

**Protection of consumers against unlawful promotional
competitions in South Africa**

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**Olivia Makhosazana Lindhorst
Student number: 25368631**

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Supervisor: Prof J Barnard

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION	4
1.1 Introduction and Background	4
1.2 Statement of the Research Problem.....	6
1.3 Significance of the Study.....	7
1.4 Methodology.....	7
1.5 Structure of the Study	7
CHAPTER 2: PROMOTIONAL COMPETITIONS IN TERMS OF SECTION 54 OF THE LOTTERIES ACT 57 OF 1997	8
2.1 Introduction	8
2.2 Purpose of the Lotteries Act	9
2.3 Functions of the National Lotteries Board.....	11
2.4 Controlling the Conduct Of Promotional Competition Organisers.....	13
2.4.1 Unlawful Promotional Competitions	14
2.5 Offences in terms of the Lotteries Act	20
2.6 Rules of Conduct for Promotional Competition Organisers	22
2.7 Conclusion.....	24
CHAPTER 3: PURPOSE OF THE CONSUMER PROTECTION ACT	26
3.1 Introduction	26
3.2 Policy Rationale for the Introduction of the Consumer Protection Act	26
3.3 Purpose and Application of the Consumer Protection Act	30
3.4 Consumer Rights in terms of the Consumer Protection Act.....	34
3.5 Conclusion.....	37
CHAPTER 4: PROMOTIONAL COMPETITIONS IN TERMS OF THE CONSUMER PROTECTION ACT 68 Of 2008	39
4.1 Introduction	39
4.2 Rules for Competition Organisers in terms of Section 36 of the CPA .	39
4.3 Enforcement of Consumer Rights and Offences in terms of the CPA .	49
4.4 Conclusion.....	51
CHAPTER 5: CONCLUSIONS	53
5.1 Introduction and Overview of the Study	53

5.2	Research Objective	55
5.3	Conclusions.....	55
6.	BIBLIOGRAPHY	59
6.1	Legislation	59
6.2	Government Gazette	59
6.3	Case Law.....	59
6.4	Tribunal Decision	60
6.5	Books	60
6.6	Journal Articles	60
6.7	Thesis.....	61
6.8	Internet Websites	61
6.9	Reports and Other Documents	61

CHAPTER 1: INTRODUCTION

1.1 Introduction and Background

Consumers are often inundated with invitations to participate in promotional competitions for a chance to win a prize.¹ Strachan states that it is common practice for businesses to promote their goods or services using promotional competitions.² The *modus operandi* for promotional competitions usually requires consumers to purchase a specific product or use a specific service in exchange for the right to compete.³ Invitations to participate in a promotional competition, for example, are usually advertised through various media and the promoted product.⁴

The existence of mobile phones, among other things, makes it easy for consumers to participate, and invitations may be received at any time together with entry to the competition.⁵ There is no doubt that mobile phones make advertising easier for competition organisers. Consumers do not need to be at an actual point of sale in order to be aware of the existence of a promotional competition. This easy access to consumers dictates that the conduct of promotional competition organisers is extremely important. As required by the provisions of section 36 of the Consumer Protection Act,⁶ it is appropriate, for example, that the invitation to participate should include *inter alia* clear information on action to be taken by the interested consumer to enter the competition. More importantly, competition organisers have the responsibility to ensure that promotional competitions comply with the law.

Prior to the enactment of the CPA promotional competitions were regulated by section 54 of the Lotteries Act.⁷ The LA defined the rules with which competition organisers were required to comply with when conducting promotional competitions. However, it was not uncommon for promotional competitions to be found to have contravened the

¹ Strachan DP *Regulation of promotional competition in South Africa 2016 LLD thesis, University of Pretoria I (Hereinafter referred to as Strachan LLD 2016)*.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Act 68 of 2008. Hereinafter referred to as "the CPA". Government Gazette 32186/29-4 -2009.

⁷ Act 57 of 1997. Hereinafter referred to as "the LA".

law. The court in *First Rand Bank v National Lotteries Board*⁸ declared a promotional competition unlawful, as it contravened the provisions of the LA. The existence of non-compliant promotional competitions conducted by some competition organisers therefore necessitated the enhancement of protection measures for consumers who participate in promotional competitions. However, while the LA contained the provisions that regulated promotional competitions, its primary purpose was to regulate lotteries.⁹ Furthermore, the National Lotteries Board (now the National Lotteries Commission) was vested with explicit responsibility to protect the interest of consumers with a valid National Lottery ticket.¹⁰ This meant that consumers who participated in promotional competitions were not the primary consumers to be protected by the LA. Their interests were competing with those of consumers who held a valid National Lottery ticket.

In order to conform to international standards, South Africa took a decision to develop comprehensive consumer legislation, which gave birth to the Consumer Protection legislation.¹¹ When the CPA came into effect, it repealed the provisions of section 54 of the LA.¹² According to the preamble of the CPA, it aim to develop innovative ways to:

- “(a) “fulfil the rights of historically disadvantaged persons and promote their full participation as consumers;
- (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress to those who are subject to abuse in the marketplace;
- (c) give effect to internationally recognised customer rights”.¹³

⁸ *First Rand Bank v National Lotteries Board* 2008 (4) SA 548 (SCA).

⁹ Preamble of the LA.

¹⁰ Section 10(b) (ii).

¹¹ Draft Green paper on the Consumer Policy Framework Notice 1957 of 2004, Gazette no 26774.

¹² Schedule 1 (c) (2).

¹³ Preamble of the CPA.

The CPA *inter alia* guarantees consumers the right to fair and responsible marketing, which had not been available under the LA.¹⁴ Chapter 2, Part E of the CPA, namely section 36 and regulation 11, provides consumer protection measures against lawful and unlawful promotional competitions by outlining the rules with which promotional competition organisers are required to comply. The question remains, however: to what extent are consumers protected by the provisions of the CPA when participating in promotional competitions?

1.2 Statement of the Research Problem

The study aims to determine the extent to which the provisions of the CPA protect consumers against lawful and unlawful promotional competitions as compared to those of its predecessor, the LA. The study will attempt to show that the provisions of the LA were not adequate to protect consumers against lawful and unlawful promotional competitions, owing to its primary purpose being that of regulating lotteries. The study will further attempt to show that the introduction of the CPA as a dedicated piece of comprehensive consumer legislation with fundamental consumer rights is a step in the right direction in ensuring protection of consumers against lawful and unlawful promotional competitions.

This will be done by answering the sub-questions below:

1.2.1 What was the level of protection that participants in lawful and unlawful promotional competitions enjoyed under the LA?

1.2.2 What are the protection measures available to consumers against lawful and unlawful promotional competitions in terms of the CPA?

1.2.3 Are the current measures adequate to ensure protection of consumers?

¹⁴ Sections 29 – 39.

1.3 Significance of the Study

There is limited research available on the protection of consumers against lawful and unlawful promotional competitions. Not enough research has been conducted to determine the efficacy of the measures available to consumers in terms of the CPA. These provisions have never been subjected to court interpretation in case law. Measures to protect consumers against unlawful promotional competitions were brought within the ambit of the CPA to have an aligned and coherent consumer protection law. This research is important to analyse the contents of these measures and determine the impact thereof.

1.4 Methodology

The research will involve a literature study of books, journals, articles, legislation and precedent. The study is primarily a critical analysis of the relevant South African literature and legislation on consumer protection law.

1.5 Structure of the Study

This study consists of five chapters. The first chapter discusses the introduction, research question, methodology and contribution of the study. Chapter 2 discusses the purpose of the LA and the meaning of lawful and unlawful promotional competitions. Chapter 3 outlines the purpose of the CPA and the rationale for the introduction of the Act. Chapter 4 provides a critical analysis of the protection measures available to consumers against lawful and unlawful promotional competitions, as contained in section 36 and regulation 11 of the CPA, and assesses their adequacy. Chapter 5 outlines the conclusion and findings of this study.

CHAPTER 2: PROMOTIONAL COMPETITIONS IN TERMS OF SECTION 54 OF THE LOTTERIES ACT 57 OF 1997

2.1 Introduction

“The board of the National Lotteries Board has the responsibility to ensure that the interests of every participant in the National Lottery are adequately protected”.¹⁵

The above quotation indicates that the board’s primary responsibility is to protect the interest of every participant in the National Lottery. The question, therefore, is the following: Were participants in lawful and unlawful promotional competitions protected in terms of the LA¹⁶ and its repealed provisions? The purpose of this chapter is to demonstrate that the protection of consumers who participated in both lawful and unlawful promotional competitions was not the primary purpose of the LA. This contention is supported firstly by the object of the LA and the functions of the board, which were specifically to “regulate, monitor and police promotional competitions”.¹⁷ Secondly, it was the responsibility of the board to protect the interest of participants in the National Lottery.¹⁸ Thirdly, it was also the responsibility of the board to ensure that the conduct of promotional competition organisers had no adverse impact on the National Lottery as outlined in the repealed section 54 and its related regulations. This chapter concludes by linking how these weaknesses in the LA contributed to the repeal of the provisions of the Act and led ultimately to the creation of the Consumer Protection Act, which is discussed in detail in Chapter 3.

¹⁵ Section 10(b)(ii) of the Lotteries Act 57 of 1997 (LA).

¹⁶ Act 57 of 1997. Hereinafter referred to as “the LA”.

¹⁷ Section 10(d).

¹⁸ Section 10(b)(ii).

2.2 Purpose of the Lotteries Act

In terms of the Preamble of the LA, the primary purpose is to “regulate and prohibit lotteries and sports pool”.¹⁹ The LA defines a lottery as “any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the *Gazette* declare to be a lottery”.²⁰

It is evident from this definition that a promotional competition is a lottery. However, in as far as promotional competitions were concerned, the purpose of the LA was to “regulate, monitor and police lotteries other than the National Lottery, including promotional competitions”.²¹ The LA further defined a promotional competition as “a lottery conducted for the purpose of promoting the sale or use of any goods or service”.²²

Whereas promotional competitions fell within the definition of a lottery, the purpose of conducting these schemes was completely different from the purpose of a lottery. According to Strachan (2016) this definition created some challenges in practice and was “circuitous”, as promotional competitions were already included in the definition of a “lottery”.²³ In my view, the definition of a “promotional competition” created an explicit rationale for conducting promotional competitions. Inclusion of promotional competitions within the definition of a lottery, on the other hand, recognised promotional competitions as lotteries.

¹⁹The LA defines “Sports pool” as “any scheme, excluding any scheme or competition in respect of horse racing which is authorised by the board, or which is conducted in the same format and manner under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997, under which-(a) any person is invited or undertakes to forecast the result of any series or combination of sporting events in competition with other participants; and (b) a prize is to be awarded to the competitor who forecasts the said result correctly or whose forecast is more nearly correct than the forecasts of other competitors, or a number of prizes are to be awarded on the basis aforesaid, and for the purpose of this definition the forecast of a result includes not only the forecast of the person, animal, thing or team that will be victorious or otherwise, but also any forecast relating to the system of scoring employed in the sporting event in question, or to the person who will be responsible to score”.

²⁰ Section 1.

²¹ Section 10 (d).

²² Section 1.

²³ Strachan (2016) 203.

However, there were no explicit provisions in the LA on the purpose of conducting a lottery. The court in *Gidani (Pty) Ltd v Minister of Trade and Industry and others*²⁴ indicated that the main purpose of a lottery is to raise funds for distribution to good causes.²⁵ This purpose is further reflected in Wiehahn on legalising gambling in South Africa, which recommended the introduction of a state lottery to raise funds for social development.²⁶ It is also important to note that the lottery is also a gambling activity, hence its introduction was preceded by the recommendation to legalise gambling in South Africa. Games offered by the National Lottery are gambling activities, which offer consumers an opportunity to win any of its offered prizes.²⁷

The National Lotteries Commission, previously called the National Lotteries Board,²⁸ is the regulator responsible for regulating lotteries under the direction of the board.²⁹ Linked to the purpose of the LA is the responsibility of the board to ensure that there is revenue growth³⁰ for the National Lottery and to keep in trust the percentage of revenues expropriated from the National Lottery for funding the prescribed causes.³¹ The purpose of conducting promotional competitions, on the other hand, is the promotion of goods and services.³² According to Barnard and Scott, the purpose of promotion is to increase sales and create brand awareness.³³ The distinguishing features therefore are that promotional competitions are used for marketing purposes to promote goods or services, which consequently leads to an increase in sales and brand awareness. Lotteries on the other hand are gambling activities used to raise funds for distribution to good causes. The same view was expressed by the courts in the case of *National Lotteries Board v Bruss NO*³⁴ where a promotional competition was declared unlawful as its intended purpose was to raise funds for charities.³⁵

²⁴ *Gidani (Pty) Ltd v Minister of Trade and Industry and others* 2016 ZAGPHC 106.

²⁵ *Gidani (Pty) Ltd v Minister of Trade and Industry and others* 2016 ZAGPHC, paragraph 16.

²⁶ Wiehahn Commission Report (1995) *The main Governmental Report on Gambling RP85/1995* 7.

²⁷ National Lottery "Powerball estimated at 15 million rand, play now" www.nationallottery.co.za (Accessed on 5 December 2018).

²⁸ (Hereinafter referred to as "the Commission").

²⁹ Section 2.

³⁰ Section 10(b)(iii).

³¹ Allocation to charities, sport and recreation, arts, culture and national heritage and for miscellaneous purposes.

³² Section 1 of the LA.

³³ Barnard & Scott "An overview of promotional activities in terms of the Consumer Protection Act in South Africa" 2015(3) *South African Mercantile Law Journal* 1.

³⁴ *National Lotteries Board v Bruss NO* 2007 ZAGPHC 268.

³⁵ 170-171.

Significantly, the purpose of the LA linked to the role of the board in as far as promotional competitions were concerned was to “regulate, monitor and police”. However, the Act does not define the meaning of these concepts; in an attempt to define these concepts the court relied on a dictionary meaning of “regulate and police” to mean “control, regulate, or keep in order by means of police or some similar force; to keep in order, administer, and control”.³⁶

It is evident from the preamble of the LA that the rationale for its existence was to regulate and prohibit lotteries. The role of the board in as far as promotional competitions were concerned was to control and keep them in order. What is evident from the LA were the distinguishing features of promotional competitions and the National Lottery. Promotional competitions are used for marketing purposes to promote goods or services, which consequently leads to an increase in sales and brand awareness. Lotteries on the other hand are gambling activities used to raise funds for distribution to good causes. It may therefore be assumed that the controlling role of the board is premised on ensuring that promotional competitions were conducted for their intended purpose. The controlling effect thus contributed to the protection of the interests of the consumers who participated in promotional competitions. More importantly, the purpose of the LA was to regulate the lottery and ensure that there were enough funds to distribute to good causes.

2.3 Functions of the National Lotteries Board

In terms of the LA, the functions of the board are *inter alia* “to ensure that the interest of every participant in the National Lottery is adequately protected.³⁷ The LA defines a participant as, “in relation to a lottery other than a promotional competition contemplated in section 54, ...means a person who is in possession of a valid lottery ticket”.³⁸

³⁶ *National Lotteries Board v Bruss NO 2009 (4) SA 362 (SCA)*.

³⁷ Section 10(b) (ii).

³⁸ Section 1.

It is evident from the functions of the board that the main interests to be protected are those of a “participant” in a National Lottery. On the basis of the definition provided, it appears that the interests of promotional competition participants were excluded from the functions of the board. Significantly, the role of the board, in as far as promotional competitions were concerned, was to “regulate, monitor and police”. However, the LA does not define the meaning of these concepts, as held in the case of the *National Lotteries Board v Bruss NO*³⁹ which relied on the dictionary meaning of “regulate and police” as “control, regulate, or keep in order by means of police or some similar force; to keep in order, administer, and control”.⁴⁰

It is in the interest of consumers that promotional competitions should be closely monitored. Nevertheless, the consumer protection of participants in promotional competitions was not the primary responsibility of the board, as the interests of these consumers were explicitly excluded from the definition of a participant whom the Board had a responsibility to protect.

Louw, when interpreting the role of the board as protecting the interests of every participant, opted to use the synonym “all”.⁴¹ In his view, it is reasonable to assume that the board’s accountability goes beyond the protection of participants in the National Lottery to include general members of the public, including beneficiaries of the National Lottery Distribution Trust Fund.⁴² When this view is taken, it is not unreasonable to infer that the inclusion of the word “every” in the role of the board in protecting the interests of participants in the National Lottery also included participants in promotional competitions. It may therefore be assumed that the board had the responsibility to protect their interests.

Therefore, an inference may be drawn that the purpose of the Act was to control the conduct of promotional competition organisers. Consequently, consumers who participated in those promotional competitions enjoyed protection, as the conduct of competition organisers was always under control. More importantly, the LA was

³⁹ *National Lotteries Board v Bruss* 2009(4) SA 362 (SCA)

⁴⁰ *g.*

⁴¹ Louw “Smoke and mirrors? The National Lottery and non-profit sector” Centre for Civil Society 2002 19 (3) *Politikon: South African Journal of Political Studies* 7.

⁴² *Ibid.*

explicit in that the National Lotteries Board had a duty to protect the interests of participants with a valid lottery ticket. While I agree with Louw's contention, it should be borne in mind that the report emanated from the views received from Non-Profit Organisations who are beneficiaries or prospective beneficiaries of the National Lottery Distribution Trust Fund. However, it does not seem that the same protection can be extended to consumers who participated in promotional competitions, judging by the explicit exclusion in the definition of a "participant" in the Act. It is however not unreasonable to assume that protection also extended to participants of promotional competitions, as the board had a responsibility to regulate the conduct of competition organisers. It is evident from these provisions that the responsibility of the board in respect of promotional competitions was that they were to be closely monitored and kept in order. There was no explicit provision in the LA on the protection of consumers who participated in promotional competitions. However, the responsibility of the board to protect the interest of consumers who participated in the National Lottery was explicit. It is therefore appropriate to assume that the primary purpose of the LA and the responsibility of the board was not to protect consumers who participated in promotional competitions. However, such protection was incidental due to the monitoring of the conduct of promotional competitions.

2.4 Controlling the Conduct of Promotional Competition Organisers

The provisions on promotional competitions were contained in section 54 of the LA. This section had five subsections. Subsection one outlined the rules for the competition organisers' conduct that would render promotional competitions unlawful. Subsection two contained the provision that gave the Minister of Trade and Industry⁴³ powers to develop regulations to control the impact of promotional competitions on the National Lottery, when their conduct was suspected to pose a risk to the National Lottery. Subsection three also gave powers to the Minister to develop regulations and outlined areas that would be covered by those regulations. Subsection four gave the Minister powers to declare promotional competitions unlawful by notice in the Government Gazette. The last subsection created an offence of failure to comply with the instruction of the board to cease operating an unlawful competition. It is common

⁴³ Hereinafter referred to as "the Minister".

cause that promotional competitions may be conducted by suppliers, manufacturers, distributors, agencies or competition organisers. For the purpose of this study and for ease of reference, the writer will use the word “competition organisers” when referring to any person or organisation that conducts a promotional competition. The provisions of section 54 will be discussed in paragraph 2.4.1 below.

2.4.1 Unlawful Promotional Competitions

In terms of section 54(1) (a), a promotional competition conducted within the Republic shall not be unlawful. Therefore, competition organisers had a responsibility to ensure that promotional competitions were conducted within the Republic of South Africa. Section 54(1) (b) (i) regulated the payment of the consideration payable for goods or services that were linked to the promotional competition. In terms of this provision, the price should always be the price that was ordinarily paid for those goods and services in the absence of a promotional competition. The existence of a promotional competition hence does not give competition organisers the right to increase the price of goods or services. Section 54(1) (b) (ii) explicitly prohibited the increase of prices for goods or services when conducting promotional competitions. Therefore, any promotional organiser who increased the price every time they conducted a promotional competition was committing an offence.

Section 54 (1) (b) (iii) made it clear that the price paid for the purchase of goods or services should include payment for the right to compete. These provisions gave a clear guideline to competition organisers when structuring their promotional competition. Competition organisers had a responsibility to ensure that the competition was designed in such a way that no added amount should be paid by consumers for their right to compete. It follows therefore that the existence of a promotional competition does not entitle competition organisers to make money from consumers over and above the purchase price.

The provision ensured that promotional competitions are conducted strictly for their intended purpose of promotion. The existence of a promotional competition therefore does not entitle organisers to have a ring-fenced top-up on the purchase price. This provision therefore ensured that consumers were not cheated when participating in

promotional competitions. It is appropriate to assume that the primary purpose was to ensure that promotional competitions did not create a lottery that would enable competition organisers to receive revenues from the competition itself. That would have meant that the scheme was being conducted no longer for the purpose of promoting but rather for the purpose of generating revenues, which is strictly the preserve of the National Lottery licensed by the Minister of Trade and Industry.⁴⁴

However, an important point was raised by Louw,⁴⁵ relying on the view expressed in *R v Ellis Brown Ltd*⁴⁶, that where the right to compete was dependent on payment of the purchase price for goods or services, it meant there was an element of a consideration for the right to compete, even if such price was the price normally paid for the purchase of goods or services. In my view, even though there is payment by consumers for the right to compete, a similar amount would still be paid by the consumer even in the absence of a promotional competition. Therefore, a promotional competition should not be rendered unlawful on the grounds of the existence of a subscription, as its purpose is to promote the product or use of such product. However, in any other promotional competition that does not require consumers to purchase any goods or use any services but requires them to pay for the right to compete, such practice should be unlawful in terms section 54(1) (b) (iii) of the LA.

In terms of section 54(1) (c), the existence of a promotional competition should not be the only reason why consumers purchase goods or use the services. Therefore, participating in a promotional competition should not be the primary reason why consumers purchase the marketed goods or use the marketed service.

The purpose of this provision is linked to the sections discussed above. It was exclusively to ensure that promotional competitions should maintain their purpose of marketing. The possibility of winning should therefore not be the primary inducement for consumers to purchase the marketed goods or use the marketed services. It is therefore assumed that once a promotional competition served as the only inducement

⁴⁴ *Gidani (Pty) Ltd v Minister of Trade and Industry and others* 2016 ZAGPPHC 609 paragraph 14.

⁴⁵ Louw "Distortion of the law: A comment on the SCA judgment in *First Rand Bank v National Lotteries Board* 2008 (4) SA 548 (SCA)" *De Rebus* 2012 August 59.

⁴⁶ *R v Brown Ellis Ltd* 1993 AD 100.

for consumers to buy the marketed goods or use the marketed product, it had crossed the line from its intended purpose to that of a National Lottery and was therefore unlawful. Strachan (2016) is of the view that in practice it would have been difficult to enforce this provision, as it involved a value judgement.⁴⁷ In my view, these provisions dictated that the board, vested with authority to police, would be required to interview and take statements from consumers participating in suspected schemes. Such process would assist the board in being able to prove the rationale for participation by consumers. Strachan further indicated that this provision aimed at protecting consumers from abuse, and I fully agree with his view. I further submit that the protection was founded on the principle that only an authorised National Lottery should have a scheme whose primary purpose is to induce consumers to participate due to the existence of an opportunity to win. Any promotional competition that was designed in such a manner that the existence of the opportunity to participate in the competition superseded the use of goods or services was unlawful. The court in *National Lotteries Board v First Rand Bank*⁴⁸ declared a promotional competition unlawful because the opportunity to participate in “a million a month” competition was the only factor that induced consumers to open a 32-day savings account with First National Bank.⁴⁹ It is evident from this reasoning that the consumer’s primary intention should always be to purchase a promoted product or use services. A promotional competition scheme that is skewed towards inducing consumers to win was therefore crossing the line from its intended promotional purpose to the purpose of a lottery, which is a gambling activity that can only be conducted by an authorised person in terms of section 13(1) of the LA. The intention of the consumer should always be to purchase a product or use services.

In terms of section 54(1) (d), competition organisers had the responsibility to ensure that promotional competitions were in line with the regulations published by the Minister. The regulations are discussed in detail in paragraph 2.6 below.

In terms of the Harmful Business Practices Act 71 of 1998, the Minister of Trade and Industry had powers to declare certain business practices unlawful. The Maintenance

⁴⁷ Strachan LLD (2016) 207.

⁴⁸ *National Lotteries Board v First Rand Bank* 2006 ZAPGH 106.

⁴⁹ *National Lotteries Board v First Rand Bank* 2006 ZAPGH 106 paragraph 1.

and Promotion of Competition Act 96 of 1979 also gave the Minister powers to declare certain restrictive practices unlawful. Therefore, in terms of section 54(1) (e), competition organisers had the responsibility to ensure that promotional competitions were not similar to any of the prohibited practices declared unlawful by the Minister. These practices were published in a government gazette, which is a public document available for access by members of the public.⁵⁰

Section 54(4) of the LA gave the Minister powers to declare promotional competitions unlawful pursuant to advice received from the board, which had the responsibility to keep promotional competitions in order. Therefore, in terms of section 54(1) (f), competition organisers had the responsibility to ensure that their promotional competitions were not similar to any of the promotional competitions declared unlawful by the Minister in terms of section 54(4).

This provision aimed to ensure that competition organisers did not engage in prohibited practices and, more importantly, to protect consumers from participating in unlawful promotional competitions.

In terms of section 54(1) (g), competition organisers had the responsibility to ensure that the promotional competition was linked to the business of the organisation on whose behalf the competition was conducted.

This provision therefore ensured that there was always a connection between the promotional competition and the ordinary business of the person conducting the promotional competition or on whose behalf the promotional competition is being conducted. Therefore, a promotional competition not linked to the organiser's ordinary course of business would be unlawful.

In terms of section 54(1)(h), organisers of joint promotional competitions had a responsibility to ensure that they did not exceed the prescribed limits, in terms of prizes, number of promotional competitions and geographical location, among other

⁵⁰ 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" *Obiter* 2010 217-231.

things. These conditions were prescribed by regulations and are discussed in paragraph 3 below.

It followed therefore that failure to comply with the above requirements rendered the promotional competition unlawful. It is not clear or explicit how the limitations aimed at protecting consumers. Section 54(1) (i) prohibited promotional competitions that were similar to any games conducted by the National Lottery. Competition organisers therefore had a responsibility to familiarise themselves with the games offered by the National Lottery. Furthermore, they had to ensure that their schemes were not similar to those of the National Lottery. Failure to comply with this provision rendered the promotional competition unlawful. This provision therefore protects consumers from participating in an unauthorised National Lottery disguised as a promotional competition. However, at the core this provision appears to give effect to the functions of the board to police and keep promotional competitions in order and, more importantly, to protect the monopoly of the National Lottery. Strachan referred to the view of MacKenzie that this provision was included to protect the monopoly of the lottery.⁵¹ I fully agree with that view, on the basis that the monopoly is founded on the fact that the Minister had powers to issue a licence to one person. Furthermore, the National Lottery contributes a prescribed percentage of its revenues to the fund administered by the board for distribution to good causes, and the board is also vested with the responsibility to ensure that the revenues of the National Lottery are as large as possible. It then follows that any scheme not contributing any revenues to good causes should be clearly monitored.

Section 54(2) and section 54(3) gave the Minister powers to make regulations to further regulate the conduct of promotional competitions. What is linked to the Minister's power was the board's responsibility to monitor and police the conduct of promotional competitions. In instances where it was suspected that they posed a potential threat to the National Lottery, it was the board's responsibility to advise the Minister to develop rules to eliminate such threat. The primary purpose was to prohibit and police promotional competitions and, in so doing, that mandate protected consumers against participating in unlawful schemes. For consistency and to avoid

⁵¹ Strachan LLD (2016)122.

duplication, these sections are discussed in detail in paragraph 2.6, as the regulations were developed in terms of these provisions.

Linked to the powers of the Minister to declare promotional competitions unlawful in terms of section 54 (4) was the creation of an offence by section 54 (5) for the failure to cease with the promotion of the activity declared unlawful in terms of the act or on instruction thereof. This section appears to have created an enforcement tool that required competition organisers to cease and desist with immediate effect any activities related to unlawful competition.

Whereas this section created a tool to enforce the provisions of the act, it failed to explicitly articulate the powers of the board to issue an instruction to offenders to cease the unlawful competition. Declarations were made through the government gazette, which is a public document. However, linked to the responsibility of the board to police promotional competition should be the responsibility to inform any person suspected of contravening the LA to cease that activity.

In the case of the *National Lotteries Board v First Rand Bank*,⁵² the authority of the board to approach the court to declare a promotional competition unlawful was questioned. This was because such powers were not explicit in the legislation. The court ruled that, whereas the legislation was not explicit, such powers were nevertheless implied, as the board had authority to police lotteries, which included any other activities related to policing, including approaching the court for an appropriate order. It can therefore be assumed that the responsibility to instruct was that of the board, which was vested with the mandate to monitor promotional competitions.

Whereas section 54 defined the rules of conduct that were required of competition organisers for their scheme to be lawful, the provisions were structured in such a way that they defined activities that would render promotional competitions unlawful, rather than defining what constituted a lawful promotional competition. According to Strachan (2016), these provisions created a model of negative regulation, and I agree with that

⁵² *National Lotteries Board v First Rand Bank* 2006 ZAPGH 106.

view, as the requirements were not structured in a way that clearly defined what was lawful.⁵³

A conclusion may be drawn from these provisions that the main purpose of the LA was to regulate the conduct of promotional competition organisers. This was for the purpose of ensuring that their conduct did not have any impact on the National Lottery. At the heart of these provisions was the provision to ensure that promotional competitions were conducted for their intended purpose of promotion. This provision prohibited promotional competitions that would induce consumers to purchase the goods or services merely because of the existence of a competition. More importantly, it prohibited competition organisers from charging an additional amount for the right to compete, over and above the normal price, merely due to the existence of a promotional competition. Promotional competitions structured in a manner that contravened these provisions would have encroached on the provisions of a National Lottery.

2.5 Offences in terms of the Lotteries Act

Whereas section 54(5) created a specific offence for failure to cease with the activities of a competition declared unlawful, Chapter 4, Part III of the LA created general offences. Section 56 of the Act prohibited any activities that sought to advertise *inter alia* any scheme not authorised in term of the LA. More importantly, organisers of schemes declared unlawful in terms of section 54(4) were prohibited from advertising such schemes.

The LA ensured that only legal and authorised schemes had the platform to communicate with consumers. In that way, consumers were protected from participating in unlawful activities. However, what is common in the manner in which the LA was drafted is the omission to explicitly give the board powers to instruct any person suspected of contravening this provision to cease the activities.

⁵³ Strachan LLD (2016) 203.

Another important element worth highlighting was the provisions of section 56(3) of the LA. The provisions prohibited any competition not authorised in terms of the Act where success was not dependent on a substantial amount of skill. Therefore, it may be assumed that when success is dependent on skill, such scheme would be lawful. However, the meaning of 'skill', and how it would have been determined, was not described in the LA, which in my view made application of this provision difficult as there was no test to determine the existence of the skill requirement. However, what was evident from this provision was that competitions that required skills and not chance in order to succeed were exempted from the application of the LA. Thus, consumers who participated in those schemes would not enjoy any protection in terms of the LA.

The other important element was found in section 63, which exempted from the application of the LA lotteries in which there was no subscription.⁵⁴ The impact of this provision was that schemes which do not require subscription were not lotteries in terms of the LA. The question of subscription was before the court in *the First Rand Bank* case. The question was whether the R100 deposit paid by customers to open the savings account constituted a subscription. The court was of the view that the R100 gave the customers an opportunity to enter the monthly draw and win the prize. On that basis the scheme was declared unlawful. In my view, whereas the R100 appears to conform to the meaning of subscription, the important factors in determining whether a scheme is a lottery within the definition of the LA is the purpose of conducting the lottery and whether revenues were raised through the subscription. In my view, any scheme that makes money not only through sales of the marketed product but also through the scheme itself is no longer conducting a promotional competition but generating revenues through a lottery. First Rand Bank is in the business of receiving deposits and the money deposited by consumers was their own savings. There was no evidence that there was money raised by First Rand Bank as a result of the competition. Louw (2012) is of the view that the court erred in declaring such scheme unlawful as it fell within the definition of a promotional competition.⁵⁵

⁵⁴ Section 1 of the LA defines: "subscription" to mean "the payment, or delivery of any money, goods, article, matter or thing, including any ticket, coupon...or entry form, for the right to compete in a lottery".

⁵⁵ Louw (2012) *De Rebus* 59.

What was interesting was that the LA made it an offence for any person to play any role in unlawful schemes. The LA made it an offence even for consumers to participate in unlawful promotional competition. The LA not only protected consumers from the conduct of unscrupulous competition organisers but created a punishment for consumers who participated in those schemes. Therefore, this provision created a responsibility for consumers to ensure that they participated in lawful schemes.

Whereas it was an offence to conduct unlawful promotional competitions, including participation in such a scheme, however on conviction it was left to the discretion of the magistrate to determine the prison terms or fine amount because there was no explicit stipulated amount for the fine or prison term.⁵⁶ This approach cast doubt on the seriousness of these offences and, more importantly, on the efficacy of the role of the board in keeping control of these schemes. The role of sanctions in regulation is to serve as a deterrent to contravention. This approach would therefore be likely to have an impact in that regard.

There is no doubt that the provision of the LA prohibited the advertisement of promotional competitions not complying with the LA and created an offence. More importantly, it ensured that consumers were protected from unscrupulous competition organisers. However, consumers who participated in unlawful schemes were as guilty as the unscrupulous competition organisers.

2.6 Rules of Conduct for Promotional Competition Organisers

In 2002 the Minister published regulations in terms of section 54(2) and (3) of the LA. The regulation created prescriptive rules of conduct for competition organisers. The regulations prohibited advertising, participation and awarding of prizes to people who were below the authorised age limit to use or consume the marketed goods. It further prohibited awarding of a prize to a person below the authorised age to use such prize. Awarding of prizes which required the consumer to pay any fees or secure licence approval by an organ of state was prohibited. Additionally, the regulations explicitly prohibited any awarding of a prize on similar terms to consumers below the age of 18.

⁵⁶ See section 63 of the LA “Any person convicted of an offence in terms of this Act shall be liable to a fine or to imprisonment or to both a fine and imprisonment”.

It further prohibited the use of winners to endorse or market goods or services linked to the promotional competition without their consent. Organisers were required to make a request in writing and the consumers' consent had to be given in writing. Where consumers were below the age of 18, written consent of the legal guardian was required.

It would appear that to ensure that prizes were awarded to consumers who by law qualified to use such prizes, the approach was that the age limit was guided by the rules regulating the use of the goods or services awarded as a prize. It would have been difficult for the Minister to be prescriptive on age limit, as various age restriction rules differ between industries. It would also appear that competition organisers had a responsibility to ensure that the prize that was being offered could be consumed by the winner of the targeted group. Children are usually considered vulnerable, therefore this provision ensured that vulnerable consumers⁵⁷ were protected.

The regulation prohibited offering any prizes that were similar to those of the National Lottery. This provision is linked to the responsibility of the board to protect the National Lottery. Promotional competitions by definition are lotteries, and similar prizes might confuse consumers into believing that they were participating in a National Lottery.

Advertising material was also regulated, and competition organisers were required to ensure that the date for the announcement of winners was printed in such material. Participation of directors and family members of the company linked to the promotional competition was prohibited.

The board had a responsibility to ensure that the National Lottery was conducted with due propriety. It may be assumed that, as promotional competitions were by definition lotteries, the rationale behind this provision was to ensure that promotional competitions were also conducted with due propriety. The principles of due propriety require fairness. The provision therefore ensured that there was fairness in the manner in which promotional competitions were conducted.

⁵⁷ Ramsay "Regulation and the Constitution of the European single market: The contribution of Consumer Law" *Can. Bus.LJ* 2011 322.

The regulations gave the board powers to inspect the premises of competition organisers. They further created offences for failure to comply with these regulations, while the powers of the board to inspect the activities and premises appeared to be in line with the powers of the board to keep promotional competition in control.

The regulations ensured that promotional competitions were conducted with due propriety. The regulations created pre-emptive rules for promotional competition organisers, most importantly by ensuring that the rights of the most vulnerable consumers under the age of 18 were protected. To ensure fairness in the system the regulations prohibited participation of directors and families of competition organisers. To ensure compliance with these provisions, the board was vested with powers to inspect and monitor promotional competition activities.

2.7 Conclusion

It is evident from the contents of section 10(d) of the LA that the responsibility of the board was to monitor and keep promotional competition in order as discussed in paragraph 2.3 above. At the heart of the LA was the regulation of lotteries and the protection of the interests of the National Lottery and of consumers who had valid National Lottery tickets. There was no explicit provision in the LA on protection of consumers who participated in promotional competitions. However, the responsibility of the board to protect the interests of consumers who participated in the National Lottery was explicit, as outlined in paragraph 2.3. While section 54 and its regulations had provisions aimed at protecting consumers as discussed in paragraph 2.4 and 2.6, it is nevertheless appropriate to conclude that the primary purpose of the LA was not to protect consumers who participated in promotional competitions. Protection was incidental to the responsibility of the board to keep promotional competitions in order.

The main purpose of the LA was to regulate the lottery and ensure that it was conducted with due propriety. More importantly, the board is vested with the responsibility to ensure revenue growth for the National Lottery and, furthermore, to ensure equitable distribution of funds to good causes, with an explicit mandate being to ensure protection of participants of the National lottery. The main purpose of this

chapter was to determine the level of protection enjoyed by consumers who participated in lawful and unlawful promotional competitions in terms of the LA.

It is appropriate to conclude that, judging by the purpose of the LA, the responsibility of the board and the provisions of section 54 and its regulations, protection of consumers who participated in promotional competition was not the primary purpose of the LA. Furthermore, it is correct to conclude that protection of consumers who participated in promotional competitions in terms of the LA was not adequate, as their interest competed with the interest of consumers who had a valid National Lottery ticket.

In an endeavour to develop a dedicated consumer protection legislation, these measures were repealed. Section 36 of the CPA and regulation 11 contained new provisions on promotional competitions. The rationale for the introduction of the CPA and its objectives will be discussed in Chapter 3.

CHAPTER 3: PURPOSE OF THE CONSUMER PROTECTION ACT

3.1 Introduction

“The Consumer Protection Act is the first consumer legislation in South Africa that recognised ‘consumer right’.”⁵⁸

Prior to the introduction of the CPA, consumer protection measures were contained in various pieces of legislation.⁵⁹ The question is whether consumers who participate in lawful and unlawful promotional competitions are protected by the CPA. This chapter seeks to demonstrate that the CPA protects consumers who participate in promotional competitions. This view is firstly supported by the policy rationale guiding the introduction of dedicated consumer protection legislation. This rationale led to the repeal of section 54 of the LA which previously contained consumer protection measures for consumers who participated in both lawful and unlawful promotional competitions. Secondly, it is supported by the preamble and purpose of the CPA which seeks to protect all consumers in the Republic of South Africa. Lastly, it is supported by the guaranteed fundamental consumer rights available to consumers, with specific emphasis on consumers’ rights to fair and honest marketing, including measures contained in section 36 of the CPA which outlines the rules for promotional competition organisers. This chapter will conclude by showing how the policy rationale, the purpose of the CPA, consumer rights and a dedicated provision which deals with promotional competition all contribute to the protection of consumers who participate in promotional competitions. The provisions of section 36 and its related regulation is discussed in chapter 4.

3.2 Policy Rationale for the Introduction of the Consumer Protection Act

Prior to the introduction of the CPA, consumer protection measures were contained in more than 60 pieces of legislation.⁶⁰ These measures included section 54 of the LA, which protected consumers against lawful and unlawful promotional competitions.

⁵⁸ Woker (2010) 218.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

Whereas consumer protection measures were available in various pieces of legislation, exploitation of consumers was nevertheless the order of the day.⁶¹ Woker (2010) identifies the challenge as the fragmentation of institutional efforts aimed at ensuring compliance with these provisions.⁶² Woker notes that there was no coordination of compliance activities, which had a negative impact on the protection of consumers.⁶³ Similar challenges were identified during the process of reforming consumer protection system in South Africa.⁶⁴

Another challenge was that, whereas provisions existed that aimed to regulate the conduct of business, these measures were usually not widely known.⁶⁵ The Unfair Business Practices Act, ⁶⁶ for example, prohibited unfair business practices. The UBPA gave the consumer affairs committee powers to investigate unfair business practices. Furthermore, the UBPA gave the Minister of Trade and Industry powers to declare a business conduct unfair. There is no doubt that these provisions created laws to guide the conduct of business, which aimed to protect consumers by regulating the conduct of business. However, as they were not known to business, there is no doubt that this contributed to limited protection for consumers. The other weakness was that even consumers were not aware of the existence of these consumer protection measures. This therefore meant that consumers could be subject to abuse as they were not aware of any protection available to them as consumers. Consumers *inter alia* were usually coerced into contracts, subjected to unfair contract terms and given incorrect or incomplete information when purchasing goods or services.⁶⁷ These challenges clearly point to the lack of a structured and legislated consumer education requirement as the contributing factor, which was exacerbated by the fragmented consumer protection efforts. When consumer protection initiatives are strengthened, information is bound to reach consumers. At the heart of the reform of the consumer

⁶¹ Woker (2010) 219.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Draft Green Paper on consumer policy framework. General Notice 1957 in *Government Gazette* 26774 of 9 September 2004.

⁶⁵ *Ibid.*

⁶⁶ Act 71 of 1988. Hereinafter referred to as "the UBPA".

⁶⁷ Woker (2010) 233.

protection regime was a need to introduce consumer education to ensure that consumers were informed.⁶⁸

In an endeavour to address the weaknesses of the consumer protection measures highlighted above, a review of all consumer protection legislative measures was conducted. The fragmentation of consumer protection measures was highlighted as the challenge in the Republic. The findings highlighted *inter alia* the lack of dedicated consumer protection legislation with guaranteed consumer rights as a barrier to adequate consumer protection.⁶⁹

Consumers therefore had no legislated fundamental consumer rights enshrined in dedicated comprehensive consumer legislation. This lack of comprehensive consumer protection legislation meant that consumer issues were competing with other matters, as indicated in chapter 2, paragraph 2.3.1 above. Consumers who participated in promotional competitions had to compete with consumers who participated in the National Lottery. The LA made it clear that its purpose was to protect the interests of the participants in the National Lottery, as opposed to those of consumers who participated in promotional competitions.

Woker points to the prevalence of misleading advertising practices by business as the challenge faced by consumers.⁷⁰ Advertising forms part of marketing, and promotions include promotional competitions as marketing tools. It is therefore correct to assume that consumers who participated in promotional competitions were in some instances victims of these misleading practices. This notion was confirmed in the case of *First Rand Bank v National Lotteries Board*,⁷¹ where the applicant in its replying affidavit stated that the “Million a Month Account” was initially promoted as an investment account.⁷² The matter was referred to the Advertising Standards Authority, which ordered in its ruling of 24 June 2005 that the account was not an investment, as no earnings were earned by consumers who opened that account. First Rand Bank was ordered to refer to the account as a “savings account” as opposed to an “investment

⁶⁸ Section 3 of the CPA.

⁶⁹ *Ibid.*

⁷⁰ Woker (2010) 230.

⁷¹ *First Rand Bank v National Lotteries Board* 2008(4) SA 548 (SCA).

⁷² Paragraph 4(g).

account”.⁷³ This case bears evidence of the existence of abusive, improper and misleading practices that targeted consumers who participated in promotional competitions.

The review further revealed that the introduction of comprehensive consumer legislation would ensure adequate protection for consumers.⁷⁴ More importantly, the legislation would provide rules stated in advance with which businesses would be required to comply. The introduction of the envisaged consumer legislation would therefore ensure that consumer affairs would be contained in one piece of legislation. This approach would resolve the problem of consumer matters having to compete with other issues. Hence section 54 of the LA, which dealt with consumer protection, was repealed and replaced by section 36 of the CPA. Furthermore, a single consumer protection legislative framework would ensure that the rules of conduct would be known to businesses, unlike the previous system.

Hawthorne is of the view that the introduction of consumer legislation will introduce a fairness-based approach.⁷⁵ I fully agree with this contention because, in my opinion, unequal bargaining power is the main cause of consumer abuse. The existence of consumer-centric legislation with its primary purpose of protecting consumers will ensure that there is fairness in the marketplace, thus levelling the playing field. The same view was expressed by Van Eeden and Barnard, who state that the CPA gave birth to a consumer contract regime founded on the principle of fairness and reasonableness.⁷⁶ Woker raises the question whether it was really necessary to introduce consumer legislation in South Africa.⁷⁷ In my view, the introduction of consumer protection legislation ensured that consumers would be protected. In answering the question, Woker took into consideration the challenges posed by abusive practices, among other things, faced by South African consumers and concluded that “any argument which says the legislation was unnecessary ignores the

⁷³ 8-9 Paragraph 4(g).

⁷⁴ Department of Trade and Industry “Consumer Protection Act 68 of 2008”: Presentation to the Portfolio Committee on Trade and Industry_www.pmg.org.za (Accessed on 8 December 2018).

⁷⁵ Hawthorne “Public governance: Unpacking the Consumer Protection Act 68 of 2008” 2013 *THRHR* 346.

⁷⁶ Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) 2nd Edition vii LexisNexis.

⁷⁷ Woker (2010) 230.

reality”.⁷⁸ The court in *Imperial Group (Pty) Ltd v MEC of Economic Development, Environmental Affairs and Forestry*⁷⁹ expressed the view that the introduction of legislation that seeks to protect consumers against unfair commercial practices was long overdue.⁸⁰ The view was expressed on the basis of the limited success that had been achieved by the fragmented provincial consumer laws. I fully agree with that view. The CPA was signed into law on 24 April 2009.⁸¹

The prevalence of unfair practices and abusive behaviour by businesses aimed at consumers were among the reasons for the introduction of the CPA. These practices were exacerbated by the fragmentation of consumer protection measures. These laws were not well known either to businesses or to consumers. More importantly, the lack of comprehensive consumer protection measures guaranteeing consumer rights was the rationale for the reform of the consumer protection system, which led to the introduction of the CPA. The CPA is the first comprehensive legislation in the area of consumer protection law.

3.3 Purpose and Application of the Consumer Protection Act

The object, preamble and purpose of the CPA is, among other things, the “promotion of a fair, accessible and sustainable market place”,⁸² more importantly to “prohibit unfair marketing and business practices”.⁸³ Unfair marketing and unfair business practices were identified as the challenges to the efficacy of the previous consumer protection regime. These provisions highlight as the primary objective of the CPA the prohibition of unfair marketing. The existence of these provision indicates the commitment to protecting consumers against unlawful practices directed at consumers who participate in promotional competitions. This contention is founded on the basis that promotional competitions are part of marketing activities.

⁷⁸ *Ibid.*

⁷⁹ *Imperial Group (Pty) Ltd v MEC of Economic Development and Forestry* 2016 ZAFSHC 105.

⁸⁰ *Imperial Group (Pty) Ltd v MEC of Economic Development and Forestry* 2016 ZAFSHC paragraph 2.

⁸¹ Consumer Protection Government Gazette No 32186, Notice No 467 dated 29 April 2009.

⁸² Preamble.

⁸³ *Ibid.*

The preamble and the purpose of the CPA take into consideration the unequal nature of the South African population. South Africa is characterised by low levels of education and high rates of poverty, which contribute to the unequal nature of society in terms of social and economic status.⁸⁴ The CPA explicitly targets the protection of the rights of historically disadvantaged and vulnerable consumers.⁸⁵ These consumers include minors, older persons and consumers from remote areas who, because of these characteristics, may not be able to participate fully in the market place. The CPA has provisions to ensure that such consumers are able to participate fully in the marketplace, notwithstanding these characteristics. Neville (2011) summarises the meaning of ‘consumer’ in terms of the CPA to include “any person to whom particular goods or services are marketed, any person who has entered into a transaction with a supplier, a user of those particular goods or recipient or beneficiary of those particular services irrespective of whether that user, recipient or beneficiary was a party to a transaction including a franchisee”.⁸⁶ It is important to note that the definition of a consumer is explicit in the CPA and, more importantly, that it includes consumers to whom goods are marketed and consequently includes consumers who participate in promotional competitions, as these are marketing activities.

The CPA further ensures that there is redress for consumers who experience unfair and abusive business practices. *Naudé and Eiselen* are of the view that the CPA “recognise[s] the class of vulnerable consumers who due to the nature of their vulnerability will be prone to exploitative behaviour from suppliers”.⁸⁷ Additionally, Barnard (2015) expresses the view that for the first time in the history of South Africa the plight of vulnerable consumers was recognised in legislation other than the Constitution. She further contends that explicit inclusion in the CPA of provisions aimed at protecting vulnerable consumers affords them special protection,⁸⁸ and I share this view. Therefore vulnerable consumers participating in promotional competitions will enjoy the special protection of the CPA.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Melville “The Consumer Protection Act Made Easy” (2011) Pretoria: Book of Life.

⁸⁷ Naudé & Eiselen Commentary on Consumer Protection Act (2016)3-3.

⁸⁸ Barnard J “Consumer rights of the elderly as vulnerable consumers in South Africa: some comparative aspects of the Consumer Protection Act 68 of 2008”2015 (39) *International Journal of Consumer Studies* 223.

The CPA recognises the importance of consumer education, including the formation of consumer groups which will advocate for the protection of consumer interests.⁸⁹ South Africa is part of the global community, and its consumer protection regime seeks to give effect to internationally recognised consumer rights.⁹⁰ Furthermore, in terms of section 3, the purpose of the CPA is *inter alia* “to promote and advance the social economic welfare of consumers in South Africa by reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers who are low income persons, who live in remote areas and consumers whose ability to read any advertisement among other things is limited by low literacy levels.”⁹¹ These provisions ensure that consumer education is prioritised, notwithstanding the low levels of literacy in the Republic. The CPA also supports the principle of simple, plain and understandable language, and suppliers are required to ensure compliance with this provision.⁹² It is therefore reasonable to conclude that compliance with these provisions will ensure that consumers are sufficiently well informed to be able to exercise their rights effectively.

In *Jaga v Donges*⁹³ it was stated that the preamble of legislation constitutes an integral part of the statute, which can be used to determine its purpose. Van Heerden on the other hand describes a preamble as a “program of action which can and should include any future intention to be strived at”.⁹⁴ It is evident from the preamble of the CPA that its purpose is the protection of consumers, unlike the LA which was never explicit about the protection of consumers who participated in promotional competitions. The CPA protects *all* consumers. Part E of the CPA on “responsible marketing” contains provisions on the protection of consumers participating in promotional competitions.⁹⁵ A conclusion may be drawn that for the first time consumers who participate in promotional competitions are explicitly identified in the legislation as the consumers whose protection is the primary purpose.

⁸⁹ Preamble read with section 3.

⁹⁰ *Ibid.*

⁹¹ Section 3.

⁹² Section 22.

⁹³ 1950 (4) SA 653(AD), at 664H.

⁹⁴ Van Heerden, M “Legislative Drafting: Structure of Primary Legislation” (2007) 8.

⁹⁵ Sections 29 – 39.

It is important to note that, in terms of section 5, the CPA applies to every transaction that is made in the Republic.⁹⁶ The CPA defines a transaction as “an agreement between two or more persons for the supply of goods or services for consideration in the ordinary course of business”.⁹⁷ An important element introduced by the CPA is that these “transactions” should be conducted in the ordinary course of business. It is therefore correct to assume that transactions conducted outside the ordinary course of business would not be covered by the CPA. This element forms an integral role in defining the lawfulness of promotional competitions; to avoid repetition, it is discussed in detail in Chapter 4 paragraph 4.2 below.

The CPA appears to have noted the role that is played by the state in the provision of public services such as electricity. The state is deemed to be a supplier and not a consumer for the purpose of the CPA. Therefore, it has a responsibility to ensure that transactions entered into with consumers in their ordinary course of business are in line with the provisions of the CPA.

The CPA is also applicable to the promotion of goods and services.⁹⁸ Promotional competitions are a part of promotions, and competition organisers are therefore required to comply with the CPA. Taylor (2011) emphasised the importance of ensuring that competition organisers fully understand the provisions of the CPA.⁹⁹ This view was founded on the basis that the CPA is applicable mostly to “SMS”¹⁰⁰ based competitions. I concur with his view, as it is imperative for competition organisers to fully understand the provisions of the CPA, to ensure that their conduct is in line with the CPA.

The preamble of the statute is a program of action that constitutes an integral part of the legislation. The CPA recognises the imbalances of the past and seeks to ensure that those consumers who were previously disadvantaged are able to participate in the marketplace. The legislation seeks to ensure the protection of consumers in line

⁹⁶ Section 5(1) (a).

⁹⁷ *Eskom Holdings Limited v Halstead-Cleak ZASCA 150.*

⁹⁸ Section 5 (1) (b).

⁹⁹ Tylor N “Promotional Competitions and their requirements under the Consumer Protection Act 2008” www.polity.org.za (Accessed 18 November 2018).

¹⁰⁰ “Short message services”.

with internationally recognised consumer rights. More importantly it seeks to protect the interests of consumers who participate in promotional competitions. It recognises the importance of consumer education to ensure that consumers make informed choices and encourages the formation of consumer groups that will advocate for the interests of such groups. Unfair marketing and unfair business processes are prohibited.

3.4 Consumer Rights in terms of the Consumer Protection Act

The CPA adopted a rights-based approach.¹⁰¹ The CPA guarantees *inter alia* the following rights to consumers, including consumers who participate in promotional competitions:

- 1) Right to privacy;¹⁰²
- 2) Right to disclosure and information;¹⁰³
- 3) Right to fair and responsible marketing;¹⁰⁴
- 4) Right to fair and honest dealings.¹⁰⁵

Consumers have a guaranteed right to privacy, and promotional competition organisers are required by law to respect consumers' privacy. Promotional competitions are known to be part of marketing tools as outlined in paragraph 1.2 above. Cell phones have made it easier for consumers to access promotional competitions. Marketing messages about promotional competitions can be sent to consumers' cell phones by the competition organisers at any time. In terms of section 11 of the CPA, the right to privacy includes the right to restrict unwarranted direct marketing. The right to privacy dictates that consumers should have the right *inter alia* to decline and opt out of those promotion messages.¹⁰⁶ Strachan is of the view that sending direct marketing and unsolicited messages is an invasion of consumers' privacy.¹⁰⁷ I concur with this view on the grounds that these messages may be sent to

¹⁰¹ Melville *The Consumer Protection Act Made Easy* (2011) Pretoria: Book of Life 5.

¹⁰² Chapter 2, Part B.

¹⁰³ Chapter 2, Part D.

¹⁰⁴ Chapter 2, Part E.

¹⁰⁵ Chapter 2, Part F.

¹⁰⁶ Section 11 (1) (a-b).

¹⁰⁷ Strachan (2016)247.

consumers at any time. In most instances, consumers did not consent to receiving such messages, and the receipt of such messages is therefore unsolicited. Consumers with better literacy levels are able to opt out of these messages with ease, provided such an option is made available to them. However, the same cannot be said about vulnerable consumers with low literacy levels. It will therefore mean that their privacy will be invaded, as they are not able to protect themselves against these practices. It follows therefore that competition organisers have the responsibility to respect the privacy of consumers and ensure compliance with the CPA. The dedicated provisions on promotional competitions which are discussed in detail in chapter 4 below give effect to the right to privacy. This right prohibits *inter alia* publication of the winners' information and competition organisers have the responsibility to ensure that participants' contact numbers are kept confidential.

Secondly, the CPA explicitly guarantees consumers the right to fair and responsible marketing, including the right to disclosure and information. It follows therefore that promotional competition organisers have the responsibility to disclose all the information regarding the promotional competitions. Among other things, the rules for participation in a promotional competition should be stated clearly in advance, which is one of the requirements in terms of section 36 of the CPA. Competition organisers are therefore required to ensure that these rights are respected. The CPA now requires promotional competition organisers to ensure that their promotional competition activities are fair and conducted in a responsible manner Barnard (2015) is of the view that the CPA protects consumers not only in respect of the provision of goods and service but also in respect of the manner in which goods are marketed and promoted.¹⁰⁸ I agree with this contention that the consumer's guaranteed right to responsible marketing ensures protection against improper marketing behaviour. Jacobs, Stoops and Van Niekerk are of the view that the right to fair and responsible marketing ensures that there is fair business practice in advertising.¹⁰⁹ These rights will be made meaningful by the practical implementation of consumer education initiatives.

¹⁰⁸ Barnard J "Consumer rights of the elderly as vulnerable consumers in South Africa: some comparative aspects of the Consumer Protection Act 68 of 2008" 2015 (39) *International Journal of Consumer Studies* 223.

¹⁰⁹ Jacobs, Stoops & Van Niekerk "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" *PER/PELJ* 2010 (13)3.

An informed consumer is seen as a tool for economic growth and is able to participate in the marketplace.¹¹⁰

Previously, consumers were victims of unfair business practices. Defective goods were sold to consumers and unfair contract terms were the order of the day.¹¹¹ Because of their unequal bargaining powers, consumers were not able to bargain with suppliers. The existence of these rights levels the playing field and ensures that there is at least fair treatment of consumers. There is no doubt that consumers who participated in promotional competitions never enjoyed these rights in the previous consumer protection regime. According to Hawthorne, the CPA introduced the first fundamental consumer rights in the country.¹¹² The writer fully agrees with this contention, as consumers did not enjoy these rights in any previous legislation.

The CPA appears to have taken into consideration the fact that promotional competitions are a marketing tool. The provisions of section 36 on promotional competitions form part of Part E of the CPA entitled “Right to fair and responsible marketing”. It is therefore correct to conclude that the provision on promotional competition gives effect to the right to fair and responsible marketing. Section 36 outlines the rules of conduct for promotional competition organisers to ensure that consumers’ rights to fair and responsible marketing are maintained. Section 36 is discussed in Chapter 4.

For the first time South African consumers have rights outlined in the CPA. Among other things consumers have the right to responsible, honest and fair marketing. Promotional competition organisers are therefore required to respect these rights. Unlike the previous LA which prioritised the interest of participants in the National Lottery, CPA explicitly protects the rights of all consumers. It is therefore correct to conclude that, for the first time, consumers who participate in promotional competition have guaranteed consumer rights.

¹¹⁰ Ramsay “Regulation and the Constitution of the European Union single market: The contribution of Consumer Law” 2011 *Can. Bus. L. J.* 322.

¹¹¹ Woker (2010) 218.

¹¹² Hawthorne L “Public governance: Unpacking the Consumer Protection Act 68 of 2008” 2013 *THRHR* 343-370.

3.5 Conclusion

It was evident in paragraph 3.2 that the prevalence of unfair practices and abusive behaviour by businesses aimed at consumers was among the reasons for the introduction of the CPA. These practices were exacerbated by the fragmentation of consumer protection measures. These rules were not well known to either business or consumers. More importantly, the lack of comprehensive consumer protection measure guaranteeing consumer rights was the rationale behind the reform of the consumer protection system, which led to the introduction of the CPA. This is the first legislation in the Republic entitled “Consumer Protection Law”.

The preamble of the CPA recognises the imbalances of the past and seeks to ensure that those consumers who were previously disadvantaged are able to participate in the marketplace. More importantly it recognises the importance of consumer education in ensuring that consumers make informed choices. It encourages the formation of consumer groups that will advocate for their interests, and prohibits unfair marketing and unfair business practices.

For the first time South African consumers have fundamental consumer rights outlined in the CPA. Among other things, consumers have the right to responsible, honest and fair marketing. It is also important to note that the definition of a consumer in the CPA includes any person to whom goods or services are marketed. Promotional competition organisers are therefore required to respect these rights. Unlike the previous LA, which prioritised the interests of participants in the national lottery, the CPA explicitly protects the rights of all consumers. It is therefore correct to conclude that, for the first time, consumers who participate in promotional competitions have guaranteed consumer rights. This was not the case with the LA, whose main intent was the regulation of lotteries with the explicit mandate to protect consumers who participated in the national lottery.

The aim of this chapter was to determine the level of protection afforded by the provisions of the CPA to consumers who participate in lawful and unlawful promotional competitions. This chapter focused on the policy rationale for the introduction of the CPA and its purpose and application. Based on the discussions in this chapter, it may

therefore be concluded that the introduction of the CPA as dedicated consumer legislation ensures the protection of consumers. The provisions of section 36 of the CPA, which deals with promotional competitions, is discussed in Chapter 4.

CHAPTER 4: PROMOTIONAL COMPETITIONS IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

4.1 Introduction

‘Competition organisers are required to comply with the provisions of Section 36 of the CPA and Regulation 11 to ensure compliance of their promotional competition with the CPA. Failure to comply with these provisions will render their promotional competition unlawful’.¹¹³

The above statement describes the importance of competition organisers’ compliance with the provisions of the CPA. The question is therefore: Are consumers who participate in lawful and unlawful promotional competitions protected by the provisions of the CPA? Taking into consideration the provisions of Section 36 and Regulation 11, which outline the rules that competition organisers are required to comply with, a conclusion may be reached that consumers are protected against lawful and unlawful promotional competitions. This contention is further supported by the discussion in Chapter 3 on the purpose of the CPA which is purely to protect all consumers in the Republic, including consumers who participate in promotional competitions.

This chapter seeks to prove this contention by firstly discussing the provisions of section 36 with reference to Regulation 11. This will be followed by a discussion of offences for failure to comply with these provisions. Taking into consideration all the discussions, a conclusion will be reached.

4.2 Rules for Competition Organisers in terms of Section 36 of the CPA

The CPA describes promotional competition as “any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance”.¹¹⁴ It further states that it is immaterial whether the participant will be required to display any skill or ability before receiving a prize.¹¹⁵

¹¹³ Sections 36 and 107-110 CPA.

¹¹⁴ Section 36(1) (d).

¹¹⁵ Section 36 (d) (ii).

The CPA does not define the concepts of “competition”, “game”, “scheme”, “arrangement”, “system”, “plan”, “device”, “lot” or “chance”. However, a prize is defined as follows: “a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing”. The CPA defines a “participant” as “any person who enters, competes in or is otherwise eligible to win in a promotional competition”.¹¹⁶

The definition of a promotional competition, however, refers to “competition”, “game”, “scheme”, “arrangement” and “system”. For the purpose of this study, the writer will use the word “scheme” when referring to all these methods of conducting a promotional competition.

Any scheme that awards a prize to a consumer by lot or by chance and awards a prize to a consumer after requiring a consumer to display some form of skill is a promotional competition in terms of this first element of a definition of promotional competition. It is important to note that the repealed section 54 of the LA excluded from the definition of a promotional competition any competition that required consumers to display skills.¹¹⁷ Therefore, in terms of the CPA, the existence of a skill element in awarding of prizes cannot be used as defence to exclude the application of the CPA. Jakoot is of the view that exclusion of the skill element from the application of the LA suggested that such schemes were not promotional competitions, as the outcome was not based on chance, and also that inclusion of a skill element in the definition of a promotional competition by the CPA closed the gap in law.¹¹⁸ I fully agree with this view, and the inclusion will ensure that competition organisers do not design their schemes in a manner that seeks to avoid the application of the law, which was possible under the LA.

It is common cause that promotional competitions are a tool for marketing goods or services. The second element of the definition requires the scheme to be conducted

¹¹⁶ Section 36(1) (a).

¹¹⁷ Section 56(b).

¹¹⁸ Jakoot | “Promotional competitions –two notable changes” www.cliffedekkerhofmeyer.com (Accessed on 2 May 2018).

in the ordinary course of business.¹¹⁹ The CPA defines business to mean “continual marketing of any goods or services”.¹²⁰ However, the CPA does not define the meaning of ‘ordinary course of business’. In an attempt to define this concept, the court in *Eskom v Halstead-Cleak*¹²¹ emphasised the importance of an objective test when determining the meaning of ‘ordinary course of business’. A similar approach was followed by the tribunal in the case *Doyle v L Killen et al*¹²². The tribunal further expressed the importance of checking the following to determine whether the act was conducted in the ordinary course of business. Firstly “whether the person has a registered business, secondly, the nature of business that the person engages in, thirdly, the nature of goods normally sold by the person, fourthly, the frequency within which the goods are sold by the person and whether the person advertises or markets his goods on a frequent or ongoing basis”¹²³.

This matter related to a sale where the house was sold by the owner. The buyer incurred some costs as a result of defects in the house that were not disclosed during the sale. The tribunal concluded that the owner was not in the business of selling properties. It therefore concluded that it was reasonable to conclude that any scheme not linked to the ordinary business of continual marketing of any goods or services would not be covered by the provisions of the CPA. Therefore, the seller was not liable for damages incurred by the buyer in terms of the CPA. I fully agree with the reasoning followed by the tribunal in defining ‘ordinary course of business’. In an attempt to align the ‘ordinary course of business’ when conducting promotional competitions, it will not make any business sense for competition organisers to conduct a promotion through a promotional competition that is not linked to marketing goods sold or services offered by them. It follows therefore that any scheme not conducted in the ordinary course of business would be unlawful.

¹¹⁹ Section 36 (1) (d) (i).

¹²⁰ Section 1.

¹²¹ 2017 (1) SA 333 (SCA) paragraph 20.

¹²² *Doyle v Killen NCT/12984/75 paragraph (1) (b)*.

¹²³ Paragraph 59.

In terms of the third element, any scheme which offers a prize which is more than R1 as prescribed by regulation 11(4) is a promotional competition.¹²⁴ It follows therefore that any competition which offers prizes above the value of R1 is a promotional competition. Taylor is of the view that by setting the low threshold the intention of the legislature was to ensure that all promotional competition are regulated in terms of the CPA.¹²⁵ In practice it is highly unlikely that competition organisers would even have a prize of R1 for their competition. I concur with that view: the low threshold will ensure that all competitions are covered.

Section 36(2) prohibits any practices that mislead consumers into believing that they have *inter alia* won a prize when they have not, in fact, won a prize, or have won the prize when in fact there was no competition. It further prohibits awarding of prizes to consumers which are subject to conditions. Requiring a consumer to pay any consideration after the awarding of the prize is prohibited. Similar rules are applicable to misleading a consumer that he/she has the right to a prize where in fact that is not true.¹²⁶ This provision is linked to the consumer's right to honest and fair marketing. More importantly it addresses the loophole that was identified as the rationale behind the introduction of the CPA, where consumers were victims of deceptive and unfair practices.

The provision section 36(3) (a) prohibits competition organisers from requiring consumers to pay a consideration. The only payment that is allowed is a reasonable cost of transmitting entry. Therefore, any scheme that requires consumers to pay consideration is unlawful.

The CPA defines consideration to mean *inter alia* "...anything of value given and accepted in exchange for goods or services".¹²⁷ At first glance the definition of

¹²⁴ Section 36(1) (d) (ii).

¹²⁵ Tylor N "Promotional Competitions and their requirements under the Consumer Protection Act 2008" www.polity.org.za(Accessed 18 November 2018).

¹²⁶ "A person must not directly or indirectly inform another person that a participant has (i) a right to a prize to which the person does not in fact have a right; (ii) if the prize was generally available or offered to all similarly situated persons or class of persons or;(iii) if, before becoming eligible to receive the prize, the required to offer further consideration for the prize or to purchase any particular goods or services".

¹²⁷ Def. "consideration" s 1 CPA: "...Including (a) money, property ,a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; (b) labour, barter or other goods or services;(c) loyalty credit or award, coupon or other right to assert a claim; or (d) any other thing,

‘consideration’, read with the provisions of section 36(3) (a), appears to prohibit any payment for goods or services when conducting a promotional competition. Does that mean that, when competition organisers are conducting promotional competitions, the promoted goods or services are free? That line of reasoning cannot be correct, as the purpose of conducting promotions is to promote goods or services and increase sales.¹²⁸

It is important to note that section 36 has its own definition for terms relating to its provisions. The meaning of ‘consideration’ as defined in section 1 appears to relate to the payment of a price for the purchase of any goods or payment of any services.¹²⁹ It is therefore appropriate to assume that competition organisers are not prohibited from charging a purchase price or requiring payment for services offered when conducting promotional competition. However, the second part of section 36 (3) (a) allows competition organisers to charge consumers a reasonable amount for sending or submitting an entry into the competition. It is therefore appropriate to assume that the prohibited consideration is for the right to compete. Therefore, competition organisers cannot require payments from consumers for the right to compete, other than anything of value given and accepted for goods or services, including the cost for “transmitting entry”. It follows therefore that any promotional competition that would require consumers to pay for the right to compete would be unlawful. This contention is supported by section 36(4), which deems competition organisers to have charged a consideration when they require a consumer to pay for the right to compete or increase the price when conducting a promotional competition.

Whereas allowing consumers to pay only reasonable costs to transmit entry appears to be protecting the rights of consumers, it might also appear to be exposing consumers to other forms of abuse. This view is based on the fact that allowing consumers to make monetary payment for transmitting entry to a promotional competition might have the following consequences. Firstly, a consumer who opts to

undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer”.

¹²⁸ Barnard & Scott “An overview of promotional activities in terms of the Consumer Protection Act in South Africa” 1.

¹²⁹ Section 1.

exercise the right to enter a competition will pay a purchase price or payment for services plus the reasonable cost of transmitting entry capped at R1,50.¹³⁰ This will mean this consumer will pay more than the consumer who opted not to exercise that right. This view is founded on the basis that in practice competition organisers usually use the “short-code sms”¹³¹ service to receive entries. This is a dedicated, ring-fenced line to which the R1,50 is credited. Therefore, where for example the price of promoted goods or services is R10 and a consumer opts to exercise the right to enter, that consumer will pay R11,50. On the other hand, when a consumer buys the same product or service and opts not to exercise the right to enter the competition, that consumer will pay R10. Therefore, there appears to be a gap in the current provision in that it allows consumers to pay more for opting to participate in a promotional competition. Secondly, the purpose of a promotional competition is to promote. The short-code approach appears to have the risk of generating a ring-fenced revenue. A competition organiser conducting a promotional competition will receive more money not only through increase in sales, which is in line with the purpose of the promotional competition, but also through the competition itself. The second element will mean, therefore, that promotional competitions are no longer conducted for their intended purpose but have crossed the line to becoming a lottery as discussed in Chapter 2. By law only an authorised licensee can raise funds through lotteries. This provision not only runs the risk of exposing consumers to participation in unlawful promotional competition but also appears to be in conflict with the Lotteries Act and the purpose of conducting a lottery. In order to enhance the protection of consumers, it would therefore be appropriate that there should be no monetary cost to consumers for transmitting an entry.

Louw criticizes the decision of the court in declaring the First National Bank¹³² million a month account an unlawful lottery in terms of the Lotteries Act. The *modus operandi* of the scheme were that FNB clients were required to open a savings account for an amount of R100 for a chance to win a million rand. Louw is of the view that the court ignored the important point that this scheme was a promotional competition and

¹³⁰ Regulation 11.

¹³¹ Section 1, “sms” means a short message service provided through telecommunication system.

¹³² Hereinafter referred to as “FNB”.

therefore not in contravention of the LA.¹³³ In his argument he identifies “the venture of subscription or stake, a chance event and award of a prize based outcome of the chance event” as three important elements for a prohibited lottery. Louw is of the view that because the R100 remained the property of the depositor and ownership of the R100 did not pass to FNB, such amount did not constitute a subscription¹³⁴. In my view, without the R100 deposit the consumer would not have had the right to compete. The passing of ownership element raised by Louw is an important element. It points directly to the purpose of a lottery, which is to generate revenue through the scheme, in contrast to the purpose of a promotional competition, which is to promote and increase sales while not generating revenue from the scheme itself.

In addition to the three elements raised by Louw, the writer refers to a fourth element, being “the scheme structured in such a way that it generates revenues.”¹³⁵ The writer further contends that if the scheme is structured in such a way, it is not a promotional competition but a lottery. Reverting to the point of subscription raised by Louw and the manner in which that scheme was structured, I hold the view that it is possible to have a scheme that has a subscription element but has as its primary purpose to promote and not generate revenues. Another practical example will be a scheme where consumers are required to complete an entry form and place it in a box. That entry falls within the definition of a subscription, but within the purpose of a promotional competition. Therefore, to determine whether a promotional competition is unlawful in terms of the CPA and therefore an unlawful lottery in terms of the Lotteries Act, the determining factor should be whether the competition organisers generate revenues from the scheme itself. The question for policy consideration therefore is on the reasonableness of the reasonable costs of transmitting entry. Judged by the proliferation of sms-based promotional competitions conducted by third parties, the writer doubts that they would be so prevalent if there were no revenue generated through the reasonable cost of transmitting entry. At the heart of this view is the protection of consumers against the risk of being exposed to gambling. The guiding principle of regulating gambling and specifically the monopoly of the lottery is to

¹³³ Louw J “Distortion of the law: A comment on the SCA judgment in *FirstRand Bank Ltd v National Lotteries Board* 2008(4) 548(SCA)” (*August DeRebus* 59-60.

¹³⁴ *Ibid.*

¹³⁵ The fourth element is derived from the purpose of conducting a lottery.

prevent overstimulation of the market.¹³⁶ A similar view was raised by Strachan .¹³⁷ The sms-based competitions entail that risk of exposing consumers to excessive gambling. It is well known that consumers are always inundated with calls to text for a chance to win. Strachan highlighted a need to revise the Lotteries Act to ensure that it is aligned to section 36 of the CPA.¹³⁸ I agree with that view, as the existing provisions in the LA have not been updated to ensure alignment of the repealed provisions with the CPA. However, it is also imperative for both pieces of legislation to have an explicit provision that prohibits any promotional competition that generates revenues from the scheme itself. Therefore, regulation 11(3) should be amended to a zero-rand cost of transmitting entry. Promotions are the activities of competition organisers, and it is thus fair and reasonable that they should carry the costs.

The CPA prohibits the participation of and the awarding of prizes to consumers who are not allowed to use or consume the marketed goods. The regulations prohibit the use of winners' images for marketing purposes without their consent. It further prohibits the participation of directors and family members of any company linked to the promotional competition.

It appears that this provision seeks to ensure that prizes are awarded to consumers who by law qualify to use such goods or services given as a prize. Prohibiting directors and family members linked to the scheme to was ensure that promotional competitions are conducted with due propriety and honesty.

Prior to conducting the scheme, competition organisers are required to draft the rules, which should be made available on request of the National Consumer Commission¹³⁹ or an interested consumer.¹⁴⁰ The CPA further requires competition organisers to ensure that material or advertisements used to invite consumers to participate in the scheme indicate *inter alia* the competition in which members are invited to participate; secondly, the action to be taken by the consumer in order to participate in that scheme; thirdly, the manner in which the winner will be determined; fourthly, the mode of

¹³⁶ The Department of Trade and Industry "Gambling Review" (2012) 6.

¹³⁷ 325.

¹³⁸ 297.

¹³⁹ National Consumer Commission herein after referred to as "the NCC". Established in terms of section 85.

¹⁴⁰ Section 36 (3) (c).

communication that will be used to communicate information about the competition, and finally information about the date, time and place where the rules can be obtained by interested consumers, including the dates, times and place where the lucky winner can claim the prize. On completion of the scheme, competition organisers are required to keep for a period of three years all documents and information¹⁴¹ relating to the manner in which the scheme was conducted.¹⁴² Jacobs, Stoops and Van Niekerk are of the view that these provisions ensure that there is transparency on the part of competition organisers.¹⁴³ I fully support this view, as transparency in the manner in which the competition was conducted will enable consumers at least to have certainty that the scheme was conducted in line with the CPA.

These provisions encourage fair and honest marketing and more importantly give effect to this right. It follows, therefore, that any competition organiser who fails to comply with this rule will be contravening these provisions and that scheme will be unlawful. However, *Naudé and Eiselen* supported the view expressed by Strachan¹⁴⁴ that it would appear that non-compliance would not render such promotional competition unlawful.¹⁴⁵ It is my view that non-compliance in this instance might render such promotional competition not illegal but unlawful. This view is founded on the principle that an illegal activity is prohibited by law and cannot be corrected. However, I submit that a non-compliant promotional competition in this instance is therefore unlawful, and the promotional competition organiser may be liable for administrative penalties as discussed further in paragraph 4.6 below. The writer further submits that the status of a non-compliant promotional competition can be changed by taking the corrective action to reverse non-compliance, which would then render such promotional competition lawful.

¹⁴¹ “ Promoter’s information, competition rules, competition material, full list of prizes, information on when and how the competition was marketed, draw manager, acknowledgment of receipt by prize winners, manner in which the prize was determined, manner in which the prize was announced, list of names and identity number of prize winners, steps taken to contact the winner in the event the winner was not contactable and steps taken to hand over the prize in the event the winner was not available during the draw”

¹⁴² Regulation 11(a-r).

¹⁴³ Jacobs Stoop PN & Van Niekerk R “Fundamental Consumer Rights under the Consumer Protection Act 68 of (2008) A critical overview and analysis 334.

¹⁴⁴ Naudé & Eiselen “Commentary on the Consumer Protection Act” (2016) 3-3.

¹⁴⁵ Naudé & Eiselen “Commentary on the Consumer Protection Act” (2016) 36-8

These provisions clearly set the rules for competition organisers. However, it is imperative to point out that monitoring of compliance with these provisions appears to be reactive. The assumption is premised on the provision of section 36(3) (ii) which does not make compulsory the submission of the rules to the NCC. This begs the question. Who has the responsibility to monitor compliance? The grounds on which the NCC can request the rules are not clear from these provisions; however, it would not be unreasonable to assume that such grounds would be found in instances where a consumer lays a complaint with the commission, as the body responsible for receiving complaints. However, the repercussions of this approach might be that consumers are exposed to promotional competitions that do not comply with the CPA, because there is no vetting of these rules. Such competitions will make it to the market without being detected. Some might argue that the requirement of the CPA that the scheme be supervised by an auditor or an advocate might ensure compliance with the CPA. In my view, the provisions in their current form might be open to abuse. It should be made a requirement that prior to conducting the scheme competition organisers should submit the rules to the NCC with the names of appointed auditors or an advocate and confirm that the scheme will be conducted in line with the CPA. That approach will ensure that compliance is monitored and more importantly that the interests of consumers are protected.

The CPA further ensures that on compliance with all the conditions for participating in a scheme the consumer's right to compete commences immediately and competition organisers may not change the vested rights,¹⁴⁶ including any other rights available to consumers who participated in the scheme once the results are released.¹⁴⁷ The provisions of section 36 set out the rules with which competition organisers are required to comply. More importantly, competition organisers are prohibited from charging consumers for the right to participate in a scheme. Consumers are allowed only to pay the costs of transmitting entry. Organisers have the responsibility to ensure that they comply with these provisions. Van Heerden in Eiselen and Naudé¹⁴⁸ also noted that section 36 creates obligations for competition organisers. Whereas the

¹⁴⁶ Section 36(7) (a-b).

¹⁴⁷ See section 36(8). "The right to any benefit or right conferred on a person as a result of that person's participation in a promotional competition is fully vested immediately upon determination of the results of the competition".

¹⁴⁸ Naudé & Eiselen "Commentary on the Consumer Protection Act" (2016)36-6.

provisions of section 36 have their own definition, it is imperative to highlight that no specific offences are outlined in that section. It is therefore proper to assume that the penalties for failure to comply with these provisions will be in terms of the general penalties outlined in the Act.

Section 36 and its related regulation appear to have provisions that protect consumers against lawful and unlawful promotional competitions. The dedicated section 36, which specifically outlines the rules with which competition organisers are required to comply and the rights of consumers, is a step to the right direction. Whether consumers in the Republic who participate in promotional competitions are aware of the existence of these provisions requires further consideration. However, the CPA advocates for consumer education and the formation of consumer groups, and one can only hope that South African consumers benefit from those measures.

4.3 Enforcement of Consumer Rights and Offences in terms of the CPA

It is important to note that the CPA gives consumers “the right to be heard and obtain redress”.¹⁴⁹ This right is available to consumers who participate in lawful and unlawful promotional competitions. The establishment of the NCC created a specialised body to investigate consumer complaints and regulate business conduct. The Consumer Tribunal on the other hand is a specialised body that adjudicates on consumer disputes. The Tribunal is a creature of statute created in terms of the National Credit Act.¹⁵⁰ Whereas consumers do not have direct access to the tribunal and their matters have to be transferred by the NCC, in exceptional cases consumers can have direct access. According to Strachan, the NCC can investigate any competition organisers suspected of contravening the provisions of the CPA.¹⁵¹ Alternatively the NCC can investigate after receiving a complaint from an affected consumer. When the competition organiser is found to have contravened the CPA, a compliance notice will be issued, directing the competition organisers to comply with the contravened provisions. Failure to comply will lead to the NCC referring the matter to the tribunal for imposition of an administrative fine. The tribunal has authority to impose a fine not

¹⁴⁹ Chapter 3, Part A.

¹⁵⁰ *BMW SA (Pty) Ltd and Another v Bonn and another NCT/2807 &2806/2011/101(1) (P)* at paragraph 91.1.

¹⁵¹ Strachan (2016)250.

exceeding one million rand or 10% of the annual turnover.¹⁵² These provisions ensure that non-compliance by competition organisers is dealt with. The imposition of a fine will no doubt serve as a deterrent for the abuse of consumers' rights. We can therefore not deny that the CPA ensures that consumers have these specialised bodies to ensure that disputes are prioritised and dealt with promptly. This is an affordable system and consumers do not require legal representation to have their matters heard. It follows therefore that consumers who participate in a promotional competition have these forums, including courts, available to them to lodge a complaint. According to Naudé, the cost of litigation in the past prevented consumers from approaching the courts when their rights were violated.¹⁵³ I concur with this view that the existence of these bodies will ensure that consumers have access to an affordable system. Naudé and Eiselen are of the view that the CPA is in line with the United Nations Guideline for Consumer Protection, which supports the establishment of formal and informal dispute resolution procedures.¹⁵⁴ However, whereas the CPA has created these dispute resolution mechanisms, nothing precludes consumers from having direct access to courts.¹⁵⁵

Chapter 6 Part C of the CPA contains offences and penalties.¹⁵⁶ These sanctions are additional to the administrative sanctions that may be imposed by the NCC and the tribunal. These are purely criminal in nature and may be dealt with by our courts. Among other things, it is an offence to disclose any personal information received when conducting any function in terms of this Act.¹⁵⁷ Promotional competition organisers usually require participants' personal information. It follows therefore that it is an offence for competition organisers to disclose the personal information of consumers who participated in promotional competition. However, an exception can be found in regulation 11(3)(a), which allows for the use of an image of the winner for marketing purposes, only after written consent has been received from the consumer. On conviction, competition organisers may be liable for a fine, or imprisonment not

¹⁵² Strachan (2016) 251.

¹⁵³ "Enforcement procedures in respect of the consumer right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective" 2010 *SALJ*.

¹⁵⁴ Naudé & Eiselen "Commentary on the Consumer Protection Act" 68-4

¹⁵⁵ Section 2 (10).

¹⁵⁶ Sections 107-110.

¹⁵⁷ Section 107(1).

exceeding 10 years, or both. In instances where the conviction related to the contravention of any other provisions in the Act other than disclosure of personal information, competition organisers may be liable for a fine or imprisonment not exceeding 12 months or both.

The provisions of the CPA ensure that consumers' rights are protected and ensure that those who violate these rights are punished. The writer therefore conclude that South African consumers can participate freely in promotional competitions knowing that their interests are protected. Judging by the discussions above, the provisions of the CPA strive to balance the unequal bargaining powers between business and consumers. These provisions outline the rules to which competition organisers are required to adhere. Failure to comply is an offence and in that manner the interests of consumers who participate in lawful and unlawful promotional competitions will be protected.

Consumers whose rights are violated by the conduct of competition organisers can lodge a complaint with the NCC and their dispute can be heard by the tribunal. Any person who contravenes consumer rights shall be guilty of an offence and may be liable for an administrative fine imposed by the tribunal. It is evident that the CPA introduced administrative bodies to deal with consumer complaints. However, consumers' rights to common law is still maintained, and nothing precludes an affected consumer from approaching the courts.

4.4 Conclusion

Section 36 and its related regulation discussed in paragraph 4.2 above appear to contain sufficient provisions to protect consumers against lawful and unlawful promotional competitions. The dedicated section 36 specifically outlines the rules that competition organisers are required to comply with and is hence a step in the right direction. Whether consumers in the Republic who participate in promotional competitions are aware of the existence of these provisions requires further consideration. However, the CPA advocates for consumer education and the formation of consumer groups, and it can only be hoped that South African consumers benefit from those measures.

Section 36 defines the meaning of promotional competitions in terms of the CPA and the rules competition organisers are required to comply with. The research concluded in paragraph 4.2 that all promotional competitions that comply with the CPA are lawful, and failure to comply with the CPA is a prohibited conduct.

It is worth noting that, whereas the CPA prohibits payment of any consideration for the right to compete, regulation 11 nevertheless permits payment of the reasonable cost of transmitting entry. It was outlined in paragraph 4.2 that this phenomenon appears to be unfair to consumers who opt to exercise the right to compete.

Consumers whose rights are violated by the conduct of competition organisers can lodge a complaint with the NCC and their dispute can be heard by the tribunal. Any person who contravenes consumer rights shall be guilty of an offence and may be liable for an administrative fine imposed by the tribunal.

It is evident that the CPA introduced administrative bodies to deal with consumer complaints. However, consumers' rights to common law are still maintained, and nothing precludes an affected consumer from approaching the courts. Judged by the discussions in this chapter, the provisions of the CPA strive to balance the unequal bargaining powers between business and consumers. These provisions outline the rules that competition organisers are required to adhere to. Failure to comply is an offence and in that manner the interests of consumers who participate in lawful and unlawful promotional competitions will be protected.

The purpose of this section was to analyse the level of protection afforded to consumers by the provisions of section 36 of the CPA and determine whether they were sufficient to protect consumers who participated in lawful and unlawful promotional competitions. It is therefore proper to conclude that section 36 and its regulations contain the necessary provisions to ensure protection of these consumers. However, payment of reasonable costs to transmit entry by consumers appear to be unfair and requires policy considerations as outlined in paragraph 4.2.

CHAPTER 5: CONCLUSIONS

5.1 Introduction and Overview of the Study

The main purpose of this research was to determine whether the provisions of the CPA protect consumers who participate in lawful and unlawful promotional competitions. Prior to the promulgation of the CPA, promotional competitions were regulated by the LA. It was therefore imperative that the repealed provisions of the LA be assessed in order to reach a proper conclusion on the current provisions contained in the CPA. It was evident in the analysis of the purpose of the LA that its main purpose was to regulate lotteries with explicit emphasis on protection of consumers who were holding a valid National Lottery ticket.¹⁵⁸ There was no explicit provision in the LA that gave the board powers to protect consumers who participated in promotional competitions. The board had the explicit role of regulating and keeping promotional competitions in order.¹⁵⁹ Protection of consumers who participated in lawful and unlawful promotional competitions was due to the board's activity of keeping the conduct of promotional competitions in order.

Whereas there were specific provisions relating to promotional competitions in terms of section 54 and its regulation, including consequences for non-compliance, it was evident that the conduct of promotional competition organisers was regulated in order to protect the National Lottery from undue competition. This was evident from the provisions of the LA and regulations which prohibited competition organisers from having any game which was similar to that of the National Lottery.¹⁶⁰ The Board had powers to request the Minister to develop regulations when the conduct of promotional competitions was suspected to have any negative impact on the National Lottery.¹⁶¹ Protection of the interest of consumers who participated in promotional competitions was not the primary purpose of the LA. It was therefore appropriate to conclude that protection by the LA of consumers who participated in promotional competitions was not sufficient.

¹⁵⁸ Preamble read with section 10 (b) (ii).

¹⁵⁹ *National Lotteries Board v Bruss NO 2009(4) SA 362 (SCA)*.

¹⁶⁰ Section 45(1) (i).

¹⁶¹ Sections 54 (2) and 54 (3).

The CPA was signed into law on 24 April 2009¹⁶² and is the first comprehensive consumer protection legislation in the Republic. Judged by its preamble and purpose, it recognises the imbalances of the past and the character of South African consumers. Its main purpose among other things is to ensure that consumers who were previously disadvantaged are able to participate in the marketplace.¹⁶³ For the first time South African consumers have fundamental consumer rights entrenched in comprehensive consumer legislation.¹⁶⁴ The legislation is explicit in its aim to protect all consumers, including consumers who participate in lawful and unlawful promotional competitions.

The provisions of section 36 and Regulation 11 set the rules that competition organisers are required to comply with. Competition organisers are required *inter alia* to ensure that prior to conducting any promotional competitions rules are drafted in a simple and clear language.¹⁶⁵ The CPA requires promotional competition organisers to ensure that those rules are made available on request.¹⁶⁶ The CPA advocates for fair and responsible marketing.¹⁶⁷ Competition organisers are required to ensure that consumers are aware of the manner in which they may participate in a competition by drafting competition rules among other things.¹⁶⁸ Payment of any fee for the right to compete other than the reasonable cost of up to R1,50 to transmit entry is prohibited.¹⁶⁹ To ensure consumers' right to privacy competition organisers are prohibited from using images of the winner without their consent.¹⁷⁰ In order to ensure fairness in conducting promotional competitions, the CPA requires the process to be overseen by an independent auditor, accountant, attorney or an advocate.¹⁷¹

The CPA further prohibits participation by directors of the company or partners or family members who are directly or indirectly related to the competition organisers.¹⁷² To ensure transparency and accountability competition organisers are required to

¹⁶² GG 32186/29-4-2009.

¹⁶³ Section 3.

¹⁶⁴ Chapter 2.

¹⁶⁵ Section 22.

¹⁶⁶ Regulation 11 (7).

¹⁶⁷ Sections 29 – 39.

¹⁶⁸ Section 36 (3) (c).

¹⁶⁹ Section 36 (3) (a).

¹⁷⁰ Regulation 3(a).

¹⁷¹ Regulation 5.

¹⁷² Section 36 (3) (ii).

keep the records of the competition for a period of 3 years.¹⁷³ The conduct of promotional competition organisers is overseen by a dedicated consumer commission. Where non-compliance is detected a compliance notice will be issued.¹⁷⁴ Failure to adhere to the notice and correct the identified area of non-compliance is an offence.¹⁷⁵ Such non-compliance may be referred to the Tribunal with powers to impose fines.¹⁷⁶ On prosecution, competition organisers may be liable to a fine or imprisonment not exceeding 10 years, in some instances not exceeding 12 months.¹⁷⁷

5.2 Research Objective

The aim of the study was to determine the extent to which the CPA protects consumers against unlawful promotional competition. This was done by answering the sub-questions below:

5.2.1 What was the level of protection that participants in promotional competitions and also unlawful promotional competitions enjoyed under the Lotteries Act?

5.2.2 What protection measures are available to consumers against promotional competitions as well as unlawful promotional competitions in terms of the CPA?

5.2.3 Are the current measures sufficient to ensure the protection of consumers?

5.3 Conclusions

It is evident from the findings of the study in Chapter 2 that the main purpose of the Lotteries Act was to protect the interest of the National Lottery and its participants. The study proved in paragraph 2.3 above that section 10(b)(ii) of the LA vested the board of the National Lotteries Board with an explicit mandate to protect the interests of a consumer with a valid National Lottery ticket. Section 54 of the LA and its regulations ensured that the interests of the National Lottery were protected. The same was demonstrated and proven by this research in paragraph 2.6 above in that promotional

¹⁷³ Regulation 6.

¹⁷⁴ Section 100.

¹⁷⁵ Section 102 (2).

¹⁷⁶ Section 99 (h).

¹⁷⁷ Section 111.

competition organisers were prohibited from designing competitions that were similar to the games offered by the National Lottery Operator.¹⁷⁸

Whereas there was no explicit provision on the responsibility of the board to protect the interests of consumers who participated in promotional competitions, the conduct of promotional competition organisers was nevertheless regulated. Promotional competition organisers were *inter alia* prohibited from publishing information of the winners without their written consent. Any conduct of promotional competition organisers that contravened the LA was unlawful.

However, section 10(d) of the LA explicitly vested the board of the National Lotteries board with authority to regulate and police promotional competitions. A conclusion was therefore reached in paragraph 2.7 that protection of consumers who participated in lawful and unlawful promotional competitions was not the primary aim of the LA. The main purpose of the LA was to regulate lotteries, protect the interests of the National Lottery and consumers who participated in a National Lottery. The purpose of Chapter 2 was to determine the level of protection enjoyed by consumers who participated in lawful and unlawful promotional competitions under the LA. The research concluded that protection by the LA of consumers who participated in lawful and unlawful promotional competition was not sufficient, as it was incidental to the role of the board to police and keep the conduct of promotional competition organisers in order.

The need to comply with international consumer laws was cited in Chapter 3 as the rationale for reforming the consumer protection system in the Republic. The prevalence of unfair practices by business where consumers were *inter alia* forced to enter into contracts without disclosure of the full contract terms, and the fragmentation of consumer protection legislation exacerbated the need for the reform. It was proved in paragraph 3.4 that the promulgation of comprehensive consumer protection legislation ensures that the interests of all consumers are protected. This had not been the case with the LA, which explicitly protected consumers who had a valid National Lottery ticket. This research proved in paragraph 3.4 that for the first time, consumers who participate in lawful and unlawful promotional competitions are explicitly protected

¹⁷⁸ Section 54(1)(i)LA.

in the legislation. The CPA explicitly protects all consumers, which includes consumers who participate in lawful and unlawful promotional competitions.

The fundamental consumer rights introduced by the CPA which *inter alia* include the right to fair and responsible marketing create an obligation on promotional competition organisers to protect and respect those rights.

It has been proved in Chapter 4 above that inclusion of section 36 of the CPA and Regulation 11, which are dedicated provisions on promotional competitions, ensures that rules are created in advance for promotional competition organisers. More importantly, a conclusion was reached in paragraph 4.3 that these provisions ensure that consumers are protected from abusive conduct by promotional competition organisers. For example, section 36(3) (a) prohibits consumers from *inter alia* making any form of payment for 'a right to compete in a promotional competition'. However, regulation 11 permits payment of a reasonable costs of up to R1,50 to transmit entry to a competition.

Failure to comply with these provisions of the CPA is a punishable offence. Consumers affected by the conduct of promotional competition organisers do not have to rely on the court process for their disputes to be resolved. A dedicated consumer commission was established to deal with complaints including a tribunal to adjudicate on these matters. The CPA is a "consumer- centric legislation" that ensures that the playing field is levelled for consumers.

Whereas the CPA is a consumer-centric legislation, allowing consumers to pay a reasonable cost of up to R1,50 to transmit entry to a competition, this appears to be unfair to consumers who opt to exercise that right. It was shown and proven by this research in paragraph 4.2 that consumers who purchase a marketed product and opt to participate in promotional competitions will pay more for that product. The conclusion was based on the fact that a consumer will pay the price of the product plus the reasonable cost of transmitting entry.

The purpose of Chapter 3 and Chapter 4 was to analyse the level of protection enjoyed under the CPA by consumers who participate in lawful and unlawful promotional

competitions and furthermore to determine whether the provisions were sufficient to ensure protection. The research concluded in paragraph 3.5 and 4.4 respectively that the provisions of the CPA offer protection to consumers who participate in lawful and unlawful promotional competitions. However, the existence of a reasonable cost to transmit entry cannot be ignored in the quest to protect consumers. To enhance protection of consumers there is therefore a need to revise the current provisions of the CPA to prohibit payment of any fee by consumers to transmit entry.

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