THE ‘UNEXPECTED TERMS’ DEFENCE TO THE CAVEAT SUBSCRIPTOR RULE IN SOUTH AFRICA

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DECLARATION

I, Liam Michael Max Sebanz, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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THE ‘UNEXPECTED TERMS’ DEFENCE TO THE CAVEAT SUBSCRIPTOR RULE IN SOUTH AFRICA

ABSTRACT

The caveat subscriptor rule has been described as one of the most firmly established rules in the entire body of South African law. This rule, however, is not absolute, and the courts have recently developed a new exception to the rule known as the ‘unexpected terms’ defence. This research report will critically analyse the unexpected terms defence and show that the introduction of the defence into the South African common law of contract has effectively obfuscated the meaning of the well-known phrase ‘read before you sign’ – a phrase commonly associated with the caveat subscriptor rule. In this regard, the paper will demonstrate how the case law dealing with the unexpected terms defence has been riddled with inconsistent application, and show how this has resulted in the courts applying the defence on an ad hoc basis. Such ad hoc application, it will be shown, has had the consequence that certain fundamental problems have arisen with the defence. Furthermore, and in light of the fact that the defence is so divergent from the traditional formulation of the caveat subscriptor rule, this research report will interrogate the reasons behind the development of the defence by the South African courts. In this regard, it will be argued that the central underlying reason for the development of the unexpected terms defence is that the courts are merely using the defence as a guise in order to conceal the fact that they are, in reality, conducting an analysis in terms of which they are enquiring into whether terms in standard-form contracts are substantively unfair. In this regard, I submit that this central underlying reason for the development of the defence may be explained in terms of two interrelated reasons, namely: (1) the fact that the defence has been developed in response to the problems that are posed by standard-form contracts; and (2) the fact that the courts have adopted a more communitarian ideology to the caveat subscriptor rule. Ultimately, the paper comes to the conclusion that the unexpected terms defence in its current form cannot subsist in the South African law of contract. In accordance with this finding, I advance a proposal on how the courts can deal with the defence in a more appropriate manner.
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I  INTRODUCTION

The phrase ‘read before you sign’ will probably not come across as a foreign concept when mentioned in conversation to the average lawyer, businessman, or man on the street. Indeed, it has been said that it is common knowledge that a person that appends his signature to a written contract does so in order to signify his assent to the contractual terms contained in the document, regardless of whether he read and/or understood such terms, and regardless of whether he subsequently discovers that such terms are not to his liking.¹ Such common knowledge, in actual fact, constitutes what is referred to as the ‘caveat subscriptor’ rule, which comprises one of the cornerstones of the South African common law of contract.² However, the caveat subscriptor rule is not absolute, and the courts have recently developed a new exception to the rule known as the ‘unexpected terms’ defence, allowing the signatory to escape unexpected or unusual terms in the contract in circumstances where the contract assertor has failed to take reasonable steps to bring such unexpected terms to the signatory’s attention.³

As one may already have noticed, however, the unexpected terms defence directly contradicts the caveat subscriptor rule in its traditional form in that it ‘turns the basic premise of the caveat subscriptor rule on its head’.⁴ Whereas the basic premise of the caveat subscriptor rule is that it is the signatory’s responsibility to become conversant with all of the terms of a contract before he appends his signature thereto,⁵ the unexpected terms defence places the responsibility on the contract assertor to take reasonable steps to ensure that the signatory is made aware of any unexpected terms therein.⁶ The defence may, therefore, appropriately be described as having brought about what may be referred to as a ‘secret shift’ in South African contract law.

² Minette Nortje “Unexpected terms” and caveat subscriptor’ (2011) 128 SALJ 741 at 741.
³ Bhana, Nortje & Bonthuys op cit note 1 at 498; Nortje op cit note 2 at 741; Minette Nortje ‘Of reliance, self-reliance and caveat subscriber’ (2012) 129 SALJ 132 at 132; Kerr op cit note 1 at 98–9; Christie & Bradfield op cit note 1 at 185.
⁴ Bhana, Nortje & Bonthuys op cit note 1 at 498; Nortje op cit note 2 at 741; Nortje op cit note 3 at 132; Kerr op cit note 1 at 98–9; Christie & Bradfield op cit note 1 at 185.
Furthermore, the case law dealing with this exception has been shrouded with inconsistent application due to the fact that no uniform approach to the defence has been explicitly expounded by our courts.\textsuperscript{7} This has led to the undesirable result that our courts (and, in particular, the Supreme Court of Appeal – hereafter ‘SCA’) are presently applying the defence on an \textit{ad hoc} basis,\textsuperscript{8} often creating more uncertainty with every reported case.

Accordingly, this research report will critically analyse the unexpected terms defence to the \textit{caveat subscriptor} rule and interrogate what really prompted the courts to develop an exception so divergent from the traditional rule. In this regard, it will be shown that the development of the unexpected terms defence is a response to the problems that are posed by standard-form contracts,\textsuperscript{9} as well as a result of the courts having adopted a more communitarian ideology to the \textit{caveat subscriptor} rule. More specifically, this report will demonstrate how the development of the defence is merely a façade being utilised by the courts in order to conceal the fact that they are, in reality, conducting an analysis in terms of which they are testing the content (i.e. substance) of standard-form contracts against the notion of fairness. At this point, it should be noted that the report will focus on the unexpected terms defence as a common law development, and that the arguments made in relation thereto should be considered in conjunction with the position under the Consumer Protection Act (hereafter the ‘CPA’).\textsuperscript{10}

The paper will begin with an exposition of the \textit{caveat subscriptor} rule in its traditional form, which will include a discussion of the theoretical framework of the rule. This will be followed by a discussion on the exceptions to the \textit{caveat subscriptor} rule – including the development of the unexpected terms defence as a qualification to the traditional formulation of the rule. The paper will then proceed to describe the explanations that may be put forward as the reasons behind the development of the unexpected terms defence. Finally, the paper will conclude with a proposal to improve the current way in which the courts are dealing with the unexpected terms defence, and the way in which they are dealing with standard-form contracts in particular.

\textsuperscript{7} Nortje op cit note 3 at 135; C-J Pretorius ‘Exemption clauses and mistake: Mercurius Motors v Lopez 2008 3 SA 572 (SCA)’ (2010) 73 \textit{THRIHR} 491 at 497; Bhana, Nortje & Bonthuys op cit note 1 at 501.

\textsuperscript{8} Nortje op cit note 2 at 762.

\textsuperscript{9} See Nortje op cit note 3 at 139–141.

\textsuperscript{10} The Consumer Protection Act 68 of 2008.
II   THE TRADITIONAL FORMULATION OF THE CAVEAT SUBSCRIPTOR RULE

(a) Introduction to the caveat subscriptor rule

In terms of the traditional caveat subscriptor rule, in circumstances where a party appends his signature to a written contract, such party is ordinarily held bound to the contractual terms contained in the document regardless of whether that party read the terms and/or understood them.\(^\text{11}\) The direct translation of this Latin maxim is ‘let the signatory beware’,\(^\text{12}\) cautioning the signatory in that he bears the responsibility to ensure that he understands what he is consenting to, and warning the signatory that he will be bound regardless of whether he actually complies with his responsibility in this regard.\(^\text{13}\)

Therefore the basis of the rule is that the signature on the written document creates the impression that the signatory intends to be bound by the contract and, accordingly, that subjective consensus between the parties has been achieved.\(^\text{14}\)

The traditional formulation of the rule was succinctly phrased more than a century ago in the authoritative\(^\text{15}\) and frequently quoted pronouncement of Innes CJ of the old Supreme Court of the Transvaal in the case of Burger v Central South African Railways:

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature”.\(^\text{16}\)

\(^{11}\) Hutchison & Pretorius op cit note 1 at 239; Van der Merwe, Van Huyssteen & Reinecke et al op cit note 1 at 43 and 261; Bhana, Nortje & Bonhuys op cit note 1 at 256 and 495; Christie & Bradfield op cit note 1 at 181-82; Kerr op cit note 1 at 97–8; C-J Pretorius ‘Caveat subscriptor and iustus error: Brink v Humphries & Jewell (Pty) Ltd 2005 2 SA 419 (SCA)’ (2006) 69 THRHR 675 at 677.

\(^{12}\) Hutchison & Pretorius op cit note 1 at 239; Bhana, Nortje & Bonhuys op cit note 1 at 495.

\(^{13}\) Ibid.

\(^{14}\) CJ Nagel (ed) Commercial Law 4 ed (2011) 67; C-J Pretorius “The incorporation of contractual terms and reliance: Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom 2003 5 SA 180 (SCA)” 2004 TSAR 416 at 416; Christie & Bradfield op cit note 1 at 182; Hutchison & Pretorius op cit note 1 at 97; Pretorius op cit note 11 at 677. Note at this stage that the theoretical basis of contractual liability upon which the rule is based is the reliance theory or so-called ‘doctrine of quasi-mutual assent’.

\(^{15}\) This statement was followed in Bhikhagee v Southern Aviation (Pty) Ltd 1949 (4) SA 105 (E) at 110; and George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 470B–C. The statement has also been referred to in Du Toit v Atkinson’s Motors Ltd 1985 (2) SA 893 (A) at 903F–H; Mathele v Mothile 1951 (1) SA 256 (T) at 258C; Keens Group Co (Pty) Ltd v Lotter 1989 (1) SA 585 (C) at 589B–C; Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd 2007 (4) SA 577 (C) at para 21; Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd 2010 (1) SA 8 (GSJ) at para 24; Home Fires Transvaal CC v Van Wyk 2002 (2) SA 375 (W) at 380G–H; Dale Hutchison “‘Traps for the unwary’: When careless errors are excusable’ in Graham Glover (ed) Essays in Honour of AJ Kerr (2006) 39–58 at 41; C-J Pretorius ‘Once again iustus error and suretyships: Absa Bank Ltd v Trzebiatowsky 2012 (5) SA 134 (ECP)’ (2013) 34 Obiter 149 at 150; Kerr op cit note 1 at 97; Bhana, Nortje & Bonhuys op cit note 1 at 495.

\(^{16}\) Burger v Central South African Railways 1903 TS 571 at 578.
In fact, the rule is so deeply embedded in our law that Turpin goes as far as to provide that the *caveat subscriptor* rule could not be more firmly established in South African law.\(^\text{17}\) Furthermore, the effect of the rule in its traditional form is that a signatory to a written contract will not be able to escape liability under the contract regardless of ‘how onerous, unreasonable or unexpected’ \[\text{own emphasis}\] the terms of such contract may be.\(^\text{18}\)

An excellent example of the application of this rule in its traditional form is found in the case of *George v Fairmead (Pty) Ltd*,\(^\text{19}\) which is regarded by numerous authorities as the *locus classicus* on the rule.\(^\text{20}\) In this case, the appellant, who had appended his signature to a hotel register form containing contractual terms, was held bound by an exclusion clause contained therein, despite the fact that he did not read and/or understand the terms thereof. The Appellate Division held that the fact that the appellant chose not to read the exclusion clause amounted to him ‘taking the risk of being bound by it’, and held further that he could then not argue that his ignorance of the clause should result in him being able to escape liability.\(^\text{21}\)

\begin{itemize}
\item[(b)] *The theoretical framework of the caveat subscriptor rule: unilateral essential mistake*
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The *caveat subscriptor* rule is merely a specific application of the general principles relating to unilateral essential mistake (within the broader doctrine of mistake).\(^\text{22}\) A unilateral essential mistake consists of the following three elements: (1) it affects a contracting party's decision to contract; (2) it occurs where one of the contracting parties acts under an incorrect impression in relation to one of the aspects of the contract, such as the parties to the contract, the terms of the contract, or the fact that the contract creates legally binding obligations; and (3) it leads to a lack of subjective consensus between the...

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\(^\text{17}\) CC Turpin ‘Contract and imposed terms’ (1956) 73 *SALJ* 144 at 149.
\(^\text{18}\) Steve Cornelius ‘The writing is on the wall for small print’ 2001 *TSAR* 793 at 793.
\(^\text{19}\) *George* supra note 15.
\(^\text{20}\) TA Woker ‘Caveat subscriptor: How careful are we expected to be?’ (2003) 15 *SA Merc LJ* 109 at 110; Nortje op cit note 2 at 742; *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) *SA* 419 (SCA) at para 2; *ABSA Bank Ltd v Trzebiatowski* 2012 (5) *SA* 134 (ECP) at para 25. This case has also been referred to with approval in numerous judgments such as *Keens Group Co (Pty) Ltd* supra note 15 at 589B–G; *Dole South Africa (Pty) Ltd* supra note 15 at 590E–F; and *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) *SA* 870 (C) at 874D–E.
\(^\text{21}\) *George* supra note 15 at 472H–473.
\(^\text{22}\) Bhana, Nortje & Bonthuys op cit note 1 at 495–96.
parties in relation to such aspect(s) of the contract.\textsuperscript{23} Unilateral essential mistakes occur frequently as a result of the fact that signatories to written contracts often fail to read and/or understand the terms of the contract before signature, and the \textit{caveat subscriptor} rule has, as a result, concretised within the framework of the doctrine of mistake in order to deal with these common situations.\textsuperscript{24}

In light of the fact that a unilateral essential mistake has the result that subjective consensus is not achieved between the parties, the contract should, in principle, be declared void \textit{ab initio}.\textsuperscript{25} However, because this would not be fair to the contract assertor (non-mistaken party) who reasonably believed that the parties had reached consensus (and accordingly had a reasonable expectation to enforce the contract), the \textit{caveat subscriptor} rule can be applied in order to protect such contract assertor’s reasonable expectation and enforce the contract against the signatory (mistaken party).\textsuperscript{26}

Historically, the South African courts have utilised two different approaches when dealing with unilateral essential mistakes, namely (1) the \textit{justus error} theory; and (2) the reasonable reliance theory.\textsuperscript{27} In terms of the \textit{justus error} theory, unilateral essential mistake is approached from the viewpoint of the mistaken party,\textsuperscript{28} and allows the mistaken party to escape the contract if he can show that his mistake was essential and reasonable (\textit{justus}) – i.e. excusable.\textsuperscript{29} On the other hand, in terms of the reasonable reliance theory, unilateral essential mistake is approached from the viewpoint of the non-

\begin{footnotesize}
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\item \textsuperscript{23} Bhana, Nortje & Bonthuys op cit note 1 at 462–67 and 477; Hutchison & Pretorius op cit note 1 at 81–9.
\item \textsuperscript{24} Bhana, Nortje & Bonthuys op cit note 1 at 495–96.
\item \textsuperscript{25} Bhana, Nortje & Bonthuys op cit note 1 at 478; Hutchison & Pretorius op cit note 1 at 83–4. Note that such a conclusion would only be reached under the ‘will theory’ of contractual liability, which focuses purely on the parties’ subjective intentions regarding the terms of the contract. For a fuller discussion on the theories of contractual liability see Bhana, Nortje & Bonthuys op cit note 1 at 9; and Hutchison & Pretorius op cit note 1 at 15.
\item \textsuperscript{26} Bhana, Nortje & Bonthuys op cit note 1 at 478 and 495–96; Hutchison & Pretorius op cit note 1 at 91–7. Note that this conclusion is reached under the ‘reliance theory’ of contractual liability, which focuses on both the parties’ subjective intentions regarding the terms of the contract and the objective external manifestations of their intentions (i.e. what the parties said or did). For a fuller discussion on the reliance theory, see Bhana, Nortje & Bonthuys op cit note 1 at 9–10; and Hutchison & Pretorius op cit note 1 at 16.
\item \textsuperscript{27} Bhana, Nortje & Bonthuys op cit note 1 at 479–89; Hutchison & Pretorius op cit note 1 at 91–100.
\item \textsuperscript{28} For an example of how the South African courts use the \textit{justus error} theory to approach unilateral essential mistake from the perspective of the mistaken party, see Diedericks v Minister of Lands 1964 (1) SA 49 (N) at 53D, 54E–55E, and especially at 56G–57G.
\item \textsuperscript{29} Bhana, Nortje & Bonthuys op cit note 1 at 479–83; Hutchison & Pretorius op cit note 1 at 99–100; Chris-James Pretorius ‘The basis of contractual liability in South African law (3)’ (2004) 67 \textit{THRHR} 549 at 549 and 554; Logan v Beit (1889–1890) 7 SC 197 at page 216; Maritz v Pratley (1894) 11 SC 345 at 347 – although the court made no express reference to the \textit{justus error} theory; \textit{National and Overseas Distributers Corporation (Pty) Ltd v Potato Board} 1958 (2) SA 473 (A) at 479F–H; Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D) at 168A; Hlobo v Multilateral Motor Vehicle Accidents Fund 2001 (2) SA 59 (SCA) at para 12; see also Pretorius op cit note 11 at 677–80 and 682–83.
\end{itemize}
\end{footnotesize}
mistaken party, and allows the non-mistaken party to enforce the contract against the mistaken party if the non-mistaken party reasonably believed that subjective consensus was achieved between the parties.\(^{30}\)

The following illustrates how the rules relating to unilateral essential mistake form the theoretical framework of the *caveat subscriptor* rule. In the first place, a signatory to a written contract will be bound to such contract on the basis of actual subjective consensus in circumstances where he did not ascertain the terms of the contract but intended to be bound by such unread terms in any event.\(^{31}\) Secondly, such signatory will generally also be held bound to the written contract under both the *justus error* theory and the reasonable reliance theory in circumstances where he did not ascertain the terms of the contract and *did not* intend to be bound by such unread terms.\(^{32}\) Under the *justus error* theory, the signatory will be bound because he will be found to have acted negligently in having signed the contract without ascertaining the terms thereof, and will therefore not be able to prove that his mistake was reasonable (*justus*).\(^{33}\) Under the reasonable reliance theory, on the other hand, the signatory will generally be bound to the contract because the contract assertor’s (non-mistaken party’s) reliance on the signature as having created the impression of consensus will generally be reasonable.\(^{34}\)

### III QUALIFICATION OF THE TRADITIONAL FORMULATION OF THE CAVEAT SUBSCRIPTOR RULE AND THE DEVELOPMENT OF THE UNEXPECTED TERMS DEFENCE

**(a) The exceptions to the caveat subscriptor rule**

As a result of the fact that the *caveat subscriptor* rule does not necessarily hold a signatory liable on the basis of actual subjective consensus (as the basis for contractual liability) but rather holds the signatory liable on the secondary basis of reasonable reliance on the

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\(^{30}\) Bhana, Nortje & Bonthuys op cit note 1 at 483–87; Hutchison & Pretorius op cit note 1 at 95–7; *Hodgson Bros. v South African Railways* 1928 CPD 257 at page 261 – where the court relied upon the authoritative English case of *Smith v Hughes* (1871) LR 6 QB 597; *Sonap Petroleum (SA) (Pty) Ltd (formerly known as SONAREP (SA) (Pty) Ltd)* v Pappadogianis 1992 (3) SA 234 (A) at 239F–240B and 240I–241A; *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) at 61B–J.

\(^{31}\) Bhana, Nortje & Bonthuys op cit note 1 at 496.

\(^{32}\) Bhana, Nortje & Bonthuys op cit note 1 at 496; Pretorius op cit note 11 at 677; Pretorius op cit note 29 at 554–55.

\(^{33}\) Ibid.

\(^{34}\) Bhana, Nortje & Bonthuys op cit note 1 at 496; Pretorius op cit note 11 at 677.
appearance of consensus.\textsuperscript{35} the rule is inherently subjected to certain exceptions (limitations).\textsuperscript{36} These exceptions can also be explained in terms of both the \textit{justus error} theory and the reasonable reliance theory.\textsuperscript{37} Under the \textit{justus error} theory, the signatory will not be bound to the contract because he will be able to prove that his mistake was reasonable (\textit{justus}).\textsuperscript{38} Under the reasonable reliance theory, on the other hand, the signatory will not be bound to the contract because the contract assertor’s (non-mistaken party’s) reliance on the signature as having created the impression of consensus will be unreasonable.\textsuperscript{39}

The following constitute the exceptions to the \textit{caveat subscriptor} rule in terms of which the signatory will not be bound by the unread terms in the contract (or the terms which he did not understand). First, where the contract assertor was aware of the fact that the signatory did not read and/or understand the terms of the contract and did not intend to be bound by those terms (i.e. where the contract assertor knew about the signatory’s mistake).\textsuperscript{40} Secondly, where the contract assertor should, as a reasonable person, have been aware of the fact that the signatory did not read and/or understand the terms of the contract and did not intend to be bound by those terms (i.e. the contract assertor should, as a reasonable person, have been aware of the mistake).\textsuperscript{41} Thirdly, where the contract assertor caused the signatory’s mistake by misleading the signatory as to the nature or contents of the written contract.\textsuperscript{42} Fourthly, Bhana, Nortje and Bonthuys provide that a signatory may possibly be able to escape unread terms in a contract if his mistake was ‘otherwise excusable’.\textsuperscript{43} Lastly, the signatory will not be bound by the unread terms in the contract (or the terms which he did not understand) if such terms were objectively

\textsuperscript{35} Hutchison in Glover op cit note 15 at 43; Bhana, Nortje & Bonthuys op cit note 1 at 497–98.
\textsuperscript{36} \textit{Burger} supra note 16 at 578; Bhana, Nortje & Bonthuys op cit note 1 at 497–98; Kerr op cit note 1 at 98–102; Nortje op cit note 2 at 741.
\textsuperscript{37} Bhana, Nortje & Bonthuys op cit note 1 at 497.
\textsuperscript{38} Ibid.
\textsuperscript{39} Bhana, Nortje & Bonthuys op cit note 1 at 497; Pretorius op cit note 11 at 677.
\textsuperscript{40} Kerr op cit note 1 at 98; Bhana, Nortje & Bonthuys op cit note 1 at 497; see for example \textit{Van Wyk v Otten} 1963 (1) SA 415 (O) at 417H–420C; \textit{Payne v Minister Of Transport} 1995 (4) SA 153 (C) at 159D–161C; and \textit{Home Fires Transvaal CC v Van Wyk} 2002 (2) SA 375 (W) at 380G–383I.
\textsuperscript{41} Kerr op cit note 1 at 98; Bhana, Nortje & Bonthuys op cit note 1 at 497; see for example \textit{Prins v ABSA Bank Ltd} 1998 (3) SA 904 (C) at 909I–910A and 911C–E; \textit{Dole South Africa (Pty) Ltd} supra note 15 at para 23.
\textsuperscript{42} Christie & Bradfield op cit note 1 at 185; Kerr op cit note 1 at 99; Bhana, Nortje & Bonthuys op cit note 1 at 497; \textit{Kempston Hire (Pty) Ltd v Snyman} 1988 (4) SA 465 (T) at 468D–H and 469D; \textit{Dole South Africa (Pty) Ltd} supra note 15 at para 22; and see for example \textit{Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd} 1986 (1) SA 303 (A) at 316E–317A, 318B–C and 318I–319C.
\textsuperscript{43} See Bhana, Nortje & Bonthuys op cit note 1 at 481–82 and particularly 498, where the authors explain that a mistake may possibly be ‘otherwise excusable’ in circumstances where such mistake is ‘not negligent’ or where the non-mistaken party ‘does not suffer any prejudice’.

\textsuperscript{35} Hutchison in Glover op cit note 15 at 43; Bhana, Nortje & Bonthuys op cit note 1 at 497–98.
\textsuperscript{36} \textit{Burger} supra note 16 at 578; Bhana, Nortje & Bonthuys op cit note 1 at 497–98; Kerr op cit note 1 at 98–102; Nortje op cit note 2 at 741.
\textsuperscript{37} Bhana, Nortje & Bonthuys op cit note 1 at 497.
\textsuperscript{38} Ibid.
\textsuperscript{39} Bhana, Nortje & Bonthuys op cit note 1 at 497; Pretorius op cit note 11 at 677.
\textsuperscript{40} Kerr op cit note 1 at 98; Bhana, Nortje & Bonthuys op cit note 1 at 497; see for example \textit{Van Wyk v Otten} 1963 (1) SA 415 (O) at 417H–420C; \textit{Payne v Minister Of Transport} 1995 (4) SA 153 (C) at 159D–161C; and \textit{Home Fires Transvaal CC v Van Wyk} 2002 (2) SA 375 (W) at 380G–383I.
\textsuperscript{41} Kerr op cit note 1 at 98; Bhana, Nortje & Bonthuys op cit note 1 at 497; see for example \textit{Prins v ABSA Bank Ltd} 1998 (3) SA 904 (C) at 909I–910A and 911C–E; \textit{Dole South Africa (Pty) Ltd} supra note 15 at para 23.
\textsuperscript{42} Christie & Bradfield op cit note 1 at 185; Kerr op cit note 1 at 99; Bhana, Nortje & Bonthuys op cit note 1 at 497; \textit{Kempston Hire (Pty) Ltd v Snyman} 1988 (4) SA 465 (T) at 468D–H and 469D; \textit{Dole South Africa (Pty) Ltd} supra note 15 at para 22; and see for example \textit{Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd} 1986 (1) SA 303 (A) at 316E–317A, 318B–C and 318I–319C.
\textsuperscript{43} See Bhana, Nortje & Bonthuys op cit note 1 at 481–82 and particularly 498, where the authors explain that a mistake may possibly be ‘otherwise excusable’ in circumstances where such mistake is ‘not negligent’ or where the non-mistaken party ‘does not suffer any prejudice’.
unexpected to the signatory and the contract assertor failed to take reasonable steps to draw the signatory’s attention to such terms. This final exception constitutes the ‘unexpected terms defence’ that will be discussed and analysed in the proceeding paragraphs.

(b) Introduction to the unexpected terms defence

In terms of the unexpected terms defence, the signatory to a written contract will not be held bound to any unexpected terms in such contract, unless the contract assertor took reasonable steps to draw the signatory’s attention to the unexpected term. The principle that underlies the exception has been expressed as being the fact that a contract assertor cannot reasonably rely on the signatory’s signature as indicating his consent to the terms of the contract in circumstances where the contract assertor has reason to believe that the signatory would not append his signature if the signatory was aware that the document contained a particular term. In determining whether a term is ‘unexpected’, an objective enquiry is conducted in that the court will consider whether the term would be unexpected to a reasonable person in the position of the signatory and not whether the signatory himself did not subjectively expect to find the term in the contract.

Of all the exceptions to the caveat subscriptor rule, it is evident that the unexpected terms defence is a relatively recent exception which was initially developed by the courts and has been accepted and applied (albeit without express mention in some instances) in a number of judgments over the last few decennia. These judgments will be discussed and analysed in the paragraphs that follow.

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44 Christie & Bradfield op cit note 1 at 185; Kerr op cit note 1 at 98–9; Bhana, Nortje & Bonthuys op cit note 1 at 498.
45 Kerr op cit note 1 at 98–9; Nortje op cit note 2 at 741; Bhana, Nortje & Bonthuys op cit note 1 at 498.
46 Dlubo v Brian Porter Motors Ltd t/a Port Motors Newlands 1994 (2) SA 518 (C) at 524–525A.
47 Bhana, Nortje & Bonthuys op cit note 1 at 498.
48 It is arguable that the unexpected terms defence was initially formulated in 1920 by his lordship Mason J in the case of Shepherd v Farrell’s Estate Agency 1921 TPD 62. For a discussion of this case as an example of a factual scenario where a term may be unexpected, see Bhana, Nortje & Bonthuys op cit note 1 at 499.
49 See for example Du Toit supra note 15; Keens Group Co (Pty) Ltd supra note 15; Diners Club SA (Pty) Ltd v Livingstone 1995 (4) SA 493 (W); Goldberg v Carstens 1997 (2) SA 854 (C) – although the court did not make express reference to the unexpected terms defence; Blue Chip Consultants (Pty) Ltd v Shamrock 2002 (3) SA 231 (W); Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA); Brink supra note 20; Mercurius Motors v Lopez 2008 (3) SA 572 (SCA); Fourie NO v Hansen 2001 (2) SA 823 (W); and see also Nortje op cit note 2 at 741; Bhana, Nortje & Bonthuys op cit note 1 at 498.
(c) The fundamental problems with the unexpected terms defence

As was briefly stated above, the case law dealing with the unexpected terms defence has been shrouded with inconsistent application as a result of the fact that no uniform approach to the defence has been explicitly expounded by the South African courts.\(^{50}\) Instead, it appears that the courts are currently resorting to an *ad hoc* approach to the defence, in terms of which the individual bias of the particular judge hearing the matter ultimately constitutes the basis upon which the signatory in question will either be held bound by the unexpected term(s) in the contract on the one hand, or escape such terms on the other hand.\(^{51}\) Such an approach has consequently led to the existence of an unacceptable level of uncertainty in South African law\(^ {52}\) – a situation clearly at variance with commercial practice.\(^ {53}\)

It is submitted that the current *ad hoc* approach that the courts are applying to the unexpected terms defence has given rise to the following three fundamental problems with the defence: (1) First, the courts have neither expressly defined what exactly constitutes an ‘unexpected term’, nor remained consistent in their determination of whether a particular term in a contract constitutes an ‘unexpected term’.\(^ {54}\) This has led to the result that there is currently no consistent authority on how to decide whether a term is an ‘unexpected term’. (2) Secondly, the courts are inconsistent in relation to the action that must be taken by a contract assertor so as to sufficiently bring an unexpected term to a signatory’s attention.\(^ {55}\) In other words, there is currently uncertainty regarding the exact informational duties that have been placed on contract assertors since the inception of the defence in the South African common law of contract. (3) Thirdly, the courts have also been inconsistent in relation to the informational duties placed on signatories in the application of the defence. More specifically, the courts are currently unclear on what

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50 Nortje op cit note 3 at 135; Pretorius op cit note 7 at 497; Bhana, Nortje & Bonhuys op cit note 1 at 501.
51 Nortje op cit note 2 at 762.
52 Ibid.
53 See Malcolm Wallis ‘Commercial certainty and constitutionalism: Are they compatible?’ (2016) 133 SALJ 545 at 545–49, where the author highlights the importance of legal certainty in commercial transactions.
54 Compare, for example, the different ways in which the SCA determined whether contractual terms constituted ‘unexpected terms’ in the cases of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) and *Mercurius Motors* supra note 49 – both of which are discussed below.
55 See the contrasting approaches of the courts in *Keens Group Co (Pty) Ltd* supra note 15; *Diners Club SA (Pty) Ltd* supra note 49; *Mercurius Motors* supra note 49; *Brink* supra note 20; and *Constantia Insurance Co Ltd* supra note 49 – all of which are discussed below.
they expect of signatories when it comes to the issue of a signatory having to read through the contractual document in question before appending his signature thereto.\textsuperscript{56}

Whilst these problems do not seem to present challenges to the judges presiding over the cases dealing with the defence (who appear to deal with these problems through an application of their individual biases),\textsuperscript{57} it is submitted that these problems will present significant challenges to legal practitioners attempting to advise their clients on matters to which the unexpected terms defence may potentially become applicable.\textsuperscript{58}

(i) The problem of determining what exactly constitutes an ‘unexpected term’

The first major problem with the defence is that the courts have neither expressly defined what exactly constitutes an ‘unexpected term’, nor remained consistent in their determination of whether a particular term in a contract constitutes an ‘unexpected term’. The courts have used various criteria to determine whether a term is unexpected and, therefore, it appears that this determination occurs by way of a contextual analysis based on the facts of each individual case.\textsuperscript{59} The following discussion of the different criteria that the courts have used to determine whether a term is ‘unexpected’ will illustrate the point.

In the first place, some courts have held that a term in a contract may be ‘unexpected’ if the actual purpose of the contract differs from what the signatory expected that purpose to be.\textsuperscript{60} In Dlovo v Brian Porter Motors t/a Port Motors Newlands,\textsuperscript{61} for example, the court held that an exclusion clause contained in a job card for the repair of a motor vehicle was an ‘unexpected term’ due to the fact that the signatory had signed the job card with the belief that she was signing it for the mere purpose of authorising the repairs to her vehicle, whilst in actual fact she was also signing the document for the purpose of

\begin{itemize}
\item \textsuperscript{56}See the contrasting approaches of the SCA in Brink supra note 20; and Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers 2007 (2) SA 599 (SCA) – both of which are discussed below. See also Nortje op cit note 2 at 749–50; and Nortje op cit note 3 at 133.
\item \textsuperscript{57}See Nortje op cit note 2 at 762.
\item \textsuperscript{58}For example, a contract assertor’s attorney will be hesitant to advise their client that they will be able to enforce a particular contractual term against a signatory where such term may potentially constitute an unexpected term. Conversely, a signatory’s attorney will also be hesitant to advise their client that they will be able to escape a contractual term being enforced against them on the basis that the term constitutes an unexpected term.
\item \textsuperscript{59}Bhana, Nortje & Bonthuys op cit note 1 at 498 and 501.
\item \textsuperscript{60}Bhana, Nortje & Bonthuys op cit note 1 at 499; Dlovo supra note 46; and see also Fourie NO supra note 49 at 832H–833A.
\item \textsuperscript{61}Dlovo supra note 46.
\end{itemize}
consenting to the exclusion clause (exempting the contract assertor from liability for damages suffered by the signatory in the event of theft of the signatory’s vehicle whilst it was in the contract assertor’s custody).62

Secondly, the courts have also held that a term may be ‘unexpected’ if it is not ordinarily found in contracts of the particular type under consideration by the court.63 In Afrox Healthcare Bpk v Strydom,64 for example, the court found that an exclusion clause in a hospital admission form (that was presented to the signatory by a private hospital before undergoing an operation) was not an ‘unexpected term’ due to the fact that such clauses were, in the court’s opinion, commonly found in standard-form contracts presented to signatories by service providers (and that admission forms of private hospitals could be included within this particular category of contracts).65

Thirdly, the courts have also held that a term may be ‘unexpected’ if it conflicts with what the signatory was led to believe by pre-contractual representations (such as advertisements or negotiations) made by the contract assertor.66 For example, in Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd,67 the court found that a clause in a standard application form for a trade exhibition (which effectively allowed the organisers to unilaterally vary the dates upon which the exhibition was to be held and nevertheless demand full payment from the exhibitor)68 constituted an ‘unexpected term’ due to the fact that it was inconsistent with what the signatory was led to believe by the representations made to him by the contract assertor’s (organiser’s) agent during the negotiations.69

Fourthly, the courts have also expressed that a term may be ‘unexpected’ if it undermines a fundamental contractual obligation flowing from the contract in question.70

In Mercurius Motors v Lopez,71 for example, the signatory had concluded a contract of

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62 Dlovo supra note 46 at 526B–C and 527B–C.
63 Bhana, Nortje & Bonthuys op cit note 1 at 498–99; see for example Afrox supra note 54.
64 Afrox supra note 54.
66 Bhana, Nortje & Bonthuys op cit note 1 at 499; see for example Shepherd supra note 48; Du Toit supra note 15; and Spindrifter (Pty) Ltd supra note 42.
67 Spindrifter (Pty) Ltd supra note 42.
68 Spindrifter (Pty) Ltd supra note 42 at 310E–J.
69 Spindrifter (Pty) Ltd supra note 42 at 315I–317A, 318B–C and 318I–319C. Note, however, that the court in casu did not expressly refer to the unexpected terms defence.
70 Bhana, Nortje & Bonthuys op cit note 1 at 499.
71 Mercurius Motors supra note 49.
deposit with the contract assertor (effectively by signing certain documents, one of which was a repair order form) in order to leave his motor vehicle at the contract assertor’s workshop so as to allow the vehicle to be serviced and for certain repairs and upgrades to be effected.\(^7^2\) However, the vehicle was subsequently stolen as a result of the contract assertor’s negligence.\(^7^3\) One of the grounds upon which the court found that an exclusion clause in the contract (specifically located in the repair order form) constituted an ‘unexpected term’ was that it undermined a fundamental contractual obligation arising out of the contract of deposit (described by the court as being ‘the very essence of the contract’) – namely the contract assertor’s obligation to safeguard the signatory’s vehicle whilst it was in the contract assertor’s possession.\(^7^4\)

Furthermore, the courts have also held that a term may be ‘unexpected’ if the signatory does not have significant experience within a specialised field to which the contract relates. In *Constantia Insurance Co Ltd v Compusource (Pty) Ltd*,\(^7^5\) for example, the court defined an ‘unexpected term’ with reference to the criterion of the level of specialisation involved in the field to which the contract related. In this case, the SCA was of the view that even if it could be said that the term in question was not unusual in contracts of the kind under consideration (in other words that the term was ordinarily found in contracts of that kind), the term would still be unexpected to the uninitiated person in the specialised field of post dispute or post litigation insurance.\(^7^6\)

Lastly, the courts have held that a term may be ‘unexpected’ if the format of the written contractual document (containing the term) is misleading in the sense that it results in the signatory being misled as to the nature or contents of the contract.\(^7^7\) In such circumstances, the term that is found to be ‘unexpected’ will necessarily form part of the misleading aspect(s) of the contractual document. A case in point is that of *Keens Group Co (Pty) Ltd v Lotter*,\(^7^8\) in which the signatory – a director of a company – signed a contractual document in order to apply for credit facilities on behalf of such company,

\(^7^2\) *Mercurius Motors* supra note 49 at paras 1–3 and 11–17.
\(^7^3\) *Mercurius Motors* supra note 49 at paras 4–6 and 34–5.
\(^7^4\) *Mercurius Motors* supra note 49 at para 33.
\(^7^5\) *Constantia Insurance Co Ltd* supra note 49 at paras 22–3.
\(^7^6\) *Constantia Insurance Co Ltd* supra note 49 at para 20.
\(^7^7\) See *Dlovo* supra note 46 at 521B–E and 526F–527C; *Keens Group Co (Pty) Ltd* supra note 15 at 591A–E and 592B–D; *Diners Club SA (Pty) Ltd* supra note 49 at 495G–496A and 497D; *Mercurius Motors* supra note 49 at para 33, where the court found that the exclusion clause constituted an ‘unexpected term’ on the additional ground (being ‘additional’ in the sense that the clause was already unexpected on the ground that the clause undermined a fundamental contractual obligation) that the repair order form signed by the signatory was misleading.
\(^7^8\) *Keens Group Co (Pty) Ltd* supra note 15.
but failed to read the document properly before signature, thereby failing to realise that the document contained two clauses purporting to bind him as surety and co-principal debtor to the contract assertor for any debts owing by the company to the contract assertor. The court ultimately found that the suretyship clauses constituted ‘unexpected terms’ on the basis that the appearance of the contractual document as a whole misled the signatory into believing that he was merely applying for credit on behalf of the company and was not undertaking a personal suretyship in addition to making such application.

The approach taken by the court in *Keens Group Co (Pty) Ltd v Lotter* has, however, been sharply criticised by Sharrock. Apart from his submission that the majority of the formatting aspects of the contractual document in *casu* were not actually misleading, Sharrock makes the argument that it is not possible for a signatory to be misled by a contractual document that he himself has not read. He accordingly argues that the approach taken by the court (that a term may be ‘unexpected’ if the format of the written contractual document is misleading) is not to be followed, as this will establish a precedent in terms of which a signatory who has neglected to read a contract before signature may escape liability under the contract by merely alleging that he was misled by the format thereof. Therefore, in Sharrock’s opinion, a term in a contract should only be found to constitute an ‘unexpected term’ in circumstances where the signatory has signed the contractual document without reading it and this failure to read is a fact that is known to the contract assertor. It is only under these circumstances that the contract assertor will be unable to show that his reliance on the impression that the signatory was conversant with all of the terms of the contract (including unexpected terms) was reasonable – and thereby allow the signatory to escape the unexpected term(s).

After having analysed the various criteria that the courts have used to determine whether a term is ‘unexpected’, it may be concluded that the courts, in making such a

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79 *Keens Group Co (Pty) Ltd* supra note 15 at 585I–587G.
80 *Keens Group Co (Pty) Ltd* supra note 15 at 590F–J, where the court disapproved of inter alia: the fact that the suretyship clauses were not made conspicuous in any way, the fact that they ‘appeared in the same typestyle and size of type as the rest of the document’, and the fact that the terms on the first page of the document began by providing that they bound the applicant (as opposed to the person completing the application on the applicant’s behalf).
81 *Keens Group Co (Pty) Ltd* supra note 15.
83 Sharrock op cit note 82 at 462–63.
84 Sharrock op cit note 82 at 463.
85 Sharrock op cit note 82 at 462.
86 Sharrock op cit note 82 at 462–63.
determination, are essentially applying two different contextual analyses, namely: (1) an analysis based on factors that are external to (or found outside of) the written contractual document; and (2) an analysis that focuses purely on the written contractual document itself and is not based on any factors outside the context of the written contractual document. The types of criteria that the courts have used to determine whether a term is ‘unexpected’ that may be categorised as fitting within the first type of contextual analysis (which may be referred to as the ‘external factors’ analysis) are the following: (1) first, the cases in which the courts have held that a term in a contract may be ‘unexpected’ if the actual purpose of the contract differs from what the signatory expected that purpose to be; 87 (2) secondly, the cases in which the courts have held that a term may be ‘unexpected’ if it is not ordinarily found in contracts of the particular type under consideration by the court; 88 (3) thirdly, the cases in which the courts have held that a term may be ‘unexpected’ if it conflicts with what the signatory was led to believe by pre-contractual representations (such as advertisements or negotiations) made by the contract assertor; 89 and (4) lastly, the cases in which the courts have held that a term may be ‘unexpected’ if the signatory does not have significant experience within a specialised field to which the contract relates. 90

On the other hand, the types of criteria that the courts have used to determine whether a term is ‘unexpected’ that may be categorised as fitting within the second type of contextual analysis (which may be referred to as the ‘internal factors’ analysis) are the following: (1) first, the cases in which the courts have held that a term may be ‘unexpected’ if it undermines a fundamental contractual obligation flowing from the contract in question; 91 and (2) secondly, the cases in which the courts have held that a term may be ‘unexpected’ if the format of the written contractual document (containing the term) is misleading in the sense that it results in the signatory being misled as to the nature or contents of the contract. 92

Ultimately, it is submitted that the reason behind the courts applying these two different types of analyses – namely the external factors analysis and internal factors analysis – is the fact that the courts are manipulating the context of the facts being placed

87 See Dlово supra note 46 at 526B–C and 527B–C; and Fourie NO supra note 49 at 832H–833A.
88 See Afrox supra note 54 at para 36.
89 See Shepherd supra note 48; Du Toit supra note 15; and Spindrifter (Pty) Ltd supra note 42.
90 See Constantia Insurance Co Ltd supra note 49 at paras 20 and 22–3.
91 See Mercurius Motors supra note 49 at paras 1–6, 11–17, and 33–5.
92 See Dlovo supra note 46 at 521B–E and 526F–527C; Diners Club SA (Pty) Ltd supra note 49 at 495G–496A and 497D; and Mercurius Motors supra note 49 at para 33.
before them in order to arrive at a desired pre-determined result (either holding the signatory bound by unexpected terms or allowing him to escape them). This submission is made on the basis that it is possible for a court to arrive at two completely different outcomes depending on which one of the two different analyses is applied: if one is to focus purely on the factors that are internal to the particular contractual document before them (such as the form of the contract – an example being the fact that certain terms are ‘in the same typestyle and size of type as the rest of the document’) and ignore all factors that are external to the contract, it is clear that the result will potentially be very different to a case where one focuses purely on (or considers in conjunction) the factors that are external to the same contractual document (such as the fact that a term directly conflicts with what the signatory was led to believe by pre-contractual representations made by the contract assertor). Accordingly, this present situation in which the courts are manipulating the context of the facts before them is a clear problem with the unexpected terms defence as it contributes considerably to the uncertainty and resulting inconsistent application of the defence in South African contract law.

In light of this conundrum, it is submitted that this main issue of determining what exactly constitutes an ‘unexpected term’ can be resolved to a certain extent if the courts’ discretion to manipulate the context of the facts before them is limited. In order to so limit the courts’ discretion, it is submitted that a guiding principle should be developed in terms of which the courts are to conduct only one of the two types of analyses (i.e. either the external factors analysis or the internal factors analysis) in their determination of whether a term in a contract constitutes an ‘unexpected term’. This, it is submitted, will necessarily ensure a more predictable outcome and a resulting body of precedent with an increased level of certainty. In my view, however, it would be most appropriate if such guiding principle were to provide that the courts are to confine their analysis to a consideration of purely external factors when making such determination as I am of the view that the internal factors analysis is most as odds with the traditional caveat subscriptor rule. More specifically, to the extent that a signatory is expected to be conversant with the terms of a written contract (under the traditional rule), I am of the view that a signatory to a contract has a greater responsibility to be conversant with factors that are internal to the written contract (such as, for example, a fundamental contractual obligation flowing from the

93 *Keens Group Co (Pty) Ltd* supra note 15 at 590F.
94 *Spindrifter (Pty) Ltd* supra note 42 at 3151–317A, 318B–C and 318I–319C.
contract in question)\(^95\) than to be conversant with factors that are external to the contract (such as, for example, the fact that a term conflicts with what the signatory was led to believe by pre-contractual representations made by the contract assertor),\(^96\) due to the fact that there is generally a higher probability that a signatory will make a mistake in consequence of the presence of an external factor.

(ii) The problem concerning the informational duties on contract assertors

Another fundamental problem with the unexpected terms defence is that the courts are inconsistent in relation to the action that must be taken by a contract assertor so as to sufficiently bring an unexpected term to a signatory’s attention. In terms of the unexpected terms defence, a signatory will be held bound by an unexpected term in circumstances where the contract assertor (the non-mistaken party) has taken reasonable steps to bring the unexpected term to the signatory’s attention.\(^97\) In their assessment of whether the contract assertor has in fact taken reasonable steps to bring an unexpected term to a signatory’s attention, the courts have previously required numerous drafting techniques as well as verbal explanations on the part of contract assertors in deciding whether they have complied with this requirement. With this aspect of the defence, therefore, the courts are also conducting a contextual analysis (in addition to the contextual analysis that they are already conducting in their determination of whether a particular term constitutes an ‘unexpected term’). This, however, is a necessary corollary of the fact that a court is, at this stage of the enquiry, required to test the contract assertor’s behaviour against the standard of reasonableness – a test that necessarily requires the court to make a value judgement.\(^98\) However, the following discussion illustrates how the courts have created a contradictory body of precedent by having failed to confine their reasonableness enquiry within some form of pre-determined parameters when testing the contract assertor’s behaviour against the standard of reasonableness.

In the case of Keens Group Co (Pty) Ltd v Lotter,\(^99\) for example, the court was of the view that the contract assertor did not take sufficient steps to bring the unexpected terms

\(^{95}\) See *Mercurius Motors* supra note 49 at paras 1–6, 11–17, and 33–5.

\(^{96}\) See *Shepherd* supra note 48; *Du Toit* supra note 15; and *Spindrifter (Pty) Ltd* supra note 42.

\(^{97}\) Bhana, Nortje & Bonthuys op cit note 1 at 498.

\(^{98}\) See Alfred Cockrell ‘Substance and form in the South African law of contract’ (1992) 109 SALJ 40 at 43.

\(^{99}\) *Keens Group Co (Pty) Ltd* supra note 15.
to the signatory’s attention in circumstances where the unexpected terms were ‘contained in the same typestyle and size of type as the rest of the document and [were] not highlighted or made conspicuous in any way’.\textsuperscript{100} but still admitted that the terms were ‘not in a particularly inconspicuous place’.\textsuperscript{101} Here the court obviously required some form of special text formatting to make the unexpected terms stand out on the physical document. Contrastingly, in \textit{Diners Club SA (Pty) Ltd v Livingstone},\textsuperscript{102} the court understandably had an issue with the fact that the unexpected term in question was found amongst ‘a series of conditions in incredibly small print, not designed to be read without the aid of magnifying equipment’.\textsuperscript{103} The court held that this resulted in a duty being placed upon the contract assertor to bring the unexpected term to the attention of the signatory (presumably by verbally alerting the signatory to the presence of the unexpected term in question).\textsuperscript{104} Similarly, in \textit{Mercurius Motors v Lopez},\textsuperscript{105} the court found it unacceptable that the unexpected term in question was located amongst a number of conditions underneath a piece of carbon paper on the reverse side of the contractual document signed by the signatory.\textsuperscript{106} Although the reader’s attention was directed to the said conditions in another clause on the front page of the document, this clause on the front page was itself ‘inconspicuous and barely legible’ and appeared next to a more prominent (less important) caption that attracted the reader’s attention.\textsuperscript{107}

Thereafter, in the case of \textit{Brink v Humphries & Jewell (Pty) Ltd},\textsuperscript{108} the SCA considered a contractual document in which the contract assertor had used a method of special text formatting when drafting the document to bring the unexpected term to the attention of the signatory.\textsuperscript{109} In \textit{casu}, the contract assertor had drafted the text of the unexpected term in capital letters so as to emphasise it but applied the same text formatting to two clauses which preceded the unexpected term (also drafting those clauses in capital letters).\textsuperscript{110} The majority of the court was of the view that this diminished the emphasis on the unexpected term.\textsuperscript{111} It appears that the majority of the court would have

\textsuperscript{100} \textit{Keens Group Co (Pty) Ltd} supra note 15 at 591A–B.
\textsuperscript{101} \textit{Keens Group Co (Pty) Ltd} supra note 15 at 590F.
\textsuperscript{102} \textit{Diners Club SA (Pty) Ltd} supra note 49.
\textsuperscript{103} \textit{Diners Club SA (Pty) Ltd} supra note 49 at 495L.
\textsuperscript{104} \textit{Diners Club SA (Pty) Ltd} supra note 49 at 495I–496A.
\textsuperscript{105} \textit{Mercurius Motors} supra note 49.
\textsuperscript{106} \textit{Mercurius Motors} supra note 49 at paras 15–17, 33, and 37.
\textsuperscript{107} \textit{Mercurius Motors} supra note 49 at paras 14–15 and 33.
\textsuperscript{108} \textit{Brink} supra note 20.
\textsuperscript{109} \textit{Brink} supra note 20 at para 10.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
come to the conclusion that reasonable steps had been taken to bring the unexpected term to the signatory’s attention if the term was not ‘part of a block of three clauses’ but was rather ‘standing on its own’ or printed in ‘red ink’. The above problem, coupled with the fact that the prominent heading of the document did not make mention of the unexpected term and the fact that the document included a phrase indicating that the signatory was signing in a representative capacity, resulted in the court finding that the signatory was not bound by the unexpected term as the contractual document was a ‘trap for the unwary’ which justifiably misled the signatory.

The SCA in *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* went even further than the above cases in answering the question of what informational duties should be placed on contract assertors in this regard. First, the court had an issue with the fact that the contract assertor had failed to draft the unexpected term in question in plain language, the court stating that the unexpected term included a ‘curious expression’ which could possibly mislead the reasonable person as to the full implications of the clause. Secondly, the court was of the view that the reasonable contract assertor would, in the circumstances, have asked the signatory whether he understood the meaning of the unexpected term, and further provided that such contract assertor would then be required to provide the signatory with an explanation of the unexpected term in instances where the signatory did not understand such meaning.

Despite the inconsistencies highlighted in the above cases, it is evident they are all similar in the sense that they demonstrate that the application of the unexpected terms defence has the effect that the primary informational duty (to ensure that the signatory understands the terms of the contract) is placed on the contract assertor. The position has accordingly changed as this primary informational duty is normally placed on the signatory in circumstances where the traditional *caveat subscriptor* rule is applied. The

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112 *Brink* supra note 20 at para 10; see also Deeksha Bhana & Minette Nortje ‘General principles of contract’ 2005 *Annual Survey of South African Law* 196 at 213, where the authors describe the majority’s viewpoint in this regard as ‘puzzling’ and question why the court found it necessary that the unexpected term be made even more prominent than it already was.

113 *Brink* supra note 20 at para 10.

114 *Brink* supra note 20 at paras 11–12. The conclusion of the majority should be contrasted to the minority judgment of his lordship Navsa JA, who came to the conclusion that the document was not misleading in light of the simplicity of the document (which comprised only two printed pages), the prominence of the unexpected term, as well as the surprising fact that the signatory’s signature actually extended over the text of the unexpected term.

115 *Constantia Insurance Co Ltd* supra note 49 at paras 22–23.

116 *Constantia Insurance Co Ltd* supra note 49 at para 22.

117 *Constantia Insurance Co Ltd* supra note 49 at para 23.
problem that has arisen in this regard, however, is the fact that the inconsistent approaches highlighted in the above case law has had the effect that a significant level of uncertainty currently exists in relation to the steps that a contract assertor will have to take in order to ‘reasonably’ bring an unexpected term to a signatory’s attention. As mentioned above, by virtue of the fact that the reasonableness criterion comprises a standard as opposed to a rule, the assessment of whether a contract assertor has taken reasonable steps in this regard is necessarily contextual. Accordingly, the determination of whether a contract assertor has taken reasonable steps will necessarily involve a level of uncertainty due to the fact that something that is considered to be reasonable in one case may be considered to be unreasonable in another – the decision will ultimately turn on the facts of the case before the court.

Nevertheless, it is submitted that the fact that a measure of uncertainty will necessarily be introduced when testing the contract assertor’s behaviour against the standard of reasonableness should not translate into absolute uncertainty. In this regard, I am of the view that the level of uncertainty that presently exists in relation to the action that must be taken by a contract assertor so as to sufficiently bring an unexpected term to a signatory’s attention is simply too high and that the courts can still introduce a greater degree of certainty in this regard. More specifically, I am of the view that such greater degree of consistency can be achieved through the introduction of pre-determined parameters to be followed by the courts that will potentially yield more predictable results.

(iii) The problem concerning the informational duties on signatories

As alluded to in the preceding paragraphs, and as Bhana, Nortje and Bonthuys aptly point out, the unexpected terms defence has turned the basic premise of the caveat subscriptor rule on its head, due to the fact that it has removed the primary duty to ensure that the signatory is conversant with all the terms of the contract from the realm of the signatory’s responsibilities, and has placed that duty within the realm of the contract assertor’s responsibilities. However, now that the contract assertor needs to take special measures to ensure that the signatory is aware of unexpected terms, the problem that arises is the

118 Cockrell op cit note 98 at 42–3.
119 Cockrell op cit note 98 at 43.
120 Bhana, Nortje & Bonthuys op cit note 1 at 503.
question of how much reading (if any) the signatory is expected to engage in before appending his signature to the written contract. This problem has arisen, again, due to the fact that the courts have been inconsistent in pronouncing upon exactly what is required of the signatory in this regard. The conflicting cases of *Brink* and *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* clearly illustrate the point.

In *Brink*, the majority of the court had an extremely low expectation in relation to the signatory’s duty to read the contract before signature. By upholding the unexpected terms defence on the facts, the majority of the court essentially held that all that is required of a signatory in this regard is that he read (1) the heading of the document; and (2) any clauses ‘standing on their own’ or ‘printed in red ink’. Significant criticism has been levelled against the majority judgment, with some authors providing that the implication of the decision is that a signatory doesn’t even have to read an obviously contractual document before appending his signature thereto. Understandably, Bhana and Nortje are of the view that this approach fails to appropriately balance the respective responsibilities of the parties as it places too much responsibility on the contract assertor and too little on the signatory.

In *Hartley*, the appellant had entrusted his wife to complete and sign the respondent’s contract in terms of which the respondent (the contract assertor) undertook to convey certain travellers’ cheques. The appellant (who may be considered as the signatory for the purposes of this discussion) did not read the contract, and later raised the unexpected terms defence (albeit without the court making explicit reference thereto), arguing that he was unaware of the existence of certain exclusion clauses limiting the liability of the respondent for the loss of the travellers’ cheques. The court took issue with the fact that the appellant did not engage in any form of reading, stated that he was ‘indifferent’ to the terms of the contract, and held that the respondent did not have a duty to bring the unexpected terms to the appellant’s attention, thereby rejecting the

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121 *Brink* supra note 20.
122 *Hartley* supra note 56.
123 *Brink* supra note 20.
124 *Brink* supra note 20 at paras 10–12.
126 Bhana, Nortje & Bonthuys op cit note 1 at 503; Bhana & Nortje op cit note 112 at 213.
127 Bhana & Nortje op cit note 112 at 213.
128 *Hartley* supra note 56.
129 *Hartley* supra note 56 at paras 3 and 9.
unexpected terms defence.\textsuperscript{131} In fact, the court went as far as to hold that to require the respondent to bring the unexpected terms to the appellant’s attention in \textit{casu} would ‘introduce a degree of paternalism in our law of contract at odds with the \textit{caveat subscriptor} rule’.\textsuperscript{132} The court, therefore, placed some responsibility on the signatory in this case as it expected the signatory to engage in some form of reading before signature.

What is particularly interesting about these two decisions is the fact that the SCA handed down both of these contradictory judgments within a period of less than two years,\textsuperscript{133} clearly demonstrating the court’s uncertainty as to the level of reading required by the signatory in the application of the defence. Pretorius succinctly points out that ‘the \textit{Hartley} decision seems to have more in common with the stricter, classical approach to the \textit{caveat subscriptor} rule…than the more lenient approach adopted in \textit{Brink}’.\textsuperscript{134}

In view of the fact that the SCA in these two decisions handed down two divergent judgments on what exactly is required of signatories in relation to their informational duties (i.e. the level of reading that they are to engage in before signature), and in view of the fact that the assessment of whether a contract assertor has taken reasonable steps to bring unexpected terms to the signatory’s attention is necessarily a contextual assessment, it is submitted that the courts are also essentially assessing the reasonableness of the signatory’s level of reading before signature. In other words, the courts are applying a contextual reasonableness test to both the contract assertor \textit{and} the signatory in assessing whether both parties have sufficiently complied with their informational duties. Accordingly, I am of the view that the uncertainty surrounding the informational duty of the signatory to become conversant with the terms of the contract can (at least to some extent) be resolved in the same manner as the uncertainty surrounding the informational duties on the contract assertor – namely, if the courts’ discretion in this regard is limited by pre-determined guidelines within which they may decide whether the signatory has complied with his duty to conform to the reasonableness criterion. Examples of such guidelines have, in fact, been proposed by Nortje which, in my view, comprise an acceptable and appropriate range within which the courts should confine their enquiry:

\begin{itemize}
\item \textsuperscript{131} \textit{Hartley} supra note 56 at paras 9 and 10.
\item \textsuperscript{132} \textit{Hartley} supra note 56 at para 9.
\item \textsuperscript{133} The judgment in \textit{Brink} supra note 20 was delivered on 30 November 2004 and the judgment in \textit{Hartley} supra note 56 was delivered on 14 September 2006.
\item \textsuperscript{134} Pretorius ‘General principles of the law of contract’ op cit note 125 at 475.
\end{itemize}
It should be accepted that in some circumstances it would be reasonable not to read the contract at all, or only cursorily, for example where the document is presented as a non-contractual document, or where the contract assertor has “ lulled him into a false sense of security” that he need not read the document. Furthermore, it should be recognised that even a “reasonable reader” may fail to notice or understand the import of some terms, especially if the document is lengthy or complex, the typographical layout is designed to lead away his attention from the clause, or the specific clause is clumsily worded.  

IV THE REASONS BEHIND THE ‘SECRET SHIFT’ BROUGHT ABOUT BY THE UNEXPECTED TERMS DEFENCE

The unexpected terms defence may appropriately be described as having brought about what may be referred to as a ‘secret shift’ in our contract law: whereas the basic premise of the caveat subscriptor rule is that it is the signatory’s responsibility to become conversant with all of the terms of a contract before he appends his signature thereto, the unexpected terms defence places the responsibility on the contract assertor to take reasonable steps to ensure that the signatory is made aware of any unexpected terms therein. There are, of course, important policy reasons behind this shift, but the courts have unfortunately failed to be candid in this regard. As was briefly stated above, I am of the view that the central underlying reason for the development of the unexpected terms defence is that the courts are using the defence as a guise in order to conduct a fairness analysis in which the substantive fairness of contracts is being tested, without the courts having to expressly acknowledge that this is the basis upon which they are actually intervening. In other words, and from a broader perspective, it is submitted that the courts are essentially evaluating the substantive fairness (i.e. content) of contracts whilst making it appear that they are merely evaluating the procedural fairness of contracts –

135 Nortje op cit note 3 at 145. Note, however, that in terms of Nortje’s broader proposal, such guidelines are only intended to apply to contracts subject to negotiation and not to standard-form contracts.  
136 Nortje op cit note 2 at 749.  
137 Bhana, Nortje & Bonthuys op cit note 1 at 498; Nortje op cit note 2 at 741; Nortje op cit note 3 at 132; Kerr op cit note 1 at 98–9; Christie & Bradfield op cit note 1 at 185. 
138 Note that the ‘substantive fairness’ of a contract refers to the question of whether the content of the contract complies with the notion of fairness (i.e. what the contracting parties have agreed to). This should be distinguished from the ‘procedural fairness’ of a contract – which refers to the question of whether the process by which the contracting parties arrived at their agreement complies with the notion of fairness. In this regard see Chris-James Pretorius ‘The basis of contractual liability (3): Theories of contract (consideration, reliance and fairness)’ (2005) 68 THRHR 575 at 590; Deeksha Bhana ‘Contract law and the Constitution: Bredenkamp v Standard Bank of South Africa Ltd (SCA)’ (2014) 29 SAPL 508 at 513–14.
through the use of the doctrine of mistake (specifically the unexpected terms defence). This decision to create such a guise, it is submitted, stems from the fact that the courts, and the SCA in particular, have consistently declined to expressly recognise judicial intervention in contracts on the basis that a contract (or contractual term) is substantively unfair.

This central underlying reason for the development of the defence, it is submitted, may be explained in terms of two interrelated reasons – with fairness being at the heart of each explanation – namely: (1) the fact that the development of the defence is a response to the problems posed by standard-form contracts; and (2) the fact that the courts have adopted a more communitarian ideology in relation to the caveat subscriptor rule. Each of these will now be analysed in detail below.

(a) The unexpected terms defence is a response to the problems posed by standard-form contracts

A standard-form contract, or so-called ‘contract of adhesion’, may be described as a written contract containing standardised terms (and conditions), which is drafted by (or on behalf of) one party, and is presented to the other party on the basis that the party to which it has been presented has no choice other than to accept all of the terms of the contract without any variation thereto (with the exception of a few negotiated terms).

The party who drafts the standard-form contract generally enters into a myriad of contracts of the same nature in the ordinary course of business and the party to which the

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140 See South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) at para 27; and Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA) at para 16. See also Bredenkamp v Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA) at paras 50–3, where the SCA expressly held that the notion of fairness is not a ‘freestanding requirement’ against which all contracts may be tested. See, however, the radically conflicting stance taken by the Constitutional Court in the decision of Botha v Rich NO 2014 (4) SA 124 (CC) at paras 21 and 49–51, where the court effectively recognised a general freestanding fairness test in terms of which the substantive unfairness of contracts may be tested. As to the fact that the court so recognised such a general freestanding fairness test, see Bhana & Meerkotter op cit note 139 at 506.

141 See Nortje op cit note 3 at 132 and 136–41 – where she submits that ‘unresolved ideological tension between individualist and communitarian values, and the advent of standard-term contracts’ comprise the main reasons for the development of the unexpected terms defence.

142 Van der Merwe, Van Huyssteen & Reinecke et al op cit note 1 at 269; Todd D Rakoff ‘Contracts of adhesion: An essay in reconstruction’ (1983) 96 Harvard LR 1173 at 1177; Turpin op cit note 17 at 144.
contract is presented generally does not enter into such contracts as regularly as the drafting party.¹⁴³

Although the above definition comprises a number of characteristics (some of which may not necessarily always be applicable to a particular case), the central characteristic has been said to be the fact that these contracts are presented on a ‘take-it-or-leave-it’ basis.¹⁴⁴ This central feature of standard-form contracts, it is argued, necessarily translates into these contracts introducing at least some level of unfairness into the contractual relationship that will be disadvantageous to the signatory (i.e. the person to which the standard-form contract is presented).¹⁴⁵ The contract assertor (i.e. the party presenting the standard-form contract for signature) has all of the power to dictate the terms of the contract and logically, in doing so, will include clauses that are advantageous – and offer the most protection – to such contract assertor.¹⁴⁶

The first ground upon which I base my submission that the unexpected terms defence was developed by the courts in response to the problems posed by standard-form contracts, is the fact that all of the reported cases in which the courts upheld the defence involved standard-form contracts.¹⁴⁷ On my reading of the reported case law, it is clear that the only cases in which the courts upheld the unexpected terms defence dealt with standard-form contracts on the facts,¹⁴⁸ and it is submitted that the courts in each of these cases upheld the defence in order to counteract the unfair situation that the signatories faced when concluding the standard-form contracts that were presented to them.

¹⁴³ Rakoff op cit note 142 at 1177.
¹⁴⁴ Nortje op cit note 3 at 139; see also the minority judgment of Sachs J in Barkhuizen v Napier 2007 (5) SA 323 (CC) at para 135; and Rakoff op cit note 142 at 1177.
¹⁴⁵ See Turpin op cit note 17 at 145 – where the author provides that standard-form contracts allow the drafter of the contract to impose unfair terms upon the signatory which may deprive the signatory of his rights to compensation or otherwise exclude the protection offered to the signatory by the common law.
¹⁴⁶ Barkhuizen (Sachs J minority) supra note 144 at para 135.
¹⁴⁷ Nortje op cit note 3 at 139; Hutchison & Pretorius op cit note 1 at 239; Turpin op cit note 17 at 154; Hutchison in Glover op cit note 15 at 58; Du Toit supra note 15; Keens Group Co (Pty) Ltd supra note 15; Brink supra note 20; Mercurius Motors supra note 49.
¹⁴⁸ See for example the following cases: Du Toit supra note 15 at 902B–C – where the respondent (Atkinson’s Motors Ltd) presented the appellant (Du Toit) with a printed standard-form contract of purchase and sale with a number of spaces in which certain details had to be filled in; Keens Group Co (Pty) Ltd supra note 15 at 586D–H – where the defendant signatory (a director of a company which sought credit facilities from the plaintiff) signed a standard-form confidential credit application sent by the plaintiff with spaces to be filled in concerning information such as trade references, the credit limit required as well as the terms of credit; Brink supra note 20 at paras 1, 4 and 5 – where the appellant (Brink) signed a one-page standard credit application form proffered by the respondent (Humphries & Jewell); and Mercurius Motors supra note 49 at paras 11–18 – where the respondent (Lopez) concluded a contract of deposit with the appellant (Mercurius) by signing two standard-form documents, namely a ‘Warranty Repair Order’ and a ‘repair order form’.
Other than my own interpretation of the reported case law, there is also considerable academic support for my argument. In the first place, Nortje accepts that it is arguable that the development of the unexpected terms defence is a response to the problems posed by standard-form contracts, and explicitly confirms that all of the cases dealing with the defence have dealt with such contracts on the facts.149 Furthermore, she also provides that it is arguable that the application of the defence is possibly confined to standard-form contracts.150 However, Nortje, in proposing her approach – which differentiates between standard-form contracts and negotiated contracts in light of her view that they raise different policy considerations – argues that the defence should only apply to negotiated contracts and that only ‘reasonable reading’ should be expected of the signatory in this context.151 In relation to standard-form contracts, Nortje is of the view that the unexpected terms defence (within the context of the doctrine of mistake) does not adequately deal with the special issues raised by such contracts and that standard-form contracts should, accordingly, be dealt with by way of the judiciary having direct control over the content of unfair terms in such contracts.152 Furthermore, Nortje is of the view that such content control can be achieved through the primary application of the (already effective) CPA,153 but that the common law will still need to be developed to perform a subsidiary function.154 In this regard, Nortje is of the view that the judiciary should be provided with the power to intervene on the basis of public policy as informed by constitutional values, and thereby advocates legislative intervention (through the CPA) supplemented by public policy.155

On the one hand, I do not support Nortje’s proposed approach that the unexpected terms defence should apply to negotiated contracts. In my view, the courts should still be able to expect a signatory to a negotiated contract to be fully conversant with the terms of such contract at its conclusion for the following reasons: (1) first, the signatory to such contract is generally – by virtue of the nature of such contract – in a position to alter the terms of the contract (in the sense that his consensus is not generally impaired); and (2)

149 Nortje op cit note 3 at 132, 139–41, and 153.
150 Nortje op cit note 3 at 139.
151 Nortje op cit note 3 at 141–48 and 153.
152 Nortje op cit note 3 at 148–53.
153 Note that such content control is provided for in Section 48 (read with Regulation 44) and Sections 51 and 52 of the Consumer Protection Act supra note 10 – all of which have the combined effect of providing the courts with the power to strike down entire contracts or terms thereof on the basis of unfairness.
154 Nortje op cit note 3 at 152–53.
155 Ibid.
secondly, in circumstances where the signatory is not in such a position to alter the terms of the contract (for example, in a situation where an inequality of bargaining powers is present), such signatory may choose to enter into an alternative negotiated contract with an alternative person. Accordingly, it is submitted that the signatory to a negotiated contract is sufficiently incentivised to become conversant with all of the terms of the contract and that he should, therefore, not be able to complain should the contractual terms not be to his liking subsequent to his failure to read them before the conclusion of the contract. On the other hand, however, and as will be elaborated upon in my proposal below, I am supportive of Nortje’s view that the appropriate approach to standard-form contracts is the regulation of such contracts by way of the judiciary having direct control over the content of unfair terms in such contracts.156

Further academic support for my argument that the unexpected terms defence was developed by the courts in response to the problems posed by standard-form contracts is found in the work of Hutchison and Pretorius.157 The authors implicitly provide that the defence applies only to standard-form contracts where they state that ‘[e]xpress terms in standardised contracts…are in one important respect [own emphasis] dealt with differently from express terms negotiated by the parties’, namely the fact that the party presenting the standard-form contract for signature has the duty to take steps to draw the signatory’s attention to any unexpected terms in such contract and that a failure to do so may result in the signatory not being bound by such unexpected term.158 By this, the authors clearly mean that the unexpected terms defence is an additional defence which is only available to a signatory to a standard-form contract and that such contract must accordingly be approached differently in this regard.159

Moreover, Turpin essentially argues that the unexpected terms defence was developed in contemplation of its application to standard-form contracts where he provides that the true basis for the defence, ‘which offends against consensuality, is practical convenience’ and that ‘[t]he law, recognizing the necessity for standardization of contract [own emphasis], relieves of the necessity for individual notification of terms

156 Nortje op cit note 3 at 152–53.
157 Hutchison & Pretorius op cit note 1 at 239.
158 Hutchison & Pretorius op cit note 1 at 239; see also Hutchison in Glover op cit note 15 at 58 – where, in a similar fashion, he also implicitly provides that the defence applies only to standard-form contracts.
159 It must be noted here that the authors seem to merely be making a statement regarding the present state of the law and are not proposing that the unexpected terms defence should apply to standard-form contracts.
where this is commercially impracticable’.\textsuperscript{160} Although Nortje’s proposal can technically be distinguished from the writings of Hutchison and Pretorius and Turpin in the sense that she does not support the application of the unexpected terms defence to standard-form contracts (whereas it appears that the others do), it is submitted that all of the above authors constitute authority for the fact that the unexpected terms defence was developed by the courts as a response to the problems posed by standard-form contracts.

Despite the considerable academic support for this argument, there is, unfortunately, one shortcoming with it – namely the fact that the courts have not expressly acknowledged that standard-form contracts are to be afforded a special status in our law.\textsuperscript{161} The only time that such a special status has ever been acknowledged in respect of these contracts was in the minority judgment of Sachs J in the case of \textit{Barkhuizen v Napier},\textsuperscript{162} which, by virtue of the fact that it did not form part of the majority’s view, can only be regarded as having persuasive effect. However, after having set out the problems that standard-form contracts present within the law of contract, Sachs J essentially held that in light of these problems and the fact that standard-form contracts perform an important and necessary function in commercial practice, it would be prudent if standard-form contracts were to be afforded a special status in our law and if \textit{the content of the terms of such contracts were to be controlled}.\textsuperscript{163} This statement causes one to contemplate upon whether the unexpected terms defence is the mechanism through which the terms of standard-form contracts are presently being controlled by the courts. As has already been argued above and will be argued below, it is submitted that the answer to this question is in the affirmative.

The second ground upon which I base my submission that the unexpected terms defence was developed by the courts in response to the problems posed by standard-form contracts, is the fact that the major problems associated with standard-form contracts are ultimately linked to the underlying problem that these contracts introduce at least some level of unfairness into the contractual relationship to the disadvantage of the signatory.\textsuperscript{164} The following constitute the major problems that are posed by standard-form contracts which, it is submitted, all contribute towards such contracts being unfair towards the signatory to the contract (and which have, accordingly, contributed to the development

\textsuperscript{160} Turpin op cit note 17 at 154.
\textsuperscript{161} Nortje op cit note 3 at 140; see also Bhana, Nortje & Bonthuys op cit note 1 at 188–90.
\textsuperscript{162} \textit{Barkhuizen} (Sachs J minority) supra note 144 at paras 121–85.
\textsuperscript{163} \textit{Barkhuizen} (Sachs J minority) supra note 144 at paras 135–39.
\textsuperscript{164} See Turpin op cit note 17 at 145.
of the unexpected terms defence by the courts): (1) first, it is arguable that the signatory is not making a sufficiently consensual choice in order to justify the imposition of contractual liability when he concludes a standard-form contract; and (2) secondly, it is arguable that standard-form contracts give rise to the issue of an inequality of bargaining powers existing between the contracting parties. Each of these issues will now be discussed in order to illustrate the point that standard-form contracts tend to operate unfairly towards signatories.

(i) The signatory is not making a sufficiently consensual choice in order to justify the imposition of contractual liability

As a result of the fact that the party that drafts a standard-form contract generally presents such contract to a signatory by providing the signatory with the choice to either contract on the proffered terms or not contract with the drafter at all, it is questionable whether the signatory’s choice can be regarded as being sufficiently consensual in order to justify holding the signatory contractually liable. Furthermore, an argument that may be raised in response to this assertion – namely that the signatory’s choice can be regarded as sufficiently consensual in view of the fact that he has the option to ‘shop around’ for another standard-form contract with more favourable terms – is most often impractical. The impracticality of this assertion can be attributed to various factors, such as: (1) the fact that it is often difficult for the average signatory (who may lack legal advice or expertise) to draw comparisons between often complex standard-form contracts; (2) the fact that ‘shopping around’ for more favourable standard-form contracts takes a considerable amount of time and effort, and (3) the fact that signatories who do attempt

165 Nortje op cit note 3 at 139; Tjakie Naudé ‘Unfair contract terms legislation: The implications of why we need it for its formulation and application’ (2006) 17 Stell LR 361 at 365–66; Turpin op cit note 17 at 144–45; Rakoff op cit note 142 at 1179–80.
166 Bhana, Nortje & Bonhuys op cit note 1 at 188–90.
167 Turpin op cit note 17 at 145; see also Rakoff op cit note 142 at 1225.
168 Nortje op cit note 3 at 139 and 150–52; Naudé op cit note 165 at 365–66; Rakoff op cit note 142 at 1179–80.
169 Deeksha Bhana & Marius Pieterse ‘Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited’ (2005) 122 SALJ 865 at 885; Rakoff op cit note 142 at 1226; Nortje op cit note 3 at 140.
170 Rakoff op cit note 142 at 1226; Nortje op cit note 3 at 140.
171 Naudé op cit note 165 at 367.
to shop around and draw such comparisons are usually only concerned with the well-publicised terms that are most likely to catch their attention.\footnote{Kevin Hopkins ‘Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice’ 2003 TSAR 150 at 156; Naudé op cit note 165 at 367; Rakoff op cit note 142 at 1226; Nortje op cit note 3 at 140.}

Hopkins explains the correlative behaviours of suppliers and consumers in relation to the offering of standard-form contracts as follows:

‘It seems to me that even in a highly competitive market where alternatives are available, banks and insurance companies compete only on the terms known better to the lay-consumer and more likely to catch their attention (such as price, premiums, and interest rates) rather than on the punitive and oppressive terms known mostly to lawyers (like those that limit liability or affect the incidence of the onus, or of prescription). This can probably be explained by the fact that the average consumer is more interested in (and thus more easily influenced by) the well-publicised and better-understood details of the transaction.’\footnote{Hopkins op cit note 172 at 156.}

Within the context of the \textit{caveat subscriptor} rule and the unexpected terms defence, the above explanation by Hopkins may be understood as meaning that the average consumer is more concerned with the \textit{expected terms} (such as price, premiums, and interest rates) as opposed to the \textit{unexpected terms} (such as those that limit the liability of the supplier).\footnote{Ibid.} Viewed in this light, the need for the application of the unexpected terms defence to standard-form contracts is self-evident in that it provides a form of protection to the average consumer (i.e. the signatory) who is generally not concerned with unexpected (ancillary) terms when ‘shopping around’ for the most (seemingly) advantageous transaction. Therefore, the unexpected terms defence, in allowing signatories to escape such unexpected terms (that they are not generally concerned with) in standard-form contracts, operates to counteract the fact that the signatory’s choice was not sufficiently consensual to justify the imposition of contractual liability.
(ii) **Standard-form contracts give rise to the issue of an inequality of bargaining powers existing between the contracting parties**

The other major problem posed by standard-form contracts – which, it is submitted, contributes towards such contracts operating unfairly towards the signatory – is the fact that standard-form contracts arguably give rise to the issue of an inequality of bargaining powers existing between the contracting parties. An inequality of bargaining powers exists when one of the contracting parties holds a position of strength or dominance in bargaining power that allows such party to dictate the terms of the contract to the other contracting party – who has little choice but to submit to the demands of the party in the stronger bargaining position. At present, it appears that the courts deal with unequal bargaining powers as an issue of legality – i.e. the existence of an inequality of bargaining powers is taken into account as a relevant factor in the court’s determination of whether a contract is contrary to public policy, but will not invalidate the contract in the absence of an additional factor indicating that the contract is void for illegality. Nevertheless, the issue of unequal bargaining powers may still be described as comprising a somewhat undeveloped aspect of South African contract law, and it is arguable that it is (also) related to the issue of the reality of consent (i.e. the issue discussed above concerning whether a contracting party is making a sufficiently consensual choice in order to justify the imposition of contractual liability).

With regards to standard-form contracts, the courts do not assume that an inequality of bargaining powers exists by virtue of the mere existence of a standard-form contract. Instead, the courts currently require ‘specific evidence as to the availability of contracts on alternative terms, and whether the contract relates to an “optional convenience, or an

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175 Bhana, Nortje & Bonthuys op cit note 1 at 188–90.
177 Bhana, Nortje & Bonthuys op cit note 1 at 187–88; see also Uniting Reformed Church, De Doorns v President of the Republic of South Africa 2013 (5) SA 205 (WCC) at paras 32–40, where the court found that a clause in a contract was void for illegality as a result of the presence of an inequality of bargaining powers between the contracting parties in culmination with the fact that the clause violated Section 25 of the Constitution of the Republic of South Africa, 1996.
178 See Bhana & Pieterse op cit note 169 at 887–89, where the authors provide that the issue of unequal bargaining powers can still be incorporated into contract law doctrines other than the doctrine of legality (such as, for example, the existing doctrines of duress and undue influence).
179 Bhana, Nortje & Bonthuys op cit note 1 at 189; see for example Brisley v Drotsky 2002 (4) SA 1 (SCA) at para 26.
essential attribute of life” for someone in the weaker party’s position’.

In fact, in the cases of Afrox Healthcare Bpk v Strydom, Napier v Barkhuizen, and Barkhuizen v Napier, all of which dealt with standard-form contracts on the facts, each court came to the same conclusion that the presence of an inequality of bargaining powers was not proved as a result of the fact that no such evidence was presented before the courts. However, this tendency of the courts to require such proof of the existence of an inequality of bargaining powers has been sharply criticised as a technique currently being used by the courts to avoid having to deal with the issue of unequal bargaining powers entirely. Indeed, it would, in actual fact, be quite difficult for one to make the argument that an inequality of bargaining powers rarely exists in a situation where a standard-form contract is concluded. On the contrary, Bhana and Pieterse make the point that standard-form contracts are, in the majority of cases, concluded as a direct result of an inequality of bargaining powers existing between the contracting parties.

The above discussion has demonstrated how the courts are, for some unarticulated reason, quite uncomfortable with the idea of developing the issue of unequal bargaining powers in South African contract law. One possible reason for this, which is directly aligned with the essential argument being put forward in this report – namely that the unexpected terms defence has been developed by the courts as a façade in order to allow them to test the substantive fairness of contractual terms – is the possible link between unequal bargaining powers and the issue of substantive unfairness. This link was recognised by the court in the case of Uniting Reformed Church, De Doorns v President of the Republic of South Africa, in which it was held that public policy requires the courts to ensure that a minimum degree of fairness is observed in the enforcement of contracts, and that a consideration of the fairness of the contract will include a consideration of the relative bargaining strength of the contracting parties. Accordingly, it is submitted that it is possible that the courts are avoiding the issue of unequal bargaining powers in order to avoid having to expressly recognise that there is a

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180 Bhana, Nortje & Bonthuys op cit note 1 at 189; Napier v Barkhuizen 2006 (4) SA 1 (SCA) at para 15.
181 Afrox supra note 54 at para 12; see also Van den Heever op cit note 65; Jansen & Smith op cit note 65 at 213.
182 Napier v Barkhuizen supra note 180 at para 15.
183 Barkhuizen v Napier supra note 144 at para 66.
185 Bhana & Pieterse op cit note 169 at 884.
186 See Bhana op cit note 184 at 146; Uniting Reformed Church, De Doorns supra note 177 at para 34.
187 Uniting Reformed Church, De Doorns supra note 177.
188 Uniting Reformed Church, De Doorns supra note 177 at paras 34–5.
justification for intervening in contracts on the basis of substantive unfairness of contractual terms.\textsuperscript{189} Instead, and as has already been argued above, the courts have decided to create a guise (within the doctrine of mistake) in terms of which the \textit{substance} of contracts can be tested against the standard of fairness without the courts having to expressly acknowledge that this is the basis upon which they are actually intervening.

\textbf{(b) The unexpected terms defence is a result of the courts adopting a more communitarian ideology in relation to the caveat subscriptor rule}

The other (interrelated) explanation for the development of the unexpected terms defence – which, it is submitted, is also tied to the issue of substantive unfairness – is the fact that the courts have adopted a more communitarian ideology in relation to the \textit{caveat subscriptor} rule.\textsuperscript{190} Whilst the traditional \textit{caveat subscriptor} rule has been described as being premised on the individualist value of self-reliance (where the signatory \textit{himself} bears the responsibility to become conversant with all of the terms of a contract before he appends his signature thereto), the unexpected terms defence has been described as being more aligned to the communitarian values of altruism and paternalism (where the responsibility is placed on the \textit{contract assertor} to consider the interests of the signatory by making him aware of any unexpected terms in the contract, and thereby ensure that the signatory is protected from harm).\textsuperscript{191}

Furthermore, it is quite conceivable that this ideological shift in respect of the \textit{caveat subscriptor} rule can be explained as a result of the courts yielding to the pressure to infuse the common law of contract with the Constitution of the Republic of South Africa, 1996 (hereafter the ‘Constitution’).\textsuperscript{192} Indeed, the Constitution is clearly premised on communitarian ideals,\textsuperscript{193} a prime example being the notion of \textit{ubuntu} – a somewhat

\begin{itemize}
\item \textsuperscript{189} See the SCA’s reluctance in this regard in \textit{South African Forestry Co Ltd} supra note 140 at para 27; \textit{Fourway Haulage SA (Pty) Ltd} supra note 140 at para 16; \textit{Bredenkamp} supra note 140 at paras 50–53; \textit{Bhana} op cit note 138 at 508; \textit{Bhana & Meerkotter} op cit note 139 at 506.
\item \textsuperscript{190} Nortje op cit note 3 at 136–39.
\item \textsuperscript{191} Nortje op cit note 3 at 136–37. As to individualism and communitarianism as opposing ideologies situated at opposite ends of a continuum, see Duncan Kennedy ‘Form and substance in private law adjudication’ (1976) 89 \textit{Harvard LR} 1685 at 1713–22.
\item \textsuperscript{192} As to the need to infuse the common law of contract with the Constitution, see Deeksha Bhana ‘The development of a basic approach for the constitutionalisation of our common law of contract’ (2015) 26 \textit{Stell LR} 3 at 3.
\item \textsuperscript{193} Theunis Roux ‘Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?’ (2009) 20 \textit{Stell LR} 258 at 280.
\end{itemize}
abstract concept which essentially underlies the constitutional value system as a whole.\(^{194}\)

Despite the fact that the meaning of *ubuntu* has proved to be quite evasive,\(^{195}\) it may be described as a fluid concept that encapsulates the (communitarian) objectives of group solidarity, compassion, and the prioritisation of the interests of others over those of oneself.\(^{196}\) In light of the fact that the Constitution is so premised on such communitarian ideals, as well as the fact that the courts have a constitutional mandate to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights in terms of Section 39(2) of the Constitution,\(^{197}\) it is conceivable that the infusion of the Constitution with the common law of contract will necessarily result in a more communitarian ideology permeating the rules of contract law through judicial decision-making.

Accordingly, it is submitted that the unexpected terms defence comprises a rule of the common law of contract that has been developed by the courts in accordance with their constitutional mandate under Section 39(2). The defence clearly echoes communitarian ideals and is specifically aligned to the objectives of *ubuntu*: one can hardly argue that a contract assessor with a duty to alert a signatory to any unexpected terms in a contract is not placing the interests of the signatory above its own.

In addition, it is submitted that this ideological explanation for the development of the unexpected terms defence should not be viewed in isolation from the first explanation as argued above (i.e. that the development of the unexpected terms defence is a response to the problems posed by standard-form contracts and the fact that such contracts operate unfairly towards signatories), as both of these explanations may be viewed as being interrelated. This interrelatedness stems from the fact that substantive fairness in contract law (which, it has been argued, is the underlying problem with standard-form contracts)

\(^{194}\) See JY Mokgoro ‘Ubuntu, the Constitution and the rights of non-citizens’ (2010) 21 *Stell LR* 211 at 222 and particularly at 224 – where it is submitted that the courts have increasingly utilised the notion of *ubuntu* in their interpretation of the Constitution. In this regard, see TW Bennett ‘Ubuntu: An African equity’ (2011) 14 *Potchefstroom Electronic Law Journal* 29 at 30–46. As to the fact that *ubuntu* embodies a communitarian ideology, see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 37, where Sachs J held as follows: ‘The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy’.

\(^{195}\) Bennett op cit note 194 at 30–32.

\(^{196}\) Mokgoro op cit note 194 at 224.

is closely aligned to a communitarian ideology. Accordingly, it is submitted that the development of the unexpected terms defence is essentially a result of a combination of these explanations – with substantive unfairness being the underlying issue that the courts are effectively grappling with, but without making express reference thereto.

V PROPOSALS FOR REFORM

In light of the problems with and inconsistences in the application of the unexpected terms defence that have been highlighted above, as well as my primary assertion that the courts are using the unexpected terms defence as a guise in order to conduct a fairness analysis and produce what they believe to be fair results in cases in which signatories would ordinarily be held bound by standard-form contracts, I am of the view that the unexpected terms defence comprises an inadequate solution to the major problems that are posed by standard-form contracts. As was discussed above, the application of the unexpected terms defence has the effect that the primary informational duty (to ensure that the signatory understands the terms of the contract) is placed on the contract assertor. Thus, the unexpected terms defence, by requiring the contract assertor to ensure that the signatory is informed of the meaning and consequences of the unexpected terms in the contract, has the result that the signatory will make a more informed choice when he concludes the contract (provided the contract assertor complies with his duty in this regard). Therefore, the existence of the defence in the common law of contract may generally be said to have the result that a signatory will make a more informed choice when concluding a standard-form contract.

However, the fact that the signatory is now sufficiently informed of the meaning and consequences of all of the terms in the standard-form contract does not change the fact that the signatory’s choice is still effectively impaired – the signatory is still faced with the basic choice of either accepting the terms of the contract as they are or not contracting at all. In this sense, it may be said that the unexpected terms defence fails to adequately solve the problem with standard-form contracts that the signatory is not making a

199 See Nortje op cit note 3 at 141 and 148–52.
200 Bhana, Nortje & Bonthuys op cit note 1 at 503. In this regard, compare Sections 22 and 49 of the Consumer Protection Act supra note 10, both of which impose informational duties on the supplier (i.e. contract assertor).
201 Nortje op cit note 3 at 141 and 150–51.
sufficiently consensual choice in order to justify the imposition of contractual liability (as discussed above).

Furthermore, in circumstances where the signatory becomes sufficiently informed as a result of the contract assertor complying with its duty (to take reasonable steps to bring unexpected terms to the signatory’s attention), an application of the unexpected terms defence may have the adverse effect that the signatory is held bound to a standard-form contract in circumstances where his consent was impaired. In this sense, it may be said that the unexpected terms defence fails to adequately solve the problem with standard-form contracts that they give rise to the issue of an inequality of bargaining powers existing between the contracting parties. In fact, under such circumstances, it may even be argued that the unexpected terms defence perpetuates the inequality of bargaining powers issue by allowing the dominant party (i.e. the contract assertor) to dictate the terms of the contract and impose such terms on the weaker contracting party (i.e. the signatory).

In light of the above discussion demonstrating how the unexpected terms defence fails to solve the major problems with standard-form contracts, I am supportive of Nortje’s view that such problems may appropriately be solved by way of direct content control of unfair terms in standard-form contracts through the primary application of the (already effective) CPA,202 but that the common law will still need to be developed so as to perform a subsidiary function in cases to which the CPA is not applicable.203 In view of my assertion that the major problems posed by standard-form contracts are ultimately linked to the underlying problem that these contracts necessarily introduce at least some level of unfairness into the contractual relationship to the disadvantage of the signatory, it is submitted that the provisions of the CPA dealing with unfair contract terms (specifically Section 48 read with Regulation 44 and Sections 51 and 52) allow the courts to better deal with the related (unfairness) issues of the signatory having impaired consent and the existence of an inequality of bargaining powers having an adverse effect on the signatory. Furthermore, by prescribing the manner in which unfair contract terms may be dealt with by judges, it is clear that the CPA strikes a more appropriate balance on the continuum between the competing considerations of fairness and certainty,204 as it

202 See Section 48 (read with Regulation 44) and Sections 51 and 52 of the Consumer Protection Act supra note 10.
203 Nortje op cit note 3 at 152, where she explains that the CPA does not apply to all standard-form contracts. See also Section 5(2) of the CPA which provides a list of transactions to which the CPA does not apply (and which can possibly involve the use of standard-form contracts).
204 As to the competing considerations of fairness and certainty see Cockrell op cit note 98 at 43; and Pretorius op cit note 198 at 263–64.
introduces a level of fairness into the contractual relationship in a prescribed (i.e. more certain) manner.

There is, however, a significant need for reform within the context of cases in which standard-form contracts are concluded in respect of transactions to which the CPA is not applicable. Nortje correctly points out that in such cases the common law will need to be developed so as to provide for subsidiary control.205 Whilst I agree with Nortje that the most appropriate (common law) solution would probably be for the courts to directly control unfair terms in standard-form contracts by way of a (constitutional) public policy exercise (rather than applying the rules of mistake – i.e. the unexpected terms defence),206 the courts have, for some unarticulated reason, declined to expressly acknowledge that standard-form contracts are to be afforded a special status in our law.207 In light of this fact, it may be more appropriate to develop the common law in an alternative manner so as to allow the courts to continue to operate within the confines of their chosen doctrine (the doctrine of mistake). Accordingly, it is submitted that it would be more appropriate to develop the unexpected terms defence itself – as it appears to be the mechanism that the courts have chosen to use to respond to the problems posed by standard-form contracts.

With regards to the development of the unexpected terms defence, it is submitted that the current inconsistency surrounding the application of the defence cannot subsist, and that a higher level of certainty needs to be introduced so as to allow both the courts and practitioners to interpret and apply the defence with greater accuracy. As was mentioned above, it is clear that it will not be possible to achieve a complete level of certainty as a result of the fact that the defence is essentially a substantive fairness enquiry (with fairness situated on the opposing end of the continuum to certainty).208 In this regard, it is suggested that judges who are presiding over future cases concerning the unexpected terms defence be mindful of the fact that certain guidelines need to emerge in order to address the uncertainty that is present within the context of the three fundamental problems with the defence as highlighted above.209 As was demonstrated above, the problem of uncertainty concerning the determination of what exactly constitutes an

205 Nortje op cit note 3 at 152.
206 Nortje op cit note 3 at 152–53.
207 Nortje op cit note 3 at 140; see also Bhana, Nortje & Bonhuys op cit note 1 at 188–90.
208 See Cockrell op cit note 98 at 43; Pretorius op cit note 198 at 263–64.
209 Note that this suggestion is in line with the submission of Wallis op cit note 53 at 566, where the author (and Judge of the SCA) correctly provides that any discretion vested in the courts must be circumscribed.
‘unexpected’ term can be resolved to some extent if the courts’ discretion to manipulate the context of the facts before them is limited through the development of a guiding principle (such as, for example, a principle in terms of which the courts are to conduct only one of two different types of analyses – i.e. either an external factors analysis or an internal factors analysis – in their determination of whether a term in a contract constitutes an ‘unexpected term’). In a similar fashion, the uncertainty surrounding the issues of the informational duties of both the contract assertor and the signatory can also be resolved to some extent if the courts’ discretion is limited by pre-determined parameters within which they may decide whether the contract assertor and the signatory have complied with their respective duties to conform to the reasonableness criterion. Once such guidelines have been introduced, the courts will be able to build upon them incrementally in order to eventually arrive at a body of precedent comprising a range of more certain and acceptable results. Clearly, however, developing the common law of contract in this manner will take a considerable amount of time and it may, therefore, be concluded that the unexpected terms defence will most probably remain in its current (uncertain) form for the next few years to come.

VI CONCLUSION

This research report has critically analysed the unexpected terms defence to the caveat subscriptor rule and interrogated what really prompted the courts to develop an exception so divergent from the traditional rule. In this regard, it was argued that the central underlying reason for the development of the unexpected terms defence is that the courts are merely using the defence as a guise in order to conceal the fact that they are, in reality, conducting an analysis in terms of which they are enquiring into whether terms in standard-form contracts (being referred to as ‘unexpected terms’) are substantively unfair. In this regard, I have submitted that this central underlying reason for the development of the defence may be explained in terms of two interrelated reasons – with the issue of unfairness comprising the central component of each reason – namely: (1) the fact that the defence has been developed in response to the problems that are posed by standard-form contracts; and (2) the fact that the courts have adopted a more communitarian ideology to the caveat subscriptor rule.

Furthermore, and in light of the problems with and inconsistencies in the application of the unexpected terms defence that have been highlighted above, I am of the view that
the unexpected terms defence in its current form comprises an inadequate solution to the problems that are posed by standard-form contracts. Accordingly, in those cases to which the CPA is not applicable to a transaction where a standard-form contract is concluded, it is submitted that the unexpected terms defence will need to be developed by the courts so that it may comprise a more appropriate subsidiary mechanism in which unfair contract terms can be controlled. In this regard, it has been suggested that judges presiding over future cases concerning the unexpected terms defence be mindful of the fact that certain guidelines need to emerge in order to address this unacceptable level of uncertainty that is present within the context of the three fundamental problems with the defence: clarity is not only required in relation to the question of what constitutes an ‘unexpected term’, but also in relation to the question of what can be considered to be ‘reasonable’ when considering both the contract assertor’s informational duty to alert the signatory to unexpected terms, and the signatory’s informational duty to ‘read before he signs’. Only until such time that the courts develop such guidelines will the true meaning of the now uncertain phrase ‘read before you sign’ be revealed.
BIBLIOGRAPHY


BOOKS

7. Van der Merwe, SWJ (Schalk), Van Huyssteen, LF, Reinecke, MFB & Lubbe, GF Contract General Principles 4 ed (Juta 2012).

ESSAYS IN COLLECTIONS


FOREIGN CASE LAW


JOURNAL ARTICLES

19. Cornelius, Steve ‘The writing is on the wall for small print’ 2001 TSAR 793.
27. Nortje, Minette ‘“Unexpected terms” and caveat subscriptor’ (2011) 128 SALJ 741.


41. Turpin, CC ‘Contract and imposed terms’ (1956) 73 SALJ 144.

42. Wallis, Malcolm ‘Commercial certainty and constitutionalism: Are they compatible?’ (2016) 133 SALJ 545.


LEGAL PUBLICATIONS

45. ABSA Bank Ltd v Trzebiatowsky 2012 (5) SA 134 (ECP).
47. Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D).
49. Blue Chip Consultants (Pty) Ltd v Shamrock 2002 (3) SA 231 (W).
56. Diedericks v Minister of Lands 1964 (1) SA 49 (N).
57. Diners Club SA (Pty) Ltd v Livingstone 1995 (4) SA 493 (W).
58. Diners Club SA (Pty) Ltd v Thorburn 1990 (2) SA 870 (C).
59. Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands 1994 (2) SA 518 (C).
60. Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd 2007 (4) SA 577 (C).
62. Fourie NO v Hansen 2001 (2) SA 823 (W).
63. Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA).
64. Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd 2010 (1) SA 8 (GSJ).
67. Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers 2007 (2) SA 599 (SCA).
70. Home Fires Transvaal CC v Van Wyk 2002 (2) SA 375 (W).
72. Keens Group Co (Pty) Ltd v Lotter 1989 (1) SA 585 (C).
74. Logan v Beit (1889–1890) 7 SC 197.
75. Maritz v Pratley (1894) 11 SC 345.
76. Mathole v Mothele 1951 (1) SA 256 (T).
77. Mercurius Motors v Lopez 2008 (3) SA 572 (SCA).
79. National and Overseas Distributers Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A).
80. Payne v Minister Of Transport 1995 (4) SA 153 (C).
81. Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).
82. Prins v ABSA Bank Ltd 1998 (3) SA 904 (C).
83. Shepherd v Farrell’s Estate Agency 1921 TPD 62.
84. Sonap Petroleum (SA) (Pty) Ltd (formerly known as SONAREP (SA) (Pty) Ltd) v Pappadogianis 1992 (3) SA 234 (A).
86. Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A).
87. Steyn v LSA Motors Ltd 1994 (1) SA 49 (A).
88. Uniting Reformed Church, De Doorns v President of the Republic of South Africa 2013 (5) SA 205 (WCC).
89. Van Wyk v Otten 1963 (1) SA 415 (O).

SOUTH AFRICAN LEGISLATION