

Enforcement and Effectiveness of Consumer Law in South Africa

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Abstract

This contribution considers the enforcement and effectiveness of South African consumer law. It first sets out the legal and policy framework, including the most important legislation and strategic plans of some institutions tasked with enforcement. Thereafter specialist enforcement agencies are considered, including the National Consumer Commission and Financial Services Board. Experience with enforcement by these bodies, including statistics on complaints handling are discussed. Provincial consumer protection bodies are considered next, including the conundrum of whether provincial legislation, as opposed to national legislation, can grant judgments of the provincial consumer courts the same effect as that of the ordinary courts. The discussion of alternative dispute resolution focuses particularly on the various ombuds accredited under the Consumer Protection Act, 68 of 2008, as well as ombuds in the financial services sector. Statistics on their complaints handling are also supplied. Thereafter enforcement by the courts are discussed, including the problematic view of the National Consumer Tribunal that only the ordinary courts may decide on “contractual disputes”, as well as the unconstitutionality of s 69 which does not allow consumers to immediately access the accessible small claims courts. After discussing collective redress actions, it is noted that consumer organisations have played a limited role in the enforcement of consumer law thus far. Private regulation through voluntary sectoral codes of conduct is considered, and thereafter sanctions for violations of consumer law. External relations and cooperation of the State, enforcers and consumer organisations are addressed before conclusions are drawn as to the effectiveness of the enforcement mechanisms.

1. Principal legal and policy framework

1.1. Legislation and common law

South Africa does not have one unified law on consumer protection. The broadest legislation is the Consumer Protection Act (“CPA”), which came into force in 2011.¹ This Act recognises 10 consumer rights,² which echo those recognised in the UN Guidelines for Consumer Protection and by Consumers

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¹ 68 of 2008.

² Sections 8 to 71. The right of equality in consumer market, right to privacy, right to choose, right to disclosure and information, right to fair and responsible marketing, right to fair and honest dealing, right to fair, just and

International. The lead regulator under the CPA is the National Consumer Commission (“NCC”). The CPA was preceded by the less comprehensive Consumer Affairs (Unfair Business Practices) Act,³ which did not recognise specific consumer rights, but relied on declaration of a practice as unfair by the Minister of Trade and Industry.

Another major law is the National Credit Act (“NCA”),⁴ which created the National Credit Regulator (“NCR”) and the National Consumer Tribunal (“NCT”). This Act revoked old consumer credit legislation.⁵

The enforcement of legislation in the financial services sector, such as the Long-Term Insurance Act⁶ and the Financial Advisory and Intermediary Services Act,⁷ is overseen by the Financial Services Board, created by the Financial Services Board Act.⁸ Suppliers in this sector are not subject to the CPA.⁹ Under the Financial Sector Regulation Bill,¹⁰ the Financial Services Board will change to become a market conduct authority known as the Financial Services Conduct Authority.

Other sector-specific Acts apply in conjunction with the CPA, such as the Rental Housing Act.¹¹ Several pieces of legislation provide for food safety standards.¹² The Electronic Communications and Transactions Act¹³ protects consumer rights, such as to a cooling-off right. The CPA provides that in case of an inconsistency between itself and other legislation, both provisions apply concurrently, and if that is not possible, the provision which most protects the consumer prevails.¹⁴

Additional legislation has created sectoral regulators, such as the National Energy Regulator.¹⁵

National government and the nine provincial governments have concurrent legislative authority regarding consumer protection.¹⁶ Most provinces are in the process of aligning their pre-existing legislation with the CPA.¹⁷

The CPA and other consumer legislation are not codifications and the uncodified common law applies as well.¹⁸

1.2. Consumer policy and strategic plans

There is no published overarching consumer policy covering all sectors. The Department of Trade and Industry, which is responsible for policy and law on consumer protection, aims *“to create a fair regulatory environment that enables investment, trade and enterprise development in an equitable and socially responsible manner”*.¹⁹ One of the purposes of the CPA is *“providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer*

reasonable terms and conditions, right to fair value, good quality and safety, supplier’s accountability to consumers and the right to be heard and obtain redress. The Act provides for consumer education in s 96.

³ 71 of 1988.

⁴ 34 of 2005.

⁵ Eg the Usury Act, 1926 and the Hire-Purchase Act, 36 of 1942.

⁶ 52 of 1998.

⁷ 37 of 2002.

⁸ 97 of 1990.

⁹ Financial Services Board Act, 97 of 1990, s 28.

¹⁰ B34-2015.

¹¹ 50 of 1999.

¹² Eg the Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972 and Agricultural Products Standards Act, 119 of 1990.

¹³ 52 of 2002.

¹⁴ Section 2(9).

¹⁵ National Energy Regulator Act, 40 of 2004.

¹⁶ Schedule 4 of the Constitution of the Republic of South Africa, 1996.

¹⁷ T Woker, “Consumer Protection and Alternative Dispute Resolution” (2015) *SA Mercantile Law Journal* 21, 43-45.

¹⁸ See eg s 2(10) CPA.

¹⁹ http://www.thedti.gov.za/about_dti.jsp.

transactions; and providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers".²⁰

Various enforcement bodies publish strategic plans. An example is the NCC's main strategic objectives, inter alia "to promote consumer protection and consumer safety", "to promote reform of consumer policy and consumer protection legislation" and "to conduct research and develop public awareness on consumer protection matters".²¹ The NCC no longer deals with all individual complaints by consumers, but refers these to the accredited industry ombuds, so that the NCC is free to rather focus on systemic problems in certain industries, proactive investigations and consumer education.²²

The Financial Services Board's 2016 strategic plan aims "to empower consumers of financial products and services, through financial education and the promotion of transformation and financial inclusion" and "to create sound financial institutions that treated customers fairly".²³

2. General design of the enforcement mechanisms

Under the CPA, a person with locus standi under the Act, "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 directly to the National Consumer Tribunal, if such a direct referral is permitted by [the CPA]...;
- (b) referring the matter to the applicable ombud with jurisdiction...;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6)...; or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter...;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
- (iv) filing a complaint with the National Consumer Commission in accordance with section 71; or
- (d) approaching a[n ordinary] court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."

*Imperial Group (Pty) Ltd v Dipico*²⁴ held that the consumer has a choice of which of the mechanisms in s 69(c) of the CPA may be approached.²⁵ In the next part, the NCC will be discussed, whereafter some sector-specific enforcement agencies will be considered, followed by a discussion of provincial consumer protection authorities and the provincial consumer courts. The ombuds and other alternative dispute resolution agents will be discussed in Part X.4 below. The NCT and ordinary courts will be discussed in part X.5 below.

3. Specialised enforcement agencies

The main advantages of enforcement by these agencies are proactive investigations and that no legal representation is needed. The main shortcoming of these agencies is that they are situated only in some major cities.

²⁰ Section 3(1)(g) and (h).

²¹ NCC, *Strategic Plan (2016/17-2020/21)* (25 January 2016) 20-23.

²² *Annual Report 2014/2015; Consumer protection: input from Department of Trade and Industry (Consumer Corporate Regulation Division), National Consumer Commission, National Credit Regulator and National Consumer Tribunal*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 29-07-2014. All such minutes referred to in this chapter are available at www.pmg.org.za for subscribers.

²³ *Financial Services Board on its 2016 Strategic & Annual Performance Plan & Quarterly Reports*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 13 April 2016.

²⁴ 2016 JDR 0690 (NCK).

²⁵ Para 32.

3.1. National Consumer Commission (“NCC”)

The NCC is an administrative body established “under the auspices of the Department of Trade and Industry”.²⁶ According to the Department’s website, the NCC is “an organ of state within the public administration”, but “an institution outside the public service”.²⁷ It receives its budget allocation from the same Department and reports regularly to it and the Parliamentary Portfolio Committee on Trade and Industry.

The NCC is responsible to enforce the CPA by promoting informal dispute resolution; receiving and dealing with complaints regarding prohibited conduct; monitoring the consumer market and effectiveness of consumer groups; investigating alleged prohibited conduct; issuing and enforcing compliance notices; negotiating and concluding undertakings and consent orders; and referring matters to the Competition Commission, NCT or National Prosecuting Authority.²⁸ The NCC has broad investigative powers.²⁹

The NCC has other functions such as establishing codes of practice,³⁰ promoting legislative reform³¹ and research and consumer education.³² The NCC deals exclusively with consumer law and franchisor-franchisee relations (and not also with competition law).

There are apparently no statistics on consumer awareness of the NCC. The NCC draws conclusions about the level of awareness of itself amongst different age and race groups from the amount of complaints received.³³ For example, the percentage of black people who lodged complaints is far below the StatsSA black population data (40.2% of complaints were by black African people, even though 79% of the population is black African).³⁴ By contrast, 45.9% of complaints were by whites, whereas whites constitute 9.1% of the population.³⁵ This suggests insufficient awareness of the NCC amongst blacks, and the difficulty of accessing the NCC for low-income consumers.

80% of the 7204 complaints received were resolved on an average of 14 days in 2014/2015.³⁶ In earlier years the NCC had a great backlog of complaints, also due to insufficient resources.³⁷ The faster resolution of complaints during 2014/2015 could be ascribed to the NCC’s decision to refer individual complaints to accredited ombuds.

Consumers may still approach the NCC if they are dissatisfied with the outcome of the ombud’s process, eg if no consensus was reached or the supplier remains recalcitrant.³⁸ The ombud may also refer matters to the NCC, particularly in cases of threats to consumers’ safety and serious contraventions.³⁹

The main causes of complaints to the NCC are poor service delivery, defective and unsafe goods, cancellation of contracts, incorrect billing, misrepresentation, unconscionable behaviour and

²⁶ <http://www.thencc.gov.za>.

²⁷ Section 85(1).

²⁸ Section 99.

²⁹ Sections 102-105.

³⁰ Section 93.

³¹ Section 94.

³² Sections 96-98. Section 100(2) obliges the Commission to consult with a regulatory authority before issuing a compliance notice to a regulated entity

³³ See eg National Consumer Commission, *Annual Report 2014/2015*, 20.

³⁴ National Consumer Commission, *Annual Report 2014/2015*, 21-22 figure 6.

³⁵ *ibid*.

³⁶ *ibid* at 36.

³⁷ See eg E Mohamed, *Presentation to the Parliamentary Portfolio Committee: Trade and Industry: Annual Report 2013-2014, 1st quarter report 2014-2015 National Consumer Commission 16-09-2014*, attachment to the minutes of a meeting of the Parliamentary Portfolio Committee: Trade and Industry 16-09-2014.

³⁸ See eg Consumer Goods and Services Ombud (CGSO) *Annual Report 2014/2015* at 8.

³⁹ CGSO, *Annual Report 2015/2016* at 3.

unauthorised deductions⁴⁰ and misleading information.⁴¹ The main sectors involved are retail, motor vehicles and the mobile phone industry.⁴²

The NCC does not publish statistics on the percentage of parties who are satisfied with the outcome and timing of a dispute. However, in some reports the NCC indicated how much money was refunded to consumers (R26.6 million in 2011/2012).⁴³

The NCC has targeted certain sectors over the years (eg the cellphone and timeshare industries, safety of paraffin stoves and pyramid schemes in 2015/2016).⁴⁴ The NCC focuses especially on vulnerable consumers, including low-income consumers, elderly, young and disabled consumers and first time home or vehicle buyers.⁴⁵

There have been indications of a lack of capacity at the NCC in the first years of its existence. Compliance notices issued by it were often set aside because the CPA was not in force at the time of the relevant conduct, or because the NCC did not comply with the procedural requirements for the issuing of compliance notices, such as an investigation.⁴⁶ It is worrying that the NCC often unjustifiably issues notices of non-referral, thereby forcing consumers to approach the National Consumer Tribunal for relief, even though the requirements for a notice of non-referral in the CPA are not met.⁴⁷ The NCC needs to take a more active stance toward enforcement.

3.2. National Credit Regulator (“NCR”)

The NCR was created by the National Credit Act, 34 of 2005 as a “Department of Trade and Industry agency”.⁴⁸ It also reports to the Parliamentary Portfolio Committee on Trade and Industry. It receives its budget allocation from the Department of Trade and Industry and reports to that Department.

The NCR’s mandate is consumer education, research, policy development, registration of industry participants (credit providers, credit bureaux and debt counsellors), investigation of complaints, and enforcement of compliance with the NCA⁴⁹. The NCR must also promote “a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry.”⁵⁰

⁴⁰ NCC, *Annual Report 2014/2015*.

⁴¹ *National Consumer Commission: further briefing; Co-operatives Amendment Bill: report back by subcommittee*, minutes of a meeting of the Parliamentary Portfolio Committee: Trade and Industry of 06-09-2012.

⁴² *Ibid*; Ebrahim Mohamed *Briefing to the Parliamentary Portfolio Committee on Trade and Industry on the second quarter report (2015-2016) of the National Consumer Commission*, attachment to the minutes of the meeting of the Parliamentary Portfolio Committee on Trade and Industry of 18-11-2015.

⁴³ NCC, *Annual Report 2011/2012* at 6.

⁴⁴ *NCR 1st Quarter 2015/6 performance*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 13-10-2015; NCC, *Annual Report 2014/2015*.

⁴⁵ See eg NCC, *Annual Report 2014/2015*.

⁴⁶ For examples, see *Vodacom Service Provider Company (Pty) Ltd and Another v National Consumer Commission* (NCT/2793/2011/101 (1)(P)) [2012] ZANCT 9 (8 June 2012); *Club Leisure Group v National Consumer Commission* (NCT/4900/2012/60(3)&101(1)(P)) [2014] ZANCT 5 (22 January 2014); *Quality Vacation Club v National Consumer Commission* (NCT/5078/2012/60(3)& 101(1)(P)) [2014] ZANCT 6 (22 January 2014). See Mhlahli Magaqa, “The NCC and the NCT walk the long road to consumer protection” (2015) 27 *SA Mercantile Law Journal* 32.

⁴⁷ Section 72.

⁴⁸ Website of the Department of Trade and Industry, <https://www.thedti.gov.za/agencies/ncr.jsp> (accessed 24-04-2016)

⁴⁹ Chapter 2 of the National Credit Act, 34 of 2005.

⁵⁰ Section 13.

The NCR has often been successful in applications for administrative fines against offending suppliers.⁵¹ The NCR also acts proactively in policing non-compliance with the NCA.⁵² In addition it sometimes conducts national studies such as on weaknesses in these systems, which may then lead to legislative reform.⁵³

There are no statistics on satisfaction by complainants with the NCR's services. The amounts refunded to consumers and adjustment to account balances are indicated (eg R2 million in 2014⁵⁴). 3336 consumer disputes were initiated in 2014/2015, whereas the NCR received much more calls and complaints.⁵⁵ No statistics on disputes resolved for this year was supplied. In 2012/2013, 90.8% of complaints were resolved within 90 days. The main causes of complaints and disputes related to high interest rates, failure to provide accounting statistics, non-issuance of notification to credit providers by debt counsellors, delayed distribution of funds by payment distribution agents, unprofessional conduct of debt counsellors, overcharging on credit life insurances, reckless lending and illegal advertising.⁵⁶

Some disputes find their way to the Credit Ombud, a voluntary dispute resolution scheme set up by the credit industry, discussed below.⁵⁷ The NCR is the only body allowed to deal with complaints about debt counsellors.

3.3. Financial Services Board

The Financial Services Board ("FSB") is an independent regulatory authority created by the Financial Services Board Act⁵⁸ to oversee the non-banking financial services sector. This includes retirement funds, short-term and long-term insurance companies, collective investment schemes (like unit trusts), capital markets and financial advisors and brokers. It is funded by levies payable by this industry.⁵⁹

The FSB has a Board of Directors with various committees, such as the legislative committee. The Executive Committee consists of an Executive Officer and five Deputies who head up various departments such as Collective Investment Schemes, Insurance and Consumer Education.⁶⁰

The FSB enforces a "Treating Customers Fairly" program. As already noted, the Financial Sector Regulation Bill⁶¹ will result in replacement of the FSB by the Financial Services Conduct Authority, which will also be supervising the conduct of banks.

It also licenses financial services providers.⁶²

3.4. Independent Communications Authority of South Africa

⁵¹ A recent example is *National Credit Regulator v Kutuma Financial Services* (NCT/16158/2014/140(1)NCA) [2016] ZANCT 5 (2 February 2016).

⁵² See eg *Public procurement and localisation & consumer credit regulation: dti briefing; Preferential Procurement Policy Framework: National Treasury briefing; National Credit Regulator on African Bank crisis, with Minister*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 22-08-2014. See also *NCR 2014/2015 Annual Report*.

⁵³ *Ibid.*

⁵⁴ *NCR, Annual Report 2014/2015*, 25.

⁵⁵ *NCR, Annual Report 2014/2015*, 21.

⁵⁶ *National Consumer Commission; National Regulator for Compulsory Specifications & National Credit Regulator on their 2014/15 Annual Reports; NCR 1st Quarter 2015/6 performance*, minutes of a meeting of the Parliamentary Portfolio Committee: Trade and Industry of 13-10-2015.

⁵⁷ Part X.4.

⁵⁸ 97 of 1990.

⁵⁹ <https://www.fsb.co.za/Pages/Home.aspx> (accessed 17-06-2016).

⁶⁰ *FSB Annual Report 2015* at 15.

⁶¹ B34-2015.

⁶² <https://www.fsb.co.za/aboutUs/Pages/About-FSB.aspx>.

The Independent Communications Authority of South Africa (ICASA) was created by the Independent Communications Authority of South Africa Act.⁶³ It regulates broadcasting, electronic communications and postal services, and is responsible for licensing.

ICASA enforces consumer protection rules in The Electronic Communications and Transactions Act⁶⁴ and Postal Services Act.⁶⁵ It also focuses on consumer education and advocacy.⁶⁶ ICASA publishes reports on its website and other media forums.⁶⁷ In 2014/2015, 4297 consumer complaint cases were opened and 3867 were resolved.⁶⁸ The main causes of complaints are contract terms and conditions, quality of service, internal referrals and billing.⁶⁹

3.5. Brief overview of some other specialised enforcement agencies

The National Regulator for Compulsory Specifications (NRCS) sets compulsory standards in line with international standards, including on food safety, building regulations, motor vehicles and electro-technical devices. It was created by the National Regulator for Compulsory Specifications Act⁷⁰ as “an entity of the Department of Trade and Industry”.⁷¹

The National Energy Regulator of South Africa (NERSA) regulates the electricity, piped gas and petroleum pipeline industries.⁷² It sets guidelines for tariffs. ESCOM, a state-owned enterprise, has a monopoly on the supply of electricity to consumers, through local authorities such as city councils.

The Health Professions Council of South Africa (HPCSA) was established by the Health Professions Act.⁷³ The HPCSA co-ordinates with professional boards within the health sector, which require registration for health professionals.⁷⁴ The HPCSA determines strategic policy (for example regarding education, registration and ethics).⁷⁵ It also arbitrates and mediates disputes.⁷⁶ The Legal Department opened 2597 cases in 2014/2015, of which the ombudsman received a total of 635⁷⁷ and resolved 307.⁷⁸

The Council for Medical Schemes (“CMA”) was established by the Medical Schemes Act⁷⁹ and provides “regulatory supervision of private health financing through medical schemes.”⁸⁰ 3876 complaints new complaints were received and 5491 were resolved in 2014/2015.⁸¹

The Estate Agency Affairs Board (“EAAB”) was created by the Estate Agency Affairs Act.⁸² It sets educational standards for estate agents and requires registration. It also has a consumer protection and education function. It administers the Estate Agents Fidelity Fund for claims in the

⁶³ 13 of 2000.

⁶⁴ 25 of 2002.

⁶⁵ 124 of 1998.

⁶⁶ <https://www.icasa.org.za/ConsumerProtection/tabid/66/Default.aspx> (accessed on 17/06/2016)..

⁶⁷ See for example

<https://www.icasa.org.za/ConsumerProtection/PublicAwareness/NationalCampaigns/tabid/532/Default.aspx> (accessed on 17/06/2016).

⁶⁸ ICASA, *Annual Report 2015*, 51

⁶⁹ ICASA *Annual Report 2013*, 49.

⁷⁰ 5 of 2008.

⁷¹ <http://www.nrsc.org.za/content.asp?subID=4> (accessed 08-03-2016).

⁷² National Energy Regulator Act, 40 of 2004.

⁷³ 56 of 1974.

⁷⁴ <http://www.hpcsa.co.za/About> (accessed on 17/06/2016).

⁷⁵ For the full list see <http://www.hpcsa.co.za/OrgStructure> (accessed on 20/06/2016).

⁷⁶ Ibid.

⁷⁷ HPCSA *Annual Report 2014/2015* 39, 46.

⁷⁸ HPCSA *Annual Report 2014/2015* 46.

⁷⁹ 131 of 1998.

⁸⁰ <http://www.medicalschemes.com> (accessed on 17/06/2016).

⁸¹ CMS *Annual Report 2014/2015* 44.

⁸² 112 of 1976.

event of disappearance of money from an estate agent's trust fund. 2888 complaints were initiated and 1076 resolved in 2014/2015.⁸³

3.6. Provincial consumer protection authorities

The consumer protection authorities of South Africa's nine provinces have typically been set up in terms of the now repealed Consumer Affairs (Unfair Business Practices) Act,⁸⁴ as well as provincial legislation.⁸⁵ The CPA recognises the jurisdiction of the provincial authorities over suppliers carrying on business exclusively within that province.⁸⁶ It provides for cooperation between these authorities and the NCC.⁸⁷ Most of the provinces are in the process of aligning their provincial legislation with the CPA.

Typically the provincial legislation provides for various powers to enable investigations into consumer complaints. After the investigation, the authority may issue a notice of non-referral to the consumer, who may then refer the matter to the consumer court. Alternatively, the investigator may negotiate with the supplier that prohibited conduct be stopped. An agreement reached may be confirmed as a consent order by the consumer court or an ordinary court. Otherwise the consumer protection authority may issue a compliance notice.⁸⁸ The Consumer Protector may also decide to institute proceedings against the supplier in the provincial consumer court.

Although in Gauteng province, matters have been known to proceed to trial in the provincial consumer court within weeks,⁸⁹ this is not currently the experience in all provinces.⁹⁰

The provincial consumer courts are really tribunals, as their orders cannot be enforced and executed as judgements of the ordinary courts.⁹¹ Instead, non-compliance with their orders is typically a criminal offence.⁹² Experience in Gauteng has shown that criminal charges do not always result in financial compensation to the consumer by the offending supplier.⁹³

Section 140(7) NCA and s 73(6) CPA may create confusion by providing that an order of a consumer court made after hearing a matter referred to it by the NCC or NCR "has the same force and effect as if it had been made by the Tribunal". In turn, an order by the Tribunal "may be serviced, executed and enforced as if it were an order of the High Court".⁹⁴ This still requires a writ of execution issued by the registrar of the High Court.⁹⁵ However, the CPA and NCA do not clearly give consumer courts' judgments the same status when a consumer or Consumer Protector approached the consumer court.

⁸³ EAAB *Annual Report 2014/2015* 32.

⁸⁴ 71 of 1998.

⁸⁵ For example the Western Cape Consumer Affairs (Unfair Business Practices) Act 10 of 2002; North-West Consumer Affairs (Unfair Business Practices) Act 4 of 1996; Northern Cape Consumer Protection Act 1 of 2012; and Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1997.

⁸⁶ Section 84.

⁸⁷ Sections 83 and 84.

⁸⁸ Section 84 CPA.

⁸⁹ MA du Plessis, "Towards better service delivery by consumer courts" (2008) *SA Mercantile Law Journal* 74 76 on the position in Gauteng.

⁹⁰ As confirmed to Tjatie Naudé by Elizabeth de Stadler, an attorney who specialises in consumer law in Cape Town, on the basis of recent letters by the Western Cape Consumer Protector. A possible explanation for these delays is that the Western Cape is currently in the process of aligning its consumer protection legislation with the CPA.

⁹¹ MA Du Plessis, "Enforcement and execution shortcomings of consumer courts" (2010) *22 SA Mercantile Law Journal* 517.

⁹² See eg s 30 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

⁹³ MA du Plessis, "Enforcement and execution shortcomings of consumer courts" (2010) *SA Mercantile Law Journal* 517, 522-523.

⁹⁴ Section 152 NCA.

⁹⁵ Rule 45 of the High Court Rules.

One author has therefore called for the provincial consumer protection legislation to provide for enforcement and execution of consumer court orders.⁹⁶ Some provinces have recently enacted new legislation or published draft legislation for comment which grants the consumer court judgments the same status as that of the Magistrates' Courts. Whether they are entitled to do so is doubtful given that only national legislation may recognise courts not already listed in the Constitution of the Republic of South Africa, 1996.⁹⁷ The Constitution does provide that a provincial legislature may promulgate legislation on consumer protection.⁹⁸ On the other hand, s 171 of the Constitution provides that "[a]ll courts function in term of national legislation and their rules and procedures must be provided for in terms of national legislation". Section 165 of the Constitution states that "judicial authority of the Republic is vested in the courts", and the courts are "(a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any High Court of appeal that may be established by (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."⁹⁹ Judicial authority can therefore only be conferred upon a tribunal by national legislation. Such national legislation should clearly set out rules on the enforcement or execution of judgments. Any writ of execution would probably still have to be issued by the clerk of the Magistrates' Court or registrar of the High Court.¹⁰⁰

Should the CPA and NCA be amended to give the provincial consumer courts' judgments the same status as that of the Magistrates' Courts? Consumers may be confused by the judgment not being executable. The provincial consumer courts may also be more accessible than ombuds and specialised agencies with offices in one city. If the provincial consumer courts can be trusted to give good judgments after referral by the NCC or NCT, they should also be trusted when approached by consumers directly. Criminal proceedings entail unnecessary costs for the state.¹⁰¹ The national legislation should also provide for appeals against the orders of the consumer courts to the National Consumer Tribunal.

Provincial authorities run awareness campaigns, with mixed success. One example is the Gauteng Consumer Protection Office, which ran 437 workshops, 46 road shows and 6 imbizos in the 2014/2015 financial year.¹⁰² A survey done in 2014/2015 to assess consumer education and awareness in the Western Cape found that about 77% of respondents knew about the CPA and more than 80% knew of other relevant legislation such as the Western Cape's consumer legislation.¹⁰³ However, only 14.2% indicated that they knew about the Office of the Consumer Protector (who represents consumers in the provincial consumer tribunal).¹⁰⁴ Very few indicated that they attended information sessions (4.7%), "heard about it in on the radio (11.2%), read about them in community newspapers (10.8%) or were given brochures (5%)."¹⁰⁵

⁹⁶ MA Du Plessis, "Enforcement and execution shortcomings of consumer courts" (2010) 22 *SA Mercantile Law Journal* 517.

⁹⁷ Sections 165, 166 and 171 of the Constitution of the Republic of South Africa, 1996.

⁹⁸ Schedule 4.

⁹⁹ Section 166.

¹⁰⁰ Cf the comparable case of *MBS Transport CC v CCMA and others; Bheka Management Services (Pty) Ltd v Kekana and Others Case No J1706/15*, unreported judgment of the Labour Court of 06-11-2015 in which it was held that the Commission for Conciliation, Mediation and Arbitration could not give itself the power to issue writs of execution, which should be issued by the Labour Court.

¹⁰¹ MA Du Plessis, "Enforcement and execution shortcomings of consumer courts" (2010) *SA Mercantile LJ* 517 at 523.

¹⁰² Gauteng Department of Economic Development *Annual Report 2014/2015* at 24. "Imbizo" is an isiZulu word for a forum for discussion of policy.

¹⁰³ Urban-Econ Development Economists, *Outcomes Evaluation of the Office of the Consumer Protector's Consumer Complaints Programme: 2014-2015* at 39.

¹⁰⁴ *Ibid* at 40.

¹⁰⁵ *Ibid* at 41.

The same survey found that 52.5% of respondents who submitted complaints were dissatisfied with the services experienced.¹⁰⁶ The following reasons were indicated: “inability to be assisted in a manner satisfactory to consumers”, “lack of communication” and “unclear conduct between [the office] and companies”.¹⁰⁷ 55.7% of respondents rated the response time as poor although respondents were informed of closure of cases within a maximum of 3 months.¹⁰⁸ Respondents also complained about technical jargon in explanations on closure of cases.¹⁰⁹ Unrealistic expectations of the powers of the Consumer Protector added to consumers’ frustration.¹¹⁰

Statistics for complaints handling by the provinces cannot be given here due to space constraints. Provincial consumer protection authorities and other enforcers send statistics to a Compliance Committee, but this data is not published.¹¹¹ Instead, the Annual Reports of some provincial authorities contain statistics.¹¹² For example, the Gauteng Department resolved 2,367 complaints within 60 days in 2014/2015.

4. Alternative dispute resolution (“ADR”)

As noted above, s 69 of the CPA provides that a consumer¹¹³ must first approach the “applicable ombud with jurisdiction”. If this route is not applicable, the consumer may refer the matter to inter alia “the applicable industry ombud, accredited in terms of s 82(6)” or another ADR agent.

An ADR agent may terminate the process if there is “no reasonable probability of the parties resolving their dispute through the process”, whereafter a complaint may be filed with the NCC.¹¹⁴ The ADR agent may refer an agreement between the parties to the National Consumer Tribunal or high court to be made a consent order, which may include an award of damages.¹¹⁵

“Ombud with jurisdiction” is defined firstly as an ombud recognised by national legislation, or where a supplier is a “financial institution”, an ombud as determined in accordance with s 13 or 14 of the Financial Services Ombud Schemes Act. This should be contrasted with “industry ombuds” accredited in terms of s 82(6). Currently, the accredited industry ombuds are the Consumer Goods and Services Ombud (CGSO) and the Motor Industry Ombudsman (MIOSA). It should be noted that, since 2014, financial institutions subject to regulation by the Financial Services Board, are no longer subject to the CPA. Thus the accredited industry ombuds will be discussed briefly first, after which the financial services ombuds will be discussed.

4.1. Ombuds accredited under the CPA

Ombud schemes accredited under the Consumer Protection Act and other industry ombuds do not have the power to make binding determinations, but their rulings are mostly accepted by both parties.¹¹⁶ The consumer retains the right to approach the NCC if they are not satisfied with the

¹⁰⁶ *Outcomes Evaluation of the Office of the Consumer Protector’s Consumer Complaints Programme: 2014/15* at 50, available at Western Cape Consumer Protector: https://www.westerncape.gov.za/assets/departments/economic-development-tourism/ocp_eval2.pdf (accessed 07 May 2016).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Email by Nation Nkosi of the Mpumalanga provincial consumer protection authority to Jacolien Barnard of the University of Pretoria, dated 05-05-2016.

¹¹² The Western Cape Office of the Consumer Protector does not publish statistics on the number of disputes initiated for example.

¹¹³ Or other party with locus standi in terms of s 4(1).

¹¹⁴ Section 70.

¹¹⁵ Ibid.

¹¹⁶ See eg CGSO *Annual Report 2014/2015* at 8.

outcome of the process. The ombud may also refer matters to the NCC, which it will do in cases of threats to their safety and serious contraventions.¹¹⁷ Moves are afoot to accredit more industry codes of conduct with dispute resolution schemes under the CPA.¹¹⁸

The CGSO was set up in 2013 as a voluntary scheme.¹¹⁹ It was accredited under the CPA in 2015 as part of the Consumer Goods and Services Industry Code of Conduct, which became binding on all suppliers in this sector upon accreditation.¹²⁰ Suppliers in this industry are now subject to the code and obliged to contribute financially to the dispute resolution scheme, except for businesses with a turnover of less than R1 million.¹²¹

The ombud applies the law (particularly the CPA and the Code), other applicable industry codes or guidelines as well as fairness. The CGSO appears to be a success story. In 2015/2016, 3495 complaints were initiated¹²² and 2192 resolved.¹²³ It took on average 57 days to resolve disputes in this period. The main causes of consumer complaints related to mobile phones, services, furniture, electrical appliances, computers and accessories, clothing, building material, hardware suppliers, cancellation and refund policies and incorrect prices.¹²⁴

MIOSA was created in 2000 under a voluntary scheme. It was accredited under the CPA in 2015, with similar consequences as accreditation of the CGSO.¹²⁵ The MIOSA Annual Reports do not usually list the number of disputes initiated and resolved. However 175,932 calls were received in 2015.¹²⁶ The case of *Imperial Group (Pty) Ltd t/a Cargo Motor Klerksdorp v Dipico and Another*¹²⁷ suggests that this ombud could in the past have done more to timeously and fairly resolve disputes. The consumer referred his complaint to this ombud during November 2012 but was allegedly told that the supplier could not find any fault with the vehicle, there was nothing to repair and the ombud was closing his file.¹²⁸ (The consumer had returned the vehicle to the supplier in April 2012). The ombud should rather have used another expert to inspect the vehicle. The NCC then referred the matter to MIOSA again in August 2013, but the dispute remained unresolved and the Ombudsman failed to make a ruling by March 2014.¹²⁹ The result was that by the time the review of a decision by a provincial consumer court in an interim application was heard by the High Court in February 2016, the consumer had been trying to resolve this dispute for almost four years without any final ruling.

The main advantage of dispute resolution by accredited ombuds is that disputes are typically resolved fast and informally by experts. The main shortcoming is that they are centrally situated and so out of reach of many low-income consumers. It may also frustrate consumers that the ombuds' rulings are not binding.

4.2. Ombuds in the financial services sector

¹¹⁷ CGSO Annual Report 2015/2016 at 3.

¹¹⁸ The Minister published an Industry Code for the Franchise Industry for comment in GN 33 of 2016 in *Government Gazette* 39631 of 29-01-2016 and a Code for the Funeral Industry (GenN 534 in *GG* 40243 of 02-09-2016). The NCC reported in 2014/2015 that it was working on an industry code for the airlines industry (Ebrahim Mohamed *Briefing to the Parliamentary Portfolio Committee: Trade and Industry on the 1st quarter report (2014-15) of the National Consumer Commission*, attachment to the minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 16-09-2014).

¹¹⁹ CGSO Annual Report 2012/2013 2.

¹²⁰ http://www.cgso.org.za/members/code_background.htm.

¹²¹ http://www.cgso.org.za/members/code_background.htm. See for a different interpretation, T Woker, "Consumer Protection and Alternative Dispute Resolution" 2016 *SA Mercantile Law Journal* 21, 42.

¹²² CGSO Annual Report 2015/2016 8.

¹²³ CGSO Annual Report 2015/2016 9.

¹²⁴ CGSO Annual Report 2015/2016 23-25.

¹²⁵ http://www.miosa.co.za/articles/MIOSA_issue4_vol5.pdf.

¹²⁶ MIOSA Annual Report 2015 9.

¹²⁷ (1260/2015) [2016] ZANHC 1 (1 April 2016).

¹²⁸ Para 4.3.

¹²⁹ Para 4.

As noted, financial services regulated by the Financial Services Board are not subject to the CPA. Sector-specific legislation in this sector is typically enforced by ombuds recognised under the Financial Services Ombud Schemes Act.¹³⁰ These ombuds were recognised before accreditation of ombuds under the CPA. A full discussion of these ombuds is beyond the scope of this chapter.¹³¹ The Office of the Ombud for Financial Services Providers (“FAIS Ombud”) was established by the Financial Advisory and Intermediary Services Act.¹³² 9003 complaints were initiated and 3110 were resolved in 2014/2015.¹³³ The Pension Fund Adjudicator was created in 1998 and inter alia enforces the Pension Funds Act.¹³⁴ 7010 complaints were initiated and 6332 resolved in 2014/2015.¹³⁵

Apart from these two statutory ombuds, there are four other voluntary ombud schemes recognised under the Financial Services Ombud Schemes Act. The ombud will first attempt conciliation, mediation and recommendation before making a determination.¹³⁶ The ombud may apply equitable principles.¹³⁷ The supplier but not the consumer is bound by the ombuds’ ruling. The Ombudsman for Long-Term Insurance was created in 1985. It enforces the Long-Term Insurance Act and policyholder protection rules. It only binds insurers who subscribe to its dispute resolution scheme, but most insurers do.¹³⁸ 5018 complaints were initiated and 3491 resolved in 2015.¹³⁹ The Ombudsman for Short-Term Insurance was created in 1989.¹⁴⁰ Its decisions are binding on the insurance companies that are its members, but not on the consumer. It enforces the Short-Term Insurance Act¹⁴¹ and policyholder protection rules issued under it. 9784 complaints were initiated¹⁴² and 2656 were resolved in 2015.¹⁴³ The Ombudsman for Banking Services was established in 1997 and applies the Code of Banking Practice.¹⁴⁴ 5021 complaints were initiated and 4899 resolved in 2015¹⁴⁵ The Credit Ombud is a voluntary scheme set up by the credit industry (but complaints against banks must be referred to the Ombudsman for Banking Services and complaints about debt counsellors are dealt with by the NCR).¹⁴⁶ 4522 complaints were initiated and 5074 resolved in 2015.¹⁴⁷ Disputes were resolved on average in 47.88 days.¹⁴⁸

5. Enforcement by the courts

¹³⁰ 37 of 2004.

¹³¹ See eg N Melville, “Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution” (2010) 22 *SA Mercantile Law Journal* 50

¹³² 37 of 2002. See <http://www.faisombud.co.za/>.

¹³³ FAIS Ombud *Annual Report 2014/2015* 29. For more about this ombud, see D Millard, “Bespoke justice? On financial ombudsmen, rules and principles” (2011) 44 *De Jure* 232.

¹³⁴ 24 of 1956.

¹³⁵ Pension Fund Adjudicator *Annual Report 2014/2015* 6. 2417 complaints were outside its jurisdiction.

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ <http://www.ombud.co.za/complaints/what-we-do>.

¹³⁹ “Key figures” in Ombudsman for Long-Term Insurance *Annual Report 2015*.

¹⁴⁰ <http://www.osti.co.za/ombudsman-about.html>.

¹⁴¹ 53 of 1998.

¹⁴² Ombudsman for Short-Term Insurance *Annual Report 2015* 9.

¹⁴³ Ombudsman for Short-Term Insurance *Annual Report 2015* 10. But note that 9944 cases were closed in this year.

¹⁴⁴ <http://www.obssa.co.za/index.php/about-us>.

¹⁴⁵ Ombudsman for Banking Services *Annual Report 2015* 20.

¹⁴⁶ <http://www.creditombud.org.za/jurisdiction/>.

¹⁴⁷ Credit Ombud *Annual Report 2015* 10.

¹⁴⁸ *Ibid.*

Over 380 small claims courts have been established,¹⁴⁹ including in rural areas.¹⁵⁰ They provide fast, accessible dispute resolution. Legal representation is not allowed.¹⁵¹

As noted above, s 69 unfortunately provides that a consumer may only approach an ordinary court, including a small claims court, until all other avenues available under national legislation have been exhausted. This is unconstitutional, particularly in relation to the small claims courts, which may be more accessible to low-income consumers in rural areas than national and provincial consumer agencies and ombuds with offices only in major cities.¹⁵²

It has been argued that s 69(d) does not apply where a consumer chooses to rely on a common law right, so that the consumer can immediately approach a court.¹⁵³ On the other hand, s 69 applies to attempts to “enforce any right ... in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier”. This is broad enough to include disputes about the correct application of the common law.

The other ordinary courts, namely the Magistrates’ Court and High Court are typically out of reach of normal consumers, given that the intricate, formal court procedures necessitates legal representation and there are long waiting periods for trials.

It is also unclear in what instances the courts retain primary jurisdiction with respect to consumer disputes. The National Consumer Tribunal (“NCT”) has stated that only the courts have jurisdiction regarding “contractual disputes.”¹⁵⁴

The interpretation that the NCT does not have jurisdiction over contractual disputes is not clearly borne out by the CPA. Amendment of this legislation is needed to clarify the position.¹⁵⁵ It is true that, in its initial briefing to Parliament, the Department of Trade and Industry stated that the ordinary courts would have exclusive jurisdiction over contractual consumer disputes in order to allay concerns by the Department of Justice that the courts’ jurisdiction would be reduced by the creation of various tribunals.¹⁵⁶ However, the CPA does not plainly confirm this intention.¹⁵⁷ At most, it could be indirectly implied from section 52, which is headed “Powers of court to ensure fair and just conduct, terms and conditions” and which only grants ordinary courts powers in respect of unfair contract terms, unconscionable conduct and misrepresentations.¹⁵⁸ However, s 73 provides that the NCC may refer prohibited conduct by a supplier to the relevant provincial consumer court or the NCT. Unfair contract terms are prohibited by s 48. One possible interpretation is that the use of an unfair contract

¹⁴⁹ Small Claims Court Act, 61 of 1984.

¹⁵⁰ <http://www.justice.gov.za/contact/lowercourts-sheet-scc.pdf>

¹⁵¹ Small claims are defined as claims for R15 000 or less (Eur 875 at 04-06-2016, but the buying power of R15 000 in South Africa is more than Eur 875 in Europe).

¹⁵² See s 34 of the Constitution of the Republic of South Africa, 1996 on the right of access to courts. The current jurisdiction of the small claims courts are claims under R15,000.

¹⁵³ C van Heerden, “Chapter 2 Protection of Consumer Rights and Consumers’ Voice” in T Naudé and S Eiselen (eds), *Commentary on the Consumer Protection Act* (Claremont, Juta, First Revision Service 2016) “Section 69” at 69-2 (para 2).

¹⁵⁴ See eg *Primi World v NCC* NCT/4740/2012/101(1)(P)CPA para 57; *Global Pact 417(Pty) Ltd and Others v Mercedes Benz Financial Services (Pty) Ltd* (NCT/40/2009/149(1)(P), NCT/41/2009/149(1)(P), NCT/42/2009/149(1)(P), NCT/43/2009/149(1)(P), NCT/44/2009/149(1)(P), NCT/49/2009/149(1)(P), NCT/60/2009/149(1)(P)) [2010] ZANCT 42 (20 April 2010).

¹⁵⁵ T Naudé, ‘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) *South African Law Journal* 515, 525. See also Y Mupangavanhu, ‘An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008’ (2012) 15 *Potchefstroom Electronic Law Journal* 319.

¹⁵⁶ TNaudé ‘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) *South African Law Journal* 515, 525 and authority there cited.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

terms only becomes “prohibited conduct” upon being declared unfair by a court.¹⁵⁹ This interpretation is not clearly conveyed by the Act.¹⁶⁰

Section 52 provides for various orders that could be made by a court should it find a transaction in whole or in part unfair or unconscionable, including any order that the court considers just and reasonable and an order that the supplier must cease or alter any practice or document.

In respect of the consumer’s fundamental right to equality in the consumer market (regulated in Chapter 2 Part A of the CPA), the equality courts have jurisdiction. Every High Court is an equality court and one or more Magistrates’ courts in an administrative region may be so qualified. The equality courts may make a wide range of orders, with the effect of a civil judgment. To date there is no reported equality court decision in relation to an alleged contravention of Chapter 2 Part A of the CPA.

The National Consumer Tribunal (“NCT”) is an independent adjudicative entity created by the National Credit Act,¹⁶¹ but also has jurisdiction in matters arising from the CPA. In March 2014, the NCT consisted of ten part-time members, and three full-time members.¹⁶² A decision of the NCT has the same status as a High Court judgment.¹⁶³ Various parties can bring cases before the NCT, including the NCR and debt counsellors. Examples of applications or referrals to the NCT are objections to compliance notices, objections to decisions made by the NCR, consent orders, administrative fines and complaints by consumers.

Legal aid South Africa is an independent statutory body established by the Legal Aid South Africa Act.¹⁶⁴ A means test determines who qualifies for legal aid.¹⁶⁵ Many universities have law clinics partially funded by Legal Aid SA, which provides free legal services to low-income consumers. In addition, legal practitioners must do some pro bono (unpaid) legal work, often in aid of low-income consumers. Some of the bigger law firms have departments dedicated to pro bono work.¹⁶⁶

As indicated above, enforcement by the courts has shortcomings. The ordinary courts may lack specialised knowledge of consumer law. An example is the patently incorrect judgment in *MFC (a division of Nedbank Ltd) v Botha*.¹⁶⁷ Various high courts have also rendered conflicting judgments on the interpretation of the National Credit Act, which ultimately had to be resolved by the Supreme Court of Appeal or Constitutional Court.¹⁶⁸

On the other hand (as will be discussed below), consumer organisations have occasionally instituted court action to enforce the rights of consumers.¹⁶⁹

6. Enforcement through collective redress

The CPA provides that “a person acting as a member of, or in the interest of, a group or class of affected persons” may approach a court, the National Consumer Tribunal or the NCC, alleging that a

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ 34 of 2005.

¹⁶² According to the NCT’s latest Annual Report available on its website, that of the 2013/2014 financial year (at 16).

¹⁶³ Section 27 NCA.

¹⁶⁴ 39 of 2014.

¹⁶⁵ <http://www.legal-aid.co.za/?p=16> (accessed on 20/06/2016).

¹⁶⁶ Eg Werksmans Attorneys (<http://www.werksmans.com/legal-services-view/pro-bono/> (accessed on 20/06/2016)).

¹⁶⁷ (6981/13) [2013] ZAWCHC 107 (15 August 2013).

¹⁶⁸ See eg the Constitutional Court judgment of *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) and the judgments preceding and following upon it, about the manner in which a so-called section 129 notice must be sent to the consumer.

¹⁶⁹ *Premier Foods v Manoim* NO 2016 (1) SA 445 (SCA); *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP).

consumer's rights in terms of the Act have been infringed, or that prohibited conduct has occurred.¹⁷⁰ Section 76 also provides that a court may "award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act". There is currently no legislation on the procedure to be followed for class actions. However, the courts have been willing to apply certification requirements.¹⁷¹ In *Mukadam v Pioneer Foods (Pty) Ltd*,¹⁷² the Constitutional Court held that a class action should be certified where this is in the interests of justice. According to this judgment, relevant non-exhaustive factors are the existence of a cause of action raising a triable issue, whether there were common issues of fact or law and whether there was a suitable class representative.¹⁷³

However, no collective redress cases in terms of the Consumer Protection Act have been reported.

7. The role of consumer organisations

Consumer organisations are not well-resourced and are not very active in the enforcement of consumer law. There are two relatively well-known consumer organisations solely dedicated to consumer protection, namely the National Consumer Forum and the SA National Consumer Union. In *Gundwana v Steko Development CC and Others*,¹⁷⁴ the National Consumer Forum submitted argument as friend of the court on whether a High Court registrar, in the course of ordering default judgment, may grant an order declaring mortgaged property that is a person's home specially executable, or whether only a court may do so. However, it should be noted that the National Consumer Forum does not have a working website at the moment, thereby raising doubts as to its effectiveness. The SA National Consumer Union was one of the parties who attempted to stop the National Roads Agency from changing certain roads in Gauteng to toll roads in the case of *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*.¹⁷⁵

Two general non-governmental organisations also seek to protect consumers' interests. The Black Sash is a highly regarded organisation advocating for social justice and engages in advocacy for effective competition legislation addressing collusion by companies with respect to basic food and services.¹⁷⁶ It also seeks to educate the public about consumer rights.¹⁷⁷ It was involved in a class action which attempted to claim damages against a company involved in bread price fixing.¹⁷⁸

Afriforum aims to protect the socio-political rights of the "Afrikaner" minority.¹⁷⁹ It successfully challenged the exclusion of certain low-income municipalities (local government institutions) from the application of the Consumer Protection Act.¹⁸⁰

8. Private regulation

There are several associations who enforce voluntary codes of conduct aimed at consumer protection and only a few can be discussed here.

¹⁷⁰ Section 4(1).

¹⁷¹ See eg *Mukadam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC); *Nkala v Harmony Gold Mining Company Ltd* [2016] ZAGPJH 97.

¹⁷² 2013 (5) SA 89 (CC).

¹⁷³ Ibid.

¹⁷⁴ (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (11 April 2011)

¹⁷⁵ (90/2013) [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (9 October 2013).

¹⁷⁶ <http://www.blacksash.org.za/index.php/about-the-black-sash/about-the-black-sash> (accessed on 17-06-2016).

¹⁷⁷ <http://www.blacksash.org.za/index.php/your-rights/consumer-protection> (accessed on 17-06-2016).

¹⁷⁸ *Premier Foods v Manoim NO* 2016 (1) SA 445 (SCA).

¹⁷⁹ <https://www.afriforum.co.za/about/about-afriforum/> (accessed on 17-06-2016).

¹⁸⁰ *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP).

The Advertising Standards Authority of South Africa (ASASA) is an independent body set up and paid for by the marketing communications industry. It enforces the Advertising Code of Practice and the Sponsorship Code.¹⁸¹ It can demand that advertisements that breaches the Codes be withdrawn. ASASA can issue an “Ad Alert” on its website and to all members that the advertisement should not be published. As all mainstream media are members of ASASA, this is an effective sanction.¹⁸² In a blow to ASASA’s ability to effectively prevent non-members from publishing misleading advertisements, a court recently interdicted ASASA from adjudicating over advertisements by non-members.¹⁸³

The Wireless Application Service Providers’ Association (WASPA) safeguards consumers of mobile phones by regulating the conduct of suppliers of wireless applications.¹⁸⁴ The major mobile phone companies require such suppliers to be members of WASPA.¹⁸⁵ WASPA enforces its Code by effective sanctions such as to block a member’s access to a specific number or a specific category of service.¹⁸⁶ If non-members of WASPA breach the Code of Conduct, WASPA can instruct members to stop assisting the non-member in providing services to consumers.¹⁸⁷

Other voluntary associations with codes of conduct containing rules on consumer protection include the Direct Marketing Association,¹⁸⁸ the Internet Service Providers’ Association,¹⁸⁹ the Wireless Application Providers’ Association,¹⁹⁰ the Direct Selling Association of South Africa¹⁹¹ and the Vacation Ownership Association of Southern Africa.¹⁹²

9. Sanctions for breach of consumer law

The Consumer Protection Act (CPA) provides for administrative fines and criminal sanctions for prohibited conduct as well as for damages and other “civil law sanctions”. The National Consumer Tribunal may impose an administrative fine for prohibited or required conduct which may not exceed 10 per cent of the supplier’s annual turnover during the preceding financial year or R1 000 000, whichever is the greater.¹⁹³ The CPA also creates various offences, most important of which is a failure to act in accordance with a compliance notice issued by the NCC in terms of section 100 CPA.¹⁹⁴ However, a person may not also be prosecuted criminally for failure to heed a compliance notice where the NCC has applied for imposition of an administrative fine.

Unfortunately, compliance notices imposed by the NCC has often been set aside by the National Consumer Tribunal for non-compliance with procedural requirements.¹⁹⁵

Certain sections of the Act provides for a non-derogable claim for damages, for example, section 61 on liability for damage caused by goods. The Act recognises other “civil law” sanctions like

¹⁸¹ www.asasa.org.za.

¹⁸² <http://www.asasa.org.za/codes/sponsorship-code/sanctions> (accessed 26-04-2016).

¹⁸³ *Herbex (Pty) Ltd v The Advertising Standards Authority* 2016 (5) SA 557 (GJ).

¹⁸⁴ <http://waspa.org.za/> (accessed 26-04-2016).

¹⁸⁵ <http://waspa.org.za/> (accessed 26-04-2016); Tanya Woker ‘Consumer Protection and Alternative Dispute Resolution’ (2016) 28 *SA Mercantile Law Journal* 21 at 32.

¹⁸⁶ Code of Conduct para 24.44 (<https://waspa.org.za/coc/14-3/> (accessed 26-04-2016)).

¹⁸⁷ Code of Conduct para 24.53.

¹⁸⁸ <http://www.dmasa.org/> (accessed 26-04-2016).

¹⁸⁹ <http://ispa.org.za/code-of-conduct/> (accessed 26-04-2016).

¹⁹⁰ <http://www.wapa.org.za/code-of-conduct/> (accessed 26-04-2016).

¹⁹¹ http://www.dsasa.co.za/modules_fe/layout1/displayfull.asp?id=7#.VyhyfyPI96M8 (accessed 26-04-2016).

¹⁹² <http://www.voasa.co.za/> (accessed 26-04-2016).

¹⁹³ Section 112(2).

¹⁹⁴ See s 110. Other offences include breaches of confidence (s 107), hindering administration of the Act (s 108), or frustrating action by the NCC or Tribunal in various ways (s 109(2)).

¹⁹⁵ An example is *Vodacom Service Provider Company (Pty) Ltd and Another v National Consumer Commission* NCT/2793/2011/101(1)P.

refund, repair or replacement in respect of defective goods.¹⁹⁶ Common law remedies may also be available. The prohibition of unfair contract terms in section 48 CPA may cause exemption clauses (purporting to limit common law remedies) to be ineffective.

The National Credit Act (NCA) has similar provisions on the imposition of administrative fines as well as criminal offences.¹⁹⁷ These sanctions have often been imposed in practice.¹⁹⁸ It also provides for the suspension or cancellation of the credit provider's registration, thereby preventing them from operating lawfully.¹⁹⁹ In addition, the Tribunal may interdict prohibited conduct or require refund to the consumer of excess amounts charged.²⁰⁰ The Act renders unlawful exemption clauses excluding warranties otherwise implied by law.²⁰¹

The legislation enforced by the Financial Services Board Act also provides for administrative penalties for contravention of legislation and codes of conduct.²⁰²

Non-compliance with orders by the provincial consumer courts are typically punishable as an offence.²⁰³

Some sanctions imposed by voluntary trade associations have been discussed in part X.8 above.

10. External relations and cooperation of the State, enforcers and consumer organisations

South Africa is a member of the Southern African Development Community (SADC), which adopted a Declaration on Cooperation in Competition and Consumer Policies.²⁰⁴ This requires member states to "adopt, strengthen and implement" the "necessary consumer laws".²⁰⁵ This Declaration aims to "foster cooperation and dialogue in the field of consumer policy and facilitate further convergence in this area".²⁰⁶

The UN Guidelines for Consumer Protection played a role in the drafting of the CPA. The preamble of the Act recognises that "it is necessary to develop and employ innovative means to...give effect to internationally recognised customer rights".

The consumer rights recognised by Consumers International are also echoed in the Consumer Protection Act.²⁰⁷ The National Consumer Forum is a member of Consumers International.

The NCC and NCR are members of the African Consumer Protection Dialogue, which facilitates discussion by African regulators, NGOs and the US Federal Trade Commission of issues such as cross-border enforcement and awareness campaigns.

Although no South African authority is listed as a member of ICPEN (the International Consumer Protection and Enforcement Network), the African Consumer Protection Dialogue forms part of ICPEN.

The NCC also has ties with the OECD.²⁰⁸

¹⁹⁶ Sections 55-56.

¹⁹⁷ See s 151 and ss 156-162.

¹⁹⁸ For some recent examples, see eg *National Credit Regulator v Abrahams* (NCT13393/2014/57(1)) [2014] ZANCT 33 (14 August 2014); *National Credit Regulator v Kutuma Financial Services* (NCT/16158/2014/140(1)NCA) [2016] ZANCT 5 (2 February 2016).

¹⁹⁹ Section 150. An example where the National Credit Tribunal ordered this relief is *National Credit Regulator v Louhen Consultants CC* (NCT/6752/2012/57(1)(P)) [2013] ZANCT 21 (4 July 2013).

²⁰⁰ Section 150.

²⁰¹ Section 90(1)(g).

²⁰² <https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx>

²⁰³ See eg s 30 of the Gauteng Consumer Affairs (Unfair Business Practices) Act, 7 of 1996.

²⁰⁴ http://www.sadc.int/files/4813/5292/8377/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf

²⁰⁵ Clause 1(b).

²⁰⁶ Clause 2(b)(ii).

²⁰⁷ Chapter 2 Parts C and D of the CPA.

²⁰⁸ The NCC reported that it attended an OECD conference in its *Annual Report 2014/2015*.

There is also evidence of more informal engagement with foreign consumer protection agencies. For example, the Financial Services Board reports that it “has developed and maintained a strong, effective presence... internationally, while working closely with its counterparts elsewhere in Africa to establish solid regulatory frameworks.”²⁰⁹ Another example is the NCR which works closely with other regulators and the World Bank.²¹⁰

The Trade, Development and Cooperation Agreement between South Africa and the European Union of 1999²¹¹ provided for “cooperation in the area of consumer policy and consumer health protection” and listed concrete ways in which this should be done. Subsequently the EU concluded an Economic Partnership Agreement with SADC, of which South Africa is a member, in 2014.²¹² This only refers to consumers not being misled about the origin of certain goods.

Various other bilateral trade agreements do not contain references to consumer protection, such as the trade agreement with the USA.²¹³ The final “Agreement establishing a tripartite free trade area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community” does not contain a reference to consumer protection, whereas an earlier draft did.²¹⁴

The CPA provides that its application “extends to a matter irrespective of whether the supplier resides or has its principal office within or outside the Republic”. The Act itself does not deal with cross-border enforcement in other ways. A South African consumer would have to use a South African judgment as a basis for instituting litigation in the suppliers’ country.

11. Critical evaluation of the effectiveness of the enforcement mechanisms

Enforcement of consumer law in South Africa relies heavily on sectoral ombud schemes. Interestingly, such ombud schemes existed in the financial services industry long before the CPA came into force in 2011, and there was more effective protection in the area of financial services before a fairly effective system of redress was introduced for consumer goods and other services.

Self-regulation through industry codes of conduct has many well-known benefits. Inter alia, the enforcers are usually experts in the sector and the codes may contain more tailor-made rules and sanctions than overarching consumer protection legislation. Industry funding excludes the problem of under-funding by government. On the other hand, industry funding may create distrust in the objectivity of the ombud by consumers.

Ombud schemes have been strengthened due to backing by legislation, thereby resulting in “enforced self-regulation”.²¹⁵ However, not all ombuds recognised by statute have the power to make binding rulings. Nevertheless, these ombud schemes are probably the most effective forums for consumers to obtain effective redress.

A drawback of the CPA’s requirement in s 69(d) that consumers first exhaust all their remedies recognised by national legislation before approaching the courts is that the ombuds and other agencies typically only have offices in big cities, which are less accessible to low-income consumers

²⁰⁹ <https://www.fsb.co.za/Pages/Home.aspx> (accessed 04-05-2016).

²¹⁰ *National Consumer Commission; National Regulator for Compulsory Specifications & National Credit Regulator on their 2014/15 Annual Reports; NCR 1st Quarter 2015/6 performance*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 13-10-2015; *NCR Annual Report 2014/2015*.

²¹¹ OJ L 311/3 of 04-12-1999.

²¹² http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf (accessed 04-05-2016).

²¹³ Agreement Concerning the Development of Trade and Investment between the Government of the Republic of South Africa and the Government of the United States of America.

²¹⁴ The final agreement is available at <http://www.tralac.org/images/docs/7646/signed-tfta-agreement-and-declaration-june-2015.pdf> (accessed 04-05-2016). The draft is available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Draft_Tripartite_FTA_Agreement_Revised_Dec_2010.pdf (accessed 04-05-2016).

²¹⁵ See also Woker (2016) 28 *SA Mercantile Law Journal* 21 at 34.

(the majority of South Africans). Giving consumers a choice of approaching the various enforcement mechanisms, including the accessible small claims courts, is more in line with the constitutional right to access of courts.²¹⁶ The objection that this may lead to forum shopping does not outweigh the benefits of access to a choice of avenues of redress. Section 69(d) only applies where a consumer or other person with locus standi in terms of s 4 approaches the court alleging that prohibited conduct has occurred. Thus it does not bar a supplier who wants to sue a consumer from directly approaching a court. The Act should be amended to allow a defendant consumer, who relies on a right in the CPA as a defence to the supplier's claim, to ask for a stay of the court proceedings, in order that the dispute could first be resolved by an ombud, provincial consumer protection authority or NCC. However, the defendant consumer who is content with the matter being heard by an ordinary court should be able to rely on the CPA there.

In addition, more should be done to advertise avenues of redress in media accessible to low-income consumers, particularly radio and television.

Because the NCC no longer deals with all consumer complaints received by it, but refers these to the accredited ombuds, it is able to proactively target industries and suppliers to ensure compliance with the CPA.²¹⁷ On the other hand, referral to ombuds may frustrate consumers expecting to be assisted at their first port of call. The NCC should play a more active role in enforcement of the CPA.

As noted above, national legislation may be needed to make the orders of provincial consumer tribunals executable as if they were judgments of the Magistrates' Court.²¹⁸

The inability of the National Consumer Tribunal to award damages in contested cases means that a consumer may have to go through the whole route of redress in terms of section 69 before being able to approach a forum which actually has the power to make a damages award, namely an ordinary court.

At least the NCA and CPA generally provide high levels of consumer protection. For example, the prohibition of unfair contract terms applies to all contracts, even negotiated terms in the business-to-small business contracts covered.²¹⁹

However, the NCA and CPA are not clearly drafted.²²⁰ For example, in some instances the CPA sets out rights for consumers, without any indication of their remedies.²²¹ This unclarity prevents the legislation from operating effectively out of court. The legislation is also not in plain language. As the CPA and NCA are not codifications of consumer rights,²²² it is difficult for consumers and suppliers to ascertain their rights and obligations. An in depth review of the CPA and NCA is necessary to properly codify consumers' rights, to eliminate bad drafting and to put the legislation into plain language.

To conclude, the enforcement of consumer law is fairly effective in South Africa, but more needs to be done to tailor the system to the needs of especially low-income consumers, the majority of South African consumers.

²¹⁶ Section 34 of the Constitution of the Republic of South Africa, 1996.

²¹⁷ As noted above. See also eg Ebrahim Mohamed *Briefing to the Parliamentary Portfolio Committee: Trade and Industry on the 1st quarter report (2014-15) of the National Consumer Commission*, attachment to the minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 16-09-2014 in which they reported about 4 targeted inspections on 65 retailers.

²¹⁸ Part X.3.6 above.

²¹⁹ Section 48.

²²⁰ See eg *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) para 2 on the NCA ("Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise").

²²¹ Eg s 44 which deals with the consumer's right to assume that the supplier is entitled to sell the goods.

²²² Eg s 2(10) CPA.