³² In conducting this balancing exercise, such execution should take place in accordance with the spirit, purport and objects of the Constitution.⁸³³

South Africa now faces a situation where lease agreements are governed by two different acts. According to De Stadler,⁸³⁴ this situation has been catered for in section 2(9) of the CPA, which governs situations where two acts can apply and there are inconsistencies between the two acts, as discussed previously. It states

⁸²⁹ *Maphango v Aengus Lifestyle Properties* 2012 ZACC 2 para 52. In *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) the Court found that tenants do not have security of tenure in their residential property that goes beyond the boundaries of the lease agreement paras 27-29. It is interesting to note that the Constitutional Court did not deal with the CPA and also did not give reasons for its failure to discuss the applicability of the CPA to the residential lease agreements of the tenants. A possible inference which can be made is that the referral by the court to the Constitution and RHA confirms which statutory provisions should be considered when the residential property rights of tenants are in question.

⁸³⁰ Maass 2012 *PER* 47.

⁸³¹ Section 25(6) states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure which is legally secure.

⁸³² Maass 2012 *PER* 47. The predicament is that the RHA does not include a predetermined list of grounds for termination of leases. Therefore, a landlord cannot accept that the ground for termination which are stipulated in the lease will entitle him to cancel the lease. If the tenant approaches the RHT and lodges a complaint with the RHT on the basis that the landlord's ground for termination constitutes an unfair practice, then the RHT may investigate the reason of the landlord for termination and must strike a balance between the interests of the landlord and tenant.

⁸³³ Maass 2012 *PER* 72.

⁸³⁴ Esselaar Attorneys 2011 <http://www.esselaar.co.za/legal-articles/lease-and-consumer-protection-act-68-2008-lets-set-record-straight>.

that where the acts can apply concurrently, they must be so applied. When the section cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision.⁸³⁵ It has been established that considering the aim of the CPA, which is primarily aimed at protecting consumers, it will be difficult to imagine a situation where the CPA will not prevail.⁸³⁶ Despite the aforesaid, the application of the CPA to lease agreements does create some limitations, which must be considered with regard to the interaction between the CPA and the RHA. This interaction is important in order to determine the inconsistency between any provision of the CPA and a provision of the RHA in line with section 2(9)(a) of the CPA. What is therefore required is to establish which act extends more protection to a consumer, bearing in mind the issues created by section 14 are the provisions that must be considered when making a determination as to which act provides greater protection to the consumer.

The limitations for consumers posed by the CPA is firstly, that it does not apply to a transaction between a consumer and a person who is not acting in the ordinary course of business. In terms of the RHA, it is immaterial whether the landlord acts in the normal course of business, or not. This extends the application of lease agreements governed by the RHA to include once off leases whereby the number of leases governed by the RHA will be substantially more than under the CPA. It appears that a far less technical application is adopted when adopting the application of the RHA, as most lease agreements shall be governed by the RHA. The second limitation of the CPA is identified in section 14 as it does not apply to transactions between juristic persons, regardless of their annual turnover or asset value.⁸³⁷ Thirdly, a further limitation of the CPA is created in the sense that if a consumer agreement is for a fixed term, that term must not exceed any prescribed maximum period of two years.⁸³⁸

In the case of the CPA, when a lease agreement is entered into between a supplier and consumer, the CPA shall apply to both residential leases and

⁸³⁵ Section 2(9) of the CPA.

⁸³⁶ De Stadler "Interpretation, purpose and application" 2-8.

⁸³⁷ Section 14(1) of the CPA.

⁸³⁸ See Regulation 5, GN 294 in GG 34181 of 1 April 2011.

commercial lease agreements. In terms of the CPA, the tenant can be either a juristic person or a natural person. When considering the protection provided in terms of the RHA, one must not forget that the RHA only applies to leases for 'housing purposes', which results therein that its application is more restricted in the sense that the CPA also applies to commercial lease agreements. Further, the RHA also does not provide for the right to cancel contemplated in section 14 of the CPA. By reasons of the aforesaid, there is therefore no discrepancy between the two acts. In fact, the RHA may be regarded as inadequate when one considers the level of protection contemplated by the CPA. De Stadler⁸³⁹ asserts that the CPA and RHA will apply concurrently and there is no room to argue that the existence of the RHA excludes leases from the ambit of the CPA. She does however acknowledge the "unfortunate, but inescapable reality" which the application of section 14 on fixed term lease agreements has caused.

In view of the aforesaid, it is submitted that a practical solution to ensure that a lessor complies with both the CPA and RHA, may be to specify the grounds for termination in the lease and ensure that such grounds do not constitute an unfair practice. The reasons for termination are not restricted to breach, but are restricted to reasons specified in the lease. The reasons for termination must be clearly specified in the notice of cancellation. The tenant has 20 business days to rectify his failure to comply with the agreement, which means rectifying the grounds for termination as specified in the lease. The agreement can be terminated by the landlord after 20 business days if the tenant does not rectify his failure within this period.

6.7 Unintended consequences of the application of section 14 to fixed term lease agreements of immovable property

The application of section 14 to fixed term lease agreements has some strange and perhaps, unintended, consequences. The problem appears to be that the drafters of the CPA drafted the section with a different type of fixed term consumer agreement in mind, such as gym and mobile telephone services. The

⁸³⁹ Esselaar Attorneys 2011 <http://www.esselaar.co.za/legal-articles/lease-and-consumer-protection-act-68-2008-lets-set-record-straight>.

reality is that suppliers of these type of services do not face difficulties similar to that of suppliers of immovable property for leasing purposes (landlords), since they are not forced to cancel the agreement in the event of default by the consumer. In the case of these different types of fixed term agreements, the services are merely terminated until the consumer pays the arrears.⁸⁴⁰ In the case of lease agreements, landlords do not enjoy the same leverage as the services cannot merely be terminated until the tenant pays the arrear rental because the nature of the services involved is different. The only effective remedy at their disposal is to cancel the lease should the lessee continuously breach the agreement, which is not possible due to the provisions of section 14(2)(ii), as will be discussed hereunder.⁸⁴¹ Further, in respect of these different types of fixed-term agreements, the suppliers would generally have no objection to the agreement continuing after its expiry. However, in the case of lease agreements of immovable property, not all landlords would necessarily wish to continue with the lease beyond its expiry date, due to the nature of the services provided.

Delpont⁸⁴² submits that in the case of the types of agreements discussed above, the supplier one-sidedly fixes the duration of the agreement and consumers do not have a choice other than to accept the fixed term offered to them. In agreements of this nature, where the consumer does not have the power to negotiate the duration, it would be considered fair and reasonable to permit the consumer to cancel the agreement prior to the termination date, subject to the payment of a reasonable cancellation penalty.⁸⁴³ This explains the provisions of

⁸⁴⁰ The position relating to these types of agreements is different in the foreign countries discussed in the previous chapters compared to the position in South Africa. When a consumer enters into a fixed term consumer agreement in the EU (the basis for consumer protection of the electronic communications services is laid out in Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)) and Ontario, (on 29 August 2006 the Canadian Radio-television and Telecommunications Commission issued a Statement of Consumer Rights, which included the rights when the phone company wants to cut off your phone service rights when you want to discontinue your phone service, right to refunds) a consumer has specific additional rights and protection when entering into a fixed term agreement for mobile or communication services.

⁸⁴¹ Delpont 2014 *Obiter* 74.

⁸⁴² Delpont 2014 *Obiter* 78.

⁸⁴³ The reason being that the consumer is locked into the fixed term stipulated in the agreement, which is dictated by the supplier, from inception of the agreement.

the regulations related to the limitation of fixed-term agreements of twenty four months, and why the supplier has to discharge the onus to indicate a 'demonstrable financial benefit' for the consumer, should the term exceed twenty four months.⁸⁴⁴ In the case of fixed term lease agreements, the position is different, as the parties have the ability to negotiate the terms of the lease and choose to enter into a lease for a shorter or longer term.

The twenty four-month limitation period has also created various problems, especially in the commercial letting industry. SAPO raised concern to the DTI in respect of the duration of fixed term agreements.⁸⁴⁵ SAPOA has argued that credit providers will not grant credit to a consumer to start up a business if the lease agreement is limited to a 24 month period and it has been argued further that on this basis, this provision should not apply to property leases.⁸⁴⁶

In addition, a further consequence resulting from the application of section 14 to fixed term lease agreements is created by section 14(2)(ii).⁸⁴⁷ This twenty business day period results therein that the tenant may frustrate the lessor over the full fixed term of the lease by frequently making late payment of at least nineteen business days,⁸⁴⁸ without running the risk of cancellation of the agreement. As long as payment is made within the twenty business days after receipt of the written notice, calling upon the lessee to rectify the breach, the agreement cannot be cancelled.⁸⁴⁹ The practical and financial implications this creates for landlords are immense.

⁸⁴⁴ Regulation 5(1)(a) of GN 293 in GG 34180 of 1 April 2011.

⁸⁴⁵ SAPOA press release dated 11 May 2011.

⁸⁴⁶ It must be noted that Regulation 5(1)(a) which provided that the maximum period will be 24 months unless "such longer period is expressly agreed with the consumer and the supplier can show a demonstrable benefit to the consumer", has addressed this issue. This means that if a consumer can obtain credit to start a business by extending the term of his lease, the consumer will be allowed to do so. Monty 2011 *Without Prejudice* 47.

⁸⁴⁷ "Section 14(2)(ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time."

⁸⁴⁸ In terms of s 2(6) "days" are regarded as business days, which in these circumstances, is for all practical purposes a full month.

⁸⁴⁹ Smit "The Consumer Protection Act, Sales and Leases" 8.

Following the above, a further undesired consequence would be that eviction of the tenant in terms of PIE can only commence after at least twenty business days have lapsed since the tenant's default, and subsequently only after cancellation of the lease.⁸⁵⁰ This is so because of the meaning of 'unlawful occupier'⁸⁵¹ contained in PIE. For as long as the lease agreement is not lawfully cancelled, the landlord cannot evict the tenant as the tenant will have a right, afforded in terms of the lease, to occupy the premises lawfully. Essentially this would mean if the lease agreement is not cancelled as provided for, the lessee will not be considered an 'unlawful occupier' in terms of PIE and eviction proceedings will not be possible at this stage.⁸⁵²

In terms of section 14(2)(d), the landlord is required to notify the tenant in writing before the expiry date of the lease of any material changes that may apply to the renewal as well as the tenant's options⁸⁵³ to either terminate the agreement or renew it for a further fixed term. If no such notice is given, the agreement automatically continues on a month-to-month basis.⁸⁵⁴ Essentially this means that a fixed-term agreement does not terminate at expiry of the fixed term, unless the consumer expressly notifies the supplier to do so.⁸⁵⁵ The lessor is not entitled to terminate the lease at the expiry thereof, this election must be executed by the tenant.⁸⁵⁶ By not affording a lessor the right to terminate the lease (other than by reason of the tenant's failure to rectify a material breach

⁸⁵⁰ Smith *Eviction and Rental Claims* 8.

⁸⁵¹ Section 1 of PIE, the term unlawful occupier means "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the *Extension of Security of Tenure Act* 62 of 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the *Interim Protection of Informal Land Rights Act* 31 of 1996."

⁸⁵² In an ex parte application for eviction, it is essential for the applicant to make an averment in the founding affidavit, used in support of the application to evict an unlawful occupier, that the lease agreement entered into between the parties has been cancelled and by virtue of the cancellation, the occupation of the property by the occupier is unlawful. The founding affidavit must be annexed to the notice of motion, the ex parte application and to the application in terms of *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

⁸⁵³ *Standard Bank v Dlamini* 2013 1 SA 219 (KZN) para 41.

⁸⁵⁴ CPA s 14(2)(c) and (d).

⁸⁵⁵ In terms of s 14(2)(d)(i) of the CPA.

⁸⁵⁶ CPAs 14(2)(b)(ii); This sub-section has been criticised as the notice requirement merely delays the landlord's right to cancel the agreement; Hutchison and Pretorius *The Law of Contract* 441.

within twenty business days) at the expiry thereof, creates a lease in perpetuity, which is not recognised in South African law, as discussed in chapter 4.⁸⁵⁷

The result of the above is an irrational situation where landlords are forced to continue leases at the demand of tenants, which in the absence of a clear indication in the wording of the section, cannot be held to have been the intention of the legislature.⁸⁵⁸ If section 14 is to apply to leases of immovable property it would mean that to terminate the lease, the lessor would have to give a month's notice at the expiry date, and the lease will terminate only at the end of the notice period. In other words, a lessor will never be entitled to occupation of the premises on termination of the fixed period despite the fact that no provision is made in the lease for its continuation after the lapse of the fixed period. This means that the earliest the lessor will be able to do so is one month after the expiry of the lease. Such consequence is rather irrational.⁸⁵⁹ The judgment of the Constitutional Court in *Maphango*,⁸⁶⁰ may have an important bearing on the contemplation of section 14 relating to the rights of lessors to decline from renewing leases at the expiry of the fixed term. Brand J stated that a tenant has no security of tenure in perpetuity and the duration of the tenant's tenure is governed by the terms of the lease agreement, and further that one thing a lease cannot be is 'for ever'.⁸⁶¹

⁸⁵⁷ Section 14(2)(b)(ii). This sub-section has been criticised in Hutchison and Pretorius *The Law of Contract* 441. The notice period only delays the lessee's right to cancel the agreement. The implication is that a consumer will be able to make late payment by twenty business days every month and the lessor will not have the right to cancel the lease, but will be required to give notice to the lessee in respect of each breach; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) para 21, the Supreme Court of Appeal ruled that a tenant cannot rent in perpetuity, and as such, the CPA does not apply and the landlord has the right to cancel a fixed term lease after it expires by giving one calendar month's written notice of the cancellation; *Plaaskem v Nippon Africa Chemicals* 2014 5 SA 289 (SCA) para 27; *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 1 SA 433 (W) para 441.

⁸⁵⁸ Smith *Eviction and Rental Claims* 17-18.

⁸⁵⁹ Delport 2014 *Obiter* 75.

⁸⁶⁰ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) para 21.

⁸⁶¹ *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) para 28. It is important to take note of the court's failure to take the CPA into account when handing down the judgment. It would have been interesting to see how the court would have dealt with the issue in light of this provision of the CPA in order to ascertain whether the outcome would have been different?

Taking the purposes of the CPA into consideration, Delport⁸⁶² contends that the CPA seeks to "protect consumers against exploitation, unfair treatment and unscrupulous business practices". The aim is not to empower consumers to act deceitfully or to exploit suppliers. The far reaching consequences which the application of section 14 will have on fixed term lease agreements do not assist in reaching its purpose. He states that it is not unfair for a landlord to cancel a lease in cases of on-going and repeated breach by the tenant, and "prohibiting a lessor from doing so would effectively allow lessees to act unscrupulously".⁸⁶³ The application of the CPA must always be in line with reaching its goals and it is doubtful whether the purpose will be met if the above discussion is considered.

A possible solution may be to differentiate between leases for residential purposes and leases for commercial purposes. The housing rights of tenants are firmly protected by various statutes which deal with these rights specifically. By virtue of these statutes, housing can be dealt with separately and the courts will be able to interpret and apply the provisions of the acts to establish whether the residential housing rights of tenants are adequately protected. This is not the case in respect of commercial lease agreements and this is where the main problem lies when the CPA is interpreted and applied to commercial lease agreements. The unintended consequences which the CPA have on commercial leases must be rectified by means of legislation to ensure that a more balanced approach is adopted, whereby the rights of tenants of commercial leases are also adequately protected.

6.8 Conclusion

The CPA applies to lease agreements entered into by landlords letting immovable property in the ordinary course of business to a tenant, except where the tenant is the State or a juristic person with an asset value or annual turnover of two million rand or more at the time of entering into the agreement. In order to determine the application of the CPA to fixed term lease agreements of immovable property, the relevant provisions of the CPA must be interpreted. In interpreting the CPA, the literal approach to interpretation could lead to

⁸⁶² Delport 2014 *Obiter* 74.

⁸⁶³ Delport 2014 *Obiter* 75.

absurdities. Due to the ambiguities and contradictions in the CPA, the conclusion is that the contextual approach will often be applied when the substantive provisions of the CPA are interpreted. The interpretation sections contained in the CPA emphasise the purposive method of interpretation by setting out certain specific factors or matters to be taken into account in the process of interpreting the CPA.⁸⁶⁴ Thus, when interpreting the CPA, the emphasis falls not on the literal meaning of the words but rather on the broad policy, purpose and spirit of the CPA and the aim is to give effect thereto. The CPA determines a purposive interpretation and therefore, it is submitted that the correct method of interpretation of the CPA would be to interpret its provisions purposively.

The CPA will have some unusual, perhaps unintended, consequences for the law of lease and the highly challenging section in this instance is section 14.⁸⁶⁵ It is submitted that applying section 14 to fixed term lease agreements complicate the law of lease, particularly as a result of the collective impact on the common law principles governing lease agreements, but it does not detract from the fact that the CPA is indeed applicable to lease agreements of immovable property. The consequence of the application of section 14 to fixed term leases of immovable property does not advance the purposes of the CPA.⁸⁶⁶ The inclusion of fixed term lease agreements under fixed terms agreements in section 14 could possibly result therein that the purpose of the CPA would not be promoted, but may in some instances, even prejudice the consumer.

Taking the above into consideration, it is submitted that although the provisions of the CPA pertaining to fixed term lease agreements of immovable property

⁸⁶⁴ From the Preamble of the CPA it is evident that the purpose of this Act is to "protect the interests of consumers" and to "ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place"; *Joroy 4440 CC v Potgieter* 2016 3 SA 465 (FB) para 1; Delpont 2014 *Obiter* 67.

⁸⁶⁵ Section 14(2)(a) the duration of a fixed term agreement may not exceed 24 months, s 14(2)(b) the consumer may cancel the agreement at any time by giving the supplier 20 days' written notice, ss 8 and 9 relating to unfair discrimination, s 19 being the supplier's duty to deliver services at the appropriate time, s 22 relating to information pertaining to the lease must be provided in plain language, ss 40 and 41 regarding the prevention of unconscionable conduct and misrepresentation, s 44(1)(d) constitutes a statutory reinforcement of the common law warranty against eviction, section 48 contractual terms must not be unfair, unreasonable or unjust.

⁸⁶⁶ Delpont 2014 *Obiter* 74.

require further examination, it has become increasingly apparent that the CPA and more specifically, section 14 of the CPA, do apply to lease agreements of immovable property by virtue of the provisions of subsection (e)(v) of the definition of services, which includes "access to or use of any premises or other property in terms of a rental".

Chapter 7 General Conclusion and Recommendation

7.1 Conclusion

The 2015 UNGCP provides guidelines on consumer protection and is aimed to achieve effective protection for consumers at the international, regional and national levels, while maintaining a balance between a high level of protection for consumers and the rights of suppliers. The most significant guidelines, for purposes of this study, include the protection of vulnerable and disadvantaged consumers, sustainable consumption patterns and effective consumer dispute resolution and redress to ensure that the interests of consumers are protected. The applicable guidelines of consumer protection extracted on international level, correspond to some extent with the protection given on regional levels, which are similar to a certain extent, to the consumer protection principles in South Africa.

The interpretation of section 14 creates ambiguity and uncertainty, which makes it difficult to apply to fixed term lease agreements of immovable property. Following a textual approach will in this instance not assist in interpreting its provisions. Due to the ambiguities and contradictions in the CPA, the contextual approach will often be applied when the substantive provisions of the CPA are interpreted. The solution to the interpretation is found in section 2, read with sections 3(1) and 4(3). Section 2(1) provides that the provisions of the CPA must be interpreted in a manner that gives effect to the purposes set out in section 3.⁸⁶⁷ Therefore, a clear injunction is contained in section 2 to interpret the

⁸⁶⁷ Section 3(1) of the CPA "The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers- (i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (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; (c) promoting fair business practices; (d) protecting consumers from- (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) deceptive, misleading, unfair or fraudulent conduct; (e) improving consumer awareness and information and

provisions purposively. Section 4(3)⁸⁶⁸ states that where any provision of the CPA "can reasonable be constructed to have more than one meaning", the provision that will prevail is the provision that will "best promote the spirit and purpose" of the CPA. Alternatively, the provision which will "best improve the realisation and enjoyment of consumer rights", especially for vulnerable consumers, will prevail. Thus, when interpreting the CPA the emphasis falls not on the literal meaning of the words, but rather on the broad policy, purpose and spirit of the CPA and the aim is to give effect thereto. The correct method of interpretation of the CPA is a purposive interpretation.

In determining the applicable legislation in a specific matter, relating to a specific issue or area of law, it is necessary to consider whether an act regulates the relevant issue in general or specific terms. It has been established that a general Act could not derogate from the provisions of an Act that specifically relates to matters being determined. In such instance the RHA, in cases of residential leases, provides for special regulation of the issue at hand and must be preferred over the CPA, which deals with the issue in more general terms.

It appeared from the literature that the common-law principles pertaining to leases remain the primary source of the rights and duties of landlords and tenants. The statutory provisions of the law of lease offer additional consumer protection. The legal instruments of statutory protection of the rights of residential and commercial tenants are, in a broad sense, the Constitution. Based on the recent case law that explicitly deals with previously disadvantaged short-term residential tenants who face eviction as a result of termination of their lease agreements and the consequential threat of being rendered homeless, one can

encouraging responsible and informed consumer choice and behaviour; (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers".

⁸⁶⁸ Section 4(3) of the CPA. "If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in s 3(1)(b)."

conclude that the present landlord-tenant regime is not in line with section 25(6) of the Constitution.

The specific regulation of the rental housing market, which regulates the rights of tenants and the relationship between a landlord and tenant, are specific in the form of the RHA, RHAA, PIE and ESTA. By generally applicable consumer protection legislation, the CPA also contains statutory provisions regulating consumer protection relating to residential and commercial lease agreements. In the main, the RHA constitutes the principal legislation dealing with the rights of tenants and landlords and provides for dispute resolution by the RHT, while it also functions as a mechanism to balance the rights of landowners and tenants. The RHA does have some shortcomings that will be addressed by the RHAA when it comes into effect. The RHAA will have a substantial impact on the rental industry, the rights and duties of landlords and tenants, amend certain requirements that lease agreements must comply with and will improve the enforcement of orders by the RHT.

A reflexion on how the EU and Ontario deal with lease agreement of immovable property and consumer protection was given by virtue of the provisions of section 2(2)(a) of the CPA, stating that foreign law may be considered when interpreting or applying the CPA. Regarding the position on the directives and consumer laws applicable in both these jurisdictions respectively, it has been established that in the case of the EU, the Consumer Directive shall not apply to contracts for the creation, acquisition or transfer of rights in immovable property. The Consumer Directive further confirms that the rental of accommodation for residential purposes is excluded from the scope of the Directive in the EU. In the case of Ontario, the Ontario CPA excludes lease agreements of immovable property for residential purposes, because consumer transactions regulated under the RTA are excluded. Further, lease agreements for commercial purposes are also excluded by virtue of the definition of consumer. Therefore, the most important conclusion that can be made from the consideration of foreign law is that in both the EU and Ontario, residential lease agreements and commercial lease agreements of

immovable property are excluded from the legislation which deals with consumer protection specifically.

As set out *supra*, the particular extent of the application of the CPA can be concluded to mean that the CPA applies to lease agreements entered into by landlords letting immovable property in the ordinary course of business to a tenant, except where the tenant is the State or a juristic person with an asset value or annual turnover of two million rand or more at the time of entering into the agreement. The application of section 14 of the CPA to fixed term lease agreements of immovable property will have some unusual and unintended consequences for the law of lease. Some important aspects raised by different scholars were highlighted in this dissertation, which include, *inter alia*, early cancellation, duration limitations for commercial tenants, allowing repeated breach, delays in eviction, difficulties of the landlord in retaking possession of the leased premises, empowering consumers to act deceitfully or to exploit suppliers. It is submitted that by applying section 14 to fixed term lease agreements of immovable property complicates the law of lease, particularly as a result of their collective impact on the common law principles governing lease agreements. However, this does not detract from the fact that the CPA is indeed applicable to lease agreements of immovable property.

In final conclusion, the correct interpretation of section 14 is a purposive interpretation that gives effect to the purposes set out in section 3, which, in the main, is to promote and advance the social and economic welfare of consumers in South Africa. The impact of section 14 on fixed term residential and commercial leases result therein that this purpose is not attained as the application on these leases does not give effect to the purpose which the CPA aims to achieve.

7.2 Recommendation

It is understood that the reason for making provision in the CPA for fixed term agreements is to cater for specific types of agreements, such as gym and cell phone contracts, intended to be regulated by the provisions of section 14. A lease

agreement of immovable property is probably not the type of agreement the legislature intended to be governed by the aforesaid section and the implications for fixed term lease agreements of immovable property may not have been afforded ample consideration.

It is recommended that lease agreements of immovable property be excluded from the application of section 14 of the CPA. It is further recommended that South Africa follows in the footsteps of other foreign jurisdictions like the EU and Ontario. In both these jurisdictions, lease agreements of immovable property are specifically excluded from their respective consumer protection legislation.⁸⁶⁹ By doing this, it will illuminate and resolve many of the uncertainties and unintended consequences created by the application of section 14 of the CPA to fixed term lease agreements of immovable property.

In sections 5(3) and 5(4), a mechanism is provided in terms of which a regulatory authority may apply to the Minister of Trade and Industry for an industry wide exemption from certain provisions of the CPA. This exclusion can be done by the Minister of Trade and Industry to grant an exemption from section 14 with respect to lease agreements of immovable property on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation. The Minister of Trade and Industry may then, by notice in the Government Gazette after receiving the advice of the Commission, grant an exemption from section 14 in respect of lease agreements of immovable property to ensure the achievement of the purposes of the CPA.

Notwithstanding the exclusion, a tenant will not be prejudiced and shall remain protected under the remaining protection measures of the CPA. Amongst others, the landlord's unconscionable conduct may be tested in terms of section 40, and unfair contract terms can be scrutinised under section 48 of the CPA. This

⁸⁶⁹ Especially in light of the fact that lease agreements in both jurisdictions are governed by more focused legislation, dealing specifically with residential tenancies and not the general consumer law provisions. Le Roux "Commentary on the Rental Housing Act" 1-5; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) para 34.

exclusion will not be contrary to the purpose that the CPA aims to achieve, which is to promote and advance the social and economic welfare of consumers in South Africa.

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