



# An Assessment of the Adequacy of Online Consumers' Protection Laws: Understanding the Realities and Mirage

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## ABSTRACT

Globally, electronic commercial transactions have been rising at a rapid rate. In the context of South Africa, this upward trend is associated with the high rates of mobile technology penetration evinced by using mobile devices like laptops, cell phones, smartphones, tablets, and other emerging electronic tools. Given that the laws and policy framework regulating e-commerce transactions is relatively new and at a developmental stage in the country, there are gaps regarding the regulation of commercial transactions as they relate to consumer protection in the online environment. Some matters have arisen and still emerging because of the outpacing of technological developments with the existing commercial laws. This disparity in technological innovations and the subsisting legal framework tends to affect the modern consumer who prefers to utilise technology to access goods and services and conclude contracts electronically. This study explored the challenges in online contract formation and the extent to which consumers are protected in the e-commerce environment. A qualitative research approach was adopted in this study, by utilising a desktop review of the existing policies and legal instruments on electronic transactions, namely, case law, international instruments, and national laws (the Electronic Communications and Transactions Act 24 of 2002). The study critically examined the mechanisms in the current legal and regulatory framework that facilitate the conclusion of electronic contracts. It also analysed the current international and national legal framework to appraise the adequacy of the subsisting legislation in protecting the rights of consumers who engage in online transactions. Findings from the study revealed that despite the mechanisms put in place by the current South African legal framework, more still needs to be done to ensure legal certainty to consumers, who are the weaker party in e-commerce transactions. The study recommended strengthening consumer protection in the e-commerce environment.

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## INTRODUCTION

Since the emergence of information technology in the 1980s, humans have been exploring and discovering faster and more convenient ways of carrying out their daily operations and activities. Apart from conveying information, technology has also been increasingly utilised to facilitate trading and other economic activities that are essential to sustain livelihoods. Thus, electronic commerce (hereafter referred to as e-commerce), is fast becoming an alternative to traditional face-to-face or paper-based commercial transactions in the business environment globally. The form and appearance of traditional business have fundamentally changed with the introduction and advancement in technology. Given the increasing advancement of the internet, internet users have become potential consumers, and portable devices such as mobile phones, tablets, and personal computers

(PCs) have begun to be increasingly used for economic activities, including price research and purchases. A consumer can generally be described as “a person to whom goods or services are marketed (offered), who enters a transaction to purchase these goods or services and/or who subsequently makes use of the goods or services.”<sup>1</sup> By extension, online consumers (referred to as e-consumers) are typically individuals who buy products and services online or through other computer networks. Online purchasing, unlike conventional transactions, does not include physical interaction with the supplier, and most sale agreements are not embodied on paper documents. It is a long-distance transaction that does not allow consumers to touch or inspect the goods before delivery or even get to know the providers and their locations. These virtual and long-distance transaction forms may bring up more challenging consumer concerns in the sale of products, that not only call into question how they are addressed from a legal point of view but also present new problems that need to be effectively resolved in order to bolster consumer trust in the e-commerce market. Given the flexibility and seamless nature of the online environment, consumers gain from expanded product availability, more extensive product information, reduced pricing, and more efficient services. Overall, the online medium of transaction has made the planet interconnected, enabling business transactions to be conducted 24 hours a day in a supposedly borderless environment.

In the South African context, electronic commerce is similarly growing at a rapid rate, parallel with the global movement. A survey conducted by PayPal and Ipsos indicated that about 58% of adults shopped online, both locally and internationally to the value of about R53.1 billion and this trend is predicted to continue at an increasing rate.<sup>2</sup> The upsurge in online commercial activities by consumers in recent times is attributed to the COVID-19 lockdown that occurred in 2020 in various regions of the world, including South Africa. To contain the spread of the deadly COVID-19 virus, most governments placed strict restrictions and regulations on face-to-face contact and shopping in the brick-and-mortar environment. This situation made many consumers gravitate towards purchasing needed goods online at a higher frequency than would have been before the pandemic. The reasons for the preference of the e-commerce market over traditional economic activities by consumers are many, which include benefits such as the availability of a wide variety of products to choose from different providers, the ease of comparing quality and prices, convenience, time-saving and speed in concluding transactions, such as buying and selling.<sup>3</sup>

In as much as e-commerce allows for convenience and comfort that a visit to a physical business may not provide, online consumers are exposed to greater risk in the digital environment as they do not have the opportunity to meet physically and negotiate the terms and conditions with suppliers and vendors before the contract is concluded. Consumers are therefore susceptible to corrupt and abusive practices in the digital marketplace in comparison to offline customers who make face-to-face contact with the sellers within the rapid development in digital technology and its concomitant use by consumers for online transactions.

In recognition of the technological innovations and the associated legal challenges surrounding its utilisation, it became necessary to devise rules to govern the emerging issues associated with online transactions. Thus, the Electronic Communications and Transactions Act<sup>4</sup> (ECT Act) was enacted to bring clarity regarding the conclusion of electronic contracts and to allow and expedite electronic transactions and communications for the benefit of consumers and the public.<sup>5</sup> Apart from the ECT Act, other statutes have a direct bearing on information and communication technologies (ICTs). This article examines the existing legal and regulatory framework in South Africa intending to determine whether these prevailing laws are sufficient to protect the interests of online consumers.

This article first introduces the consumer in the context of the e-commerce environment. It then presents the rationale for protecting consumer rights in the online environment. It further highlights the consumer protection measures in the online environment and closes by discussing the adequacy of the existing regulatory framework on electronic commerce in South Africa and the protection afforded to consumers.

## METHODOLOGY

The aim of this study is to explore the legal challenges affecting consumer protection in online contracts in South Africa and appraise the prevailing legislation governing online contracts. This study relied exclusively

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<sup>1</sup> D. Holness, A Govindjee, and A Shirk, *Commercial Law 1: Fresh Perspectives* (Pearson South Africa, 2006).

<sup>2</sup> Carin Smith, “SA E-Commerce Growing by Leaps and Bounds,” News24, February 22, 2017, <https://www.news24.com/fin24/sa-e-commerce-growing-by-leaps-and-bounds-20170222>.

<sup>3</sup> C Eugene Franco and Regi S Bulomine, “Advantages and Challenges of E-Commerce Customers and Businesses: In Indian Perspective,” *International Journal of Research–Granthaalayah* 4, no. 7 (2016): 7–13.

<sup>4</sup> Electronic Communications and Transactions Act 25 of 2002 (hereinafter ECT Act).

<sup>5</sup> M. A. Fouche, *Legal Principles of Contracts and Commercial Law* (LexisNexis, 2004), <https://books.google.com.gh/books?id=1vQIAQAIAAJ>.

on the qualitative approach to tackle the highlighted objective. A desktop review of legal material by way of a detailed analysis of relevant literature on e-commerce and consumer protection, namely, case law, international instruments and national laws in South Africa, particularly the Electronic Communications and Transactions Act (ECT Act) of 2002 was utilised for this study to ascertain their impact on safeguarding online consumer rights in South Africa. This was achieved through an analysis of the existing gap in South African law. In addition, case law would be referred to, in establishing the extent of consumer protection in the e-commerce business environment in South Africa.

### **The Consumer in the Context of Online Transactions**

A consumer is generally someone who purchases items or utilises services for personal consumption. A consumer is also described as a person to whom products or services are advertised and who has engaged in transactions with suppliers in the usual course of the supplier's business. It may also include a user, receiver, or benefactor of the products or services. These definitions suggest that almost everyone who purchases different items and services that others provide in one form, or another is a consumer. Within the ambit of consumer protection law, the term "consumer" has a more specific definition that considers the customer's interactions with suppliers of products and services in the context of commercial or business activities. A review of legislation indicates that there is no standardized definition of a "consumer" in South Africa. Both the Consumer Protection Act<sup>6</sup> (CPA) and the ECT Act do not have a homogenous consumer concept which is viewed as one of the greatest pitfalls in consumer law in the South African context given that both legislations extend to online consumers in varying degrees. A 'consumer' is defined in section 3 (1) of the South African Consumer Protection Act 1999 as a person who – (a) acquires or makes use of products or services of a sort that are often used or consumed for personal, domestic, or home purposes.; and (b) does not claim to have purchased or used the products or services, or to have done so largely for the purpose of, - (i) resupplying them through commerce; (ii) ingesting them during a manufacturing procedure; or (iii) when it comes to goods, repairing or treating other items or land fixtures in commerce. The ECT Act on the other hand defines a 'consumer' as "any natural person who enters or intends to enter into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier." Notwithstanding these variations in the description of a consumer, it can be deduced that to be categorised as a consumer, a person must acquire or utilise "consumer products," which are commodities acquired for personal, domestic, or home use, and the goods must not be obtained for commercial purposes specified in (i), (ii) and (iii). This approach was applied in *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd*<sup>7</sup>, where the Malaysian Court of Appeal determined that a private firm that purchased a Mercedes Benz motor vehicle, to be used as a company automobile, was a customer. The Mercedes Benz in this case was treated as a consumer good for the company given that it was not intended for resale as a company stock.

Online consumers (referred to as e-consumers) are typically individuals who buy products and services online or through other computer networks. Online purchasing, unlike conventional transactions, does not include physical interaction with the supplier, and most contracts of sale are not formed on paper. It is a long-distance transaction that does not allow consumers to examine the goods or get to know the providers and their locations. This virtual and distant transaction may bring up more challenging consumer concerns in the sale of products that not only call into question how the law addresses them but also present new problems that need to be effectively resolved. Given the flexibility and seamless nature of the online environment, consumers gain from expanded product availability, more extensive product information, reduced pricing, and more efficient services. Overall, the online medium of transaction has made the planet interconnected, enabling business transactions to be conducted nonstop, through the day, in a supposedly borderless setting.

### **Rationale for Consumer Protection**

Literature suggests that consumer protection is a construct of the 20th century and is directly linked to increased industrialisation and globalisation.<sup>8</sup> It is averred that much of the modern consumer protection ideology is drawn from the work of the Molony Final Report of 1962.<sup>9</sup> The explanation for justification of consumer protection in that report was that the consumer of today finds it difficult, if not impossible, to recognise the composition of the goods on offer and their manner of production, as well as to assess their quality and fitness for their particular purpose whereas the consumer of 50 years ago only needed a reasonable modicum of skill and knowledge to do so. The report further elucidated the task of determining and soundly appraising that the vast

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<sup>6</sup> The Consumer Protection Act 68 of 2008 (hereinafter the CPA).

<sup>7</sup> *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27.

<sup>8</sup> Tjatie Naudé et al., *Commentary on the Consumer Protection Act*, 3rd ed. (Juta, 2018).

<sup>9</sup> J.T. Molony, *Final Report on Consumer Protection* (UK: Hansard, 1962), 605-625.

array of alternative options available to the consumer is more than they can realistically be expected to perform. In such a maze, the argument goes, the consumer is unable to make a reasonable and informed decision and is prone to exploitation and fraud.<sup>10</sup>

The view highlighted above is still relevant for consumers in modern society who make purchases online and may not fully understand the complex environment they are operating. The consumer protection legislation therefore evolved because of a rising societal concern to bolster the protection of the vulnerable and those unable to care for themselves. The main argument for increased protection for the weak is a disparity in bargaining power. Due to information asymmetry between the parties, the vendor tends to have more information and favorable input towards drafting the terms and conditions relating to the contract. Consumers on the other hand are less opportune, making them to be in a weaker negotiating position in comparison to the more powerful supplier of products and services. Ramsay argues that the fundamental basis for consumer protection in modern times has been influenced by neo-liberalist ideas, with a particular focus on educating consumers, the provision of expert advice, the provision of information and knowledge, and empowering consumers to make informed choices.<sup>11</sup> All these sentiments and views are also apparent in the provisions of the Consumer Protection Act 68 of 2008 (hereafter the CPA) in which it is stated in the preamble that the aim of the legislation is “to promote a fair, accessible and sustainable marketplace for consumer products and services”. For this purpose, the CPA creates nationwide rules and guidelines for consumer protection, provides for improved consumer information standards, which forbid some unfair business and marketing tactics and encourages responsible consumer conduct and a framework for law and regulation governing consumer agreements and transactions. In protecting consumers, the Consumer Protection Act 68 of 2008 (“CPA”) forbids suppliers from proposing conditions that are “unfair, unjust, or unreasonable” to consumers. Although the CPA does not define these phrases directly, they nonetheless extend to contractual terms that are “excessively one-sided in favour of any party other than the consumer” or “so hostile to the customer as to be inequitable.”<sup>12</sup>

### **Consumer Protection in the Online Commerce Context**

Alongside the remarkable development in modern technology and the internet, are some emerging issues and concerns regarding consumer legal protection. Literature suggests that as commerce and retail have increasingly migrated online, consumer protection has become more complex.<sup>13</sup> Consumers in e-commerce transactions face many of the same issues as offline consumers, such as delayed, undelivered, and faulty purchases, invoicing errors, warranty conflicts, misleading advertising, and fraudulent or unethical behaviour. In addition to the offline issues, the more sophisticated nature of online transactions exposes online consumers to more precarious situations and concurrent vulnerability to unfair trade practices exhibited by online vendors or suppliers.

The notion of online consumer protection gained global attention in 1999 when the Organisation for Economic Co-operation and Development (OECD) Council approved the first international instrument for consumer protection in the context of electronic commerce, referred to as the “1999 Recommendation.”<sup>14</sup> The 1999 Recommendation outlined the core characteristics of consumer protection for electronic commerce, including fair and transparent business and advertising practices, information about businesses, goods and services, transactions, adequate dispute resolution and redress mechanisms, payment protection, privacy, and education.<sup>15</sup> Subsequently, in 2016, the OECD Council amended the 1999 instrument and the Recommendation of the Council on Consumer Protection in E-commerce (“the revised Recommendation”).<sup>16</sup> The 2016 Recommendation attempts to cover new and developing inclinations and issues confronting consumers in today's dynamic e-commerce industry. Member countries were encouraged to develop their national laws to be in unison with these recommendations and similar international standards.

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<sup>10</sup> Molony, *Final Report on Consumer Protection*, 41-43.

<sup>11</sup> Iain Ramsay, “Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU,” *Journal of Consumer Policy* 35, no. 4 (2012): 421–41. Between neo-liberalism and the social market: approaches to debt adjustment and consumer insolvency in the EU.

<sup>12</sup> S 48(2) read with s 49(1) of the Consumer Protection Act 68 of 2008 (“CPA”).

<sup>13</sup> Michelle Garcia, “Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum,” *Campbell L. Rev.* 36 (2013): 31.

<sup>14</sup> Ruwanthika Ariyaratna, “Protecting Consumer Rights in Electronic Contracts: A Lessons From European Union and United Kingdom,” in *11th International Research Conference* (Colombo: General Sir John Kotelawala Defence University, 2018), 27–32; OECD, *OECD Recommendation of the Council on Consumer Protection in E-Commerce* (OECD, 2016), 1-24. <https://doi.org/10.1787/9789264255258-en>.

<sup>15</sup> OECD, *OECD Recommendation of the Council on Consumer Protection in E-Commerce*, 3.

<sup>16</sup> OECD, *OECD Recommendation of the Council on Consumer Protection in E-Commerce*, 4.

Drawing from these international instruments, it is apparent that the aim of legislation and policy on the legal protection of online consumers is presumably to give them rights against those who produce and supply defective goods and services as well as provide safeguards and remedies where they have suffered harm or injustice. It has become increasingly clear that the growth and success of e-commerce in any country largely rests on how clear, predictable, and appropriate the legal structure is, as well as whether or not it logically addresses the demands of online customers. It is therefore important for the law to be developed to regulate wrap contracts and other similar online agreements to address the associated emerging challenges faced by consumers. In essence, e-commerce is like any other current commercial activity; however, the primary distinction is that electronic systems and devices are used to engage in transactional activities instead of traditional paper-based channels. As a result, the current legal doctrines may no longer be suitable to address the problems that emanate because of the growth of e-commerce. The new forms of abuse and threats to consumer protection that keep emerging regularly necessitated the adoption of new safeguards to tackle the associated issues that emanate from there. Some key specific issues that are peculiar to e-commerce and warrant the protection of consumer rights are grouped into the following broad non-exclusive categories.

### ***Fair-trading***

This includes aspects such as misleading and unfair advertising, unfair contract terms, informational requirements and rights of withdrawal, product safety and liability, warranties and unfair or deceptive trade practices.

### ***Unsolicited Electronic Communications***

Although this does manifest itself to a degree mainly as direct marketing in the offline environment, it is an issue of particular significance to e-consumers. The problem is infinitely magnified in the electronic environment because of the ease of sending, the large volumes that are sent and the negative effects that are coupled with this problem, such as phishing and spreading malicious malware.

### ***Privacy***

The violation of privacy is identified as one of the greatest threats to consumers engaging in business transactions online.<sup>17</sup> Privacy issues related to concerns and problems around the tracking of internet users' search habits, and trade in internet users' personal electronic profiles (names, addresses, marital status and so on) which have significant commercial value. Also, consumers are confronted with vices such as identity theft and unsolicited communications due to the intrusion of their privacy on the online platform.

### ***The Security and Certainty of Electronically Executed Financial Transactions***

Consumers are exposed to the activities of computer hackers who intercept electronic transactions and steal their payment card information. A report by the OECD revealed that there are varying degrees of consumer protection for online and mobile electronic payments.<sup>18</sup> The protection offered depends on the type of payment instrument used and the medium used to make a payment.

### ***Protecting Minors and Other Vulnerable or Disadvantaged Consumers***

In consumer protection literature, protecting minors and vulnerable consumers would generally be an issue that is common to both e-consumers and all other offline consumers. However, due to the electronic device prevalence, particularly mobile phone use among minors, and the unbounded nature of the internet, the involvement of minors as a contracting party does present some unique e-consumer problems, such as over-consumption and access to inappropriate content by underage users.

Other peculiar issues include the flexibility to accommodate the inherently unique issues in e-commerce such as the use of small screens, and limited technological capacity. There is also the aspect of consumer redress, especially in international transactions and the use of Alternate Dispute Resolution (ADR) mechanisms.

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<sup>17</sup> Lilian Edwards, "Consumer Privacy, on-Line Business and the Internet: Looking for Privacy in All the Wrong Places," *International Journal of Law and Information Technology* 11, no. 3 (2003): 226–50.

<sup>18</sup> OECD, *Report on Consumer Protection in Online and Mobile Payments* (OECD Publishing, 2012).

## Assessment of the Adequacy of the Legal Protection of Online Consumers in the E-Commerce Environment in South Africa

Given the rapid rise in the use of online transactions and the associated challenges, the interaction between business providers and consumers has been regulated by many laws directly or indirectly to foster trust and confidence between the parties. The ECT Act, being the main piece of legislation that regulates electronic transactions in South Africa, has the provision of a “safe, secure and effective environment” for online consumers as one of its noble objectives. Flowing from this aim, a lot of measures have been put in place to shield consumers who purchase goods and services online from fraudulent and abusive practices. These attempts made by the South African Parliament to safeguard the interest of online consumers are noteworthy, particularly as the United Nations Commission on International Trade Law (UNCITRAL), which formed the basis of the ECT Act, has been criticised for not paying adequate consideration for online consumer protection issues.<sup>19</sup>

In this regard, Chapter VII of the ECT Act contains provisions that protect consumers in South Africa who contract online with suppliers irrespective of where the supplier is located. South African website owners or online merchants are expected to design or structure their websites in compliance with these requirements. Failure to do so provides the consumer the right to cancel the purchase within 14 days of obtaining the infringing goods or services.<sup>20</sup> In terms of section 43 of the ECT Act, the supplier’s website must contain certain minimum information available on the goods or services that are offered to consumers (being natural persons) for sale, hire or exchange by way of an electronic transaction. The rationale for this disclosure requirement is to make consumers knowledgeable and make appropriate decisions with regard to the intended online transaction. The minimum information that must be disclosed includes amongst others, the supplier's full name and legal standing; its registration number, place of registration and office bearers; the supplier's physical address and telephone number, website address and email address; details of the supplier's membership of any regulatory or accreditation bodies and the contact details of that body; details of any code of conduct to which the supplier subscribes; the physical location where the provider will be served with legal paperwork; the contractual terms that are applicable to the transaction and details of how those terms may be accessed, stored and reproduced in a digital form; a sufficient description of the main characteristics of the goods, to enable the consumer to make an informed decision; the total cost of the items; the payment method; the duration or period in which any goods will be delivered or dispatched; the manner and period in which the consumer can access completed details of the transaction; the return, exchange and refund policy of the supplier; the supplier's subscription to any alternative dispute resolution code, as well as information on how to access that code. The Act also requires suppliers (retail website owners) to detail their security procedures and privacy policies with respect to payments, information on payments, and personal data.<sup>21</sup> Online retailers are required to use a secure payment system, otherwise, the retailer could be held liable for any damages sustained by a consumer concerning the transaction at issue.<sup>22</sup> Further, where applicable, the minimum duration of any ongoing agreement for the supply of goods or services must also be disclosed.<sup>23</sup> In addition to this are the details in relation to the cooling-off period during which consumers can cancel the contract without penalty.<sup>24</sup>

Apart from the minimum information to be provided to consumers, the ECT Act also provides that the supplier must allow the consumer to inspect the full electronic transaction, rectify any errors, and withdraw from the transaction before making an order. If a supplier fails to adhere to these instructions within 14 days of obtaining the products or services, the consumer may cancel the transaction.<sup>25</sup> Also, to implement these consumer protection principles thereby securing the rights of the consumer, section 49 of the Act authorises a consumer to file a complaint with the National Consumer Commission for any violation of the ECT Act's consumer protection principles.

It is quite evident that the body of jurisprudence relating to electronic contracts in South Africa has grown in the last few years alongside interesting ground-breaking court cases, intriguing rulings, and court decisions.<sup>26</sup> The case law has assisted in providing direction in resolving disputes that occur because of the use of electronic means of communication for the conduct of business transactions. For instance, in *Global & Local*

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<sup>19</sup> Acep Rohendi, “Consumer Protection in the E-Commerce: Indonesian Law and International Law Perspective,” *Berkman Center Research Publication, Forthcoming*, 2015, 474.

<sup>20</sup> S 43(3) of the ECT Act 2002.

<sup>21</sup> S43(5) of the ECT Act.

<sup>22</sup> S 43(5) of the ECT Act.

<sup>23</sup> S 43(1)(q) of the ECT Act.

<sup>24</sup> S 44 of the ECT Act.

<sup>25</sup> S 43 of the ECT Act.

<sup>26</sup> *Gareth Cliff v Electronic Media & Another*, [2016] 2 All SA 102 (GJ) ; *Global & Local Investments Advisors (Pty) Ltd v Fouche* 71/2019) [2020] ZASCA 8280; and *Spring Forest Trading v Willbery* (725/13) [2014] ZASCA 178.

*Investments Advisors (Pty) Ltd v Fouché*<sup>27</sup>, the court had to determine whether the form of authentication used in an email constituted a “signature” as required in the mandate between the parties and as understood in the Electronic Transactions and Communications Act (ECT Act). In that case, the plaintiff, Nicholas Fouché gave Global & Local Investments Advisors (Pty) Ltd (Global) a written mandate to act as his agent and invest money with Investec Bank on his behalf in November 2015. The communication by Fouché to Global was to the effect that all instructions from him must be sent by fax to a designated number, or by email with his signature. Further, the funds were to be invested in a Corporate Cash Manager (CCM) account in Fouché’s name. Global accordingly opened and managed the CCM accounts at Investec. In August 2016, fraudsters hacked Fouché’s Gmail account and, using his authentic email credentials, sent three emails to Global on August 15, 18, and 24, 2016. Global was instructed in the fake emails to transfer specific amounts to the accounts of named third parties at First National Bank (FNB). Two of the three emails containing the instructions to transfer money ended with the words 'Regards, Nick', while the third ended with 'Thanks, Nick'. There were no attachments in any of the emails.

In response, Global transferred R804,000 from Fouché’s CCM account to unidentified third parties. When Fouché discovered this, he informed Global that the emails were not sent by him and sought payment of the amounts transferred to third-party accounts, claiming that Global had paid out in violation of the written mandate. The High Court ruled in favour of Fouché, determining that there had been a breach of the mandate and that Global was therefore liable. Global appealed to the Supreme Court of Appeal and argued that it acted within the terms of the mandate, on instructions from Fouché’s legitimate email address, and that the typewritten name 'Nick' at the foot of the emails satisfied the signature requirement when viewed in light of section 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act). The provision of the ECT Act read as follows, “Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if a method is used to identify the person as to indicate the person’s approval of the information communication and having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.”

Global claimed that it acted in accordance with the mandate because the instructions came from Fouché’s legitimate email address and that the typewritten name 'Nick' at the bottom of the emails satisfied the signature requirement. It also stated that this is in accordance with section 13(3) of the ECT Act. Fouché, on the other hand, claimed that the instructions via the email message lacked his signature, whether handwritten or electronic, as required by the mandate. As a result, the payment instruction lacked his "signature" as defined in the mandate.

In reaching its decision, the court hinged on the correct reading of the written directive and whether Global acted in violation of it. It considered the business context use of the term "signature" as a means of authentication and verification as well as the provision of the ECT Act. The Supreme Court of Appeal upheld the decision of the High Court citing that the instruction was not accompanied by such a signature and the High Court correctly held that the funds were therefore transferred without proper instructions and contrary to the mandate.

Another noteworthy judgment where the reliability of the email or identity of parties was not in dispute but rather another aspect of electronic transactions was at issue, was *Spring Forest Trading v Willbery*.<sup>28</sup> In this case, the court had to decide whether an exchange of emails between the contracting parties might fulfil their contractual demand that the 'consensual termination' of their contract be 'in writing and signed' by the parties. The fact of the case was that the parties signed a written contract that included a non-variation provision that stated that no change or voluntary cancellation would be valid unless reduced to writing and signed by both parties. After this, a disagreement ensued over the course of numerous e-mails as to whether the arrangement had been cancelled by e-mail. One of the parties contended that the e-mail exchange was merely a negotiation between the parties and did not amount to contract cancellation; further, that because the Act required an advanced electronic signature and none of the e-mails contained such advanced signatures, the agreement could not have been cancelled by e-mail. The court decided that the emails were trustworthy, accurately communicated the facts, and plainly demonstrated a desire to revoke the contract. Also, the parties' typed names at the bottom of the emails were there to identify them and were rationally related to what was said in them. Hence, it was determined that they were a legal form of electronic signature, and no advanced electronic signature was necessary since the parties hadn't specified the kind of electronic signature to be utilised. It was concluded therefore that the agreement was rightfully terminated.

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<sup>27</sup> *Global & Local Investments Advisors (Pty) Ltd v Fouché* (71/2019) [2019] ZASCA 08.

<sup>28</sup> *Spring Forest Trading v Willbery* (725/13) [2014] ZASCA 178).

Notwithstanding these ground-breaking court cases that provide guidance on challenges encountered in electronic transactions, there is a submission that consumer protection for consumers engaged in e-commerce transactions in South Africa has not been given holistic consideration.<sup>29</sup> From the basic point, the pieces of law relating to e-consumer protection are fragmented. The ECT Act, the CPA and the POPIA have provisions that are relevant to consumers engaging in e-commerce transactions, yet they are not harmonised. This may limit the ability to protect the rights of online consumers due to inconsistencies in the definition of concepts and the interpretation of the rules on similar issues.

Another area of concern relates to the gaps and legal uncertainties in the enforceability of online agreements. As online contracts take on the characteristics of the typical standard form or adhesion contracts where the terms are unilaterally imposed by the vendor, there is a lack of clarity on whether clicking an icon or agreement button for a standard form online contract constitutes an intention to be legally bound or an invitation to do business. There are no specific provisions in the ECT Act that addresses the enforceability of click-wrap, browse-wrap, and shrink-wrap contracts<sup>30</sup> which are forms of expression of assent by consumers in online contract by consumers. Courts therefore apply the contract formation rules which require the contractual party to have actual or constructive knowledge of the contract's terms and conditions prior to utilising the website or other product. The effect of this is that all reasonable measures must have been taken to bring the terms and conditions to the contractual party's attention before acceptance is made by the other contracting party. In the practical sense, it means that each dispute brought before the court will be treated on the facts of the individual cases, by considering different factors such as whether the consumer was given notice of the terms before clicking on the 'I agree' button, whether the terms were visible on the web page, the location or position of the terms amongst others. This could result in different outcomes for similar online consumer situations. The lack of consistency could be detrimental to the consumer who may not intend to be bound by the terms of the online contracts.

Furthermore, there is an ambiguity that borders on the aspect of jurisdiction for cross-border online contracts. A South African consumer for example, who enters into an online contract with a supplier in another country whose server is outside that country will result in uncertainty about where the contract can be said to have been concluded and by implication, the court's jurisdiction to hear and settle any conflict that may arise from the contract. It is unlikely that any substantial cross-border complaint would ever be pursued against such overseas online suppliers who do not have a physical presence in South Africa.<sup>31</sup>

## RECOMMENDATIONS

Considering the potential disadvantages to online consumers in the current cyberspace environment, this study proposes a need for interventions that can strengthen and effectively protect consumer rights in the online environment. The government through its legislature should take appropriate steps to amend and regularly update the current legislation and legislative actions to keep up with emerging technology to protect consumers. In addition, the government should take steps to impose regulations on internet enterprises, particularly regarding standard terms/adhesion contracts so that some of the problematic provisions can be prescribed and standardised to prevent consumer exploitation. Finally, regulatory agencies and consumer organisations should take a more active role in implementing legal rules and methods, to prevent business providers from inserting unfair conditions in online contracts. Consumers interacting in the e-commerce sector will gain confidence from the implementation of these proposed measures to safeguard their rights in the online contract environment.

## CONCLUSION

This article has outlined how the existing South African legal framework is addressing contentious and evolving developments around consumer protection and has discussed the adequacy or otherwise of the existing legislation in addressing these issues. It has been revealed in this article that although South Africa is aligning with international best practices, it still falls behind in terms of consumer protection provisions in contrast to the legal systems of advanced countries. In the United Kingdom, for example, there is a constant attempt to

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<sup>29</sup> Papadopoulos S (2012) 75 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR) Are we about to cure the scourge of spam? A commentary on current and proposed South African legislative intervention, 223.

<sup>30</sup> A click-wrap agreement is concluded by means of a consumer in the contract clicking on words or an image stating "I agree" or "I agree to be bound by the terms and conditions", indicating agreement or consent to the particular terms and conditions. A browse wrap on the other hand is an agreement where the user is not required to click on words or image but the mere use of the website constitutes assent to the terms and conditions associated with the contract. Shrink wrap contracts is a form of licensing arrangement where the contract's terms and conditions, typically present on the plastic or documentation of the goods bought by the consumer, is enforced.

<sup>31</sup> Sylvia Papadopoulos and Sizwe Snail, *Cyberlaw@ SA III: The Law of the Internet in South Africa* (Van Schaik, 2022), 90.

update the consumer protection standards where the restrictions are rather complex. The forms of protection in the regulatory framework with regards to online consumers should therefore be modified to keep up with technological developments to provide the highest degree of consumer protection. Strengthening the existing legal framework is necessary to mitigate the effect of emerging challenges in the online environment and to increase online consumers' trust and confidence in information highways. Given the likelihood that the growth of e-commerce will benefit from this protection of e-consumers, an effective regulatory framework is crucial and required to secure their protection.

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