

**THE EFFICACY OF THE ENFORCEMENT MECHANISMS PROVIDED  
FOR IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008**

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## 1. INTRODUCTION

The Consumer Protection Act 68 of 2008 (“the CPA”) was the first statute that was initiated into South Africa to regulate consumer issues in a systematic and comprehensive manner.<sup>1</sup> Prior to the CPA coming into effect in 2011, consumer affairs were dealt with in a patchwork fashion with industry-specific pieces of legislation in conjunction with the general principles of the common law.<sup>2</sup> Such legislation included the Foodstuffs, Cosmetics and Disinfectants Act of 54 of 1972, the Measuring Units and National Measuring Standards Act of 1973, and the Consumer Affairs (Unfair Business Practices) Act 71 of 1988, amongst others.<sup>3</sup> These safeguards in this period have been criticised as being largely ineffective, inconsistently applied, and only offering protection in a limited number of areas.<sup>4</sup>

One of the more fundamental introductions in the CPA has been the introduction of eight consumer rights that are largely seen elsewhere internationally.<sup>5</sup> Moreover, the Act cannot be said to be a codification of the common law as the consumer may choose to exercise their common law rights or their rights in terms of the Consumer Protection Act.<sup>6</sup> Moreover, unlike common law rights, consumers are not able to waive the rights available to them in terms of the CPA.<sup>7</sup> This is undoubtedly a much stronger form of protection afforded to consumers.

More than being a shift towards consumer protection, the CPA has also been seen as a tool through which to address the inequality of the past. Section 3 of the CPA

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<sup>1</sup>Monique L Du Preez ‘The Consumer Protection Bill: A Few Preliminary Comments’ (2009) 1 *Journal of South African Law* 58.

<sup>2</sup> Ibid at 58-9.

<sup>3</sup> Tanya Woker ‘Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act’ (2010) 31(2) *Obiter* 218; S Eiselen & T Naudé ‘Introduction and overview of the Consumer Protection Act’ in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) para 1.

<sup>4</sup> Ibid.

<sup>5</sup> These rights are the right to fair and responsible marketing, the right to choose, the right to fair and honest dealing, the right of disclosure and information, the right to privacy, the right to equality in the consumer market, the right to reasonable terms, the right to fair value, good quality, and safety (Prof C Van Der Heerden & J Barnard ‘Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion’ (2011) 6(3) *Journal of International Commercial Law and Technology* 131).

<sup>6</sup> Section 2(10) of the CPA; Tjakie Naude and Jacolien Barnard ‘Enforcement and Effectiveness of Consumer Law in South Africa’ in Hans-W Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (2018) 567.

<sup>7</sup> Dale Hutchison et al *The Law of Contract in South Africa* 3 ed (2017) 44.

states that the protection of vulnerable consumers is one of the purposes of the Act.<sup>8</sup> This includes low-wage earners, illiterate people, and those who reside in areas that are less densely populated.<sup>9</sup> These vulnerable consumers make up a large proportion of South Africa's consumer marketplace.<sup>10</sup> This means that, while it is a common reality that many consumers that reside in other countries face difficulties when attempting to access their rights, these hardships are largely more severe in a South African context. In combination with this, consumer rights, at least horizontally, implicate human rights.<sup>11</sup> The CPA is an echo of South Africa's Constitution in a plethora of ways and protects a vital constitutional right: the consumer's right to dignity.<sup>12</sup> Thus, it is evident that the consumer protections envisaged in the CPA are of the utmost importance.

However, in order for the purposes of the CPA to be fulfilled it is necessary that the Act's unique enforcement mechanisms are able to work efficiently.<sup>13</sup> Moreover, the rights provided for in the Act are not of any use unless there is a mechanism by which one is able to realise these rights.<sup>14</sup> Another danger of lack of enforcement<sup>14</sup> is that it can result in the widespread lack of compliance with the provisions of the CPA.<sup>15</sup> As one of the redress mechanisms listed in the CPA is the court system, the inability to adequately gain access to a court could also involve constitutional concerns such as access to justice. In fact, on the international level, it has been accepted that consumer protection statutes and access to justice are intimately connected.<sup>16</sup>

This is why this dissertation will analyse the degree to which this project has been successful by assessing the efficacy of the redress mechanisms available to the consumer. To explore this question effectively, the avenues of redress available in terms

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<sup>8</sup> Section 3(1)(b) of the CPA; J Barnard and E Mišćenić 'The Role of the Courts in the Application of Consumer Protection Law: A Comparative Perspective' (2019) 44(1) *Journal for Juridical Science* 116.

<sup>9</sup> *Ibid.*

<sup>10</sup> Barnard and Mišćenić op cit note 8.

<sup>11</sup> *Nzwana v Dukes Motors* 2019 JDR 1624 (ECG) para 22; Eiselen & Naudé op cit note 3 para 29.

<sup>12</sup> *Nzwana* supra note 11; Eiselen & Naudé op cit note 3 para 18.

<sup>13</sup> The CPA itself recognizes this to some extent as s 3(1) of the Act lists efficiency as one of the aims of the Act.

<sup>14</sup> Y Mupangavanhu 'An Analysis of the Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008' (2012) 15(5) *PELJ* 321.

<sup>15</sup> Draft Green Paper on Consumer Policy Framework GN 1957 in GG 266774 of 9 September 2004 at 37; Eiselen & Naudé op cit note 3 para 18.

<sup>16</sup> Tanya Woker 'Consumer Protection and Alternative Dispute Resolution' (2016) 28 *SA Mercantile Law Journal* 21.

of the CPA will firstly be discussed in chapter 2. Following this, in chapter 3, the focus will move to the inefficiencies surrounding s 69 of the Act. Namely, the fact that section 69 prevents a consumer from approaching a small claims court in the first instance, incorporates an unclear hierarchy of redress mechanisms, and adopts an inflexible position that all redress mechanisms in terms of the Act must be exhausted before a court can be approached. Chapter 4 will then identify two further difficulties with the CPA. Firstly, the fact that s 52 solely provides a court with jurisdiction over unfair contract terms, and secondly, that s 115 prescribes a cumbersome two-step procedure in cases where quantifying damages is in issue. Chapters 5 and 6 will then examine Nigeria and then India to decipher how other developing nations have structured their consumer mechanisms and laws. Lastly, chapter 7 will then suggest some reforms to address the shortcomings of the enforcement of consumer law in South Africa.

## 2. AVENUES OF REDRESS AVAILABLE UNDER SECTION 69 OF THE CPA

Section 69 of the CPA lists a variety of different redress mechanisms. These forms of redress are the National Consumer Commission (“the NCC”), the National Consumer Tribunal (“the NCT”), ombuds, consumer courts, alternative dispute resolution agents (“ADR agents”), and the ordinary court system.<sup>17</sup> Most of these are unique to the CPA and many can be classified as alternative dispute resolution mechanisms. Each redress mechanism provided for in terms of the CPA will now be considered.

### 2.1 National Consumer Commission

The NCC is an administrative agency that has jurisdiction throughout the entirety of South Africa.<sup>18</sup> The NCC was established in terms of s 85 of the CPA. The Commission is a creature of statute that has to go about its purposes within the constraints imposed by its founding legislation.<sup>19</sup> The Commission’s key functions are listed in s 99 of the CPA. They include stimulating informal dispute resolution, receiving complaints, investigating, and referring matters to several other entities.<sup>20</sup>

One of the main functions of the NCC is its investigation function. This function has the potential to greatly increase access to justice in that these investigations are proactive and require no legal representation.<sup>21</sup> The NCC may begin an investigation as the result of a complaint, or alternatively, the NCC may start an investigation of its own accord.<sup>22</sup> After investigating, the NCC will make a finding based on the information put forward by the inspector who was assigned to the particular investigation.<sup>23</sup>

After concluding an investigation, the NCC may enforce its findings in a variety of ways. The NCC may decide to propose a consent order to the respondent. This

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<sup>17</sup> Section 69 of the CPA.

<sup>18</sup> Mupangavanhu op cit note 14 at 322.

<sup>19</sup> C van Heerden ‘Section 69’ in Naude & Eiselen (eds) *Commentary on to the Consumer Protection Act* para 69-7.

<sup>20</sup> Section 99 of the CPA; Van Heerden op cit note 19 para 69-8.

<sup>21</sup> Naude and Barnard op cit note 6 at 568.

<sup>22</sup> Mhlahli Magaqa ‘The NCC and the NCT Walk the Long Road to Consumer Protection’ (2015) 27 *SA Mercantile Law Journal* 35.

<sup>23</sup> Mupangavanhu op cit note 14 at 323.

consent order will only be binding once it has been signed by the respondent and then confirmed by the NCT or a court.<sup>24</sup> Note that the NCC does not have the authority to prosecute.<sup>25</sup> Instead, if the NCC believes that an offence took place, then it may refer the matter to the National Prosecuting Authority. Alternatively, if the matter concerns a civil complaint, the NCC may refer it to the NCT, consumer court, or a Provincial Consumer Protection Authority.<sup>26</sup> Should the NCC have reasonable grounds to believe that the respondent engaged in prohibited conduct, the Commission also possesses the power to issue a compliance notice.<sup>27</sup> A compliance notice is binding unless struck down by the NCT.<sup>28</sup> Once the respondent has complied with a compliance notice then the NCC is obligated to issue a compliance certificate.<sup>29</sup>

Since 2013 the Commission has taken the decision to shift its attention to investigate endemic abuses in the consumer market.<sup>30</sup> Thus, although the Commission has since initiated a few cases based on individual complaints,<sup>31</sup> the NCC has largely stopped investigating individual complaints. The NCC often relies on s 99(a) of the CPA when referring individual consumer complaints to other forums.<sup>32</sup> Woker argues that relying on s 99(1)(a) of the CPA is unjustified on a plain reading of the section. The section does state that the NCC is required to promote informal resolution of disputes, but is not required to intervene or adjudicate on these disputes.<sup>33</sup> However, the section goes further to state that that the NCC must enforce the Act through various functions including issuing compliance notices and conducting investigations.<sup>34</sup>

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<sup>24</sup> Roman Chausse *A Comparative and Critical Discussion of the Redress Available to Consumers by Consumer Courts in terms of the Consumer Protection Act 68 of 2008* (unpublished LLM thesis, University of Pretoria, 2012) 15.

<sup>25</sup> Mupangavanhu op cit note 14 at 323.

<sup>26</sup> Barnard and Van Heerden op cit note 5 at 133.

<sup>27</sup> Section 73(1)(c) read with section 100(1) of the CPA; Magaqa op cit note 22.

<sup>28</sup> Section 100(5) of the CPA; Magaqa op cit note 22 at 37.

<sup>29</sup> Mupangavanhu op cit note 14 at 324.

<sup>30</sup> Van Heerden op cit note 19 para 69-10; Naude and Barnard op cit note 6 at 567; NCC 'National Commission Annual Report 2013/2014' 12 available at <https://www.thecc.gov.za/sites/default/files/media/NCC%20-%20Annual%20Report%202014%20-%202015%28print%29.pdf> accessed on 17<sup>th</sup> January 2021.

<sup>31</sup> *National Consumer Commission v Highends Trading and Projects (Pty) Ltd t/a Highends Auto Services* (NCT/101932/2018/73(2)(b)) [2018] ZANCT 55 (22 July 2018); Van Heerden op cit note 19 para 69-10.

<sup>32</sup> Tanya Woker 'Evaluating the Role of the National Consumer Commission in Ensuring that Consumers have Access to Redress' (2017) 29 *SA Mercantile Law Journal* 7.

<sup>33</sup> *Ibid* at 15.

<sup>34</sup> *Ibid*.

However, in practice it appears that the NCC's approach after receiving consumer complaints is that it either sends the matter back to an ADR mechanism or it issues a notice of non-referral.<sup>35</sup> Referring the matter back to an ADR mechanism (either the same or different ADR mechanism) after failing to resolve the dispute in this manner runs contrary to s 72(1)(b) of the CPA. This section states that the NCC may not refer to an ADR mechanism if the parties previously attempted to resolve the dispute and were unsuccessful.<sup>36</sup> The NCC's other approach, a notice of non-referral, enables consumers to bring the matter before a Tribunal or provincial court directly without the NCC needing to investigate the matter.<sup>37</sup> However, this too is problematic in that s 72(1) of the CPA only provides an extremely limited number of circumstances where these notices may be given out: if a complaint is frivolous or vexatious, if it has prescribed, or if it does not fall under the jurisdiction of the CPA.<sup>38</sup>

Woker ultimately advocates for the NCC to play a central role in investigating and resolving consumer disputes.<sup>39</sup> While there is no doubt that this would assist the consumer in South Africa, it is unclear if the NCC has the capacity to do so. Barnard and Naude have questioned the capacity of the NCC given some of the regulatory body's previous actions.<sup>40</sup> In addition, the NCC itself has noted its limited resources and that it does not have the capacity to investigate every complaint.<sup>41</sup> Naude has noted that the NCC's resource limitations mean consumers are forced to seek relief via the other enforcement mechanisms in terms of the Act.<sup>42</sup> Bearing this in mind, while it is submitted that the role of the NCC should be expanded, it is evident that the NCC cannot be primarily relied on to enforce South Africa's consumer law.

## 2.2 National Consumer Tribunal

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<sup>35</sup> Woker 2017 op cit note 32 at 11.

<sup>36</sup> Ibid at 12.

<sup>37</sup> Ibid at 13.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid at 16.

<sup>40</sup> Naude and Barnard op cit note 6 at 568.

<sup>41</sup> Van Heerden op cit note 19 para 69-10; Commission 'Annual Report 2018/2019' 12 available at [https://www.thencc.gov.za/sites/default/files/media/NCC-Annual-Report\\_2018-19.pdf](https://www.thencc.gov.za/sites/default/files/media/NCC-Annual-Report_2018-19.pdf) accessed on 17<sup>th</sup> January 2021.

<sup>42</sup> Van Heerden op cit note 19 para 69-10; Tjakie Naude 'Dissemination of Consumer Law and Policy in South Africa' (2018) 41 *Journal of Consumer Policy* 413.

The National Consumer Tribunal is a juristic person that is situated in Centurion, Gauteng, but has jurisdiction over South Africa as a whole.<sup>43</sup> This tribunal was created in terms of s 26 of the National Credit Act (“ the NCA”).<sup>44</sup> The NCT is required to uphold the spirit and purposes of the CPA and make orders that foster access to redress for consumers.<sup>45</sup> When a matter is referred to the NCT, the tribunal is obliged to hold hearings and later declare if the concerned conduct is prohibited by issuing certificates of prohibited conduct.<sup>46</sup>

In addition to hearing matters and issuing such certificates, other powers of the NCT include being able to condone non-compliance with its rules and the power to interdict prohibited conduct.<sup>47</sup> Moreover, the NCT may make an order that confirms a settlement achieved by consent orders or may impose administrative fines for prohibited conduct.<sup>48</sup> An administrative fine may be a hefty penalty as the NCT may impose a maximum fine of either R1 million or 10% of the respondent’s annual turnover during the preceding year.<sup>49</sup> On top of this, s 4(2)(b) the CPA allows the NCT to craft innovative orders to safeguard the recognition and realisation of consumer rights.<sup>50</sup> An order handed down by the tribunal is equal in status to an order of the High Court.<sup>51</sup>

### 2.3 Ombuds

Ombuds are an alternative form of dispute resolution and thus they function differently than a court of law. Their approach should not be adversarial, instead they are required to go about their functions in a manner that fosters settlement making.<sup>52</sup> Hence, an ombud facilitates the resolution of disputes through either conciliation, mediation, or arbitration.<sup>53</sup> These institutions are not empowered to enforce decisions that they take

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<sup>43</sup> Mupangavanhu op cit note 14 at 325.

<sup>44</sup> Van Heerden op cit note 19 para 69-10B-C.

<sup>45</sup> Ibid para 69-10D.

<sup>46</sup> Section 75(4)(a) and (b) of the CPA; Sections 150 and 151 of the NCA; Chausse op cit note 24 at 14.

<sup>47</sup> Section 150 of the NCA; Barnard and Van Heerden op cit note 5 at 134.

<sup>48</sup> Section s150 and 151 of the NCA; Magaqa op cit note 22 at 53.

<sup>49</sup> Section 112(2)(a) and (b) of the CPA; 3 Mupangavanhu op cit note 14 at 326.

<sup>50</sup> Mupangavanhu op cit note 14 at 326.

<sup>51</sup> Section 152 of the NCA; Woker 2016 op cit note 16 at 45.

<sup>52</sup> Mupangavanhu op cit note 14 at 330.

<sup>53</sup> Ibid.

and are thus non-binding.<sup>54</sup> Instead, ombuds may record settlements as orders. These orders can be made into consent orders by either a court of law or the NCT.<sup>55</sup> There are two distinct categories of ombuds: industry accredited ombuds and ombuds with jurisdiction.

Woker notes that there are two different types of ‘ombuds with jurisdiction’ provided for in both the NCA and the CPA: statutory ombuds (such as Financial Advisory and Intermediary Services) and financial institution ombuds as defined in the FSOS Act.<sup>56</sup> Note that the CPA has not been applicable to financial services that are regulated by the Financial Sector Conduct Authority since 2014.<sup>57</sup> However, the Community Schemes Ombud Service is an example of an existing statutory ombud with jurisdiction that deals with CPA matters.<sup>58</sup>

While industry accredited ombuds are not explicitly defined in terms of the CPA, s 69(1)(c) of the Act makes provision that these types of ombuds should be accredited in terms of s 82(6).<sup>59</sup> Van Heerden makes the argument that the most probable interpretation of s 82(6)(b) of the CPA is that accredited industry ombuds are ombuds that are assigned to specific industries in the accredited code of that particular industry.<sup>60</sup> Thus, an ombud will have jurisdiction in a matter where the supplier resides within the jurisdiction of such an ombud.<sup>61</sup>

The current accredited industry ombuds are the Motor Industry Ombudsman (MIOSA) and the Consumer Goods and Services Ombud (CGSO).<sup>62</sup> MIOSA is a longstanding ombud that will hear consumer complaints free of charge that concern motor vehicles or related matters, whereas CGSO is applicable to wholesale,

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<sup>54</sup> Woker 2016 op cit note 16 at 38; Naude and Barnard op cit note 6 at 579.

<sup>55</sup> Barnard and Van Heerden op cit note 5 at 134.

<sup>56</sup> Woker 2016 op cit note 16 at 38.

<sup>57</sup> Section 10 of the Financial Sector Regulation Act 9 of 2017; Van Heerden op cit note 19 para 69-20D.

<sup>58</sup> Community Schemes Ombud Service Act 9 of 2011.

<sup>59</sup> Van Heerden op cit note 19 para 69-11.

<sup>60</sup> *Ibid.*

<sup>61</sup> Mupangavanhu op cit note 14 at 330

<sup>62</sup> GN 817 in GG 38071 of 2014-10-17 (MIOSA); GN 217 in GG 38637 of 2015-10-30 (CGSO); Stephen Newman and Mark Tait ‘Resolving Provincial Cross-Border Disputes under the Consumer Protection Act’ (2018) 39(3) *Obiter* 695; Naude and Barnard op cit note 6 at 577.

manufacturing, and retail industry consumers.<sup>63</sup> There have been other industries that have applied for accreditation of their codes such as the Franchise Association of South Africa (“FASA”)<sup>64</sup> and Advertising Standards Authority of South Africa (“ASA”).<sup>65</sup> However, in the case of FASA, the Minister has not yet accredited this code<sup>66</sup> and, following ASA’s liquidation, no further steps have been taken to accredit ASA’s code.<sup>67</sup>

#### 2.4 Alternative dispute resolution agents

Apart from ombuds, additional forms of alternative dispute resolution are alternative dispute resolution agents.<sup>68</sup> ADR agents are entities or persons who deliver conciliation, mediation, or arbitration services to foster the resolution of disputes in terms of the CPA.<sup>69</sup> Woker notes that a broad definition could mean that any person or entity that provides guidance to consumers and assists them in resolving disputes could potentially be deemed as an ADR agent.<sup>70</sup> Although the NCA has obliged ADR agents to register, those operating in terms of the CPA are not obligated to do so.<sup>71</sup> This means that those who profess to operate as an ADR agent in terms of the CPA are not subject to sufficient safeguards to ensure adequacy in both their training and skill levels.<sup>72</sup> Any settlements that are consented to by both of the parties can be made into consent orders by the NCT or court of law.<sup>73</sup>

#### 2.5 Provincial consumer courts

Consumer courts are another form of alternative dispute resolution as provided for under s 70 the CPA.<sup>74</sup> Thus, when the CPA uses the term “court” this is a wholly distinct

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<sup>63</sup> Michel M Koekemoer ‘Consumer Complaints and Complaint Forums Employed in the South African Motor Vehicle Service Industry: A Survey of the Literature’ (2014) 30(3) *Journal of Applied Business Research* 665-666.

<sup>64</sup> FASA: The Franchise Association of South Africa 'Lodge a complaint against an accredited franchiser' available at <https://www.fasa.co.za/submitcomplaint/> accessed on 23<sup>rd</sup> December 2020.

<sup>65</sup> GN 224 in GG 36253 of 2013-10-30.

<sup>66</sup> FASA: The Franchise Association of South Africa op cit note 66.

<sup>67</sup> Advertising Regulatory Board ‘FAQ’ available at <http://arb.org.za/faq.html> accessed on 23<sup>rd</sup> December 2020.

<sup>68</sup> Barnard and Van Heerden op cit note 5 at 135.

<sup>69</sup> Section 1 of the CPA; Barnard and Van Heerden op cit note 5 at 135.

<sup>70</sup> Woker 2016 op cit note 16 at 29.

<sup>71</sup> Ibid at 31.

<sup>72</sup> Ibid at 30.

<sup>73</sup> Barnard and Van Heerden op cit note 5 at 135.

<sup>74</sup> Van Heerden op cit note 19 para 69-14.

institution from a “consumer court”.<sup>75</sup> When the CPA refers to a “court”, it refers to ordinary courts, such as magistrate’s courts, small claims courts, and the higher courts.<sup>76</sup> In contrast, “consumer courts” have different powers than regular courts and these powers are confined by the relevant founding legislation of the different provinces.<sup>77</sup> Section 1 of the CPA defines “consumer court” as a consumer tribunal or body of this name that was established in accordance with provincial consumer legislation. Chausse describes consumer courts as administrative tribunals rather than civil courts of law.<sup>78</sup> Provincial courts, like other dispute resolution mechanisms under the CPA, have the authority to record settlements as consent orders.<sup>79</sup>

All nine provinces have enacted provincial legislation to regulate provincial consumer courts<sup>80</sup> and have a functioning provincial Consumer Protector.<sup>81</sup> However, the Eastern Cape still does not have an operating provincial consumer court.<sup>82</sup> Nevertheless, the diverse locations of these provincial courts make them a viable way for many to access justice, particularly for those residing in rural areas.<sup>83</sup> This stands in contrast to ombuds and other specialised agencies that generally only have offices located in a single city.<sup>84</sup> Another way in which these consumer courts increase access to justice is the fact that the Office of Consumer Protector receives and investigates complaints,<sup>85</sup> institutes proceedings, as well as prosecutes matters before the consumer court.<sup>86</sup> As the Consumer Protector’s services are free, this results in proceedings that are efficient and inexpensive for the consumer.<sup>87</sup>

However, there has been some criticism launched against these courts, although this largely falls beyond the scope of this dissertation. Firstly, Du Plessis has pointed

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<sup>75</sup> Section 1 of the CPA; Barnard and Van Heerden op cit note 5 at 135.

<sup>76</sup> Ibid.

<sup>77</sup> Woker 2016 op cite note 16 at 43; M A Du Plessis ‘Enforcement and Execution Shortcomings of Consumer Courts (2010) 22(4) *SA Mercantile Law Journal* 517.

<sup>78</sup> Chausse op cit note 24 at 22.

<sup>79</sup> Section 70(3)(a) and (b) of the CPA; Barnard and Van Heerden op cit note 5 at 135.

<sup>80</sup> Du Plessis 2010 op cit note 77 at 519; Kwazulu-Natal Consumer Protection Act No 4 of 2013.

<sup>81</sup> Barnard and Mišćenić op cit note 8 at 126.

<sup>82</sup> Confirmed after making an inquiry over the phone with Eastern Cape Consumer Protector on the 29<sup>th</sup> of January 2021.

<sup>83</sup> Naude and Barnard op cit note 6 at 576.

<sup>84</sup> Naude and Barnard op cit note 6 at 576; Newman and Tait op cit note 62 at 696.

<sup>85</sup> MA Du Plessis ‘Towards Better Service Delivery by Consumer Courts’ (2008) 20(1) *SA Mercantile Law Journal* 75.

<sup>86</sup> Ibid at 76.

<sup>87</sup> Ibid.

out that there have been problems with the enforcement of the orders handed down by these courts.<sup>88</sup> Another issue has been jurisdictional; in that the wording of the CPA prevents a provincial consumer court from hearing a cross-provincial dispute<sup>89</sup> or in cases where the supplier operates nationally and not exclusively in a single province.<sup>90</sup> While the Act urges the NCC to take over such matters, this is unlikely given the NCC's current stance in opposition to taking on individual cases.<sup>91</sup> This narrows the available routes of redress for the consumer, forcing either to go before the NCT (upon a letter of non-referral from the NCC) or an ombud.<sup>92</sup>

## 2.6 Ordinary courts

Section 1 of the Act states that a “court”, for the purposes of the legislation, does not refer to a consumer court. In light of this, it is submitted that the definition includes the civil courts, criminal courts, and the equality courts. The civil courts include the small claims courts, magistrates’ courts, High Courts, the Supreme Court of Appeal, and the Constitutional Court.<sup>93</sup>

As the CPA has created new offences, should there be an allegation that any of these offences have been contravened, the criminal courts will have jurisdiction. In such matters, the court will be empowered, in terms of the CPA, to hand out penalties such as fines and/or imprisonment.<sup>94</sup>

However, should there be an allegation that chapter 2 of the CPA (which prohibits unfair discrimination) has been contravened, then the equality courts shall enjoy exclusive jurisdiction.<sup>95</sup> Such matters usually involve situations where the consumer’s right to equality has either been infringed or threatened in a consumer market context.<sup>96</sup>

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<sup>88</sup> Du Plessis 2010 op cit note 77.

<sup>89</sup> That is a dispute where the complainant is a resident in one province, but the sale has taken place in another province; Newman and Tait op cit note 62 at 685.

<sup>90</sup> Ibid at 691.

<sup>91</sup> Ibid at 700.

<sup>92</sup> Ibid.

<sup>93</sup> Van Heerden op cit note 19 para 69-14.

<sup>94</sup> Barnard and Van Heerden op cit note 5 at 136.

<sup>95</sup> Van Heerden op cit note 19 para 69-14.

<sup>96</sup> Mupangavanhu op cit note 14 at 328.

### 3. ANALYSIS OF SECTION 69 OF THE CONSUMER PROTECTION ACT

Having discussed the various enforcement mechanisms provided for in terms of the CPA, this chapter will now consider s 69 of the Act and whether it presents any difficulties for consumers when attempting to access their rights. This chapter will discuss three main issues: whether a consumer may directly approach a court, whether all avenues of the CPA have to be exhausted before approaching a court, and lastly, whether s 69 presents a hierarchy of enforcement mechanisms. Thereafter, the answer to these questions will be critiqued.

3.1 May a consumer directly approach a court and bypass the other CPA mechanisms listed in s 69 of the Act?

3.1.1 The current position in our law

It is clear that South Africa, when establishing the consumer protection enforcement mechanisms, did so with the focus on encouraging consensual dispute resolution mechanisms.<sup>97</sup> However, this does not diminish the important role of the courts have in the effective enforcement of consumer protection law. This is why it is pivotal to obtain a definitive answer as to whether a consumer is able to approach a court directly and bypass the other CPA mechanisms listed in s 69 of the Act. Many consumers, especially for more expensive items (such as vehicles) may wish to approach a court for a definitive resolution to the dispute.

Conversely, s 69(d) of the CPA states that 'a court may be approached by any person with locus standi in terms of s 4(1) if all other remedies available to that person in terms of national legislation have been exhausted.' On a plain reading, this seems to imply that a court may not be directly approached unless other redress mechanisms provided for in terms of the Act have been resorted to first. However, there have been

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<sup>97</sup> Barnard and Mišćenić op cit note 8 at 111.

arguments presented that the clause needs to be interpreted in line with s 4(3) of the CPA, and thus a literal interpretation need not be resorted to.<sup>98</sup>

This uncertainty was laid to rest in *Joroy*. In this case the applicant, relying on s 55 and s 56 of the CPA (right to good quality goods), approached the court to obtain a refund of the price of his previously purchased vehicle.<sup>99</sup> In doing so, the applicant did not allege that he had previously approached any other redress mechanism provided for in the CPA in his particulars of claim.<sup>100</sup> While referring to the Commentary on the CPA, the court came to a decisive conclusion: that when a consumer bases their action in terms of the CPA, a consumer may not directly approach a court.<sup>101</sup> To back up this conclusion, the court also made reference to a foundational principle as laid down in *Chirwa v Transnet Ltd*:<sup>102</sup> where a specialised framework has been fashioned to resolve disputes, claimants ought to initiate their actions predominantly through such mechanisms.

*Richter v Schatheuna Boerdery CC*,<sup>103</sup> thereafter discussed the rule as set out in *Joroy*. *Richter* dealt with a trust appealing on the grounds that occupational interest was not owed following the sale of a farm due to a delay in the transfer of the property.<sup>104</sup> Defending this position, the appellants argued that one of the clauses that the other party relied on was prohibited by the CPA.<sup>105</sup> While the court found many reasons why the CPA was not, in fact, applicable in this case, one of the reasons they mentioned was the precedent as put forward in *Joroy*.<sup>106</sup> In doing so, they interpreted s 69 in a similar fashion: a consumer is not permitted to directly approach a court except if the remedies listed in s 69 of the CPA have been exhausted.<sup>107</sup>

This position has been confirmed numerous times in various cases in different courts. In *Oos Vrystaat Kaap Bedryf Beperk v Cillers*,<sup>108</sup> the court echoed what was

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<sup>98</sup> For example, the argument put forward by the applicants in *Joroy 4440 CC v Potgieter NNO* 2016 (3) SA 465 (FB) paras 5-7.

<sup>99</sup> *Ibid* para 2.

<sup>100</sup> *Ibid* para 5.

<sup>101</sup> *Ibid* para 8.

<sup>102</sup> 2008 (4) SA 367 (CC) (2008) 29 ILJ 73 para 41; *Joroy* supra note 98 para 10.

<sup>103</sup> (CA&R19/2-17) [2017] ZANHC 60 (20 October 2017).

<sup>104</sup> *Ibid* para 16.

<sup>105</sup> *Ibid* para 52.

<sup>106</sup> *Ibid* para 55.

<sup>107</sup> *Ibid*.

<sup>108</sup> 2019 JDR 0049 (FB).

said in *Joroy*, this time in the context of finance agreements. In a later case, *Nzwana*<sup>109</sup> the court confirmed, applied, and expanded the *Joroy* case. Eventually, the court denied the application based on the fact that the applicant failed to make any allegations of compliance with any of the internal remedies applicable in terms of s 69 of the CPA.<sup>110</sup> In addition, when faced with the question of the constitutionality of s 69(d) of the CPA, the court found that the section meets s 34 of the Constitution's imperative.<sup>111</sup> This was because the court found that the internal remedies provided for in s 69 of the CPA in combination with the recourse to a court in last resort was a structural approach that balanced fairness and did no damage.<sup>112</sup>

Moreover, in *MGC Express Proprietary Limited v South African Express Airways Soc Limited*<sup>113</sup> the court noted *obiter* that since the CPA was not relevant to the inquiry, the court could be approached directly. In *Maphutse v Motodeal Party (Pty) Ltd t/a Motor Deal Premium*<sup>114</sup> once again the court confirmed the position set out in *Joroy* and *Nzwana*. Thus, the ultimate answer to this question seems clear and settled in South African law: a consumer may not simply approach a court without having first approached another redress mechanism as provided for in terms of the Act.

### 3.1.2 A critical analysis of this position

Overall, the requirement of approaching a redress mechanism in terms of s 69 before approaching the courts does seem to be the uniform reading of s 69 as established in the case law. This is a pressing issue in the context of small claims courts as they are ostensibly ousted as courts of first instance. This is because it seems the small claims courts are incorporated when s 69 of the CPA makes reference to "courts."<sup>115</sup> The entire purpose of the creation of small claims courts is to provide for the economical and prompt resolution of disputes that involve claims of smaller values.<sup>116</sup> Thus, prohibiting

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<sup>109</sup> *Nzwana* supra note 11 para 34.

<sup>110</sup> *Ibid* para 49.

<sup>111</sup> *Ibid* para 26.

<sup>112</sup> *Ibid*.

<sup>113</sup> (12144/2019) [2019] ZAGP JHC 501 (9 December 2019) para 18.

<sup>114</sup> (40586/2016) [2019] ZAGP JHC 492 (3 December 2019) para 27.

<sup>115</sup> Hutchison *op cit* note 7 at 476.

<sup>116</sup> Stephen Peté et al *Civil Procedure: A Practical Guide* 3 ed (2017) 484.

these courts to be approached in the first instance runs counter to a central component of the purpose of the CPA: ensuring accessible and efficient redress for consumers.<sup>117</sup>

Unlike the ordinary court system, the resolution of disputes is often speedier as the small claims courts are more inquisitorial, meaning that there is less room for legal wrangling concerning points of procedure.<sup>118</sup> Moreover, as no legal representation is allowed, they are more affordable and easier for consumers to navigate.<sup>119</sup> Many of these courts have demonstrated their success in dealing with consumer disputes in the past.<sup>120</sup> In conjunction with this, as the current monetary jurisdiction of small claims courts is claims less than R20 000,<sup>121</sup> a small claims court would be an ideal forum for dealing with consumer disputes as these disputes often concern claims for smaller amounts of money.<sup>122</sup> Moreover, after a judgment has been made it is final and thus can only be reviewed in certain circumstances.<sup>123</sup> Should a supplier not comply with a judgment, a consumer may transfer the matter to the Magistrate's Court to ensure its enforcement through a writ of execution.<sup>124</sup> Hence, these judgments can be speedily and easily enforced in comparison to some of the other non-binding alternative dispute resolution mechanisms provided for in the Act.

Furthermore, not being able to approach small claims courts is problematic as they could be vital tools to realise access to justice. There are approximately 415 small claims courts in South Africa, including in rural areas.<sup>125</sup> Many of the mechanisms in the CPA are inaccessible to low-income consumers as many ombuds and consumer agencies are only located in major cities.<sup>126</sup> In addition, although ombuds and provincial authorities are contactable online, they may still be inaccessible to low-income South Africans who reside in rural areas as they may have reduced internet and

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<sup>117</sup> Section 3(1)(g)-(h) of the CPA.

<sup>118</sup> Van Heerden op cit note 19 para 69-18.

<sup>119</sup> Naude and Barnard op cit note 6 at 581.

<sup>120</sup> Hutchison op cit note 7 at 476.

<sup>121</sup> The Department of Justice and Development 'Small Claims Courts' available at <https://www.justice.gov.za/scc/scc.htm> accessed on the 18th of January 2021

<sup>122</sup> Van Heerden op cit note 20 para 69-17.

<sup>123</sup> Barnard and Miscenic op cit note 8 at 121.

<sup>124</sup> Ibid.

<sup>125</sup> The Department of Justice and Development 'Lower Courts: Magistrate's Courts, Branch Courts, and Periodical Courts' available at [https://www.justice.gov.za/contact/lowercourts\\_full.html](https://www.justice.gov.za/contact/lowercourts_full.html) accessed on the 2nd of January 2021; Naude and Barnard op cit note 6 at 581.

<sup>126</sup> Naude and Barnard op cit note 6 at 581.

telephone access.<sup>127</sup> Small claims courts would increase access to justice for these types of South Africans as they can simply physically enter into a small claims court to be assisted. Thus, not allowing consumers access to these courts would frustrate the purposes of the CPA in that it would reduce accessible and efficient redress for consumers. Naude and Barnard argue that s 69 of the CPA and the court's current interpretation that limits s 34 of the Constitution in this regard this is unconstitutional.<sup>128</sup> Thus, it is submitted that this aspect of s 69 should accordingly be amended to allow for consumers to approach the small claims courts in the first instance.

However, the same cannot be said regarding the limitation of access to Magistrates Courts, High Courts, and superior courts. Although this proposed position would not allow the rest of the courts to be approached in the first instance and it may seem like the position infringes on the consumer's right of access to a court<sup>129</sup> to some extent, ultimately it does seem to be a defensible position. As put forward in *Nedbank v Gqirana NO*,<sup>130</sup> s 34 of the Constitution is comprised of three key parts: i) the right for disputes to be adjudicated by a court of law; ii) the right to a just public hearing; iii) and that a court may be substituted for an independent tribunal or forum where this is appropriate.

Bearing this definition in mind it is arguable that the internal remedies provided for in s 69 of the CPA meet this constitutional imperative. This because s 69 of the CPA provides for disputes to be heard at impartial tribunals and forums, in combination with the fact that the section also permits disputes to be heard before a court after following the procedure stipulating by the Act. Furthermore, other commentators have supported this view as some have made the argument that s 69(d) of the CPA is not unconstitutional given the fact that the forums provided for in s 69 could satisfy the requirement in s 34 of the Constitution of an alternative tribunal or forum.<sup>131</sup>

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<sup>127</sup> Hutchison op cit note 7 at 476.

<sup>128</sup> Naude and Barnard op cit note 6 at 581.

<sup>129</sup> As set out in s 34 of the Constitution of the Republic of South Africa, 1996

<sup>130</sup> 2019 (6) SA 139 (ECG) para 45; *Nzwana* supra note 11 para 26.

<sup>131</sup> Tshepiso Scott *The Realisation of Rights in Terms of the Consumer Protection Act 68 of 2008* (Ph.D. thesis, University of South Africa, 2018) 48.

Moreover, as a central component of the purpose of the CPA is to ensure accessible and efficient redress for consumers,<sup>132</sup> it can be argued that the current position works best to advance these purposes. This is because the position promotes other less costly and efficient redress mechanisms provided for in terms of the CPA at the expense of the ordinary court system. Paleker makes the argument that alternative dispute mechanisms could likely be the key to realising access to justice in South Africa.<sup>133</sup> This is because, in order for access to justice to be more than merely an ideal, justice is required to be tangible to its citizens.<sup>134</sup> It is well known that the ordinary court system is generally expensive, challenging to traverse, and time-consuming. As noted by Paleker, the expense of litigation, even at the Magistrates' Court level, can regularly surpass the value of the claim.<sup>135</sup> Thus, the court system is generally beyond the reach of many consumers. Moreover, the adversarial character and the formality of court procedures habitually lends itself to prolonged litigation due to legal quarrelling concerning points of law and procedure.<sup>136</sup>

In contrast, alternative dispute resolution mechanisms are comparatively informal, less challenging to navigate, more economical, and generally resolve disputes more efficiently.<sup>137</sup> This is why Woker argues that the aim of alternative dispute resolution is to create a bridge between a complete lack of action and a costly and complex court process.<sup>138</sup> It is arguable that the need to promote alternative redress mechanisms is even more necessitated in the context of consumer protection where many claimants may not be well resourced or highly knowledgeable about the structure of the courts.<sup>139</sup> Thus, the aforementioned position is best in line with the purposes of the CPA, as promoting alternative dispute mechanisms at the expense of the ordinary court system in this way could work towards increasing the realisation of consumer's rights. Equally, other forms of redress provided for in s 69 of the CPA are also aimed at offering consumers less expensive and burdensome avenues of redress.<sup>140</sup>

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<sup>132</sup> Section 3(1)(g)-(h) of the CPA.

<sup>133</sup> Mohamed Paleker 'Court Connected ADR in Civil Litigation: the Key to Access to Justice in South Africa' (2003) 6(3) *Global trends in Mediation* 3.

<sup>134</sup> *Ibid* at 1.

<sup>135</sup> *Ibid*.

<sup>136</sup> *Ibid*.

<sup>137</sup> Peté op cit note 116 at 509.

<sup>138</sup> Woker 2016 op cit note 16 at 26.

<sup>139</sup> Barnard & Miscenic op cit note 8 at 116.

<sup>140</sup> Mupangavanhu op cit note 14 at 322.

In combination with this, as stated in *Joroy*, the current position is in line with the principle as stated in *Chirwa*.<sup>141</sup> The court in *Chirwa* stated, although in the context of labour law, that purposely built frameworks should take preference over non-purpose-built processes. In doing so, the court emphasised that it is hesitant to deny a litigant of their rights, however, ultimately found that specialised mechanisms (such as the LRA) are more appropriate forums to deal with employment-related matters.<sup>142</sup> This principle has been reinforced quite a few times by the courts, indicating its importance in a South African context. Following this reasoning, the specialised frameworks provided for in s 69 of the CPA should take precedence over the ordinary court system. Thus, the current position is in line with the general jurisprudence from the Constitutional Court.

Hence, overall while the small claims courts should be made available in the first instance, it is submitted that the statute's limitation of preventing consumers from approaching the ordinary court system in the first instance is a justifiable one.

3.2 Are consumers required to exhaust all remedies listed in s 69 of the CPA before approaching a civil court?

3.2.1 The current position in our law

A plain reading of s 69(d) of the CPA suggests that the courts are indeed a last resort as the section states that courts are only accessible 'if all other remedies available to that person... have been exhausted.' However, a recent case seems to run counter to this plain grammatical meaning. This is the case of *Wentzel v Autofit Centre Renault (Pty) Ltd Zambezi*<sup>143</sup> that was handed down in late 2019. In this case, the applicant, as a response to purchasing a faulty vehicle, approached MIOSA.<sup>144</sup> However, there was a delay in finalising the dispute in MIOSA, and thus she was unable to refer the matter to the NCC since her matter was still pending.<sup>145</sup> Therefore, she approached the court.

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<sup>141</sup> *Chirwa* supra note 102 para 41; *Joroy* supra note 98 para 10.

<sup>142</sup> *Chirwa* supra note 102 para 41.

<sup>143</sup> (2019) JOL 46271 (GP).

<sup>144</sup> *Ibid* para 11.

<sup>145</sup> *Ibid*.

The respondents alleged that since she had not exhausted all the remedies as set out in s 69(a)-(c) of the CPA that the court could not adjudicate on the matter.<sup>146</sup>

On this point, the court found that the respondent's contention should be dismissed. This is because the court noted that, since resorting to every internal remedy would present both time and cost difficulties, it is doubtful that it was the legislature's intention to craft a more costly and cumbersome procedure for consumers to enforce their rights.<sup>147</sup> The court also noted the dangers of prescription if following this approach. The court went as far as to say that such a reading of s 69 of the CPA would in fact be prejudicial to consumers. Thus, the court stated that it would be sufficient if the consumer has approached at least one of the available internal remedies listed in s 69(a)-(c) before referring the matter to a court of law.<sup>148</sup> To support this reading of the section, the court also relied on *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government's*<sup>149</sup> interpretation that the consumer has a choice between all the remedies listed in s 69(c) of the CPA (indicating that s 69 and s 70 are not contained in peremptory words).<sup>150</sup> As such, the court was able to hear the application since the applicant was deemed to have substantially complied with the obligation to exhaust the remedies before referring this matter to the court. Notably, the court did not mention any of the previous cases that had previously dealt with this issue.

However, *Wentzel* runs entirely counter to the interpretation of the section that had been established by earlier courts. In *Joroy*, the court stated that the applicant must exhaust all the other internal remedies from s 69(a)-(c) before resorting to a court.<sup>151</sup> The court found that this was due to the use of the word 'if' which necessitated this interpretation.<sup>152</sup> In addition, the court in *Joroy* went further to state that there is only one possible reading of the text as the section is clear and unambiguous.<sup>153</sup>

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<sup>146</sup> *Wentzel* supra note 143 para 13.

<sup>147</sup> *Ibid* para 15.

<sup>148</sup> *Ibid*.

<sup>149</sup> [2016] 3 All SA 794 (FB) (9 June 2016).

<sup>150</sup> *Wentzel* supra note 143 para 15.

<sup>151</sup> *Joroy* supra note 98 para 5.

<sup>152</sup> *Ibid* para 8.

<sup>153</sup> *Ibid*.

Many other cases that followed also affirmed the reading as set out in *Joroy*. In *Sekgala v Steve's Auto Clinic (Pty) Ltd*,<sup>154</sup> while there was no explicit mention of *Joroy*, the court dismissed an application summary judgment based on the fact that the defendant had a *bona fide* defence: despite the fact that the applicant had approached the NCC, they had not exhausted the other remedies in terms of the CPA. This indicates the court's endorsement of the approach as set out in the *Joroy* case. *Joroy's* reading of s 69(d) of the CPA was later endorsed in *Cillers*<sup>155</sup> and *Nzwana*.<sup>156</sup>

In *Maphutse*<sup>157</sup> the main issue the court had to decipher was whether there was a duty to exhaust all the remedies from 69(a)-(c) of the CPA before approaching a court.<sup>158</sup> In this matter, the applicant alleged misrepresentation on the grounds that a purchased vehicle was later found to have no service history and brake pad issues amongst other faults.<sup>159</sup> After the applicant found no success in both the NCC's appointed mediation and arbitration and later at MIOSA, they approached the court. The court found that based on *Joroy* and *Nzwana*, that the applicant failed to fully comply with the requirements listed in s69(a)-(c) of the CPA as she had not alleged compliance under oath nor exhausted all the internal remedies provided for in terms of the Act.<sup>160</sup> Hence, the court was found not to have jurisdiction in the matter.<sup>161</sup> Thus, the vast majority of the case law has interpreted s 69(d) of the CPA as peremptory.

### 3.2.2 A critical analysis of this position

It is submitted that should an amendment be made, the position put forth by the majority of cases should be departed from. This is because there are times where access to a court, before exhausting all the mechanisms in the CPA, would be necessary for a consumer's complaint to be resolved effectively and efficiently. For example, where an ombud has failed to finalise a dispute and thus a consumer is barred from approaching other redress mechanisms.

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<sup>154</sup> (56238/2016) [2017] ZAGPPHC 25 (3 February 2017) paras 44-45.

<sup>155</sup> *Cillers* supra note 108 para 6.

<sup>156</sup> *Nzwana* supra note 11 para 34.

<sup>157</sup> *Maphutse* supra note 114.

<sup>158</sup> *Ibid* para 10.

<sup>159</sup> *Ibid* para 5.

<sup>160</sup> *Ibid* para 26.

<sup>161</sup> *Ibid* para 28.

Thus, the CPA's position has the capacity to frustrate the very purpose of the Act. When interpreting the purpose of the Act as set out in s 3(1) of the CPA, the court in *Maphutse* found that one of the primary purposes of introducing this piece of legislation was to simplify the procedure of consumer dispute resolution so that these disputes can be resolved more affordably to enable the most vulnerable South Africans be able to refer a matter to the relevant redress mechanism.<sup>162</sup> Yet, requiring consumers to exhaust every remedy provided for in the CPA when they wish to resolve a dispute could place a heavy monetary burden on the consumer. These heavy costs would run counter to the purposes as set out in the CPA as in many cases could very well constitute a barrier preventing consumers from realising their consumer rights. This would particularly be the case for previously disadvantaged persons who would likely have less disposable income to sustain a case from s 69(a)-(c) of the CPA and then also pursue the claim in court.

Additionally, the position put forward by the majority of the cases would mean that there would be a large amount of ineffectiveness in the system. This is due to the tremendous amount of time it could take for rights to be satisfactorily protected in the CPA. This system would not only be ineffective, it could also result in claims prescribing.<sup>163</sup> This problem has somewhat been circumvented by the Tribunal in *Lazarus v RDB Project Management CC t/a Solid*<sup>164</sup> (and in other cases) where the Tribunal read down s 116 of the CPA to allow for the interruption of prescription once a consumer approaches an alternative dispute resolution provided for in terms of the Act. However, s 116 of the CPA only refers to approaching a tribunal or a consumer court, thus the usual prescription periods for instituting an action in a court in terms of the Prescription Act 68 of 1969 would presumably still apply. This means that a consumer could effectively be blocked from accessing the court system if delays in exhausting s 69's alternative dispute mechanisms exceed 3 years from the date that prescription began to run.<sup>165</sup> Additionally, the issue remains that it could take an exceedingly long time for a consumer to obtain the required redress which would

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<sup>162</sup> *Maphutse* supra note 114 para 25.

<sup>163</sup> Barnard and Miscenic op cit note 8 at 126.

<sup>164</sup> (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016) para 31; Barnard and Miscenic op cit note 8 at 126.

<sup>165</sup> Section 11(d) of the Prescription Act.

frustrate the purpose and preamble of the CPA which recognises the necessity of ensuring accessible and efficient redress for consumers.

While these are pressing issues, the interpretation of s 69 of the CPA as put forward in *Wentzel* cannot be endorsed. This is because the wording of s 69 is arguably peremptory despite the finding in *Wentzel*. The leading case on statutory interpretation, *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>166</sup> stated that when interpreting a judge must consider the provision's language "in light of the ordinary rules of grammar and syntax," together with its context and purpose. The SCA in *Chiliza v Govender*<sup>167</sup> found that when deciphering whether a provision is peremptory, a statute's clear language should not be disregarded. Moreover, Claassen has argued that if an Act mandates a condition before doing something, this condition is usually peremptory and not directory.<sup>168</sup> It is submitted that the wording of s 69(d) is couched in peremptory terms as approaching the court is conditional upon *all* remedies in terms of the legislation being exhausted. Since it is a peremptory provision, this usually means that substantial compliance is not usually enough to cure non-compliance with the condition attached.<sup>169</sup> Therefore, it is submitted that an amendment would need to be made to rectify this position.

However, one should be careful when embarking upon amending s 69 of the CPA. As noted by De Stadler and Du Plessis, an approach that is unduly lop-sided in favour of the consumer can result in a precedent with adverse effects for the interests of wider consumers.<sup>170</sup> For example, a finding against a supplier could mean that consumers have to pay higher prices or that fewer products could be available in the market as a result of a business model becoming unprofitable.<sup>171</sup> Allowing a consumer to approach a court only after attempting to resolve a dispute through one of s 69's

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<sup>166</sup> 2012 (4) 593 (SCA) pg 273.

<sup>167</sup> 2016 (4) SA 397 (SCA) para 9.

<sup>168</sup> RD Claassen 'Peremptory Provisions' in *Claassen's Dictionary of Legal Words and Phrases* First Reissue (2000) referring to the Zimbabwean cases of *S v Tkaendesa* 1972 4 SA 72 (RA) and *Salisbury Hellenic Co v City of Salisbury* 1973 1 SA 534 (RA).

<sup>169</sup> LM Du Plessis 'Statute Law and Interpretation' in W A Joubert (founding ed) *The Law of South Africa* vol 25(1) First Reissue (2000) para 366; Although the distinction between directory and peremptory provisions has been somewhat questioned more recently as noted in LAWSA as seen in *African Democratic Party v Electoral Commission* 2006 5 BCLR 579 (CC) paras 25-26.

<sup>170</sup> E de Stadler & E du Plessis 'Section 2' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) para 2-5.

<sup>171</sup> *Ibid.*

forums could lead to undue litigation costs for suppliers. This, in turn, could lead to a more detrimental impact on the wider interests of consumers, and thus allowing a consumer free rein in this manner cannot be permitted. Instead, it is submitted that should a consumer run into difficulties enforcing their rights in terms of the CPA that they may approach a court upon showing the court compelling reasons. This would be the case in matters where access to justice has been repeatedly threatened by ombuds such as MIOSA failing to finalise disputes (meaning that consumers are unable to access other internal remedies such as the NCC).<sup>172</sup> Another compelling reason could be in cases where the supplier has clearly demonstrated a lack of interest in engaging *bona fide* in mediation and thus the risk of non-compliance with a non-binding finding is pressing. A court in this circumstance could allow a consumer to escape bringing the matter before another arbitration forum.

Adopting such an approach would allow a consumer to approach a court without exhausting all redress mechanisms listed in s 69 of the CPA in certain cases. This would not be at odds with the principle set out in *Chirwa*, as the redress mechanisms provided for in the CPA would still be greatly preferred. More than this, this added degree of flexibility would solve the inefficiencies in the current system where certain consumers are unable to obtain effective and efficient redress.

3.3 Is there an implied hierarchy between the different ADR redress mechanisms listed in s 69?

3.3.1 The current position in our law

There is a lack of clarity in s 69 of the CPA itself as to whether a consumer must follow a certain order when approaching the various redress mechanisms listed in s 69. However, reading additional sections in the CPA does provide some guidance as to the order in which the redress mechanisms should be approached. Scott notes that s 69 should be read in conjunction with ss 70-78 and ss 83-118 of the CPA.<sup>173</sup>

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<sup>172</sup> As was the case in both *Dipico v Imperial Group Limited t/a Cargo Motos Klerkdsdorp* (2212/2017 [2018] ZANHC 23 (25 April 2018) para 4.5 and *Wentzel* supra note 149 para 11.

<sup>173</sup> Scott op cit note 131 at 49.

While the NCT is the first internal remedy listed in s 69 of the CPA, this is most likely not the first redress mechanism that applicants should approach. In fact, a matter may only be referred to the NCT in accordance with particular provisions in terms of ss 73-75, s 114, and s 116 of the CPA.<sup>174</sup> A matter can be “directly referred” to the NCT within the meaning of s 69 of the CPA as per s 75(1)(b) of the Act. In accordance with s 75(1)(b) of the CPA, this is only permitted when the NCC issues a notice of non-referral.<sup>175</sup> This position has since been confirmed by the Tribunal in *Vivier v Towbars Cape CC*<sup>176</sup> as the NCT held that should the applicant not have a notice of non-referral from the NCC, then the NCT cannot hear the matter.

As far as the NCC is concerned, s 72(1)(b) read with s 72(1)(d) of the CPA indicates that the NCC should only investigate after the claimant has referred the matter to at least one of the alternative dispute mechanism as stipulated in s 69(b)<sup>177</sup> and (c)<sup>178</sup> of the Act.<sup>179</sup> Thus, the first point of access should be one of the mechanisms listed in s 69(b) and (c) of the Act: an ombud with jurisdiction, an accredited industry ombud, a consumer court, or an alternative dispute resolution agent. However, as pointed out by Van Heerden, there seems to be a conflict between s 69 and s 70 of the CPA. This is because s 69(b) seems to give a preference to ombuds with jurisdiction in comparison to s 70 which seems to create the impression that the consumer can pick any alternative dispute resolution mechanism they wish.<sup>180</sup>

In 2016 the court in *Dipico*<sup>181</sup> was tasked with interpreting these sections. In this regard, the court noted that the section ought to be interpreted contextually in line with both the purpose of the Act and s 70 of the CPA.<sup>182</sup> The court found on a plain reading of s 69 of the Act that a consumer may go to the NCT (if permitted to do so in

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<sup>174</sup> Barnard Miscenic op cit note 8 at 124; Van Heerden op cit note 19 para 69-22.

<sup>175</sup> Ibid.

<sup>176</sup> (NCT/6570/2012/75(1)(P)(CPA) [2013] ZANCT 55 para 32.

<sup>177</sup> An ombud with jurisdiction.

<sup>178</sup> An accredited industry ombud, a consumer court or a provincial consumer protection authority, or an alternative dispute resolution agent.

<sup>179</sup> Tjakie Naude ‘Enforcement Procedures in Respect of the Consumer’s Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective’ (2010) 127(3) *SALJ* 523.

<sup>180</sup> Van Heerden op cit note 19 para 69-10C.

<sup>181</sup> *Dipico* supra note 172 para 3.

<sup>182</sup> Ibid para 27.

terms of the Act) or may refer the matter to an applicable ombud with jurisdiction.<sup>183</sup> If there is no such applicable ombud with jurisdiction, then the consumer has a choice of any of the alternative dispute mechanisms set out in s 69(c) of the CPA.<sup>184</sup> However, the court noted that should a consumer be subject to an ombud with jurisdiction, they may not be denied access to the various other dispute resolution mechanisms afforded to other consumers.<sup>185</sup> The court reasoned that parliament would have expressly stated if they had intended that a certain class of consumers could only submit to the jurisdiction of a specific resolution forum.<sup>186</sup> Thus, it is evident that this decision was made in line with one of the main purposes of the Act: to promote a quick and effective system of redress for consumers.<sup>187</sup> Overall the court found that consumers are not required to approach ombuds with jurisdiction prior to any other remedy provided for in s 69(c) of the CPA;<sup>188</sup> clearing up the apparent contradictions between s 69 and s 70 in the CPA.

Shortly following the *Dipico* case, the court in *Imperial Group*<sup>189</sup> also dealt with the issue of whether there was a hierarchy provided for in s 69 and s 70 of the Act. This case dealt with a matter which was heard in a consumer court before MIOSA, another dispute resolution agent, or the NCC were approached.<sup>190</sup> Accordingly, the court considered whether there was any prescribed hierarchy in s 69 of the CPA.

In doing so, the court found that it is unclear whether there is such a hierarchy between the dispute resolution agents as found in s 69(c) of the CPA.<sup>191</sup> However, the court found that there is room for more than one interpretation of these sections and thus, the court relied on interpretation provisions to make the argument that where a provision in the CPA is able to have more than one interpretation, the one that best aligns with the spirit and purposes of the Act must be preferred.<sup>192</sup> In this regard, the court referenced Van Heerden to state that consumers may directly approach either a

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<sup>183</sup> *Dipico* supra note 172 para 29.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid* para 30.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid* paras 31-2 referencing Van Heerden op cit note 19 para 69-18.

<sup>189</sup> *Imperial Group* op cit note 149.

<sup>190</sup> *Ibid* para 8.

<sup>191</sup> *Ibid* para 43.

<sup>192</sup> *Ibid* para 43.

consumer court or an ombud (one with jurisdiction or an industry accredited one) in the first instance.<sup>193</sup> However, this is arguably *obiter* as the ombud was not accredited at the time the dispute arose.<sup>194</sup> Nevertheless, the court did note that even if the ombud was accredited at the time or if there was an ombud with jurisdiction, the applicant's failure to refer the dispute to these ombuds in this particular matter would not affect the jurisdiction of the consumer court, particularly as the supplier had made it evident that they were not willing to enter into any alternative dispute resolution process.<sup>195</sup> Instead, the court found that, at best for the supplier, the consumer court, finding it more appropriate, may have stayed the matter and directed the consumer to refer the matter to an ombud.<sup>196</sup> However, the court confirmed that the respondent's failure to comply "with internal remedies could not have the effect that the Free State Consumer Affairs Court's jurisdiction to entertain the dispute disappeared into thin air."<sup>197</sup>

Most recently in *Nzwana*,<sup>198</sup> the court touched on whether there is a hierarchy as provided for in terms of s 69 of the CPA. In this case, this discussion was *obiter* as the consumer in this matter did not allege nor attempt compliance with any of the redress mechanisms listed in s 69 of the CPA before approaching the court.<sup>199</sup> Nevertheless, when discussing whether there was a hierarchy provided for in s 69, the court set out the Commentary on the CPA and affirmed it as the correct approach.<sup>200</sup> The general order provided for in Van Heerden's Commentary on the CPA is to initially approach either an alternative dispute resolution mechanism listed in the Act or alternatively a consumer court, thereafter the consumer is advised to approach the NCC.<sup>201</sup> Following a non-referral, the consumer may approach the NCT (although on some occasions a consumer court may be approached).<sup>202</sup> Lastly, a consumer may institute proceedings in a civil court as they are a redress mechanism of last resort.<sup>203</sup> However, the court then qualified this position by affirming the position as stated in

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<sup>193</sup> *Imperial Group* op cit note 149 para 45 referencing Van Heerden op cit note 19 para 69-18.

<sup>194</sup> *Ibid* para 47.

<sup>195</sup> *Ibid* para 48.

<sup>196</sup> *Ibid* para 50

<sup>197</sup> *Ibid*.

<sup>198</sup> *Nzwana* supra note 11.

<sup>199</sup> *Ibid* para 9.

<sup>200</sup> *Ibid* para 31 referencing Van Heerden op cit note 19 para 69-20.

<sup>201</sup> *Ibid*.

<sup>202</sup> *Ibid*.

<sup>203</sup> Van Heerden op cit note 19 para 69-23.

*Dipico*.<sup>204</sup> The hierarchy in Van Heerden’s Commentary as endorsed by *Nzwana* was later confirmed in *Maphutse*.<sup>205</sup>

However, there have been some inconsistencies regarding this application of the implied hierarchy provided for in s 69 of the CPA. Although the hierarchy as set out in Van Heerden’s Commentary on the CPA has been endorsed by various courts and academics, it has also been departed from. For example, in *Byleveld v Execor Twelve (Pty) Ltd t/a Motor City*<sup>206</sup> after the claimant approached the Gauteng Provincial Affairs Office, she was instructed to approach the NCC. This provides an instance where the NCC was mandated to operate prior to a redress mechanism listed in s 69(c) of the CPA.<sup>207</sup> Moreover, the court in *Imperial Group v MEC Economic* also noted that the use of the word “may” instead of “must” in combination with the general context and provisions of the Act indicate that it is not certain whether there is an implied hierarchy in s 69 of the CPA.<sup>208</sup> Hence, there is still some uncertainty regarding the correct position.

### 3.3.2 A critical analysis of this position

The most glaring problem with the current position is that the exact procedure that a consumer is required to follow is unclear and thus hard to navigate. Du Preez has already emphasised the fact that the Act in general is not user-friendly due to its wording and hence it will most possibly be extremely difficult for the run-of-the-mill consumer to properly comprehend the way in which to enforce their rights.<sup>209</sup> So the structure (or lack thereof) for attaining redress as provided for in s 69 of the Act would be extremely daunting to consumers and in many cases constitute a real barrier for individuals to realise their rights. This impedes access to justice in South Africa.

In addition, this unclear and overly complex system of redress runs counter to the very aim of constructing alternative dispute mechanisms as they are believed to

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<sup>204</sup> *Imperial Group* supra note 149 paras 32-33.

<sup>205</sup> *Maphutse* supra note 114 para 22.

<sup>206</sup> (NCT/10686/2013/75(1) (2014) ZANCT 2 para 27.

<sup>207</sup> Magaqa op cit note 22 at 35.

<sup>208</sup> *Imperial Group* supra note 149 para 43.

<sup>209</sup> Du Preez op cit note 1 at 82.

reduce the expenses and complex nature of court processes.<sup>210</sup> It also makes the system less accessible to consumers which is contrary to the purposes of the CPA as stipulated in s 3(1) of the Act. Moreover, the complexity of the current position also goes against the reasoning that went into the creation of the CPA. This is because the very thing the legislature was trying to do by creating this new system was to overturn the old system since the patch-work pieces of various legislation were hard for consumers to traverse.<sup>211</sup> Accordingly, it is submitted that the state of the law currently is prejudicial to consumers who want to vindicate their rights as the ambiguity makes it exceedingly difficult for consumers to currently navigate the system. Thus, it is clear that an amendment is needed to provide further guidance pertaining to the exact procedure to be followed to enforce one's rights in terms of the CPA.

Furthermore, the fact that there are clear instances where the consumer has an election between various redress mechanisms could lead to the possibility of forum shopping.<sup>212</sup> The Constitutional court in *Gcaba v the Minister for Safety and Security*<sup>213</sup> has emphasised the importance of preventing forum shopping. This was part of the reason why the court ultimately found, in the context of the administrative law/labour interface, that there should only be one system of redress for those employed by the state (in this case it was the redress mechanisms provided for in terms of the LRA). Although shortly after the Act was promulgated it was argued that forum shopping would be circumvented as s 69's internal remedies are interdependent and complement each other,<sup>214</sup> Mupangavanhu refutes this argument.<sup>215</sup> She points out that a consumer is able to start proceedings in one forum and then after some time approach an alternative forum that they perceive will be more likely to hand down a decision in their favour.<sup>216</sup>

The court in *Dipico* also noted the dangers of forum shopping.<sup>217</sup> However, the court concluded that this risk could be prevented to a certain degree due to the fact that

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<sup>210</sup> Woker 2016 op cit note 16 at 26.

<sup>211</sup> *Dipico* supra note 172 para 31.

<sup>212</sup> Du Preez op cit note 1 at 81.

<sup>213</sup> (2010) 31 ILJ 296 (CC) para 57.

<sup>214</sup> Du Preez op cit note 1 at 81.

<sup>215</sup> Mupangavanhu op cit note 14 at 332.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Dipico* supra note 172 para 31.

if a consumer finds various forums are able to entertain the matter in terms of s 69 of the Act, then the litigant must choose where to refer the matter. Once this decision has been made, then the dispute must run to its conclusion in that specific redress mechanism. This was compared to the principles pertaining to concurrent jurisdiction found in the ordinary court system.<sup>218</sup>

Therefore, overall it is clear that s 69 of the CPA should be amended for the hierarchy espoused by the courts to be made clear in the legislation itself. This would assist consumers in traversing what course of action to take when attempting to vindicate their rights. Moreover, as put forth by *Dipico*, the dangers of forum shopping within this hierarchy have been mitigated.

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<sup>218</sup> *Dipico* supra note 172 para 31.

#### 4. ORDINARY COURTS' JURISDICTION REGARDING UNFAIR CONTRACT TERMS AND DAMAGES

While some of the most pressing difficulties with s 69 of the CPA have been traversed in the previous chapter, this chapter goes on to pinpoint other potential problems with the Act. This chapter will discuss s 52 of the Act which gives the court sole jurisdiction over unfair contract terms and why this may reduce access to justice for consumers. Following this, the procedure set out in s 115 of the Act will be critiqued.

##### 4.1 Unfair contract terms

###### 4.1.1 Do the ordinary courts have sole jurisdiction in respect of unfair contract terms?

Section 52, in essence, gives the court the authority to declare contracts unfair or unconscionable if no other remedy in the Act is otherwise applicable.<sup>219</sup> More specifically, the court is able to make use of the remedies listed in s 52(3) of the CPA if the supplier contravenes s 40, s 41, or s 48 of the Act. Section 48 regulates unfair contract terms, while s 41 deals with deceptive representations and s 40 deals with unconscionable conduct. Once the contract in whole or in part is declared unfair, then the court may make any further order it believes to be reasonable to ensure fairness including compensation to the consumer.<sup>220</sup> Although, not clearly stated, on a plain reading of s 52 of the CPA it may be inferred that only civil courts have this power. This is due to the fact that the section only mentions a court and thus fails to include the NCT or provincial consumer courts.<sup>221</sup> As previously stated, a 'court' in terms of s 1 of the CPA does not include provincial consumer courts.

However, s 73 seems to contradict s 52 of the CPA as s 73 of the Act gives the power to the NCC to refer a finding of prohibited conduct to a consumer court or the NCT. Using unfair terms is 'prohibited' as per s 48 of the Act. Thus, Naude argues that the NCC is empowered in terms of s 73 to make a finding of this effect and then refer

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<sup>219</sup> Tjakie Naude 'The Consumer's Right to Fair, Reasonable and Just Terms under the new Consumer Protection Act in Comparative Perspective' (2009) 126(3) *SALJ* 525.

<sup>220</sup> Section 52(3)(b) of the CPA; Mapangavanhu op cit note 14 at 333.

<sup>221</sup> Naude 2009 op cit note 219.

it to the NCT or consumer court.<sup>222</sup> This seems to run contrary to s 52 of the CPA because, as per s 52, this matter should fall within the exclusive jurisdiction of the civil courts. Nevertheless, Naude mentions the argument that one way around this apparent inconsistency would be if unfair contract terms only become ‘prohibited conduct’ after a court has found the term to be unfair.<sup>223</sup> Following this finding from the court, the NCC, consumer court, or NCT will be able to have jurisdiction.<sup>224</sup> This is only an argument mentioned by Naude and still awaits clarification from the courts.

In addition, there is another seeming contradiction; s 52 of the Act seems to contradict provincial consumer protection legislation that operates concurrently with the CPA.<sup>225</sup> This is because such legislation, including the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996, gives the provincial consumer courts jurisdiction on matters concerning ‘unfair business practices.’<sup>226</sup> Unfair business practices’ is widely defined, including “any business practice which, directly or indirectly has or is likely to have the effect of unfairly affecting any consumer.”<sup>227</sup> This wide definition which could incorporate unfair contract terms in combination with the lack of a clear statement in s 52 of the CPA means that there has been some uncertainty in this regard. Thus, clarification by an amendment to this position would be extremely useful.

The NCT has briefly discussed this issue on two occasions. The first was in *Vodacom Service Provider Company (Pty) Ltd v National Consumer Commission*.<sup>228</sup> In this case, these issues were not particularly raised by the parties and thus the NCT only stated in passing that the issue of whether the ordinary courts were the only courts that had jurisdiction over these matters was an important question.<sup>229</sup> Later in *National Consumer Commission v Western Car Sales CC t/a Western Car Sales*,<sup>230</sup> the NCT

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<sup>222</sup> T Naudé ‘Section 52’ in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) para 52-29.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> The Opening of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996; Naude ‘Section 52’ op cite note 222 para 52-29.

<sup>227</sup> Section 1 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996; Naude ‘Section 52’ op cite note 222 para 52-29.

<sup>228</sup> (NCT/2793/2011/101 (1) (P)) [2012] ZANCT 9 (8 June 2012).

<sup>229</sup> Ibid para 62.

<sup>230</sup> (NCT/81554/2017/73(2)(b)) [2017] ZANCT 102 (14 September 2017).

directly dealt with the issue. Here the NCT found that, upon reading s 52 with s 48 plainly, “the power to apply the provisions of section 48 remain exclusively reserved for a court of law.”<sup>231</sup> However, the NCT found that the Tribunal has the power to make determinations regarding whether conduct contravenes s 51 of the CPA.<sup>232</sup> Thus, it appears that the position of the NCT is that the powers in s 52 of the CPA are in the sole jurisdiction of the ordinary courts. Accordingly, this paper operates from the position that s 52 of the Act does indeed grant sole jurisdiction to the ordinary courts in respect of unfair contract terms.

#### 4.1.2 Should the courts have sole jurisdiction in respect of unfair contract terms?

If this is indeed the position, it is not entirely clear what “sole jurisdiction of the court” entails. It could suggest that, since s 52 only applies if no other remedy in terms of the CPA is applicable, the consumer must first resort to the other ADR mechanisms as provided for in the Act before going to court.<sup>233</sup> This would also be in line with s 69 of the CPA which, as previously discussed, mandates that other remedies should be exhausted before going to court.<sup>234</sup> However, Naude points out that if this is the case, the fact that other ADR mechanisms in the Act are not given powers under s 52 would mean that the consumer would have to jump through many hoops.<sup>235</sup> The consumer would first have to resort to an ADR mechanism where the entity is unable to make a finding in the dispute, only to have them refer the matter to a court.<sup>236</sup> This is undoubtedly an undue burden and would cause many delays for the consumer. This also runs counter to one of the main purposes of the Act which is to increase consumers’ economic and social welfare in the country.<sup>237</sup>

In these cases, there could also be the possibility that the consumer may have to separate out different issues in the same matter and bring them before different enforcement institutions: unfair contract terms to the courts and the other issues (such

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<sup>231</sup> *Western Car Sales* supra note 230 para 42.

<sup>232</sup> *Ibid.*

<sup>233</sup> Naude 2009 op cit note 219 at 525.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> Section 3(1) of the CPA; Mupangavanhu op cit note 14 at 338.

as s 51 or s 55 violations) to the NCT.<sup>238</sup> This would also be unduly burdensome for the consumer. These interpretations of "sole jurisdiction of the court" defeat the purpose in s3(1)(h) of the CPA as they do not provide for an effective and efficient system redress for consumers.<sup>239</sup> Barnard argues that this is the reason why in *Tshehla v Aucamp Eiendoms Beleggings t/a CA Motors*<sup>240</sup> the NCT went as far as to mask its determination of the fairness of a consumer's contractual clause as 'ultra vires.'<sup>241</sup>

Even if this is not the case, and consumers are permitted to go straight to the ordinary courts should there be a concern that there is an unfair contract term, there would still be extreme costs in preserving the court's sole jurisdiction in this regard. As already stated, the costs of taking a matter to court are often prohibitively high for the large majority of consumers.<sup>242</sup> This is exacerbated by the fact that contractual disputes that implicate the CPA usually concern small sums of money.<sup>243</sup> Moreover, there is also the possibility that a supplier seeking to shirk the consumer's claim could launch an appeal to the High Court or Supreme Court of Appeal.<sup>244</sup> The costs of carrying a claim to these courts could force a consumer to drop or settle their claims even if they were successful in the lower courts. Naude argues that this possibility would decrease if the provincial consumer courts also had jurisdiction regarding these matters.<sup>245</sup> There is also the likelihood that some consumers would avoid the courts due to their unfamiliarity with the law and intimidation of the court system.<sup>246</sup> Hence, it is evident that this interpretation both conflicts with s 69 of the CPA and also fails to give effect to efficient and effective redress for consumers.

Conversely, it has been asserted that reserving the power for the courts could have some benefits. Granting sole jurisdiction to the courts would add to legal certainty due to the system of precedent and the fact the decisions of the High Court, Supreme

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<sup>238</sup> Jacolien Barnard 'Suppliers, Consumers and Redress for Defective Vehicles – the Reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*' (2020) 137(2) SALJ 241.

<sup>239</sup> *Ibid* at 242.

<sup>240</sup> [2019] ZANCT 160.

<sup>241</sup> Jacolien Barnard op cit note 238 at 243.

<sup>242</sup> Naude 2009 op cit note 219 526.

<sup>243</sup> Naude 2010 op cite note 179 at 527.

<sup>244</sup> *Ibid*.

<sup>245</sup> *Ibid*.

<sup>246</sup> Mupangavanhu op cit note 14 at 339; Woker 2017 op cit note 32 at 2.

Court of Appeal, and Constitutional Courts are reported.<sup>247</sup> In combination with this, it is arguable that the magistrates and judges in the ordinary court system may be better trained to handle the peculiarities of unfairness in contract law than the officials hearing matters in the other redress mechanisms provided for in the CPA.<sup>248</sup> A finding of unfairness as a basis to refuse to enforce a contract term is a complex and serious task that necessitates a value judgment from a person with legal training.<sup>249</sup> There is a need for those applying s 52 of the CPA to be aware of the common law standards of balancing certainty and good faith as well as the relevant constitutional rights involved.<sup>250</sup> This is a tricky endeavour for even the courts to navigate as evidenced by the long period of contrast between the Supreme Court of Appeal and Constitutional Courts concerning the correct role of fairness in contract law.<sup>251</sup> This tension was only recently resolved by the Constitutional Court in *Beadica 231 CC v Trustees for the Oregon Trust*.<sup>252</sup>

However, many of these benefits of retaining the sole jurisdiction of the ordinary courts can be refuted. Although some of the decisions of the higher courts are reported, this would not substantially add to legal certainty too much since most consumer disputes would probably be resolved in the lower courts.<sup>253</sup> In conjunction with this, the need for those presiding over these matters to have expertise in the area of contract law does not necessitate that the court has sole jurisdiction. In fact, Naude points out that in provincial courts, often chairpersons are required to be lawyers with the requisite experience.<sup>254</sup> In addition to this, Mupangavanhu argues that the expertise issue can equally be resolved in the NCT by ensuring that those who are employed by the NCT have legal training.<sup>255</sup> Thus, many of the benefits of granting the ordinary courts sole jurisdiction over unfair contract terms are marginal in comparison to the shortcomings.

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<sup>247</sup> Naude 2010 op cit note 179 at 527; Mupangavanhu op cit note 14 at 334.

<sup>248</sup> Ibid.

<sup>249</sup> Mupangavnhu op cit note 14 at 339.

<sup>250</sup> Ibid.

<sup>251</sup> Dale Hutchison 'From Bonda fide to Ubuntu: the Quest for Fairness in the South African Law of Contract' *Acta Juridica* (2019) 99.

<sup>252</sup> (2020) ZACC 13.

<sup>253</sup> Naude 2010 op cit note 179 at 527.

<sup>254</sup> Ibid.

<sup>255</sup> Mupangavanhu op cit note 14 at 339.

Perhaps the current situation could be salvaged if South Africa did not rely on individual consumers to bring challenges concerning the unfairness of contract terms in their own capacity. This is because South Africa's governmental and sectoral enforcement bodies are very much under-resourced at present.<sup>256</sup> If these bodies were functioning optimally they could act as a preventative measure in deterring suppliers from including unfair terms in their agreements with consumers.<sup>257</sup> The NCC is one such body in South Africa as they have the power to bring interdict proceedings against suppliers and negotiate with businesses to put pressure on them to cease using specific terms.<sup>258</sup> However, in 2012 the NCC stopped conducting investigations into individual complaints and began conducting investigations into endemic destructive business trends and practices, as well as focusing on matters of policy.<sup>259</sup> This has meant that the NCC is often constrained with a few issues. For example, from 2017 until 2018 the NCC was occupied by the listeriosis outbreak, the Ford Kuga disaster, and the Timeshare Enquiry.<sup>260</sup> It is likely due to the resource constraints and the new role of the NCC that it will not be able to perform a role deterring suppliers from including unfair terms in consumer contracts. Thus, the CPA in its current form is unlikely to effectively eliminate unfair terms in consumer contracts.

Thus, overall it is submitted that the ordinary courts should not have sole jurisdiction in respect of unfair contract terms. Not only would this work against the purposes of the Act as it places more hurdles in the way of consumer redress in terms of costs and time, the benefits of granting sole jurisdiction in this way are not clear and can be refuted. This situation is aggravated by the fact that South Africa largely relies on individual consumers bringing claims to give effect to their rights in terms of the CPA. Thus, individual consumers must be able to access justice without too many barriers. Bearing this in mind, the CPA should be amended to allow the provincial consumer courts, the NCT, and the courts to make declarations in terms of s 52 of the Act.

#### 4.3.1 Do the ordinary court have sole jurisdiction over contractual disputes in general?

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<sup>256</sup> Naude 'Section 52' op cit note 222 para 52-31; Naude 2010 op cit note 179 at 528.

<sup>257</sup> Naude 2010 op cit note 179 at 527.

<sup>258</sup> Naude 2009 op cit note 219 at 527.

<sup>259</sup> Woker 2017 op cit note 32 at 6; NCC's 2013/2014 Annual Report op cit note 30.

<sup>260</sup> Van Heerden op cit note 19 para 69-10A.

On a plain reading of the section, it is evident that the courts only have sole jurisdiction in matters contemplated in s 48, s 40, and s 41 of the CPA. However, in *Springside Investment (Pty) Ltd v Viking Fishing Company (Pty) Ltd*<sup>261</sup> the NCT stated that it cannot adjudicate on contractual disputes. This is much wider than unfair contract terms, unconscionable contract terms, and misrepresentation in terms of s 40, s 41, and s 48 of the CPA. Despite the fact that in *Springside* the matter did concern unfair contract terms,<sup>262</sup> it is still concerning to see that the NCT is widening the court's sole jurisdiction to contractual disputes in general. It is submitted that this approach should not be followed by the courts in general. Not only does this position exacerbate the aforementioned problems associated with the court having sole jurisdiction, but it also does not necessarily follow on from the wording of s 52 of the Act.

## 4.2 Damages

### 4.2.1 Is the National Consumer Tribunal barred from awarding damages in terms of s 115 of the CPA?

Another issue is whether the NCT is able to award damages. The NCT has the power to both make any order as provided for in the CPA as well as any innovative order to realise a consumer's right as per s 4(2)(b)(i)-(ii) of the CPA.<sup>263</sup> Additionally, s 150 of the National Credit Act gives authority to the NCT to make orders requiring the supplier to repay the consumer if excessively charged together with interest. In conjunction with this, the NCT's orders have the same status as the ordinary courts and can be enforced accordingly.<sup>264</sup> Despite this, s 115 alongside s 76(1)(c) of the CPA indicate that the power to award and quantify damages is in the sole jurisdiction of the civil courts. Section 76(1)(c) of the CPA makes clear that it is within the powers of the ordinary court to award damages against a supplier to remedy damage to a class of consumers or all consumers generally. In addition, s 115(2)(b) of the CPA states that a complainant may institute a claim for the awarding of damages in an ordinary court after filing a

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<sup>261</sup> (NCT/104417/2018/75(1)(b)) [2018] ZANCT 94 (27 June 2018) para 36; Van Heerden op cit note 19 para 69-18A.

<sup>262</sup> *Springside Investment* supra note 261 para 34.

<sup>263</sup> Magaqa op cit note 22 at 51.

<sup>264</sup> Section 152(1) of the NCA; Magaqa op cit note 22 at 51.

notice certifying that the conduct complained of has been found to be prohibited conduct by the NCT. Section 70(4) and s 74 of the CPA merely allow the NCT to confirm consent orders for the parties that already includes the awarding of damages.<sup>265</sup> This means that the NCT is only able to award damages should both parties agree.

Furthermore, the fact that this power is the exclusive power of the civil courts has been confirmed on many occasions by the NCT. Firstly, in *CJ Digital SMS Marketing v National Consumer Commission*<sup>266</sup> the NCT read s 115 of the CPA to mean that the power of awarding damages to consumers is in the exclusive domain of the ordinary courts. Accordingly, the NCT found that neither the NCT nor the NCC has this power.<sup>267</sup> The NCT also confirmed that this would be the case unless the parties entered into a consent order that includes an award of damages.<sup>268</sup> In *Audi SA (Pty) Ltd v National Consumer Commission*<sup>269</sup>, the NCT reiterated the fact that the awarding of damages is not a power that is extended to the NCT. Similarly, in *Clientele General Insurance Ltd v National Consumer Commission*<sup>270</sup> the NCT stated that an award of damages cannot be made in a compliance notice issued by the NCC or the NCT. More recently, the NCT confirmed that it did not have the jurisdiction to award damages once again in *Carstens v Beukes*.<sup>271</sup>

Thus, it is clear that the civil courts alone are empowered to quantify and award damages in terms of the CPA. A related issue to this is the issue of whether the consumer is obliged to approach the NCT in order for it to make a finding that the supplier engaged in prohibited conduct before heading to the civil court in these matters. If a consumer is able to lead evidence in an ordinary court and the court was able to make a finding that prohibited conduct occurred, then it would mean that the consumer would not be subject to lengthy procedure of going both to the NCT and civil courts in order to get effective relief. However, on a plain reading of s 115 of the CPA,

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<sup>265</sup> Jacolien Barnard op cit note 238 at 244.

<sup>266</sup> (NCT/3584/2011/101(1)) [2012] ZANCT 22 (1 October 2012) para 46; C Van Heerden 'Section 115' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) para 115-2.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> (NCT/4058/2012/101(1)(P)CPA) [2013] ZANCT 4 (21 January 2013) para 30; Van Heerden 'Section 115' op cit note 266 para 115-2.

<sup>270</sup> (NCT/4671/2012/60(3) & 101(1) (P)) [2013] ZANCT 7 (15 April 2013) paras 77-78; M A Du Plessis 'Access to Redress for Consumers A Tale of the Effect of a Notice of Non-Referral by the National Consumer Commission' *South African Mercantile Law Journal* (2018) 34.

<sup>271</sup> (NCT/133281/2019/75(1)(b)) [2020] ZANCT 20 (24 September 2020) para 22.

this is not a clear conclusion. Van Heerden argues that it is the intention of the legislature that the consumer first go to the NCT for a finding of prohibited conduct and then go to the civil courts to quantify and award damages.<sup>272</sup>

This issue has been dealt with by the NCT on quite a few occasions. In the *CJ Digital* case, the NCT found that the consumer may only approach the civil courts to claim damages after the NCT has made a finding that the supplier has in fact engaged in prohibited conduct.<sup>273</sup> The NCT went further in the recent case of *Brad Green Cars CC v Breytenbach*.<sup>274</sup> In this case, the NCT also noted that first approaching the NCT for a hearing, as well as exhausting all the other remedies in s 69, is required before approaching the ordinary courts with a claim for damages.<sup>275</sup> The court stated that this is in accordance with s 69 of the CPA as interpreted in the *Joroy* case.<sup>276</sup>

Note that in addition, with approaching the NCT for a hearing, the consumer must also receive a notice that certifies the conduct as prohibited from the Chairperson of the Tribunal as per s 115(2)(b) of the CPA in order to approach the civil courts for damages.<sup>277</sup> In combination with this, as illustrated in *Simelane v Pretoria Franchise Support Services (Pty) Ltd t/a Fastway Couriers (Pretoria)*,<sup>278</sup> simply because the NCT makes a finding of prohibited conduct does not mean that the consumer is entitled to damages. Instead, when claiming damages in court, the consumer is required to prove that there is a causal connection between the prohibited conduct and the damage suffered by the consumer.<sup>279</sup> In addition, the consumer will be required to prove the extent of the damages in court.<sup>280</sup>

#### 4.2.2 Should this position be amended?

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<sup>272</sup> Van Heerden 'Section 115' op cit note 266 para 115-4.

<sup>273</sup> *CJ Digital* supra note 266 at 47.

<sup>274</sup> (NCT/110467/2018/75(1)(b)) [2019] ZANCT 1 (21 January 2019) para 46; Van Heerden 'Section 115' op cit note 266 para 115-2

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> Ibid para 115-4.

<sup>278</sup> (NCT /8742/2013/73/(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 43 (14 November 2013) para 55; Van Heerden 'Section 115' op cit note 266 para 115-4.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid para 115-4A.

It is submitted that this position should be altered by an amendment to the CPA because it lays out a demanding and burdensome procedure for the consumer. The consumer is required to the NCT for a hearing, as well as possibly also being obliged to exhaust the other remedies in terms of s 69 of the CPA, and then go to a civil court in order to prove damages. Even if the consumer is only obliged to complete the two-step procedure in terms of s 115 of the CPA before heading to court, this will lead to substantial delays in the consumer receiving relief and also subject the consumer to an unnecessarily complex and costly procedure. This undoubtedly could deter consumers from seeking out relief in terms of the CPA entirely should the required relief take the form of damages. This does not provide for the welfare of the consumers and thus obstructs from this purpose of the CPA.<sup>281</sup> Moreover, the position is contrary to the purpose of the CPA in the sense that it does not provide a mechanism through which a consumer can get quick and efficient relief.<sup>282</sup>

Thus, it is clear that the CPA should be amended to create a less cumbersome process for the consumer. However, unlike unfairness in contract, where the principles can more easily be taught to the many non-lawyer members of the NCT, the relevant principles regarding contractual damages are far more technical and complex.<sup>283</sup> Some of the more complex principles concerning damages include how to quantify damages, and deciphering whether there is both factual causation and legal causation.<sup>284</sup> These rules would be exceedingly difficult for the members of the NCT who do not possess formal legal training. Hence, the best way in which make the process more efficient, simple, and cost-effective is to allow a consumer to approach a court in the first instance in cases where the quantum of damages is in issue. While this still will mean that the consumer has to approach a civil court which is more intimidating, costly, and alien in comparison to an alternative dispute mechanism, it does save the time and money of the consumer as there are fewer hoops through which to jump.

However, it is also submitted that a consumer also be allowed to go to the NCT in the first instance and thereafter follow the two-step procedure as per s 115 should

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<sup>281</sup> Section 3(1) of the CPA.

<sup>282</sup> Section 3(1)(g) of the CPA; Magaqa op cit note 22 at 52.

<sup>283</sup> Hutchison op cit note 7 at 341.

<sup>284</sup> Ibid at 348.

they wish. This could be the case, for example, if the consumer does not have money for legal assistance and instead would prefer the NCT's inquisitorial process. If successful, choosing such a route would allow a consumer to obtain a certificate of prohibited conduct that could be used as a tool to encourage settlement, thus potentially avoiding having to go to court.

## 5. COMPARATIVE ANALYSIS OF NIGERIA'S APPROACH TO CONSUMER PROTECTION

Having identified various issues with South Africa's CPA, the next two chapters of this dissertation will look to two other developing countries and their consumer protection regimes as a comparative tool. This is because these countries may have encountered similar issues to South Africa and thus their methods of addressing these issues may be helpful.

### 5.1 The reason why Nigeria was chosen for a comparative study

Nigeria has been chosen as there are many important similarities between the country and South Africa. Similar to South Africa, Nigeria has a population with higher levels of illiteracy, poverty with sub-par levels of consumer awareness.<sup>285</sup> In addition, like South Africa, Nigeria is also one of the larger economies in Africa and has a larger population made up of many consumers.<sup>286</sup> This means that Nigeria's failures and successes in its consumer regime could prove illustrative in a South African context.

This chapter will primarily focus on the efficacy issues relating to the functioning of the consumer protection redress mechanisms and thus not cover substantive issues with Nigeria's consumer protection law.

### 5.2 Nigeria's Consumer Law

#### 5.2.1. Introduction to Nigeria's consumer law

Recently there has been a new Act that has come into force in Nigeria: the Federal Competition and Consumer Protection Act 2018 ('the FCCPA'). Sections 104 and 105

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<sup>285</sup> F Monye 'An Overview of Consumer Law in Nigeria and Relationship with Laws of Other Countries and Organizations' (2018) 41(4) *Journal of Consumer Policy* 374.

<sup>286</sup> Adekunbi Adeleye 'An Appraisal of the Consumer Protection Council Act and Consumer Rights in Nigeria' (2017) 8(2) *The Gravitas Review of Business & Property Law* 2.

of the FCCPA grant supremacy to this law over all other consumer protection laws.<sup>287</sup> This Act repealed the Consumer Protection Council Act 2004 ('the CPC Act') and the FCCPA can now be referred to as the most comprehensive piece of consumer legislation in Nigeria.<sup>288</sup> The CPC Act was previously the most noticeable piece in terms of consumer protection.<sup>289</sup> This is because the CPC Act had previously been described as the most direct and general piece of consumer legislation of that time.<sup>290</sup> However, the CPC was not comprehensive and thus the development of the FCCPA has been described as moving Nigeria nearer to having a single codified set of consumer laws.<sup>291</sup>

Running alongside the main pieces of consumer law are other pieces of legislation that have offered and continue to offer consumer protection through sector-specific laws and agencies.<sup>292</sup> These sectors include financial services, aviation, product standards, banking, energy, food and drugs, and telecommunications.<sup>293</sup> Each of these sectors generally have a specific piece of legislation that provides a degree of consumer protection.<sup>294</sup> Such laws include the Food and Drugs Act 1974, Trade Malpractices (Miscellaneous Offences) Act 1992, Standards Organization of Nigeria Act 2015, among others.<sup>295</sup>

In this legal regime, there are sector-specific enforcement bodies such as the National Agency for Food and Drugs Administration and Control, the Nigerian Communications Commission, the Utilities Charges Commission, and the Standards Organization of Nigeria ('SON').<sup>296</sup> Many of these sectors have specific regulatory

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<sup>287</sup> Festus Okechukwu Ukwueze and Peace Chiedozi Onubuleze 'Appraisal of the Protection of the Rights and Interests of Electricity Consumers in Nigeria' (2019) 92 *Journal of Law, Policy and Globalization* 145.

<sup>288</sup> Etefia Ekwere Ekanem and Akebong Samuel Essien 'A Critique of the Federal Competition and Consumer Protection Act 2018' (2019) 1(2) *International Journal of Comparative Law and Legal Philosophy* (2019) 16.

<sup>289</sup> Etefia E Ekanem 'Institutional Framework for Consumers' Protection in Nigeria' (2011) 2(1) *International Journal of Advanced Legal Studies and Governance* 35.

<sup>290</sup> *Ibid.*

<sup>291</sup> Y Okojie and I Bolu, 'A Review of the Federal Competition and Consumer Protection Bill 2016' available at <https://www.mondaq.com/nigeria/antitrust-eu-competition-/707458/a-review-of-the-federal-competition-and-consumer-protection-bill-2016> accessed on the 22nd of August 2020.

<sup>292</sup> Monye op cit note 285.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid* at 374.

<sup>295</sup> *Ibid.*

<sup>296</sup> Okoro Jude Henry Ekwoma 'Enforcement of Consumer Protection Laws in Nigeria: An Appraisal' (2013) 1(1) *Journal of Private Law* 254.

authorities that can adjudicate on particular issues. However, Monye has asserted that a prominent feature of Nigeria's consumer protection regime has been the strong regulatory agencies that have consigned consumers to the background, in order to focus on service and product providers.<sup>297</sup>

### 5.2.2 The position under the previous CPC Act

Arguably the two primary regulatory bodies and agencies that were responsible for carrying consumer laws into effect were the Consumer Protection Council ('the Council') and the SON.<sup>298</sup> The Consumer Protection Council acted in terms of the CPC Act.<sup>299</sup> However, the CPC Act did not explicitly provide consumers with rights.<sup>300</sup> Instead, the rights of consumers were implicitly recognised in the functions of the Council.<sup>301</sup> The Council was tasked with managing consumer complaints through negotiation, mediation and conciliation, while also seeking ways of removing unsafe products from the market and publishing lists of banned products.<sup>302</sup> The Council could also mandate that any offending supplier compensate for any harm.<sup>303</sup> To carry out this mandate efficiently, the Council established State Committees in each of Nigeria's States, the sole purpose of which was to investigate, raise awareness, and to receive consumer complaints.<sup>304</sup> These State Committees provided relief in the form of criminal law sanctions against offending suppliers.<sup>305</sup>

The performance of the Council's investigative and enforcement function has been mixed. In their study of the Council, Emeka and Francis found that the employees of the Council timeously responded to complaints, were sufficiently knowledgeable, and instilled a sense of confidence to complainants.<sup>306</sup> On the other hand, the Council

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<sup>297</sup> Monye op cit note 285 at 377.

<sup>298</sup> Nkiru J Obumneme-Okafor 'Effective Institutional Framework of Consumer Protection: An Indispensable Tool for Economic Development in Nigeria' (2014) 4(1) *World Educators Forum* 3.

<sup>299</sup> Ibid at 6.

<sup>300</sup> Kamrudeen Babtunde Bello et al 'Perspectives on Consumerism and Consumer Protection Act in Nigeria' (2012) 4(10) *European Journal of Business and Management* 72.

<sup>301</sup> Ibid.

<sup>302</sup> Emmanuel E Akhigbe et al 'Hopelessness of the King of Production in Nigeria: The Consumer Protection Council a Saviour or Mirage?' (2015) 12(9) *US-China Law Review* 728.

<sup>303</sup> Ibid.

<sup>304</sup> Adeleye op cit note 286 at 2.

<sup>305</sup> Ekanem op cit note 289 at 36.

<sup>306</sup> Ifediba Emmanvitalis Emeka and Eze C Francis 'Using the Servoual Model to Evaluate the Service Delivery of the Consumer Protection Council in Nigeria'(2018) 10(18) *European Journal of Business Management* at 96.

has also faced many critiques from different academics. For example, although the Council's activity levels have not been empirically documented, it has been found that consumer issues have largely been under-investigated.<sup>307</sup>

Additionally, Adeleye has noted that, despite the Council's mandate to protect consumers from hazardous products in s 2(b) of the CPC Act, the continuation of many fake products suggested that the Council had proved ineffective in this regard.<sup>308</sup> The Council was also supposed to ensure that no sub-standard products were sold by confirming the product's quality after its registration with the SON. However, this too was not particularly successful given the number of unregistered and substandard products on the country's market.<sup>309</sup> In conjunction with this, Adeleye has also argued that s 2(j) of the CPC Act's implied duty to certify products as safe prior to a consumer's consumption has also been contrary to the past practice of the Council.<sup>310</sup> The Council instead often waited for national outcry before publishing a public ban on hazardous products; for example, the Council only acted against My Pikin Baby Teething Mixture after 84 children had died.<sup>311</sup> Moreover, the Council had only prosecuted a few cases that led to compensation to consumers.<sup>312</sup> Furthermore, the Council was criticised for not raising consumer awareness to adequate levels,<sup>313</sup> despite the fact that Nigeria's regulatory agencies have made some attempts to remedy this.<sup>314</sup>

The Council's lack of adequate performance has been attributed to many reasons. Chief among them was the fact that it was not adequately funded, that there was a lack of infrastructure to enable people from rural communities to have access to the body, coupled with a high degree of illiterate Nigerian consumers who have been generally unaware of their rights and the functions of the agency.<sup>315</sup> In addition, it has been argued that the lack of representation from consumer associations have also played

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<sup>307</sup> Emeka and Francis op cit note 306 at 92.

<sup>308</sup> Adeleye op cit note 286 at 7.

<sup>309</sup> As per section 3(a-f) of the CPC Act; Adeleye op cit note 286 at 8.

<sup>310</sup> Adeleye op cit note 286 at 8.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Adeleye op cit note 286 at 9; Emmanuel C Ndubisi et al 'Protecting the Nigerian Consumer: An Expository Examination of the Role of the Consumer Protection Council' (2016) 4(3) *International Journal in Management and Social Science* 540.

<sup>314</sup> Monye op cit note 285 at 392; Obumneme-Okafor 2014 op cit note 298 at 15.

<sup>315</sup> Akhigbe op cit note 302 at 730.

a role in the Council's problems.<sup>316</sup> However, perhaps more pressing was the fact that the Council's functions overlapped with other frameworks acting in terms of legislation.<sup>317</sup> For example, some of the SON's functions overlapped with the Council's; both SON and CPC were empowered to standardise products and the SON can also hear and investigate consumer complaints.<sup>318</sup> The fact that there was no clear guidance in national legislation regarding how to navigate these overlaps added an element of complexity to the consumer protection regime.<sup>319</sup> This coupled with the already high illiteracy rate undoubtedly deterred consumers from attempting to obtain redress.

In addition, consumers are also able to seek enforcement in the civil courts either through tort or contract-based actions.<sup>320</sup> There are major issues however with relying on these methods as the sole way in which consumers are able to obtain effective redress. For a contractual claim to succeed, there needs to be a contractual relationship between the supplier and the consumer.<sup>321</sup> Moreover, the viability of consumers relying on contract law has also been reduced considering the fact that the Nigerian courts have handed down conflicting decisions as to the acceptability of exemption clauses that protect parties even in cases of a fundamental breach of contract.<sup>322</sup>

Resorting to a negligence claim in the tort law is also not the best of choices as it is difficult for a consumer to prove that the supplier acted with fault in the context of product liability.<sup>323</sup> The Nigerian courts have not lowered the standard for consumers and thus often consumers were left without a remedy.<sup>324</sup> In fact, Ekanem has asserted that the concept of consumer protection has failed to be properly acknowledged by the courts.<sup>325</sup> Bello et al have noted that the judiciary's stance of strict adherence to legal rules when dealing with consumer issues has been one of the contributing factors

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<sup>316</sup> Obumneme-Okafor 2014 op cit note 298 at 10-11.

<sup>317</sup> Akhigbe op cit note 302 at 731.

<sup>318</sup> Adeleye op cit note 286 at 9.

<sup>319</sup> Akhigbe op cit note 302 at 731.

<sup>320</sup> Monye op cit note 285 at 374.

<sup>321</sup> Akhigbe op cit note 302 at 725.

<sup>322</sup> Ibid at 726.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ekanem op cit note 296 at 38.

adding to a low level of consumerism in Nigeria.<sup>326</sup> This means that individuals who sought to obtain redress from the courts were often left without much prospects of success; meaning that Nigeria's previous system heavily relied on agencies and regulatory bodies to provide for a level of consumer protection.

#### 5.2.2.1 Relevance in a South African context

What is clear from the background sketched out above is that barriers were placed preventing most consumers from seeking redress on their own behalf. This was evident firstly from the approach of the civil courts which narrowly defined tort-and-contract-based claims for consumers. Additionally, redress from a civil court is prohibitively expensive for most Nigerian consumers.<sup>327</sup> This negative effect was compounded by the small number of specialised redress mechanisms, as the main forums available to consumers were the State Committee, the Council, sector-specific regulatory authorities, or the civil courts. The lack of other alternative dispute mechanisms such as specialised tribunals was widely critiqued by scholars.<sup>328</sup> Given the fact that the Council was not prompt in initiating investigations, this left consumers with few options. This is particularly the case as there did not seem to be a way in which consumers could compel these entities to take any action after making a complaint.<sup>329</sup> This is because s 8(a) and (b) of the CPC Act mandated that a consumer may only approach the court after the complaint has been investigated by the CPC or State Committee and the consumer has made it clear that there has been an infringement of their rights.<sup>330</sup> Not only was this an onerous burden to place on the consumer, it may have constituted a real barrier that prevented consumers from obtaining sufficient redress.

Instead, Nigeria largely relied on regulatory bodies to enforce its consumer laws. As seen from the above analysis, the performance of Nigeria's main regulatory body, the Council, has not been particularly successful in a number of respects. This has been attributed to underfunding, lack of awareness, illiteracy, and lack of roads that

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<sup>326</sup> Bello op cit note 300 at 74.

<sup>327</sup> Dahiru Jafaru Usman et al 'An Inquiry on the Affordability of Legal Services and the Appropriateness of the Regular Courts for Consumer Redress' (2016) 7(2) *Beijing Law Review* 91.

<sup>328</sup> Adeleye op cit note 286 at 12; Monye op cit note 285 at 392; Bello op cit note 300 at 77.

<sup>329</sup> Ekwoma op cit note 296 at 256.

<sup>330</sup> Bello op cit note 300 at 76.

would provide rural communities access to these institutions. Since South Africa faces similar problems, the NCC could arguably face similar obstacles should it attempt to take on a more central role in the enforcement of consumer law. It is arguable that this case study illustrates the pitfalls of relying on under-funded regulatory bodies where the population is particularly vulnerable. Instead of giving the NCC a central role, it is arguable that the avenues of redress should be opened up in South Africa. This would include allowing consumers to approach the small claims courts in the first instance as this would provide greater access to justice for rural communities and giving the consumer a greater degree of flexibility so that they need not exhaust all of the avenues of redress in the CPA. This is not to say that a well-funded regulatory body could not also solve the issue. However, it is not clear whether South Africa has the resources to fund the NCC to the level where it could play this preventative role successfully.

On top of this, the fact that Nigeria had many different regulatory agencies with overlapping functions has also been critiqued.<sup>331</sup> The fact that there were no clear mechanisms and clear guidelines regarding what is the appropriate avenues of redress in combination with the high illiteracy rates and low consumer awareness further dissuades consumers from seeking out redress. On top of this, there was no clear hierarchy indicating when a consumer should approach the State Committee, the Council, the court, or the sector-specific authorities. Although not to the same degree, South Africa has a similar problem that has been touched upon in chapter 3 in this dissertation. The fact that there are many redress mechanisms provided for in the CPA yet no clear hierarchy or definitive interpretation of s 69 of the Act also probably adds to a consumer's uncertainty when bringing a case against a supplier. Thus, it is submitted that amendments be made so that there are clear guidelines in plain language to empower consumers to be able to seek out redress without the need to first obtain legal advice.

### 5.2.3 The current position under the FCCPA

The introduction of the FCCPA has brought with it new bodies to assist in regulating consumer affairs: the Federal Competition and Consumer Protection Commission ( "the

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<sup>331</sup> Akhigbe op cit note 302 at 731.

Commission”) as well as the Competition and Consumer Protection Tribunal (“the Tribunal”).<sup>332</sup> Another noticeable development has been the introduction of rights for the consumer in Part XY of the Act.<sup>333</sup> In addition to this, the Act importantly introduces comprehensive competition regulation in Nigeria, however, the following discussion will focus on the developments concerning consumer protection.

The Commission has a number of responsibilities; the most important of which is the responsibility of ensuring that every Nigerian citizen has access to safe products and that all consumer's rights are secured.<sup>334</sup> Other noticeable responsibilities of the Commission include performing an adjudicatory role, advising the government on matters concerning consumer protection for the purposes of forming national policies, and enforcing both the FCCPA and any regulations made in terms of the Act.<sup>335</sup> The Commission has wide powers to carry out these responsibilities.<sup>336</sup> These powers include making regulations, preventing the circulation of public hazardous goods and services, regulating charges and fines, issuing public notices regarding health hazards involving consumer goods, and ensuring that quality tests are carried out if needed.<sup>337</sup> When performing its adjudicative role and a decision has been reached, this decision is registerable as a consent order in a court of competent jurisdiction. An award of damages to the complainant may be included in such consent orders.<sup>338</sup>

The main purpose of the Tribunal is to adjudicate matters that arise in terms of the FCCPA.<sup>339</sup> The Tribunal is empowered to hear appeals from the Commission and can review a decision from any sector-specific authority that concerns consumer and/or competition issues.<sup>340</sup> However, s 47(2) of the Act qualifies this slightly by stating that a review of a sector-specific authority must first be heard by the Commission before a Tribunal may adjudicate on the matter. If a supplier is found to have failed to comply

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<sup>332</sup> Eno-Obong Akpan ‘A Comparative Analysis of Consumer Protection Framework in Nigeria, United States of America and South Africa’ (2019) 1(2) *International Journal of Comparative Law and Legal Philosophy* 136.

<sup>333</sup> Ekanem and Essien op cit note 288 at 21.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Section 17-18 of the FCCPA; Ekanem and Essien op cit note 288 at 21.

<sup>337</sup> Section 18 of the FCCPA; Ekanem and Essien op cit note 288 at 19.

<sup>338</sup> Section 150 of the FCCPA; Okojie and Bolu op cit note 291.

<sup>339</sup> Akpan op cit note 332 at 136.

<sup>340</sup> Section 47(1)(a) and (b) of the FCCPA; Ekanem and Essien op cit note 288 at 20.

with the Tribunal's interim order or contravened the Act, the Tribunal can impose an administrative penalty of up to 10% of the supplier's annual, domestic turnover, and exports in the preceding year.<sup>341</sup> If there is no other way to remedy prohibited conduct or there is repeated prohibited conduct, the Tribunal may also order a party to divest its shares from a company.<sup>342</sup> Although an order of the Tribunal is binding on the parties, for enforcement purposes the order must be registered with the Federal High Court.<sup>343</sup> Appeals of the Tribunal's decisions are heard at the Court of Appeal.<sup>344</sup> However, s 146(2) of the FCCPA still allows consumers to approach a court to seek redress in the first instance.<sup>345</sup> The fact that courts still play a prominent role means that there is still the need for the attitude of the courts to become more consumer-friendly.<sup>346</sup>

In addition, consumers are still provided with protection under the general law in terms of contract or tort law.<sup>347</sup> However, as noted previously, the success of following such routes will probably not be great given the hurdles that consumers are faced with when attempting to enforce their rights through contract or tort law. Thus, the mechanisms in terms of the FCCPA and the hierarchy need to be as consumer-friendly as possible in order to foster access to justice for Nigerian consumers.

#### 5.2.3.1 Relevance in a South African context

This piece of legislation is new and thus its efficacy is still unclear. However, on the face of it there seems to be some identifiable improvements in Nigeria's enforcement procedure for consumer-related issues. Firstly, the creation of a specialised tribunal that deals with consumer issues has been a welcome development that has been called for by many academics. Moreover, the FCCPA marks a move away from a sector-specific consumer regime towards a more generalist enforcement agency, meaning that there will be fewer duplications of regulatory bodies' functions while also providing for more efficiency in the enforcement process.<sup>348</sup>

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<sup>341</sup> Section 51 of the FCCPA.

<sup>342</sup> Section 52 of the FCCPA.

<sup>343</sup> Section 54 of the FCCPA; Akhigbe *op cit* note 302 at 139.

<sup>344</sup> Section 55 of the FCCPA.

<sup>345</sup> Ukwueze and Onubuleze *op cit* note 287 at 146.

<sup>346</sup> Akpan *op cit* note 332 at 140.

<sup>347</sup> Ukwueze and Onubuleze *op cit* note 287 at 141.

<sup>348</sup> Ekanem and Essien *op cit* note 288 at 24.

Secondly, the new hierarchy that is imposed in terms of the FCCPA is somewhat clear. It is evident from reading the Act what forums are available to the consumer should they want to institute action against a supplier. As per s 146(1) of the FCCPA, in the first instance, the consumer must approach either the Commission or an applicable sector-specific regulatory authority.<sup>349</sup> If the consumer chose to directly approach the sector-specific regulatory authority, then the consumer may approach the Commission in the second instance.<sup>350</sup> Only after a matter has been heard by the Commission is the consumer permitted to approach the Tribunal.<sup>351</sup> Appeals from the Tribunal are heard in the Court of Appeal as per s 55 of the Act.

Thus, overall it is clear that there is a clear hierarchy that a consumer must follow when seeking to enforce their rights in terms of the FCCPA. As touched on briefly already in this chapter, it is clear that such procedures need to be clear without ambiguity in the legislation itself, particularly in Nigeria's context where illiteracy levels are so high. Although the route is set out across various chapters of the legislation, the pathway is clear upon a closer reading thus the Act will hopefully enable the consumer to better navigate these systems.

More than this, the hierarchical system that is proposed in Nigeria offers consumers a degree of flexibility. This is because the consumer can decide to head straight to the Commission and bypass the sector-specific authority should they find it to be more appropriate. Additionally, in terms of s 146(2) of the FCCPA, a consumer may decide to enforce their rights in terms of the FCCPA in a court of law instead of going through the stipulated procedure as set out in the paragraph above.<sup>352</sup> The degree of flexibility that is provided for in the Act allows the consumer to decide which avenue would be most appropriate given the nature of the complaint. For example, if a particular consumer has a complaint for a larger amount of money and the consumer can afford to take the matter to court, the consumer is empowered to directly approach

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<sup>349</sup> Ekanem and Essien op cit note 288 at 22.

<sup>350</sup> Section 147 of the FCCPA.

<sup>351</sup> Section 47(1)(a) and (b) read with section 47(2) of the FCCPA.

<sup>352</sup> Although the high degree of flexibility in section 152 has been criticized by the Ekanem and Essien op cit note 288 at 22. This is because this section permits a consumer to obtain compensation or restitution from a court in addition to any address the Commission imposes.

the civil courts. While this may lead to a degree of forum shopping, it is submitted that this approach should be preferred to that one that limits the options for individual consumers. This is particularly so in countries where regulatory bodies are not well-financed and thus the consumer often needs to enforce their rights themselves.

Bearing in mind the above, it is put forward that South Africa should take note and possibly implement amendments to replicate the hierarchy set out in Nigeria's new Act. The clear hierarchy alongside some flexibility would provide the consumer with a greater number of options and with a greater sense of certainty. Thus, a clearer hierarchy of how a consumer should progress and perhaps greater flexibility to allow consumers to be able to approach the courts in certain circumstances should be provided for in the CPA. Suggestions of the possible amendments to the CPA will be contemplated in the final chapter of this dissertation.

## 6. COMPARATIVE ANALYSIS OF INDIA'S APPROACH TO CONSUMER PROTECTION

Having considered Nigeria's consumer protection regime, this chapter will now look to India's regime to assess whether there is anything of relevance that should be implemented in South Africa.

### 6.1 The reason why India was chosen for a comparative study

The reason why India has been chosen for a comparative study is because the country's relevant demographics are similar to South Africa when it comes to the average consumer. Similar to both Nigeria and South Africa, the average consumer in India is illiterate and unaware of their rights as a consumer.<sup>353</sup> In India, as estimated by the World Bank, 37% of the population lives on less than \$1.25 US dollars a day.<sup>354</sup> This makes it a good candidate for comparison as it faces similar challenges to South Africa in ensuring its consumers are adequately protected. Consequently, the solutions that the country has put in place could be instructive from a South African perspective.

While there have been numerous pieces of commentary regarding India's consumer protection measures, this chapter will focus on the critiques relating to mechanisms by which consumers can obtain relief and not on the substantive law.

### 6.2 India's Consumer Law

#### 6.2.1 Introduction to India's consumer law

The main consumer protection law in India is the Consumer Protection Act of 2019 ("2019 Act"). Alongside this law, many other laws seek to regulate specific aspects of consumer life, such as the Prevention of Food Adulteration Act of 1954, the Essential Commodities Act of 1955, and the Prevention of Black Marketing and Maintenance of

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<sup>353</sup> Dr Md Irshadun Nabi and Dr Mohammed Kamalun Nabi 'Consumer Protection: New Age Challenges' (2019) 40(5) *Orissa Journal of Commerce* 66.

<sup>354</sup> Keertichandra Rajan et al 'Is Wealthier Always Healthier in Poor Countries? The Health Implications of Income, Inequality, Poverty, and Literacy in India' (2013) 88 *Social Science & Medicine* 99.

Essential Supplies Act of 1980.<sup>355</sup> The main piece of consumer legislation, the Consumer Protection Act of 2019, has recently repealed the Consumer Protection Act of 1986 (“1986 Act”).<sup>356</sup> This new Act's purpose is to better protect consumer interests, inter alia by establishing certain authorities to settle disputes in a speedier and more efficient manner.<sup>357</sup> In doing so, this new 2019 Act has made substantial changes to the unique consumer redress mechanisms put in place by the previous Act.

### 6.2.2 The position under the previous 1986 Consumer Protection Act

The 1986 Act created two main unique consumer bodies to help better the affairs of consumers.<sup>358</sup> Most noticeably, the Act made provision for special courts known as Consumer Dispute Redressal Forums. These special courts had a hierarchy of three different levels where the matter can be appealed: the National Commission at the union level (the highest level), State Commission at the state level, and the District Forum at the lowest level.<sup>359</sup> The District forums were the most accessible, with one in each district in India.<sup>360</sup> This separate consumer mechanism was put in place to both simplify and expedite consumer issues.<sup>361</sup> To ensure this efficiency, s 13(3A) of the 1986 Act set a limit of 90 days to dispose of a case where no lab testing of products was required, and in cases where testing was not required, the limit was set at 150 days.<sup>362</sup>

In addition, the 1986 Act also made provision for Consumer Protection Councils.<sup>363</sup> These councils also had three different levels: District level (the lowest level), State level, and lastly Centre level (the highest level). Prashad notes that the

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<sup>355</sup> Dr A Rajendra Prasad ‘Historical Evolution of Consumer Protection of Consumer Protection and Law in India: A Bird’s Eye View’ (2008) 11(3) *Journal of Texas Consumer Law* 134; Krishna Bharadwaj Hotur ‘Consumer Protection in India: Need for Structured Reforms’ (2018) 7(3) *European Online Journal of Natural and Social Sciences* 222.

<sup>356</sup> MZM Nomani et al ‘Consumer Protection Act, 2019 and its implications for the medical profession and health care services in India’ (2019) 41(4) *Journal of Indian Academy of Forensic Medicine* 282.

<sup>357</sup> Dr Aneesh V Pillai ‘Promises and Nuances of Consumer Protection Act, 2019: A Birds Eye View’ (2020) 2 *Consumer Protection Reporter* 336.

<sup>358</sup> Nabi and Nabi op cit note 353 at 67.

<sup>359</sup> Nabi and Nabi op cit note 353 at 67; Anupam Goyal ‘Consumer Protection Act, 1986: Structural Loopholes in Consumer Courts’ Constitution – A Brief Analysis’ (1999) 41(2) *Journal of Indian Law Institute* 273.

<sup>360</sup> Gurjeet Singh ‘Business Self-Regulation and Consumer Protection in India: A Critique’ (1993) 16 *Journal of Consumer Policy* 5.

<sup>361</sup> Goyal op cit note 359 at 273.

<sup>362</sup> Sheetal Kapoor ‘Effectiveness of Consumer Forums in India’ (2019) 6(1) *Journal of Indian Economy* 75.

<sup>363</sup> Singh op cit note 360 at 8.

purpose of these councils was to advise the government regarding possible improvements after reviewing consumer-related policies.<sup>364</sup>

The 1986 Act also had some provisions that were in place to make it procedurally easier for a consumer to bring a claim in comparison to procedures required to bring a claim in the civil courts. For example, lawyers were not required in Consumer Forums, and instead, consumers were able to represent themselves on their election.<sup>365</sup> In addition, some of the requirements in terms of the procedural law were relaxed and simplified to foster greater access to justice. For example, the traditional principles regarding *locus standi* were relaxed to allow for consumer organisations to file complaints.<sup>366</sup>

Despite the introduction of these unique consumer mechanisms in the 1986 Act, there were still many problems associated with these mechanisms that prevented consumers from effectively obtaining justice. Most significantly, the previous Act was severely criticised on the ground that the Consumer Forums were simply unable to attain their stated objective: speedy and simple consumer redress.<sup>367</sup> On average consumers experienced a delay of 16 and a half months from the date of filing their consumer complaint.<sup>368</sup> Additionally, there was a huge backlog of cases. Kapoor notes that from the Act's inception until July of 2018 more than 420 000 cases had pended at different consumer dispute mechanisms.<sup>369</sup> Moreover, the redress available has also been described as costly; with 82% of complainants' costs going towards a lawyer's fee.<sup>370</sup>

There were also severe complications with the efficacy of the Consumer Protection Councils as well as a general lack of consumer awareness regarding the existing redress methods despite the fact that the 1986 Act provided for consumer education.<sup>371</sup> These issues greatly increased calls for a greater number of redress

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<sup>364</sup> Sections 6, 8, and 8B of the 1986 Act; Kapoor op cit note 362 at 70.

<sup>365</sup> Prasad op cit note 355 at 135.

<sup>366</sup> Ibid.

<sup>367</sup> Pillai op cit note 357 at 485.

<sup>368</sup> Ibid.

<sup>369</sup> Kapoor op cit note 362 at 69.

<sup>370</sup> Pillai op cit note 357 485.

<sup>371</sup> Ibid at 486.

avenues and/or options available to consumers through which disputes could be resolved.<sup>372</sup> Thus, the 2019 Act sought to get rid of these issues that are associated with the old system.

### 6.2.3 The current position under the new 2019 Act

The 2019 Act has maintained the Consumer Forums; however, they are now referred to as Consumer Dispute Redressal Commissions. As per the 2019 Act, there will now be a Commission on the National level, State level, and District level.<sup>373</sup> To add to this, mediation cells will be attached to every Commission.<sup>374</sup> Once a matter is before the Commission, should it feel that mediation could be suitable in the circumstances and the parties consent, the dispute can be referred for mediation.<sup>375</sup> Thus, mediation, an additional form of obtaining redress, has been introduced through this Act and has arguably been put in place with the notion of speeding up the process of redress.<sup>376</sup> Overall, this new Act has created more avenues of redress whilst also encouraging the resolution of disputes through alternative dispute mechanisms.

The 2019 Act has also maintained the Consumer Protection Councils at the District, State, and Central levels.<sup>377</sup> A noticeable change however is that the monetary limits for each Commission have been increased substantially in comparison to the limits in place under the 1986 Act.<sup>378</sup> In addition, the 2019 Act also permits parties to choose whether to go to the District Commission where they reside or at their place of work; increasing the ways in which consumers can obtain jurisdiction.<sup>379</sup> These changes allow for greater jurisdictional reach of the Commissions thus making it easier for consumers to obtain redress at the District Commission of their choice at a lower cost. Moreover, other procedural requirements have been further relaxed. For example,

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<sup>372</sup> Prasad op cit note 355 at 135.

<sup>373</sup> Vipin Kumar and Adya Sharma 'Strengthening Consumer Rights: The Advent of Consumer Protection Act, 2019' (2019) 156(2) *SEBI and Corporate Laws* 4.

<sup>374</sup> Kumar and Sharma op cit note 373; Pillai op cit note 357 at 488.

<sup>375</sup> Section 37(1) and (2) of the 2019 Act; Pillai op cit note 357 at 488.

<sup>376</sup> Kumar and Sharma op cit note 373 at 7; Pillai op cit note 357 at 488.

<sup>377</sup> Sections 3(1), 6(1), and 8(1) of the 2019 Act.

<sup>378</sup> Section 58(1), 47(1), and 34(1) of the 2019 Act.

<sup>379</sup> Section 34(2) of the 2019 Act; Kumar and Sharma op cit note 373 at 7; Pillai op it note 357 at 488; Dr G Nedumaran et al 'Consumer Protection Act: An Overview' (2020) 10(10) *Mukt Shabd Journal* 293.

on sufficient cause shown, complaints can now be filed electronically and be heard via video conferencing.<sup>380</sup> This could arguably increase access to justice further as it presumably could allow those who might not be able to physically access a Commission to obtain relief.

Arguably the most prominent change brought by the Act has been the creation of the Central Consumer Protection Authority (“CCPA”).<sup>381</sup> This has been created to act as a regulatory and investigatory body.<sup>382</sup> For this body to regulate effectively, the Act makes provision for an investigatory wing to inquire into or investigate consumer complaints should they have an impact on consumers as a class, although the body can also investigate *mero meru* on issues that affect consumers as a class. This avenue is available in instances where it is alleged that a supplier has either violated a right of a class of consumers, has made a misleading or false advertisement, or has committed an unfair trade practice against a class of consumers.<sup>383</sup>

The body does so by firstly discerning whether there is a *prima facie* case of an infringement of the Act through a preliminary inquiry.<sup>384</sup> If so, then the matter is investigated by an official in the CCPA or, if appropriate, through one of the Regulators established through another law.<sup>385</sup> After the investigation, if there is enough evidence, the CCPA may impose an order. These orders include recalling goods or withdrawing services should they be unsafe, reimbursing a consumer for goods if these goods are unsafe, and lastly discontinuing any practices deemed unfair or prejudicial to consumers.<sup>386</sup> In addition, the body can also impose penalties including the imposition of prison time up to two years or a fine of 10 lakh rupees for false and misleading marketing.<sup>387</sup> The CCPA is also able to intervene in the processes at any of the Consumer Dispute Redressal Commissions.<sup>388</sup>

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<sup>380</sup> Section 38(6) of the 2019 Act; Nedumaran op cit note 379 at 296.

<sup>381</sup> Sections 15(1) and 18(1)(a) of the 2019 Act; Kumar and Sharma op cit note 373 at 1.

<sup>382</sup> Ibid.

<sup>383</sup> Pillai op cit note 357 at 489.

<sup>384</sup> Section 19(1) of the 2019 Act.

<sup>385</sup> Sections 19(1) and (2) of the 2019 Act.

<sup>386</sup> Section 20 of the 2019 Act.

<sup>387</sup> Sections 21(1), (2), (3), and (4) of the 2019 Act.; Kapoor op cit note 362 at 77.

<sup>388</sup> Section 18(1)(c) of the 2019 Act.; Kumar and Sharma op cit note 373 at 6.

One of the greatest changes is that this process has effectively led to the creation of class actions in India as now the CCPA can initiate class action suits against suppliers *mero meru* or on a consumer's filing of a complaint.<sup>389</sup> This has largely been seen as one of the highlights of the Act as it allows a large number of consumers to obtain justice in a single action specifically for consumer issues.<sup>390</sup> Hence, it has the potential to drastically increase access to justice for Indian consumers. However, it is unclear what redress individual consumers may have if their complaint does not affect the interests of consumers as a class. On a plain reading of the legislation, it appears that the CCPA does not cater for individual complaints, meaning that the capacity of the regulatory body to relieve the financial burden of vindicating the rights of individual consumers is somewhat tempered.

The CCPA has many other functions and tasks including that it must promote research and awareness of consumer rights as well as being able to review any of the factors inhibiting the enjoyment of consumer rights.<sup>391</sup> It can also issue alert notices to consumers regarding unsafe products as well as issue guidelines to protect consumers' interests.<sup>392</sup> The wide powers of the CCPA in combination with the fact that it relieves consumers of expense, time, and effort in vindicating their rights, means that there is the potential of greatly increasing the realisation of the consumer's interest. This is especially true given the limited resources of the average Indian consumer.

#### 6.2.4 Other existing mechanisms through which Indian consumers could vindicate their rights

In addition to the 2019 Act, there are other pre-existing mechanisms, such as tort law and contract law, through which Indians are able to seek alternative redress for consumer disputes.

Contract law, like in most jurisdictions, stumbles in its effectiveness in regulating consumer-supplier relations due to the fact that in many cases there is no

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<sup>389</sup> Kapoor op cit note 362 at 77.

<sup>390</sup> Pillai op cit note 357 at 489.

<sup>391</sup> Sections 18(1)(c) and (d) of the 2019 Act; Pillai op cit note 357 at 489.

<sup>392</sup> Sections 18(i) and (j) of the 2019 Act.

contractual relationship between the person at fault (the manufacturer) and the person who suffered the loss (the consumer) as the consumer only often does business with the retailer.<sup>393</sup>

While tort law gets around this problem and can be resorted to if one were to suffer damage as a result of a product, this avenue does not make accommodations in cases where there is no fault or where the supplier's fault is difficult to prove.<sup>394</sup> These civil law remedies are not often resorted to and have not been readily resorted to since the 1986 Act came into force. This is because these remedies are often more expensive for a consumer than the consumer routes,<sup>395</sup> especially given the fact that most times consumer claims are not for a substantial amount of money. Additionally, the principles regarding product liability have been relaxed in the 2019 Act since there are now additional grounds to satisfy a claim rather than fault, and actions can be brought against manufacturers and sellers.<sup>396</sup> Thus, although these other mechanisms remain available in theory, practically speaking they offer no real form of protection for Indian consumers.

### 6.3 Key takeaways from the Indian consumer legal system that could be applicable in a South African context

#### 6.3.1 Potential success of placing an emphasis on a regulator to deal with consumer issues

Although the 2019 Act has only recently been implemented, the likely success and stumbling blocks of the new system can be somewhat predicted. Accordingly, predictions on the likely success of the 2019 Act will be made and what South Africa should take away and implement in its consumer protection system.

There is some indication that the CCPA could be very effective in protecting consumers' rights. This is because the CCPA is publicly funded and does not require

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<sup>393</sup> Hotur op cit note 355 at 222.

<sup>394</sup> Hotur op cit note 355 at 222; Goyal op cit note 359 at 273.

<sup>395</sup> Hotur op cite note 355 at 222.

<sup>396</sup> Chapter VI of the 2019 Act.

consumers to individually vindicate their rights. As alluded to above, the CCPA can file and investigate consumer complaints, and thereafter impose penalties for breaches of the interests of consumers as a class. These proactive measures undoubtedly relieve some of the burden placed on consumers to vindicate their own rights. The reason why this measure could potentially be so effective is that many Indian consumers simply do not have the means nor the awareness to vindicate their rights on their own. Thus, given that the average South African consumer is also illiterate and is within a low-income bracket, this suggests that a greater focus should move to South Africa's regulatory consumer body (the NCC).

However, while in theory, the outlook of the CCPA's effectiveness seems positive, there are some indications that this body may not be as effective as predicted given the limited resources that can be directed to consumer issues. Some have pointed out that one of the greatest reasons why the previous 1986 Act was ineffective was due to underfunding.<sup>397</sup> In 2016, the Supreme Court formed a committee to monitor the functioning of India's consumer forums.<sup>398</sup> In this examination, it was uncovered that the state failed to maintain the various forums with basic needs such as lights and fans in courtrooms. In addition, there were additional issues with the forums: there was often an insufficient number of stenographers, no provisions were made for the adequate storage of files, and the necessary maintenance was simply not taking place on the buildings.<sup>399</sup> This either indicates the state's lack of resources or shows a lack of will. In either case, it is clear that a future project's hope may be dashed if these concerns cannot be adequately addressed.

In addition to this, there has been some critique that the plans to add mediation cells to every Consumer Commission will be in and of itself a difficult task for the government as there is a lack of infrastructural facilities for these Commissions.<sup>400</sup> Given the fact that the additional mechanisms provided for in the 2019 Act are an even greater drain on the country's resources, it is unclear how effective the CCPA will be able to be in carrying out its mandate. This is a similar pattern as established in the previous chapter concerning Nigeria; it seems that some developing countries simply

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<sup>397</sup> Hotur op cit note 355 at 230.

<sup>398</sup> Ibid at 228.

<sup>399</sup> Ibid at 229.

<sup>400</sup> Nedumaran op cite note 379 at 296.

do not have the resources to properly make use of these regulatory bodies to the extent needed for consumers to fully vindicate their rights. Thus, it is arguable that it is advisable for South Africa to ensure that it is as easy as possible for consumers to realise their rights on their own volition. This would prevent consumers from having to rely on these regulatory bodies to fully realise their rights.

On the other hand, perhaps the fact that India's regulatory body only caters for class actions is an acknowledgement of the fact that the CCPA may not have the capacity to proactively realise the rights of individual consumers. Meaning that the CCPA's actual role in advancing consumer interests may be confined and less pervasive than similar regulatory bodies in other countries. Nevertheless, this body does have a mandate that is broader than the NCC's current policy of pursuing only a couple of industry issues a year in South Africa. Thus, India's regulatory body could arguably play a larger role in advancing consumer interests than its South African counterpart. Perhaps South Africa should follow suit as this could be a way to balance the need to advance consumer interests and the limited resources of the country. However, this is arguably still insufficient to advance the consumer interests of South Africans as a whole and thus it is still maintained, as stated previously, that avenues for individuals to realise their rights be made broader and easier for consumers to access.

### 6.3.2 The creation of multiple avenues of redress

The 2019 Act seemingly realises this as it does make it easier for consumers to realise their rights through the introduction of an additional avenue of redress: mediation. This suggests that Indian policymakers have theorised that the creation of additional avenues of redress may foster greater access to justice. This is in line with the position in South Africa where there are many alternative dispute mechanisms available in terms of the CPA. However, perhaps something that can be taken away from this is that the forum to approach is clear in the 2019 Act. The Commission is the one that refers the consumers to mediation if it would be appropriate to do so. While such a simple procedure would not work in South Africa where there are multiple redress forums, the clear nature of the Indian process does make it easier to obtain redress. Thus, it does drive home the point made earlier: South Africa's redress procedure needs to be made simpler.

However, while it is laudable that India has created another redress forum, this is arguably not enough. This insufficiency is particularly the case for those residing in more secluded or rural areas as even the District Forums usually only deal with the needs of a small proportion of urban consumers.<sup>401</sup> Nabi argues that additional lower-level forums situated in rural areas should be created to deal with this problem, particularly in cases where the amount the consumer is claiming for is low.<sup>402</sup> This is similar to the situation in South Africa where access to justice for rural consumers is difficult. Hence, why this paper has previously stated, in a similar vein to Nabi, that the small claims courts should be made available to assist vulnerable South African consumers in these types of situations.

Conversely, Nabi argues that impediments to the realisation of consumer rights within rural areas can also be explained by the general lack of awareness regarding the consumer laws and mechanisms.<sup>403</sup> Awareness needs to be fostered in order for these consumers to adequately comprehend how to go about vindicating their rights. Nabi suggests that there should be councils especially for villages so that the 'spirit of consumerism' can effectively penetrate rural areas as deeply as it has urban areas.<sup>404</sup> Nabi believes that in doing so awareness and overall consumer protection in India will increase.<sup>405</sup> However, she goes further to state that this alone is not enough as voluntary organisations in conjunction with this is required.<sup>406</sup> She states that should these voluntary organisations grow to become prominent enough then there would be little need for these particular councils. Thus, Nabi envisages the role of these councils to ideally be temporary.

Thus, Nabi also sees the encouragement of consumer organisations to be one main way in which to improve redress for consumers, particularly if these organisations create a presence in rural areas.<sup>407</sup> Singh has noted that as far back as 1993 consumer organisations have already played a large role in filing a large number of successful

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<sup>401</sup> Nabi and Nabi op cit note 353 at 69.

<sup>402</sup> Ibid at 73.

<sup>403</sup> Ibid at 68-9.

<sup>404</sup> Ibid at 72.

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

<sup>407</sup> Nabi and Nabi op cit note 353 at 69; Kapoor op cit note 362 at 78.

complaints on behalf of Indian consumers.<sup>408</sup> Not only can these organisations vindicate the rights of consumers, they can also educate them.<sup>409</sup> However, Nabi points out that there are only around 500 voluntary organisations which is grossly out of proportion to the high population rate in India.<sup>410</sup> Thus, these organisations should be encouraged to both move into rural areas and also promote awareness.<sup>411</sup> Nabi also argues that this, in combination with social media education campaigns targeted to those in rural areas, would be a real way to educate and empower those from rural backgrounds.<sup>412</sup>

South Africa, like India, also makes provision for these types of consumer organisations to bring cases.<sup>413</sup> However, at present, the role of consumer organisations in South Africa is extremely limited as they are not well resourced.<sup>414</sup> One of the two main known consumer organisations that is committed solely to consumer protection does not have a functioning website, indicating that perhaps it is not extremely effective.<sup>415</sup> However, this is not to say that there is no potential that this could grow given the right amount of encouragement. The success of other organisations that specialise in social justice, such as the Black Sash, indicate this potential.<sup>416</sup> Perhaps until this is the case, the temporary creation of councils in rural areas seeking to educate and encourage consumer organisation growth could be one method in which to do this. The overall solution is a seemingly viable one given that the council's role would only temporarily drain resources. This would be in conjunction with social media campaigns as referred to earlier as this would be less resource-intensive than conventional methods of raising awareness (such as seminars through the radio and TV).<sup>417</sup>

Lastly, the 2019 Act's provision for video conferencing and filing complaints electronically, while undoubtedly opening up the avenues of redress for consumers, may not be the most effective method in a South African context. This is due to the fact

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<sup>408</sup> Singh op cit note 360 at 2 and 8.

<sup>409</sup> Nabi and Nabi op cit note 353 at 69.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid at 72.

<sup>412</sup> Ibid at 71.

<sup>413</sup> Section 35 of the 2019 Act; Section 4 of the Consumer Protection Act (South Africa).

<sup>414</sup> Naude and Barnard op cit note 6 at 584.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

<sup>417</sup> Nabi and Nabi op cit note 353 at 72.

that making use of video conferencing for an entire redress process would use up an extremely large amount of data. This may be a stumbling block as the cost of data in South Africa is extremely high. In addition, many rural areas in the country simply do not have access to stable internet access.<sup>418</sup> This means that this method may not be the most effective for increasing access to justice, particularly for those residing in rural areas in South Africa. Nevertheless, it may be of assistance to those in the middle class or those that have internet access. Hence, it is arguable that there would be no harm in making provision for such allowances at the consumer's discretion. The recent Covid-19 pandemic also points to a need for alternative arrangements should they be feasible for the consumer.

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<sup>418</sup> Hutchison op cit note 7 at 476; Naude and Barnard op cit note 6 at 581.

## 7. CONCLUSION AND SUGGESTIONS FOR POSSIBLE AMENDMENTS TO THE CPA

### 7.1 Suggested amendments

As shown from the case study of both Nigeria and India, and also in the context of South Africa, placing too much emphasis on a regulatory body to vindicate rights is not a viable strategy through which to protect consumer rights due to the state's limited capacity. Bearing this in mind, it is pivotal that the individual ways in which to bring a case is made efficient and accessible to fully realise access to justice in South Africa.

To ensure this, some suggested amendments to the CPA will be submitted. Note that not all improvements that have been put forth will be covered here, instead the most pressing amendments will be discussed.

#### 7.1.1 Amendment to s 69 of the CPA

As discussed in chapter 3, one of the most pressing needs is the ability to go to the small claims courts in the first instance. Another need is a degree of added flexibility to the hierarchy in particular instances where the consumer would otherwise be left without recourse. This would be the case, for instance, in cases where a matter has failed to be resolved at MIOSA. Such a change would bring South Africa alongside other countries, such as Nigeria, that have provided the consumer with a degree of flexibility when vindicating their rights. Additionally, a clear pathway of the required route of redress is particularly important as consumers should not be required to obtain legal counsel when attempting to vindicate their rights in terms of the CPA. Lastly, the suggested amendment below also allows consumers who need to quantify damages access to the courts in the first instance as discussed in chapter 4.

#### “Enforcement of rights by consumer

Section 69. (1) A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by-

- (a) referring the matter in the first instance to:

- i) a small claims court with jurisdiction over the matter; or
  - ii) an applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud; or
  - iii) applying to a consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court; or
  - iv) referring the matter to another alternative dispute resolution agent contemplated in section 70;
- (b) after approaching at least one of the applicable avenues of redress in section 69(1)(a), filing a complaint with the Commission in accordance with section 71;
- (c) upon notice of non-referral by the Commission, proceeding to the Tribunal;
- i) however, should there be an allegation that either section 40, 41, or 48 has been contravened in terms of section 52, the Tribunal, provincial consumer court, or court must be approached in the first instance.
- (d) in the last instance, after all the other remedies in terms of national legislation have been exhausted, approaching any other court with jurisdiction of the matter other than those listed in section 69(1)(a)(i).

(2) Section 69(1)(d) shall not apply:

- (a) in cases where the quantum of damages is in issue. In such matters, a person seeking to enforce their rights must either approach a court with jurisdiction over the matter in the first instance or act in terms of s 115 of the CPA.
- (b) if the applicant can show that it would be in the interests of justice. In such cases, a person seeking to enforce their rights may be permitted to take a matter to a court with jurisdiction over the matter provided that at least one of the enforcement mechanisms in terms of section 69 has been approached.”

### 7.1.2 Amendment to s 52 of the CPA

An amendment to s 52 would also be required in order to make it clear that the Tribunal and consumer courts would also have jurisdiction over unfair contract terms as put forward in chapter 4 of this dissertation. This would mean that the consumer would not be obliged in the first instance to comply with the higher costs and formalities of court

despite the fact that principles of contractual fairness would be fairly easy for members of the Tribunal or provincial consumer courts to learn.

The addition of the word “Tribunal, and consumer courts” each time “court” is referred to in the section. For example: “Powers of court, *Tribunal, and consumer courts* to ensure fair and just conduct, terms and conditions.”

### 7.1.3 Amendment to s 115 of the CPA

Section 115 of the CPA should be amended to make it clear that a consumer, when choosing to act in terms of s 115, is entitled to approach the NCT in the first instance. In addition, s 115 would need to be amended to reflect the fact that a consumer may choose to directly approach the courts in the first instance where the quantum of damages is in issue.

“Section 115(2) A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct-

- a) ...
- b) if entitled to initiate a claim for damages, *and chooses to proceed to the Tribunal in the first instance*, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal...”

The rest of the section would read as it presently does.

### 7.2 A summary of other significant suggestions proposed in this dissertation

As stated previously, the NCC in South Africa does not appear to have the capacity to take a hands-on role in the resolution of consumer disputes as set out in the CPA. However, it is submitted that an added function comparable to the consumer regulatory body in India would be a realistic way in which to expand the role of the NCC to improve access to justice. Thus, it is submitted that the NCC, alongside investigating a couple of industry issues a year, should also be mandated to institute class action suits against suppliers either upon a filing of a complaint or *mero motu*.

Another suggestion that has been put forward in this dissertation is that, until the role of consumer organisations has grown in South Africa, is that councils in rural areas be created to encourage consumer organisation and educate consumers. This would only be a temporary measure and thus not drain too much of South Africa's resources. This education effect of this could be bolstered through social media campaigns.

### 7.3 Conclusion

Throughout the course of this dissertation, it has become clear that there are many areas of reform required to ensure that South Africa's consumer law enforcement mechanisms are able to actively ensure access to justice for consumers. As previously stated, this project is vitally important since rights, without a method of enforcement, are meaningless. Moreover, ensuring adequate enforcement is a pertinent issue given the fact that the CPA is a piece of legislation that strives to address South Africa's grave injustices of the past.

The two case studies explored in this paper have also indicated that it is likely that certain developing countries with fewer resources cannot solely rely on regulatory bodies to enforce the country's consumer law. Instead, both Nigeria's and India's body of consumer law have showcased the importance of a clear and somewhat flexible enforcement system that individual consumers can easily traverse.

While there have been many amendments and proposed suggestions put forward in this dissertation, one of the most vital is that the small claims courts be an avenue of redress for consumers in the first instance. This would ensure that a greater number of rural South Africans have access to a redress mechanism despite the fact that many of the alternative dispute mechanisms in the Act are located in cities. In addition, a clear hierarchy of enforcement mechanisms with a greater amount of flexibility in s 69 would ensure a more accessible and efficient system for consumers to navigate. Lastly, the CPA's position regarding damages and the court's sole jurisdiction regarding contractual fairness should also be altered. These changes would compensate for the NCC's lack of capacity as the consumer would be better empowered to obtain redress.

## 8. BIBLIOGRAPHY

### Primary Sources

#### Constitution

The Constitution of the Republic of South Africa, 1996.

#### Statutes: South Africa

Community Schemes Ombud Service Act 9 of 2011.

Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

Consumer Protection Act 68 of 2008.

Financial Sector Regulation Act 9 of 2017.

Foodstuffs, Cosmetics and Disinfectants Act of 54 of 1972.

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

Kwazulu-Natal Consumer Protection Act No 4 of 2013.

Measuring Units and National Measuring Standards Act of 1973.

National Credit Act 34 of 2005.

Prescription Act 68 of 1969.

#### Draft Green Papers and Regulations: South Africa

Draft Green Paper on Consumer Policy Framework GN 1957 in GG 266774 of 2004-09-09.

GN 817 in GG 38071 of 2014-10-17 (MIOSA).

GN 217 in GG 38637 of 2015-10-30 (CGSO).

GN 224 in GG 36253 of 2013-10-30.

#### Statutes: Nigeria

Consumer Protection Council Act 2004.

Federal Competition and Consumer Protection Act 2018.

Food and Drugs Act 1974.

Standards Organization of Nigeria Act 2015.

Trade Malpractices (Miscellaneous Offences) Act 1992.

Statutes: India

Consumer Protection Act of 1986.

Consumer Protection Act of 2019.

Essential Commodities Act of 1955.

Prevention of Black Marketing and Maintenance of Essential Supplies Act of 1980.

Prevention of Food Adulteration Act of 1954.

Cases: South Africa

*African Democratic Party v Electoral Commission* 2006 5 BCLR 579 (CC).

*Audi SA (Pty) Ltd v National Consumer Commission*

(NCT/4058/2012/101(1)(P)CPA) [2013] ZANCT 4 (21 January 2013).

*Beadica 231 CC v Trustees for the Oregon Trust* (2020) ZACC 13.

*Brad Green Cars CC v Breytenbach* (NCT/110467/2018/75(1)(b)) [2019] ZANCT 1 (21 January 2019).

*Byleveld v Execor Twelve (Pty) Ltd t/a Motor City* (NCT/10686/2013/75(1) (2014) ZANCT 2.

*Carstens v Beukes* (NCT/133281/2019/75(1)(b)) [2020] ZANCT 20 (24 September 2020).

*Chiliza v Govender* 2016 (4) SA 397 (SCA).

*Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) (2008) 29 ILJ 73.

*CJ Digital SMS Marketing v National Consumer Commission* NCT/3584/2011/101(1)) [2012] ZANCT 22 (1 October 2012).

*Clientele General Insurance Ltd v National Consumer Commission*

(NCT/4671/2012/60(3) & 101(1) (P)) [2013] ZANCT 7 (15 April 2013).

*Dipico v Imperial Group Limited t/a Cargo Motos Klerkdsdorp* (2212/2017 [2018] ZANCHC 23 (25 April 2018).

*Gcaba v the Minister for Safety and Security* (2010) 31 ILJ 296 (CC).

*Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government* [2016] 3 All SA 794 (FB) (9 June 2016).

*Joroy 4440 CC v Potgieter NNO* 2016 (3) SA 465 (FB).

*Lazarus v RDB Project Management CC t/a Solid* (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016).

*Maphutse v Motodeal Party (Pty) Ltd t/a Motor Deal Premium* (40586/2016) [2019].

*MGC Express Proprietary Limited v South African Express Airways Soc Limited* 12144/2019) [2019] ZAGP JHC 501 (9 December 2019).

*Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) 593 (SCA).

*National Consumer Commission v Highends Trading and Projects (Pty) Ltd t/a Highends Auto Services* (NCT/101932/2018/73(2)(b)) [2018] ZANCT 55 (22 July 2018).

*National Consumer Commission v Western Car Sales CC t/a Western Car Sales* (NCT/81554/2017/73(2)(b)) [2017] ZANCT 102 (14 September 2017).

*Nedbank v Gqirana NO* ZAGP JHC 492 (3 December 2019).

*Nzwana v Dukes Motors* 2019 JDR 1624 (ECG).

*Oos Vrystaat Kaap Bedryf Beperk v Cillers* 2019 JDR 0049 (FB).

*Richter v Schatheuna Boerdery CC* (CA&R19/2-17) [2017] ZANCHC 60 (20 October 2017).

*Sekgala v Steve's Auto Clinic (Pty) Ltd* (56238/2016) [2017] ZAGPPHC 25 (3 February 2017).

*Simelane v Pretoria Franchise Support Services (Pty) Ltd t/a Fastway Couriers (Pretoria)* (NCT /8742/2013/73/(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 43 (14 November 2013).

*Springside Investment (Pty) Ltd v Viking Fishing Company (Pty) Ltd* (NCT/104417/2018/75(1)(b)) [2018] ZANCT 94 (27 June 2018).

*Tshehla v Aucamp Eiendoms Beleggings t/a CA Motors* [2019] ZANCT 160.

*Vivier v Towbars Cape CC* (NCT/6570/2012/75(1)(P)(CPA) [2013] ZANCT 55.

*Vodacom Service Provider Company (Pty) Ltd v National Consumer Commission* NCT/2793/2011/101 (1) (P)) [2012] ZANCT 9 (8 June 2012).

*Wentzel v Autofit Centre Renault (Pty) Ltd Zambezi* (2019) JOL 46271 (GP).

Case Law: Zimbabwean

*Salisbury Hellenic Co v City of Salisbury* 1973 1 SA 534 (RA).

*S v Tkaendesa* 1972 4 SA 72 (RA)

## Secondary sources

### Articles

Adeleye, Adekunbi ‘An Appraisal of the Consumer Protection Council Act and Consumer Rights in Nigeria’ (2017) 8(2) *The Gravitas Review of Business & Property Law* 1.

Akhigbe, Emmanuel E et al ‘Hopelessness of the King of Production in Nigeria: The Consumer Protection Council a Saviour or Mirage?’ (2015) 12(9) *US-China Law Review* 719.

Akpan, Eno-Obong ‘A Comparative Analysis of Consumer Protection Framework in Nigeria, United States of America and South Africa’ (2019) 1(2) *International Journal of Comparative Law and Legal Philosophy* 133.

Barnard, Jacolien ‘Suppliers, Consumers and Redress for Defective Vehicles – the Reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*’ (2020) 137(2) *SALJ* 229.

Barnard, J and E Mišćenić ‘The Role of the Courts in the Application of Consumer Protection Law: A Comparative Perspective’ (2019) 44(1) *Journal for Juridical Science* 111.

Bello, Kamrudeen Babtunde et al ‘Perspectives on Consumerism and Consumer Protection Act in Nigeria’ (2012) 4(10) *European Journal of Business and Management* 72.

Du Plessis, M A ‘Access to Redress for Consumers: A Tale of the Effect of a Notice of Non-Referral by the National Consumer Commission’ *South African Mercantile Law Journal* (2018) 330.

Du Plessis, M A ‘Enforcement and Execution Shortcomings of Consumer Courts’ (2010) 22(4) *SA Mercantile Law Journal* 517.

Du Plessis, M A 'Towards Better Service Delivery by Consumer Courts' (2008) 20(1) *SA Mercantile Law Journal* 74.

Du Preez, Monique L 'The Consumer Protection Bill: A Few Preliminary Comments' (2009) 1 *Journal of South African Law* 58.

Ekanem, Etefia Ekwere and Akebong Samuel Essien 'A Critique of the Federal Competition and Consumer Protection Act 2018' (2019) 1(2) *International Journal of Comparative Law and Legal Philosophy* (2019) 16.

Ekanem, Etefia E 'Institutional Framework for Consumers' Protection in Nigeria' (2011) 2(1) *International Journal of Advanced Legal Studies and Governance* 33.

Ekwoma, Okoro Jude Henry 'Enforcement of Consumer Protection Laws in Nigeria: An Appraisal' (2013) 1(1) *Journal of Private Law* 249.

Emeka, Ifediba Emmanvitalis and Eze C Francis 'Using the Servoval Model to Evaluate the Service Delivery of the Consumer Protection Council in Nigeria' (2018) 10(18) *European Journal of Business Management* at 91.

Goyal, Anupam 'Consumer Protection Act, 1986: Structural Loopholes in Consumer Courts' Constitution – A Brief Analysis' (1999) 41(2) *Journal of Indian Law Institute* 272.

Hotur, Krishna Bharadwaj 'Consumer Protection in India: Need for Structured Reforms' (2018) 7(3) *European Online Journal of Natural and Social Sciences* 221.

Hutchison, Dale 'From Bonda fide to Ubuntu: the Quest for Fairness in the South African Law of Contract' *Acta Juridica* (2019) 99.

Kapoor, Sheetal 'Effectiveness of Consumer Forums in India' (2019) 6(1) *Journal of Indian Economy* 69.

Koekemoer, Michel M 'Consumer Complaints and Complaint Forums Employed in the South African Motor Vehicle Service Industry: A Survey of the Literature' (2014) 30(3) *Journal of Applied Business Research* 659.

Kumar, Vipin and Adya Sharma 'Strengthening Consumer Rights: The Advent of Consumer Protection Act, 2019' (2019) 156(2) *SEBI and Corporate Laws* 1.

Magaqa, Mhlahli 'The NCC and the NCT Walk the Long Road to Consumer Protection' (2015) 27 *SA Mercantile Law Journal* 32.

Monye, F 'An Overview of Consumer Law in Nigeria and Relationship with Laws of Other Countries and Organizations' (2018) 41(4) *Journal of Consumer Policy* 373.

Mupangavanhu, Y 'An Analysis of the Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008' (2012) 15(5) *PELJ* 319.

Nabi, Dr Md Irshadun and Dr Mohammed Kamalun Nabi 'Consumer Protection: New Age Challenges' (2019) 40(5) *Orissa Journal of Commerce* 66.

Naude, Tjakie 'Enforcement Procedures in Respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective' (2010) 127(3) *SALJ* 515.

Naude, Tjakie 'The Consumer's Right to Fair, Reasonable and Just Terms under the new Consumer Protection Act in Comparative Perspective' (2009) 126(3) *SALJ* 505.

Naude, Tjakie 'Dissemination of Consumer Law and Policy in South Africa' (2018) 41 *Journal of Consumer Policy* 411.

Ndubisi, Emmanuel C et al 'Protecting the Nigerian Consumer: An Expository Examination of the Role of the Consumer Protection Council' (2016) 4(3) *International Journal in Management and Social Science* 529.

Nedumaran, Dr G et al 'Consumer Protection Act: An Overview' (2020) 10(10) *Mukt Shabd Journal* 290.

Newman, Stephen and Mark Tait 'Resolving Provincial Cross-Border Disputes under the Consumer Protection Act' (2018) 39(3) *Obiter* 684.

Nomani, MZM et al 'Consumer Protection Act, 2019 and its implications for the medical profession and health care services in India' (2019) 41(4) *Journal of Indian Academy of Forensic Medicine* 282.

Obumneme-Okafor, Nkiru J 'Effective Institutional Framework of Consumer Protection: An Indispensable Tool for Economic Development in Nigeria' (2014) 4(1) *World Educators Forum* 1.

Paleker, Mohamed 'Court Connected ADR in Civil Litigation: the Key to Access to Justice in South Africa' (2003) 6(3) *Global trends in Mediation* 1.

Pillai, Dr Aneesh V 'Promises and Nuances of Consumer Protection Act, 2019: A Birds Eye View' (2020) 2 *Consumer Protection Reporter* 335.

Prasad, Dr A Rajendra 'Historical Evolution of Consumer Protection of Consumer Protection and Law in India: A Bird's Eye View' (2008) 11(3) *Journal of Texas Consumer Law* 132.

Rajan, Keertichandra et al 'Is Wealthier Always Healthier in Poor Countries? The Health Implications of Income, Inequality, Poverty, and Literacy in India' (2013) 88 *Social Science & Medicine* 98.

Singh, Gurjeet 'Business Self-Regulation and Consumer Protection in India: A Critique' (1993) 16 *Journal of Consumer Policy* 1.

Ukwueze, Festus Okechukwu and Peace Chiedozi Onubuleze 'Appraisal of the Protection of the Rights and Interests of Electricity Consumers in Nigeria' (2019) 92 *Journal of Law, Policy and Globalization* 137.

Usman, Dahiru Jafaru et al 'An Inquiry on the Affordability of Legal Services and the Appropriateness of the Regular Courts for Consumer Redress' (2016) 7(2) *Beijing Law Review* 83.

Van Der Heerden, Prof C & J Barnard 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) 6(3) *Journal of International Commercial Law and Technology* 131.

Woker, Tanya 'Consumer Protection and Alternative Dispute Resolution' (2016) 28 *SA Mercantile Law Journal* 21.

Woker, Tanya 'Evaluating the Role of the National Consumer Commission in Ensuring that Consumers have Access to Redress' (2017) 29 *SA Mercantile Law Journal* 1.

Woker, Tanya 'Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31(2) *Obiter* 217.

### Books

Claassen, RD 'Peremptory Provisions' in *Claassen's Dictionary of Legal Words and Phrases* First Reissue (2000) LexisNexis, Johannesburg.

Du Plessis, LM 'Statute Law and Interpretation' in WA Joubert (founding ed) *The Law of South Africa* vol 25(1) First Reissue (2000) LexisNexis, Johannesburg.

Eiselen, S & T Naudé 'Introduction and overview of the Consumer Protection Act' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) Juta, Cape Town.

Hutchison, Dale et al *The Law of Contract in South Africa* 3 ed (2017) Oxford University Press, Cape Town.

Naude, Tjakie and Jacolien Barnard 'Enforcement and Effectiveness of Consumer Law in South Africa' in Hans-W Micklitz and Geneviève Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (2018) Springer International Publishing, Cham.

Naudé, T 'Section 52' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) Juta, Cape Town.

Peté, Stephen et al *Civil Procedure: A Practical Guide* 3 ed (2017) Oxford University Press, Cape Town.

Stadler, E de & E du Plessis 'Section 2' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) Juta, Cape Town.

Van Heerden, C 'Section 115' in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) Juta, Cape Town.

Van Heerden, C 'Section 69' in Naude & Eiselen (eds) *Commentary on to the Consumer Protection Act* (Original Service 2014) Juta, Cape Town.

#### Internet references

Advertising Regulatory Board 'FAQ' available at <http://arb.org.za/faq.html> accessed on 23<sup>rd</sup> December 2020.

Commission 'Annual Report 2018/2019' 12 available at [https://www.thencc.gov.za/sites/default/files/media/NCC-Annual-Report\\_2018-19.pdf](https://www.thencc.gov.za/sites/default/files/media/NCC-Annual-Report_2018-19.pdf) accessed on 17<sup>th</sup> January 2021.

FASA: The Franchise Association of South Africa 'Lodge a complaint against an accredited franchiser' available at <https://www.fasa.co.za/submitcomplaint/> accessed on 23<sup>rd</sup> December 2020.

NCC 'National Commission Annual Report 2013/2014' 12 available at <https://www.thencc.gov.za/sites/default/files/media/NCC%20->

%20Annual%20Report%202014%20-%202015%28print%29.pdf accessed on 17<sup>th</sup> January 2021.

Okojie, Y and I Bolu, 'A Review of the Federal Competition and Consumer Protection Bill 2016' available at <https://www.mondaq.com/nigeria/antitrust-eu-competition-/707458/a-review-of-the-federal-competition-and-consumer-protection-bill-2016> accessed on the 22nd of August 2020.

The Department of Justice and Development 'Lower Courts: Magistrate's Courts, Branch Courts, and Periodical Courts' available at [https://www.justice.gov.za/contact/lowercourts\\_full.html](https://www.justice.gov.za/contact/lowercourts_full.html) accessed on the 2nd of January 2021; Naude and Barnard op cit note 6 at 581.

The Department of Justice and Development 'Small Claims Courts' available at <https://www.justice.gov.za/scc/scc.htm> accessed on the 18th of January 2021

#### Thesis'

Chausse, Roman *A Comparative and Critical Discussion of the Redress Available to Consumers by Consumer Courts in terms of the Consumer Protection Act 68 of 2008* (unpublished LLM thesis, University of Pretoria, 2012).

Scott, Tshepiso *The Realisation of Rights in Terms of the Consumer Protection Act 68 of 2008* (Ph.D. thesis, University of South Africa, 2018).