



**PRODUCT LABELLING AND TRADE DESCRIPTION:  
FAILURE TO WARN AND THE CONSUMER PROTECTION ACT 68 OF 2008**

**VIKELWA VICKY KAMANGA  
(U14441188)**

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SUPERVISOR:  
PROF JACOLIEN BARNARD**



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## 1 INTRODUCTION

Proper labelling laws, which are critical to the legal, social and economic fibre of society, transcend the functions of providing the consumer with “adequate and accurate information”<sup>1</sup> or promoting fair marketing practices in respect of goods. In South Africa Product Labelling and Trade Description is an area of consumer law that has not received in-depth research and analysis from legal, social and, to some degree, economic perspectives. Prior to the Consumer Protection Act product labelling has been regulated in a fragmentary fashion. Furthermore, the anaemic development of legal jurisprudence in South Africa specifically around product labelling, both before and after the new dispensation incorporating the Act, renders it difficult to promote and further the objectives of the Act.<sup>2</sup> There remains a strong necessity to provide in-depth, multi-disciplinary legal research and analysis of all consumer-related laws which interphase with the Act that regulates product labelling and trade description. Moreover, the goal should be the achievement of full harmonization of all legislation regulating labelling requirements. It seems that the current legislative framework, consisting of the Act, in its attempt to fully harmonize the previously fragmented laws into a single uniform statute (it also attempts to promote and protect the legitimate interests of a consumer in a proactive manner) has created even greater uncertainty.<sup>3</sup> The reason for this statement is the seemingly large number of lacunae in various areas of concern, such as the nature of the goods covered by the labelling requirements as well as the manner in which goods are to be labelled. The research will also attempt to demonstrate the additional legal, social and, seemingly, economic considerations which are absorbed by consumers, which results in their being prejudiced financially in that the price of goods sold may increase to include a cost margin to cover any insurance and packaging costs that the manufacturers incur.

As will be shown, the CPA provides for a comprehensive summary of mandatory disclosure requirements, including Product Labelling and Trade Description as well as the minimum requirements in respect of all goods as defined by the Act.<sup>4</sup> This research demonstrates that the current legislative framework remains vague and fragmented and is susceptible to

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<sup>1</sup> D McQuoid–Mason. T Woker. L Greenbaum. I Konyn. C Lakhani. T Cohen (1997) *Consumer Law in South Africa*, 281.

<sup>2</sup> 68 of 2008. Hereinafter referred to as the CPA or Act.

<sup>3</sup> T 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 *Obiter* 217 – 231.

<sup>4</sup> Section 24 of the Act.

misinterpretation and poor application. As well the framework is found to be restrictive with regard to non-consumable goods, in respect of certain goods only, resulting in an array of goods that are poorly regulated and are available on the consumer market. Such goods either may be poorly labelled or may contain false or misleading information or deceptive information in terms of the provisions of the CPA.<sup>5</sup> The researcher asserts that mandatory labelling requirements are not extended widely to goods which may not be adequately regulated by other pieces of legislation. In the concluding chapter the researcher argues this failure is of particular concern as the consumer protection legal framework governed poorly by the Act is established to safeguard and to protect the consumer as well as promoting fair marketing, and, at the same time, performing a balancing act so that it achieves its objectives without over-regulation.<sup>6</sup> In the interpretation of the Product Labelling and Trade Descriptions provisions foreign and international law may be taken into consideration, but such laws may not be suited to a country such as South Africa with its hybrid mix of sophisticated consumers and vulnerable consumers.<sup>7</sup> Chapter 5 below discusses the unique nature of South African consumers.<sup>8</sup>

## 1.1 RESEARCH PROBLEM

The ultimate intention of this research project is to interrogate the inadequacies of consumer laws in South Africa in so far as they relate to Product Labelling and Trade Description of non-consumable goods as is discussed in Chapters 5 and 6.<sup>9</sup> This research project will include a short exploration of alternative forms of regulation or governance such as self-regulation, which may assist the legislature to successfully achieve the fundamental purpose of product labelling laws. The basis of the research is the CPA and its regulation (in particular section 24 of the Act) from which point other legislation and applicable law will be

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<sup>5</sup> Section 41 of the Act which, as part of the right to fair and honest trading, prohibit false or misleading representations.

<sup>6</sup> T Amunkete “*The link between Competition Policy and Consumer Protection Law*” (2013) [www.nacc.com.na](http://www.nacc.com.na) (Accessed on 19 August 2015)

<sup>7</sup> Section 2(2) of the Act provides that when interpreting and applying the Act, a person, court, Tribunal or Commission, may consider foreign and international laws, international conventions, declarations or protocols relating to consumer protection. See also Section 3(1)(b) of the Act.

<sup>8</sup> Section 3(1) (b) of the Act states that “*the purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—(i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented*”.

<sup>9</sup> These are goods that are not suitable for human consumption. See also G Ruhl “*Consumer Protection in Choice of Law*”(2011) Cornell International Law Journal Vol 44 600

assessed.<sup>10</sup> Section 24 of the CPA encapsulates the consumer's fundamental right to Disclosure and Information (Chapter 2 Part D).<sup>11</sup> The research further aims to highlight the lack of jurisprudential development and research in the area of Product Labelling and Trade Description. In order to contextualise legal challenges surrounding Product Labelling and Trade Description in terms of the Act the emphasis in the discussion in chapter 4 is on the value-chain process of consumer goods: from the advertisement and labelling of goods, failure to warn, product liability, product recall and implied enforcement hierarchy.

## 1.2 RESEARCH METHODOLOGY

The inadequacies in the Product Labelling and Trade Description provisions in terms of the CPA warrant further investigation by way of a comparative approach as applied to the implementation of the applicable European Union (EU) legislation in a particular member state, the United Kingdom.<sup>12</sup> A systematic approach is required to identify and address the failures identified in the provisions of Product Labelling and Trade Description in terms of the Act and will interrogate the various assumptions presumed to have been adopted by the legislature when regulating Product Labelling laws as well as assess the legal, social and possible economic impact such failures have on consumers as a whole. In essence this aim will be achieved through discussion and by comparing primary legal sources including legislation and case law, as well as secondary legal sources such as the scholarly writings of authors in text books and journal articles. The goal is to demonstrate the lack of development of legal reform and jurisprudence around product labelling provisions.

The researcher adopts a variety of traditional methodology techniques in identifying the market failure of Product Labelling and Trade Description in terms of the CPA as well as proposing practical resolutions which may restore consumer confidence in the marketplace and simultaneously assure business confidence among suppliers.<sup>13</sup> A practical solution would serve to achieve a balance between the interests of the consumer and the supplier.

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<sup>10</sup> 68 of 2008

<sup>11</sup> See footnote 10 Supra

<sup>12</sup> This is largely due to the recent announcement of the United Kingdom's exit from the European Union through the European Union Referendum in terms of Article 50 of the Lisbon Treaty commonly known as "*Brexit*": the researcher elected not to focus specifically on the United Kingdom as a particular emphasis for comparative analysis purposes. Currently the 2 year transitional period is applicable and the exit referendum is technically not binding on the European Parliament. See also G Ruhl "*Consumer Protection in Choice of Law*"(2011) Cornell International Law Journal Vol 44 600.

<sup>13</sup> These are the historical approach where you compare the previous legal regimen to the current regimen, a comparative approach where you compare the local legal regimen to an international legal regimen and the testing of these legal theories. See also G Ruhl "*Consumer Protection in Choice of Law*"(2011) Cornell International Law Journal Vol 44 600.

The researcher hopes that these traditional techniques are the best approach to adequately address the problem statement in a clear, concise and logical manner. It is further hoped that such techniques will guide and assist the researcher throughout the mini-dissertation to fully interrogate the problem statement and to test the various false assumptions discussed further in Chapter 2. Ultimately, it is hoped that this research approach contributes to identifying ways to bolster consumer confidence regarding labelled goods sold and thus achieve the salient purpose of the Act to protect the consumer.

1.2.1 An effective method in order to gain a greater understanding of the legislative regime of Product Labelling and Trade Description is to conduct a comparative analysis between the previous legislative regime and the current regime in terms of the CPA in South Africa.

1.2.1.1 A comparative study will provide an objective assessment of the previous market failures as against the current regime as indicated in Chapters 3 and 6 below.<sup>14</sup> This comparison will demonstrate whether the current South African position has improved the situation in favour of the consumer or whether it remains static and market failure continues unabated, or whether the current situation further fails the consumer.

1.2.1.2 A comparative study contextualises the ever-changing legal reform process and ever-changing geo-political landscape in South Africa.<sup>15</sup> An effect of social engineering in South Africa has been the low level of literacy among a certain type of consumer regarded as being vulnerable.<sup>16</sup> According to the researcher the result is these consumers have been prejudiced in so far as understanding the labelling requirements of goods purchased. This situation has a parallel in the poor enforcement of punitive measures used against non-compliant suppliers in the event of an offense as discussed in Chapter 8. It is accepted that as a precursor to mandatory disclosure requirements, consumers should have a right to disclosure requirements that are plain and simple to understand.<sup>17</sup> The legal dispensation governing Product Labelling and Trade Description prior to the Act will be further

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<sup>14</sup> Prof W Du Plessis "A self-help guide: Research Methodology and Dissertation Writing" (2007) [www.nwu.ac.za](http://www.nwu.ac.za). (accessed on August 2015)

<sup>15</sup> Prof W Du Plessis "A self-help guide: Research Methodology and Dissertation Writing" (2007) [www.nwu.ac.za](http://www.nwu.ac.za) (accessed on August 2015)

<sup>16</sup> Section 3(1)(b)(i) of the Act which stipulates that the purpose of the Act is to promote and advance the social and economic welfare of consumers by reducing or ameliorating any disadvantages experienced in accessing any supply of goods and services by consumers who are low income persons or persons compromising a low income group.

<sup>17</sup> Section 22 of the Act containing the plain language requirement.

discussed in Chapter 3: a plethora of legislation then governed Product Labelling and Trade Description and ensured the integrity of goods sold.<sup>18</sup> The objectives of the previous laws were premised upon consumer awareness and consumer safety as discussed in Chapter 3.<sup>19</sup> It will be argued that the legislature attempted to solve the market failure of labelling requirements through strict legislation and overregulation and criminalisation. An observation with regard to the development of natural laws and norms will highlight the lack of comparative “possibilities” with other jurisdictions.<sup>20</sup>

1.2.1.3 A further justification for the methodology arises out of the unequal bargaining power of the consumer against a supplier in South Africa and the inadequacies identified in the Act regarding the right policies. This situation warrants a comparative analysis with a suitable foreign legal system, preferably of a first-world country where it is assumed that the legal regime governing product-labelling should be advanced and robust and proven to have protected the consumer from being misinformed. This means not only are consumers fully informed in terms of understanding the goods covered by the Act and of exercising their buying power responsibly, but that access to the courts is made simpler to enforce in the event that their fundamental consumer rights are infringed. In this context, authors such as Hawthorne have argued that the Act “is a first in legitimising contextualisation of the particular circumstances in relation to the adjudication process” with regard to court processes.<sup>21</sup> By way of example, according to Hawthorne the court proceedings in terms of Section 52(2) of the Act must, “consider the nature of the parties to the agreement, their relationship to each other and their relative capacity, education, experience, sophistication and most importantly their relative bargaining position”.<sup>22</sup> The researcher intends to compare the legal system in South Africa to that of the European Union, with a focus on the United Kingdom (UK): in recent years the aim has been full harmonisation of EU Directives and the law of member states.<sup>23</sup> The researcher will test the hypothesis that product labelling laws, as part of mandatory disclosure requirements, tend to harm both the consumer and the supplier. In order to prove so, the researcher will

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<sup>18</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) *Consumer Law in South Africa*, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>19</sup> See footnote 18 Supra and Chapter 1. .

<sup>20</sup> Prof W Du Plessis “A self-help guide: Research Methodology and Dissertation Writing” (2007) [www.nwu.ac.za](http://www.nwu.ac.za). (Accessed on August 2015)

<sup>21</sup> L Hawthorne “Public governance: Unpacking the Consumer Protection Act 68 of 2008” 2013 THRHR 343-370.

<sup>22</sup> L Hawthorne “Public governance: Unpacking the Consumer Protection Act 68 of 2008” 2013 THRHR 343-370.

<sup>23</sup> For example, the EC Unfair Commercial Practice Directive 2005/29/EC.

study all laws in South Africa regarding product labelling prior to and after the Act regulating or having an impact on product labelling.<sup>24</sup> The researcher will not digress to discuss the various societies that influence the different legal system as this is beyond the scope of this research. The researcher has already identified the problem statement above and, to avoid repetition, will not repeat it here. Thereafter the researcher will consolidate all laws and Directives, and case law governing product labelling in South Africa as well as in the European Union Directive (with a special focus on the UK) that deals with product labelling.<sup>25</sup> It is hoped that the researcher in adopting this approach will be in a position to address the problem statement from two separate jurisdictions and assess whether both systems provide adequate mechanisms to protect the consumer as far as product labelling is concerned or whether a particular system affords greater protection to consumers.

### 1.3 OVERVIEW OF CHAPTERS

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The overview of chapters is intended to offer an outline of the logical development of the research problem and argument and is unique to the nature of the research topic. A brief overview of the chapters is presented below:

#### 1.3.1 Chapter 1: Introduction

Chapter 1 introduces the research topic. Further, in outlining the research problem, it explores its nature and the value of interrogating the problem. It lays out the problematic development of product- labelling jurisprudence in South Africa. Chapter 1 also provides an objective literature review of what the researcher knows as against what the researcher aims to discover during the course of the research. In addressing the problem statement, the chapter deals with the methodology adopted by the researcher, namely to address the problem statement in a manner that is historical as well as comparative in relation to another jurisdiction in which product-labelling provisions appear to be more successfully applied.

#### 1.3.2 Chapter 2: Motivation and Justification

Chapter 2 deals with the motivation of the research from the perspective of context and justification.

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<sup>24</sup> See Chapter 3 below.

<sup>25</sup> See Chapter 6 below.



The section on justification discusses the purpose of the research approach that has been selected. It also discusses various false assumptions identified by the researcher. The researcher compares the objectives of the Act in section 24 provisions of the CPA from a procedural and a substantive point of view to the false assumptions that have been identified.<sup>26</sup>

### 1.3.3 Chapter 3: Product Labelling and Trade Description prior to the Consumer Protection Act

Chapter 3 deals with the legislative regime around product labelling prior to the Act.<sup>27</sup> This Chapter introduces the various pieces of legislation promulgated to govern product labelling, as well as other legislation which affected product labelling. Then the writer critically discusses each piece of legislation, assessing the negative impact that each set of laws had on consumers so as to indicate what each contributed to the promulgation of the Act. It is hoped that this account will provide the researcher with an objective assessment of the problematic application of previous legislation and indicate whether the position has improved under the terms of the Act. This historical comparative analysis of the previous legislative regime as against the Act will test the legal theories that were applied before the Act.<sup>28</sup>

### 1.3.4 Chapter 4: Product Labelling and Trade Description: The current position

This Chapter reviews the provisions of the current CPA.<sup>29</sup> This Chapter will also deal with the context of the problem statement by analysing the CPA in general as well as its purposes, interpretation and application (including the exclusions where the Act does not apply).

The introduction to this Chapter discusses the literal interpretation of the Act as the preferred initial approach by the researcher: interpreting Section 24 of the Act strictly according to the ordinary grammatical meaning of the words. The researcher believes that, in so doing, it will highlight various drafting errors as well as the insufficient coverage of a broad range of goods not dealt with in the Act. It is imperative that the Act provides certainty and that the construction of the words should not result in varying interpretation in the event of judicial interpretation.

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<sup>26</sup> 68 of 2008.

<sup>27</sup> 68 of 2008.

<sup>28</sup> 68 of 2008. See also Prof W Du Plessis *"A self-help guide: Research Methodology and Dissertation Writing"* (2007) [www.nwu.ac.za](http://www.nwu.ac.za). (Accessed on August 2015).

<sup>29</sup> 68 of 2008.

The discussion in this section provides background to and contextualises the research question in Chapters 5 and 6 below. It is not the intention of the researcher to cover an array of goods which are not adequately dealt with in the Act and which are consumable goods for human consumption, which is beyond the scope of this research. The researcher will discuss the effect of the narrow scope of goods covered by the Act.<sup>30</sup> Further, this chapter provides the context for Chapter 6 which deals with goods which are inadequately regulated and in the researchers' view ought to have been regulated by the Act so as to provide greater consumer protection.

### 1.3.5 Chapter 5: Product Labelling and Trade Description: A holistic appraisal of the South African position

This chapter offers a holistic appraisal of product-labelling jurisprudence in South Africa after a comprehensive discussion of the position prior to the implementation of the CPA<sup>31</sup> as well as of the content and application of the CPA. The chapter appraises the current South African position and identifies unique variables affecting Product Labelling and Trade Description. The social, economic and ethical considerations in the current product-labelling regime are identified with particular focus on the concept of the consumer. The problematic situation with regard to the failure to warn is identified and the application of the CPA in relation to other relevant legislation is discussed.<sup>32</sup>

### 1.3.6 Chapter 6 : Research comparison: an analysis comparing South Africa to the EU and an EU Member State (**UK**)

This Chapter compares the legal regime in South Africa with the legal regime of the European Union, focusing on the UK, with regard to Product Labelling and Trade Description.<sup>33</sup> The Chapter then critically discusses the goods, based on this research, which are inadequately regulated by the Act.<sup>34</sup>

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<sup>30</sup> 68 of 2008.

<sup>31</sup> 68 of 2008.

<sup>32</sup> 68 of 2008.

<sup>33</sup> For example, Article 55 of the Council Directive 2004/27/EC of the European Parliament and the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medical products for human use and EC Unfair Commercial Practice Directive 2005/29/EC.

<sup>34</sup> 68 of 2008.

An example of common goods, which ought to have been regulated by the Act<sup>35</sup> to afford consumers greater protection in the public interest, is complementary medicine. The nature and scope of complementary medicine and product-labelling provisions in South Africa will be critically examined and a comparison made with the best practices adopted by the European Union through its Directive.<sup>36</sup>

As previously iterated it is not the intention of the researcher to offer an expansive discussion on an array of both consumable and non-consumable goods as this is beyond the scope of this research. The researcher will conduct a comparative analysis between the CPA and the position in the UK under the European Directive regarding goods which are either poorly regulated by South African laws or inadequately regulated and a focus on complementary medicine.<sup>37</sup>

### 1.3.7 Chapter 7: Failure to warn

The provisions of Section 58 of the Act<sup>38</sup> will be discussed briefly in this chapter. The chapter relates to warnings to be disclosed in relation to facts and the nature of the risk attached to goods of a certain character. This discussion is especially relevant for goods such as complementary medicine which pose a higher health-risk to the consumers, well as the packaging of which that poses a risk to the environment.

The value chain concept of Product Liability in terms of Section 61 of the Consumer Protection Act<sup>39</sup> will be discussed. The discussion in this Chapter does not form part of the research problem as the concept of Product Liability in terms of the Act is a research topic on its own. The intention of incorporating it into this research is to establish the value chain concept in relation to how the Act is applied. A pertinent discussion is the omission of the word “*supplier*” in Section 61(1) of the Act and its implications.<sup>40</sup> The exceptions in terms of Section 61(4) will also be discussed. It is unclear what the legislature intended by the omission of the word “*supplier*” from the Act. Further, the concept of strict liability without the proof of negligence as a test will be discussed briefly as well as its effect on suppliers.

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<sup>35</sup> 68 of 2008.

<sup>36</sup> See footnote 33 Supra.

<sup>37</sup> See footnote 33 Supra.

<sup>38</sup> 68 of 2008.

<sup>39</sup> 68 of 2008.

<sup>40</sup> 68 of 2008.

Section 60 of the Act<sup>41</sup> relating to safety monitoring and recall of goods declared unsafe will be discussed in the context of the inadequately regulated goods above, as well as adherence to the guidelines by suppliers and manufactures.

### 1.3.8 Chapter 8: Enforcement

All enforcement provisions of the Act: Section 8 read with Section 73(c)(i); Section 52 dealing with exclusive jurisdiction for contraventions of Sections 40, 41, 48 and 70(1);<sup>42</sup> Section 26 of the National Credit Act<sup>43</sup> and Section 69, hierarchical application, are examined, as is the financial impact each provision has on consumers. Ancillary to this discussion the merits of Section 4 of the Act which deals with the realisation of consumer rights, including the plausibility of class actions,<sup>44</sup> in the current regime will be featured.<sup>45</sup> Similarly to Chapter 7 this Chapter is not part of the research problem as the enforcement regime in terms of the Act warrants a research topic of its own. The intention in incorporating it is to establish the value chain concept in the application of the Act. It is anticipated that enforcing legislative compliance in respect of labelling requirements will prove difficult for consumers. The labelling requirements are found either to be restrictive in relation to certain goods or to leave lacunae in respect of goods utilised by most consumers.

### 1.3.9 Chapter 9: Recommendations and conclusion

The researcher explores the possibility of reviewing the wording of Section 24 of the Act and evaluates the wording against the salient objectives of the Act.<sup>46</sup> This will entail reiterating the mandatory labelling requirement in respect of goods, the legal lacunae identified in respect of the scope of goods covered by the Act in the Regulations of the Act, the possible concurrent application of existing legislation dealing with labelling requirements, the outcome of the comparative analysis, and the role of direct regulation in respect of the labelling requirements of goods, in the context of the research questions above. The recommendation and conclusion will address the problem statement that was raised and offer suggestions to resolve the research questions.

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<sup>41</sup> 68 of 2008.

<sup>42</sup> 68 of 2008.

<sup>43</sup> 34 of 2005.

<sup>44</sup> Section 4(1) (a)-(e) of the Act.

<sup>45</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 CC.

<sup>46</sup> 68 of 2008.



## 2. MOTIVATION : JUSTIFICATION

In the researcher's view the CPA is based on various false assumptions. These assumptions arose among legislators as a result of their trying to balance codifying and harmonising previous laws that dealt with labelling requirements as well as upholding the noble tenet of protecting all consumers but without full consideration of the role of the supplier as enabler of the CPA. Prior to the enactment of the Act various laws dealt with labelling requirements as a means of correcting market failures in relation to labelling requirements.<sup>47</sup> As indicated in Chapter 3 below, it was presumed by providing more information and by passing more Acts of Parliament the market failures would be resolved. The result was a legislative regime that was too fragmentary and did not provide sufficient protection to the consumer whom it was intended to protect.<sup>48</sup> In a country such as South Africa a balancing act is achievable only if there is an adverse impact on the consumers which it seeks to protect. It is important for the researcher to understand the thinking behind the salient objectives of consumer-related legislation in a broader sense. The researcher is interested in evaluating these objectives against the fundamental rights enshrined in the Act in respect of Product Labelling and Trade Description, and to what extent the consumer is protected by these rights.<sup>49</sup> The concluding chapter will elucidate whether or not the consumer is adequately protected and if the salient objectives of the Act have been met. By posing a series of questions the researcher will explore the assumptions surrounding policy considerations when drafting consumer laws. The researcher is of the opinion that through these questions the uncertainties, inconsistencies and legal lacunae are exposed.

The fundamental objectives of consumer-related legislation can be summed up as follows:<sup>50</sup>

- a) Protection for all consumers against exploitation by suppliers in the entire value-chain process of goods, from the production, importation, refining, distribution, marketing and retailing of goods sold and delivered.

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<sup>47</sup> D Mc-Quoid - Mason, T Woker, L Greenbaum, I Konyon, C Lakhani, T Cohen (1997) *Consumer Law in South Africa* Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>48</sup> T 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 Obiter 217 – 231.

<sup>49</sup> W Jacobs, P N Stoop & R Van Niekerk *Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008. A critical overview and Analysis* PER/PELI 2010(13)3 302-508.

<sup>50</sup> O Bar – Gill & O Ben – Shahr. *Regulatory Techniques In Consumer Protection: A critique of the Common European Sales law* (May 2012) University of Chicago Law & Economics 1-30.

- b) Protection for all consumers against inferior quality of goods or unsafe or dangerous goods.
- c) Protection specifically of vulnerable consumers against false and misleading information regarding the nature of goods sold and delivered, due to perceived levels of low literacy.<sup>51</sup>
- d) Protection against unfair contractual terms and conditions, this being mostly applicable (but not entirely restricted) to written contracts.<sup>52</sup>
- e) Return framework of goods that are non-compliant with the Act.<sup>53</sup>
- f) Introduction of strict liability without the necessity to prove the common law test of “*negligence*”.<sup>54</sup>
- g) Enforcement and other punitive measures.<sup>55</sup>

In South Africa, the legal dispensation of the Act is divided up in terms of procedural fairness and substantive fairness.<sup>56</sup> The high level objections, from a) to g) above, form a part of both substantive and procedural fairness in terms of the Act.<sup>57</sup> The legal transition from the previous legal regime is thus seen to be in line with our Constitution which enshrines a constitutional doctrine of fundamental human rights.<sup>58</sup> This has been coined “*the fairness orientated approach*” by authors such as Hawthorne<sup>59</sup> and entails that the “*legislature views the moral improvement of its people as its aim*”.<sup>60</sup>

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<sup>51</sup> T 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 Obiter 224.

<sup>52</sup> See footnote 51 Supra.

<sup>53</sup> See footnote 51 Supra.

<sup>54</sup> Section 61 of the Act.

<sup>55</sup> Section 69 of the Act read together with the provisions of Sections 8, 52, 70(1) of the Act and Section 26 of the National Credit Act 34 of 2005.

<sup>56</sup> W Jacobs, PN Stoop & R Van Niekerk “*Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008. A critical overview and Analysis*” PER/PELI 2010(13)3 302-508. See also L Hawthorne “*Public governance: Unpacking the Consumer Protection Act 68 of 2008*” 2013 THRHR 343-370 and Y Mupangavanhu “*An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008*” (2012) Volume 15 No 5 PER 321-638.

<sup>57</sup> See footnote 56 supra.

<sup>58</sup> 108 of 1996.

<sup>59</sup> L Hawthorne “*Public governance: Unpacking the Consumer Protection Act 68 of 2008*” 2013 THRHR 343-370.

<sup>60</sup> L Hawthorne “*Public governance: Unpacking the Consumer Protection Act 68 of 2008*” 2013 THRHR 343-370.

Procedural fairness envisages that the conclusion of contracts should be done under “*fair circumstances*”.<sup>61</sup> The method employed by the legislator to ensure procedural fairness in the application of the Act for the purposes of product labelling relies on implementing the following;<sup>62</sup> an information obligation forms part of procedural fairness: this entails full disclosure of information regarding goods covered by the Act in respect of price, sales information and product labelling.<sup>63</sup>

Substantive fairness: it is envisaged that the terms and obligations of contract must be concluded fairly. In order to ensure substantive fairness in the application of the Act for the purposes of product labelling the legislator enjoined the right to fair, just and reasonable terms and conditions.<sup>64</sup> Ancillary to the above is the prohibition of blacklisted or grey-listed terms and conditions in a written contract or a commercial arrangement. Blacklisted terms are contractual terms or arrangements that seek to circumvent or defeat the purpose and policies of the Act.<sup>65</sup> Any attempt in reducing or setting aside of such terms shall result in the said written contract or arrangement being deemed null and void.<sup>66</sup> Grey-listed terms are contractual terms or arrangements that are presumed to be unfair.<sup>67</sup> The interpretation of statute doctrines as well as interpretation of contracts would then apply when interpreting whether the terms concerned may be just and reasonable depending on a given set of circumstances.<sup>68</sup> The onus of proof lies on the supplier to prove that the grey-listed term or arrangement is fair.

The legislator ought to be lauded for the attempt to consolidate all applicable fragmented laws that formed part of the previous regime as well as entrenching fundamental rights of fairness arising from the Constitution in the consumer regulatory framework. Nevertheless, the researcher is of the view that this pattern of thinking in legislators is rather ambitious and faulty and does not inspire consumer confidence or necessarily protect consumers generally.<sup>69</sup>

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<sup>61</sup> See footnote 56 supra.

<sup>62</sup> Y Mupangavanhu “*An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008*” (2012) Volume 15 No 5 PER 321-638.

<sup>63</sup> Regulation 6 of the Act. See also footnote 62 Supra.

<sup>64</sup> Sections 48, 49 and 51 of the Act.

<sup>65</sup> Sections 51(1) and 51(2) of the Act.

<sup>66</sup> Section 51(3) of the Act.

<sup>67</sup> See footnote 62 Supra.

<sup>68</sup> Section 52 (4)(d) of the Act.

<sup>69</sup> T 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 Obiter 217 – 231.



The researcher will analyse the high level objectives from a) to f) above to illustrate the false assumptions of the legislature in creating objectives that appear to be implausible from a practical point of view. The false assumptions will be highlighted by posing a series of questions under each assumption below.

## 2.2 False Assumptions

The researcher has identified various assumptions, some of which may or may not have been part of any empirical study. These assumptions are important for this research in that they address the possible thinking and other considerations behind various legal approaches which are assumed to have influenced the drafting of the Act by legislators. Largely, it is assumed that legislators attempted to perform a balancing act in codifying the previous legal regime that governed Product Labelling and Trade Description as well as upholding the noble tenet of protecting all consumers. It is also assumed that the role of the supplier as enabler of the Act was largely ignored.

During the course of this research empirical studies that focus on the particular issues and the interplay of disclosure requirements that form part of this mini-dissertation have not been identified in South Africa, thus a comparative analysis is supplied with reference to suitable laws which have been applied in foreign jurisdictions such as the United Kingdom.<sup>70</sup>

### a) Disclosure requirements:

It is ambitious of legislators to assume that they could adopt a largely paternalistic approach in requiring disclosure of information that may be viewed as *“simple or basic in some instances (such as pricing or technical information (such as product labelling on goods covered by the Act without consulting suppliers), as well assuming that all suppliers shall adhere to the principles of good faith and will be transparent”*.<sup>71</sup> What the legislature did not take into consideration is the psychology of a consumer at the end-point of a sale and various socio-economic factors discussed in Chapter 5 below. The following questions should have been addressed by legislators in providing a holistic approach to consumer protection:

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<sup>70</sup> O Ben-Shahar and C E.Schneider. *“More than your wanted to know: The Failure of Mandated Disclosure”* (March 1 2010) University of Chicago Law & Economics, Common Market Law Review Vol 50 109.

<sup>71</sup> See footnote 70 Supra.

- (i) Do the provisions of the Act in as far as they relate to product labelling adequately cover all goods that should be adequately labelled?<sup>72</sup> This question forms the crux of this research. Throughout this research the adverse effects will become apparent if the scope of goods is narrow and there is legal uncertainty.
- (ii) In respect of goods that are covered by legislation are the consumers of such goods proactive readers and are they capable of understanding the labelling requirements of such goods? Is the information clear enough to be understood? This question is of particular importance in South Africa where general and financial literacy levels are generally low.
- (iii) Is the information disclosed relevant as far the consumer is concerned? It can be argued that certain disclosure requirements are viewed with a degree of apathy as any attempt to try and understand the disclosure requirements on the goods may be time-consuming for the consumer.
- (iv) What is the economic impact of labelling and packaging requirements on the goods and the retail cost that may be passed on to the consumer?

Similarly to the situation in the Common European Sales Law, the questions above have not been addressed by the current legislative regime for consumer protection regarding product labelling. The researcher fully supports research authors such as Oren Bar-Gill, who confirms that the *“disclosure paradigm adopted by the Common European Sales Law represents an archaic and futile regulation of information”* on the legal grounds that the interpretation of the product labelling provisions do not aid the consumer in addressing the questions raised above.<sup>73</sup> The legislature does not take into consideration the socio-economic factors unique to the Republic of South Africa regarding consumer literacy levels and sophistication. The legislature adopted a simplistic approach of mitigating against the previous legal regime surrounding Product Labelling and Trade Description by providing for mandatory disclosure of information on goods sold and simultaneously not accounting for goods which are available on the market and unregulated by any legislation<sup>74</sup>. The authors Ben-Shahar and Schneider, in their scholarly article, argue that mandatory disclosure provisions are an indirect form of consumer awareness designed to educate (and thus

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<sup>72</sup> See footnote 70 Supra.

<sup>73</sup> O Ben-Shahar and C E.Schneider. *“More than your wanted to know: The Failure of Mandated Disclosure”* (March 1 2010) University of Chicago Law & Economics, Common Market Law Review Vol 50 109.

<sup>74</sup> It is important to note throughout this research that the goods covered by this research are goods referred to in Annexure D, Regulation 6 of the Act *supra*.

presumably inform) the consumer.<sup>75</sup> This is done by providing information to a consumer who is likely neither unaware nor interested in the technical information provided about the goods apart from basic information such as their nature, size, price, basic instructions in utilizing the goods and, maybe, the country of origin.<sup>76</sup> In addition, the manner in which products are labelled is problematic: the textile industry, for example, provides its labelling requirement on garments in a non-conspicuous manner, inside the garment, in very small and sometimes illegible print, usually in English. The consumer is likely to become aware of the product labelling of the garment after the purchase of the goods. It is clear that the current approach by legislatures to product labelling, including that of textile goods and other goods that are not included in the scope of application for product labelling, is unsustainable and that a new approach is required. This approach will have to take into consideration the socio-economic impact on consumers of labelling goods, and in some instances their ethical considerations too.<sup>77</sup> The example above supplies mandatory disclosure readability and demonstrates from a practical point of view how mandatory disclosures do not always protect the consumers, albeit with best intentions on the part of the legislature.

b) Realisation of consumer rights

The view held by the authors Omri Ben-Shahar and Schneider that the consumer protection law in the Common European Sales Law adds very little value to consumers based on the false assumptions above is fully supported.<sup>78</sup> A comparative analogy regarding the disclosure requirements above clearly indicates that the consumer does not fully benefit from the paternalistic approach adopted by legislature and that a different approach should be considered by the legislature in an indirect form of consumer awareness that is not intensely regulated by law. The failure of the legislature to revise its disclosure requirement is not only detrimental to consumers and suppliers alike, it has no meaning and remains ineffective.

The researcher is of the view that it was presumptive of the legislature to further assume that they would be able create awareness regarding the nature of goods sold all the time. The consumer who is purchasing goods cannot peruse the labelling requirement of all the goods being purchased, this is not their intention nor is part of the consumer's core behaviour. At best consumers are influenced by mandatory information, such as pricing and quantity, and are least likely to be influenced by other mandatory labelling requirements.

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<sup>75</sup> O Ben-Shahar and C E.Schneider. *"More than you wanted to know: The Failure of Mandated Disclosure"* (March 1 2010) University of Chicago Law & Economics, Common Market Law Review Vol 50 109.

<sup>76</sup> See footnote 75 Supra.

<sup>77</sup> See footnote 75 Supra.

<sup>78</sup> See footnote 75 Supra.



### 3. PRODUCT LABELLING AND TRADE DESCRIPTION PRIOR TO THE CONSUMER PROTECTION ACT

#### THE LEGISLATIVE REGIME PRIOR TO THE CONSUMER PROTECTION ACT

In the past a plethora of legislation was enacted to regulate product labelling and to prescribe processes that must be followed to protect consumers. The aim was to make consumers aware of the nature of the goods sold and make informed decisions.<sup>79</sup> In the view of the researcher the approach that was adopted then was to control product labelling through a variety of legislation in order to deal with market failure. In other words, it was presumed failure would be corrected by providing more information and passing more Acts of Parliament. Inevitably, this approach led to a legislative regime that was too fragmented and which did not provide sufficient protection to the consumer whom it was intended to protect.<sup>80</sup>

In addition the legislature criminalised prohibited conduct: it was the view of the then legislature that governmental authorities, such as the South African Police Services and in some instances the Department of Customs and Excise, had to intervene to protect consumers. By implication these governmental authorities were viewed by the legislature to have the necessary competence, capacity and resources to administer these Acts. For the consumer this meant that any transaction that was entered into with a manufacturer contrary to the Acts amounted to a breach of a statutory provision and rendered the contract void unless otherwise proven. Statutory interpretation had to be adopted to establish the true intention of the legislature to determine whether or not the agreement with the consumer was void.<sup>81</sup> In *Metro Western Cape (Pty) Ltd v Ross* it was stated: *“the intention of the legislature must be determined by considering the language, scope and object of the provision and the consequences in relation to justice and convenience of adopting one view rather than the other parties”*.<sup>82</sup> Over and above that the contract between the consumer and the supplier was presumed to be void, consumers had to rely on governmental authorities to act on their behalf to enforce their rights by reporting such transgressions to the said authorities. Since the burden of proof lay with the authorities to show beyond reasonable doubt that they had transgressed, all that manufacturers or retailers in breach of the law had to do was to show an element of doubt in the authorities' version.

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<sup>79</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) *“Consumer Law in South Africa”*, Juta Legal and Academic Publishers Chapter 9.281-291 and Chapter 1.

<sup>80</sup> Memorandum to the Consumer Protection Bill B19D-2008.

<sup>81</sup> R Sharrock (2007) *“Business Transaction Law”*, Butterworths, Chapter 5 page 92.

<sup>82</sup> 1986 (3) SA 181 (A).

In addition it is noted that the enforcement mechanisms for criminal sanctions were rather weak in that the fines were not sufficiently severe to deter the unlawful contravention of the laws, and the worst punishment was a relatively short term of imprisonment. The number of different authorities may have created confusion in terms of establishing jurisdiction for prosecution purposes.

As a way of illustrating the fragmentary nature of the previous regime, the researcher has analysed the legal position of who or what constituted a consumer. Of the statutes that were previously applicable few provided a definition of a consumer.<sup>83</sup> The Trade Practices Act defined the consumer as “*any person who makes use of any service*”, whereas other statutes, such as the Harmful Business Practices Act 71 of 1988, defined the consumer as “*a person to whom any commodity is offered, supplied or made available*.”<sup>84</sup>

For the purposes of regulating product labelling, the following statutes were applicable which directly affected and regulated product labelling:

- a) Measuring Units and National Measuring Standards Act 76 of 1973
- b) Trade Metrology Act 77 of 1973
- c) Marketing Act 59 of 1968
- d) Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 read together with Regulations 1555
- e) Price control Act 25 of 1964
- f) Trade Practices Act 76 of 1976
- g) Consumer Affairs (Unfair Business Practices) Act 1998

a) Measuring Units and National Measuring Standards Act 76 of 1973

This legislation, which was repealed and replaced by the Measuring Units and Measurements Standards Act 18 of 2006, has been amended on numerous occasions. The Act provides for the introduction of measuring units of the International System of Units within South Africa.<sup>85</sup> The Act also introduced other measuring units, and in terms of Section

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<sup>83</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>84</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>85</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291..

7(1) it introduced national measuring standards by means of a notice in the government gazette, as well as other incidental matters as indicated in its preamble. Section 7 (5) of the said Act provided for “*traceability*” for measuring standards where there were no national standards in place.

In order to deal with any potential infringement, the Act, in terms of Section 8, made it an offence to use any measuring unit other than a designated metric unit.<sup>86</sup>

As it was then it remains vital that quality control be preserved not only in the interest of trade nationally and globally but also in the interest of consumer safety. The Act sought to ensure quality control in weights and measurements in South Africa, but the wording of “*traceability*” was vague and created legal problems.<sup>87</sup>

b) Trade Metrology Act 77 of 1973

The purpose of this legislation was to “*consolidate and amend the laws relating to trade metrology*”.<sup>88</sup> Ancillary to this purpose, the Act aimed to promote fair trade and to protect public health and safety and the environment.<sup>89</sup> The Act furthermore prohibited false or incorrect statements of quantity and it was a statutory offence if such statements were false, untrue or intentionally misleading as regarding the weight of an item in packaged goods.<sup>90</sup> The Regulations of the above Act dealt with prescribed quantities, the manner of marking quantity statements and descriptive terms. Similarly to the Measuring Units and National Measuring Standards Act 76 of 1973, any non-compliance with its provisions was deemed to be a statutory offence and the goods concerned could not be sold to the markets. At the time the legislature placed a high value on laws surrounding trade metrology. The Act furthermore provided a policing system of inspectors to ensure enforceability.

The problems that arose in the past relate to the adherence (or lack thereof) by manufactures to abide by the regulations regarding prescribed quantities, the manner of

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<sup>86</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291..

<sup>87</sup> Measuring Units and National Measuring Standards Amendment Bill 1998[B25 – 98]. Memorandum on the objects of the Measuring Units and National Measuring Standards Amendment Bill 1998. Page 8.

<sup>88</sup> Act 77 of 1973 preamble.

<sup>89</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>90</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*” (1997) Consumer Law in South Africa, Juta Legal and Academic Publishers Chapter 9.281-291.

making quantity statements and descriptive terms.<sup>91</sup> It is noted that there was still dishonesty on the part of manufacturers and retailers by short-weighting products, by using incorrect labelling on goods, by using incorrect scaling for consumable goods such as certain vegetables that are weighed and by employing incorrect packaging of similar products in similar containers but with different weights.<sup>92</sup>

The element of poor enforcement of the abovementioned Act, seemingly, contributed to dishonest manufactures and retailers acting fraudulently and, similarly, the punitive provisions of the current CPA regime are insufficiently severe and do not inspire consumer confidence, as is noted further in Chapter 8.<sup>93</sup>

c) Marketing Act 59 of 1968

The purpose of this legislation was to deal with laws regulating the production, distribution and sale of agricultural products as defined in the said Act and, furthermore, to establish a national mark for the grading and standardization of agricultural products. The Act introduced the “*agricultural marketing system to control the movement, pricing, quality standards, selling and supply of a large volume of farm production with the view to securing price stability and narrowing the gap between the producer and consumer prices*”.

The Minister of Agriculture, in terms of the empowering provision of Section 89 of the abovementioned Act, made regulations in the Schedule. The Minister regulated the following:

- a) *The standard of composition of a product or any class of product and the ingredients and other substances which a product or class of product shall contain,*
- b) *The particulars with which and the manner in which any product or container containing such product shall be marked or labelled.*

The concern is that this Act has the potential to overlap with the provisions of Section 24 of the CPA dealing with Product Labelling and Trade Description. For instance, on comparing

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<sup>91</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>92</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>93</sup> Own emphasis.



the provisions of Section 24 of the CPA with Section 89 of the abovementioned Act, Section 24 (1) stipulates that a trade description is applied to goods if it is—

- (a) applied to the goods, or to any covering, label or reel in or on which the goods are packaged, or attached to the goods;*
- (b) displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description;  
or*
- (c) is contained in any sign, advertisement, catalogue, brochure, circular, wine list, invoice, business letter, business paper or other commercial communication on the basis of which a consumer may request or order the goods.*

The definition of “goods” in terms of the CPA includes—

- (a) anything marketed for human consumption, or any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded; or any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; or a legal interest in land or any other, or immovable property, other than an interest that falls within the definition of ‘service’ in this section; and gas, water and electricity.*

The analysis of these references to the labelling of goods indicates there is a clear overlap between the two pieces of legislation in terms of their coverage of what amounts to labelling requirements.<sup>94</sup> This overlap likely will lead to problems of interpretation when consumers seek to enforce their rights and are unsure which piece of legislation affords them greater protection and adds to confusion among consumers.

d) Foodstuff, Cosmetics and Disinfectants Act 54 of 1972

This piece of legislation is applied concurrently with the current regime of the CPA as some of the definitions in the abovementioned Act, such as “*labelling*”, may assist in the interpretation of the word “*labelling*” for the purposes of the CPA (product labelling is not

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<sup>94</sup> Own emphasis.

defined in the CPA). It is submitted that the result can be confusion and overlap as the abovementioned Act regulates only the *ability to control the sale, manufacture and importation of foodstuff, cosmetics and disinfectants* whereas the CPA covers an array of goods which includes *anything marketed for human consumption and any tangible object not otherwise contemplated for human consumption*.<sup>95</sup>

In terms of the abovementioned Act, the word “foodstuff” means any “*article or substance ordinarily eaten or drunk by a person or purporting to be suitable or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as part of ingredient of any such article or substance*”.<sup>96</sup>

Furthermore, the abovementioned Act defines “*label*” (the CPA does not) as any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed with any foodstuff, cosmetics or disinfectant or its package, and referring to such foodstuff, cosmetics or disinfectant, and, when used as a verb, means to brand or mark or to attach or to provide in any written, pictorial or other descriptive manner.<sup>97</sup>

The abovementioned Act criminalises and penalizes any of its transgressions: any person shall be guilty of an offence if he sells or manufactures or imports for sale any foodstuff, cosmetics or disinfectants that do not comply with the labelling requirements.<sup>98</sup> On any composition of matter, additives were either not permitted or any excessive amount was not permitted. The abovementioned Act further criminalised false description on labels of goods such as food: any false description as to the origin, nature, substance composition, quality, strength, nutritional value and other properties.<sup>99</sup>

Similar to the Trade Metrology Act 77 of 1973 the punitive measure/s were weak and did not deter an unscrupulous manufacturer or retailer as they amounted to a mere slap on the wrist. For instance, a first time offender received a fine of a particular threshold (R400) determined from time to time or imprisonment not exceeding 6 (six) months,<sup>100</sup> or both, a second offence received a determined fine (R800) or imprisonment not exceeding 12

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<sup>95</sup> Preamble of Act 54 of 1972.

<sup>96</sup> This would exclude any article or substance governed by the Medicine and Related Substances Act 101 of 1965 or other goods covered by public regulation.

<sup>97</sup> Act 54 of 1972.

<sup>98</sup> Section 17 and 18(1) of Act 54 of 1972.

<sup>99</sup> Section 18 of Foodstuff, Cosmetics and Disinfectants Act 54 of 1972.

<sup>100</sup> Section 18(1) (a) of Act 54 of 1972.

(twelve) months or both,<sup>101</sup> a third time offence received a determined fine (R2000) or imprisonment not exceeding 24 (twenty four) months.<sup>102</sup> It is the view of the researcher that such punitive measures are hardly a deterrent and that an unscrupulous supplier in all probability will elect to pay the fines and continue acting in breach of the said Act.

e) Price control Act 25 of 1964

This abovementioned Act later became known as the Sales and Services Matters Act 25 of 1964. This Act stipulated that a Controller, who is appointed by the Minister of Trade and Industry, by way of a notice in the Government Gazette may prescribe requirements and rules on the following issues:

- a) Deposits and refunds payable on container of goods sold
- b) Sale of goods by auction
- c) Marking of prices on goods by dealers
- d) Placing of identity marks on goods by manufacturers and dealers
- e) Issuing and retention of invoices by certain purchasers and by persons rendering services

The Controller had wide discretionary powers to issue notices in the Government Gazette to either prohibit or impose conditions that he deemed fit to impose regarding any sale of goods or services rendered. The non-compliance with the said notice amounted to a criminal offence.<sup>103</sup>

f) Trade Practices Act 76 of 1976

This Act has been amended by the Trade Practice Amendment Bill as published in the Government Gazette No 22249 of 24 April 2001. In terms of the memorandum of the objects of the Trade Practices Amendment Bill, it is stipulated that the Bill “*seeks to amend the Trade Practices Act 1976 so as to prohibit certain practices known as “ambush marketing” on sponsored events and to place penalties in the event of any contravention of its provisions*”.

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

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<sup>101</sup> Section 18(1)(b) of Act 54 of 1972.

<sup>102</sup> Section 18(1)(c) of Act 54 of 1972.

<sup>103</sup> R Sharrock (2007) “*Business Transaction Law*”, Butterworths, Chapter 5. Page 91

The purpose of the abovementioned Act was to provide for the prohibition or control of certain business practices and any matters connected therein<sup>104</sup>. The Act defined unfair business practices as *any business practice which directly or indirectly has, or is likely to have the effect of:*

- a. Harming the relations between businesses and consumers;*
- b. Unreasonably prejudicing any consumer;*
- c. Deceiving any consumer;*
- d. Unfairly affecting any consumer.*

The Act furthermore defined (and thus restricted) business practices as:

- a. Any agreement, accord, arrangement, understanding, undertaking whether legally enforceable or not, between two or more persons;*
- b. Any scheme, practice or method of trading, including any method of marketing or distribution;*
- c. Any advertising, type of advertising or any other manner of soliciting business;*
- d. Any act or omission on the part of any person, whether acting independently or in concert with any other person;*
- e. Any situation arising out of the activities of any person or class or group of persons, but does not include a practice regulated by competition law.*

The Act sought to protect the consumer by providing a framework to safeguard against unfair business practices by establishing a Business Practice Committee with wide-ranging powers bestowed in terms of the said Act.<sup>105</sup>

The mechanisms that the Act provided for to assist consumers in terms of redress were through a direct, implied hierarchical structure, which starts with a consumer laying a complaint, then investigations and prosecution, as well as through indirect and informal structures such as education and compliance programmes.<sup>106</sup>

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<sup>104</sup> Preamble of Act 71 of 1988.

<sup>105</sup> Act 71 of 1988.

<sup>106</sup> Act 71 of 1988.

Having discussed the previous legal regime around Product Labelling and Trade Description ,it is clear from the past regime that two elements were core to establishing a regulatory framework for product labelling:

- (a) Direct regulation of labelling requirements by the state and exemptions granted in respect of certain goods only.<sup>107</sup>
- (b) Dual enforcement for a contractual or delictual claim of damages in the event of any contravention as well as the creation of statutory offences in certain instances coupled with a payment of a fine or imprisonment or both.<sup>108</sup>

The main distinguishing feature with regard to the enforcement mechanism from the previous regime and the existing regime is the imposition of financial penalties equivalent to 10% of the annual turnover of the previous financial year of a suppliers' legal entity.<sup>109</sup> The introduction of the industry bodies and introduction of the Consumer Tribunal as part of the enforcement regime discussed in Chapter 8 creates a radical departure from the previous consumer law regime as far as product labelling is concerned.<sup>110</sup> The balance of the provisions in the current Act according to the researcher, are not too distinguishable from the previous regime and the consumer remains disempowered and unprotected.

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<sup>107</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyon. C Lakhani. T Cohen (1997) *“Consumer Law in South Africa”*, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>108</sup> See footnote 107 Supra.

<sup>109</sup> Own emphasis.

<sup>110</sup> Own emphasis.

#### 4. PRODUCT LABELLING AND TRADE DESCRIPTION: CURRENT POSITION

The current legal position of Product Labelling and Trade Description which is regulated by Section 24 of the Act read together with Regulation 6 in the researcher's view does not signify a radical departure from the previous legislative regime governing labelling requirements, mainly on the grounds of the prevailing uncertainty regarding the scope of goods covered by the Act. Naude and Eiselen state: *Section 24 protects consumers against any misleading trade descriptions or descriptions that have been tampered with.*<sup>111</sup> This is certainly the intention of the legislature, however the researcher agrees with Woker, who argues: *despite attempts by both industry and government to deal with consumer protection, in reality most consumers must rely on the general principles of the common law, this is due to enforcement challenges highlighted in Chapter 8 below.*<sup>112</sup>

It will be noted that most goods in South Africa that are subject to Product Labelling and Trade Description provisions are industry-specific, that is, specific rules are created for each industry (for instance, in complementary medicine as discussed in Chapter 6) and these rules are then codified into laws and regulations to create formality. It means that a wide array of goods remain regulated under different laws which laws in some instances will apply concurrently with the Act as indicated in Chapter 3 above.<sup>113</sup> This means that the provisions of Section 24 of the Act should not be looked at in isolation when applying the Act and that parallel pieces of legislation and, in some instances, self-regulated bodies also regulate labelling requirements and trade description.<sup>114</sup> However, it will be noted, despite the broad regulation, not all industries fall under direct government regulation through laws, creating legal uncertainty. Furthermore, the inference is that the labelling requirements and trade description laws remain fragmented and un-codified, leading to a problem of application when a consumer seeks to enforce their rights as indicated in Chapter 8.

Chapter 3 (Part B) of the Act provides the over-arching provisions for the *“establishment of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of the consumer generally”*. For suppliers the Act seeks to *“promote fair business practices”*. Ancillary to this objective is the *“protection of consumers from unconscionable, unfair, unreasonable, unjust or otherwise*

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<sup>111</sup> T Naudè & S Eiselen (eds) *“Commentary on the Consumer Protection Act”* (2014) J 24-2, 24-3.

<sup>112</sup> T 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 Obiter 223.

<sup>113</sup> Own emphasis.

<sup>114</sup> E de Stadler (2013) *“Consumer Law Unlocked”* Siber Ink Chapter 2. Page 19.

*improper trade practices*” and *“deceptive, misleading, unfair or fraudulent conduct”*.<sup>115</sup> For the consumer the Act has the objective of *“improving of consumer awareness and information and encouraging responsible and informed consumer choice and behaviour”*.<sup>116</sup>

As part of the fundamental right to disclosure and information is that the consumer has the right to information in plain and understandable language,<sup>117</sup> the disclosure of price of goods and services,<sup>118</sup> Product Labelling and Trade Description,<sup>119</sup> the disclosure of grey market goods.<sup>120</sup> The Act attempts to codify the legal regime dealing with all aspects of the right to full disclosure. However its limited scope and application as noted throughout this research reduces these rights and diminishes consumer confidence in as far as the disclosure obligation is concerned. The Act furthermore broadens its scope from the mere supply of goods to include the promotion of goods and services, which relates to various forms of marketing techniques often applied in the promotion of goods and services. The Advertisement Standards Association of South Africa (ASASA) plays a role in marketing of goods in terms of the Act due to the wide definition of trade description. However, as indicated, this is a self-regulated voluntary association with an ombudsman scheme for the advertisement industry.<sup>121</sup>

The Act provides further that where goods are exempt the provisions dealing with strict liability without the common law legal test for negligence still apply.<sup>122</sup> This provision is to be lauded, especially in relation to goods that are poorly regulated and not subjected to various integrity tests which may expose the consumer to a hazardous, unsafe and potentially fatal situation.<sup>123</sup>

For the purposes of this research the following local Acts of Parliament have parallel application with the provisions of Section 24 of the Act:

- a) Allied Health Professions Act 63 of 1982

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<sup>115</sup> Section 3(1)(d)(i)&(ii) read with Section 40(1)(a)-(e)&41(1)(a)-(b).

<sup>116</sup> Section 3(1)(e).

<sup>117</sup> Section 22 of the Act.

<sup>118</sup> Section 23 of the Act.

<sup>119</sup> Section 24 of the Act.

<sup>120</sup> Section 25 of the Act.

<sup>121</sup> E de Stadler (2013) *Consumer Law Unlocked* Siber Ink Chapter 5. Page 94.

<sup>122</sup> For instance, by virtue of a financial threshold in terms of Section 6(1) of the Act or where the size of a juristic entity is above the determined threshold which is currently at R2 000 000,00 (Two Million Rand).

<sup>123</sup> See Chapter 6 below.

- b) Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 read together with Regulations 1555
- c) Measuring Units and National Measuring Standards Act 76 of 1973
- d) Medicine and Related Substances Control Act 101 of 1965
- e) Medicine and Related Substances Control Amendment Act 59 of 2002
- f) Medical Research Council Act 19 of 1969
- g) National Health Act 61 of 2003
- h) National Regulator for Compulsory Specifications Act 05 of 2008
- i) Trade Metrology Act 77 of 1973
- j) Marketing Act 59 of 1968,
- k) Standards Act 29 of 1993

The Act is drafted in a manner that creates a causality chain process: no single section of the Act can be looked at in isolation.<sup>124</sup> The researcher assumes this has been created to provide the maximum protection for the consumer as envisaged in 4.2 below. It means that the labelling provisions have an influence on other sections of the Act and vice-versa. For instance, if a supplier acts in contravention of the provisions of Section 24 of the Act, this has an impact on a number of sections of the Act dealing with the various rights of the consumer.<sup>125</sup> At one end of the causality chain is a supplier whose goods are not in compliance with Section 24 of the Act and other ancillary laws which apply and at the other end is the effect of such non-compliance in a form of product recall or enforcement provisions. For the purposes of this research the following sections have been identified to form a causality chain and have an influence on the application and are not a substitute for Section 24 of the Act:

- a) Section 18: Consumer's right to choose or examine goods, which deals with consumers who may physically touch goods for the purposes of examining them. The transaction is not perfected until the consumer accepts the goods by purchasing them. Section 18 (3) provides that where a consumer agrees to purchase goods on the basis of a description or sample or both then such goods must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or a reasonable examination of a sample.
- b) Section 20 read simultaneously with Section 56 of the Act. This section deals with the consumer's right to return goods for which the consumer will receive a full refund on

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<sup>124</sup> Own emphasis.

<sup>125</sup> Own emphasis.



goods that the consumer did not have the opportunity to examine before delivery and the consumer rejected on the grounds that the consumer was either not satisfied with the type and quality reasonably contemplated for the goods or that they do not conform in all material respects to that which an ordinary consumer would expect based on the description of such goods.

- c) Section 23 deals with disclosure of the price of goods or services. This section places numerous obligations on the retailer in respect of displaying the price on goods that are presented either for advertisement or information purposes. The section also prescribes the manner in which a price is adequately displayed in respect of goods purchased,<sup>126</sup> which is particularly relevant as an extension of a right to the correct disclosure of information.
- d) Section 26 deals with sales records. This section creates an obligation on a supplier to provide a written record of each transaction. Furthermore, the section prescribes the minimum amount of information that this record should contain, such as Vat (Value Added Tax) information, the address of the supplier, the date of the transaction, the name and description of goods bought, their unit price, quantity and total price, the amount of the applicable tax and the total price of the entire transaction.<sup>127</sup>
- e) Section 41 read with Section 29 (and not in substitution) deals with false, misleading or deceptive misrepresentation. This section relates to the marketing of goods and it is to be read with the Codes of Code of Advertising Practice emanating from the Advertising Standards Association of South Africa (ASASA) which was formed by the Advertising Standards Authority.<sup>128</sup> The section<sup>129</sup> provides that the supplier is strictly prohibited from doing the following:
  - i. Whether directly or indirectly, express or imply a false, misleading or deceptive representation concerning material facts to a consumer.
  - ii. Using exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception, or

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<sup>126</sup> Section 23(5) of the Act.

<sup>127</sup> Section 26(3) of the Act.

<sup>128</sup> See footnote 121 Supra.

<sup>129</sup> Section 29 of the Act.

- iii. Fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation,
- iv. The following acts also amount to false, misleading or deceptive representation:
  1. To falsely state or imply or fail to correct an apparent misapprehension that the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have. This is of particular relevance in Chapter 6 which will deal with complementary medicine.
  2. To falsely state or imply or fail to correct an apparent misapprehension that any goods have ingredients, performances characteristics, accessories, uses, benefits, qualities, sponsorships or approval that they do not have. This is also of particular importance in Chapter 6 below.
  3. To falsely state or imply or fail to correct an apparent misapprehension that goods have been supplied in accordance with a previous representation.

Any purported transaction entered into with the consumer in contravention of the abovementioned provisions in Section 40 shall be void to the extent of its contravention and notwithstanding the enforcement mechanisms afforded by the Act in terms of Section 69 discussed in Chapter 8 below as well as other remedies available in terms of other applicable legislations noted above. Furthermore, the Act affords the consumer direct access to the courts' processes.<sup>130</sup>

- f) Section 44 deals with the consumer's right to assume that the supplier is entitled to sell goods. This entails the legal right and authority by the supplier to supply the goods. This becomes particularly important in respect of goods which are deemed harmful and are imported without being registered with the local regulator and where the manufacturer does not have permission to sell such goods, for example, the Dettol Disinfectant Liquid range which had to be recalled<sup>131</sup> however under a different piece of legislation.<sup>132</sup>

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<sup>130</sup> Section 51 read together with Section 52 of the Act.

<sup>131</sup> See Chapter 6.4 below.

<sup>132</sup> As discussed in Chapter 6 and in the context of the National Regulator for Compulsory Specifications Act 05 of 2008.

- g) Section 55 deals with the consumer's right to safe, good quality goods. This section is a codification of the common law position and it forms an extension of the implied warranty of goods, that the goods are:
- i. Reasonably suitable for the purposes for which they are generally intended;<sup>133</sup>
  - ii. Are of good quality, in good working order and free from any defects;<sup>134</sup>
  - iii. Comply with the Standards Act 29 of 1993 or any other public regulation.

The following factors will be considered in determining whether goods supplied comply with the strict provisions of Section 55:

- i. The manner in which, and the purposes for which the goods are marketed, packaged and displayed, the use of any trade description or mark, any instruction for, or warnings with respect to the use of the goods;
  - ii. The range of things that might be reasonably be anticipated to be done with or in relation to the goods, and;
  - iii. The time when the goods were produced and supplied.
- h) Section 56 is an extension of Section 55 and stipulates that in any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied warranty which applies across the entire value chain from the producer or importer, the distributor right up to the retailer, that the goods sold and delivered comply with the requirements and standards contemplated in Section 55 above except to the extent that the goods have been altered contrary to any given instructions. The statutory implied warranty is applied over and above other implied warranties created by statute or by common law and shall not be in substitute of Section 56.

The consumer has up to six months to return goods to the supplier which fail to comply with the strict provisions of Section 55 above without any penalty and at the supplier's risk and expense and the supplier shall be required at the instance of the consumer to either repair, replace any failed, unsafe or defective good or refund the consumer the price paid by the consumer.<sup>135</sup>

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<sup>133</sup> Section 55 of the Act.

<sup>134</sup> See footnote 133 Supra.

<sup>135</sup> Section 56 of the Act.

- i) Section 58 deals with the warning concerning facts on the nature of goods. This deals with goods that are regulated largely by the Hazardous Substances Act 15 of 1973 which regulates goods that are deemed hazardous and/or unsafe. The section creates positive obligations on a supplier of any activity that is subject to any risk of an unusual character or nature, risk which a consumer could not reasonably be expected to be aware of or risk that could result in serious injury or death of a consumer. In addition, any person who packages any hazardous or unsafe goods to the consumer must display in the packaging a notice that is conspicuous, clear and in plain and simple language.
- j) Section 61 introduces into South African law the concept of strict liability across the entire supply value chain without the common law negligence test and without any restriction in so far as application of the Act is concerned. In terms of this section it means that any exclusion of indirect or consequential damages claim in any transaction is now prohibited according to the strict interpretation of this section.
- k) Section 61: the supplier is not included in this section as forming part of the supply value chain. In terms of this section, any producer, importer, distributor or retailer of any goods is liable for any harm (being the death or injury or illness of a natural person, any loss of or physical damage to any property and an economic loss) caused wholly or partly from supplying unsafe goods, product failure or defect or hazard in any goods or inadequate instructions or warning provided to the consumer pertaining to any hazard arising from or associated with the use of any goods.
- l) Section 69 deals with the realisation of consumer rights through an enforcement hierarchy. This section should be read with Section 4 of the Act which regulates persons who would have capacity to bring a matter pertaining to the Act to any court, Tribunal or to the Consumer Commission.

As noted above the marketing of goods falling under the ambit of Section 24 of the Act is regulated by the Advertising Standards Association of South Africa (ASASA). According to its website it is a self-regulating body for the marketing and communication industries which seeks to enforce a Code of Advertising Practice for the said industries.<sup>136</sup>

The Act furthermore and inadvertently creates a positive obligation on retailers in so far as they have a direct interface with the consumer since they facilitate the on-point sale

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<sup>136</sup> [www.asasa.org.za](http://www.asasa.org.za).

transaction with the consumer. It is argued in Chapter 5.2 that the act of placing a positive obligation on the retailer in ensuring that the retailer should not “*display or supply goods if the (person/retailer) knows or reasonably could determine or has reason to suspect that doing so is likely to mislead the consumer as to any matter implied or expressed in that trade description or that the trade description has been altered*” has a negative financial impact on the consumer overall as all the stakeholders involved in the entire supply chain for goods in all likelihood will apportion business risks such as insurance, packaging and labelling to the consumer.<sup>137</sup> The supplier is likely to obtain special insurance for any direct, indirect and consequential damage claim that may arise out of or in connection with the failure by the retailer to comply with the provisions of the Act, including Section 24.<sup>138</sup>

In terms of common law provisions, product labelling is referred to as “*any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to pre – packaged goods*”.<sup>139</sup>

The scope, purpose, application and interpretation of the Act are discussed below:

#### 4.1. Current scope

Section 1 of the Act defines “*Trade Descriptions*” as *any description, statement or other direct or indirect indication, other than a trade mark, as to—*

- (i) the number, quantity, measure, weight or gauge of any goods;*
- (ii) the name of the producer or producers of any goods;*
- (iii) the ingredients of which any goods consist, or material of which any goods are made;*
- (iv) the place or country of origin of any goods;*
- (v) the mode of manufacturing or producing any goods; or*
- (vi) any goods being the subject of any patent, privilege or copyright; or*
- (b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly associated with those goods.*

Included in this description are textile goods and genuine leather goods, as well as any intellectual property or copyrights or marks commonly associated with them. Further

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<sup>137</sup> Section 24(3)(a)(i) and (ii) of the Act.

<sup>138</sup> Y Mupangavanhu “*An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008*” (2012) Volume 15 No 5 PER 321-638.

<sup>139</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyn. C Lakhani. T Cohen (1997) “*Consumer Law in South Africa*”, Juta Legal and Academic Publishers Chapter 9.281-291.

circumstances under which trade descriptions apply to goods includes packaging or labels, advertisements or other commercial communication.<sup>140</sup>

Section 24. (1), furthermore states that for the purposes of this section, a trade description is applied to goods if it is:—

- (a) *applied to the goods, or to any covering, label or reel in or on which the goods are packaged, or attached to the goods;*
- (b) *displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description;*  
*or*
- (c) *is contained in any sign, advertisement, catalogue, brochure, circular, wine list, invoice, business letter, business paper or other commercial communication on the basis of which a consumer may request or order the goods.*

(2) A person (meaning a supplier) must not:—

- (a) *knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description;* or
- (b) *alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.*

(3) A retailer of goods must:—

*not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that—*

- (i) *a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description;*  
*or*
- (ii) *a trade description or trade mark applied to those goods has been altered as contemplated in subsection (2)(b); and*

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<sup>140</sup> T Naudè & S Eiselen (eds) “Commentary on the Consumer Protection Act” (2014) J 24-3, 24-4.

(a) *with respect to any goods within the retailer's control, take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a) or subsection (2)(b).*

(4) *The Minister may prescribe:—*

(a) *categories of goods that are required to have a trade description applied to them, as contemplated in subsection (5);*

(b) *the rules to be used in accordance with any international agreement for the purpose of determining the country of origin of any goods or components of any goods; and*

(c) *the information that is required to be included in any trade description, from among the categories of information contemplated in the definition of "trade description" in section 1.*

(5) *The producer or importer of any goods that have been prescribed in terms of subsection (4) must apply a trade description to those goods, disclosing—*

(a) *the country of origin of the goods; and*

(b) *any other prescribed information.*

(6) *Any person who produces, supplies, imports or packages any prescribed goods must display on, or in association with the packaging of those goods, a notice in the prescribed manner and form that discloses the presence of any genetically modified ingredients or components of those goods in accordance with applicable regulations*

The regulations supporting the provisions of Section 24 are found in Regulations 6 and 7 of the Act, however Regulation 7 has been amended by the substitution of sub-regulation (2)<sup>141</sup> in the following manner:[The words in brackets indicate omission and words underlined indicate new insertions.]<sup>142</sup>

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<sup>141</sup> (Proclamation No. 824 of 2012) *Government Gazette* 35776, 09 October 2012 (Regulation Gazette No 35776.)

<sup>142</sup> *Loco citato.*

- (a) The word “all” has been added to Regulation 7(a)(2),
- (b) The word [organism] has been omitted and replaced by “ingredients or components” in Regulation 7(b),
- (c) The words [or ingredient or component] and [applied to such good or marketing material, as the case may be] have been omitted and replaced by “displayed on, or in association with the packaging of those goods”  
Furthermore, the words [or ingredients or component] and [organism] have been replaced by the words “ingredients or components” in Regulation 7(c),
- (d) The words [or ingredient or component] and [organism] have been omitted and replaced by “ingredients or components” in Regulation 7(d),
- (e) The word “sub” has been added to the word “regulation” to read “sub-regulation” and the words [organism] and [or ingredient or component] have been omitted in Regulation 7 (e),
- (f) The word [organisms or] have been omitted and the word “or components” have been added and the words.

The balance of the Regulations below have not been further substituted and/ or removed

Regulation 6 of the Act<sup>143</sup> provides as follows:

*Regulation 6 (1) provides that in order to assist consumers in making informed decisions for the purposes of Section 24 (4) and (5) of the Act<sup>144</sup> the importation into or the sale in the Republic (of South Africa) of the goods specified in Annexure D,<sup>145</sup> irrespective of the origins of where the goods were manufactured, is prohibited unless:*

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<sup>143</sup> See footnote 141 Supra.

<sup>144</sup> See footnote 141 Supra.

<sup>145</sup> These goods are textile goods as listed in Chapter 50, 51, 52, 53, 54, 55, 56, 57,58,59,60 and 63 of the Harmonized Customs Tariff. This is in terms of the Customs and Excise Act 91 of 1964, which amongst other functions regulates the importation and exportation of goods coming into or leaving the Republic of South Africa. Other goods are clothing as listed in Chapter 42, 43, and 64 of the Harmonized Customs Tariff as well as shoes and leather goods as listed in Chapter 42, 43 and 64 of the Harmonized Customs Tariff.



a) a trade description meeting the requirements of Section 22 of the Act is applied to such goods in a conspicuous and easily legible manner stating clearly:

(i) the country in which they were manufactured, produced or adapted,

(ii) in the event of a textile manufacturer, importer or seller operating in the Republic using imported greige fabric to produce dyed, printed or finished fabrics in the Republic, that such fabric has been dyed, printed or finished in South Africa from imported fabric, and

(iii) that a locally manufactured product using imported material must state “Made in South Africa from imported material”,

b) such goods conform to the South African national standards for fibre content and care labelling in accordance with the provisions of Government Notice No.2410 of 2000, published in the Gazette of 30 June 2000,

c) If, after such goods have been reconditioned, adapted, rebuilt or remade, whether in the Republic or elsewhere, a trade description is applied to such goods in a conspicuous and easily legible manner stating clearly that such goods have been so reconditioned, adapted, rebuilt or remade, as the case may be,

d) If the goods were wholly assembled or made in the Republic (of South Africa), a trade description is applied to such goods in a conspicuous and easily legible manner stating “Made in South Africa, or

e) Goods are correctly labelled.

## 4.2 Purpose of the Act

As indicated above, Chapter 3 (Part B) of the Act<sup>146</sup> provides an over-arching objective to the Act, which is the creation of a legal structure whose purpose is to balance the rights of the consumers against those of business suppliers as well as to “develop, enhance and protect the rights of the consumer”.<sup>147</sup> The exact wording in the Act sets out the purpose of the Act, to provide the “establishment of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and

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<sup>146</sup> 68 of 2008.

<sup>147</sup> Jacobs et al, 2013.3.

*responsible for the benefit of the consumers generally*".<sup>148</sup> The provisions of the Act thus are aligned with the global objectives of consumer laws as noted in Chapter 2.

For the purposes of balancing consumer rights as against obligations imposed on business suppliers, the Act seeks to "*protect consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices*" as well as against "*deceptive, misleading, unfair or fraudulent conduct*".<sup>149</sup>

For the purposes of safeguarding consumer rights in so far as product labelling is concerned, the Act provides for "*improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour*".<sup>150</sup> The researcher is of the opinion that this objective relates to the information obligation and broadly covers part of the right to full disclosure and information, primarily, that the consumer has the right to information in plain and simple or understandable language<sup>151</sup> to the disclosure of the price of goods and services,<sup>152</sup> to product labelling and trade description,<sup>153</sup> as well as to the disclosure of reconditioned or grey market goods.<sup>154</sup>

In summary, for consumers in general and vulnerable consumers in particular the purpose of product labelling is to serve as a communication tool for consumers with regard to the product sold. This right, it is submitted, should be coupled with the need for the information to be in understandable language.

It is further submitted that informed consumers make better-informed choices in entering transactions. The need to make informed choices emanates from health and safety concerns, thus making vital the disclosure of accurate labelling.

There is a further economic purpose which is worth discussing in Chapter 5 for the need to protect consumers against unfair commercial practices emanating from product labelling issues. This purpose is to safeguard against the abuse of power and of dominance by industry players in making false or misleading or deceptive statements and labelling on their

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<sup>148</sup> Section 3(1)(a) of the Act.

<sup>149</sup> Section 48 (1) and (2) of the Act.

<sup>150</sup> Section 3(1)(c) of the Act.

<sup>151</sup> Section 22 of the Act.

<sup>152</sup> Section 23 of the Act.

<sup>153</sup> Section 24 of the Act.

<sup>154</sup> Section 25 of the Act.

products as this has a direct impact on incorrect decisions made and product liability incidences.

For the industry players product labelling and trade description can be utilised for competitive and leveraging purposes, provided that this is done responsibly and within the parameters of the law.<sup>155</sup> The industry may promote and market their goods and services by adding information that will “*highlight the benefits of their products when compared to those of their competitors*”.<sup>156</sup> The labelling requirements furthermore may be used by marketers to promote their goods by employing various marketing techniques in bringing to the attention of the consumer vital information; however this should also be done responsibly and within the parameters of legislation.<sup>157</sup>

### 4.3 Interpretation

Section 2 of the Act provides that the Act must be “*interpreted in a manner that gives effect to the purpose of the objectives as set out in Section 3 of the Act*”. This entails that the Act shall be interpreted in a manner that promotes and advances consumer rights to the extent permissible by law. For the purposes of product labelling, the provision of Section 24 shall be given broad interpretation to the extent that such interpretation promotes consumers’ rights, however the drafting of Section 24 as illustrated below in paragraph 4.5 is problematic and lends itself to ambiguity and misinterpretation.

The Act further provides that when interpreting the provisions of the Act, “*a person, court or Tribunal or Commission may consider appropriate foreign and international law, conventions, declarations or protocols relating to consumer protection*” and any judicial decision made by the courts of the Republic of South Africa.<sup>158</sup> Although this allowance by the legislature is laudable, it is submitted that such interpretation with conflicting laws may lead to differing interpretations as such laws do not necessarily share the same objectives as the Act, furthermore a hybrid country, such as South Africa, has its own unique historical and economic challenges which must be considered. It is simply inadequate to adopt a literal interpretation: a holistic, objective form of interpretation techniques must be adopted. As

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<sup>155</sup> Labelling: competitiveness consumer information and better regulation for the European Union” DG SANCO Consultative 2006 2-12.

<sup>156</sup> Labelling: competitiveness consumer information and better regulation for the European Union” DG SANCO Consultative 2006 2-12.

<sup>157</sup> See note 138 Supra.

<sup>158</sup> Section 2(2)(a) of the Act.

such, a conscious effort must be made by any person, court or tribunal that a comparable foreign legal regime be consulted to avoid any potential conflicts of laws.

Furthermore, where there are inconsistencies with the provisions of Chapter 5 of the Act and provision of any act,<sup>159</sup> in such an event the provisions of the Act prevail. It is unclear to the researcher why the provisions of Public Finance Management Act 01 of 1999 are excluded in as far as Chapter 5 of the Act is concerned.

#### 4.4 Application

The intention of the Act<sup>160</sup> is to cover as widely as possible any economic activity between suppliers and consumers in line with the objectives of the Act.<sup>161</sup> Section 5 (1) of the Act provides that the act applies to:

- a. *Every transaction occurring within the Republic (of South Africa) unless it is exempt by subsection (2) or in terms of subsections (3) and (4),*
- b. *The promotion of any goods or services, or of the supplier of any goods or services within the Republic (of South Africa) unless:*
  - i. *Those goods or services could not reasonably be the subject of a transaction to which the Act applies in terms of paragraph (a) above,*
  - ii. *The promotion of those goods or services has been exempted in terms of subsection (3) and (4).*
- c. *Goods or services that are supplied or performed in terms of a transaction to which the Act applies irrespective of whether any other goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services,*
- d. *Goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5),<sup>162</sup>*

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<sup>159</sup> With the exception of any provisions of Chapter 5 of the Act and the provisions of the Public Finance Management Act 01 of 1999 or the provisions of the Public Service Act 103 of 1994. In such an event the provisions of the said Acts shall prevail.

<sup>160</sup> 68 of 2008.

<sup>161</sup> Section 3 (1) of the Act.

- e. The following arrangements constitute transactions, over and above the transaction as defined in the Act:
- i. The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity whether corporate or unincorporated and whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity,*
  - ii. A solicitation of offers to enter into franchise agreements,*
  - iii. An offer by a potential franchisor to enter into a franchise agreement,*
  - iv. A franchise agreement and ancillary documentation,*
  - v. The supply of any goods or services to a franchise in terms of a franchise agreement.*
- f. *Transactions between juristic persons, regardless of the financial threshold in terms of Section 6 of the Act,*
- g. The scope of application extends to matters irrespective of whether the supplier:
- i. Resides or has its principal office within our outside the Republic;*
  - ii. Operates on a for-profit basis or otherwise ;*
  - iii. Is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership, or;*
  - iv. Is required to be licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.*

From the above, it seems clear that the Act has broadened its scope from the mere supply of goods to include the promotion of goods and services.<sup>162</sup> The word “*promotes*” denotes various forms of marketing techniques.

The Act provides further that where goods are exempt from the Act (for example by virtue of the financial threshold in terms of Section 6(1) of the Act or where the size of

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<sup>162</sup> Subsection (5) of Section 5 dealing with the application of the Act provides that if any goods are supplied within the Republic (of South Africa) to any person in terms of a transaction that is exempt from the application of the Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to Sections 60 and 61 of the Act.

<sup>163</sup> Subject to the exceptions in Section 1(b)(i)&(ii) of the Act.

a juristic entity or entities is above the determined threshold [currently the annual turnover of the entity being R2 000 000, 00 {Two Million Rand}], the strict liability provisions in terms of Sections 60 and 61 still find application and the legal test for negligence to prove liability is no longer required. Although this provision is to be lauded, especially on goods that are inadequately regulated and have not passed various integrity tests, which potentially may lead to harm as stipulated in terms of Section 61 of the Act, it is unfortunate that the vertical enforcement mechanism not only will frustrate the consumer in realising and enforcing their rights, but may result in the consumer being in a worse off position.

## 4.5 Problem with the current position

### 4.5.1 General

Based on the discussion of Section 24 above, it is clear that the area of Product Labelling and Trade Description as governed by the Act warrants a comparative approach by comparing South Africa's benign legal regime with a suitably different legal system in which product labelling provisions have been applied with greater success. It is problematic that the Act does not provide a definition of "*Product Labelling*", however it does define "*Trade Description*" as indicated above.. The rationale behind this omission is unclear and certainly lends ambiguous the interpretation of the term "Product Labelling". In the reported case of *R v Harris*<sup>164</sup> it was mentioned in obiter by Lord Denning that "*we no longer construe Acts according to their literal meaning. We construe them according to their objects and intent*".

It is worth noting that part of the motivation for this research, as well as part of the Problem Statement in Chapters 5 and 6, is the issue of the application of the abovementioned regulations by businesses operating downstream of the supply chain, such as retailers. Industries such as fashion outlets find themselves curbing practices of illegal conduct of "*transshipment and country of origin swapping in dealing with illegal imports*".<sup>165</sup> Although goods are adequately inspected upon entry or exit during importation and exportation into and out of the Republic of South Africa, some of the goods sold at the end of the value chain by retailers may not be compliant with the abovementioned Regulation 6(1)(b) to (e) of the Act.<sup>166</sup> The effect of this failure not only reduces consumer confidence about goods that are

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<sup>164</sup> 1836 7 C & P 446.

<sup>165</sup> T Robbins. "*Made in SA liars face prison and fine*" Business Report. April 19 2007. [www.ifashion.co.za](http://www.ifashion.co.za).

<sup>166</sup> 68 of 2008.

locally manufactured, it economically impairs local manufacturers that are compliant with the current legislative regime.

#### 4.5.2 Non-Consumable goods

In terms of section 1 of the Act the term “goods” is defined as to include:

- a) *anything marketed for human consumption,*
- b) *any tangible object not otherwise contemplated in paragraph 9 a), including any medium on which anything is or may be written or encoded,*
- c) *any literature, music, photograph, motion picture, game, information, data, software codes or other intangible product written or encoded on any medium, or a licence to use any such intangible product,*
- d) *gas, water and electricity.*

It is clear that the scope of goods that fall within the application of the Act is restrictive. Commercial markets are saturated with various goods that are manufactured for various purposes and which are not regulated by the Act or other concurrent pieces of legislation to be discussed in Chapter 4. It is submitted that the restrictive definition of “goods” in terms of the Act and Regulation 6 may have the effect of reducing consumer safety and confidence with regards to an array of goods not covered by the said Act.<sup>167</sup> It is unclear why the legislature omitted to partially regulate only certain goods. Furthermore, Regulation 6 of the Act is restricted to textile, clothing, shoes and leather goods, and regulation 7 deals with Product Labelling and Trade Description regarding genetically modified organisms. The merit for such a restriction of goods is unclear and the effect of this legal lacuna is evident in Chapter 6 below.

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<sup>167</sup> Own emphasis.

## 5. RESEARCH QUESTION: A HOLISTIC APPRAISAL OF THE SOUTH AFRICAN POSITION

In the context of South Africa, there are additional socio-economic variables that have an effect on an institutionalised consumer-legal framework. These variables have an impact on product labelling and on the failure to warn consumers. The most important of the variables will be discussed below.

### 5.1. The South African consumer: A social context

In South Africa, a country of contradictions in which a first-world economy co-exists with third-world circumstances and where there was rampant exploitation of consumers by large conglomerates, the issue of illiteracy and indigent consumers is relevant to the understanding of the implications of labelling goods as an information tool.<sup>168</sup> This feature is of particular importance in respect of goods that are deemed dangerous and have the potential to harm the consumer.

One of the main purposes of product labelling legislation is to empower the consumer to make informed choices about the goods purchased<sup>169</sup> by providing relevant information about the goods, such as their nature and description, the quantity and quality of the said goods, their country of origin, and the ingredients contained in such goods and so forth.<sup>170</sup> Product labelling provisions serve as a communication tool for the consumer, provided the consumer is able to decode the given information. It is anticipated, through such legislation, the consumer is in a better position in terms of their decision-making capacity in terms of the purchasing of goods.<sup>171</sup> However, this does not take into full consideration whether or not the consumer is in a position to understand the nature of the labelling of goods purchased and the instructions provided on such goods, specifically textiles, clothing, shoes, leather, as well as genetically modified organisms containing more than 5% of genetically modified material, irrespective of the country of origin.<sup>172</sup>

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<sup>168</sup> Own emphasis.

<sup>169</sup> D Mc Quoid — Mason. T Woker. L Greenbaum. I Konyn. C Lakhani. T Cohen (1997) *Consumer Law in South Africa*, Juta Legal and Academic Publishers Chapter 9.281-291.

<sup>170</sup> See Act Supra.

<sup>171</sup> Own emphasis.

<sup>172</sup> These are goods which are currently regulated by Regulations 8 and 9, which regulations form part of the 68 of 2008.



The degree of understanding of the wording on labels largely depends upon the consumer's level of literacy and the effectiveness of legislation in achieving its objectives with regard to product labelling and trade description provisions and enshrines the need for plain and understandable language to be used.<sup>173</sup> The interpretation of the “*plain and understandable language*” provision should be extended to product labelling and trade description, here there is a need for the regulation of accurate and comprehensible information about the product, as well as the manner in which such accurate and comprehensible information is communicated from a language perspective. The National Credit Act makes provisions for all credit agreements, where reasonably possible and on request, to be in all the official languages of the Republic of South Africa,<sup>174</sup> which allows consumers who are conversant only in their home language to understand such credit agreements and make informed decisions prior to entering into a credit agreement. Currently, there is no such obligation in the Act, and even more in the product labelling provisions. In addition, a fundamental issue that is not addressed is whether there can be acceptance of a contractual offer between a supplier and a consumer where a consumer is unable to understand the labelling requirements on goods and products purchased by virtue of their either not being multi-lingual or not being literate at all, or due to the technical language used on such labelled goods. It can be argued that contractually there clearly is a lack of consensus arising from a lack of acceptance of such an offer, which lack of acceptance arises from a lack of capacity to understand the goods purchased or received.<sup>175</sup> Furthermore, suppliers often use technical methods in an attempt to comply with regulations provided by supportive legislation as a marketing and compliance tool, especially in packaging. This can be frustrating to all consumers, whether vulnerable or sophisticated, in that they may consider the labelling irrelevant and as such feel discouraged to even attempt to understand the information provided, especially in respect of point-of-sale transactions, and that the language employed is industry-specific, reflecting both jargon on chemical composition as well as figures, which has the effect of disengaging the consumer in their attempt to understand the labelling information provided.<sup>176</sup>

## 5.2. A South African Consumer: the economic considerations

Growth in the economy acts as a catalyst for the need to provide legislation that balances the need to provide a legislative framework that protects the consumer as well as

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<sup>173</sup> This is regulated by Section 22 of the Act read together with Regulations.

<sup>174</sup> 34 of 2005 read together with its Regulations.

<sup>175</sup> Own emphasis.

<sup>176</sup> Own emphasis.

safeguarding the interest of the economic sector. Gross domestic product is influenced by consumer spending, so consumers play a vital role in the economy. It is important for a developing economy, such as South Africa's, that its consumers make informed decisions and understand the nature of goods purchased. There is a correlation between consumer consumption and gross domestic product.

As mentioned previously in this research, the Act is drafted with downstream operations in mind, specifically retail operations,<sup>177</sup> and parallel to the vertical relationship between the supplier and the consumer. The Act does not consider the value-chain process in the supply chain of goods from the purchase of raw ingredients, the country of origin of such raw ingredients, the manufacturing or refining of such goods and the possibility of goods having their specifications changed during the manufacturing process, the transportation and wholesale of goods and the eventual sale and marketing of goods to the retailer for selling on to the consumer.<sup>178</sup> The price composition of goods changes as the goods are supplied to different chains. More importantly for product labelling purposes, the specification of most goods changes during the supply-chain process, especially at the manufacturing level, however in some instances there appears to be no legal obligation for the full disclosure of product information during the manufacturing process.<sup>179</sup> This failure results in the financial impact of the above value chain being absorbed by the consumer as the cost of product-labelling technologies by manufacturers, producers and wholesalers is passed down to the consumer, and can have dire consequences where unsafe goods are concerned. Furthermore, there is a possibility of fraudulent activities and the misrepresentation of goods arising from a lack of integrity surrounding the technical methods in labelling goods.<sup>180</sup>

In addition, market-labelling technology utilized during the printing and packaging process of good "*adds to economic and innovation growth*" in the markets in respect of all goods in general as it not only creates a separate packaging market which boosts economies, but it creates confidence in the mind of the consumer regarding the goods purchased, as well as promoting transparency.<sup>181</sup> The dual purpose of market-labelling technologies in promoting consumer confidence in respect of the labelled goods and promoting fair marketing practices has a pricing impact on the consumer as it is the consumer who is likely to absorb all the

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<sup>177</sup> See Chapter 4 above and 5.3 below.

<sup>178</sup> Own emphasis.

<sup>179</sup> Own emphasis.

<sup>180</sup> J Albert "*Innovation in food labelling*" (2010) published by The Food and Agriculture Organisation of the United Nations and Woodhead Publishing Limited 4 Chapter 1

<sup>181</sup> See footnote 180 Supra.

costs involved in package design and labelling.<sup>182</sup> In some instances packaging machines are used to package and label goods, which machines are not only costly from a purchasing point of view, but require regular maintenance and upkeep. Again, these costs are absorbed by the consumer.<sup>183</sup> The packaging process and the labelling process, whether electronic or graphic, are according to the researcher vertically integrated throughout the entire supply chain process, from manufacturing to the retailer.<sup>184</sup> The packaging industry is ever-evolving with innovation to protect goods as well as serving as a marketing tool, depending on the design of such packages.<sup>185</sup> The costs of innovation and design in packaging also are likely to be absorbed by the consumer, which has a financial impact on the consumer in terms of the affordability of labelled goods.

### 5.3. A South African Consumer: the ethical consideration

The ethical consideration of Product Labelling and Trade Description is and will remain an extension of ethical corporate governance, especially with regards to juristic persons. In basic terms it means that suppliers are expected to act in an ethical manner and to subscribe to best ethical standards and practices when it comes to product labelling. Therefore it extends beyond the general prohibition of misleading practices in product labelling. The current legislative regime provides that either “a person **must not**— (a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description; or (b) alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers”.<sup>186</sup> Furthermore, “a retailer of goods **must**— (a) not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that— (i) a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description; or (ii) a trade description or trade mark applied to those goods has been altered as contemplated in subsection (2)(b); and (b) with respect to any goods within the retailer’s control, take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a) or subsection (2)(b)”.<sup>187</sup> The wording of the legislation is peremptory,

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<sup>182</sup> See footnote 180 Supra.

<sup>183</sup> See footnote 180 Supra.

<sup>184</sup> Own emphasis.

<sup>185</sup> See footnote 180 Supra.

<sup>186</sup> Sections 24 (2) (a) and 24 (3) (a) & (b) of the Act.

<sup>187</sup> Sections 24(3)(a)(i) –(ii) and Section 24(3)(b) of the Act.

suggesting that the provisions are non–negotiable and that any failure to comply with the provisions is a contravention of the law.<sup>188</sup>

The objectives of Section 24 of the Act are commendable and they reinforce the fundamental rights and obligations contained in the Constitution of the Republic of South Africa, yet the burden of proof when interpreting the provisions of Section 24 is problematic.<sup>189</sup> The literal interpretation of the words “*knowingly*” and “*reasonably knows*” presupposes a subjective awareness on the part of the retailer or person referred to in the said section. It can be argued that the retailer, at the end of the supply chain, cannot reasonably be expected to have subjective awareness of the nature and character of the goods sold. As such, it is unreasonable for a retailer or a person who has not manufactured or distributed or packaged and labelled the goods concerned to have a subjective awareness regarding the accuracy of the labelling and trade description.<sup>190</sup> It is immaterial that the goods are in the control of the retailer as the labelling process containing trade description (not prices) often takes place prior to the retailing phase. The retailer, more often than not, received the goods fully packaged and labelled. The consumer is now be faced with a higher burden of proof in law when enforcing their rights, and has to prove that the retailer knew or reasonably ought to have known that the labelling and trade description would mislead the consumer.<sup>191</sup>

Although the concept “*ethical Product Labelling and Trade Description*” is not merely a fad, the relationship between the concept “*ethical consumerism*” and corporate governance is intricate and has an issue relating to interpretation.<sup>192</sup> It is accepted as a general premise that most suppliers who fall under some of the mandatory provisions of the Act are also be regulated by the Companies Act,<sup>193</sup> read together with the supporting regulations and, most importantly, (for the purposes of Product Labelling and Trade Description) the King IV Report on corporate governance in the Republic of South Africa.<sup>194</sup>

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<sup>188</sup> Own emphasis.

<sup>189</sup> Act 108 of 1996.

<sup>190</sup> Own emphasis.

<sup>191</sup> Own emphasis.

<sup>192</sup> DH Justin & D.de Jongh “*Ethical Consumerism as a key consideration for future brand strategy development in South Africa*”, South African Business Review Vol 12 No 3. UNISA. 2008.

<sup>193</sup> Act 71 of 2008.

<sup>194</sup> This is the King Code of Governance Principles, commonly referred to as the “King IV” report which replaced the King III report which was effective as of on 01<sup>st</sup> March 2010. At the time of final drafting of this research mini-dissertation, the King Committee were in the process of drafting a King VI report which was published on 01 November 2016. Similar to the King III report, King IV report is currently not legislated and serves as a guiding principle for legal entities governed by the Companies Act 71 of 2008 to enforce corporate governance. As such it is more of a self–regulation exercise with reputational benefits for compliant legal entities.

In terms of the King IV Report, legal juristic entities are encouraged to promote ethical leadership and become “*responsible corporate citizens*”.<sup>195</sup> For the purposes of this research it entails an ethical relationship between a juristic legal entity and the society in which the juristic legal entity operates. To expand on this notion, all suppliers who are simultaneously regulated by the Companies Act are viewed as instruments of social change and are expected to promote the objectives of the Act for the benefit of the consumer, as opposed to merely adopting an economic stance of making profits and sharing profits with shareholders and members.<sup>196</sup> The consumer is viewed as an important stakeholder in the equation through the establishment of voluntary groups created in terms of the Act to promote and realise consumer rights.<sup>197</sup>

It is interesting to note, with reference to South Africa’s past history of inequality and discrimination based on race, as well as prevailing levels of social inequality, some of which arguably is perpetuated by the legal juristic persons acting in an anti-competitive manner as well as engaging in unfair and misleading trading practices, as seen in the Pioneer Food case,<sup>198</sup> the legislature felt it prudent to introduce the King Report on a voluntary basis as opposed to making it mandatory.<sup>199</sup> This degree of self-regulation is to be found in societies where legal entities are known to act ethically and are properly governed, as well as in a society that has low levels of inequality, which is not the case in South Africa. This level of denial on the part of the legislature is particularly concerning.<sup>200</sup>

All suppliers affected are expected to consider the economic impact that their goods may have on the consumer from all perspectives, financial, economic, health, environmental or social. They may not abdicate this corporate obligation by passing it on to the retailer with whom most of the interface with the consumer takes place. Based on the above discussion, the reality is that it is the retailer who is faced with the greater burden to ensure compliance with this corporate obligation.

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<sup>195</sup> See footnote 194 Supra.

<sup>196</sup> Own emphasis.

<sup>197</sup> Act 71 of 2008.

<sup>198</sup> Competition Commission v Pioneer Foods (Pty) Ltd. Case No 15/CR/Mar10.

<sup>199</sup> Own emphasis.

<sup>200</sup> Own emphasis.

## 6. RESEARCH COMPARISON: AN ANALYSIS COMPARING SOUTH AFRICA TO THE EU AND AN EU MEMBER STATE, THE UNITED KINGDOM (UK)

### 6.1 Introduction

The purpose of the comparative analysis in respect of Product Labelling and Trade Description of the South African legal regime and the EU, with a particular emphasis on the UK, is to identify any commonalities and differences in approach and solutions to problems between the jurisdictions. It is accepted that member states of the European Union have a more complex legal system, in part this is the consequence of historical developments such as the timing of the history of the industrial revolution. The member states of the Union developed consumer laws over a longer period. The European Union was established by the Treaty of Rome, its ideology in part was transposed from principles formulated by President Kennedy in the United States of America and incorporated in changes to Article 53 which adopted a programme of harmonisation of consumer rights.<sup>201</sup> It was assumed harmonisation would, provide techniques to protect and empower the consumer, as well as create competitive markets among member states. In terms of harmonisation there are three sources of European Union legislation which form a body of laws: these are '*primary legislations, secondary legislation and supplementary legislation*'.<sup>202</sup>

Two main harmonisation techniques exist: minimum and maximum harmonisation.<sup>203</sup> In terms of minimum harmonisation consumer law competencies between European Union members are shared. National legislatures and courts are free to establish their own legal framework.<sup>204</sup> There is greater leverage to add more stringent laws where needed, however member states cannot fall short of the minimum requirements.<sup>205</sup> This technique promoted the development of national legislation by member states, but it also resulted in fragmentation due to the different legal frameworks of each member state. From a compliance perspective it was costly to enforce and as a result was viewed as to the objectives of the Directives.

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<sup>201</sup> Sources of European Union law: Summary of European Union law. Access to European Union law. [www.Eur-lex.europa.eu](http://www.Eur-lex.europa.eu) (Accessed 15 March 2016).

<sup>202</sup> Sources of European Union law: Summary of European Union law. Access to European Union law. [www.Eur-lex.europa.eu](http://www.Eur-lex.europa.eu) (Accessed 15 March 2016).

<sup>203</sup> See footnote 201 Supra.

<sup>204</sup> See footnote 201 Supra.

<sup>205</sup> See footnote 201 Supra.

The above concerns regarding minimum harmonisation led to the development of full harmonisation of Directives to be adopted by all Member States. The main intention of full harmonisation is to simplify the regulatory framework and to facilitate business in internal markets by reducing compliance obligations.<sup>206</sup> It was argued that it would increase consumer confidence. It entailed consolidating and amending previous consumer Directives into a single Directive to regulate consumer markets.<sup>207</sup> Full harmonisation entails that all consumer laws have to be transposed into the national laws of each Member State. The Member States cannot add further protective laws, even when required.<sup>208</sup> Although full harmonisation establishes legal certainty and specialisation, it is viewed by the researcher as paternalistic, and the dominant European Union Member State is likely to be more dominant by virtue of its economic muscle. It is also impossible to harmonise all laws between Member States as each has different markets.

## 6.2 UK Laws

Assuming that the UK remains part of the of the European Union free trade area after the transition period of two years from the date of the announcement that it has elected to exit the European Union, so-called “Brexit”,<sup>209</sup> there are three main pieces of legislation that are central to Product Labelling and Trade Description:

1. The Consumer Protection from Unfair Trading Regulations of 2008, read together with the Consumer Protection Amendment Regulations promulgated on 01<sup>st</sup> October 2014<sup>210</sup>
2. The United Kingdom Consumer Act of 1987
3. EC: Unfair Commercial Practices Directive 2005/29/EC

The Consumer Protection from Unfair Trading Regulations of 2008, read together with the Unfair Commercial Practice Directive 2005/29/EC “*seeks to implement the requirements of the European Council Unfair Commercial Practice Directives*”.<sup>211</sup> The Act defines “*product*” to

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<sup>206</sup> See footnote 201 Supra.

<sup>207</sup> See footnote 201 Supra.

<sup>208</sup> See footnote 201 Supra.

<sup>209</sup> Brexit is the abbreviation for “British exit”. On the 23<sup>rd</sup> of June 2016 in a referendum British citizens elected to exit the European Union.

<sup>210</sup> The amendments to the Consumer Protection from Unfair Trading Regulations of 2008 addressed the redress mechanisms by introducing civil remedies. As such the only amendments that were affected were Regulation 2 with the addition of new definitions and a New Part 4A of 2008 from Section 27A-Section27J being added. Another amendment was Regulation 19(1) of 2008 Regulations.

<sup>211</sup> EC: Unfair Commercial Practices Directive 2005/29/EC.

mean “any goods or services and includes immovable property, rights and obligations”. Comparatively, in South Africa “Product Labelling” is not defined and instead “Trade Description” is defined as indicated in Chapter 4 above. According to its explanatory memorandum, the Consumer Protection from Unfair Trading Regulations “places a comprehensive framework for dealing with sharp practices and rogue traders who exploit loopholes in existing legislation”. Similarly, the Business Protection from Misleading Marketing Regulations 2008, “prohibit misleading business to business advertising and sets out conditions under which comparative advertisements are permitted”. Similarly to the Act, this legislation complements and does not replace common law in the UK. It applies to acts of omission between the consumer and a trader in connection with the promotion and sale or supply of a product to a consumer.<sup>212</sup> This means it also has a vertical application between a supplier and a consumer and applies before, during and after a transaction.

Regulation 3 of the abovementioned Regulations provides that unfair commercial practices are prohibited. Regulation 3(3)(b) specifically provides that a commercial practice is unfair if it “materially distorts or is likely to materially distort the economic behaviour of the average consumer with regards to the product”. Regulation 4(a) provides that a commercial practice is unfair if it is a misleading action or omission.<sup>213</sup> Regulation 5(1)(a) is met if it (commercial practice) contains false information and is therefore untruthful in relation to matters in Regulations 5(4) (a)-(k) or it deceives or is likely to deceive the average consumer, and it causes or is likely to cause an average consumer to take a transactional decision they would not have taken otherwise.<sup>214</sup> Comparatively, the Act provides similar provisions in Section 24(2) with the added provision of the Trade Description that has been tampered with.<sup>215</sup>

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<sup>212</sup>commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product;  
“consumer” means any individual who in relation to a commercial practice is acting for purposes which are outside his business

“product” means any goods or service and includes immovable property, rights and obligations

“trader” means any person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a trader.

<sup>213</sup> Regulations 5 & 6.

<sup>214</sup> (a)the existence or nature of the product;

(b)the main characteristics of the product;

(c)the extent of the trader’s commitments;

(d)the motives for the commercial practice;

(e)the nature of the sales process;

(f)any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product;

(g)the price or the manner in which the price is calculated;

(h)the existence of a specific price advantage;

(i)the need for a service, part, replacement or repair;

(j)the nature, attributes and rights of the trader;



In terms of Regulation 6(1)(a)-(d) a commercial practice is misleading if, on its factual context taking into account specific matters such as features and circumstances of the commercial practice, the practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or if the commercial practice fails to identify its commercial intent, unless this is apparent from the context. “*Material information*” refers to information which an average consumer needs, according to the context, in order to take an informed transactional decision and any information required which applies in relation to a commercial communication as a result of a community obligation. It means that what amounts to “*material information*” depends on the surrounding circumstances of each case, however it could be argued that information regarding Product Labelling and Trade Description is material information and the failure by a trader in this instance to provide sufficient material information could lead to misleading conduct. This position is similar to the South African legal regime under Section 24 read together with Sections 29 and 41 of the Act which deals with false, misleading or deceptive misrepresentation, read in conjunction with the Code of Advertising Practice emanating from the Advertising Standards Association of South Africa (ASASA).

Greater clarity in the interpretation of the relevant legislation in the UK is provided by the courts. In *R v X Limited*<sup>216</sup> wherein the issue of what amounts to a “commercial practice” was decided, the courts held that:

- (a) A “commercial practice” can be derived from a single incident, but whether or not, it depends on the facts of a particular case;
- (b) A “transactional decision” is not limited to the formation of the contract;
- (c) The contravention of professional diligence in respect of a single consumer can constitute an offence;
- (d) It is not necessary to identify a controlling mind to establish corporate knowledge or recklessness;
- (e) Under the law of precedent a judgment of the Crown Court has no authoritative value.

In *Citroen Belux v Federatie Voor Verzekerings- En Financiële Tussenpersonen*<sup>217</sup> which dealt with the request for a preliminary ruling on the interpretation of Article 3(9) of Directive

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(k) the consumer’s rights or the risks he may face.

<sup>215</sup> Tampered means to alter, deface, cover, remove or obscure a trade description or trademark applied to goods in a manner calculated to deceive a consumer.

<sup>216</sup> [2013] EWCA CTLC 145.

2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practice (an advertisement campaign for a free insurance offer for a duration of six months) committed by Citroen and deemed to be a prohibited practice, the main issue was to interpret paragraph 1 read together with paragraph 9 of Article 3 of Directive 2005/29/EC which provides that:

- a) *“This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product”.*
- b) *“In relation to “financial services”, as defined in Directive 2002/65/EC [of the European Parliament<sup>218</sup> and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16)], and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates”.*

The court ruled that *“Article 3(9) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) must be interpreted, as must Article 56 TFEU, as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers made to consumers where at least one of the components of those offers is a financial service”.*

The concept of *“misleading action”* as being misleading commercial practices was also discussed in *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl v Autorità Garante della Concorrenza e del Mercato* which dealt with a request for a preliminary ruling on Article 6(1) of the Directive 2005/29/EC.<sup>219</sup> Briefly, the facts of this case were that a consumer lodged a complaint against a supermarket in Trento, Italy, regarding a promotional offer of a laptop

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<sup>217</sup> [2013] EUECJ C-265/12.

<sup>218</sup> ‘Financial service’ is defined by the Directive 2002/65/EC as *“any service of a banking, credit, insurance, personal pension, investment or payment nature”.*

<sup>219</sup> [2013] EUECJ C-281/12.

computer that was run by a retail group known as COOP of which the supermarket in Trento was a part. The complaint was that the promotional offer was misleading in that when the consumer went to the supermarket during the promotional offer period, the laptop computer was unavailable. The courts had to look at the scope of misleading commercial practice as referred to in Article 6(1).

The issue was whether the Italian version of Article 6(1) of Directive 2005/29/EC uses the words “*e in ogni caso*”, *to be understood as meaning that, in order for the existence of a misleading commercial practice to be established, it is sufficient if even only one of the elements referred to in the first part of that paragraph is present, or that, in order for the existence of such a commercial practice to be established, it is also necessary for the additional element to be present, that is to say, the commercial practice must be likely to interfere with a transactional decision adopted by a consumer? By its question, the referring court asks essentially whether a commercial practice must be classified as ‘misleading’ for the purposes of Article 6(1) of Directive 2005/29 on the sole ground that that practice contains false information or that it is likely to deceive the average consumer, or whether it is also necessary that that practice be likely to cause the consumer to take a transactional decision that he would not have taken otherwise”.*

The court held that a commercial practice must be classified as ‘*misleading*’ for the purposes of Article 6(1) of Directive 2005/29/EC when that practice contains false information or is likely to deceive the average consumer, and is likely to cause the consumer to take a transactional decision that he would not have taken otherwise. The court further held that Article 2(k) of the Directive must be interpreted as meaning that any decision directly related to the decision whether or not to purchase a product is covered by the concept of ‘transactional decision’.

### 6.3 Redress

The non-compliance of the abovementioned regulations follows a less complex procedure as compared to the vertical hierarchical approach to enforcement more fully discussed in Chapter 8 of the Act. Although Section 107 of the Act introduces offences as well, it is restricted to issues relating to “breach of confidentiality”.

Regulation 8 creates a criminal offense. In terms of Regulation 8(1) a trader is guilty of an offence if—

*(a) he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a); and*

*(b) the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product under regulation 3(3)(b).*

*For the purposes of paragraph (a) a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice might contravene those requirements.*

*A trader is guilty of an offence if he engages in a commercial practice which is a misleading action under regulation 5 otherwise than by reason of the commercial practice satisfying the condition in Regulation 5(3)(b).*

*A trader is guilty of an offence if he engages in a commercial practice which is a misleading omission under Regulation 6.*

*A trader is guilty of an offence if he engages in a commercial practice which is aggressive under Regulation 7.*

The penalties are either a maximum fine or imprisonment not exceeding 2 years or a combination of both.

The Regulations create a statutory defence in law in Regulation 17. This protection for traders is not available to suppliers in South Africa. Regulation 17 (1) provides that *“in any proceedings against a person for an offence under regulation 9, 10, 11 or 12 it is a defence for that person to prove that the commission of the offence was due to a mistake; reliance on information supplied to him by another person; the act or default of another person; an accident; or another cause beyond his control; and; that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control”*.

Recently, there has been development of the consumer laws in the UK around issues of redress.<sup>220</sup> The lack of civil redress has resulted in the promulgation of the Consumer

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<sup>220</sup> See footnote 201 Supra.

Protection Amendment Regulations in 2014. The Regulation 9 came into force on 13th June 2014 and applied in relation to contracts entered into on or after that date. The balance of the provisions of the amended Regulations come into force on 1st October 2014 and apply in relation to contracts entered into, or payments made, on or after that date.

The new Part 4A of the Regulations introduces the following civil redress mechanism:

Regulation 27A (2) stipulates that a consumer has a right to redress when the following conditions are met

- (a) the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a “business to consumer contract”),*
- (b) the consumer enters into a contract with a trader for the sale of goods to the trader (a “consumer to business contract”), or*
- (c) the consumer makes a payment to a trader for the supply of a product (a “consumer payment”).*

*(3) Paragraph (2)(b) does not apply if, under the contract, the trader supplies or agrees to supply a product to the consumer as well as paying or agreeing to pay the consumer.*

*(4) The second condition is that the trader engages in a prohibited practice in relation to the product or in a case where a consumer enters into a business to consumer contract for goods or digital content—*

- (i) a producer engages in a prohibited practice in relation to the goods or digital content, and*
- (ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it.*

When the abovementioned conditions are satisfied, the consumer reserves the right to institute a civil action against a trader for a commercial practice that is misleading or aggressive.<sup>221</sup> Consumers are able to claim damages should they incur any financial losses which the consumer would not have incurred if the prohibited practice in question had not taken place, or has suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place.<sup>222</sup>

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<sup>221</sup> Consumer Protection from Unfair Trading Regulations of 2008 read together with the Consumer Protection Amendment Regulations promulgated on 01<sup>st</sup> October 2014.

<sup>222</sup> Regulations 27J of the Consumer Protection Amendment Regulations 14.

The trader does have statutory defences. For instance, a consumer does not have the right to damages if the trader can prove that the occurrence of the prohibited practice in question was due to a mistake, reliance on information supplied to the trader by another person, the act or default of a person other than the trader, an accident, or another cause beyond the trader's control, and that the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.<sup>223</sup>

The extent to which the courts in the UK have developed measures to protect the consumer in so far as handing down sentences that will serve as a deterrent in discouraging misleading or aggressive conduct is highlighted in *R v Scott King*.<sup>224</sup> In this case, a certain Mr Scott King engaged in a misleading and a fraudulent conduct of selling second-hand cars as a private seller when, in fact, he was acting in his scope and course of employment. In doing so he attempted to avoid providing prospective purchasers with warranties. Although in this case Mr King pleaded guilty to breaching Regulations 12, 13 and paragraph 22 of Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008, the court handed down a confiscation order in the sum of £109,970. The confiscation order was taken on appeal on grounds that it was disproportionately high and that a confiscation order is suitable where the activity of selling used cars would have been unlawful. The Appeal court dismissed the appeal on the grounds that the prohibited conduct amounted to misrepresentation to avoid providing warranties to prospective purchasers of vehicles and the business activity was premised on an unlawful activity.

#### **6.4 The South African position regarding certain complementary medicine**

Part of the aim in this research is to highlight areas of concern where legal lacunae's exist in respect of goods covered by the Act, as is indicated in Chapters 1, 2 and 4 above. The research focuses on complementary goods. In respect of certain complementary medicines these are partially regulated by the Medicines Control Council of South Africa whose function is to adopt standards imposed by the Medicine and Related Substances Control Act 101 of 1965. This Act, according to its preamble, regulates the manufacturing, distribution, sale and marketing of medicines and a scheduling regime is used to monitor the prescription and dispensation of such medicines. The scope of this Act is rather broad for the purposes of this research and special emphasis is placed on complementary medicines with the potential to fall outside the regulatory framework of the Medicine and Related Substances Control Act

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<sup>223</sup> Regulation 27J (5) of the Consumer Protection Amendment Regulations 14.

<sup>224</sup> [2014] EWCA Crim 621.

101 of 1965 as here is a legal lacuna which the CPA has not filled as the researcher would have expected. This classification is of “*complementary medicine*” as described above. It can be argued that the health benefits of any medicine, whether or not scheduled in terms of the Medicine and Related Substances Control Act 101 of 1965 depends to some degree on the average consumer being able to decipher the labelling of such medicine regarding its composition, ingredients, dosage instructions, any further precautions and any adverse effects for instance. As such there is a direct correlation between the safe usage of complementary medicine and sufficient labelling and trade description that is easy to understand.<sup>225</sup> A consumer thus is able to identify any relevant information and is empowered to make safe and informed choices that will not lead to any harm to them as defined in the Act.<sup>226</sup>

The Medicine and Related Substances Control Act 101 of 1965 as amended includes as part of its objectives the registration of medicine and related substances intended for human and for animal use, the establishment of the Medical Control Council to provide for the control of medicines and scheduled substances and medical devices and, most importantly, to make further provisions for the prohibition of the sale of medicine which are subject to registration and are not registered and to further provide that labels are approved by Council. This Act also regulates the purchase and sale of medicine by manufacturers.

In terms of Section 14 of the abovementioned Act, it states that unless authorized by Council<sup>227</sup> and/or where prescribed conditions are applicable, no person shall sell any medicine which is subject to registration by virtue of a resolution published by the Council.<sup>228</sup> In terms of this resolution, which is published in the Government Gazette, the Council may determine that a medicine or a class or category of medicines or part of any class or category mentioned in the resolution shall be subject to registration in terms of this Act. Furthermore, it includes medicine that was marketed in South Africa prior to the date when the Act became applicable.

The Act defines medicine as “*any substance or mixture of substances which may be used in the following:*”

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<sup>225</sup> Own emphasis.

<sup>226</sup> Own emphasis.

<sup>227</sup> Section 21 of the Medicine and Related Substances Control Act 101 of 1965.

<sup>228</sup> Section 13(2)(a) of the Medicine and Related Substances Control Act 101 of 1965.

- (a) *Diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms in human beings; or*
- (b) *Restoring, correction or modification of any somatic, psychic or organic function in human beings, including veterinarian medicine*.<sup>229</sup>

The exception in terms of the prohibition relates to a sale of any medicine composed by a pharmacist in the course and scope of their professional activities or compounded by a license holder in terms of Section 22 (c) (1) in quantities that are not greater than as prescribed by regulations for sale to the market.<sup>230</sup> This Act is comprehensive in respect of regulating the medicines through a registration process, but it is possible for ordinary goods, which ordinarily fall under the definition of “medicine” above, to fall outside the regulatory framework, especially imported medicines. However these goods fall outside the scope of this dissertation.

In terms of Section 18 of this Act which deals with labelling and advertisements, it states that no person shall sell any medicine or scheduled substances unless the immediate container or the package in which that medicine or scheduled substance is sold, bears a label bearing the prescribed particulars.<sup>231</sup> In addition, no person shall advertise any medicine or scheduled substances for sale unless such advertisement complies with minimum requirements. Any deviation from the above by the supplier must be approved by the Council.<sup>232</sup>

For redress purposes, this Act provides for inspectors who are vested with wide powers for entering and searching the premises of a licensed holder for the inspection of any medicine or scheduled substances, book, records or document which they believe is important for enforcement purposes,<sup>233</sup> and, finally, to issue warrants. A contravention of the provisions above amounts to a statutory offence.<sup>234</sup> It is also an offence if any person makes false or misleading statements in connection with any medicine in the course of the sale of such

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<sup>229</sup> Section 1 of Medicine and Related Substances Control Act 101 of 1965.

<sup>230</sup> These are medical practitioner dentist, medical practitioner, nurse or other professional registered under the Health Professions Act of 1974.

<sup>231</sup> Section 18 (1) of Act 101 of 1965.

<sup>232</sup> Section 29(h)(ii) of Act 101 of 1965.

<sup>233</sup> Section 28(1) of Act 101 of 1965.

<sup>234</sup> Section 14(1) of Act 101 of 1965 .



medicine:<sup>235</sup> the statutory sanctions are either a fine or imprisonment not exceeding 10 years.

In 2013 the Medicine Control Council introduced a roadmap for the formal registration of complementary medicines to provide certainty regarding the legal position of complementary medicines in the marketplace.<sup>236</sup> In terms of Section 22C (1)(b) of the Medicine and Related Substances Control Act 101 of 1965 all manufacturers and wholesalers of complementary medicines “*should*” be licenced. It is interesting that this is not a peremptory provision as is indicated by the word “*should*”. Furthermore, in terms of Regulations 8, 9 and 10 of the said Act, all medicines categorised as Category D described in paragraph c (which are regulated in a haphazard fashion in the view of the researcher) below must comply with labelling requirements as indicated in terms of Section 18 of the said Act. This roadmap, which intends to simplify the registration process for complementary medicines and to be applicable by no later than November 2019,<sup>237</sup> has met with resistance by the Health Products Association who, according to an article published in The Business Day by T Kahn on 27 February 2014, have expressed concern that “*the ramifications will be absolutely horrendous*” and that they estimate that “*the losses to the economy could be as much as 50 billion rand*”. In terms of the labelling of complementary medicine, Regulation 8 of the said Act provides that all medicines categorised under Category D must comply with labelling requirements within 6 months of the date of publication in the Government Gazette.<sup>238</sup> In terms of the labelling requirements, complementary medicines must before the deadline of 15 February 2014:

- a) Be written in English and at least one other official language. There is no requirement for braille and or pictorial presentation as compared to the European Union Directive discussed below.<sup>239</sup> Although it is impractical to insist on all 11 official languages in South Africa for the purposes of labelling requirements, it is unclear what criterion was used to adopt “at least one other official language”.
- b) State on the product the following information:
  - a. The category of medicine;

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<sup>235</sup> Section 29(h)(ii) of Act 101 of 1965.

<sup>236</sup> Established by the Medicine and Related Substances and Control Act 101 of 1965.

<sup>237</sup> Roadmap for registration of complementary medicine. Version 1 – Implementation in accordance with the Government Gazette Notice R.870 of 15 November 2013. [www.mccza.com](http://www.mccza.com).

<sup>238</sup> Government Gazette Notice R.870 of 15 November 2013.

<sup>239</sup> European Directive 2004/27/EC.

- b. The pharmacological classification of the medicine;
  - c. The discipline of medicine;
  - d. The words *“This medicine has not been evaluated by the Medicines Control Council. This medicine is not intended to diagnose, treat or prevent any disease”*.
- c) No other information not called for by Regulation 8 except where the Council has authorised the inclusion of any such additional information.

In terms of Section 24 of the Act discussed in Chapter 4 above, the Minister prescribes which goods shall have trade descriptions ascribed to them, and includes the country of origin of the goods.<sup>240</sup> Read together with Section 24, Regulation 6 provides for the limited category of goods covered as discussed above. Compared to Section 18 of the Medicine and Related Substances Control Act 101 of 1965, in terms of its trade description requirements in respect of the Act, the following information must be included in plain language:

- (a) The country of origin in which the goods were manufactured, produced or adapted; and
- (b) That textile was dyed, printed or finished in South Africa from imported fabric in the event that a textile manufacturer, importer or seller operation in South Africa uses imported substances. In such an event the statement “made in South Africa from imported material” must be reflected.<sup>241</sup>

At the time of preparing this research no further proposals have been issued to broaden the scope of goods covered in Regulation 6 as an enabling Regulation for Section 24 of the Act in respect of mandatory labelling of any other goods, specifically goods where there is doubt as to which Act they fall under. The researcher is aware of the General Notice<sup>242</sup> that was issued by the Minister dealing with the labelling of goods originating from East Jerusalem, Gaza or West Bank, incorrectly labelled as originating in Israel in terms of Section 24 of the Act. The Minister of Trade and Industries prescribed categories of goods and information which require an importer, producer, retailer or supplier in South Africa to label goods where they originate in Israel to be labelled as such. The Notice covered goods such as cosmetics, technology, food and beverages, textile and household goods.

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<sup>240</sup> Section 24(4)(a) read with Section 24(5) of the Act.

<sup>241</sup> E de Stadler (2013) *Consumer Law Unlocked* Siber Ink. Chapter 5. 97.

<sup>242</sup> Notice 380 of 2013 in the Government Gazette 36 364 of 12 April 2013.

The importance cannot be overemphasised of legal certainty in respect of a streamlined regulation of medicines in the interest of public health in order to safeguard against untested and in some instances unproven, misleading complementary and/or unregistered medicine. The poor regulation of any complementary medicine means that information which is vital for the safe use of such complementary medicines either is not disclosed due to a lack of mandatory disclosure obligation or the information disclosed is unclear or misleading, leading to legal uncertainty. This prevailing legal uncertainty potentially could harm consumers. From the analysis of the Medicine and Related Substances Control Act 101 of 1965, as well as the CPA, the following concerns have been identified by the researcher regarding complementary medicines, which concerns must be addressed by regulators in conjunction with the medical fraternity (areas of concern).

- (a) Medicines (as defined by the Medicine and Related Substances Control Act 101 of 1965) which have been deemed harmful by the relevant bodies such as the National Regulator for Compulsory Specifications may be withdrawn as banned products as these product are proven to be hazardous to public health.<sup>243</sup> Where goods do not fall squarely under the abovementioned Act then the CPA does not offer any measure of protection due to the limited scope of goods envisaged in Section 24 read with Regulation 6 of the Act.
- (b) Goods which were scheduled substances under the Medicine and Related Substances Control Act 101 of 1965, but which contravene the said Act, may be withdrawn by the relevant bodies, such as the Medicine Control Council. These are goods that may contain scheduled substances, such as Vitamins and other substances to be found on “fat burners” which are sold in most pharmaceutical stores.<sup>244</sup> Again, where goods do not fall squarely under the abovementioned Act then the CPA does not offer any measure of protection due to the limited scope of goods envisaged in Section 24 read with Regulation 6 of the Act.
- (c) In terms of registration any medicine which is imported into South Africa and not registered with the local regulator will be recalled and possible criminal sanctions will be imposed. Medicines are further categorised from Category A to D.<sup>245</sup> Category A relates to “*any substance used or purported to be used, or manufactured or sold for use in the*

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<sup>243</sup> This Regulator is created in terms of the National Regulator for Compulsory Specifications Act 05 of 2008.

<sup>244</sup> Act 05 of 2008.

<sup>245</sup> [www.CAMcheck.co.za](http://www.CAMcheck.co.za). See also Act 05 of 2008.

*diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms thereof, or restoring, correcting or modifying any somatic or psychic or organ function in a human being*” in terms of the above Act. All medicines to which a compulsory specification applies<sup>246</sup> and which fall under Category A require registration in terms of the said Act. The Category A medicines appear to be adequately regulated. At the other end of the spectrum Category D medicine is largely unregulated and/or complementary medicine. It is this classification of medicines that fall outside the framework of the CPA in so far as mandatory labelling and trade description are concerned and not adequately regulated by the Medicine and Related Substances Control Act 101 of 1965 where there is uncertainty about the correct categorisation of these medicines under both legislations. Although the Medicine and Related Substances Control Act 101 of 1965 has been amended to provide certainty regarding categorisation of medicines, uncertainty prevails.

- (d) Imported goods which ought to have been regulated and registered with the National Regulator for Compulsory Specifications, and which contravene the provision of the National Regulator for Compulsory Specifications as well as Section 14 of the Medicine and Related Substances Control Act 101 of 1965 inadvertently may be distributed to retailers and the consumer as indicated below.
- (e) It is possible for some complementary medicines to be regulated in a concurrent and fragmented fashion under different pieces of legislation such as the National Health Act,<sup>247</sup> Medical Research Council Act<sup>248</sup> as well as the National Regulator for Compulsory Specification Act 05 of 2008.

In the matter of the *Treatment Action Campaign (applicants) & Another v Rath and Others (respondents)*,<sup>249</sup> the case illustrates the concerns of the limited scope of what constitutes “medicine” and “goods”. The applicant sought a declaratory order against the respondents that they contravened the provisions of the Medicine and Related Substances Control Act 101 of 1965 and to declare the respondents’ action unlawful and to further interdict the respondents from carrying on their unlawful activities. The respondents were involved in the sale of Vitacor Plus, Epican Forte, Lysin C Drink mix and Vitacell in South Africa for the treatment of HIV (human immunodeficiency virus), which sale was believed to be unlawful

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<sup>246</sup> In terms of Act 05 of 2008.

<sup>247</sup> 61 of 2003.

<sup>248</sup> 19 of 1969.

<sup>249</sup> (12156/05) [2008] 4 ALL SA 360 (C) (13 June 2008).

and placed at risk the health of people with AIDS (acquired immunodeficiency syndrome).  
The main legal facts are that the respondents:

- a) Sold medicines which are not registered as required by the Medicine and Related Substances Control Act 101 of 1965;
- b) Sold product containing scheduled substances;
- c) Made false and unauthorised statements about the efficacy of their medicine in treating AIDS;
- d) Conducted unauthorised clinical trials on people with AIDS;
- e) Made false statements that ARV (Anti-Retro Viral) medication is ineffective in treating AIDS and discouraged people infected with AIDS from continuing with their ARV treatment.

The statement of issues is:

- a) Whether the respondents acted unlawfully in distributing “medicine” as defined in the Medicine and Related Substances Control Act 101 of 1965;
- b) Whether the respondents conducted unauthorised trials;
- c) Whether the respondents published false and misleading advertisement concerning vitamins, multivitamins and certain products produced by the respondents;
- d) Whether the government (which has a positive duty of care towards its citizens) has taken measures to investigate and to end the above activities.

The discussion of what constitutes “medicine” in terms of the abovementioned Act and whether the sale of Vitacor Plus, Epican Forte, Lysin C Drink mix and Vitacell amounted to a sale of medicine was presented and, although the applicants succeeded in this matter against the sale and marketing of the abovementioned products of the defendants, the issue of what constitutes “medicine” remains vague in so far as complementary medicines is concerned. It remains possible for unscrupulous suppliers to flood the market with goods that are not fully compliant from a health and safety perspective.

The issue of what constitute “medicine” was also discussed in the case of *Reitzer Pharmaceutical (Pty) Ltd v Registrar of Medicines and Another*<sup>250</sup> where it was argued that “*whether or not any particular substance is a medicine must be determined with reference to the Medicine and Related Substances Control Act 101 of 1965 and when its identity is being questioned*”. On Page 114 of the said case, it was further mentioned that “*the statutory definition of medicine was not overbroad, as such it could be established with certainty*”, however the question of its constitutionality was referred to the Constitutional Court. In this matter the applicants challenged the constitutionality of the definition of “medicine” in terms of Section 1 of the Medicine and Related Substances Control Act 101 of 1965 read together with Section 14 and 19 of the said Act on the grounds that such definition is “invalid for over breadth” and such prohibition restricts those, for instance, who are involved in what is typically known as alternative or herbal medicine industries.<sup>251</sup> It was argued that the definition conflicted with Section 26 (1) of the Interim Constitution<sup>252</sup> and the right to equal treatment contained in Section 8 of the Interim Constitution. In this matter the application for an interdict was refused, however the definition of “medicine” remains open to interpretation according to the researcher.

It is submitted by the researcher that the Minister of Trade and Industries could assist in closing this lacuna in the law above by broadening the scope of goods covered for the purposes of product labelling in Section 24 of the CPA as suggested in the concluding Chapter. That way there would be a clear identification of goods, including certain complementary goods (regardless of whether they strictly fall within the ambit of the definition of medicine or not) and the safe use of such goods would be indicated. It is submitted this proposal will achieve the objectives of the CPA from a safety and healthy perspective.

In 2013 the National Regulator for Compulsory Specifications, which body gains its powers from the National Regulator for Compulsory Specifications Act<sup>253</sup> ordered a nation-wide recall of the Dettol Disinfectant Liquid<sup>254</sup> which was imported from the United Kingdom on the grounds that the goods concerned were not registered with the National

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<sup>250</sup> 1998 (4) SA 660 (T).

<sup>251</sup> As defined supra.

<sup>252</sup> This was known as the Constitution of the Republic of South Africa Act 200 of 1993 which was applicable before the final Constitution was promulgated on 04 February 1997.

<sup>253</sup> 05 of 2008.

<sup>254</sup> Not to be confused with the Dettol range which includes Dettol Hygiene Liquid and Dettol Antiseptic Liquid which are available on the market.

Regulator of Compulsory Specification, the product failed the necessary “*bacteria efficacy test*” and was unsafe for use by consumers., The packaging of the product under recall was similar to other compliant Dettol-related products thus having the potential to confuse consumers and the recalled disinfectant was on the market without the mandatory registration certificate issued by the National Regulator for Compulsory Specifications.<sup>255</sup> Again, this example indicates the close relationship between the Medicine and Related Substances Control Act 101 of 1965 and the CPA in respect of certain goods and it highlights the importance of the proper information and identification of goods for safe use by consumers.

Other legislation that has an impact on product labelling in so far as complementary medicines are concerned are:

- a) The National Health Act 61 of 2003 which provides the “norms and standards” on health-related matters, however this Act has a very limited influence and is included here for the sake of completion.
- b) The South African Institute for Drug Free Sports Act 25 of 2006 also has a very limited application to the issue of complementary medicines. This Act deals with doping agents and incidental matters and is widely applicable in the sports fraternity.

The CPA, in the researchers view, is meant to serve as an all-embracing legislation in respect of the supply and acquisition of goods and services in South Africa, however, as noted above, it is restrictive in respect of a number of goods, including complementary medicines which either are:

- (a) Imported and potentially harmful:
- (b) Not registered with the local regulator in terms of National Regulator for Compulsory Specifications Act 05 of 2008:
- (c) Not compliant with the provisions laid down by the roadmap for registration of complementary medicines as prescribed by the Government Gazette Notice R870 of 15 November 2013; however these goods fall outside the scope of this dissertation.

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<sup>255</sup> News statement issued by the National Regulator for Compulsory Specifications on [www.nrccs.org.za](http://www.nrccs.org.za)

- (d) Not falling under the scope and application of Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 read together with Regulations 1555; or the Fertilizers, Farm Feed, Agricultural Remedies and Stock Remedies Act 36 of 1974 or the provisions of Section 24 read together with Regulation 6 of the CPA;
- (e) Where the manufacturer has no permission to market the complementary goods; however these goods fall outside the scope of this dissertation.
- (f) Complementary medicine not falling squarely under the definition of Section 1 of the Medicine and Related Substances Control Act 101 of 1965 but contain scheduled substances;
- (g) Complementary medicine where uncertainty prevails regarding the categorisation.

### **European Union position regarding certain complementary medicine:**

In comparison with the European Union regulatory regime governing best practices on the labelling of medicines, including complementary medicines, the South African regulatory framework is fragmentary. In Europe, for instance, there appear to be three main levels of regulation:<sup>256</sup>

- (a) Direct regulation by the state through Directives such as the Directive 2004/27/EC of the European Parliament and the Council on 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use;
- (b) Self-regulation by the state not applicable to labelling laws relating to medicinal products for human use;
- (c) Self-regulation conducted largely by businesses not applicable to labelling laws relating to medicinal products for human use.

Article 55 of the Council Directive 2004/27/EC of the European Parliament and the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to

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<sup>256</sup> Official Journal of the European Union L136/34 issued on 30.04.2004/OJ L136, 30.4.2004, Page 1 found on [www.ema.europa.eu](http://www.ema.europa.eu)



medicinal products for human use is relevant for comparative purposes.<sup>257</sup> This Directive codifies all laws of European Union members relating to medicinal products for human use for the purposes of “clarity and rationalisation”, as well as the easy movement of medicinal products within the European marketplace to stimulate trade and healthy competition.<sup>258</sup> The Directive aligns all national laws and regulations which may contain different provisions regarding medical goods.<sup>259</sup> The Directive takes cognisance of the dual role played by suppliers, in that in the development of laws to protect the public the laws must achieve their objective of protecting consumers but not at the expense of frustrating the commercial interests of suppliers. This recognition is not the case with the CPA.

Furthermore, the Directive provides that “*as a result of scientific and technical progress, the definitions and scope of the Directive 2001/83/EC be clarified in order to achieve high standards for the quality, safety and efficacy of medical products for human use*”. As indicated above the CPA does not provide a definition of “product labelling”, however it provides for trade descriptions. There are other Acts in South Africa which also regulate trade descriptions, such as the Trade Metrology Act 77 of 1973, which creates legal uncertainty as indicated.

The Directive modified the definition of “medical products” to remove “*any doubt of applicable legislation when a product, whilst fully falling within the definition of a medical product, may also fall within the definition of other regulated product*”.<sup>260</sup> In South Africa, the definition of “medicine” lends itself to ambiguity in respect of medicinal products as discussed above. The definition of “medical product” in terms of the Directive is broad and it includes:

- (a) Any substance or combination of substances presented as having properties for treating or preventing diseases in human beings, or
- (b) Any substances or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis.

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<sup>257</sup> Official Journal of the European Union L136/34 issued on 30.04.2004/OJ L136, 30.4.2004, Page 1 found on [www.ema.europa.eu](http://www.ema.europa.eu)

<sup>258</sup> See footnote 257.

<sup>259</sup> Directive 2004/27/EC.

<sup>260</sup> See footnote 259 Supra.

- (c) Homeopathic medical products (similar to complementary medicine in South Africa) are defined as *“any medical product prepared from substances called homeopathic stocks in accordance with homeopathic manufacturing procedure described by the European Pharmacopoeia, or, in the absence thereof, by the pharmacopoeias currently used officially in the Member States. A homeopathic medicinal product may contain a number of principles”*. In South Africa the Regulations issued in terms of the Medicine and Related Substances Control Act 101 of 1965 define complementary medicine as *“any substance or mixture of substances that originate from plants, minerals or animals, is used or intended to be used for, or manufactured or sold for use in assisting the innate healing powers of a human being or animal to mitigate, modify, alleviate or prevent illness or the symptoms thereof or abnormal physical or mental state and is used in accordance with the practice of the professions regulated under the Allied Health Professions Act 63 of 1982”*. Although in South Africa the Medicines Control Council has produced a roadmap for the registration of complementary medicines above, it is important to note that the power of redress for the purposes of the roadmap however currently does not reside with the Medicine Control Council, it is the mechanisms of the Medicine and Related Substances Control Act 101 of 1965 that are applicable, thus leading to legal uncertainty.
- (d) Article 6 of the Directive<sup>261</sup> categorically states that no medical products (including homeopathic medical products) may be placed on the market of a Member State unless a marketing authorization has been issued by the competent authority of that Member State in accordance with this Directive. This order inspires consumer confidence as the responsible marketing obligations are consolidated in an inclusive Directive and not regulated in a fragmentary fashion by the Advertisement Standards Association of South Africa (ASASA), the Medicine and Related Substances Control Act 101 of 1965 together with the Medicine Control Council, as well as the CPA as is the case in South Africa.
- (e) Chapter 2 of the Directive<sup>262</sup> provides for specific provisions applicable to homeopathic medicinal products. Chapter 2a provides for specific provisions applicable to traditional herbal medicine products, thus we note a clear distinction between the two categories each with its own requirements. In terms of the homeopathic medicinal product which is the subject matter, Member States shall ensure that homeopathic medicinal products manufactured and placed on the market are registered or authorised in accordance with Articles 14, 15 and 16 of the Directive unless they are covered by registration or

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<sup>261</sup> Directive 2004/27/EC.

<sup>262</sup> See footnote 261 Supra.

authorisation under national legislation. In addition, Member States are required to establish a simplified registration procedure for homeopathic medicinal products. In South Africa, the deadline of 14 February 2014 was given by the Medicines Control Council to ensure labelling requirements were met, however the provision of the simplified registration process as envisaged by the said Council is acceptable only for certain complementary medicinal products. It is uncertain what the legal position is with regard to complementary goods that do not fall under the ambit of the Medicine and Related Substances Control Act 101 of 1965 or the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 or the Fertilizers, Farm Feed, Agricultural Remedies and Stock Remedies Act 36 of 1974 or the provisions of Section 24 read together with Regulation 6 of the Act.

(f) Article 16 of the Directive<sup>263</sup> provides that homeopathic medicinal products shall be authorized and labelled in accordance with Articles 8, 10, 10a, 10b, 10c and 11. Article 8 provides that prior to authorization of the said medicinal products, application must be accompanied by information such as (this not being the entire list of particulars and each particular containing sub particulars):

- a) Name and address of manufacturer,
- b) Name of medicinal product,
- c) Qualitative and quantitative particulars of all the constituents of the medicinal products,
- d) Therapeutic indications, contraindications and adverse reactions,
- e) Results of any clinical trials,
- f) Pharmaceutical form,
- g) Clinical particulars,
- h) Pharmacological properties,
- i) Pharmaceutical particulars,
- j) Market authorisation holder and number,
- k) Date of the first authorization or renewal of the authorization,
- l) Date of revision of the text.

(g) Article 54 provides for labelling and packaging requirements. It will be noted that the requirements are more stringent yet simplified, more codified and various modes of communication of information are adopted as opposed to the South African regime. In addition, there are requirements relating to the outer packaging and the inner packaging.

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<sup>263</sup> See footnote 261 Supra.

In terms of Article 54, salient features shall appear on the outer package and inner leaflets (this not being a full comprehensive list for comparative purposes):

- (a) The name of the medicinal product followed by its strength and pharmaceutical form and whether it is intended for babies, children or adults;
  - (b) A statement of the active substances expressed qualitatively and quantitatively per dosage unit;
  - (c) The pharmaceutical form and the contents by weight, volume or number of doses;
  - (d) Method of administration;
  - (e) Special warning that the medicine must be kept out of reach of children;
  - (f) Any other special warnings;
  - (g) Expiry date;
  - (h) Special storage instructions;
  - (i) Specific instruction regarding disposal;
  - (j) The particulars referred to above and in Article 55 and 62 shall be easily legible, comprehensible and indelible. In addition, the name of the medicinal product in Article 54 must also be expressed in Braille format on the packaging.
  - (k) The package leaflet must be written and designed to be clear and understandable enabling the user to act appropriately where necessary with the help of a health professional.
- (h) Over and above the mandatory requirements in paragraph (f) and (g) above, Article 68 states that homeopathic medicinal products shall be labelled in accordance with the provisions of the Directive and shall be identified by a reference on their labels in a clear and legible form and to their homeopathic nature.

Based on the comparative analysis above with reference to South African and European Union laws, with specific emphasis on a particular member state, the UK, relating to product labelling and trade description, the researcher was able to demonstrate the extent of the development of consumer laws and the extent to which consumers in a Member State such as the UK are protected. UK laws are clear in their scope and less ambiguous than the CPA. In addition, the courts have assisted and developed further jurisprudence in interpreting certain provisions of the law. Furthermore, the amendments to UK law in terms of the Consumer Protection Amendment Regulations promulgated on 01st October 2014 have significantly improved the enforcement mechanism by including civil redress and by prescribing the manner in or mechanism by which damages can be ascertained against a supplier.

In addition, the European Directives are comprehensive and unambiguous in their drafting so that it becomes clear from the literal interpretation of the Directive what is the intention of the legislature as well the scope of goods to be covered. This is not the case in South Africa. As indicated above the CPA presented an opportunity to serve as an all-embracing legislation in respect of the supply and acquisition of goods and services in South Africa, however it is restrictive in respect to the type of goods it covers, including complementary medicines as demonstrated above. It also silent on goods that are neither covered by it nor by any other existing legislation. There are also issues surrounding concurrent application of existing laws with the CPA which results in judicial uncertainty. Thus the position in South Africa as compared to the EU legal regime does not inspire consumer confidence and fails to meet some of the salient objectives of the Act regarding the protection of consumers as required by law.

## 7. FAILURE TO WARN AND FAILURE TO ADEQUATELY WARN ON LABELLED GOODS

The crux of the legislative requirement in Product Labelling and Trade Description is to create awareness and identification regarding the composition and ingredients and adverse effects in respect of products purchased in order to empower the consumer with good decision-making choices. Ancillary to this statutory obligation is the obligation to provide warning and instructions about use in respect of certain goods which may pose a higher risk from a public health perspective. The Act<sup>264</sup> provides that where the supplier of any activity or facility that is subject to any—

- (a) risk of an unusual character or nature;
- (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
- (c) risk that could result in serious injury or death,

This fact, specifically, as well as the nature and potential effect of that risk, must be drawn to the attention of consumers in a form and manner that meets the standards set out in section 49 (3) to (5) of the Act, primarily being that any provision, condition or notice must be written in plain language<sup>265</sup> as well as that the fact, nature and effect of the provision or notice must be drawn to the attention of the consumer<sup>266</sup> in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer<sup>267</sup> having regard to the circumstances. Furthermore, the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provisions or notice mentioned above.<sup>268</sup> In respect of hazardous substances or unsafe goods,<sup>269</sup> any person who packages such goods for supply to the consumer must display on or within that packaging a notice that meets the requirements of Section 22, meaning that it must be written in plain and understandable language. This means the test used is the small experience of an average consumer to whom the goods are intended to be sold. Timeous warning must be provided. The Act

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<sup>264</sup> Section 58(1) of the Act.

<sup>265</sup> As provided for in Section 22(1) of the Act.

<sup>266</sup> Section 49(4)(1) of the Act.

<sup>267</sup> Section 49(4)(1)(a) of the Act.

<sup>268</sup> Section 49(5) of the Act.

<sup>269</sup> Section 58(2) of the Act. These goods incidentally are also regulated by the Hazardous Substances Act *supra*. In such an event the provisions of the CPA may not apply, depending on which Act provides the highest degree of protection to the consumer.

provides that this notification requirement must occur before the earlier of the time at which the consumer enters into a transaction or agreement, begins to engage in the activity or enters or gains access to a facility or is required or expected to offer consideration for the transaction or agreement.

In the event that the suppliers fail to provide any warnings and instructions as required by the Act, then the strict liability provisions in terms of Section 61 apply, regardless of the threshold applicability indicated in Section 6(1) of the Act. The supplier will be liable for any harm<sup>270</sup> caused by inadequate warnings and instructions for use. This means that the supplier will be liable for supplying unsafe goods<sup>271</sup>; a product failure, defect or hazard in any good,<sup>272</sup> inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of goods.<sup>273</sup> The common law test for negligence in terms of establishing liability shall not be applicable.

Over and above the statutory requirements for warnings and instructions for use, E De Stadler<sup>274</sup> argues that:

- (c) *Warnings and instructions must be proportionate to the risk posed by the goods;*
- (d) *Warnings should be drafted on the basis of the ordinary use of the product;*
- (e) *The warning must be presented in a conspicuous manner and form that will attract the attention of the ordinary alert consumer depending on the circumstances;*
- (f) *The consumer must be given enough opportunity to read and understand the warning.*

Section 61 of the Act provides for strict liability in the event of non-compliance with the provisions of the Act above which may result in any harm arising from goods which were inadequately labelled and not supported with proper instructions for use, this resulting in unsafe and potentially harmful goods being introduced into the marketplace and potentially diminishing consumer confidence in safeguarding public health for instance. This section is a

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<sup>270</sup> Harm in terms of Section 61(5) of the Act relates to *harm for which a person may be held liable in including—*

- (a) *the death of, or injury to, any natural person;*
- (b) *an illness of any natural person;*
- (c) *any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and*
- (d) *any economic loss that results from harm contemplated in paragraph (a), (b) or (c).*

<sup>271</sup> Section 61(a) of the Act.

<sup>272</sup> Section 61(b) of the Act.

<sup>273</sup> Section 61 (c) of the Act.

<sup>274</sup> E de Stadler (2013) *Consumer Law Unlocked* Siber Ink. Chapter 7. Page 165 from M Loubser and E Reid (2012) *Product Liability in South Africa* Juta. Page 112.

deviation from the common law strict liability provision where the common law test of negligence using the reasonability test was required to prove strict liability in law. Consequently, Section 61, as stated in Barnard's article,<sup>275</sup> does not require the common law test of fault to be proven in court to establish liability on the part of the producer or importer, distributor or retailer. Interestingly, the section does not include a supplier in its value-chain liability process.<sup>276</sup> The rationale and the policy considerations for strict liability were interrogated by authors such as Botha & Joubert,<sup>277</sup> They suggest that the evolving fault theory combined with rapid industrialisation lead to the introduction of strict liability in South Africa. They state: "*according to the fault theory the wrongdoer had to act with fault, either intent or negligence, on his part to incur delictual liability (Neethling et al 329)*". They also state that "*due to the increase in industrial development and technological climax, the idea of strict product liability was raised in reaction to the fault theory (Neethling et al 329)*".<sup>278</sup>

The researcher supports the abovementioned author's views. A rapid industrialisation process means that the causality chain in respect of the movement of goods from the manufacturing process to the marketing and selling of goods cannot be proved by the consumer as it would be unreasonable to do so based on some of the factors discussed in Chapter 5 above. This means that the supplier is in a suitable position to ensure that goods moving across the value chain are in accordance with their manufactured specifications, albeit at a cost to the consumer. Botha & Joubert<sup>279</sup> further highlight five factors that are applicable in a South African context in favour of strict liability: (McQuoid-Mason 108–110)

- (a) *The vast majority of manufacturers do not sell directly to the public and cannot be held strictly liable under the Kroonstad rule for their harmful products, even though they are responsible for introducing these products into the marketplace.*
- (b) *Manufacturers who introduce defective products into the marketplace escape liability because the consumer must prove fault on their part, whereas sellers who are often "unwitting conduits" for manufactured products that are latently defective are held strictly*

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<sup>275</sup> Dr J Barnard "The Influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defect, voetstoets clauses and liability for damages"(2012) De Jure Page 480-484.

<sup>276</sup> Jacobs, Stoop & Van Niekerk 2010 PER 320 – 370.

<sup>277</sup> MM Botha & EP Joubert "Does the Consumer Protection Act 68 of 2008 provide for Strict Product Liability? – A comparative analysis" 2011 THRHR 305-318.

<sup>278</sup> See footnote 277 Supra.

<sup>279</sup> See footnote 277 Supra.



*liable because they professed that they have skill and expert knowledge in relation to those products. (312 2011 (74) THRHR)*

*(c) Large-scale manufacturers who swamp the market with masses of potentially dangerous goods through intermediaries are not held strictly liable whereas ordinary artists and craftspeople that do not swamp the market with such masses of potentially dangerous goods are held strictly liable.*

*(d) The re-entering of South Africa into the global economy with trading partners such as Australia, the European Union, Japan, the United Kingdom and the United States who have introduced strict liability for dangerous and defective products is likely to increase pressure on South Africa to do the same.*

*(e) Cognizance must be taken of the notions of fairness and justice .*

The evolving of the common law position regarding strict liability provisions should not be restricted contractually and parties may approach the courts in terms of the law of delict for any pure economic loss suffered. In addition, the courts will look at public policy considerations in enforcing strict liability. In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*<sup>280</sup> where a supplier supplied a foodstuff containing a banned contaminant for chicken spices which rendered it unfit for human consumption, it was held that an exemption clause in a supply agreement which limits liability of a supplier for goods supplied by way of warranties or representations as to the quality or the fitness of any goods, in this instance a foodstuff, is contrary to public policy and unenforceable. This decision means that suppliers, whether contractually or in delict, cannot exclude a strict liability provision if doing so would be against public policy.

In addition to the abovementioned strict liability provisions (the word “strict” is ironical in the researcher’s view as a statutory defence is available in law in favour of suppliers as referred to below), the Act also provides that goods may be recalled if found to be unsafe.<sup>281</sup> The Consumer Product Safety Recall Guidelines provide a framework regarding the obligations of the supplier when goods are recalled.<sup>282</sup> Section 60 states that the Commission<sup>283</sup> *must*

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<sup>280</sup> 2011 4 SA (SCA): [2011] 2 All SA 362 (SCA).

<sup>281</sup> Section 60(1) of the Act.

<sup>282</sup> The guidelines have been published by the Government Gazette No 490 of 13 June 2012.

<sup>283</sup> Established in terms of the Act.

*promote, within the framework of section 82, the development, adoption and application of industry-wide codes of practice providing for effective and efficient systems to—*

*(a) receive notice of—*

- (i) consumer complaints or reports of product failures, defects or hazards;*
- (ii) the return of any goods because of a failure, defect or hazard;*
- (iii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard; and*
- (iv) other indication of failure, defect or hazard in any particular goods or in any component of them, or injury or damage resulting from the use of those goods;*

*(b) monitor the sources of information contemplated in paragraph (a) above, and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use of or exposure to those goods;*

*(c) conduct investigations into the nature, causes, extent and degree of the risk to the public;*

*(d) notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods; and*

*(e) if the goods are unsafe, recall those goods for repair, replacement or refund.*

Section 60 (2) further provides that *if the Commission has reasonable grounds to believe that any goods may be unsafe, or that there is a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code contemplated in subsection (1), the Commission, by written notice, may require that producer (and interestingly not the supplier or distributor who may have an influence in the change of specification of goods) to—*

*(a) conduct an investigation contemplated in subsection (1) above; or*

*(b) carry out a recall programme on any terms required by the Commission.*

Upon examining the provisions of Sections 49, 58, 60 and 61 of the Act above which essentially provide a causality chain of liability in the event of non-disclosure of warning obligations, it is clear that the Act creates a positive obligation on suppliers and producers alike to warn consumers in respect of certain material facts and to provide instructions relating to *risks of an unusual character or nature or risks of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or risk that could result in serious injury or death.*<sup>284</sup> This positive obligation by extension applies to products labelled and used by consumers as well as to third parties who potentially could be harmed by the products purchased.

As noted above the Act prescribes the manner in which suppliers are required to provide certain warnings to consumers on labels, however the procedure to warn consumers is not uniform and precise, though, admittedly, it cannot be an exact science since the warning requirements cover a broad range of goods which are regulated in a fragmentary manner.<sup>285</sup> The question that remains is what measure will the courts or other enforcement agents use to establish whether a supplier or producer has taken all reasonable measures to ensure that warning are provided in a clear and understandable manner in compliance with Section 22, 49 and 58 of the Act.<sup>286</sup> A unique appraisal of a consumer in a South African context, as reflected in Chapter 5, indicates the unique challenges that exist in South Africa, such as low levels of literacy. If consumers are largely vulnerable, not average and in some instances illiterate, the question remains what measures are suppliers expected to take to ensure that such consumers are able to decipher the warning communication on the goods concerned as well as the instructions. The factors in Chapter 5 play a significant role when a supplier has to develop techniques to warn consumers in South Africa and currently, from what the researcher can establish, there is no test that exists as to what constitutes “*adequate warning*” for the purposes of the Act, thus it is left to the judiciary to determine. It is also uncertain whether the reasonability test available in common law will be used by the courts to determine liability in such instances, however the common law reasonability test consideration falls outside the scope of this dissertation.

The researcher has praise for the statutory duty upon a supplier in respect of warning obligations discussed above, however the researcher has a further problem in respect of the abovementioned warning obligations in that it may not be feasible for a supplier or a

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<sup>284</sup> Section 58(1).

<sup>285</sup> Own emphasis.

<sup>286</sup> Own emphasis.

producer to provide “adequate” warning on labelled goods as the word “adequate” is open to interpretation, which interpretation will have to be determined judicially.<sup>287</sup> Furthermore, the provision which establishes warnings on labelled goods may come at a considerable financial cost, specifically from a packaging and design perspective. Invariably, these costs may be passed on to the consumer who is then worse off as a result of legal compliance requirements. In addition and due to the above, the warnings may be inadequate and fall short of the statutory requirements mentioned above and result in harm as described in Section 61,<sup>288</sup> being, in summary, injury, loss, death and economic loss. Both the supplier or producer and the consumer are worse off in this instance. For instance, the consumer will have to prove their matter on a balance of probabilities<sup>289</sup> and exhaust the hierarchical enforcement mechanisms provided for in Section 69 of the Act, at their financial expense, so as to prove that the supplier or producer did not adequately take measures to provide warnings or instructions on the use of a product. The possible negligent behaviour of the consumer in ignoring a warning label and/or instructions of use appears not to have been factored in unless this leads to harm in Section 61(5) of the Act and where defence in terms of Section 61(4) can be proven.<sup>290</sup> Jacobs et al<sup>291</sup> submit that it would be advisable for suppliers and producers to take out special insurance against consequential losses or damage in respect of Section 61 strict liability provisions. Again, such an insurance provision attracts a considerable financial cost and, as stated previously, such costs are passed on to

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<sup>287</sup> Own emphasis.

<sup>288</sup> 68 of 2008.

<sup>289</sup> This does not exclude the criminal sanctions that may be imposed in terms of Section 109 of the Act.

<sup>290</sup> This Section provides that strict liability of a particular person does not arise if—

- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;*
- (b) the alleged unsafe product characteristic, failure, defect or hazard—*
  - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or*
  - (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;*
- (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers; or*
- (d) the claim for damages is brought more than three years after the—*
  - (i) death or injury of a person contemplated in subsection (5)(a);*
  - (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or*
  - (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or*
  - (iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).*

<sup>291</sup> W Jacobs, PN Stoop & R Van Niekerk “Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008. A critical overview and Analysis” PER/PELI 2010(13)3 302-508.

the consumer who, due to the additional insurance, may end up paying an additional margin for the products sold.

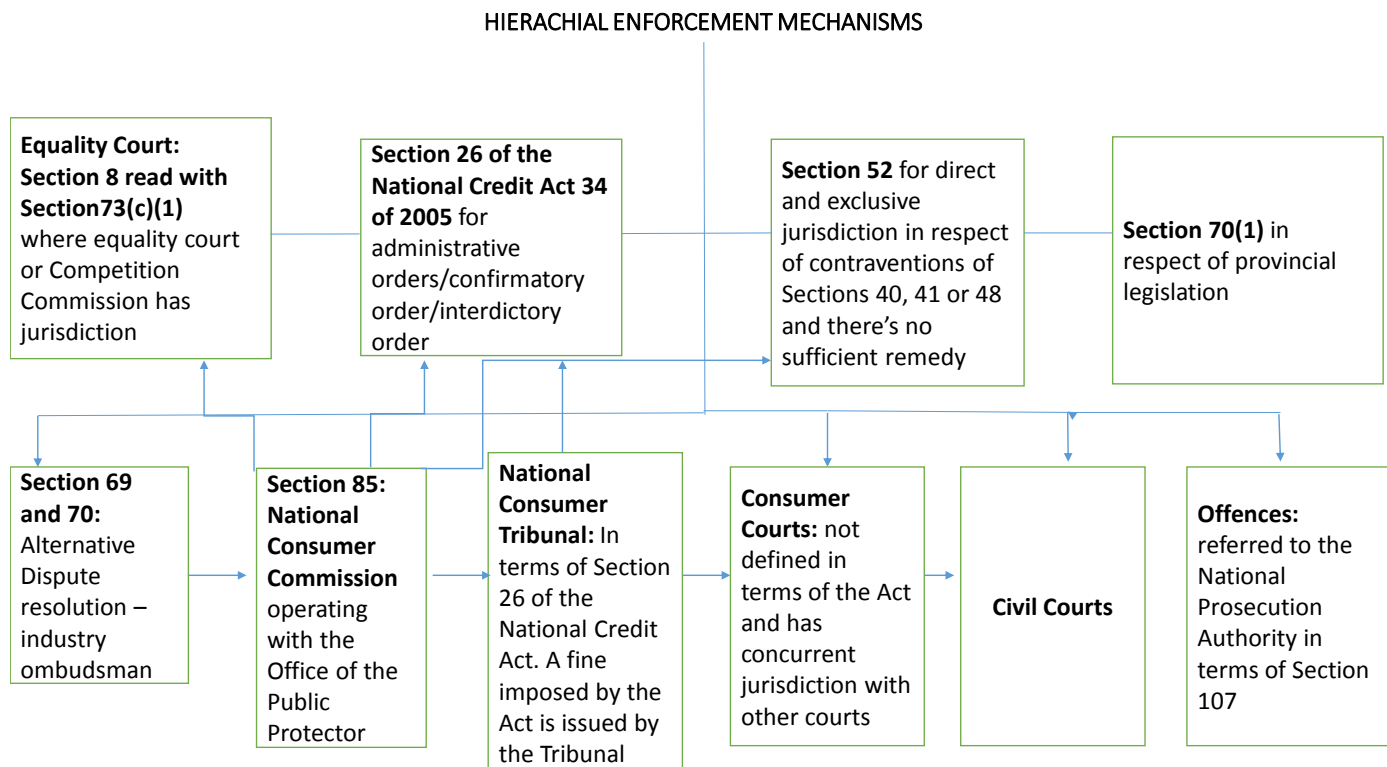
The research deems it prudent to add that there exists a vertical relationship between the supplier and the consumer, not only from a bargaining point of view but also the supplier is in a more informed position to know the exact nature, composition, potential side effects and safety of the goods which they produce, as they are the proprietaries of such goods and compliance as discussed above is merely quasi-regulatory, the suppliers play a superior role as they have the expertise to determine, for instance, whether the composition of certain goods with an “x” amount of ingredients may result in toxicity and lead to harm and jeopardize public health. Both the consumers and the legislature that establishes the law are not experts in products regulated by laws in South Africa and it appears that they rely heavily on the good faith of suppliers. Where a supplier or producer is sued for a contravention of the provisions of the section above the courts would, from a constructive knowledge doctrine, assume that the said supplier or producer was aware of the safety or its lack in the product causing harm as they possess greater knowledge in respect of their products. The supplier would have to prove that they took reasonable steps to provide adequate warnings or instructions, or they would have to rely on the existence of the defence in Section 61(4).

The failure to warn or to warn adequately or to provide instructions on use can have dire consequences for all consumers, more so vulnerable consumers. It could also lead to financial and reputational exposure on the part of the supplier, both to product liability claims and product recall. The variables raised in Chapter 5 dealing with ethical, social and economic issues unique to South Africa first must be considered and addressed before the rights enshrined in this Chapter can be realised to the benefit of consumers and society as a whole.

## 8. ENFORCEMENT

The redress mechanisms created by the Act are surprisingly complex and fragmented considering the salient objectives of the Act. The Act has established state mechanisms, such as the National Consumer Commission<sup>292</sup> and the National Consumer Tribunal,<sup>293</sup> on the presumption that these have sufficient capacity to carry out their mandate. In reality they are overburdened and under-capacitated based on the number of consumer-related queries that they receive on a daily basis as well as on their response time.<sup>294</sup> The default enforcement provisions are regulated by Section 69 of the Act read together with the provisions of Sections 8, 52, 70(1) of the Act and Section 26 of the National Credit Act 34 of 2005. These provisions must be read together with those of all parallel legislation discussed in Chapters 3 and 4 of this research.

Below is a schematic presentation of the redress mechanism envisaged by the Act:



<sup>292</sup> Section 70(2) read together with Section 71(2) of the Act.

<sup>293</sup> Section 73(5) of the Act.

<sup>294</sup> During the course of 2014, the researcher attempted to contact the mechanisms of the state in respect of a complaint to be lodged on behalf of a consumer who had requested assistance without much success. The query related to defective building works conducted by a constructor in a newly-developed residential estate. The researcher was provided with a reference number. No further correspondence was received.

The first row indicates redress mechanisms that have exclusive jurisdiction, as will be shown in this Chapter, and the 2<sup>nd</sup> row indicates a hierarchical flow of redress mechanism that a consumer must follow where exclusive jurisdiction is either not applicable or unsuccessful.

In order to address the redress mechanisms, the consumer has to consider the *locus standi in iudicio*<sup>295</sup> provisions as well as the following elements raised by Y Mupangavanhu:<sup>296</sup>

- (a) The value of the claim;
- (b) The level of complexity of the matter;
- (c) The number of affected consumers;
- (d) Is there an incentive to solve the claim concerned;
- (e) The nature of the claim;
- (f) Affordability by the consumer/s;
- (g) Any policy consideration;
- (h) Any cross border elements.

*Locus standi in iudicio:*

The Act has introduced *locus standi* provisions in order to make it feasible for certain types of consumers to lodge an action against a supplier.<sup>297</sup> The Act in terms of facilitating the promotion of access to justice as enshrined in the Constitution provides for a wide *locus standi*,<sup>298</sup> which it does by creating a classification of persons that have *locus standi* to bring the matter to the redress mechanisms created by the Act. In terms of Section 4(1) *the following persons may, in the manner provided for in this Act approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:*

- (a) a person acting on his or her own behalf;*
- (b) an authorised person acting on behalf of another person who cannot act in his or her own name;*
- (c) a person acting as a member of, or in the interest of, a group or class of affected persons;*

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<sup>295</sup> This latin maxim means "the right to sue or be sued in a court of law".

<sup>296</sup> Y Mupangavanhu "An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008" (2012) Volume 15 No 5 PER 321-638.

<sup>297</sup> Section 4(1) of the Act.

<sup>298</sup> Y Mupangavanhu "An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008" (2012) Volume 15 No 5 PER 321-638.

(d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and

(g) an association acting in the interest of its members.

(2) In any matter brought before the Tribunal or a court in terms of this Act—

(a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).<sup>299</sup>

Sections 4(1)(a) to (b) are a codification of the common law *locus standi* provisions and are a mere affirmation of common law doctrine. Section 4(1)(c) introduces the concept of a class action in commercial law litigation. A class action is defined as “a [procedure] that enables a large group of people, whose rights have been similarly infringed by a wrongdoer, to sue the defendant as a collective entity. One member (or more members) of a group, which does not have to form an organizational unit, initiates the action as a representative party on behalf of a whole group, without the need to join all the members. If the court is satisfied that certain requirements have been met, *inter alia*, that the plaintiff will represent the interests of the absent members of the class adequately, it may grant leave for the action to proceed as a class action. And the order of the court at the end of the proceedings is not only for the benefit of all members of the group, but it also binds all of them.”<sup>300</sup> In South Africa the concept of class action was introduced by the new constitutional dispensation in terms of the Constitution of the Republic of South Africa.<sup>301</sup> Section 38<sup>302</sup> of the Constitution introduced

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<sup>299</sup> These are vulnerable consumers who by virtue of their background are *low-income persons or persons comprising low-income communities*;

(ii) *who live in remote, isolated or low-density population areas or communities*;

(iii) *who are minors, seniors or other similarly vulnerable consumers*; or

(iv) *whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.*

<sup>300</sup> W Le R De Vos “*Is Class Action a “classy act” to implement outside the ambit of the constitution*”(2012) TSAR Page 738.

<sup>301</sup> Act 108 of 1996.

<sup>302</sup> Section 38 states that “*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including*

*a declaration of rights. The persons who may approach a court are –*

(a) *anyone acting in their own interest*;

(b) *anyone acting on behalf of another person who cannot act in their own name*;

(c) *anyone acting as a member of, or in the interest of, a group or class of persons*;

(d) *anyone acting in the public interest*; and



class actions as a redress mechanism in respect of human-rights related actions only.<sup>303</sup> This restriction may have been the catalyst for the realisation of a consumer rights mechanism in Section 4 of the Act. Although the Act is to be lauded for introducing class actions to assist consumers to have a greater voice as a consortium against a particular large supplier with extensive resources to defend its actions where they have acted in contravention of the Act, the Act creates no mechanism or processes for recognising class groups and certifying them, and the common law has not addressed the issue at the time of writing of this research.

An illustration of the manner in which class actions have been lodged in South Africa against suppliers is the example of the National Consumer Forum<sup>304</sup> together with other associations, such as the Black Sash, which formed a class action with the Competition Commission in terms of cartel conduct to fix prices and to divide up the market contrary to the provisions of Section 4(1)(b)(i) of the Competitions Act<sup>305</sup> in the case of *Competition Commission v Pioneer Foods (Pty) Ltd.*<sup>306</sup> Although this matter relates to cartel conduct in terms of the Competitions Act<sup>307</sup> it demonstrates the need in South Africa to establish identifiable classes of persons for the purposes of filing class actions. The test that should be used to establish a class action is as follows:

- a) Is there a direct and substantial interest for the consumers in the outcome of the matter? By direct, there must be an actual and current interest which must not be far removed.<sup>308</sup>
- b) Will the Section 4 provisions introduce a collective redress measure?<sup>309</sup>
- c) Are the provisions for the sake of convenience?<sup>310</sup> By convenience the reference is to the joinder and intervention, consolidation of matters in civil procedure dictated by the

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*(e) an association acting in the interest of its members.”*

<sup>303</sup> Wouter Le R De Vos “Is Class Action a “classy act” to implement outside the ambit of the constitution”(2012) TSAR Page 738.

<sup>304</sup> According to its website [www.ombudsmen.co.za](http://www.ombudsmen.co.za) this is an *autonomous organization that takes up complaints on behalf of Consumer* and is established in terms of Section 4(1)(e) of the Act.

<sup>305</sup> 89 of 1998.

<sup>306</sup> Case no 15/CR/Mar10.

<sup>307</sup> See footnote 305 Supra.

<sup>308</sup> See footnote 306 Supra.

<sup>309</sup> Barnard supra.

<sup>310</sup> Supra.

Magistrate Court Act 32 of 1944<sup>311</sup> and High Court Rules<sup>312</sup> where there is a separate claim against the same defendant (read supplier) regarding the same transaction.

There is an “accreditation” process, however, that is applicable to a class of persons under Section 78(3) read together with Section 4 of the Act. There is no procedural framework for the establishment of identifiable class actions. There is no guideline for Consumers to form a class action, or even determinable circumstances.<sup>313</sup> South Africa has to take as an example the law in the United States of America which has an established framework for the establishment of identifiable class actions. These procedural guidelines provide the following, in summary:

- a) Certification: This is a judiciary process of certifying that there is a direct and substantial interest in a form of a declaratory order.
- b) Notice to class member: This is a formal notice to all consumers affected by the same supplier under a transaction that falls under the provision of the Act which will contain information such as the class action definition, relief sought against the supplier and the option for the consumer to opt-out of the class action.
- c) In *O’Regan, Ferreira v Levin NO*<sup>314</sup> it was mentioned that “*circumspection is not an act of mala fides*”.
- d) There must be methods of assessing or quantifying damages.
- e) Costs must be determined.

The procedural guidelines may not represent an exact science as it is possible for suppliers to exclude such applications by means of contractual waiver clauses (although the inclusion of such waivers likely will amount to grey-listed and blacklisted items in terms of the Act and strictly prohibited). The legal framework that exists does not extend to providing procedural guidelines, with the consequence that suppliers may elect to mitigate against the possibility of class actions by means of waiver clauses in fine print on the packaging of labelled goods. It must be mentioned that should class actions succeed against suppliers, it could expose the supplier to extraordinary financial and reputational damages since all the members of the class action stand to benefit from the outcome, and further considering that the goods sold may also be recalled in terms of Section 60(2) discussed in Chapter 0 above.

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<sup>311</sup> As amended.

<sup>312</sup> Section 10(1) of the Uniform Rules of Court established by Section 43(2) of the Supreme Court Act 59 of 1959.

<sup>313</sup> Supra.

<sup>314</sup> 1995 ZACC 13.

## Default hierarchical chain of enforcement

### Alternative Dispute Resolution

Section 69 of the Act serves as the primary and statutory administrative agency for enforcement. Section 70 provides for an alternative dispute resolution route as a starting point where exclusive jurisdiction does not apply. This establishes a statutory ombudsman created to resolve disputes by consent. *Section 70(1) provides that a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be—*

- (a) an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;*
- (b) an industry ombud accredited in terms of section 82(6), if the supplier is subject to the jurisdiction of any such ombud;*
- (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud; or*
- (d) applying to the 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.*

*If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may—*

- (a) record the resolution of that dispute in the form of an order, and*
- (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order in terms of its rules.*

*(4) With the consent of a complainant, a consent order confirmed in terms of subsection (3)(b) may include an award of damages to that complainant*

### National Consumer Commission

Sections 72, 73, 74 read together with Section 85 of the Act provide for the establishment of the National Consumer Commission as an autonomous “*organ of state*” serving a public

function within the ambit of the law It serves as the primary administrative agency and institution for enforcement and operates in the Public Protector's office.<sup>315</sup> This Section must be read together with the Operation Framework: Rules and Final Enforcement Guidelines and Service Charter. The said office is required to exercise its function in accordance with the principles of the Constitution. In summary this public office has an investigative function which receives and investigates alleged prohibited-conduct offences.<sup>316</sup> It also has an enforcement function which negotiates and concludes undertakings and consents, as well as issuing orders and awarding damages.<sup>317</sup> The Commission also may issue the following: a notice of non-referral,<sup>318</sup> a compliance notice,<sup>319</sup> referral to the National Prosecution Authority where the conduct of the supplier amounts to a statutory offence,<sup>320</sup> referral to the Tribunal,<sup>321</sup> referral to the Consumer Provincial Court<sup>322</sup> or the Equality Court where it has exclusive jurisdiction,<sup>323</sup> compliance certificates as well as monitoring functions.<sup>324</sup> The functions of the said office are contained in Sections 99, 93, 94, 96, 97 and 98.<sup>325</sup>

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<sup>315</sup> Y Mupangavanhu supra.

<sup>316</sup> Section 71 – 73 of the Act.

<sup>317</sup> Section 74 – 75 of the Act.

<sup>318</sup> Section 73(1) of the Act.

<sup>319</sup> Sections 99 (1)(e) and 100 of the Act.

<sup>320</sup> Section 73(b) of the Act.

<sup>321</sup> Section 73(2)(a) of the Act.

<sup>322</sup> Section 73(2) of the Act.

<sup>323</sup> Section 73(c)(1) of the Act.

<sup>324</sup> Sections 99 (1)(c) and 100 of the Act.

<sup>325</sup> Section 99 provides the function of the National Consumer Commission as *to enforce the Act by—*

*(a) promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;*

*(b) receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3;*

*(c) monitoring—*

*(i) the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and*

*(ii) the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;*

*(d) investigating and evaluating alleged prohibited conduct and offences;*

*(e) issuing and enforcing compliance notices;*

*(f) negotiating and concluding undertakings and consent orders contemplated in section 74;*

*(g) referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act No. 89 of 1998);*

*(h) referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act; and*

*(i) referring alleged offences in terms of this Act to the National Prosecuting Authority.*

## National Consumer Tribunal

The National Consumer Tribunal is established in terms of the National Credit Act<sup>326</sup> and has jurisdiction throughout South Africa. It exercises an administrative function and the provisions of the Promotion of Administrative Justice Act<sup>327</sup> are applicable in that the Tribunal must adhere to its rules and guidelines. The Operation Framework: Rules and Final Enforcement Guidelines and Service Charter regulated by the Tribunal are also applicable. As indicated on the schematic representation above, the Tribunal has exclusive jurisdiction and is only approached by the consumer upon referral by the Consumer Commission or directly by the consumer or by the Consumer Courts.<sup>328</sup> In terms of its powers the Tribunal may issue consent orders where both parties agree to the proposed terms of an appropriate order or undertaking<sup>329</sup>. It may also interdict prohibitory conduct.<sup>330</sup> It is noteworthy to mention that the orders of the Tribunal have High Court status and must protect as well as ensure the realisation of consumer rights.<sup>331</sup> The most significant impact of the Tribunal is its power to issue administrative fines. Section 112 (1) of the Act provides that *the Tribunal may impose an administrative fine in respect of prohibited or required conduct.*

*(2) An administrative fine imposed in terms of this Act may not exceed the greater of—*

*(a) 10 per cent of the respondent's annual turnover during the preceding financial year; or*

*(b) R1 000 000.<sup>332</sup>*

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<sup>326</sup> 34 of 2005.

<sup>327</sup> 03 of 2000.

<sup>328</sup> Sections 73(3) and 75(2) of the Act.

<sup>329</sup> Section 74 of the Act.

<sup>330</sup> See footnote 328 Supra.

<sup>331</sup> Section 4(2)(b).

<sup>332</sup> When determining an appropriate administrative fine, the Tribunal must consider the following factors:

- (a) The nature, duration, gravity and extent of the contravention;*
- (b) any loss or damage suffered as a result of the contravention;*
- (c) the behaviour of the respondent;*
- (d) the market circumstances in which the contravention took place;*
- (e) the level of profit derived from the contravention;*
- (f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and*
- (g) whether the respondent has previously been found in contravention of this Act.*

The shortcomings of this provision and its wording are discussed below as part of the challenges which relate to the enforcement provision of the Act.

### Provincial Consumer Courts

The Act does not define what the Consumer Courts are within the context of the Act, this is probably on grounds that the Provincial Consumer Courts have concurrent jurisdiction with other provincial courts, and that each province has its own legislation similar to the (now repealed) Unfair Business Practices: Consumer Affairs Act.<sup>333</sup> The courts may be approached as an alternative to the alternative dispute resolution mentioned above, however, only after the termination of the process. The orders of the Provincial Consumer Courts are published in the Government Gazette.<sup>334</sup> As provincial courts they depend on the *domicillium* of the complainant, in this regard they differ from the civil courts. In terms of its powers the provincial consumer authority may:

- (a) Issue compliance notices to a person that is carrying on business in the respective province.
- (b) Facilitate mediation through the alternative dispute resolution to persons carrying on business in the respective province.
- (c) Refer any dispute to the provincial consumer courts mentioned above.
- (d) Request the Consumer Commission to initiate a complaint.

The applicability of this redress forum is patent in the inconsistency of orders issued by different provinces who have discretionary powers to act as they deem fit.<sup>335</sup> A further complication is that some suppliers have a presence in various provinces. In addition, there appears to be no procedure for executing the orders concerned. The consumer thus is unable to realise their right of redress despite the provisions of Section 4(2) which provides for the development of common law to improve the realization and enjoyment of consumers. The courts may also request that the supplier either alter or discontinue the conduct complained about or refer the matter for prosecution to the Tribunal or both. Du Plessis argues that the enforcement and execution orders made by the consumer courts fall short of the vision articulated in the preamble to the Act.<sup>336</sup> Du Plessis also argues that the utilisation of consumer courts is a less expensive means of redress for consumers than utilising the

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<sup>333</sup> 71 of 1988.

<sup>334</sup> Section 76 of the Act.

<sup>335</sup> MA du Plessis "Access to Justice outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training" (2007) 32 Journal for Juridical Science 44 at 53-6).

<sup>336</sup> See footnote 335 Supra.

conventional courts of law (.<sup>337</sup> The author further states that the only alternative remaining to the consumer would be to approach a conventional court of law (a forum that the consumer chose to avoid in the first instance), to have the consumer court's order made an order of such court that has a provision for the enforcement and execution of its orders. It is therefore suggested that the provincial legislation be amended, to ensure the effective enforcement and execution of orders of consumer courts.<sup>338</sup>

### Civil Courts

The general rule is that civil courts are the court of last resort for damages and enforcement. The consumer is required to exhaust the hierarchical enforcement process first, unless exclusive jurisdiction applies.<sup>339</sup> A notice from the Chairperson of the Tribunal is also required before the civil courts may be approached. The exception to the rule is if exclusive jurisdiction applies in terms of Section 52 of the Act. Section 2(10) further provides that the common law provisions are available.

### Offences

An interesting provision in Section 107 of the Act declares that a “*breach of confidentiality*” as envisaged in Section 106 of the Act shall amount to an offence. The Act implies that confidentiality goes to the core of the commercial relationship with a supplier so that its contravention should be considered repugnant to society and be classified as an offence. The punitive measure is even more baffling: a fine or imprisonment for a period not exceeding 10 years, or both a fine and imprisonment.<sup>340</sup> The researcher is of the view that this provision is an example of overkill and that privacy laws are regulated in South Africa through the common law and by the introduction of the Protection of Personal Information Act.<sup>341</sup> Other acts which are deemed to be statutory offences are thwarting the administration of the Act by way of *hindering, opposing, obstructing or unduly influencing any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act*.<sup>342</sup> The failure to comply with a Tribunal order is also an offence.<sup>343</sup> Of particular importance to this research as well, is that prohibited conduct, such as to altering, obscuring,

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<sup>337</sup> MA du Plessis “Access to Justice outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training”(2007) 32 Journal for Juridical Science 44 at 53-6).

<sup>338</sup> MA Du Plessis “Enforcement and Execution Shortcomings of Consumer Courts” 2010 SA Merc LJ 517 – 531.

<sup>339</sup> Section 69 of the Act.

<sup>340</sup> Section 111(1)(a) of the Act.

<sup>341</sup> 04 of 2013.

<sup>342</sup> Section 108 of the Act of the Act.

<sup>343</sup> Section 109(1) of the Act.

falsifying, removing or omitting to display price, labelling or trade description without authority, amounts to an offence. This provision relates to product labelling within the scope of the Act, and, though the Act is commendable in this regard, the penalties of a fine or imprisonment for a period not exceeding 12 months or both a fine and imprisonment are risible in light of the fact that such prohibited conduct may lead to harm such as serious injury, illness or death of a natural person, loss of property and pure economic loss.<sup>344</sup>

### Other provisions

The Act provides for vicarious liability where an employer-employee exists.<sup>345</sup> This is commendable as it provides a tried and tested redress mechanism that offers adequate compensatory relief, however the penalties indicated in Section 111 may not deter an unscrupulous supplier who can afford the fines imposed and may argue against direct imprisonment for 12 months.

### Challenges and conclusion:

The challenges that the researcher foresees in terms of the enforcement of the Act are many; one of which is the concurrent application of enforcement mechanisms from other pieces of legislation which likely will lead to legal uncertainty and confusion, as discussed in Chapter 3 in relation to Product Labelling and Trade Description. The researcher supports the view of Jacob et al<sup>346</sup> that this situation may result in forum shopping by consumers as to which Act offers provisions which afford greater protection for the consumer and which legislation has provisions that are more feasible to enforce.<sup>347</sup> Turnaround times and affordability also play a factor. Most of the concurrent Acts provide for an alternative dispute mechanism which is industry specific and, since it is sponsored by the group of suppliers against whom consumers lodge their claims, it is likely to be biased. Further, there is a chain process by means of which claims escalate to the courts, commission or tribunal. In instances where the act committed by the supplier amounts to an offence as stipulated in the Act, such a matter is referred to the National Prosecuting Authority and will be treated as a criminal matter. Not only does this circumstance confuse the consumer in terms of following the correct redress mechanism, the supplier will likely raise a defence of a lack of jurisdiction for the matter to be heard in a particular forum, depending on the degree of punitive

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<sup>344</sup> Section 61(5) of the Act.

<sup>345</sup> Section 113 of the Act.

<sup>346</sup> W Jacobs, PN Stoop & R Van Niekerk *“Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008. A critical overview and Analysis”* PER/PELI 2010(13)3 302-508.

<sup>347</sup> Supra.



measures that the said Act imposes. The increase in consumer choice with regard to different enforcement forums afforded by different legislation may have a financial impact, especially on vulnerable consumers for whom the cost of access to any form of justice may lead to further financial impoverishment with no guarantee of success. It is also unclear what transpires if a supplier complies with the Act and simultaneously contravenes a concurrent piece of legislation dealing with product labelling. As discussed in Chapter 3 the punitive measures of the Trade Methodology Act<sup>348</sup> differ from those of the Act: If a supplier contravenes the Trade Methodology Act,<sup>349</sup> the goods concerned are removed and criminal sanctions are imposed until compliance with the Act.

In respect of the Act itself, as indicated in the schematic representation above, there are too many enforcement mechanisms created by the Act and the consumer is likely to be unsure whether their claim has exclusive jurisdiction or whether they should follow the default hierarchical redress mechanism. In addition, there are issues of concurrent jurisdiction in terms of the Consumer Tribunal, Provincial Consumer Courts and the Civil Court which likely will affect the consumer in terms of the interpretation of the powers of the courts. It will be noted from the schematic representation above, with the exception of instances where the consumer has recourse to exclusive jurisdiction, the courts of law cannot be approached directly unless the other options in the redress chain have been exhausted: primarily the alternative dispute resolution mechanisms of the consumer commission, the consumer tribunal and the consumer provincial courts. This process is delayed justice and usually time is of the essence in consumer claims. For instance, if a product was inadequately labelled as the supplier is under no clear obligation to provide important labelling information regarding the safety use and adverse effects and a vulnerable consumer with a low literacy level purchases such goods based on a misleading advertisement that it is cheaper alternative medicine and that it will treat a particular ailment (with no evidence of clinical trials having been conducted) and the consumer overdoses and is caused harm, the consumer is in such a medical state that they cannot afford to follow a cumbersome chain of redress process. In addition, valuable information which serves as evidence may be diluted during this hierarchical enforcement process. There is also the financial impact that must be considered as such a consumer is likely going to require professional legal assistance. The tiresome and cumbersome process does not inspire consumer confidence.

It is suggested that the enforcement provisions contained in the Act be redrafted to provide a proper procedural framework to facilitate redress proceedings as the current regime is too

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<sup>348</sup> 77 of 1973.

<sup>349</sup> 77 of 1973.

broad and is likely to confuse most consumers. In addition, the procedural framework proposed should provide a framework for the establishment of an identifiable class action using the procedural guidelines discussed above. This measure will empower even the most vulnerable of consumers as part of a collective in order to bring about an equitable compensatory reward for the class group and to punish the delinquent behaviour of the supplier. If a claim relates to a matter where exclusive jurisdiction applies, then these courts must be equipped and competent, and should be fully capacitated to handle the large volumes of claims that will be lodged by aggrieved consumers on a daily basis. The punitive measures in the form of financial penalties should mirror those provided in the Competition Act.<sup>350</sup>

A comparison in terms of the redress afforded by the Act and the Competition Act<sup>351</sup> indicates the principles are similar in that they both seek to protect the consumer. They have a similar legal framework to promote and to protect consumer rights, as such they are complementary. The manner in which competition law enforces the protection of consumer rights differs from consumer law. The competition law policy framework is concerned with prohibiting vertical and horizontal practices between firms which have the effect of reducing competition in the market place.<sup>352</sup> One of the main purposes of the competition law framework is “*to provide consumers with competitive prices and product choices*”, as well as to “*promote employment and advance the social and economic welfare of South Africans*”.<sup>353</sup> As such the relationship is a horizontal one as it is between competing firms. The consumer law policy framework is concerned with prohibiting unfair practices between suppliers and the consumer. As such the relationship is a vertical one as it is between a supplier, at an arm’s length position, and a receiving consumer.<sup>354</sup> Both the Competition Law legislation and the Consumer Protection laws apply to economic activity and transactions within or having an effect within South Africa, with exceptions which relate to collective labour and bargaining activity.

The current competition legal framework focuses on addressing the unequal disparities of the past legal regime in which natural and produced resources were withheld from the poor, and legal developments supported such narratives. This position was safeguarded by

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<sup>350</sup> Act 89 of 1998.

<sup>351</sup> Act 89 of 1998.

<sup>352</sup> Sections 4 (1) (a) and 5 (1) of the Competition Act 89 of 1998.

<sup>353</sup> Sections (2) (b) and (c) of the Competition Act 89 of 1998.

<sup>354</sup> OECD (2008), *The interface between competition and consumer policies*, Global Forum on Competition, [www.oecd.org/dataoecd/22/34/40898016](http://www.oecd.org/dataoecd/22/34/40898016).

discriminatory laws and practices<sup>355</sup> by means of which ownership and control of natural and produced resources were in the hands of a limited number of juristic entities who engaged in anti-competitive conduct. This being the pervasive form of conduct it filtered through to other areas of law such as Product Labelling. The effect is discussed in chapter 3 which deals with Product Labelling and Trade Description prior to the Consumer Protection Act.<sup>356</sup> The current Competition Act's<sup>357</sup> framework attempts to ensure "fair and equal"<sup>358</sup> distribution and allocation of the natural and produced resources, which has an impact on the "choice of quality" of goods. Similarly, the Consumer Protection Act's<sup>359</sup> high level objectives are to address, amongst other issues, false and misleading marketing practices, unfair contractual practices, failure to warn consumers in respect of certain type of goods, and product liability, all of which interface with Product Labelling and Trade Description.

Despite the close association between the two, the Competition Act has more developed common law based on a number of rulings and fines handed down by the tribunal established by the Competitions Act: the *Pioneer Food* case is one of these common law cases. In addition, the Competition Act is less ambiguous in its wording in terms of imposing fines as compared to the Act. Section 112 (1) of the Act provides that *the Tribunal may impose an administrative fine in respect of prohibited conduct.*

*(2) An administrative fine imposed in terms of this Act may not exceed the greater of—*

*(a) 10 per cent of the respondent's annual turnover during the preceding financial year; or*

*(c) R1 000 000.<sup>360</sup>*

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<sup>355</sup> The Preamble of the Competition Act 89 of 1998.

<sup>356</sup> 68 of 2008, read together with its Regulations. Hereinafter referred to as "the Act".

<sup>357</sup> Supra.

<sup>358</sup> Supra.

<sup>359</sup> Supra.

<sup>360</sup> When determining an appropriate administrative fine, the Tribunal must consider the following factors:

- (a)* The nature, duration, gravity and extent of the contravention;
- (b)* any loss or damage suffered as a result of the contravention;
- (c)* the behaviour of the respondent;
- (d)* the market circumstances in which the contravention took place;
- (e)* the level of profit derived from the contravention;
- (f)* the degree to which the respondent has co-operated with the Commission and the Tribunal; and
- (g)* whether the respondent has previously been found in contravention of this Act.

It is submitted that the wording “**or**” is a serious error and reflects poor drafting. It is unclear why the legislature constructed the administrative fine provisions above to be optional as opposed to both being mandatory. This error should be corrected as soon as possible and the section must be redrafted to provide that the supplier shall be liable for an administrative fine of 10% of its annual turnover during the preceding financial year and R1 000 000, 00 as a default fine, it not being discretionary. In the event that the section remains as it is in terms of its wording, suppliers who have contravened sections of the Act and are brought before the Consumer Tribunal in all likelihood will opt to tender a payment of R1 000 000 instead of 10% of annual turn-over.

## 9. RECOMMENDATIONS AND CONCLUSION

Based on the research conducted as part of this dissertation, it is argued that South Africa has a plethora of legislation governing the information disclosure requirements on products for consumable goods, though less than in comparison with non-consumable goods.<sup>361</sup> Consumable goods are covered by legislation which seeks to protect consumers regarding their health and safety. Most non-consumable products that are regulated are regulated from a safety and environmental perspective as these goods are mainly classified as dangerous goods. Other goods, appear to be labelled on a voluntary basis in that there appears to be no uniform standard on the amount of information to be disclosed, resulting either in too much information being disclosed or insufficient information being provided.<sup>362</sup> This circumstance results in some categorised goods falling outside any strict regulatory framework. According to the researcher the regulatory framework for labelling requirements needs urgent improvement and the CPA potentially presented a great opportunity to provide for the umbrella regulation of all goods that are inadequately regulated in other pieces of legislation in South Africa.<sup>363</sup> The alternative option of self-regulation is too risky to even contemplate as we are dealing with a disclosure obligation for the purposes of the health of human beings and, as such, government intervention is absolutely vital bearing in mind the factors in Chapter 5 above.<sup>364</sup> At the same time the argument for and against self-regulation may be relevant in a country in which government appears to have limited resources to police any unscrupulous conduct by suppliers and where awareness can only be created to the extent that a consumer is capable of understanding product labelling requirements.

Based further on the historical analysis of the previous regime, it is the view of the researcher that the degree of misrepresentation (whether fraudulent or innocent) in terms of product labelling has not greatly improved on the grounds that have been discussed in Chapters 5, 6, 7, 8. The consumer is in no better a position than they were in during the previous dispensation before the Act.<sup>365</sup> The fundamental consumer rights enshrined in the Act are worthless if the consumer can enforce these rights only through a cumbersome redress process and leaves the consumer to resort to court processes.<sup>366</sup>

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<sup>361</sup> See Chapters 1 and 4.5.1 above.

<sup>362</sup> See Chapter 6.4 above.

<sup>363</sup> Own emphasis.

<sup>364</sup> These being (i) Socio-economic factors such as high number of indigent consumers and low literacy levels, issues of language and understanding of labelling requirements of goods in English (ii) Economic factors such as the supply chain process regarding the movement of goods and passing of risk and the role of a retailer (iii) Ethical considerations relating to good corporate governance principles.

<sup>365</sup> See Chapter 3 above.

<sup>366</sup> See Chapter 8 above.

In addition to the above, apart from the provisions of Section 24 of the Act, some of the legislation discussed in Chapter 4 has concurrent application, for instance, the Trade Metrology Act read together with the National Regulator for Compulsory Specification Act. This situation has the potential to create confusion as to which Act affords greater protection to the consumer as multiple pieces of legislation must be complied with. One may argue, although Section 24(1) (a) applies to “*goods or to any covering, label or reel in or which the goods are packaged or attached to the goods*”, this may very well exclude certain goods not covered by other legislation. The Minister,<sup>367</sup> in terms of the Act, has wide powers to create categories of goods which fall under the ambit of the Act in terms of Regulation 6. Currently, the categories of goods falling under the ambit of the Act are too restrictive.<sup>368</sup> It appears that mandatory labelling has not been extended widely to other goods which may not be adequately regulated by other pieces of legislation. In terms of this research, the researcher identifies the area of complementary medicine as being an example of such goods that are used by consumers on a daily basis and have an impact on the health and safety of consumers.<sup>369</sup> These goods may be inadequately labelled by the suppliers as there is no positive or clear legal obligation to label their goods to a particular standard, and the failure adequately to label such goods may lead to harm as defined in Section 61 of the Act. The hierarchical enforcement of the Act simply adds to consumer frustration with regard to enforcing their rights. Legislation, such as the Standards Act which deals with good quality and safety of goods and which is regulated by the South African Bureau of Standards (SABS), proves some reassurance, however this relates to an implied warranty of goods, regulated in Section 55(2)(b) of the Act, and does not deal with a disclosure obligation. A warranty, similar to a representation, is a statement of fact regarding the quality and safety of goods. It does not further assist as an information tool for trade descriptions. In simplified terms, trade descriptions relate to the composition and specification of goods: so that any ingredient involved in the composition is disclosed on the goods themselves.

Socio-economic factors relating to consumers must be considered when reviewing Section 24 of the Act as recommended in Chapter 9 above. This is a suitable approach to a review, otherwise the labelling provisions will remain ineffective when tested by the courts. Empirical studies of South African consumers of all levels should be conducted in order to understand the effect of the contractual relationship between a supplier and a consumer, especially at point-of-sale transactions. In South Africa, product labelling may fail due to a consumer

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<sup>367</sup> This being the Minister of Trade and Industries.

<sup>368</sup> See Chapters 4 and 6 above.

<sup>369</sup> See Chapter 6 above.

being reluctant or unable to read and understand the label or fully comprehend the warning about use as this is not their focus when purchasing goods or products. The consumer's attention during a point-of-sale transaction is to purchase goods or products for their intended purpose. In addition, the nature of these transactions is such that the consumer cannot reasonably have the time to read and understand the labelling on goods or products. There is a high degree of apathy which results in consumers acting on good faith and with the hope that the goods will not cause them harm. This is a dangerous assumption.

It is submitted that Regulation 6 which supports Section 24 of the Act should be reviewed in its entirety. The narrow scope of goods covered is unacceptable as it is too restrictive. Although most consumer goods are regulated in South Africa through existing legislation, such legislation is either equally restrictive or inadequately drafted. The result is legal uncertainty. The researcher supports direct regulation by the state as opposed to self-regulation, as it remains the preferred approach to labelling obligations.<sup>370</sup> To leave mandatory disclosure obligation requirements to suppliers by means of self-regulation or a combination of self-regulation and direct regulation by the state will only prejudice the consumer even more, as the interests of suppliers are largely driven by sales volumes which override a focus on critical issues such as safety and the quality of goods as well as the protection of public health. The researcher supports Woker, who argues, *in order for self-regulation to be truly effective there must be an industry body that has the capacity to monitor the industry and to deal with transgressors effectively. There must also be a telling sanction which will deter business people from transgressing their code.*<sup>371</sup> Currently, this is not the case. Based on the above, labelling requirements should be defined in a broad manner and the scope should be clarified in order to achieve both objectives of the CPA aimed at protecting the consumer from a safety and quality perspective.

The Minister of Trade and Industry has a public duty to protect consumers against prohibited conduct, and should broaden the current scope of goods under Section 24 to include other goods not covered by any other piece of legislation and to avoid confusion regarding the applicability of legislation if a product falls under both the CPA and other concurrent legislation. The Minister has a number of mechanisms available to achieve this goal, one of which is to provide a "catch-all" or an umbrella provision in Regulation 6 of the Act, or Section 24 should be amended and the following should be inserted: "Section 24 shall apply to all goods or services in South Africa, provided that this section shall not apply to any

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<sup>370</sup> See Chapters 1.1 and 4 above.

<sup>371</sup> T 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 Obitier.

goods or services to the extent that such goods or services are covered by any existing notice, public regulation and/or legislation".<sup>372</sup> This insertion simultaneously deletes the provision in Regulation 6 of the Act that requires the Minister of Trade and Industry to prescribe categories of goods.

It can be argued that the health and benefit of any medical goods depend to some degree on the ability of the consumer to understand the labelling on such medication regarding its composition, safety dosage and other relevant information such as side effects. There is a direct correlation between the safe usage of medical goods and sufficient labelling and trade descriptions that is in plain and easy language to understand: a consumer is able to identify any relevant information and is empowered to make a safe and informed choice. Laws which are restrictive in their application and where there is legal uncertainty may result in some goods falling outside a strict regulatory framework (such as complementary medicines). This failure could lead to greater confusion with respect to the applicability of laws, which could also harm a consumer. Should the situation prevail, consumers in the current framework are likely to purchase and consume complementary medicine that potentially may be hazardous to their health as a result of poor regulation and their being inadequately informed. The CPA would have failed these consumers.

From an assessment of the entire value chain process for the purposes of Product Labelling and Trade Description, the current regime exposes both the supplier and the consumer to financial loss. In addition, the supplier faces reputational damage. The Act should consult extensively with various critical stakeholders. The Act cannot continue to function with its existing legal lacunae in place, as has been indicated throughout the research, without affecting consumers and suppliers adversely, and it is urgent that its framework be revised in order to safeguard consumers and to fulfil the salient objectives of the Act.

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<sup>372</sup> This umbrella provision is a drafting technique that the researcher drafted and that can be used in legislative drafting to broaden the Regulations of the Act.



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- 10.17. Directive 2008/121/EC of the European Parliament and of the Council dealing with textile industry.
- 10.18. Directive 2005/29/EC: Unfair Commercial Practices Directive.

- 10.19.** The Consumer Protection from Unfair Trading Regulations of 2008, read together with the Consumer Protection Amendment Regulations promulgated on 01st October 2014.
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