

Does the Consumer Protection Act 68 of 2008 provide adequate protection to the consumer with regards to unfair or “unconscionable” commercial practices?

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ABSTRACT/SUMMARY

This dissertation aims at addressing the question of whether the CPA provides adequate protection to the consumer with regards to unfair or “unconscionable” commercial practices.

In terms of unfair commercial practices, this dissertation highlights that protection against such practices is provided through the fundamental right to fair and responsible marketing, which is regulated by Part E of the CPA. Furthermore, these sections enable the consumer to hold the supplier accountable to a general marketing standard. This protection is furthermore aided by the interaction between sections 29 and 41 of the CPA, in that a producer, importer, distributor, retailer or service provider is prohibited from marketing any goods or services, as mentioned in section 41 of the CPA, in a manner that is reasonably likely to imply a false or misleading representation.

In terms of “unconscionable” commercial practices and representations, this dissertation highlights that protection against such practices, is provided for by sections 40 and 41 of the CPA. In terms of these sections, the CPA provides a wide ambit of application with regards to “unconscionable” conduct on behalf of the supplier. Due to such, numerous problems have arisen such as: The effectiveness of the defence of “unconscionability”.

In conclusion, the aims of this dissertation are to: Firstly, analyse sections 29, 40 and 41 of the CPA, in order to determine the scope of their protection towards consumers and how they interact with one another; secondly, to interpret the CPA in order to highlight any remedies available to the consumer; and lastly, to highlight what challenges are encountered, when applying the CPA to unfair or “unconscionable” commercial practices.

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CHAPTER 1: INTRODUCTION

1.1 Background

The purpose of the Consumer Protection Act 68 of 2008 (hereafter referred to as the, “CPA”) is to ensure the promotion of the social and economic welfare of consumers, within the Republic of South Africa.¹ This purpose can be attained by establishing a legal framework, with the aim of developing and maintaining a consumer market that is: Fair, accessible, efficient, sustainable, and that is responsible for the benefit of all consumers.² Thus, it can be held that the main purpose of the CPA is to level the imbalances constantly present between the consumer and the supplier, such as: The consumer having to rely on the information received by the supplier regardless of its validity, or the consumer not having the financial resources to fight for their rights in the judicial sphere.³

A method in which such a purpose can be achieved, can be seen in how the CPA aims to promote and regulate fair business practices within the commercial realm.⁴ This is done by providing protection to the consumer against “unconscionable”, unfair, unreasonable or unjust commercial practices by the relevant supplier.⁵ This form of protection falls under the concept of “consumer rights”.⁶ In terms of this dissertation, the fundamental consumer rights that will be discussed are those relating to, Fair and Responsible Marketing;⁷ and Fair and Honest Dealing.⁸

In terms of the former, section 29 of the CPA holds paramount importance, as this section prohibits two types of conduct: Firstly, it prohibits any type of marketing that is misleading, fraudulent or deceptive;⁹ and secondly it prohibits any type of marketing that is conducted in such a manner that it is likely to imply a misleading, fraudulent or deceptive representation of the goods or services concerned, to the consumer.¹⁰

¹ Section 3(1)(a) of the Consumer Protection Act 68 of 2008, (hereafter referred to as the, “CPA”).

² *Ibid.*

³ 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* 230.

⁴ S 3(1)(c) of the CPA.

⁵ S 3(1)(d) of the CPA.

⁶ Chapter 2 of the CPA.

⁷ S 29 – 39 of the CPA.

⁸ S 40 – 47 of the CPA.

⁹ S 29(b) of the CPA.

¹⁰ S 29(a) of the CPA; Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-2.

In terms of regulating false and misleading representations on the part of the supplier, section 29 of the CPA works in conjunction with section 41 of the CPA, which provides examples of false and misleading representations.¹¹ However, the examples provided within section 41 of the CPA, are not exhaustive.¹² These examples are there to merely aid the consumer in recognising when he or she has been subjected to a false or misleading representation.¹³ With regards to the supplier's liability for providing such representations, section 29 of the CPA provides that a supplier will be held liable, if the supplier had known or reasonably could have known, of the misconduct.¹⁴

In terms of regulating fraudulent, misleading or deceptive marketing, section 29(b) of the CPA, finds application. This section provides a list of aspects of the goods or services concerned, that if fraudulently or deceptively marketed would result in a contravention of section 29 of the CPA.¹⁵ However, this list of aspects is not exhaustive and the prohibition provided for in terms of section 29(b) of the CPA casts a very wide and general net.¹⁶ Nevertheless, it can be interpreted that this provision of the CPA, will only find application when dealing with the material aspects of the goods or services concerned.¹⁷

In terms of the consumer's fundamental right to Fair and Honest Dealing, sections 40 and 41 of the CPA will be discussed. These sections pertain to and discuss the notion of "unconscionable" conduct;¹⁸ and also provide a field of application regarding false, misleading and/or deceptive representations made by the supplier.¹⁹ In terms of section 40 of the CPA, "unconscionable" conduct focuses on the improper ways in which the will and mind-set of the consumer can be influenced.²⁰

¹¹ Van Zyl "Section 29" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-9.

¹² S 41 of the CPA.

¹³ Du Plessis "Section 41" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-2.

¹⁴ Van Zyl "Section 29" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-10.

¹⁵ S 29(b) of the CPA; Van Zyl "Section 29" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-10.

¹⁶ S 2(7) of the CPA.

¹⁷ Van Zyl "Section 29" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-11.

¹⁸ S 40 of the CPA.

¹⁹ S 41 of the CPA.

²⁰ Du Plessis "Section 40" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-1.

With regards to what constitutes, “unconscionable” conduct section 40(1) of the CPA lists various forms of improper conduct, which could constitute “unconscionable” conduct, such as duress.²¹ However, due to the vast number of prohibited conduct listed in section 40(1) of the CPA; and their individual requirements and definitions, the regulation of what constitutes “unconscionable” conduct has become troublesome.²² An example of such complexity can be seen in the regulation of duress within the current consumer market by section 40 of the CPA, as the CPA has to account for the numerous requirements of duress before the conduct in question can be identified as duress and by extension “unconscionable”.²³

Thus, it can be concluded that section 40(1) of the CPA provides complex examples of “unconscionable” conduct, and in order for such a conduct to be regulated, all of its requirements must be met.²⁴

1.2 Research Problems and Aims

1.2.1 Research Problem

The research problem, within this dissertation, discusses the question of whether the CPA provides adequate protection to the consumer with regards to unfair or “unconscionable” commercial practices.

In terms of unfair commercial practices, this dissertation will firstly aim at analysing how the CPA in affording the consumer, a fundamental right to fair and responsible marketing, regulates unfair commercial practices.²⁵ This fundamental consumer right in question, is regulated by sections 29 to 39 of the CPA, which pertains to the identifying and prohibiting of any form of unfair commercial practice, such as: Bait marketing, negative option marketing, catalogue marketing, and referral selling.²⁶

²¹ S 40(1) of the CPA.

²² Glover “Section 40 of the Consumer Protection Act in comparative perspective” 2013 *TSAR* 694.

²³ Du Plessis “Section 40” in Naudé & Eislen, *Commentary on the Consumer Protection Act* (2014) 40-7.

²⁴ Du Plessis “Protection consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008” 2012 *THRHR* 29.

²⁵ Chapter 2 Part E of the CPA.

²⁶ S 30, 31, 33 & 38 of the CPA; WebbersLaw ‘Right to Fair and Responsible Marketing’ <http://www.webberslaw.com/right-to-fair-and-responsible-marketing/> (Accessed on 4 April 2018).

In terms of regulating this fundamental right, the main section that is applicable is that of section 29 of the CPA, which provides a general standard regarding marketing of goods and services.²⁷ In other words this section regulates the concept of marketing within commercial practices;²⁸ as well as every party within the supply chain of the goods or services such as the importer, producer and retailer.²⁹ In terms of its application, this dissertation will also evaluate its provisions, with regards to whether it can effectively regulate the rise of direct marketing and direct sales within our current consumer market.³⁰

Secondly, in terms of “unconscionable” commercial practices, this dissertation will aim at discussing how the CPA in affording the consumer, a fundamental right to fair and honest dealing, will be regulating such commercial practices.³¹ In terms of such, the main sections that will be discussed are those of sections 40 and 41 of the CPA. In terms of section 40 of the CPA, “unconscionable” conduct on the part of the supplier can be defined as:

“(1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

- (a) marketing of any goods or services;
- (b) supply of goods or services to a consumer;
- (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
- (d) demand for, or collection of, payment for goods or services by a consumer; or (e) recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor”.³²

Based on such, it can be seen that the CPA provides a wide ambit of application with regards to “unconscionable” conduct on behalf of the supplier. However, the problems or issues that arise from such is in a sense, semantic.³³

²⁷ S 29 of the CPA.

²⁸ Van Zyl “Section 29” Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-2.

²⁹ *Ibid.*

³⁰ Andrea Ayemoba ‘[South Africa] DSASA shows 35% growth in direct selling businesses amidst downgraded economy’ 18 July 2017 <https://africabusinesscommunities.com/news/south-africa-dsasa-shows-35-growth-in-direct-selling-businesses-amidst-downgraded-economy/> (Accessed 7 April 2018), (hereafter referred to as, “Ayemoba”).

³¹ Chapter 2 Part F of the CPA.

³² S 40(1-2) of the CPA.

³³ Glover 2013 TSAR 691.

As in terms of the defence of “unconscionability”, the courts are provided with the power to regulate such a term;³⁴ however such regulation is done without the courts having a concrete meaning of “unconscionable” conduct, as well as with no guidance as to how such a defence is to be administered or interpreted.³⁵

1.2.2 Research Aim

In terms of the above discussions relating to unfair and “unconscionable” commercial practices, it can be held that the aims of this dissertation are to:

Firstly, analyse sections 29, 40 and 41 of the CPA, in order to determine the scope of their protection towards consumers and how they interact with one another.

Secondly, interpret the CPA in order to highlight any remedies available to the consumer, with regards to unfair or “unconscionable” commercial practices.

Lastly, to highlight what challenges are encountered, when applying the CPA to unfair and “unconscionable” commercial practices.

1.3 Methodology

In order to address the research aim of this proposed dissertation, I will be involving and consulting a number of literature sources, namely: Legislation; journal articles; textbooks; international instruments; websites and various precedents to highlight the current situation regarding these prohibited commercial practices.

1.4 Structure of the Dissertation

1.4.1 Chapter 2: How does the CPA regulate the consumer’s fundamental rights to fair and responsible marketing and fair and honest dealing?

This chapter will firstly, critically discuss the consumer’s fundamental right to fair and responsible marketing in terms of the CPA.³⁶ It will illustrate how the CPA regulates marketing or conduct that is committed by the supplier, which is misleading, fraudulent or deceptive in nature.³⁷ It will also depict how the provisions of the CPA are interlinked when regulating such a commercial practice.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Chapter 2 Part E of the CPA.

³⁷ S 29 of the CPA.

This chapter secondly, will critically discuss the notion of “unconscionable” conduct, in terms of the consumer’s fundamental right to fair and honest dealing.³⁸ It will dissect sections 40 and 41 of the CPA revealing what “unconscionable” conduct entails; as well as illustrate how the CPA regulates such a conduct.

Lastly this chapter will illustrate how the notion of fairness has been incorporated within these provisions, as well as provide a brief background on how the notion of good faith was incorporated within our law, how it is tested and what is its value within our judicial system.

1.4.2 Chapter 3: What remedies are provided by the current legal dispensation with regards to unfair and “unconscionable” commercial practices?

This chapter will be tasked in determining what type of remedies are available to the consumer should he or she be subject to unfair or “unconscionable” commercial practices.

In terms of unfair commercial practices, this chapter will firstly discuss the “ordinary” remedies provided to the consumer should he or she be subjected to unfair commercial practices.³⁹ Secondly, it will highlight and discuss the roles of the National Consumer Commission (hereafter referred to as the, “NCC”);⁴⁰ the National Consumer Tribunal (hereafter referred to as the, “NCT”);⁴¹ and the National Prosecuting Authority (hereafter referred to as the, “NPA”).⁴²

In terms of “unconscionable” commercial practices, this chapter will focus on discussing the integration between section 52 and sections 40 and 41 of the CPA, especially in terms of how section 52 of the CPA provides the courts with the power to adjudicate a matter that has been influenced by an “unconscionable” act.⁴³ The chapter will also highlight the jurisdiction of the courts, the remedies available to the consumer, and the orders that the court may render.⁴⁴

³⁸ Chapter 2 Part F of the CPA.

³⁹ S 68-71 of the CPA.

⁴⁰ S 71 of the CPA.

⁴¹ S 100(6)(a) of the CPA.

⁴² S 100(6)(b) of the CPA.

⁴³ S 52(3) of the CPA.

⁴⁴ S 52(1-2) of the CPA.

Lastly, it will also depict the influence of section 51 of the CPA and regulation 44 of the CPA, on sections 40 and 41 of the CPA, in terms of providing relief to the consumer.⁴⁵ In the alternative, the chapter will also mention the position of the consumer's common law remedies.⁴⁶

1.4.3 Chapter 4: What challenges are encountered, when applying the CPA to unfair and “unconscionable” commercial practices?

This chapter will identify and discuss any challenges that may be encountered by the CPA in its regulation of unfair and “unconscionable” commercial practices.

In terms of unfair commercial practices, this chapter will discuss the rise of direct marketing within the current consumer market and evaluate if the CPA and its provisions will be able to regulate such a prohibited marketing practice effectively.⁴⁷

In terms of “unconscionable” commercial practices, this chapter will firstly discuss and highlight the issues of using section 40 of the CPA as a defence;⁴⁸ and then secondly address the influence of section 69 of the CPA, with regards to the relief available to the consumer should he or she be subjected to an “unconscionable” commercial practice.⁴⁹

1.4.4 Chapter 5: Conclusion.

This chapter will address the dissertations aims and objectives as mentioned in Chapter 1 and conclude based on such.

⁴⁵ S 51 of the CPA; Regulation 44 of the CPA.

⁴⁶ S 2(10) of the CPA.

⁴⁷ S 32 of the CPA.

⁴⁸ Glover 2013 *TSAR* 697.

⁴⁹ S 69 of the CPA.

1.5 Limitations and delineations on the scope of study

In terms of this study, a limitation that was present is that of the length of the dissertation, in that only the most relevant topics and issues were discussed and analysed. Recognition is provided to the various other forms of prohibited conduct and terms that fall within the ambit of the CPA, such as with regards to direct marketing and its affiliation with unsolicited goods;⁵⁰ however a full detailed discussion regarding these practices is not possible within this study.

The main aspect of discussion regarding this study, is that of analysing the fundamental consumer rights of: Fair and Responsible Marketing;⁵¹ and Fair and Honest Dealing.⁵² In terms of such, the main sections of the CPA that required discussion are those of sections 29, 40 and 41. These sections highlight that all marketing practices are linked in some form either through conduct or terms used, and thus all such practices must be in line with the above sections.

In terms of section 29 of the CPA, it stipulates general guidelines on the supplier regarding how he or she markets or promotes their goods or services.⁵³ In terms of sections 40 and 41 of the CPA, these sections address the wide meaning of “unconscionable” conduct and provide provisions on identifying such conduct.⁵⁴

In terms of unfair commercial practices, a discussion regarding unfair terms and conditions was specifically excluded from this study, as although unfair terms and unfair conduct are liquid in form and can lead to one another, this study focused on the later rather than the former.⁵⁵ However, it must be acknowledged that unfair conduct can lead to a clause or a whole agreement been unfair.⁵⁶ Hence although a full discussion regarding unfair terms and conditions is absent, its role in unfair commercial practices is still highlighted.

⁵⁰ S 32 of the CPA, read with S 21 of the CPA.

⁵¹ Chapter 2 Part E of the CPA.

⁵² Chapter 2 Part F of the CPA.

⁵³ S 29(b)(i-v) of the CPA.

⁵⁴ S 40-41 of the CPA.

⁵⁵ S 22(2) of the CPA; Barnard “In search of the “ordinary consumer” and information in plain language in a multilingual, multicultural South Africa” 2014 *Journal of Consumer and Commercial Law* 11.

⁵⁶ *Ibid.*

Furthermore, in terms of the presence of the notion of fairness within the CPA and its provisions, this study acknowledges that the CPA has attempted to incorporate the notion of fairness, to some degree, within its provisions.⁵⁷ However, the main focus when discussing the notion of fairness within this study, will be on whether the notion is present in the conduct of the supplier, rather than in the terms or conditions enforced by the supplier.

⁵⁷ Muphangavanhu "Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 135.

Chapter 2: HOW DOES THE CPA REGULATE THE CONSUMER'S FUNDAMENTAL RIGHTS TO FAIR AND RESPONSIBLE MARKETING AND FAIR AND HONEST DEALING?

2.1 Introduction

This chapter addresses the question of how the consumer's fundamental rights to fair and responsible marketing and fair and honest dealing, are regulated by the CPA. It will firstly, analyse the regulation of the consumer's fundamental right to fair and responsible marketing by the CPA;⁵⁸ secondly, it will discuss the consumer's fundamental right to fair and honest dealing, with a specific focus on the concept of "unconscionability";⁵⁹ and lastly, this chapter will discuss the notion of fairness and how it has been incorporated into the regulation of these consumer rights and the CPA as a whole.

2.2 Unfair Commercial Practices

In terms of unfair commercial practices, the current consumer protecting dispensation regulates such practices, by means of affording the consumer a fundamental right to fair and responsible marketing.⁶⁰ This right is regulated by sections 29 to 39 of the CPA, which pertains to the identifying and prohibiting of any form of unfair commercial practice.⁶¹ In terms of such regulation, the most important section within the CPA, is that of section 29, which provides a general standard for the marketing of goods and services within the commercial realm.⁶² This wide ambit of application allows the section to apply to any marketing practice regardless of whether the CPA has a specific provision regulating that type of marketing practice or not.⁶³

2.2.1 Application of Section 29 of the CPA

The scope and application of this section as mentioned above is quite vast, as the section in essence prohibits two types of conduct:

⁵⁸ Chapter 2 Part E of the CPA.

⁵⁹ Chapter 2 Part F of the CPA.

⁶⁰ Chapter 2 Part E of the CPA.

⁶¹ S 29 - 31, 33 & 38 of the CPA; WebbersLaw 'Right to Fair and Responsible Marketing' <http://www.webberslaw.com/right-to-fair-and-responsible-marketing/> (Accessed on 4 April 2018)

⁶² S 29 of the CPA.

⁶³ Van Zyl "Section 29" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-1.

Firstly, the section prohibits any type of marketing that is either misleading, deceptive or fraudulent;⁶⁴ and secondly, the section prohibits any type of conduct which is conducted by a supplier in such a manner, that such conduct is likely to imply a false, misleading or deceptive representation to the consumer, in relation to the goods or services concerned.⁶⁵

In terms of the marketing of goods and services, section 29 of the CPA provides a general standard upon which the marketing, by a supplier, of his or her goods or services can be measured.⁶⁶ This criterion is aided by a holistic interpretation of the terms “market”, “promotion” and “supply” by the CPA, which enables the section to cast a wide net of application in regards to the supplier’s conduct.⁶⁷ Furthermore, the regulation of the marketing of goods and services by section 29 of the CPA, is not only curtailed to the actual marketing of the goods and services; but also applies to the supply of those goods and services.⁶⁸

Hence, it can be deduced that the regulation of the marketing of goods and services by the CPA, incorporates an overlapping of many sections and definitions of the CPA.⁶⁹ This results, as discussed above, in section 29 of the CPA having a wide net of application, as it will be applicable to not only the promotion of goods or services but also to the supply of such goods and services.⁷⁰

2.2.2 Interaction between section 29 and sections 56 and 61 of the CPA

A further mechanism of protection against unfair commercial practices, which is afforded to the consumer, is highlighted through the interaction between sections 29, 56 and 61 of the CPA, with a particular focus on the parties involved in the supply chain of the goods and services.⁷¹

⁶⁴ S 29(b) of the CPA.

⁶⁵ S 29(a) of the CPA; Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29- 2.

⁶⁶ S 29 of the CPA.

⁶⁷ Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29- 3.

⁶⁸ Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29- 4.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29- 4.

All the parties involved in the supply chain of the goods and services have been defined within the above sections, however the major difference between the above sections, is within their wording, and by extension their application.⁷² As within section 29 of the CPA, all the parties share a “joint liability” towards the consumer, meaning that all parties involved in the supply of the goods and services to the consumer will have to comply with the general marketing standard present within section 29 of the CPA.⁷³ Whereas in section 56 and 61 of the CPA, certain parties within the supply chain of goods and services are distinguished from one another.⁷⁴ This is due to the fact that these sections recognise that certain parties within the supply chain are responsible for specific aspects and areas of the supply chain, and to apply a blanket provision over all the parties concerned would place a heavy burden, that some parties would not be able to withstand, such as retailers whose transactions fall within the ambit of the CPA.⁷⁵

Thus, section 29 of the CPA in relation to the marketing as well as to the supply of goods and services, provides liability on all parties present within the “lifecycle” of the goods and services concerned.⁷⁶ This places a burden on the supplier in which, he or she when either marketing their goods or even supplying their goods, must comply with the general standard of section 29 of the CPA.⁷⁷

This results in the consumer being provided with protection from the moment he or she sees the advertisement, till he or she receives the advertised good or service.⁷⁸

2.2.3 Misleading, deceptive or fraudulent marketing

In terms of misleading, deceptive and fraudulent marketing, section 29(b) of the CPA regulates such conduct and lists within its section, certain aspects of the goods and services that it applies to, such as:

“(b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—

⁷² Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-5.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-6.

⁷⁸ *Ibid.*

- (i) the nature, properties, advantages or uses of the goods or services;
- (ii) the manner in or conditions on which those goods or services may be supplied;
- (iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;
- (iv) the sponsoring of any event; or
- (v) any other material aspect of the goods or service.”⁷⁹

Hence, in terms of the scope of section 29(b) of the CPA as stated above, it can be ascertained that protection will be provided to the consumer against any misleading, deceptive or fraudulent marketing, especially when dealing with the material aspects of the goods or services in question.⁸⁰

2.2.4 Conduct likely to imply a false, misleading or deceptive representation to the consumer, in relation to the goods and services concerned.

Section 29(a) of the CPA regulates such conduct in conjunction with section 41 of the CPA which provides a list of instances which would constitute false, misleading and/or deceptive representations.⁸¹ The list provided for within section 41 of the CPA is not exhaustive but rather just provides examples, and thus is open to interpretation.⁸²

However, an important aspect when regulating such conduct is to determine, whether the supplier was aware of fact that the information he or she was providing to the consumer was false or not.⁸³

As for section 29(a) of the CPA to hold any application, the aggrieved party (consumer) must prove that the supplier had known or reasonable could have known that the information he or she was providing to the consumer was inaccurate and by extension misleading, fraudulent or deceptive in nature.⁸⁴

⁷⁹ S 29(b) of the CPA.

⁸⁰ Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-11.

⁸¹ S 41 of the CPA.

⁸² S 41(3) of the CPA.

⁸³ Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-10.

⁸⁴ *Ibid.*

2.3 “Unconscionable” Commercial Practices

2.3.1 Application of Section 40 of the CPA

In terms of “unconscionable” commercial practices, the current consumer protection dispensation regulates such, by providing the consumer with a fundamental right to Fair and Honest Dealing.⁸⁵ With regards to such, sections 40 and 41 of the CPA will be discussed within this chapter.

These sections pertain to and discuss the notion of “unconscionable” conduct,⁸⁶ and also provide a field of application regarding false, misleading and/or deceptive representations made by the supplier, which can be regarded as been “unconscionable” conduct.⁸⁷ The development of these sections and its application to the South African consumer realm has been warranted with ambiguity, as the term “unconscionable” conduct is not well versed within South African law, hence alluding to the fact that it has been inspired by international common law systems.⁸⁸ Section 40 of the CPA is thus a prime example of legislative borrowing and the effects of such.⁸⁹

However, regardless of such, section 40 and its contents still manage to fulfil certain purposes set out within the CPA, such as:

Firstly, promoting and advancing the social and economic welfare of consumers by reducing and ameliorating the disadvantages experienced in certain vulnerable groups of consumers;⁹⁰ and secondly protecting consumers from “unconscionable”, unfair, unreasonable, unjust or otherwise improper trade practices.⁹¹ Furthermore, section 40 of the CPA in its application does not operate in isolation but rather overlaps with sections 4(5)(b) and 48(1)(b) of the CPA.

⁸⁵ Chapter 2 Part F of the CPA.

⁸⁶ S 40 of the CPA.

⁸⁷ S 41 of the CPA.

⁸⁸ *Competition and Consumer Act* 2010; Du Plessis “Section 40’ in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-2.

⁸⁹ Glover 2013 *TSAR* 693.

⁹⁰ S 3(1)(b) of the CPA.

⁹¹ S 3(1)(d)(i) of the CPA.

In terms of the former, this overlap allows section 4(5)(b) of the CPA, which provides a general prohibition against “unconscionable” conduct, to cover instances whereby section 40 of the CPA will not be applicable.⁹² In terms of the latter, the overlap allows prohibited behaviour as provided for in section 48(1)(b) of the CPA, to be regarded as “unconscionable” conduct.⁹³

Lastly, in terms of scope of section 40 of the CPA, “unconscionable” conduct focuses on the improper ways in which the will and mind-set of the consumer can be influenced.⁹⁴ In terms of such it can be construed that section 40 of the CPA deals with the aspects of procedural fairness and substantive fairness - in which the former deals with how consent between the parties was obtained, whilst the latter focuses on the material terms of the contract.⁹⁵ This overlap is the key differentiating factor between cases that will be decided under the doctrine of “unconscionability” and cases that will be decided on the grounds of misrepresentation, duress or undue influence.⁹⁶ This view was highlighted in the case of *Resource Management Co v Weston Ranch and Livestock Co Inc*, which held that where only procedural irregularities are present, the doctrines of fraud, duress and misrepresentation provide more apt and superior tools for analysing the validity of the contract, in question.⁹⁷

Thus, it can be deduced that even though section 40 is verbose and ambiguous, it does provide a wide ambit of protection to the consumer, however the administration of such a defence must be clear and concise.⁹⁸

2.3.2 Section 40(1) of the CPA

With regards to what constitutes, “unconscionable” conduct section 40(1) of the CPA provides factual settings whereby conduct, on the part of the supplier, will be regarded as been “unconscionable” in nature.⁹⁹

⁹² Du Plessis “Section 40” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 40-3.

⁹³ *Ibid.*

⁹⁴ Du Plessis 2012 *THRHR* 31.

⁹⁵ *Ibid*; Stoop “The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts” 2015 *PELJ* 1111-1112.

⁹⁶ Glover 2013 *TSAR* 693.

⁹⁷ *Resource Management Co v Weston Ranch and Livestock Co Inc* 706 P 2d 1028 (1985).

⁹⁸ Glover 2013 *TSAR* 691.

⁹⁹ Van Eeden & Barnard *Consumer Protection Law in South Africa* (2017) 113.

However, with regards to such, the provision provides a wide scope of application regarding what constitutes “unconscionable” conduct, and due to such it can be interpreted that section 40(1) of the CPA applies to the entire life-cycle of the agreement: Beginning with the marketing and supplying of goods and services, continuing through the negotiation phase, and ending with the enforcement of such through the recovery of goods and services (debt collection).¹⁰⁰

However, due to the vast number of prohibited conducts listed within this provision, and their individual requirements and definitions, the regulation of what constitutes “unconscionable” conduct has become troublesome.¹⁰¹ An example of such complexity can be seen in the regulation of duress, and its numerous requirements and criteria that have to be met.

In terms of duress, which is a well-established ground for rescinding contracts, there is the requirement that an unlawful threat had to be used to induce a person to conclude a contract.¹⁰² Furthermore, it illustrates that the fear suffered by the aggrieved party (consumer), must be reasonable.¹⁰³ This reasonableness criterion is an objective standard, meaning that consumers who are sensitive or easily manipulated will not enjoy its protection.¹⁰⁴

However such a requirement has become weakened over time, which has resulted in the wrongful party (supplier) losing their defence of simply stating that the aggrieved party (consumer) should not have been frightened so easily.¹⁰⁵ Due to such, it can be deduced that the main reason as to why, such a criterion still exists is to establish that there is a causal link between the threats made by the supplier (wrongful party) and the conduct of the consumer (aggrieved party).¹⁰⁶

¹⁰⁰ *Ibid.*

¹⁰¹ Glover 2013 TSAR 694.

¹⁰² Du Plessis 2012 THRHR 31.

¹⁰³ *Broodryk v Smuts NO 1942 TPD 47 51.*

¹⁰⁴ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-7.

¹⁰⁵ *Bloek v Dogon Dreyer & Co 1910 WLD 330.*

¹⁰⁶ Du Plessis *Compulsion and Restitution: A historical and comparative study of the treatment of compulsion in Scottish private law with particular emphasis on its relevance to the law of restitution or unjustified enrichment* (2004) 102.

In terms of the current consumer market, duress has transgressed from been conduct that induces physical harm to conduct that induces unlawful threats of economic harm, such as an unlawful termination of a contract.¹⁰⁷

Based on the above, numerous administrative problems can be identified regarding section 40(1) of the CPA such as, the courts not been provided with a concrete definition of what constitutes an “unconscionable” act, as well as no proper guidelines on how to administer and interpret such an act.¹⁰⁸ A further discussion regarding the challenges hindering the regulation of “unconscionable” commercial practices will follow in the dissertation.

2.3.3 Section 40(2)

Section 40(2) of the CPA, supplements section 40(1) of the CPA by adding the aspect of awareness. The section states as follows:

“(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor”.¹⁰⁹

“Unconscionable” conduct in this regard comprises three elements: Firstly, the consumer must be subjected to some act of mental or physical disability;¹¹⁰ secondly the consumer must not be able to protect his or her own interests, due to the aforementioned mental or physical disability;¹¹¹ and lastly, the supplier must knowingly take advantage of the fact that the consumer is substantially unable to protect his or her interests, as a result of the mental or physical disability.¹¹²

¹⁰⁷ *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 5 SA 339 (SCA) para 1; Du Plessis 2012 *THRHR* 32.

¹⁰⁸ Glover 2013 *TSAR* 689-697.

¹⁰⁹ S 40(2) of the CPA.

¹¹⁰ Van Eeden & Barnard 114.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

In terms of a consumer suffering from a mental disability, the common law would not hold the consumer as a valid party to the contract as he or she does not have the mental capacity to appreciate what he or she is entering into;¹¹³ and furthermore the common law would render the contract in question void.¹¹⁴

In terms of section 40(2) of the CPA, the mentioning of illiteracy as a weakness, requires a further discussion, especially within the current South African consumer market. This view is highlighted by Farber's article, which held that,

“Unesco lists South Africa as having a literacy rate of 93% but, beyond the mechanical ability to identify words, the picture is much bleaker. According to research released on Tuesday by the University of Pretoria, eight out of 10 Grade 4 pupils “still cannot read at an appropriate level”.¹¹⁵

Based on the views of Faber, it can be concluded that even though South African consumers are making strides in understanding the English language, in order for these consumers to obtain protection from section 40(2) of the CPA, they must: Firstly establish that their physical or mental weakness resulted in them been substantially impaired, and due to such they were unable to protect their own interests;¹¹⁶ and secondly and most importantly the consumer must indicate that the supplier knowingly took advantage over him or her, due to their weakness.¹¹⁷

2.3.4 Section 41 of the CPA

Section 41 of the CPA, pertains to the regulation of the suppliers conduct when trying to convince a consumer to purchase a good or a service.¹¹⁸ In other words, it ensures that consumers are not prejudiced by false, misleading and/or deceptive misrepresentations.¹¹⁹ In terms of its regulation, section 41 of the CPA should not be read in isolation but rather should incorporate many other sections of the CPA in its application such as:

¹¹³ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-11.

¹¹⁴ *Pheasant v Warne* 1922 AD 481 488; S 39(1)(a) of the CPA; Du Plessis 2012 *THRHR* 36.

¹¹⁵ T Farber ‘Read it and weep: SA kids struggle with literacy’ <https://www.timeslive.co.za/news/south-africa/2017-12-06-read-it-and-weep-sa-kids-struggle-with-literacy/> (Accessed on 21 August 2018).

¹¹⁶ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-12.

¹¹⁷ *Ibid.*

¹¹⁸ S 41 of the CPA.

¹¹⁹ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-2.

Firstly, section 3(1)(d)(ii) of the CPA, which in conjunction with section 41 of the CPA fulfils one of the purposes of the CPA which is, protecting the consumer from deceptive, misleading, unfair and fraudulent conduct;¹²⁰ secondly, the consumers fundamental right to the disclosure of information, which when applied in conjunction with section 41 of the CPA enables the consumer to demand a notice and/or information in a plain and understandable language;¹²¹ and lastly, sections 51(1)(a)(ii) and 51(1)(a)(iii) of the CPA, which when applied in conjunction with section 41 of the CPA, allows for certain terms that are in general inherently misleading to be effectively, “blacklisted”.¹²²

In terms of the application of section 41 of the CPA, the section provides a general prohibition on a supplier making any representation that is false, misleading or deceptive. This prohibition is highlighted in section 41(1) of the CPA, which states the following:

“(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—
 (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
 (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
 (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation
 or permit or require any other person to do so on behalf of the supplier.”¹²³

In terms of S 41(1)(a) of the CPA, it can be discussed that the representation mentioned, does not have to be in a particular form, meaning that it can be made tacitly or expressly.¹²⁴ Due to such a wide interpretation, the CPA in providing protection to the consumer must ensure that such a representation, when relating to a material fact of the goods or services in question, must also be interpreted broadly.¹²⁵

¹²⁰ S 3(1)(d)(ii) of the CPA; Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-3.

¹²¹ Chapter 2 Part D of the CPA; S 22 of the CPA; Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-3.

¹²² S 51(1)(a)(ii-iii) of the CPA; Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-4.

¹²³ S 41(1)(a-c) of the CPA.

¹²⁴ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-5.

¹²⁵ *Feinstein v Niggli* 1981 (2) SA 684 (A) 695 D-G.

As then the CPA, specifically section 41, will have a broad area of application with regards to representations made by the supplier, including their opinions.¹²⁶ However, if the above is not adhered to, the consumer, can fall back onto the common law remedies pertaining to misrepresentations.¹²⁷

In terms of section 41(1)(b) of the CPA, the crucial aspect present within this subsection is that the prohibited term in question, must relate to a material fact of the goods or services.¹²⁸

In terms of sections 41(1)(c) of the CPA, the main issue that arises is, whether the supplier had a duty to disclose certain information regarding the goods or services to the consumer.¹²⁹

This issue has become the topic of discussion within the judicial sphere, as courts have been concerned with identifying whether a duty to disclosure information, on the part of the supplier, could arise from a special relationship of dependency or trust between the parties.¹³⁰ In order to curtail such an issue, certain international instruments have been used, such as the *Common European Sales Law*, (hereafter referred to as the, “*CESL*”) which provides a twofold mechanism in assuring that false, misleading, and deceptive misrepresentations are minimised, as well as aids in determining when a duty to disclose certain information, regarding the goods and services, is placed on the supplier.¹³¹

The first aspect is that the *CESL* provides provisions which set out what pre-contractual information must be provided by the supplier to the consumer, which enables the consumer to make an informed decision regarding the goods or services in question.¹³² The second aspect is that the *CESL* has a specific provision that regulates fraud, which thus provides strict and conduct specific limitations on suppliers and furthermore, provides harsh penalties for any type of transgression.¹³³

¹²⁶ *Ibid.*

¹²⁷ S 2(10) of the CPA.

¹²⁸ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-7.

¹²⁹ *Ibid.*

¹³⁰ *MV Afris Pioneer: National Stevedores (Pty) Ltd v MV Afris Pioneer* 2004 (3) SA 88 (N) 94.

¹³¹ *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law* 2011/0284, (hereafter referred to as, “*CESL*”).

¹³² Articles 13-22 of the *CESL*.

¹³³ Article 49 of the *CESL*.

Lastly, in terms of section 41(1) of the CPA, the aspect of liability of third parties committing false, misleading or deceptive representations on behalf of the supplier, must be discussed. In terms of such, section 41(1) of the CPA, prohibits the supplier permitting another person to provide a false, misleading or deceptive representation, on behalf of him or her.¹³⁴ Furthermore, there is a general prohibition on any person acting on behalf of the supplier, meaning that, such a person could incur liability independently from the supplier.¹³⁵

In terms of section 41(3) of the CPA, this section provides a further list of instances whereby a supplier could be found guilty of either: Making a false, misleading or deceptive representation;¹³⁶ or failing to correct an apparent misapprehension on the part of the consumer with regards to any representation listed in section 41(3) of the CPA.¹³⁷

However, in terms of this section, the following key aspects must be adhered to: Firstly, the list does not intent to limit the broad net of application, that has been cast by sections 41(1) and 41(2) of the CPA;¹³⁸ and secondly, the list of instances that are present in the sub-section all pertain to material aspects of the goods or services in question.¹³⁹

2.4 The Notion of Fairness

In terms of the regulation of the consumer's fundamental rights to fair and responsible marketing and fair and honest dealing, the notion of fairness and how it has been incorporated within the CPA, requires discussion.¹⁴⁰

With regards to the notion of fairness, it highlights a classical model of law which is based on the assumption that a consumer when entering into a contract has equal bargaining power with the supplier, and has access to consumer rights, such as freedom of choice.¹⁴¹

¹³⁴ Du Plessis "Section 41" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-9.

¹³⁵ S 41(2) of the CPA.

¹³⁶ S 41(3) of the CPA; Van Eeden & Barnard 119-120.

¹³⁷ *Ibid.*

¹³⁸ Du Plessis "Section 41" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-10.

¹³⁹ *Ibid.*

¹⁴⁰ Chapter 2 Part E-F 2 of the CPA.

¹⁴¹ Hutchison & Pretorius *The Law of Contract in South Africa* (2017) 23.

However, such a model has not come to full fruition within the current consumer regime, as there has been an imbalance between the need for certainty and sanctity of a contract, and the need for good faith and equity between parties.¹⁴²

In order to bridge the gap between these competing concepts, the CPA was promulgated with the task of addressing the social and economic inequalities of the past,¹⁴³ as well as to ensure that the inequality of bargaining power between the supplier and the consumer is taken into account in terms of contractual autonomy.¹⁴⁴ The impact of such, is that the whole contract dynamic is targeted and the notion of fairness has been made a top priority, resulting in procedural fairness been extended and substantive fairness made a benchmark for consumer contracts.¹⁴⁵

In terms of procedural fairness, it endeavours to set the scene for the conclusion of the contract in circumstances which are fair;¹⁴⁶ and is established through the fundamental consumer rights present within the CPA.¹⁴⁷ Furthermore, through procedural fairness, the CPA has had the ability to also introduce the aspect of substantive equality into the commercial realm, which addresses the personal aspects of the contracting parties and ensures that consumers will no longer be exploited.¹⁴⁸

In terms of substantive fairness, this refers to the fair distribution of substantive rights and obligations in terms of the contract in question;¹⁴⁹ and aims to promote and advance social justice and the economic welfare of consumers.¹⁵⁰ With regards to substantive fairness and its interaction with the CPA, it is based on two standards namely one-sidedness and adverseness, which colloquially are referred to as the “basic” unfairness standards.¹⁵¹ These standards can be found in sections 48(2)(a) and 48(2)(b) of the CPA.¹⁵²

¹⁴² Muphangavanhu 2015 *De Jure* 119.

¹⁴³ S 3 of the CPA; Muphangavanhu 2015 *De Jure* 129.

¹⁴⁴ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12.

¹⁴⁵ Hawthorne “Public Governance: Unpacking the Consumer Protection Act 68 of 2008” 2012 *THRHR* 355.

¹⁴⁶ Hawthorne 2012 *THRHR* 356.

¹⁴⁷ Chapter 2 of the CPA; *Ibid.*

¹⁴⁸ S 40(2) of the CPA; Hawthorne 2012 *THRHR* 35 360.

¹⁴⁹ Hawthorne 2012 *THRHR* 361.

¹⁵⁰ Adams and Brownsworld *Understanding contract law* (2004) Chapter 8.

¹⁵¹ Van Eeden & Barnard 250.

¹⁵² S 48(2)(a-b) of the CPA.

Furthermore, these provisions although defined and set out in clear detail, are still open to subjective interpretation, which can be seen in how the courts have the ability to consider any relevant trade usage or customary terms used in trade, when determining if a term has transgressed these “basic” unfair standards.¹⁵³ In other words the application of these standards to a specific term or conduct will be applied on a case by case basis.¹⁵⁴

Furthermore, in terms of regulating fairness within the CPA, sections 48 and 51 of the CPA will be imperative. As the latter identifies terms that are regarded as been unfair, unjust, “unconscionable” or unreasonable;¹⁵⁵ and furthermore states that, these terms will also be regarded as been “blacklisted” terms, meaning that they cannot be present within a contract.¹⁵⁶ In terms of the former, it provides a flexible mechanism to regulate all the terms that fall outside the ambit of section 51 of the CPA.¹⁵⁷

However, the incorporation of substantive fairness into the CPA, could be met with some hindrances such as: Firstly, by requesting that the outcome of contracts be analysed by the judicial sphere, based on the concepts of fairness, reasonableness and justice, may be contrary to the constitutional values of human dignity and freedom;¹⁵⁸ and secondly the inability of the legislator to define concepts such as, “fairness”, “reasonableness” and “justice”.¹⁵⁹

An additional view regarding bridging the gap between the need for certainty and sanctity of a contract, and the need for good faith and equity between parties, is argued by Hawthorne, who states that the Constitution of the Republic of South Africa does not support the classic model of contract law, but rather adheres to an ideal which recognises substantive moral values and various socio-economic conditions.¹⁶⁰

¹⁵³ Van Eeden & Barnard 250.

¹⁵⁴ *Ibid.*

¹⁵⁵ S 51(1)(a-c) of the CPA.

¹⁵⁶ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-4.

¹⁵⁷ Van Eeden & Barnard 250.

¹⁵⁸ S 10 & 12 of the Constitution of the Republic of South Africa, 1996; Hawthorne 2012 *THRHR* 369.

¹⁵⁹ *Ibid.*

¹⁶⁰ Hawthorne “New Learning” 2008 *SALR/PL* 78.

This ideal according to Botha, can be achieved by combining a commitment to the rule of law with a substantive normative vision and a transformative political agenda, which gives recognition to transformation and social justice.¹⁶¹

In terms of such, it can be interpreted that the provisions of the CPA are likely to force courts to modify established principles and doctrines of contract law, so that a harmonised approach of consumer protection can be achieved.¹⁶²

In terms of achieving such, some of the CPA's shortcomings must be removed and a method that can be used to achieve such, is that of international comparison. To highlight such, a comparison shall be discussed between the foreign model of consumer protection and the South African model regarding consumer protection.¹⁶³

The former, pertains to the European Union's directive on consumer protection known as the *Unfair Commercial Practices Directive* (hereafter referred to as the, "UCPD"), which is aimed at increasing legal certainty and providing the consumer with economic growth and market confidence,¹⁶⁴ however in spite of such, criticisms have been made regarding the *UCPD*, such as: Its lack of accurate empirical studies and the realisation that many consumers are not aware of their own national law or consumer rights.¹⁶⁵

In terms of the similarities between these two models of consumer protection, the following can be highlighted and discussed:

Firstly, the aspect of political influence and compromise, in that the *UCPD* in its application is regulated by the European Union Commission, but in terms of the development of fairness, is regulated by judicial institutions;¹⁶⁶ this can hold some favour in the South African context, whereby there is constant tension between enforcement agents and the judiciary, in terms of assessing the role of fairness in a commercial practice, that is involving consumers.¹⁶⁷

¹⁶¹ Botha "The Legitimacy of legal order (3): Rethinking the rule of law" 2001 *THRHR* 524.

¹⁶² Muphangavanhu 2015 *De Jure* 133.

¹⁶³ Barnard "The role of comparative law in consumer protection: A South African Perspective" 2017 *SA Merc LJ* 382.

¹⁶⁴ Unfair Commercial Practices Directive 2005, (hereafter referred to as, "UCPD"); *Ibid*.

¹⁶⁵ *Ramsay Regulation and the constitution of the EU single market: The contribution of consumer law* 2011 50 *Can Bus LJ* 322.

¹⁶⁶ Barnard 2017 *SA Merc LJ* 383.

¹⁶⁷ *Ibid*.

Furthermore, this tension is compounded by the issue of the common law been considered as an alternative within the judicial sphere.¹⁶⁸

Secondly, the interpretation of a “vulnerable” and “average” consumer. Both these models of consumer protection address these aspects, however the *UCPD* will aid the CPA in its interpretation of such aspects, by providing proper guidance regarding: Interpreting the plain-language test, as well as the concept of an “ordinary” and “vulnerable” consumer.¹⁶⁹

Thirdly, the *UPCD* and the CPA can be regarded as been safety nets for consumers, in that both legislative texts will be used to complement and clear any abnormalities present, within existing consumer protecting legislation,¹⁷⁰

In terms of such, it can be interpreted that the role of comparative law within consumer protection is invaluable, as it offers consumer protecting dispensations new methods and avenues to improve their regulation of commercial practices.¹⁷¹

With regards to the notion of fairness and by extension the concept of good faith, Ramsey highlights, that the notion of good faith will always be interpreted and applied in various manners based on the institution tasked with its administration.¹⁷² With regards to such, Muphangavanhu, further highlights that fairness in its administration, is a “slippery concept” which is very difficult to attain.¹⁷³

This view is further promulgated by the lack of open norms within our consumer market, as open norms allow for discretionary adjudication, enabling the formal rules of consumer law to become more adaptable to the modern consumer market.¹⁷⁴ Based on such, in isolation the CPA cannot achieve fairness, however it can be regarded as been a stepping stone to building a consumer dispensation that is based on fairness and equity.¹⁷⁵ In addition to such, the courts can aid the CPA by actively developing such a dispensation.¹⁷⁶

¹⁶⁸ S 2(10) of the CPA; *Ibid.*

¹⁶⁹ Barnard 2017 *SA Merc LJ* 383-384.

¹⁷⁰ *Ibid.*

¹⁷¹ Barnard 2017 *SA Merc LJ* 387-389.

¹⁷² Ramsay 2011 50 *Can Bus LJ* 334.

¹⁷³ Muphangavanhu 2015 *De Jure* 135.

¹⁷⁴ Hawthorne “Concretising the open norm of public policy: Inequality of bargaining power and exploitation” 2014 *THRHR* 411.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

In terms of the judicial sphere's participation in developing the notion of fairness and aiding the CPA, the main judgement is that of the Constitutional Court judgement of *Barkhuizen v Napier*, (hereafter referred to as, "*Barkhuizen*"), in which the court held that the notion of good faith is not a self-standing rule but rather an underlying value that is given expression though the rules of law.¹⁷⁷

Furthermore, the court held that the proper approach in regulating such, is to test the term in question against public policy, as public policy represents the legal convictions of the community, which is determined by the values that underpin our constitutional democracy.¹⁷⁸ Such a decision has revolutionised the norm of public policy, as now public policy is set to develop into an open norm;¹⁷⁹ whereas previously it was used to justify the rigid application of *pacta sunt servanda*.¹⁸⁰

Hence, from the above case discussion it can be held that the question of whether a term is regarded as been fair or not, will be determined by the doctrine of legality, and benchmarked against public policy, which contains the values that underpin our South African constitutional democracy.¹⁸¹

Such determination will involve a two-fold process, one aspect been objective and the other subjective.¹⁸² In terms of the former, it will involve determining whether the term in question is generally unreasonable.¹⁸³ In terms of the latter, should the term in the first aspect been deemed generally unreasonable, the test now will be to determine if such a term will be contrary to public policy, taking into account the situations/positions of the contracting parties.¹⁸⁴

Such a process, found application in the *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* judgement, (hereafter referred to as the, "*Uniting Reform Church*").¹⁸⁵

¹⁷⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 82, (hereafter referred to as, "*Barkhuizen*").

¹⁷⁸ *Barkhuizen* paras 28-29.

¹⁷⁹ *Barkhuizen* para 82.

¹⁸⁰ Zimmermann and Visser *Southern Cross: Civil law and common law in South Africa* (1996) 240ff.

¹⁸¹ Hawthorne 2014 *THRHR* 414.

¹⁸² *Ibid.*

¹⁸³ *Barkhuizen* para 59.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC), (hereafter referred to as, "*Uniting Reformed Church*").

Furthermore, this judgement also provides useful insight into the nature of the elusive element that could be used to establish public policy within the judicial sphere.¹⁸⁶ In terms of addressing the two fold process mentioned above, the judicial officials in the *Uniting Reformed Church* case held that in terms of the first aspect, a balance must be struck between the principle of *pacta sunt servanda* and the constitutional right to seek redress.¹⁸⁷

In terms of the second aspect, the judicial officials focused on the bargaining positions of the parties at the time of the conclusion of the agreement.¹⁸⁸ They further held that the foundational source for unfairness is an unequal bargaining position of the contracting parties together with other factors.¹⁸⁹ This view is imperative as it implies that the factor of, inequality of bargaining positions between the contracting parties, cannot in isolation find a particular term contrary to public policy, it requires assistance.¹⁹⁰ This assistance, in terms of the *Uniting Reformed Church* judgement, is that of exploitation.¹⁹¹ Hawthorne, further expands on such by stating that:

“the element of exploitation may be recognised as the other factor to be taken into account of, together with an inequality between the parties, when deciding whether an unfair contract or term is unenforceable because it is contrary to public policy”.¹⁹²

Furthermore, Hawthorne is of the opinion that by exploitation been the other factor, it can harness the discretionary role of public policy whilst simultaneously addressing the criticisms regarding its application.¹⁹³ In terms of exploitation finding a place within the CPA, it can be argued that section 48(1)(ii) of the CPA when interpreted can give rise to the conclusion that exploitation would qualify as an example of a term that would be adverse to the consumer.¹⁹⁴

¹⁸⁶ Hawthorne “Frontiers of change and governance in contractual agreements: The possible role of exploitation – *Uniting Reformed Church De Doorns v President of the Republic of South Africa 2013 5 SA 205 (WCC)*” 2014 *PER/PELJ* 2824.

¹⁸⁷ *Uniting Reformed Church* para 34; S 34 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁸ *Uniting Reformed Church* para 34.

¹⁸⁹ *Barkhuizen* para 59.

¹⁹⁰ Hawthorne 2014 *PER/PELJ* 2831.

¹⁹¹ *Ibid*; *Uniting Reformed Church* para 40.

¹⁹² Hawthorne 2014 *PER/PELJ* 2835.

¹⁹³ *Ibid*.

¹⁹⁴ S 48(1)(ii) of the CPA; Hawthorne 2014 *PER/PELJ* 2838.

Based on the above discussions, it can be held that the judicial sphere has made encouraging strides to incorporate the notion of fairness and by extension the concept of good faith, within its sphere of application. The following recent judgements indicate such: Firstly, the judgment of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*, where it was held by the Constitutional Court that contracting parties certainly need to relate to each other in good faith, where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reach an agreement in good faith.¹⁹⁵

Secondly, the judgement of *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another*, in which the Constitutional Court made reference to the judgment of *Barkhuizen*, in relation to the test used to determine if a term was contrary to public policy.¹⁹⁶ In conclusion, it reiterated *Barkhuizen* in that, many people conclude a contract without understanding what they are signing or agreeing to, and this type of conduct can be used in determining fairness in the consumer realm.¹⁹⁷

Lastly, the Constitutional Court case of *Public Servants Association OBO UBOGO v Head, Department of Health, Gauteng and Others*, in which the court held that in terms of section 34 of the Constitution, a consumer or contracted party has the right to approach a court to have his or her dispute resolved in a fair public hearing.¹⁹⁸ This right not only enables the party in question to have access to the courts, but also validates the concept of public policy as containing the legal convictions and values that are the most significant within our society.¹⁹⁹ In conclusion the court held that the consumer's right to a fair public hearing requires procedures which, in any particular situation or set of circumstances, are right, just and fair.²⁰⁰

¹⁹⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 72.

¹⁹⁶ *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* 2016 (12) BCLR 1515 (CC) para 9, (hereafter referred to as, "*Gbenga-Oluwatoye*").

¹⁹⁷ *Barkhuizen* para 65; *Gbenga-Oluwatoye* paras 21-25.

¹⁹⁸ S 34 of the Constitution of the Republic of South Africa, 1996; *Public Servants Association OBO UBOGO v Head, Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) para 62, (hereafter referred to as, "*Public Servants Association*").

¹⁹⁹ *Ibid.*

²⁰⁰ *Public Servants Association* para 62.

Hence, it can be held that the CPA in its regulation of the consumer's fundamental rights to fair and responsible marketing and fair and honest dealing, has attempted to incorporate the notion of fairness within its provisions.²⁰¹ In terms of the former, this can be seen by the inclusion of procedural and substantive fairness standards which has provided a general marketing standard that needs to be upheld, as well as instituted limitations on the supplier regarding what he or she can do when trying to entice a consumer.²⁰² In terms of the latter, the inclusion of procedural and substantive fairness standards has enabled a broad regulation of "unconscionable" conduct, and allowed the courts to invoke a more involved approach in identifying and regulating "unconscionable" terms.²⁰³

However, there is still a journey to be had in assuring that the notion of fairness is actively present in the CPA and its provisions, and in order for such to occur, the CPA and the judicial system must coincide to ensure that the doctrines of contract law are taking into account constitutional values.²⁰⁴ Furthermore, the promulgation of public policy, been a benchmark mark for regulating fairness within consumer contracts, must be administered in a general manner, so that all parties present to the transaction are considered.²⁰⁵

2.5 Conclusion

In terms of the consumers' fundamental rights to fair and responsible marketing and fair and honest dealing, this chapter has analysed how these rights have been regulated by the CPA.²⁰⁶

In terms of the consumer's fundamental right to fair and responsible marketing, the CPA casts a wide net of applicability in terms of section 29 of the CPA, in that the CPA will regulate any type of marketing that is false, misleading or deceptive;²⁰⁷ as well as regulate any type of conduct, on the part of the supplier, that is likely to imply or promote a false, misleading or deceptive representation.²⁰⁸

²⁰¹ Chapter 2 Part E-F of the CPA.

²⁰² S 29 & S 41 of the CPA.

²⁰³ S 40-41 & S 51-52 of the CPA.

²⁰⁴ Muphangavanhu 2015 *De Jure* 135.

²⁰⁵ Hawthorne 2014 *THRHR* 426.

²⁰⁶ Chapter 2 Part E-F of the CPA.

²⁰⁷ S 29(b) of the CPA.

²⁰⁸ S 29(a) of the CPA.

It will also cover not only the advertising and promotion of the goods and services, but as well as the supply of those goods and services, to the consumer in question.²⁰⁹

In terms of the consumer's fundamental right to fair and honest dealing, the CPA aims at providing a wide net of application regarding "unconscionable" practices by grouping prohibited conduct under one term, "unconscionable" conduct.²¹⁰ This type of conduct is regulated by sections 40 and 41 of the CPA.

Section 40 of the CPA, provides a two – fold approach to regulating "unconscionable" commercial practices, in that: Firstly, it provides instances and examples of such conduct;²¹¹ and secondly, it addresses the intention and awareness of the supplier's conduct, with regards to a consumer's physical or mental disability.²¹²

Section 41 of the CPA, in its regulation of, "unconscionable" conduct aids section 40 of the CPA by focusing on the intention and conduct of the supplier.²¹³ It prohibits any type of false, misleading or deceptive representations, on the part of the supplier;²¹⁴ as well as provides a list of examples of such conduct, which if committed by the supplier, will be regarded as been, "unconscionable" in nature.²¹⁵

With regards to the regulation of these fundamental consumer rights and their integration with the notion of good faith, this chapter held that the determination of whether a term is regarded as been unfair will be determined by the doctrine of legality, and benchmarked against public policy, which is infused with the values that underpin our South African constitutional democracy.²¹⁶

In terms of such, it can be interpreted that the CPA has attempted to incorporate the notion of fairness within its provisions. This can be seen in the broad regulation of "unconscionable" conduct;²¹⁷ and in terms of marketing, demanding that a general marketing standard is met by all suppliers.²¹⁸

²⁰⁹ Van Zyl "Section 29" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-4.

²¹⁰ S 40 of the CPA.

²¹¹ S 40(1) of the CPA.

²¹² S 40(2) of the CPA.

²¹³ S 41 of the CPA.

²¹⁴ S 41(1) of the CPA.

²¹⁵ *Ibid.*

²¹⁶ Hawthorne 2014 *THRHR* 414.

²¹⁷ S 40 – 41 of the CPA; S 51- 52 of the CPA.

²¹⁸ S 29 and S 41 of the CPA.

However, there is still a journey to be had in assuring that the notion of fairness is actively present in the CPA and its provisions, and in order for such to occur, the CPA and the judicial system have to coincide to ensure that the doctrines of contract law are taking into account, constitutional values;²¹⁹ as well as applying the benchmark of public policy in a general manner.²²⁰

²¹⁹ Muphangavanhu 2015 *De Jure* 135.

²²⁰ Hawthorne 2014 *THRHR* 426.

CHAPTER 3: WHAT REMEDIES ARE PROVIDED BY THE CURRENT LEGAL DISPENSATION WITH REGARDS TO UNFAIR AND “UNCONSCIONABLE” COMMERCIAL PRACTICES?

3.1 Introduction

This chapter will discuss and analyse what remedies are provided by the current legal dispensation with regards to unfair and “unconscionable” commercial practices. It will firstly, discuss what type of remedies are available to the consumer, should he or she be subjected to an unfair commercial practice; and then secondly will discuss what type of remedies are available to the consumer, should he or she be subjected to an “unconscionable” commercial practice.

3.2 Unfair Commercial Practices

In terms of unfair commercial practices, the main section that will have to be transgressed by the supplier, is that of section 29 of the CPA. In terms of such, the consumer will be provided with the “ordinary” remedies present in sections 68 to 71 of the CPA. These sections pertain to the protection of consumer rights;²²¹ the enforcement of consumer rights;²²² providing alternative dispute resolutions to the consumer;²²³ and lastly allowing the NCC to intervene by issuing a complaint with the NCC.²²⁴

In terms of the NCC and its application a further discussion is required. With regards to the powers and functions of the NCC, it is responsible for carrying out functions and exercising the powers assigned to it by either: A legislative text;²²⁵ any other national legislation;²²⁶ or by a Minister of the Republic of South Africa.²²⁷ It is also referred to as a juristic person and has jurisdiction throughout the whole of the Republic of South Africa.²²⁸

²²¹ S 68 of the CPA.

²²² S 69 of the CPA.

²²³ S 70 of the CPA.

²²⁴ S 71 of the CPA.

²²⁵ Van Eeden & Barnard 408.

²²⁶ S 92(1) of the CPA.

²²⁷ S 71(2)(a) of the CPA.

²²⁸ S 85(2)(a-b) of the CPA; Van Eeden & Barnard 408.

However, in relation to the CPA and its purpose, the NCC's function plays a pivotal role in consumer protection, which is:

“(2) To better ensure the realisation of the purposes of this Act, and the enjoyment of the consumer rights recognised or conferred by this Act, the Commission, in addition to its responsibilities set out elsewhere in this Act, is responsible to—

(a) take reasonable and practical measures to promote the purposes of this Act and to protect and advance the interests of all consumers, and in particular those consumers contemplated in subsection (1)(b);”²²⁹

In terms of such, it can be held that the NCC, is the pivotal institution to deal with consumer matters;²³⁰ however due to the NCC been established by the CPA, it has jurisdiction over only consumer matters;²³¹ whereas the NCT, which is established by the National Credit Act 34 of 2005, (hereafter referred to as the, “NCA”) has jurisdiction over both credit agreements and consumer agreements.²³²

In addition, in terms of the NCC's application, it has been stated that the NCC does not investigate individual complaints, but only endemic harmful business practices;²³³ however, in terms of such, the judgement of *The National Consumer Commission v Western Car Sales CC* holds importance as in terms of such the NCC investigated an individual complaint which it successfully referred to the NCT, highlighting that the NCC is not completely against interpreting and regulating individual complaints.²³⁴

In terms of seeking relief from the NCC, before any relief can be provided to the consumer, all the requirements present in section 71 of the CPA must be adhered to.²³⁵

²²⁹ S 3(2)(a) of the CPA.

²³⁰ Van Eeden & Barnard 32.

²³¹ S 92(2)(b) of the CPA.

²³² S 26-27 of the National Credit Act 34 of 2005, (hereafter referred to as, “NCA”); Van Eeden & Barnard 448.

²³³ Woker “Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress” 2017 *SA Merc LJ* 6.

²³⁴ *The National Consumer Commission v Western Car Sales CC t/a Western Car Sales* NCT/81554/2017/173(2)(b) paras 5-7, (hereafter referred to as, “*Western Car Sales*”); Van Heerden “Section 85” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 85-2.

²³⁵ S 71(1) of the CPA.

With regards to its regulation and application to section 29 transgressions, the NCC in terms of section 100 of the CPA, may issue a compliance notice to the supplier in question, whom the NCC believes on reasonable grounds has acted in a manner inconsistent with the CPA.²³⁶

In terms of the compliance notice, mentioned above, such a notice must contain the following information, as provided for in section 100(3) of the CPA:

“(3) A compliance notice contemplated in subsection (1) must set out—

- (a) the person or association to whom the notice applies;
- (b) the provision of this Act that has not been complied with;
- (c) details of the nature and extent of the non-compliance;
- (d) any steps that are required to be taken and the period within which those steps must be taken; and
- (e) any penalty that may be imposed in terms of this Act if those steps are not taken.”²³⁷

If the supplier, in question, fails to comply with the compliance notice, the NCC has two avenues of recourse: Firstly, apply to the NCT for the rendering of an administrative fine on the supplier in question;²³⁸ or refer the matter to the NPA, who will treat such a transgression as an offence in terms of section 110(2) of the CPA.²³⁹ However, the NCC in this regard may only rely on one of the avenues mentioned above and not both.²⁴⁰

In terms of the first avenue of relief the NCT, in its application to protecting consumers and regulating suppliers conduct, obtains its power from section 112 of the CPA, which enables it to impose an administrative fine on the supplier in question, in respect of any prohibited conduct.²⁴¹ The amount of the administrative fine however is limited, in that it cannot exceed the greater amount between, ten per cent of the supplier’s annual turnover during the preceding financial year, or R1 000 000.²⁴²

²³⁶ S 100 of the CPA; Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-11.

²³⁷ S 100(3)(a-e) of the CPA.

²³⁸ S 100(6)(a) of the CPA.

²³⁹ S 100(6)(b) of the CPA.

²⁴⁰ *Ibid.*

²⁴¹ S 112(1) of the CPA.

²⁴² S 112 (2) of the CPA.

The R1 000 000 threshold has come under scrutiny, as for major international companies, R 1 000 000, does not even impact their day to day earnings, however such a threshold has been justified and thus is still applicable in the current consumer market.²⁴³

With regards to determining an appropriate administrative fine, the NCT must take into account 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.”²⁴⁴

In terms of such, it can be seen that the NCT, provides a detailed evaluation of the suppliers (wrongful party) conduct, in order to ensure that transparency and fairness is maintained, in both the amount of the fine that is awarded to the supplier and the amount of compensation that the consumer (aggrieved party) seeks.²⁴⁵ However, in recent case law it was held that the provisions of section 112(3) of the CPA does not offer a meaningful mechanism for the determination of administrative penalties and that the relationship between the categories of prohibited conduct and the appropriate level of penalty, is blurred and requires clarification.²⁴⁶

Hence, in terms of the application of the NCT, to transgressions of section 29 of the CPA, it is limited to issuing an administrative fine irrespective of the intensity of the unfair conduct in question.²⁴⁷ Should the consumer require additional relief such as damages, he or she would have to seek a civil court and comply with section 69 of the CPA.²⁴⁸

²⁴³ *National Credit Regulator v Shoprite Investments LTD* NCT/32946/2015/140(1) para 118.5.

²⁴⁴ S 112(3)(a-g) of the CPA.

²⁴⁵ Van Eeden & Barnard 464-465.

²⁴⁶ *Western Car Sales* paras 43-54.

²⁴⁷ S 112(1-2) of the CPA.

²⁴⁸ S 69(d) of the CPA.

In terms of the second avenue of relief, the NPA in regulating a transgression of section 29 of the CPA, as a penalty, will have to make reference to section 111 of the CPA, which in relation to penalties, provides the following:

“(1) Any person convicted of an offence in terms of this Act is liable—

(a) in the case of a contravention of section 107 (1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or

(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

(2) Despite anything to the contrary contained in any other law, a Magistrate’s Court has jurisdiction to impose any penalty provided for in subsection (1).”²⁴⁹

In terms of such, a transgression of section 29 of the CPA, will result in the supplier been liable for a fine and/or imprisonment for a period not exceeding 12 months, this is based on the seriousness of the transgression and the Magistrates Courts views on the case.²⁵⁰

However, in practice, an aggrieved consumer might want to rely on his right to be protected against any type of fraudulent, misleading or deceptive representations, as provided for in section 41 of the CPA.²⁵¹ This will provide a more permanent type of protection, as with any type of transgression on section 41 of the CPA, section 51 of the CPA applies.²⁵² This means that should the consumer prove that the representation made by the supplier was misleading, fraudulent or deceptive, such representation will be “blacklisted” and in effect prohibited.²⁵³

Furthermore, by the consumer relying on the legislative text and its remedies, it reduces the need for the consumer to approach the judicial system and obtain a remedy.²⁵⁴ As in many cases, the consumer when seeking the judicial system for assistance has been met with countless obstacles.²⁵⁵

²⁴⁹ S 111(1-2) of the CPA.

²⁵⁰ *Ibid.*

²⁵¹ S 41(1) of the CPA.

²⁵² Van Zyl “Section 29” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 29-11.

²⁵³ S 51(1)(a)(ii-iii) of the CPA.

²⁵⁴ Van Zyl “Section 29” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 29-11.

²⁵⁵ *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and others* 2016 3 All SA 794 (FB) para 47, (hereafter referred to as, “*Auto Niche*”).

Such a view can be seen in the *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and others*, (hereafter referred to as, “Auto Niche”) case, which highlighted how the aim of the CPA - in providing a speedy, fair and inexpensive procedure to the consumer, in the event that the consumer’s fundamental rights have been violated - was not fulfilled;²⁵⁶ as in *casu* the consumer faced a lengthy and expensive litigation procedure.²⁵⁷

3.3 “Unconscionable” Commercial Practices

In terms of “unconscionable” commercial practices, the provisions of sections 40 and 41 of the CPA will have to be transgressed.

3.3.1 Section 40 of the CPA

In terms of transgressing section 40 of the CPA, the consequences of such are not provided for within the wording of the section, as the section only states that in the event of court proceedings, section 51 of the CPA will be applicable, hence allowing the prohibited conduct in question to be “blacklisted”.²⁵⁸

However, various authors have mentioned that the section incorrectly referenced section 51 of the CPA;²⁵⁹ and in actual fact should be considering section 52 of the CPA, which deals with the powers of the courts, in terms of ensuring fair and just conduct, terms and conditions.²⁶⁰

In terms of the interaction between section 52 of the CPA and section 40 of the CPA, a further discussion is required, focusing on: Firstly, the civil courts jurisdiction provided by section 52 of the CPA;²⁶¹ and secondly on what type of remedies and orders these courts can provide in the event that a consumers fundamental right to fair and honest dealing has been transgressed.²⁶²

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ S 40(3) of the CPA; S 51(1)(a)(ii-iii) of the CPA.

²⁵⁹ Du Plessis “Section 40” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 40-14.

²⁶⁰ S 52(1)(a) of the CPA.

²⁶¹ *Ibid.*

²⁶² S 52(3) of the CPA.

In terms of the first aspect, section 52(1) of the CPA holds importance and states the following:

“any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—

(a) the supplier contravened section 40, 41 or 48; and

(b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,

the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3)”.²⁶³

In terms of such, it can be interpreted, that this section of the CPA, has been drafted with numerous unnecessary challenges regarding existing contracts between a supplier and an individual consumer.²⁶⁴ This section should have been drafted and constructed to challenge general, as well as abstract, hindrances plaguing the CPA.²⁶⁵ This unnecessary burden also creates problems regarding judicial control due to the inherent limitations of court involvement already stipulated within the CPA.²⁶⁶ Hence, in terms of such these courts will only have jurisdiction to hear a matter if the CPA does not otherwise provides a remedy to the consumer, which is “sufficient enough” to correct the prohibited conduct that is unfair, unjust, unreasonable or “unconscionable” in nature.²⁶⁷ Furthermore, in conjunction with section 69(d) of the CPA, section 52 of the CPA further limits the civil courts involvement, by providing that the civil courts may only be approached by a consumer, once the consumer has exhausted any and all other remedies available to him or her, as provided for in section 69 of the CPA.²⁶⁸

Lastly, section 52 of the CPA, in its drafting does not make a provincial consumer court applicable in its application, but rather only allows a civil “normal” court to be applicable.²⁶⁹

²⁶³ S 52(1) of the CPA.

²⁶⁴ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-3.

²⁶⁵ *Ibid.*

²⁶⁶ S 69(d) of the CPA; *Ibid.*

²⁶⁷ S 52(1)(a); *Ibid.*

²⁶⁸ S 69(c)(i-iv) of the CPA.

²⁶⁹ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-4.

This highlights the point above of how, the drafting of this section whilst providing detailed functions and powers of the courts in terms of regulating prohibited commercial practices;²⁷⁰ simultaneously provides challenges for such regulation, in terms of the courts regulation, applicability and jurisdiction.²⁷¹

In terms of the second aspect, the type of orders and remedies that the civil courts will be able to provide the consumer in the event that the consumer is subjected to an “unconscionable” commercial practice, can be illustrated through sections 52(2) and 52(3) of the CPA.²⁷²

In terms of the former, this provision is used to ensure that the consumer has been subjected to unfair, unjust, unreasonable or “unconscionable” conduct.²⁷³ This is determined by courts analysing a non-exhaustive list of factors provided by the provision.²⁷⁴ The fact that the list present, is non-exhaustive prompts the courts to consider other factors that it finds relative to the case at hand;²⁷⁵ this action is also aided by the civil courts having inherent jurisdiction.²⁷⁶

In terms of the latter, this provision sets out a list of orders that the court may make, if the court in question finds that the agreement was partly or in entirety “unconscionable”, unjust, unreasonable or unfair – Section 52(3) of the CPA provides the following possible court orders:

“(3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—

- (a) make a declaration to that effect; and
- (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
 - (i) to restore money or property to the consumer;
 - (ii) to compensate the consumer for losses or expenses relating to—
 - (aa) the transaction or agreement; or
 - (bb) the proceedings of the court; and
 - (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier’s conduct”.²⁷⁷

²⁷⁰ S 52(1) of the CPA.

²⁷¹ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-3.

²⁷² S 52(2-3) of the CPA.

²⁷³ S 52(2) of the CPA.

²⁷⁴ *Ibid*; Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-6.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid*.

²⁷⁷ S 52(3) of the CPA.

In terms of section 52(3)(a) of the CPA, this provision allows the courts to declare the agreement in question unfair, unjust, unreasonable or “unconscionable” in part or in entirety.²⁷⁸ Such an agreement or the specific term in the agreement will be regarded as been void.²⁷⁹ In terms of section 52(3)(b) of the CPA, this provision is an extension of the above as it allows the courts to make further orders that it considers to be just and reasonable.²⁸⁰

These orders range from restoration of money lost;²⁸¹ compensation for any expense or loss;²⁸² and lastly requiring the supplier to cease or alter any action that causes a repetition of the prohibited conduct in question (future protection).²⁸³

In terms of the final order listed above, within section 52(3)(b)(iii) of the CPA, it pertains to the prevention of the supplier relying on a term, that has been labelled as been unfair, in future contracts with consumers.²⁸⁴ This power provided to the courts also enables them to alter, amend or adjust any problematic term present within the supplier’s contract.²⁸⁵

This is where exploitation could possibly arise, in that the supplier could cynically and purposefully include unfair terms within their contracts, so that the courts may assist them in ensuring that the contract is in line with the CPA.²⁸⁶ A method to combat such contemptuous actions, on the part of the supplier, is for the courts - when altering, amending or adjusting the problematic terms within the supplier’s contract - to pass an order prohibiting further use of the term in question in a general capacity, thus preventing any evasion of the order by casting a wide net of application.²⁸⁷

²⁷⁸ S 52(3)(a) of the CPA.

²⁷⁹ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-26.

²⁸⁰ S 52(3)(b) of the CPA.

²⁸¹ S 52(3)(b)(i) of the CPA.

²⁸² S 52(3)(b)(ii) of the CPA.

²⁸³ S 52(3)(b)(iii) of the CPA.

²⁸⁴ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-26.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid*; Steenhot “Public and Private Enforcement in the Field of Unfair Contract Terms” 2015 *European Review of Private Law* 599-603.

²⁸⁷ Naudé Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective 2010 *SALJ* 534.

In terms of the courts providing compensation to the consumer for any losses or expenses;²⁸⁸ this refers to the losses and/or expenses actually suffered by the consumer, as well as any appropriate costs that the courts deem fit.²⁸⁹ Furthermore, section 76(1)(c) of the CPA, enables the courts to also provide the following cost order to the consumer, namely:

“(c) award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act”.²⁹⁰

However, regardless of such section 52(3) of the CPA still has its administrative issues especially regarding its application to general and abstract challenges.²⁹¹ Hence, as a precaution the courts should provide more proactive and abstract orders in order to ensure that the unfair or “unconscionable” term in question remains out of the contract both in the present and in the future.²⁹²

The first order that will could be served is that of the court issuing an order that directs the supplier to advise the NCC and provisional consumer protection agencies of its decision, especially if the decision renders the term in question, unfair or “unconscionable”, for all the supplier’s contracts.²⁹³ The second order that could be served, is that of the court in certain scenarios, requiring the court order to be published at the expense of the supplier, as this will aid in having a preventative effect on the suppliers prohibited actions.²⁹⁴ Lastly, an order that could be served involves the courts ordering a phased in penalty on the supplier.²⁹⁵

²⁸⁸ S 52(3)(b)(ii) of the CPA.

²⁸⁹ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (Revision Service 3 2018) 2-26A; *Four Wheel Drive Accessory Distribution CC v Rattan NO* (2018) JOL 40076 (KZD) para 66.

²⁹⁰ S 76(1)(c) of the CPA.

²⁹¹ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (Revision Service 3 2018) 52-26B.

²⁹² Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-27.

²⁹³ Naudé 2010 SALJ 215.

²⁹⁴ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-27.

²⁹⁵ Naudé 2010 SALJ 215.

With that in mind, the next aspect that will be discussed in terms of the interaction between section 52 of the CPA and sections 40 and 41 of the CPA, will pertain to what remedies are actually available to the consumer should these sections be transgressed.

With regards to this new harmonised approach to dealing with transgressions of section 40 of the CPA, the first step that must be discussed is what type of institutions can provide relief to the consumer?

The fact that section 40 of the CPA does not operate in isolation is imperative in answering such. As when section 40 is interpreted and applied in conjunction with sections 4(1) and 69 of the CPA, a number of institutions become available to the consumer, in order to obtain relief.²⁹⁶

These institutions are provided for in section 69 of the CPA, and pertain to, amongst others: An alternative dispute resolution agent;²⁹⁷ the NCC;²⁹⁸ and a civil court.²⁹⁹ In terms of such, it is imperative to keep in mind that, regardless of the fact that section 69 of the CPA, provides numerous avenues of relief to the consumer it has been regarded by many authors as one of the biggest hurdles hindering the CPA's effectiveness.³⁰⁰ Such problematic areas include: Unclear wording, and an absence of a correct and simple route for the consumer to follow in order to obtain redress, as various entities that can be approached for the purposes of redress are not indicated in section 69.³⁰¹ A further discussion of section 69 will follow in the dissertation.

After determining what type of institution is available to the consumer, the next aspect that requires determination is, what type or form of relief does the consumer seek from these institutions?

²⁹⁶ Du Plessis "Section 40" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-14.

²⁹⁷ S 69(c)(iii) of the CPA.

²⁹⁸ S 69(c)(iv) of the CPA.

²⁹⁹ S 69(d) of the CPA.

³⁰⁰ Van Heerden "Section 69" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 69 – 2.

³⁰¹ *Ibid.*

The first form of relief, is a court order allowing for the altering or discontinuation of the “unconscionable” conduct.³⁰² This type of relief is especially effective when the “unconscionable” conduct in question has not yet resulted in the conclusion of the agreement.³⁰³ With regards to the administrative aspects needed in obtaining this type of relief, the following methods can be used: Firstly, the issuing of a compliance notice by the NCC (as mentioned above);³⁰⁴ secondly an order provided for by the NCT;³⁰⁵ and lastly an order by a consumer court.³⁰⁶ If the above methods do not work, the consumer then in terms of section 2(10) of the CPA can rely on his or her common law remedies, and thus apply for an interdict regarding the “unconscionable” conduct in question.³⁰⁷

The second form of relief, is an order confirming that the consumer is not bound to the agreement.³⁰⁸ This type of relief finds its basis in section 52(3) of the CPA, which states that in the event of a contravention of section 40 of the CPA, a court may declare the transaction “unconscionable” in nature, as well as render any other order that the court considers to be just and reasonable in those circumstances.³⁰⁹ In terms of such, it can be interpreted that such a provision could also pertain to an order that states that, the consumer is no longer liable under the agreement in question.³¹⁰

However, a key aspect to keep in mind when applying section 52(3) of the CPA, is that an order stating that the consumer is no longer liable under the agreement in question, can only be given provided that: Firstly, the CPA does not provide any other remedy that is “sufficient enough” to rectify the relevant prohibited conduct;³¹¹ and secondly, the courts before issuing such an order must consider the purposes of the CPA and the factors provided in section 52(2) of the CPA.³¹²

³⁰² Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-15.

³⁰³ *Ibid.*

³⁰⁴ S 100(1) of the CPA.

³⁰⁵ S 75(4)(b) of the CPA.

³⁰⁶ S 73(5)(b) of the CPA.

³⁰⁷ S 2(10) of the CPA; *Ibid.*

³⁰⁸ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-15.

³⁰⁹ S 52(3)(b) of the CPA.

³¹⁰ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-15.

³¹¹ S 52(1)(b) of the CPA.

³¹² Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-16.

Problems that arise from such requirements are that: Firstly, there is no clear indication as to what is an alternative “sufficient remedy” within the CPA, thus resulting in confusing and ineffective administration;³¹³ and secondly, requiring a court to consider the purpose and the provisions of the CPA, as well as section 52(2) of the CPA could be regarded as been a practical burden on the courts and result in long judicial proceedings – which are not cost effective to the consumer.³¹⁴

The third form of relief is that of restitution. In terms of such, a distinction needs to be drawn between claiming restitution regarding a transfer made in fulfilment of an agreement, that has contravened section 40;³¹⁵ and claiming restitution whereby the transfer itself was obtained in a manner that contravenes section 40 of the CPA.³¹⁶

The former pertains to a situation whereby an agreement was concluded due to “unconscionable” conduct;³¹⁷ whereas the latter pertains to a situation whereby the supplier uses “unconscionable” conduct to obtain the full purchase price of the goods or services in question.³¹⁸ In terms of the former, the court in addressing such and providing an order, will make use of section 52(3)(b)(i) of the CPA, which allows the court to restore any money or property to the consumer, provided that the court has satisfied the requirements of sections 52(1) and 52(2) of the CPA.³¹⁹ The courts in providing this order will be in essence, providing an order that is similar to the common law remedy of, *restitutio in integrum* – which is aimed at placing the parties in a position prior to the transgression.³²⁰

Based on such, it can be presumed that the courts will be able to exercise equitable discretion in excusing the consumer from any inability to return in full what he or she has received from the supplier, thus protecting the consumer from situations whereby added expenses are required from the consumer, due to the supplier’s unfair commercial tactics.³²¹

³¹³ *Ibid.*

³¹⁴ *Auto Niche* para 47.

³¹⁵ Du Plessis “Section 40” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 40-16.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ S 52(1)(2)(3)(b)(i) of the CPA.

³²⁰ Du Plessis “Section 40” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 40-16.

³²¹ *Ibid.*

In terms of the latter, the relief that would be afforded to the consumer will be based on the common law remedy of unjustified enrichment.³²²

The fourth type of relief available to the consumer, is that of damages. The purpose of this type of relief is to provide monetary compensation to the consumer, which will be of a sufficient amount to place the consumer in the position whereby the “unconscionable” act had not been committed and its effect will be marginalised.³²³

In terms of awarding the compensation, the courts when providing such an order must take into account sections 52(3) and 115(2)(b) of the CPA. In terms of the latter, a finding by the NCT and certification by the chairperson of the NCT is required, before any compensation is provided.³²⁴ Such a finding by the NCT must contain the following information:

“(i) certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;

(ii) stating the date of the Tribunal’s finding, if any; and

(iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any.”³²⁵

The final type of relief that is available to the consumer, is that of adaptation. This pertains to an order made by the court on the backing that the court has determined that the agreement in question is “unconscionable” in nature.³²⁶ The order will allow for the agreement to be modified or adapted to remove the “unconscionable” aspects of the agreement.³²⁷

3.3.2 Section 41 of the CPA

With regards to section 41 of the CPA, the only major differentiating factor between its regulation and section 40 of the CPA, with regards to providing relief to the consumer, is in terms of the forms of relief available. Thus the same institutions providing relief to a section 40 transgression, are also applicable here.³²⁸

³²² *Ibid.*

³²³ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-17.

³²⁴ S 115(2) of the CPA; Van Eeden & Barnard 58.

³²⁵ S 115(2)(b)(i-iii) of the CPA.

³²⁶ S 52(3)(b) of the CPA.

³²⁷ *UNIDROIT Principles of International Commercial Contracts* 2016, (hereafter referred to as, “*UNIDROIT PICC*”) Articles 451- 455.

³²⁸ S 69 of the CPA.

The first form of relief available to the consumer, is a court order allowing for the altering or discontinuation of the misrepresentation in question.³²⁹ This type of relief is predominantly successful when dealing with a supplier that is constantly engaged in prohibited representations.³³⁰ With regards to the administrative aspects needed in achieving such a relief, they are identical to those needed to obtain a court order to either alter or discontinue the “unconscionable” conduct in question, as seen in section 40 of the CPA (as discussed above).³³¹

The second form of relief available to the consumer, pertains to a court order confirming that the consumer is not bound to the agreement in question.³³² In other words, a contravention of section 41 of the CPA by the supplier could result in the consumer not being bound to the agreement, as it will be regarded as being void from its inception.³³³ Furthermore, a contravention of section 41 of the CPA by the supplier, will result in section 52(3) of the CPA becoming applicable, provided all the requirements of sections 52(1) and 52(2) of the CPA have been fulfilled.³³⁴

The third form of relief available to the consumer, is that of restitution.³³⁵ If section 41 of the CPA is transgressed, a court may make an order for compensation as provided for in section 52(3)(b)(i) of the CPA, provided all the requirements of sections 52(1) and 52(2) of the CPA have been fulfilled.³³⁶

The fourth form of relief available to the consumer is that of damages.³³⁷ When section 41 of the CPA has been transgressed, it is important to take note that the CPA does not require any particular state of mind for the contravention to occur, meaning that the damages may be claimed by the consumer in the absence of fault.³³⁸

³²⁹ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-16.

³³⁰ *Ibid.*

³³¹ S 73(5)(b) of the CPA; S 75(4)(b) of the CPA; S 100(1) of the CPA.

³³² Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-17.

³³³ S 52(4) of the CPA; Van Der Merwe, Van Huyssteen, Reinecke & Lubber *Contract: General Principles* (2012) 22-24.

³³⁴ S 52(3) of the CPA.

³³⁵ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-17.

³³⁶ S 52(3)(b)(i) of the CPA.

³³⁷ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-18.

³³⁸ *Ibid.*

This differs from the common law position, as in terms of such, fault is an imperative requirement when claiming damages as a result of a misrepresentation.³³⁹ Furthermore, a contravention of section 41, will also warrant a section 52(3) of the CPA court order, as well as enable the consumer to claim for collective damages.³⁴⁰

The final form of relief available to the consumer is that of adaptation.³⁴¹ This form of relief pertains to the modification of the agreement, in order to remove or curb the prohibited representation, on the part of the supplier.³⁴² However, such an order can only be made if the courts are satisfied that the agreement has transgressed section 41 of the CPA, and that such an order is just and reasonable.³⁴³

Lastly, in terms of transgressing section 41 of the CPA, the aspect of contractual regulations holds importance.³⁴⁴ As in some instances, suppliers and consumers conclude agreements whereby the consequences of committing a false representation, are regulated by the agreement rather than the legislation.³⁴⁵ Hence, the consumer in that regard must seek relief through the agreement itself rather than the legislation.³⁴⁶

3.3.3 Common Law Remedies

As an alternative, the consumer may rely on their common law remedies in the event that their consumer rights have been infringed. This view is highlighted by section 2(10) of the CPA, which states the following: “No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law”.³⁴⁷ Furthermore, this section must be read with section 4(2)(a) of the CPA, which provides that, “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)”.³⁴⁸

³³⁹ *Ibid.*

³⁴⁰ S 52(3) of the CPA; S 76(1)(c) of the CPA.

³⁴¹ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-18.

³⁴² *UNIDROIT PICC* Articles 455-456.

³⁴³ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-18.

³⁴⁴ *Ibid.*

³⁴⁵ *Smith v Smith* 1954 (3) SA 434 (SWA) 436, (hereafter referred to as, “*Smith*”)

³⁴⁶ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-18.

³⁴⁷ S 2(10) of the CPA.

³⁴⁸ S 4(2)(b) of the CPA.

In terms of such, a consumer who wishes to engage with his or her common law remedies, should state that all other remedies available to him or her in terms of the CPA have been exhausted, including any alternative dispute resolution mechanisms.³⁴⁹

In the alternative should the consumer wish to invoke only the CPA's remedies and not consider the common law remedies available to him or her, the following considerations should be heeded:

Firstly, should the consumer elect to engage in legislative relief and specifically section 69(d) of the CPA, the consumer needs to provide evidence indicating that all other avenues of relief present within the section have been exhausted;³⁵⁰ and secondly, should the consumer wish to approach the civil courts, he or she must be aware of the time constraints and limitations present with such, as depicted in section 116 of the CPA and provisions within the Prescription Act 68 of 1969.³⁵¹

3.3.4 Section 51 of the CPA

A fail safe, with regards to the supplier transgressing sections 40 and 41 of the CPA, is that of section 51 of the CPA, which applies to both the above sections in the event that the consumer approaches a civil court, for an adequate remedy.

Section 51 of the CPA in its regulation sets out a list of absolutely prohibited contractual terms, which are void to the extent that they contravene the section.³⁵² This list is commonly and colloquially referred to as the "blacklist" of terms.³⁵³

This list, applies to all contractual terms covered by the CPA, including any term that is negotiated between business and small business contracts, provided these businesses fall within the ambit of the CPA.³⁵⁴ In terms of its origin, section 51 of the CPA was inspired by the NCA, and its provisions on unlawful conduct and contractual terms.³⁵⁵

³⁴⁹ Van Eeden & Barnard 529.

³⁵⁰ S 69(d) of the CPA; *Ibid*.

³⁵¹ S 116 of the CPA; S 11 of the Prescription Act 68 of 1969 (as amended); *Ibid*.

³⁵² S 51(3) of the CPA.

³⁵³ Naudé "The use of black and grey lists in unfair contract terms legislation in comparative perspective" 2007 *SALJ* 128-130.

³⁵⁴ Naudé "Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008" 2017 *TSAR* 138.

³⁵⁵ S 90 of the NCA.

In terms of its application, section 51 applies to, amongst other terms, the following key terms: Firstly, any exemption clause in respect of gross negligence;³⁵⁶ secondly, terms that allow for a transfer of the consumer's claim against the Guardians Fund;³⁵⁷ thirdly, terms that allow for false acknowledgements by the supplier stating that there were no representations or warranties, or that goods, services or a required document was received by the consumer;³⁵⁸ fourthly, any term that requires the consumer to forfeit any money to the supplier, in the event that the consumer exercises any fundamental consumer right in terms of the CPA, or in the situation whereby the supplier is not entitled to that money;³⁵⁹ and lastly the five types of unfair enforcement clauses.³⁶⁰

With regards to, prohibiting exemption clauses in respect of gross negligence, section 51 of the CPA states that instances of ordinary negligence on the part of the supplier will not always be accepted.³⁶¹ Furthermore, in the event that the CPA is unable to regulate such a term, regulation 44(3) of the CPA will provide a safety net and will be able to regulate clauses that are aimed at excluding the supplier's liability with regards to the negligent act in question.³⁶²

With regards to terms that allow for the supplier to make a false acknowledgement regarding the presence of warranties, section 51(1)(g)(i) of the CPA prohibits such, provided that the representation was made before the inception of the contract and that no representation was made in connection with the agreement by the supplier or someone acting on behalf of the supplier.³⁶³ However in terms of regulating such, a more extensive approach is provided for in regulation 44(3) of the CPA, which refers to, "limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition which depends exclusively on the supplier."³⁶⁴

³⁵⁶ S 51(1)(c)(i-ii) of the CPA.

³⁵⁷ S 51(1)(f) of the CPA.

³⁵⁸ S 51(1)(g) of the CPA.

³⁵⁹ S 51(1)(b) of the CPA.

³⁶⁰ S 51(1)(i-j) of the CPA.

³⁶¹ Naudé "Section 51" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 51-4.

³⁶² Regulation 44(3)(b) of the CPA.

³⁶³ S 51(1)(g)(i) of the CPA.

³⁶⁴ Regulation 44(3)(c) of the CPA.

Hence, it can be ascertained that regulation 44(3) of the CPA will provide an extra net of application and thus will aid in curtailing prohibited conduct committed by the supplier.³⁶⁵ A further criticism of section 51's regulation of this type of term, is that such a term should not have been "blacklisted", but rather "grey listed" and thus fall under the ambit of regulation 44 of the CPA.³⁶⁶ Furthermore, the applicability of section 51 of the CPA to these transactions, prevents small businesses and franchises from negotiating and expressly agreeing to a term, to the effect that their written agreement will be the sole record of their transaction and due to such no party would be able to rely on the alleged representation or warranties that have not been recorded in the written agreement.³⁶⁷

With regards to terms that require the consumer to forfeit any money to the supplier, section 51(1)(b) of the CPA will be applicable.³⁶⁸ However with regards to its application to situations of where the consumer has to provide money to the supplier, which he or she is not entitled to, such application is met with scepticism.³⁶⁹ As in terms of such, it can be interpreted that such a forfeiture clause is actually invalid, unless the forfeiture clause is specifically allowed by law.³⁷⁰

A way to rectify such scepticism is to alter the manner in which section 51(1)(b) of the CPA is interpreted.³⁷¹ According to Naudé, it should be interpreted in a manner in which it states that a forfeiture clause is valid unless prohibited by the CPA or any other recognised law.³⁷² This view removes a narrow interpretation of the provision, and is also in line with the trite presumption of statutory interpretation.³⁷³

The last term that will be mentioned is that of the five types of unfair enforcement clauses, which are provided for in section 51(1)(i) and 51(1)(j) of the CPA.

³⁶⁵ Naudé 2007 *SALJ* 128-129.

³⁶⁶ Naudé "Section 51" in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 51-4.

³⁶⁷ Naudé "The Consumer's 'Right To Fair, Reasonable and Just Terms' Under The New Consumer Protection Act in Comparative Perspective" 2009 *SALJ* 523.

³⁶⁸ S 51(b) of the CPA.

³⁶⁹ Naudé "Section 51" in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 51-4.

³⁷⁰ Naudé "Section 51" in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 51-5.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ Du Plessis *Re-Interpretation of statutes* (2002) 252.

In terms of assuring that these prohibited conducts are not circumvented, section 51(2)(a) of the CPA provides that a supplier may also not directly or indirectly require or induce a consumer into entering a supplementary agreement, or sign any document that contains a provision that is prohibited under section 51 of the CPA.³⁷⁴

With regards to the interaction between sections 51 and 40 of the CPA, the former finds application with regards to contractual terms aimed at excluding liability of the supplier for conduct that is prohibited under section 40 of the CPA.³⁷⁵ Such a contractual term will be “blacklisted” under section 51 of the CPA as it goes against the purposes of the CPA, and furthermore tries to set aside the effect of section 40, which will result in an unlawful action in the eyes of the CPA.³⁷⁶ Furthermore, excluding the liability of the supplier, when he or she has committed conduct that is recognised by section 40 of the CPA, will also have common law implications as such a term will be contrary to public policy.³⁷⁷

With regards to the interaction between sections 51 and 41 of the CPA, the former finds application, in terms of section 51(1)(g)(i). In terms of such, it is held that such a term (that acknowledges that no representation, pertaining to warranties or guaranties, was made to the parties in question), is regarded as been void and the implication of such is that a supplier cannot rely on such a term to exclude liability whenever a representation is made to the consumer.³⁷⁸

Furthermore, whether the representation was made intentionally, negligently or innocently, is irrelevant in terms of the CPA.³⁷⁹ The supplier in this scenario will be liable for any representation in terms of section 41 of the CPA, as well as the common law of contract.³⁸⁰

Finally, the last point of discussion regarding section 51 of the CPA, is that of its interaction with regulation 44 of the CPA.

³⁷⁴ S 51(2)(a) of the CPA.

³⁷⁵ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-18.

³⁷⁶ S 51(1)(a)(i) of the CPA, read with S 3 of the CPA.

³⁷⁷ *Barkhuizen* para 82.

³⁷⁸ S 51(3); Du Plessis “Section 51” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-19.

³⁷⁹ Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-19.

³⁸⁰ S 2(10) of the CPA; *Ibid.*

In terms of regulation 44 of the CPA, its application is based only on “true” business to consumer transactions, whereby the suppliers are contracting for the sole benefit of their businesses; and whereby the consumer is contracting for a purpose unrelated to their business.³⁸¹

The list present within regulation 44 is non-exhaustive and establishes a presumption that the terms listed may be fair in terms of the particular circumstances of the case, however the onus of proof is on the supplier to prove that the term in question is fair.³⁸² Furthermore, its application also extends to negotiated terms between the supplier and the consumer, and this is imperative as if such a term was excluded from its ambit it may result in a supplier engaging in superficial attempts to negotiate terms without having the intention to actually change them, just to avoid its application.³⁸³

In terms of section 51 of the CPA and regulation 44, it can be held that these provisions and regulations improve the effectiveness of the control of unfair terms by the CPA, and lead to greater certainty in determining what terms are fair or unfair.³⁸⁴ However, in terms of the most effective avenue of prohibition, it can be held that “blacklisted” terms are more effective in ensuring proactive control, when compared to “grey listed” terms.³⁸⁵ In other words, the extent of regulation 44 of the CPA is less extensive and threatening than the basic ambit of the CPA, in terms of consumer agreements.³⁸⁶

Hence, it is proposed that a number of terms present in regulation 44 of the CPA should be transferred and identified within the provisions of section 51 of the CPA.³⁸⁷ Examples of such terms include: Firstly, terms that allow the supplier to increase the agreed price of the goods or services in question, without giving the consumer the right to terminate the agreement;³⁸⁸ and secondly terms that enables the supplier to unilaterally alter the terms of the agreement, such as the quantity and quality of the goods or services in question.³⁸⁹

³⁸¹ Regulation 44(1) of the CPA.

³⁸² Regulation 43(2) of the CPA.

³⁸³ Naudé 2017 *TSAR* 138.

³⁸⁴ Sharrock "Judicial control of unfair contract terms: the implications of the Consumer Protection Act" 2010 *SA Merc LJ* 317.

³⁸⁵ Naudé "Section 51" in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 51-6.

³⁸⁶ Van Eeden & Barnard 268.

³⁸⁷ *Ibid.*

³⁸⁸ Regulation 44(3)(h) of the CPA.

³⁸⁹ Regulation 44(3)(i) of the CPA

3.4 Conclusion

With regards to unfair and “unconscionable” commercial practices, this chapter discussed and analysed the remedies that are available to the consumer, should he or she be subjected to such commercial practices.

In terms of unfair commercial practices, the main section of the CPA that is transgressed is that of section 29. The remedies afforded to the consumer in this regard are based on the “ordinary” remedies present within the CPA.³⁹⁰ However, the most beneficial remedy available to the consumer is present within section 41 of the CPA, which prohibits any representations that is misleading, fraudulent and deceptive.³⁹¹ Furthermore, should this section also be transgressed, section 51 of the CPA becomes applicable, enabling the prohibited term within the agreement to be “blacklisted”.³⁹²

In terms of “unconscionable” commercial practices, the sections of the CPA that are transgressed, are those of sections 40 and 41. With regards to the supplier transgressing these sections, the remedies provided for are based on section 52 of the CPA, which provides the courts with orders on how to address an agreement that is either in whole or in part, “unconscionable” in nature.³⁹³

In terms of such, due to administrative problems regarding section 52 of the CPA, the courts should keep in mind alternative orders to hinder the supplier’s prohibited conduct, such as requiring the court order to be published at the expense of the supplier.³⁹⁴ In the alternative, the consumer, in such a case, can also invoke his or her common law remedies.³⁹⁵

With regards to the supplier transgressing section 40 of the CPA, the process of obtaining a remedy is twofold, in that firstly, the consumer must determine which institution he or she will approach; and secondly, determine what form of relief he or she seeks.

³⁹⁰ S 68-71 of the CPA.

³⁹¹ S 41 of the CPA.

³⁹² S 51(1)(a)(ii-iii) of the CPA; Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-11.

³⁹³ S 52(1)(a) of the CPA.

³⁹⁴ Naudé “Section 52” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 52-27.

³⁹⁵ S 2(10) of the CPA.

In terms of the first aspect, the available institutions are listed in section 69 of the CPA, due to its interaction with section 40 of the CPA.³⁹⁶ In terms of the second aspect, the remedies available to the consumer will find basis from section 52(3) of the CPA.³⁹⁷ Some of the applicable court orders available to the consumer range from a court order altering or discontinuing the “unconscionable” conduct in question;³⁹⁸ to a court order providing the consumer with either restitution, damages or adaption of the contract in question.³⁹⁹

With regards to the supplier transgressing section 41 of the CPA, the consumer in this scenario will only have to determine what type of relief he or she seeks, as the institutions available are identical to what is provided for in section 40 of the CPA.⁴⁰⁰ In terms of such, the relief available to the consumer will also be based on section 52(3) of the CPA.⁴⁰¹

Some of the applicable court orders would range from: A court order altering or discontinuing the misrepresentation present;⁴⁰² to a consumer been able to claim for damages and restitution for losses and expenses suffered.⁴⁰³ As an alternative remedy, the consumer must be mindful of contractual regulations.⁴⁰⁴

Lastly, this chapter discussed the provision of section 51 of the CPA, which in conjunction with regulation 44 of the CPA, provides a watchdog function to any type of prohibited conduct. In terms of Section 51 of the CPA, it sets out a list of absolutely prohibited contractual terms – Which are referred to as the “blacklist” of terms.⁴⁰⁵ It furthermore, interacts with sections 40 and 41 of the CPA. In terms of the former, section 51 finds application with regards to contractual terms aimed at excluding liability of the supplier for conduct that is prohibited under section 40 of the CPA.⁴⁰⁶

³⁹⁶ S 69 of the CPA, read with S 40 & 4(1) of the CPA.

³⁹⁷ S 52(3) of the CPA.

³⁹⁸ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-15.

³⁹⁹ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-16 & 40-17; *UNIDROIT PICC* 2016 Articles 451- 455.

⁴⁰⁰ S 73(5)(b) of the CPA; S 75(4)(b) of the CPA; S 100(1) of the CPA.

⁴⁰¹ S 52(3) of the CPA.

⁴⁰² Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-16.

⁴⁰³ S 52(3)(b)(i) of the CPA; Du Plessis “Section 41” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 41-18.

⁴⁰⁴ *Smith* 436.

⁴⁰⁵ S 51(3) of the CPA; Naudé 2007 *SALJ* 128-130.

⁴⁰⁶ Du Plessis “Section 40” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 40-18.

Such a term will be “blacklisted” as it goes against the purposes of the CPA;⁴⁰⁷ it tries to set aside the effect of section 40 of the CPA;⁴⁰⁸ and furthermore, is contrary to public policy.⁴⁰⁹ In terms of the latter, section 51 of the CPA will render the prohibited representation as a “blacklisted” term, as well as ensure that the supplier will be liable for any representation in terms of section 41 of the CPA, and the common law of contract.⁴¹⁰

Thus, it can be interpreted that section 51 of the CPA in conjunction with regulation 44 of the CPA, provides greater certainty in determining what terms are fair or unfair.⁴¹¹ However, in terms of the most effective avenue of prohibition, section 51 of the CPA is preferred.⁴¹²

⁴⁰⁷ S 3 of the CPA.

⁴⁰⁸ S 51(1)(a)(i) of the CPA, read with S 3 of the CPA.

⁴⁰⁹ *Barkhuizen* para 82.

⁴¹⁰ S 2(10) of the CPA; *Ibid.*

⁴¹¹ Sharrock 2010 SA *Merc LJ* 317.

⁴¹² Naudé “Section 51” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 51-6.

CHAPTER 4: WHAT CHALLENGES ARE ENCOUNTERED, WHEN APPLYING THE CPA TO UNFAIR AND “UNCONSCIONABLE” COMMERCIAL PRACTICES?

4.1 Introduction

This chapter will discuss and highlight what type of challenges are encountered, when applying the CPA to unfair and “unconscionable” commercial practices. In terms of the former, this chapter will focus on the rise of direct marketing within the modern consumer market and whether the provisions present within the CPA will be able to regulate such.⁴¹³ In terms of the latter, this chapter will highlight the following aspects namely: the administrative problems regarding using section 40 of the CPA as a defensive tool;⁴¹⁴ and will also provide a brief discussion on section 69 of the CPA, in relation to remedial actions.⁴¹⁵

4.2 Unfair Commercial Practices

In terms of section 29 of the CPA, a consumer is afforded the fundamental consumer right to fair and responsible marketing;⁴¹⁶ this right, amongst other aspects, imposes a general standard on the supplier, that must be complied with, when dealing with the marketing of goods or services.⁴¹⁷ This general marketing standard present within the CPA regulates and prohibits numerous marketing practices such as, direct marketing.⁴¹⁸

4.2.1 The Rise of Direct Marketing

In terms of the above, the main marketing practice that could test the general marketing standard present within section 29 of the CPA, would be that of direct marketing, due to its dramatic increase in the current consumer market.⁴¹⁹ In order to address such a statement, a twofold approach is required. The first aspect that will be discussed is the origin of the increase of direct marketing within the consumer market.

⁴¹³ S 32 of the CPA.

⁴¹⁴ S 40 of the CPA.

⁴¹⁵ S 69 of the CPA.

⁴¹⁶ Chapter 2 Part E of the CPA.

⁴¹⁷ S 29 of the CPA.

⁴¹⁸ S 32 of the CPA.

⁴¹⁹ S 29 of the CPA; Ayemoba (Accessed 18 September 2018).

The second aspect that will be discussed pertains to what provisions are present within the CPA to regulate direct marketing, and whether these provisions are still capable of regulating such a marketing practice.

In terms of the first aspect, the rise of direct marketing, within the modern consumer market, was stated by Ayemoba who held that, “An estimated 1.3 million independent business owners have generated R12.9 billion for the national economy in the form of sales directly to customers”.⁴²⁰ This depicts the popularity of direct selling and direct marketing within our consumer market, as well as highlights how this type of commercial practice can contribute to an economy that is in peril, whilst in the process invoke job creation and employee skills development.⁴²¹

This view was furthermore promulgated by the Chairman of the Direct Selling Association of South Africa, Ernest Du Toit, who stated that, the role of direct marketing and direct selling within our economy has adapted in that it,

“adds value to lives, giving people the opportunity to achieve financial independence, without the limitations of being office bound [and] this is a very attractive proposition, especially in today’s modern society where single-parent families struggle to balance their home and working lives”.⁴²²

Hence, it can be ascertained that the role of direct sales and direct marketing within our modern consumer market is imperative - for the interim.⁴²³ This temporary view of economic relief is based on the fact that direct marketing and direct selling has provided the supplier of such services with the ability to earn an income without necessarily having any qualifications or recommendations, it in essence provides the supplier with enough of an income to float in the economic peril that is drowning our country.⁴²⁴

With regards to the second aspect, the CPA regulates direct marketing through section 32, which states that:

⁴²⁰ Ayemoba (Accessed 18 September 2018).

⁴²¹ *Ibid.*

⁴²² Leonie Wagner ‘Bad times bring boom for direct-sales industry’ 25 February 2018 <https://www.pressreader.com/south-africa/sunday-times/20180225/281947428337474> (Accessed 18 September 2018), (hereafter referred to as, “Leonie”).

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

“(1) A person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement, as set out in section 16.

(2) If a person who has marketed any goods as contemplated in subsection (1) left any goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 21 applies”.⁴²⁵

This section in its regulation of direct marketing should not be read in isolation, some of the sections it incorporates in its application are: Section 11 of the CPA, which regulates the consumers right to restrict unwanted direct marketing;⁴²⁶ section 12 of the CPA, which regulates the time and dates upon which suppliers may conduct direct marketing;⁴²⁷ section 16 of the CPA, which provides the consumer with a “cooling off right” – which is a right enabling the consumer to cancel the contract as a result of direct marketing;⁴²⁸ section 20(2)(a) of the CPA which exercises the “cooling off right” present within section 16 of the CPA;⁴²⁹ and section 21 of the CPA, which regulates unsolicited goods that are left in possession of the consumer after direct marketing.⁴³⁰

With regards to section 32(1) of the CPA, this sub-section pertains to the “cooling off right” as discussed by section 16 of the CPA and enforced by section 20(2)(a) of the CPA.⁴³¹ In terms of such, the consumer can return the goods, supplied through direct marketing, to the supplier within five business days, of the latter of the following two dates, either: The date upon which the contract or transaction was concluded; or the date upon which the goods, in question, were delivered to the consumer.⁴³²

The justification for the “cooling off right” mentioned above is that in terms of modern high pressure selling and in particular direct selling, the consumer’s choice is often overlooked, hence the consumer should be afforded an opportunity for, more mature reflection and reconsideration regarding the agreement in question.⁴³³ This would aid the consumers in making a confident, value based decision.⁴³⁴

⁴²⁵ S 32 of the CPA.

⁴²⁶ S 11 of the CPA.

⁴²⁷ S 12 of the CPA.

⁴²⁸ S 16 of the CPA.

⁴²⁹ S 20(2)(a) of the CPA.

⁴³⁰ S 21 of the CPA.

⁴³¹ S 16 of the CPA; S 20(2)(a) of the CPA; S 32(1)(a) of the CPA.

⁴³² S 16(3) of the CPA.

⁴³³ Van Eeden & Barnard 27.

⁴³⁴ *Ibid.*

However, its application according to Van Eeden and Barnard requires review, as the current wording of section 16 of the CPA is too vast and inclusive, which could lead to administrative hindrances.⁴³⁵ Hence, according to Van Eeden and Barnard, section 16 of the CPA should only be applicable to consumers who are not juristic persons as well as to transactions that have been concluded away from the business premises.⁴³⁶

In terms of enforcing such a right, the supplier must according to section 16(4)(a)(i-ii) of the CPA provide the following:

“(4) A supplier must—

(a) return any payment received from the consumer in terms of the transaction within 5 business days after—

(i) receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction; or

(ii) receiving from the consumer any goods supplied in terms of the transaction;”⁴³⁷

Furthermore, due to an absence of guidance regarding the form that is needed in order to make the consumer aware of such a right, the supplier must inform the consumer of the existence of the following aspects, namely: His or her “cooling off right”; the time period involved, and the fact that notice to cancel such a transaction or contract must be done in writing.⁴³⁸ An additional requirement was raised by Barnard, who held that the supplier in informing the consumer of the above, should also make the consumer aware of the implications present with regards to failing to adhere to the provided time periods,⁴³⁹ as well as the allowable deductions as provided for in section 20(6) of the CPA.⁴⁴⁰

⁴³⁵ Van Eeden & Barnard 238

⁴³⁶ *Ibid.*

⁴³⁷ S 16(4)(a)(i-ii) of the CPA.

⁴³⁸ Van Zyl & De Stadler “Section 32” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 32-2.

⁴³⁹ Barnard “An Appraisal of a consumer’s cooling-off right in terms of section 16 of the Consumer Protection Act 68 of 2008” 2016 79 *THRHR* 499.

⁴⁴⁰ S 20(6) of the CPA; *Ibid.*

With regards to the above, the European Union Directive on consumer rights might be able to share some insight on how the CPA can improve their notification regulations.⁴⁴¹ In terms of the directive, the following is granted onto the consumer namely: A 14 day “cooling-off period” as well as the duty on the supplier to notify the consumer of the existence of such a “cooling off period”.⁴⁴² The “cooling off period” will also only start once the consumer has been notified of its existence, if not the “cooling off period” will be a period of 12 months which runs from the date upon which the goods were delivered or the services performed – However if during such a period the consumer becomes aware of the his or her “cooling off period”, the 12 month time period lapses and the former, 14 day period comes into existence.⁴⁴³

The incorporation of such into the CPA will be beneficial in scenarios whereby the supplier has failed to inform the consumer of his or her section 16 right.⁴⁴⁴

An added impact of section 32 of the CPA on the supplier is that, the supplier in terms of this section of the CPA is required to inform the consumer of a particular right.⁴⁴⁵ This type of duty on the supplier has been met with scepticism, as many suppliers have developed the notion that only if the CPA requires an explanation, is it actually warranted by the supplier.⁴⁴⁶ In terms of such, the main aspect that needs to be adhered to by suppliers, is that they should not present a misguided view of the rights and obligations that are afforded to the consumer, as if such occurs, the supplier could be found guilty of contravening sections 29 and 41 of the CPA.⁴⁴⁷

In terms of section 32(2) of the CPA, this sub-section deals with the relationship between direct marketing and unsolicited goods.

⁴⁴¹ *Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011*, (hereafter referred to as, “*Directive 2011/83/EU*”).

⁴⁴² *Directive 2011/83/EU* Article 6(1)(b).

⁴⁴³ *Directive 2011/83/EU* Article 10(1).

⁴⁴⁴ Van Zyl & De Stadler “Section 32” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 32-3.

⁴⁴⁵ S 32(1) of the CPA.

⁴⁴⁶ Van Zyl & De Stadler “Section 32” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 32-3.

⁴⁴⁷ S 29 of the CPA; S 41 of the CPA; Van Zyl & De Stadler “Section 32” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 32-4.

In terms of such, it provides a serious caveat to suppliers, in that if any goods are left in the possession of the consumer without the supplier (direct marketer) arranging for the payment of the goods in question, such goods will be regarded as been unsolicited goods - meaning goods that the consumer did not ask or request for.⁴⁴⁸

The consequences of such, are twofold: Firstly, the consumer can choose to keep the goods, free of charge;⁴⁴⁹ or the consumer can choose to return the goods back to the supplier at the supplier's expense.⁴⁵⁰ The supplier (direct marketer) can avoid the goods becoming unsolicited if he or she informs the consumer within 10 days that the goods were delivered in error, and ensures that the goods will be collected within 20 days of the consumer receiving the 10 day notice.⁴⁵¹ Furthermore, the supplier can also avoid the goods becoming unsolicited if the consumer fails to inform the supplier that the goods have been delivered to him or her in error.⁴⁵²

Thus in conclusion, it can be held that the role of direct marketing within our modern consumer society has developed a more prominent role, by providing consumers with a steady flow of income in order to combat the turmoil that is the South African economy.⁴⁵³ In terms of regulating and coping with such a rise, section 32 of the CPA provides duties on the supplier, to ensure that the activity of direct marketing and direct selling, is restricted and regulated in order to protect the consumer.⁴⁵⁴ Furthermore, due to section 32 of the CPA not operating in isolation, if the supplier chooses to contravene such a section, the supplier's actions will be interpreted as a criminal offence and will result in either or both ten years imprisonment or a fine.⁴⁵⁵ Lastly, in terms of regulating direct marketing within the modern consumer market, such a regulation is a welcomed relief to consumers.⁴⁵⁶

4.3 “Unconscionable” Commercial Practices

With regards to the CPA, regulating “unconscionable” commercial practices, this chapter will discuss the following challenges that may be encountered:

⁴⁴⁸ S 32(2) of the CPA read with S 21(1)(a) of the CPA.

⁴⁴⁹ S 21(7) of the CPA.

⁴⁵⁰ S 21(5) of the CPA.

⁴⁵¹ S 21(2)(a) of the CPA; S 21(3)(a) of the CPA; S 21(3)(c) of the CPA.

⁴⁵² S 21(2)(b) of the CPA.

⁴⁵³ Leonie (Accessed 18 September 2018).

⁴⁵⁴ Van Eeden & Barnard 587.

⁴⁵⁵ S 107 of the CPA.

⁴⁵⁶ Van Eeden & Barnard 588.

Firstly, the administrative problems that arise when using section 40 of the CPA as a defence;⁴⁵⁷ and secondly, the implied hierarchy present in section 69 of the CPA, with regards to remedial action.⁴⁵⁸

4.3.1 Administrative problems that arise when using section 40 of the CPA as a defence.

In terms of such, the administrative problems that arise with using section 40 of the CPA as a defensive, stem from semantics.⁴⁵⁹ As section 40 of the CPA provides the courts with the jurisdiction and the ability to identify and remove any type of conduct or term that is “unconscionable” in nature;⁴⁶⁰ however section 40 of the CPA in providing such power did not provide a concrete meaning to the term “unconscionable”, as well as did not provide steadfast and efficient guidelines for the courts to follow when administering such a defence, on the part of the consumer.⁴⁶¹

The above issue, is further discussed by Glover, who states that the drafting of section 40 of the CPA and its aim of creating a wide scope of “unconscionable” acts has led to the issue discussed above.⁴⁶² Glover, further highlights that the drafters of section 40 of the CPA, did not properly understand what type of section they were creating, when gathering and collecting sources, from other legal systems across the world;⁴⁶³ this resulted in section 40 been the benchmark for highlighting the potential harmful consequences that may arise when there is lack of awareness on the part of drafter, when adapting comparative source material to a domestic context.⁴⁶⁴

In light of such, Glover concludes by stating that, due to the poor drafting skills of section 40 of the CPA, the South African consumer market is facing a semantic issue regarding the defence of “unconscionability”.⁴⁶⁵

⁴⁵⁷ S 40 of the CPA.

⁴⁵⁸ S 69 of the CPA.

⁴⁵⁹ Glover 2013 *TSAR* 691

⁴⁶⁰ S 40 of the CPA; S 52 of the CPA.

⁴⁶¹ Hillman “Debunking some myths about unconscionability: A new framework for UCC section 2-302” 1982 *Cornell Law Review* 1; Glover 2013 *TSAR* 691.

⁴⁶² Glover 2013 *TSAR* 694.

⁴⁶³ Glover 2013 *TSAR* 696.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ Glover 2013 *TSAR* 697.

In that on the one hand, the “unconscionable” act in question, needs to be defined and given context;⁴⁶⁶ however on the other hand, and in most cases, such an “unconscionable” act will not be clearly defined, but rather simply accepted by the judicial official, hence allowing the judge to impact a case rather than the law.⁴⁶⁷

4.3.2 Section 69 of the CPA

Section 69 of the CPA sets out the avenues of redress that are available to a consumer, should his or her consumer rights be violated.⁴⁶⁸ These avenues are highlighted and provided for when section 69 of the CPA is read with sections 40 and 4(1) of the CPA.

The institutions available to the consumer, who has been subjected to an “unconscionable” act, include: The NCT;⁴⁶⁹ an ombud with jurisdiction;⁴⁷⁰ an applicable and accredited industry ombud;⁴⁷¹ a consumer court that has jurisdiction to hear the matter;⁴⁷² an alternative dispute resolution agent;⁴⁷³ the NCC;⁴⁷⁴ and lastly approaching a court that has jurisdiction over the matter, provided that the above avenues have been entered into and, exhausted.⁴⁷⁵

In terms of these avenues, the preferred route is that of engaging with an alternative dispute resolution agent, as in this scenario the matter is kept out of court, resolved timeously, and ensures that both parties walk away content with the decision.⁴⁷⁶ An alternative dispute resolution agent finds its power and functions from section 70 of the CPA and can also be identified from such a provision.⁴⁷⁷

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ S 69 of the CPA; *Simelane v Pretoria Franchise Support Services (Pty) Ltd t/a Fastway Couriers (Pretoria)* NCT/8742/2013/73(3) & 75(1)(b) & (2) para 50.

⁴⁶⁹ S 69(a) of the CPA.

⁴⁷⁰ S 69(b) of the CPA.

⁴⁷¹ S 69(c)(i) of the CPA.

⁴⁷² S 69(c)(ii) of the CPA.

⁴⁷³ S 69(c)(iii) of the CPA.

⁴⁷⁴ S 69(c)(iv) of the CPA.

⁴⁷⁵ S 69(d) of the CPA.

⁴⁷⁶ Van Heerden “Section 69” in Naudé & Eiselen, *Commentary on the Consumer Protection Act (2014)* 69-2.

⁴⁷⁷ S 70(1)(a-d) of the CPA.

However, the main issue that arise from the interaction between sections 69 and 40 of the CPA, is the formers limitation on the access to the civil courts by a consumer, in order to seek relief.⁴⁷⁸ It in other words states that in order for a consumer to approach a civil court, he or she has to make an allegation within his or her particulars of claim, stating that all the avenues of redress present within section 69 of the CPA have been exhausted and subsequently provide proof of such exhaustion.⁴⁷⁹

This interpretation has led to numerous administrative problems and abnormalities such as: Firstly, if the consumer has not exhausted all of his or her remedies available in section 69 of the CPA, is he or she barred from seeking relief from the civil courts?⁴⁸⁰ Secondly, what is the procedure when a court has exclusive jurisdiction to hear a matter that arises from the CPA?⁴⁸¹

However, in terms of addressing the problems above, the judgement of *Chirwa v Transnet Ltd and Others* managed to shed some light on the application of section 69 of the CPA.⁴⁸² It held that where there is a specialised framework that has been created to resolve disputes within the consumer market, such a framework must be primarily followed and abided by.⁴⁸³ Thus, stating that the implied hierarchy present within section 69 of the CPA should be followed.⁴⁸⁴

However, a contradictory point can be made by section 4(3) of the CPA, which states that:

“(3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)”.⁴⁸⁵

⁴⁷⁸ S 69(d) of the CPA.

⁴⁷⁹ *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) paras 6-8, (hereafter referred to “Joroy”).

⁴⁸⁰ Van Heerden “Section 69” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 69-17.

⁴⁸¹ *Ibid.*

⁴⁸² *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC), (hereafter referred to as, “Chirwa”).

⁴⁸³ *Chirwa* para 77.

⁴⁸⁴ Section 3(g) of the CPA.

⁴⁸⁵ S 4(3) of the CPA.

With regards to such, it can be interpreted that section 69(d) of the CPA can be reasonably construed to have more than one meaning, hence allowing section 4(3) of the CPA to become applicable.⁴⁸⁶ In addressing such, there have been a number of cases that highlight the wide and narrow interpretations that can befall section 69 of the CPA.

The first case is that of *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*, which provided a flexible approach to interpreting section 69 of the CPA and held that section 69 of the CPA must be read contextually and in conjunction with section 70 of the CPA.⁴⁸⁷ Furthermore, the court was of the view that had the legislature intended that a specific category of consumers could only be allowed a specific dispute resolution avenue, it would have expressly mentioned such.⁴⁸⁸ It also held that, by limiting a consumer's access to relief, due to a specific order or hierarchy that must be followed, would be against the purpose of the CPA, with regards to providing an accessible, harmonised, effective and efficient system of redress.⁴⁸⁹ Lastly, the court stated that forum shopping (whereby a consumer has a claim that can be exercised in two avenues of redress) is prohibited, and the consumer must choose one avenue of redress.⁴⁹⁰

The second case is that of the *Auto Niche* judgement, which highlighted a wide approach to section 69 of the CPA. As it involved a supplier requesting the consumer to follow the avenues of redress present within section 69 of the CPA, specifically to approach a Motor Industry Ombud, however the supplier did not take into account that such an ombud was not accredited at the time of the request.⁴⁹¹ The court held that the consumer's inability to approach the Motor Industry Ombud (*in casu*) shall not be held against him or her.⁴⁹²

⁴⁸⁶ Van Heerden "Section 69" in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 69-20; *Auto Niche* para 49.

⁴⁸⁷ *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANCHC 1 (unreported case no 1260/2015) (NCK) (1 April 2016) para 27-28, (hereafter referred to as, "*Dipico*").

⁴⁸⁸ *Dipico* para 30

⁴⁸⁹ S 3(1)(h) of the CPA; *Ibid.*

⁴⁹⁰ *Dipico* para 31.

⁴⁹¹ *Auto Niche* para 47.

⁴⁹² *Auto Niche* para 48.

The final case, is that of *Joroy 4440 CC v Potgieter and Another NNO*, which provided a narrow interpretation of section 69 of the CPA, and held that section 69(d) of the CPA could not be reasonable construed to have more than one meaning;⁴⁹³ and hence dismissed the matter as the consumer in question failed to prove that all other avenues of relief present within section 69 of the CPA were exhausted.⁴⁹⁴

Thus, it can interpreted that the section 69 of the CPA, has a undesirable effect on the regulation of “unconscionable” conduct within the consumer market, as its divergent interpretation by the judicial sphere has resulted in confusion in the minds of the consumers, specifically regarding what type of avenue of relief to pursue and when to pursue such.⁴⁹⁵

The impact of such can be seen in the recent case of *Nedbank Limited v Thobejane*.⁴⁹⁶ The issues that arose within this case pertain to: Firstly, the powers of the NCT, in that once the consumer has required assistance from the NCT, the NCT is limited to issuing an administrative fine on the wrongful party and does not have the power to allow for a claim for damages;⁴⁹⁷ secondly, the notion of how suppliers find it easier and more convenient to settle their claims and disputes in the high court.⁴⁹⁸

In terms of these issues, the impact on the consumer, is that they are forced to incur expensive litigation fees, not out of choice, but for simply defending themselves in the judicial sphere.⁴⁹⁹ Furthermore, in terms of the jurisdiction of the courts, in most instance the Magistrates Court has jurisdiction to hear the matter, but out of convenience and trust, suppliers opt to seek relief in the High Court.⁵⁰⁰ With regards to such, the court held that due to the judicial sphere, especially the High Courts, been inundated with issues;⁵⁰¹ if a matter can be heard by a Magistrates Court, the High Court hearing such a matter shall refer the matter to the applicable Magistrates Court in question.⁵⁰²

⁴⁹³ *Joroy* para 8.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Van Heerden “Section 69” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 69-26.

⁴⁹⁶ *Nedbank Limited v Thobejane* 2018 JDR 1681 GP, (hereafter referred to as, “*Thobejane*”).

⁴⁹⁷ *Western Car Sales* paras 17-18 & 53- 54.

⁴⁹⁸ *Thobejane* paras 10 & 29.

⁴⁹⁹ *Thobejane* paras 11.1-11.4.

⁵⁰⁰ *Thobejane* paras 1, 10 & 51.

⁵⁰¹ *Thobejane* paras 15-18 & 25.

⁵⁰² Uniform Rules of Court 39(22); *Thobejane* paras 78-81.

This judgement bodes well for consumers as now their litigations costs will be reduced as the matter will be heard in a Magistrates court as opposed to a High Court.⁵⁰³ However, in terms of accessing the Magistrate Courts, the consumer will still have to go through section 69 of the CPA and provide proof that all the other alternative remedies present within the section have been exhausted.⁵⁰⁴ Hence, unless total jurisdiction is provided to the Magistrates Courts and by extension the small claims court to hear consumer matters;⁵⁰⁵ the consumer will still be plagued by section 69(d) of the CPA.⁵⁰⁶

4.4 Conclusion:

In terms of regulating unfair commercial practices, the CPA in its application and regulation of such, may encounter the challenge of trying to cope with the rapid rise of direct marketing practices. The question discussed in this chapter was whether such a spike could be handled by the provisions present within the CPA.

In addressing such a question, it can be held that the role of direct marketing within our modern consumer society has developed a more prominent role, by providing consumers with a steady flow of income in order to combat the turmoil that is the South African economy.⁵⁰⁷

However in light of such, section 32 of the CPA will still be able to provide duties on the supplier, to ensure that the activity of direct marketing and direct selling, is restricted and regulated in order to protect the consumer.⁵⁰⁸ Furthermore, due to section 32 of the CPA not operating in isolation, if the supplier choses to contravene such a section, the supplier's actions will be interpreted as a criminal offence and will result in either or both ten years imprisonment or a fine.⁵⁰⁹

⁵⁰³ *Thobejane* paras 11.3 & 96.

⁵⁰⁴ S 69(d) of the CPA.

⁵⁰⁵ Uniform Rules of Court 39(22); *Thobejane* para 96.1.

⁵⁰⁶ S 69(d) of the CPA.

⁵⁰⁷ Leonie (Accessed 18 September 2018).

⁵⁰⁸ Van Eeden & Barnard 587.

⁵⁰⁹ S 107 of the CPA.

Hence, even though there has been a spike in direct marketing, the CPA and its provisions will still provide a welcomed relief to consumers by ensuring that there are protected from unwanted marketing and that the supplier abides to the general marketing standard.⁵¹⁰

With regards to regulating “unconscionable” commercial practices, the application of the CPA when regulating such a practice, may encounter the following obstacles, namely: The effective utilisation of section 40 of the CPA as a defensive tool for the consumer; and section 69’s application in terms of remedial action.

In terms of the former, it was highlighted by Glover that the defence of “unconscionability” has numerous administrative issues that stem from semantics.⁵¹¹ As the drafters of section 40 of the CPA failed to take cognisance of the future implications of this section, especially regarding the broad definition of what can be regarded as been an “unconscionable” act, and the lack of guidance provided to the courts to administer such an act.⁵¹²

In terms of the latter, the lack of a concrete method of interpretation regarding section 69 of the CPA, has resulted in many consumers, who been subjected to an “unconscionable” act, perplexed regarding what type of avenue of redress to pursue and whether they can actually pursue such avenues.⁵¹³

Methods that can provide clarity to the above situation include: Firstly, section 69 of the CPA needs to be amended to address all the ambiguities created from its application;⁵¹⁴ secondly, section 4(3) of the CPA should be used in order to create a more wide interpretation of section 69(d) of the CPA and in the process promote the spirit and purposes of the CPA;⁵¹⁵ thirdly, the use of the small claims court should be encouraged provided that there application is extended to consumer matters;⁵¹⁶

⁵¹⁰ Van Eeden & Barnard 588; Section 12 of the CPA read with Regulation 4 of the CPA; S 29 of the CPA; S 32 of the CPA.

⁵¹¹ Glover 2013 *TSAR* 691.

⁵¹² Hillman 1982 *Cornell Law Review* 1; Glover 2013 *TSAR* 691.

⁵¹³ Van Heerden “Section 69” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 69-26.

⁵¹⁴ Van Eeden & Barnard 453-454.

⁵¹⁵ S 4(3) of the CPA.

⁵¹⁶ Section 34 of the Constitution of the Republic of South Africa, 1996; Naudé “Section 52” in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2014) 52-30; *Thobejane* para 96.1.

and lastly, as the preferred method of redress, alternative dispute resolution agents need to have the ability to render penalties rather than simply adjudicate matters.⁵¹⁷

In the alternative, section 2(10) of the CPA can also aid the consumer, as should the consumer chose to invoke his or her common law rights, he or she does not have to follow the route or implied hierarchy present with section 69 of the CPA, but can approach the civil courts as a first resort.⁵¹⁸ In other words, if the consumer chooses to invoke his or her common law rights, the provisions provided for in section 69 of the CPA, fall away.⁵¹⁹

⁵¹⁷ Van Heerden “Section 70” in Naudé & Eiselen, Commentary on the Consumer Protection Act (Revision Services 3, 2018) 70-4; *Auto Niche* para 48.

⁵¹⁸ S 2(10) of the CPA; Van Heerden “Section 69” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 69-2.

⁵¹⁹ *Ibid.*

5 CONCLUSION

This dissertation was tasked with analysing whether the CPA provides adequate protection to the consumer with regards to unfair or “unconscionable” commercial practices? In terms of addressing such, it highlighted three aims to discuss.

The first aim pertains to critically analysing the provisions of the CPA that regulate unfair and “unconscionable” commercial practices. These provisions are sections 29, 40 and 41 of the CPA.

With regards to unfair commercial practices, the CPA, through section 29, provides the consumer with a wide net of applicability in terms of regulating any type of marketing that is false, misleading or deceptive;⁵²⁰ and furthermore also regulating any type of conduct, on the part of the supplier, that is likely to imply or promote a false, misleading or deceptive representation.⁵²¹ Furthermore, this section does not operate in isolation, meaning it covers not only the advertising and promotion of the goods and services, but as well as the supply of those goods and services, to the consumer in question.⁵²²

With regards to “unconscionable” commercial practices, the CPA also casts a wide net of application, by grouping prohibited conduct by the supplier under one banner, known as “unconscionable” conduct. This wide application is regulated by sections 40 and 41 of the CPA. In terms of regulating “unconscionable” conduct, section 40 of the CPA provides a two-step approach, in that: Firstly, it provides instances and examples of such conduct;⁵²³ and secondly, it addresses the intention and awareness of the supplier’s conduct, with regards to a consumer’s physical or mental disability.⁵²⁴ With regards to section 41 of the CPA, it aids section 40’s regulation by focusing on the intention and conduct of the supplier.⁵²⁵ It also prohibits any type of false, misleading or deceptive representations, on the part of the supplier;⁵²⁶ as well as provides a list of examples of such conduct.⁵²⁷

⁵²⁰ S 29(b) of the CPA.

⁵²¹ S 29(a) of the CPA.

⁵²² Van Zyl “Section 29” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 29-4.

⁵²³ S 40(1) of the CPA.

⁵²⁴ S 40(2) of the CPA.

⁵²⁵ S 41 of the CPA.

⁵²⁶ S 41(1) of the CPA.

⁵²⁷ *Ibid.*

An additional aspect discussed within this dissertation, is the notion of good faith and its incorporation within these provisions. It was held that the notion of good faith has been evident in these provisions especially regarding the general standard of marketing present in section 29 of the CPA;⁵²⁸ as well as the broad regulation of section 40 of the CPA.⁵²⁹ However, it must be heeded that there is still a journey to be had regarding the notion of good faith and its place within our law.

The second aim of this dissertation was to interpret the CPA in order to highlight any remedies available to the consumer, with regards to unfair or “unconscionable” conduct.

In terms of unfair commercial practices, it was held that the consumer is entitled to the “ordinary” remedies present within the CPA.⁵³⁰ These include alternative dispute resolutions,⁵³¹ as well as seeking assistance from the NCC, NCT, and the NPA.⁵³² However, the most beneficial remedy available to the consumer is present within section 41 of the CPA, as when invoked it identifies the prohibited term or conduct in question, and due to section 51 of the CPA been applicable, such a term or conduct will be “blacklisted”.⁵³³

In terms of “unconscionable” commercial practices, the main provision providing the consumer relief is that of section 52 of the CPA, as it enables the courts to have jurisdiction and pass orders on matters whereby a consumer was subjected to an “unconscionable” act partly or in entirety.⁵³⁴ These orders range from the court declaring the term or conduct “unconscionable” in nature;⁵³⁵ to providing compensation to the consumer.⁵³⁶

⁵²⁸ S 29 of the CPA.

⁵²⁹ S 40(1) of the CPA.

⁵³⁰ S 68-71 of the CPA.

⁵³¹ S 70 of the CPA.

⁵³² S 71 of the CPA; S 100(6)(a-b) of the CPA.

⁵³³ S 41 of the CPA read with S 51 of the CPA.

⁵³⁴ S 52(3) of the CPA.

⁵³⁵ S 53(3)(a) of the CPA.

⁵³⁶ S 53(3)(b)(ii) of the CPA.

In addition to such, sections 40 and 41 of the CPA, also fall within the ambit of section 51 of the CPA and regulation 44 of the CPA, which provide a more permanent remedy regarding the prohibited term or conduct, as in terms of section 51 of the CPA, such a term will be regarded as been “blacklisted” and void;⁵³⁷ and in terms of regulation 44 such a term will be regarded as been “grey-listed” and will be interpreted as been voidable.⁵³⁸ In the alternative, the consumer in terms of these prohibited commercial practices, can always seek their common law remedies.⁵³⁹

The final aim of this dissertation involves highlighting and discussing any challenges that may be present when applying the CPA to unfair and “unconscionable” commercial practices.

In terms of unfair commercial practices, one of the challenges that may be encountered when applying the CPA, is the constant rise of direct selling and direct marketing within the current consumer market. However, in terms of such the CPA turns to its prevailing provision, section 32, which provides duties on the supplier, to ensure that the activity of direct marketing and direct selling is restricted and regulated in order to protect the consumer.⁵⁴⁰ It furthermore does not operate in isolation, hence providing harsh penalties to the supplier should he or she contravene this provision.⁵⁴¹

In terms of “unconscionable” commercial practices, the challenges that may plague the CPA in its regulation of such a commercial practice is the effective utilisation of section 40 of the CPA as a defensive tool for the consumer; and section 69’s application in terms of remedial action. With regards to the former, the main issue facing the CPA, is one of semantics, as the drafters of this section failed to take cognisance of the future implications of this section, especially regarding the broad definition of what constitutes an “unconscionable” act,⁵⁴² as well as the lack of guidance provided to the courts to administer such an act.⁵⁴³

⁵³⁷ S 51(1)(a)(ii-iii) of the CPA.

⁵³⁸ Regulation 44(1) of the CPA.

⁵³⁹ S 2(10) of the CPA.

⁵⁴⁰ Van Eeden & Barnard 587.

⁵⁴¹ Van Eeden & Barnard 588.

⁵⁴² Glover 2013 *TSAR* 691.

⁵⁴³ Hillman 1982 *Cornell Law Review* 1; *Ibid.*

With regards to the latter, the lack of a concrete method of interpretation regarding section 69 of the CPA, has resulted in many consumers, who been subjected to an “unconscionable” act, perplexed regarding what type of avenue of redress to pursue and whether they can actually pursue such an avenue.⁵⁴⁴ A method, amongst others, that can be used to rectify such, would be an amendment of the section.⁵⁴⁵ In the alternative, should the consumer invoke his or her common law remedies, they will not have to abide by the provisions of section 69 of the CPA.⁵⁴⁶

Thus in conclusion, it can be held that the CPA in its regulation of unfair and “unconscionable” commercial practices, does provide adequate protection to the consumer. Taking into account the challenges that may be encountered by the CPA when regulating these commercial practices, the CPA still manages to provide the consumer with numerous options to obtain relief as well ensures that their fundamental rights are been recognised. Finally, the CPA, although aged in terms of the modern consumer market still manages to provide the consumer with protection and keep the supplier in check, which in this modern consumer market is priceless.

Word Count: 27525

⁵⁴⁴ Van Heerden “Section 69” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 69-26.

⁵⁴⁵ Van Eeden & Barnard 453-454.

⁵⁴⁶ S 2(10) of the CPA; Van Heerden “Section 69” in Naudé & Eiselen, Commentary on the Consumer Protection Act (2014) 69-2.

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