THE REGULATION OF THE SALE OF BRINE-INJECTED POULTRY MEAT PRODUCTS IN TERMS OF CONSUMER PROTECTION ACT 68 OF 2008

MINI-DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE LLM (MERCANTILE LAW)

FACULTY OF LAW, UNIVERSITY OF PRETORIA

BY

BILLY MALOSE MAKHAFOLA
(28246706)

PREPARED UNDER THE SUPERVISION OF:

PROFESSOR JACOLIEN BARNARD

SUMMARY

The regulation of Individually Quick Frozen portions (IQFs) as consumer products is the subject of this dissertation. Not only the regulations relating to how the product is produced but also the quality and labelling thereof is discussed. IQFs are regulated by public legislations that address, among others, labelling and permissible food additives such as phosphate salts, water, and sodium chloride. As part of this process, brine is a commonly added ingredient in the commercial poultry meat industry. Brine is a saltwater solution added to IQFs in order to cure, preserve, and add flavour.

The research reveals that consumer protection in the form of established maximum limits for sodium chloride (salts), including methods used to determine the level, presence, or absence of such ingredients, is important. The research shows that in the production of IQF portions, the use of brine has the potential to compromise some of the consumer rights encapsulated in the Consumer Protection Act 68 of 2008 (CPA) regarding implied warranty of quality. The product labelling and trade description under the CPA and other legislations is critically discussed in the dissertation. This dissertation further encourages the use of plain and understandable language in product labelling and trade description with regard to the content of IQFs, as it has a direct influence on the consumer's right to "fair value, good quality and safety" in terms of the CPA.

The dissertation ultimately recommends the inclusion of the word "warning" in the disclosure of information regarding ingredients such as sodium chloride (salts) in these types of products. The reason is that these ingredients are potentially harmful to a consumer's health. The CPA was shown to be co-extensive with the potency and robustness of other statutes such as the Agricultural Product Standards Act 119 of 1990 (APS Act) and the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972.

Table of Contents

CHAPTER 1: INTRODUCTION

1.1. Background

In South Africa, Individually Quick Frozen (IQF) portions as a consumer product presented for sale are mostly treated (injected) with a brine or brine-based mixture consisting of water, salt, phosphates, and other permitted substances. An amendment to the poultry meat regulations, *inter alia*, provided for the maximum brine treatment level in respect of IQF portions of 15 percent.[1] However, the lingering question is whether brine injection into poultry meat products and the sale of such products infringes on the consumer rights as enshrined in the CPA[2], regarding, amongst others, the right to implied warranty of quality, safety, and value attached thereto in terms of the CPA.

The research will attempt to establish the importance of how the maximum limits for sodium chloride (salts) and water, as well as methods used to determine the level, presence, or absence of such ingredients, assists in consumer protection. The study will investigate whether the use of brine in the production of IQF portions compromises consumer rights as encapsulated in the CPA. Comparisons will be drawn between product labelling and trade description as governed by the CPA and the legislations that predated the CPA.

The use of plain and understandable language in product labelling and trade description regarding the content of the IQF portions including its direct influence on the consumer's right to fair value, good quality, and safety in terms of the CPA will be explored. The effect of the existing consumer protection laws towards the applicability and complementarity of the consumer rights as contained in the CPA will be looked into.

The need for the inclusion of the word "warning" in the disclosure of information regarding ingredients such as sodium chloride (salt) in the IQF portions will be investigated and

[1] See GN R 471, 2016 in *GG* 39944 of 22 April 2016 (hereinafter "Brining Regulation).
[2] 68 of 2008 (hereinafter "the CPA"). All references to sections and regulations hereinafter will be in accordance with the CPA unless indicated otherwise.

considered. The research will further expound on the role of the common law in the realm of contract of sale in terms of how consumers can have redress in the event of non-conformances with the warranty of the product, including misrepresentation.

The importance of the CPA and its applicable rights will be looked into in order to reflect on how consumers can use those remedies to realise their rights. In interrogating the application of consumer rights, focus will be placed on the role of the suppliers to supply goods in a fair and transparent manner so that there is a balance between the interest of the consumers and that of the suppliers in the market place.[3] The role of the CPA in upholding the rights of consumers within the regulated space within which IQF products are sold will be evaluated.

There are concerns by consumer bodies regarding a high loss of mass when thawing and cooking brined IQF portions and the fact that consumers believe that they are purchasing the same unadulterated (undiluted) quality product.[4]

1.2. **Research questions**

The purpose of this study is to interrogate consumer rights as encapsulated in the CPA regarding implied warranty of quality, safety, and value attached thereto, as well as the use of plain and understandable language in product labelling and trade description.[5] The application of consumer rights of the CPA will be looked into in relation to the brining provisions as published in the Brining Regulation under the Agricultural Product Standards Act[6] with specific reference to the sale of IQF portions, including the applicability of the Foodstuffs, Cosmetics and Disinfectants Act[7].

[3] L Hawthorne "Public Governance: Unpacking the Consumer Protection Act 68 of 2008" 2012 *THRHR* 345 -370.
[4] Department of Agriculture, Forestry and Fisheries A Hugo. IB Zondagh & E Maholisa *Effect of brine injection on broiler meat quality and its implications for the South African consumer* 2013 (hereinafter "The DAFF Final Report").
[5]See Ss 22, 24, 41, 55, 56, 58 and 61 of CPA pertaining to the right to information in plain and understandable language; product labelling and trade descriptions; false, misleading, or deceptive representation; consumer's rights to safe, good quality goods; implied warranty of quality; warranty concerning fact and nature of risks and liability for damage caused by goods respectively.
[6] Act 119 of the 1990 (hereinafter "the APS Act").
[7] Act 54 of 1972 (hereinafter "the FCD Act").

1.3. Research methodology

The research will involve a critical analysis and literature study of the relevant primary sources of law (legislation, judicial precedent, common law etc.), as well as secondary sources of law (scholarly books and journals) and other relevant sources, including online sources. The focus of the research is on the South African position. The approach to the dissertation is multidisciplinary in nature, as an analysis of the regulations that regulate and manage the scientific process as well as the regulation of the consumer product as a pre-requisite to establish whether this will affect the legal rights of consumers such as safety, quality, and information, and as to whether the position is regulated sufficiently.

1.4. Chapter breakdown

The breakdown of chapters is intended to address the research problem through the logical sequence of how different legislations intersect, including the CPA, APS Act and FCD Act in terms of consumer protection. Chapters are broken down as follows:

CHAPTER 2: THE REGULATION OF BRINED CHICKEN BREASTS AS A CONSUMER PRODUCT, BRINING PRACTICES, AND OTHER ASSOCIATED PROBLEMS (REGULATORY POSITION PRIOR TO THE PROMULGATION OF THE CPA)

The Chapter starts by looking into brining practices, where successive publication of regulations under the APS Act and the FCD Act will be evaluated. The evolution of brine as a concept and a practice is traced in both the APS Act and FCD Act. The treatment of certain types of poultry meat products with brine is evaluated and discussed with special emphasis put on IQF portions.

A comparison is drawn between the regulations published in both the FCD Act and the APS Act in as far as they relate to the treatment of poultry meat products with brine or

brine-based mixture. The success of the Brining Regulations in terms of addressing the regulation of brining in the poultry meat industry is evaluated.

CHAPTER 3: THE APPLICATION OF "CONSUMER PROTECTION LAW" IN THE CONTEXT OF THE AFFECTED CONSUMER RIGHTS WITH PRIMARY FOCUS ON THE CPA

Chapter 3 deals with statutes that predate the publication of the CPA, where they are listed and evaluated in terms of their role in advancing consumer protection. The chapter further evaluates the common-law position of the contract of sale in as far as it relates to warranty of goods and misrepresentation.

Chapter 3 further deals with consumer rights, which may be affected by the brining practice, and the associated regulatory intervention. This chapter focuses on rights in respect of sections 22, 24, 41, 55, 56, 58, and 61 of the CPA, and evaluates their applicability to the brining practice. Associated regulatory regimes on brining are evaluated and discussed against the applicability of the CPA.

The obligation of suppliers towards upholding consumer rights is considered from a position of the associated regulations. The chapter further discusses and exposes pre-contractual agreement sections from the associated regulations that reinforce some of the rights contained in the CPA.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

The research will interrogate the relationship, as far as consumer protection is concerned, between the FCD Act and the APS Act in terms of regulating the quantity of water and sodium chloride (salts) that poultry meat products are to be treated with. The application of certain consumer rights regarding brined IQF portions, as contained in the CPA, will be explored. The conclusion and recommendation will address the research problem that was raised and offer suggested solutions.

1.5. Delineation and limitation

The regulation of the science behind brining practices as a background will be evaluated in order to undergird the primary focus of the research, which is essential to establishing a legal position in terms of brining practice in relation to the CPA. The relevance and application of applicable provisions of the CPA will be considered, along with possible remedies that may be recommended in the application and interpretation of the brining provisions of the Poultry Meat Regulation and its attendant amendments. The applicability of other relevant laws, to the extent that they affect brining, will be considered.

CHAPTER 2 - THE REGULATION OF BRINED CHICKEN BREASTS AS A CONSUMER PRODUCT, BRINING PRACTICES, AND OTHER ASSOCIATED PROBLEMS (REGULATORY POSITION PRIOR TO THE PROMULGATION OF THE CPA)

2.1. Introduction

In sub-Saharan Africa, the largest producer of poultry meat products is South Africa, with a consumption rate of 37.4kg per capita reported in the year 2014.[8] The increased consumption of poultry meat products meant that effective and efficient processing to produce good quality meat product had to be found.[9] Brine or brine-based mixture is used for, among others, tenderisation, flavouring, and preservation of poultry meat products.[10] The concept of meat enhancement within the poultry meat industry connotes brining since both processes involve the use of salts, water and other permitted additives.

The chapter will look into the origin of the brining poultry meat products as consumer products from a regulatory perspective, as well as its evolution in terms of the sale of poultry meat products. The aim and purpose of the chapter will be to provide regulatory background to the science and practice of brining in the poultry meat production industry with a view to providing a basis upon which the legal position can be established.

Applicable regulations drawn from two statutes, the APS and the FCD Acts will be interrogated in as far as they relate to the brining of IQFs (mixed portions). The regulatory interventions brought about by the Brining Regulations in order to offer protection to consumers will be evaluated. Furthermore, there is an aim to interrogate whether consumers are protected in terms of the introduced regulatory changes since the publication of the Regulation Regarding Control over the Sale of Poultry Meat in 1992.

[8] Tan *et al South African Journal of Animal Science* 199-200.
[9] *Ibid.*
[10] See GN R 146, 2010 in *GG* 32975 of 01 March 2010 (Hereinafter "R 146")

2.2. Brining practices and limits before the publication of amended regulation

Brining for the purpose of preserving meat has been in practice since 200 BC, in Mesopotamia, Egypt, China, and the Mediterranean.[11] Brine is a formulated solution that contains water, salt, phosphates, and flavouring additives to maintain, among others, the tenderness and juiciness of the meat during cooking.[12] In terms of the published Poultry Meat Products Regulation[13] and its amended Poultry Meat Products Regulation,[14] only a phosphate or other chemical solutions were allowed to be injected into the breast part of the carcasses, where the percentage of the chemical or phosphate was restricted to 0.5 percent and the rest of the solution was made of absorbed water up to 7.5 percent. In other words, brine as a concept or term was not used in the first published regulation and the first amendment thereafter, but a description that conforms to the definition of brine or brine-based mixture was used. According to regulation published under the FCD Act, brine refers to a solution of sodium chloride and water that is used for curing, flavouring, and/or preservation of the foodstuffs.[15] Saltwater solution with permitted additives that may be added for purposes of curing, flavouring, preserving, tenderising, and for juiciness is called brine or brine-based mixture.

Brine injection into poultry meat products entails the use of a multi-needle injector, which consists of a conveyer that introduces the meat to an injection head with two to four rows of needless.[16] Poultry meat products are injected with the brine solution simultaneously by all needles and are then tumbled or massaged to ensure that the brine is evenly distributed throughout the muscles of the poultry meat.[17]

[11] Tan *et al South African Journal of Animal Science* 199-200.
[12] *Ibid.*
[13] See GN R 946, 1992 in *GG* 13876 of 27 March 1992 (hereinafter "Poultry Meat Products Regulations").
[14] See GN R 988, 1997 in *GG* 18155 of 25 July 1997 (hereinafter "Amended Poultry Meat Products Regulation").
[15] See definition under R 146.
[16] Tan *et al South African Journal of Animal Science* 199-200.
[17] *Ibid*.

2.2.1. Regulatory limits for treatment of poultry meat products with phosphates or chemical solutions for graded carcass

In South Africa, the process of the addition of phosphate salts, similar to the contemporary brining practice, was introduced through the first regulation, which was published in March 1992.[18] The Regulation provides, among others, in respect of brining of carcasses, "quality standards for poultry carcasses and poultry meat portions, labelling and packaging". In terms of brining or addition of phosphates or chemical solution based on water, the Regulation states,[19]

(a) "in the case of breast meat of a carcass which is treated with a phosphate or another chemical solutions, the mass increase of the carcass as a result of such treatment, calculated on a mass per mass basis, shall not be more than 4 percent and the concentration of the phosphate in the phosphate solution on a mass per mass shall not be more than 0,5 percent.;

(b) such a treatment with a chemical solution may only be carried out on carcasses containing less than 4 percent absorbed moisture."

Phosphates or a chemical solution are stated in the alternatives, but connote two different things, given the particularity with which differentiation is made in the case of phosphate solution, which is also a chemical solution. Chemical solution means any combination of chemical compound that can be added to the poultry meat and this present a problem in that, the regulation only established limits for phosphate addition and not for chemical solution. In terms of phosphate and its concentration in a water solution, a limit had been determined.[20] However, in the case of a chemical solution, there was no particularity either in terms of what chemical compounds are to be part of the solution or the concentration limit thereof.

[18] Tan *et al South African Journal of Animal Science* 199-200.
[19] See Regulation 4(9) of the Poultry Meat Products Regulation.
[20] *Ibid*.

From the above paragraph it is clear that the breast meat of a carcass has to be treated (injected) with a phosphate or chemical solution which should not be more than 4 percent combined with water (moisture). The concentration of phosphates should not exceed 0.5 percent in a 4 percent phosphate solution. However, there is no limit given to molecules, which could be part of a chemical solution, since the use of a chemical solution could be used as an alternative to a phosphate solution. According to Regulation 4(9) of Poultry Meat Products Regulation, the amount of water derived from an injected solution should be 4 percent (phosphate solution or chemical solution), and the other 4 percent should be from absorbed moisture before the treatment of the carcass (injection of phosphate or chemical solution). This brings the total amount of water permitted in the carcass to 8 percent.

Regulation 4(2) of the Poultry Meat Products Regulation further provides that a poultry carcass that has been graded as Grade A or B shall not contain more than 8 percent absorbed moisture.[21] The 8 percent water that is comprised of administered solutions and absorbed water is only allowed in respect of carcasses that are graded as A or B. Regulations 4(2) and 4(9) of the Poultry Meat Products Regulation establish the scope of brining in the following manner:

- the area of treatment (injection) is specified, breast meat of the carcass;
- the stage at which treatment with 4 percent phosphate or chemical solution is to be administered to the carcass is specified, which was after the carcass has absorbed 4 percent water (moisture);
- the concentration of the phosphate in the solution of 0.5 percent;
- the total allowable water, both injected and absorbed, of 8 percent;
- the indication of how phosphate or chemical solution treatment is to measured, on a mass per mass basis; and
- The scope and application of the treatment (injection) and the set limit is with respect to Grade A or B carcasses.

[21] Reg 4(2) read in conjunction with Regulation 4(1) of the Poultry Meat Products Regulation.

2.2.2. Method and procedure for determining the amount of moisture (water) absorbed

Regulation 14(1) provides for the method and procedure for determining the amount of moisture absorbed.[22] The method relies on the measuring on mass per mass basis of sample carcasses drawn from the abattoir, taken from the production line prior to chilling and treatment processes, as well as the weighing of those carcasses sampled after the chilling and treatment processes. The difference in mass between the recorded mass prior to chilling and treatment processes and the one found after shall represent the amount of the absorbed water.[23] The absorbed water should not exceed 8 percent in respect of Grade A or B carcass.

2.2.3. Is there a limit on moisture for the portions (individually quick frozen portions)?

Regulation 14(6) of the Poultry Meat Products Regulation provides that if the 8 percent limit of (both absorbed and injected moisture) water is exceeded, carcasses shall then be processed into portions.[24] This means that if the 8 percent limit for absorbed moisture is exceeded, the carcasses are processed into portions. There is no method that is set out to determine whether the concentration of phosphates in a phosphate solution exceed the set limit of 0.5 percent, nor is there, any method or procedure set out to evaluate and detect the composition of the chemical solution. In other words, there is no limitation set for water that can be contained or absorbed by IQF portions. In all classes of poultry meat products, there is no method or procedure set out to gauge, test, or analyse the level of concentration of phosphates or chemicals in a treatment solution administered to carcasses. Regulation 14 only ensures that carcasses graded A or B comply with the limit of 8 percent.[25] The other classes and grades of poultry meat products do not have restrictions on the amount of absorbed moisture allowed[26].

[22] Reg 14 of the Poultry Meat Products Regulation.
[23] *Ibid*.
[24] Reg 14(6) of the Poultry Meat Products Regulation.
[25] *Ibid*.
[26] Regulation 3 (1) read with Table 1 of the Poultry Meat Products Regulation. Classes that do not have restrictions on the amount of absorbed moisture are portions of chicken, turkey or duck (half carcass, quarter carcass, leg, thigh, drumstick, wing and breast). These classes are not provided for in terms of quality standards and, therefore not graded.

2.2.4. Declaration through labelling of whether a poultry meat product has been treated with phosphates or another chemical solution and the amount of moisture absorbed

The marking requirement of the poultry meat regulation requires that legibility and clear distinction between different classes be made in respect of:[27]

- indication of the name and address of packers;
- class designation;
- applicable grade designation;
- indication of parts or cuts of poultry meat with the designation in accordance with normal trade practice;
- indication of species in the case of the sale of portions;
- the expression or indication of the state or condition at which the poultry meat product is sold, such as fresh, chilled, deep frozen, and frozen, as the case may be;
- date or code as indication of the suitability for use of the poultry meat product;
- declaration of a production lot; and
- country of origin if the poultry meat product is imported.

The Regulation does not have a provision in the marking requirements that places a positive duty on the packers or sellers of treated poultry meat product to declare the amount of water (moisture) or the type of chemical solution that the product has been treated with.

2.2.5. Amended Poultry Meat Products Regulation

The amendment to the 1992 Poultry Meat Regulations stated in Regulation 5, which substituted Sub-regulation 2 with respect to treatment with permitted[28] phosphate salts

[27] Reg 8 of the Poultry Meat Products Regulation. The regulations relate to labelling requirements that should be indicated on the package or container containing poultry meat products, including IQF portions
[28] See GN 1425, 2016 in *GG* 40432 OF 17 November 2016.

and other food additives, that “a poultry carcass that has been graded as Grade A or B shall, subject to the provisions of sub regulations (1) and (8) of regulation 14, contain no more than eight per cent of absorbed moisture”.[29] Regulation 4(2) in the Poultry Meat Regulation states that, “a poultry carcass that has been graded as Grade A or B shall, subject to the provisions of the method prescribed in regulations 14(1), not contain absorbed moisture of more than 8 per cent.”[30]

The amendment of the aforementioned section in the Amended Poultry Meat Product Regulation of 1997 did not introduce substantial changes or amendments apart from superficial grammatical amendments; it could be that more clarity was provided. The materiality of the provisions did not differ with what was contained in the previous regulation. Furthermore, it is clear that graded carcasses shall not exceed the level of 8 percent absorbed moisture, both in the original regulation[31] and in the amendments.[32]

The amendment to the Regulations Regarding Control over the Sale of Poultry Meat in 1997[33] further introduced an additional grade in the form of undergrade carcass. The under grade carcass could only birthed in the event of, among others, when the limit of 8 percent absorbed moisture is exceeded.[34] In other words, in terms of Regulation 5, if Grade A or B poultry carcasses’ grading (quality) requirements which include, *inter alia*, a threshold of 8 percent are not complied with, carcasses may be labelled as undergrade.[35] This contrast with the original regulation, which did not provide for an undergrade carcass.[36]

The amendments to the Regulations Regarding Control over the Sale of Poultry Meat in 1997[37] extended the scope of poultry meat products, which could now contain more than

[29] Reg 4(2) by the Amended Poultry Meat Products Regulation.
[30] Reg 4(3) by the Amended Poultry Meat Products Regulation.
[31] Reg 4 (9) of the Poultry Meat Products Regulation.
[32] Reg 4(3) by the Amended Poultry Meat Products Regulation.
[33] See GN R 988, 1997 in *GG* 18155 of 25 July 1997
[34] Reg 4(3)(b) by the Amended Poultry Meat Products Regulation.
[35] *Ibid.*
[36] Reg 4 of the Poultry Meat Products Regulation.
[37] See GN R 988, 1997 in *GG* 18155 of 25 July 1997

8 percent absorbed moisture by adding undergrade carcasses. This meant that there was no limit to the amount of water or saltwater (chemical solution) that could be injected into undergrade carcasses and IQF portions.

2.3. The 2016 amendment to the Poultry Meat Products Regulation

The concept of brine was transposed from the labelling and advertising regulations into the poultry meat regulation in 2016. According to the regulations relating to the labelling and advertising of foodstuffs, brine refers to a solution of sodium chloride in water**,** which is used for curing, flavouring, and/or preserving the foodstuffs.[38] The Brining Regulations refers to a definition as provided for in the regulation published under the FCD Act.[39] With the Brining Regulations, the brine-based mixture as a terminology was introduced, and is defined as a brine solution to which only permitted phosphate salts and food additives may have been added, and which is used for, among other purposes, tenderising, flavouring, and preserving poultry meat.[40]

The addition of phosphate salts and other permitted additives is used for, *inter alia*, tenderising meat, whereas brine is used to cure, preserve, and flavour hence, the term 'brine-based mixture' that is used in the poultry meat rather than in foodstuffs. According to the FCD Act, "foodstuff means any article or substance, excluding drugs, ordinarily eaten or drunk by man or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or ingredient, or any substance used or intended or destined to be used as part or ingredient of any such article or ingredient."[41] It means that any article or ingredient that is eaten or drunk or intended (meant) and fit for human consumption is regarded as foodstuff. Therefore, poultry meat products, since they are intended and fit for human consumption, qualify as foodstuffs.

[38] See definition under R 146.
[39] See definition under the Brining Regulation.
[40] *Ibid*.
[41] See definition in S 1 of the FCD Act.

Regulation 1 defines poultry meat as the slaughtered carcasses of fowls, turkeys, and ducks as well as Muscovites, including portions or parts of such carcasses, which are usually sold for human consumption, provided that portions and cuts are recognisable as a carcass, portions, pieces, or strips, and include raw processed poultry meat.[42] However, the Brining Regulation refers to poultry meat as slaughtered carcasses of fowls (chicken), turkeys, ducks and Muscovites, including recognisable portions and cuts derived from such carcasses and this includes raw processed poultry meat. The Brining Regulation furthers defines raw processed poultry meat as poultry meat which has been treated with formulated solutions, has not undergone any heat treatment, and is still recognisable as a poultry carcass, portions, pieces or strips.[43]

The concept of a formulated solution, which could be used to treat poultry meat in the form of a carcass, portions, pieces, or strips is defined as brine, brine-based mixture, marinade, phosphate solution, or any other similar solution/mixture of food additives that may have been added to foodstuffs by the Brining Regulation.[44] It is clear that, this means that any salt-based mixture with permitted additives, which the raw processed poultry meat could be treated with, is accepted. It is also clear that only raw processed poultry meat can be treated with a formulation. 'Treatment' "means the process whereby a formulated solution is added to raw poultry meat at the plant by means of but not limited to injection (pumping), tumbling, massaging and marinating, which is –

(a) retained in the poultry meat up till the point of sale and will lead to an increase in its moisture content; and

(b) among others, intended to improve the eating quality (juiciness, flavour and tenderness) of the poultry meat: provide that water on its own or marinade shall not be injected."[45]

[42] See definition in Reg 1 of the Poultry Meat Products Regulation.
[43] See definition in Reg 1 of the Brining Regulation.
[44] *Ibid.*
[45] *Ibid.*

This definition of 'treatment' applies to both carcass and portions as set out in regulations 4(9) and 5(4)(b).[46]

Although the definition of brine includes sodium chloride as part of the water solution, the regulation in terms of its permissible level as prescribed by the FCD Act is silent. Regulation 4(9)(a)(ii) provides that the concentration of phosphates and food additives in the formulated solution in the final treated poultry shall be in harmony with permissible levels as set out in FCD Act. However, there is no permissible level of sodium chloride set for poultry meat products under the FCD Act; yet it is the main ingredient of brine, or brine-based mixture.[47]

In terms of the Quantitative Ingredient Declarations (QUID), the absorbed moisture or the percentage treatment with a formulated solution shall be declared as a percentage of declarable weight of the product.[48] In other words, the raw processed poultry meat product shall indicate the quantitative ingredient declaration as a percentage for meat and water content on the main panel.[49] This means that where a poultry meat product has absorbed a moisture content of 7 percent during washing and cleaning and is treated with 8 percent of brine solution, the QUID shall be indicated as 15 percent water and 85 percent poultry meat product.

In terms of the amended Regulation 4(9), Grade A or Grade B carcasses that are treated with formulated solution shall not exceed 10 percent of absorbed moisture in terms of QUID[50], whereas in terms of portions a maximum of 15 percent was set.[51] The formulated solution is different from the prescribed phosphate or chemical solution combined with absorbed moisture level of 8 percent set out for Grade A or Grade B in the previous 1992

[46] This refers to the Regulations that are from Poultry Meat Products Regulation, Amended Poultry Meat Products Regulation and Brining Regulation either having been amended or not.
[47] See GNR 214, 2013 in *GG* 36274 of 20 March 2013 (hereinafter "Sodium Reduction Regulation"). In this Regulation processed meats such as raw processed meat (poultry meat products) have been excluded in terms of setting limits for sodium chloride; GN 1425, 2016 in *GG 40432* of 17 November 2016 exclude sodium chloride as food additives.
[48] See definition in Reg 1 of the R 146.
[49] See Reg 26(2) of the R 146.
[50] See Reg 4 of the Brining Regulation.
[51] *Ibid.*

and 1997 Regulations, which also did not set a limit for portions.[52] The other difference is that, in terms of the Brining Regulation, there is a need for a declaration on the packages of the poultry meat products which have been treated with formulated solutions, whereas prior to the amendment, at least in as far as poultry meat product was concerned, such a declaration was not required in terms of R 146.

The water to protein ratio referred to in method C was introduced in the Brining Regulation in addition to method A and B in order to determine the water and protein content of the poultry meat products, which have already been subjected to treatment.[53] The moisture content that represents water found is then expressed as a percentage of the total mass of the frozen or deep frozen portions[54] and therefore protein represents the poultry meat product. The method, should it be employed, would be applicable to imported poultry meat products. Method C will be employed in accordance with the latest international methods of analysis, such as Association of Analytical Communities (AOAC).[55]

2.3.1. Determining the success or lack thereof with respect to the intervention brought about by the amended regulation

The Brining Regulation in 2016 was promulgated in order to protect consumers by limiting the amount of brine that poultry meat products may be treated with. The evaluation of whether the amendments introduced through the publication are successful or not should be evaluated by dissecting the following amendments:

2.3.1.1. The definition of “brine”

The definition of brine under the Brining Regulation is the same as the definition contained in the regulations published under the FCD Act.[56] The regulations published under the

[52] See Reg 4 of the Poultry Meat Products Regulation.
[53] Reg 14 of Brining Regulation read in conjunction with Annexure, Method C of the Brining Regulation.
[54] *Ibid.*
[55] *Ibid*.
[56] See definition in Reg 1 of the Brining Regulation.

FCD Act relating to the labelling and advertising of foodstuffs define brine as a solution of sodium chloride in water, where the solution is used for curing, flavouring, and/or preserving the foodstuff.[57] Brine-based mixture is defined as a brine solution to which only permitted phosphate salts and food additives may have been added, and which is used for, amongst other purposes, tenderising, flavouring, and preserving poultry meat.[58]

The above definitions highlight the functional properties for which brine is used, which relate to enhancing of the quality of foodstuff through curing, flavouring, and/or preserving. Brine-based mixture is used, in addition to the aforementioned functional properties, to tenderise and make the poultry meat products juicy. The other difference between brine and brine-based mixture is that the former is made up of a solution of water and sodium chloride (saltwater solution only), whereas, the latter may be composed of permitted food additives in addition to saltwater solution and permitted phosphate salts. Permitted phosphates and food additives are those phosphate salts and food additives which are prescribed in terms of the FCD Act.[59] The definition of brine is prescribed by regulations published under the FCD Act, and this means that the definition is reproduced from the regulations of FCD Act into the regulations of APS Act. The functional properties and the purpose for which brine is accepted in the FCD Act for addition to poultry meat products resonate with the APS Act hence the need for the brine limitation in order to prevent product adulteration of the poultry meat and the quality thereof.

2.3.1.2. Standards for carcasses – maximum limit of brine and absorbed water

Regulation 4(2) provides that a poultry carcass that has been graded as Grade A or Grade B shall, subject to provisions of Sub-regulations (1), (4) and (8) of Regulation 14, contain no more than 7 percent (QUID) of the absorbed moisture, and may then be treated with

[57] *Ibid*.
[58] See definition in Reg 1 of the Brining Regulation.
[59] Joint FAO/WHO Food Standards Programme *Codex Alimentarius*; *Codex General Standards for Food Additives Codex Stan 192 – 1995* (1995). The Food additives Regulation adopted the use of the Codex General Standard for food additives, this standard establishes the type of food additives and the product classification in such additives could be used including the permitted levels to which they could be added to foodstuff.

formulated solutions.[60] Regulation 14 is concerned with the methods and procedure regarding absorbed moisture, and carcasses and portions treated with a formulated solution.[61] The Brining Regulation defines 'treatment' as the process whereby a formulated solution is added to raw poultry meat at the plant by means of, among others, injection (pumping), tumbling, massaging, and marinating.[62] The formulated solution shall be retained in the poultry meat up until the point of sale and will lead to increase in its moisture content.[63] The formulated solution is, amongst other purposes, intended to improve the eating quality (juiciness, flavour, and tenderness) of the poultry meat: provided that water on its own or marinade shall not be injected.[64] In the circumstance, 'formulated solution' means brine, brine-based mixture, marinade, phosphate solution, or any other similar solution or mixture to which food additives and/or foodstuffs may have been added.[65]

A carcass that does not comply with the requirements for Grade A or Grade B shall be cut into portions, pieces, or strips, or subjected to further processing; or, if it is sold as a whole carcass, be marked and sold as an undergrade carcass.[66] In the case of a Grade A or Grade B carcass, which is treated with a formulated solution, the mass increase of the carcass as a result of such treatment shall not exceed 10 percent (QUID).[67] Furthermore, the combined percentage of the absorbed moisture and formulated solution shall not exceed 10 percent and, it is prescribed that the concentration of phosphates and food additives in the formulated solution in the final treatment of poultry meat shall be within the permissible levels set by the FCD Act.[68]

Carcasses graded as Grade A or Grade B shall only contain 10 percent of both absorbed moisture and a treatment of formulated solution. The concentration of formulated solution

[60] See Reg 4(2) of the Brining Regulation.
[61] See Reg 14 of the Poultry Meat Products Regulation.
[62] See definition in Reg 1 of the Brining Regulation.
[63] *Ibid*.
[64] *Ibid*.
[65] See definition in Reg 1 of the Brining Regulation.
[66] See Reg 4(9) of the Brining Regulation.
[67] *Ibid.*
[68] *Ibid.*

shall consist of permitted phosphate salts and food additives, in terms of quantity, as prescribed under the FCD Act. However, in the event that both the formulated solution and absorbed mass on a mass basis exceed the maximum limit of 10 percent such carcasses shall, among other actions, be cut into portions or be labelled and sold as undergrade carcasses. This means that there is no limit set for undergrade carcasses, thus imperilling the protection of consumers.

2.3.1.3. Standards for portions – maximum limit for brine and absorbed water

Poultry portions may contain food additives in the amounts permissible in terms of the FCD Act. In the case of IQF portions which are treated with a formulated solution, the mass increase of the individual portions because of such treatment shall not exceed 15 percent.[69] Furthermore, the combined percentage of the absorbed moisture and formulated solution shall not exceed 15 percent and the concentration of phosphates and food additives in the formulated solution in the final treatment of poultry meat shall be within the permissible levels prescribed by the FCD Act.[70] IQF portions that do not comply with the maximum limit of 15 percent absorbed moisture and formulated solutions shall be supplied to the catering industry, where the poultry meat is sold in the cooked form, or be subjected to further processing.[71] In terms of Regulation 1, further processing alters the poultry meat in such a way that it is not recognisable as a carcass, portion, piece, or strip.[72]

The amended regulation establishes a maximum limit for both absorbed water and formulated solution, which is set at 15 percent for IQF portions. The restriction regarding the concentration of phosphates and food additives in IQF portions is prescribed under the FCD Act.[73]

[69] See Reg 5(4) of the Brining Regulation.
[70] *Ibid.*
[71] *Ibid.*
[72] See definition in Reg 1 of the Brining Regulation.
[73] See GN 1425, 2016 in *GG* 40432 OF 17 November 2016.

The Brining Regulations succeeded in establishing the maximum limit for additional water or absorbed moisture for increased mass of poultry meat portions sold to consumers. However, the Brining Regulations failed to establish methods to determine the presence or absence of permitted phosphates salts, food additives, or sodium chloride, instead the same methods that determines the percentage of absorbed moisture have been carried through. In the final analysis, consumers are only protected against the addition of water since methods contained in the regulations only determines the amount of water absorbed.

2.4. The laws applicable to and governing the legal position prior to the implementation of the CPA

Prior to the publication of the CPA, South Africa did not have a comprehensive and systematic body of law, which dealt with consumer issues.[74] However, consumer protection measures found direct and indirect expression in various legislations that were administered by different authorities.[75] It has to be taken into cognisance that legislations that had consumer protection measures were more focused on the conduct and practices of the manufacturers, producers, and /or sellers, and for this reason, prohibited conducts were criminally prosecuted.

Characteristic of legislations applicable prior to the enactment of the CPA was a lack of reference or invocation in their provisions of the word 'consumers', except in a few legislations where the consumer was defined in their text.[76] In terms of the Trade Practices Act,[77] the consumer is defined as "any person who makes use of any service', whereas the Harmful Business Practices Act[78] defines a consumer as "a person to whom any commodity is offered, supplied or made available".

[74] T Woker "Why the need for Consumer Protection Legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" 2010 *OBITER* 217 -217.
[75] Woker *OBITER* 217 – 218.
[76] D Mc Quoid-Mason. T Woker. L Greenbaum. I konyn. C Lakhani & T Cohen 1997 "Consumer Law in South Africa", Juta Legal and Academic Publishers Chapter 9 281-291.
[77] 76 of 1976 (hereinafter "TPA").
[78] 71 of 1988 (hereinafter "HBP").

The following laws were applicable in respect of the sale of poultry meat products treated with brine or brine-based mixture:

(a) Measuring Units and Measurement Standards Act 18 of 2006
(b) Legal Metrology Act 9 of 2014
(c) Agricultural Product Standards Act 119 of 1990
(d) Meat Safety Act 40 of 2000
(e) Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972
(f) Price Control Act 25 of 1964
(g) Business Practices Act 76 of 1976
(h) Consumer Affairs Act 71 of 1988

(a) Measuring Units and Measurement Standards Act [79]

The Measuring Units and National Measuring Standards Act[80] was replaced by the Measurement Units and Measurement Standards Act[81], which has since been amended several times. The MUMS Act provides for use of the International System of Units and certain other measurement units.[82] The MUMS Act further makes provision for traceability for measuring standards where national standards are not in place.[83] The use of any measuring units other than those set out in the MUMS Act constitutes an offence, which may attract either a prison term or a fine as a penalty.[84]

The main purpose of the MUMS Act is to ensure that, there is reliability in the use of measurements and to ensure quality control in weights and measurements in South Africa. However, the invocation of the word 'traceability' was found to be vague and created legal uncertainty in terms of interpretation.[85]

[79] 18 of 2006 (hereinafter "the MUMS Act")
[80] 76 of 1973
[81] MUMS Act
[82] Long title of the MUMS Act.
[83] S 7 of the MUMS Act.
[84] S 8 of the MUNMS Act.
[85] Measuring Units and National Standards Amendments Bill 1998 [B25-98], Memorandum on the objects of the Measuring Units and National Measuring Standards Amendments Bill 1998.

The use of reliable measuring instrument is important in the measurement of agricultural products such as poultry meat products. The role that is played by the MUMS Act is relevant in the sense that poultry products are sold based on, among others, weight and therefore use of measurements in sale of the poultry meat is important.

(b) Legal Metrology Act[86]

The purpose of this legislation is to provide for the administration and maintenance of legal metrology technical regulations in order to promote fair trade and to protect public health and safety and the environment, as well as to provide for matters connected therewith.[87] Furthermore, the Act prohibits false and misleading statements regarding the true quantity of content of the commodity being sold. Therefore, it is an offence if there are *inter alia* misleading statements regarding the weight of an item in packaged goods.[88]

Section 15 of the Legal Metrology Act provides that, "the Minister may in respect of any measuring instruments, or any product or service which affects, *inter alia,* fair trade, public health and safety declare, upon receipt of recommendations from the National Regulator for Compulsory Specifications (NRCS), South African National Standards (SANS) or a provision of SANS as a legal technical metrology regulation."[89]

Regulation 4 of the Trade Metrology Regulation provides for the regulation of the declaration of quantity of any pre-packed products that are imported and resold, and binds the seller or importer to have known about the declared quantity and the country of origin[90]. The regulation requires, among others, that the quantity or the weight of products must be marked or labelled in a particular manner, including the indication of net mass of the product.[91]

---

[86] Act 9 of 2014. (hereinafter "LM Act")
[87] Preamble of the LM Act.
[88] S 26 of the LM Act.
[89] S15 of the LM Act.
[90] See GN 517, 2007 in *GG* 30003 of 21 June 2007.
[91] *Ibid.*

In terms of price descriptions, the Trade Metrology regulation provides under Regulation 20 that products must be sold in line with price descriptions displayed in the retail space.[92] Essentially, the regulation is about the measurement, labelling, prescribed quantities in pre-packages, and general rules for the delivery and sale of goods.[93] The Legal Metrology Act is relevant in the sale of the poultry meat products in the products are sold on the basis of the net mass or net weight. Therefore, a poultry meat product that is highly injected with brine detracts from the net weight of the product that put out for sale in that the product plus water are therefore sold as poultry meat product and thereby misleading the consumer.

(c) Agricultural Product Standards Act 119 of 1990

The APS Act's main purpose is to ensure fair trade practices and consumer protection by providing for regulatory controls regarding the sale of local, imports, and exports of regulated agricultural products.[94] 'Agricultural product' is defined in terms of section 1 of the APS Act as:

(a) "any commodity of vegetable or animal origin, or produced from a substance of vegetable or animal origin, and which consists wholly or partially of such substance; and

(b) any other commodity which in general appearance, presentation and intended use corresponds to a commodity of vegetable or animal origin."[95]

Products are those that are derived from plants (e.g. fruits, vegetables, and grains and grain products), animals (e.g. red meat, poultry meat, dairy products and imitation dairy products, as well as eggs) and processed products (e.g. canned fruits, canned vegetables, honey, jam and marmalade, vinegar, table olives, frozen fruits and vegetables, fruit juices, Rooibos, canned pasta, and mushrooms).[96] These regulatory

[92] *Ibid.*
[93] *Ibid*.
[94] Long title of the APS Act.
[95] S 1 of the APS Act.
[96] The Department of Agriculture, Forestry and Fisheries "About us: Food Safety and Quality Assurance" www.daff.gov.za (Accessed on 26 July 2018)

controls concern the prohibition of the sale of a regulated agricultural product unless that product:

(i) "is sold according to the prescribed class or grade;
(ii) complies with the prescribed standards regarding the quality in terms of grade and class;
(iii) complies with requirements relating to packing, marking, and labelling;
(iv) contains prescribed prohibited substances or does not contain a prescribed substance; and
(v) is packed, marked and labelled in a prescribed manner or with the prescribed particulars."[97]

The APS Act deems non-compliance with certain peremptory provisions as offences that are criminally prosecutable, where fines or imprisonment can be imposed against any contravening person.

The Minister publishes the regulations in terms of section 15 read in conjunction with section 3.[98] Essentially, the regulations are about the grading and classification of products in accordance with standards that particularise certain attributes, as well as the manner in which products are made to comply with requirements as far as packing, marking, and labelling is concerned. The grading and classification of products addresses the compositional properties of the product in terms of its fact and nature. The amplification of the compositional content of the product is carried through packaging and labelling, which includes trade description of the product.

Section 6 of the APS Act provides that, "no person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a product in a manner that conveys or creates or is likely to convey or create a false or

[97] S 3(1)(a) of the APS Act.
[98] S 15 of the APS Act.

misleading impression as to the nature, substance, quality or other properties, or the class or grade, origin, identity, or manner or place of production, of that product".[99] It is clear that section 6 is a prohibition provision, meaning that the intention of the legislature when enacting it was to prohibit a person from using false or misleading descriptions of agricultural products in connection with the sale thereof. This section is in accord with the CPA, especially concerning consumer rights pertaining to disclosure of information in respect of product labelling and trade description and the right to fair and honest dealing, which aims to prohibit false or deceptive representations.

The Brining Regulations provide for the manner in which labelling has to be executed, including the indication of the product name, accompanied by the true description of the added formulated solution.[100] In the context, IQF portions are treated with a solution where permitted phosphate salts and permitted additives are added to, amongst others uses, tenderise, flavour, and preserve poultry meat.[101] Ensuring fair trade practices among different sellers of frozen meat poultry meat products and the protection of the consumers is the fulcrum of the APS Act and its poultry regulations.[102]

In the quest to ensure consumer protection and fair competition in the sale poultry meat products, the Minister of Agriculture, Forestry and Fisheries in the *SAPA Case* restricted the amount of brine that could be added into poultry meat products. In the *SAPA Case,* the South African Poultry Association, which represented about 50 to 80 percent of broilers producers at varying stages, sought an order from the court to suspend the implementation of the published Brining Regulations, especially, the provision establishing limit restricting the addition (injection) of brine into IQF portion.[103] The Brining Regulation set out, among others, limit for 15 percent on brine in respect to the production of IQF portions.[104]

---

[99] S 6 of APS Act.
[100] Department of Agriculture, Forestry and Fisheries "DAFF Media Release: Publication of amendments on Poultry Meat Product Regulation 22 April 2016" www.daff.gov.za (Accessed on 26 July 2018).
[101] See Reg 4 of the Brining Regulations.
[102] *South African Poultry Association v Minister of Agriculture, Forestry and Fisheries and others* (39597/2016) [2016] ZAGPPHC 862 (21 September 2016) (hereinafter referred as "SAPA case").
[103] *SAPA Case* para 4.
[104] *Ibid.*

The Brining Regulation came in at time when there was no restriction regulation or provision on the amount of brine that could be injected into the IQF portions, and some IQF portions producers were injecting up to 40 percent brine resulting in a poor quality product.[105] The Minister supported by the consumer representative union and others cited among others reasons, that consumers needed to be protected from exploitation and the need to prevent unfair competition among traders.[106] They further cited concerns about the salt content in brine with reference to consumers' health issues.[107] On the hand, the producers of IQF portions wanted a cap of 20 to 25 percent of brine injection into IQF portions.[108]

The court held that, the Minister through the publication of the Brining Regulation did have regard to the interest of the consumers where the excessive brining was to be prevented.[109] The court dismissed the application with costs.[110] The *SAPA Case* highlighted the importance of consumer protection as paramount over profit making. However, the importance of brining as an objective benefit to consumers seems to have been compromised due to the fact competing views of interested and affected parties were all considered in arriving at the 15 percent brine limit.[111] In other words, objective consideration such as science was forgone in interest of balancing varied interest in the determination of a cap.

(d) The Meat Safety Act[112]

The purpose of the MA Act is to provide for measures aimed at ensuring meat safety and the safety of animal products by applying national standards in respect of abattoirs.[113] The MA Act further regulates the importation and exportation of meat, where control

[105] *SAPA Case* para 13.
[106] *Ibid*.
[107] *SAPA Case* para 20.
[108] *SAPA Case* para 19.
[109] *SAPA Case* para 27.
[110] *SAPA Case* para 31.
[111] *SAPA Case* para 22.
[112] Act 40 of 2000 (hereinafter "MA Act").
[113] The preamble of the MA Act.

measures are exercised in terms of ensuring meat products are not diseased and that there is no putrefaction, decomposition, or contamination.[114]

Essentially the MA Act is concerned with the manner in which meat and other regulated animal products are handled at abattoirs, with the aim of ensuring that the meat is safe and fit for human consumption.[115] The MA Act prohibits the slaughtering of animals at places other than approved abattoirs, unless an exemption is granted.[116]

The MA Act is enforced concurrently between the national (Department of Agriculture, Forestry and Fisheries) and provincial (Provincial Departments of Agriculture) spheres of government.[117] The MA Act allows for the designation of assignees by the Minster, in order to strengthen the application of certain provisions of the MA Act.[118] Prohibited conducts and non-complying meat products with regards to provisions of the MA Act are criminalized, and penalties such as fines or imprisonment terms can be imposed upon any transgressor.[119]

(e) Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

The FCD Act provides for control measures regarding the sale, manufacture, importation and exportation of foodstuffs, cosmetics, and disinfectants.[120] The regulations relating to the labelling and advertisement of foods are published under the FCD Act.[121] The FCD Act provides for regulatory control regarding the sale, manufacture, and importation of foodstuffs, cosmetics, and disinfectants, as well as for matters connected therewith.[122] It is apparent that the FCD Act, unlike the APS Act is limited to *inter alia* foodstuffs sold

[114] See the preamble read in conjunction with Ss 12, 13 and 14 of the MA Act.
[115] *Ibid*.
[116] S7 read with S11 of the MA Act.
[117] S 3 of the MA Act.
[118] S 4 of the MA Act.
[119] S 19 of the MA Act.
[120] Long title of the FCD Act.
[121] Tan *et al South African Journal of Animal Science* 199-200.
[122] Long title of the FCD Act.

within the boundaries of South Africa in terms of application, regardless of whether such products are produced locally or imported.

Section 1 of the FCD Act defines foodstuffs as, “any article or substance ordinarily eaten or drunk by man or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance or any substance used as a part or intended or destined to be used as part or ingredient of any such article or substance”.[123] In other words, the FCD Act is concerned with foodstuffs, or parts thereof, that are fit for human consumption.

Regulations relating to the labelling and advertising of foods set out circumstances and conditions under which labelling and advertising with respect to the following are to be carried out:[124]

(i) identification of category names in ingredients;
(ii) setting out of nutritional information declaration format and conversion factors;
(iii) nutrient reference value for the purposes of food labelling;
(iv) existing of foodstuff exempted from a date durability;
(v) evaluation of protein quality for the purpose of making protein claims; and
(vi) the manner of expression of energy, nutrient, or other substances values found in foodstuffs in the table with nutritional information.

It is in the foretasted regulation where the definition of brine that is in accord with the Brine Regulations is found. The regulation promotes ethical labelling and advertisement, including the need to have substantiated claims. The Regulation advances safety, quality, and compositional integrity of the product through circumscribed labelling and advertisement. The ultimate aim of the regulation is to ensure fair trade practices amongst manufacturers, importers, retailers, and sellers of foodstuffs, as well as protecting the consumers from falsity, misrepresentation of products, and misleading labels. The

[123] S1 of the FCD Act.
[124] Tan *et al South African Journal of Animal Science* 199-200.

Regulation further provides for caution or warning about possible ingredient or product misuses and the presence of allergens as a safety precaution.

The Regulation is aligned with provisions of the standards and guidelines of the Codex *Alimentarius* Commission. The Codex *Alimentarius* Commission is an intergovernmental body of the United Health Organization (FAO) and the World Health Organization (WHO). The Codex *Alimentarius* Commission adopts the Codex *Alimentarius,* or "food law", which is a collection of standards, guidelines, and codes of practice that governments may opt to use to ensure food safety, quality, and fair trade.[125]

(f) Price Control Act[126]

The Price Control Act 25 of 1964 was later to be known as the Sales and Services Matters Act 25 of 1964, which was replaced later by the Price Control Act 71 of 1993.[127] Of relevance and importance among the discretional duties of the Controller is section 7, which deals with the display or marking of prices and marking of goods.[128] In terms of section 2 of Price Control Act, controller is person who performs function and exercise duties assigned to him or her by Minister in terms of the Price Control Act and such a perform is still subject to the control of the Minister.[129] Section 7 requires *inter alia* that manufacturers or any particular manufacturer of any specified goods or goods of a specified class, or any dealer or any particular dealer in such goods, to mark such goods in such a manner as the control may prescribe.[130] The Price Control Act required substantial compliance and the Controller could, considering certain circumstances, grant an exemption to a manufacturer.[131]

[125] Joint FAO/WHO Food Standards Programme *Codex Alimentarius: Food Import and export inspection and certification systems* (2012) iii
[126] Act 25 of 1964 (hereinafter "the Price Control Act")
[127] Long title of the Price Control Act.
[128] S 7 of the Price Control Act.
[129] S 2 of the Price Control Act.
[130] S 7 of the Price Control Act.
[131] S 9(3) of the Price Control Act.

(g) Trade Practices Act 76 of 1976

The Trade Practices Act 76 of 1976 was amended to by the Trade Practices Act 34 of 2001 with the thrust of prohibiting ambush marketing regarding sponsored events, and to impose penalties in the event of any contravention of its provisions.[132] All practices, which were improper and unconscionable, were dealt with through this legislation.

(h) Consumer Affairs (Unfair Business Practices) Act[133]

The purpose of the Business Practices Act was to provide for the prohibition or control of certain business practices and any matters connected therewith.[134] The Business Practices Act defines 'harmful business practice' as "any way of doing business that would harm the relationship between the business and the consumer, mislead the consumer or be unreasonably unfair to the consumer".[135]

Business practice was further characterized by the Business Practices Act as:[136]

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

[132] Trade Practices Amendment Bill 34 of 2001. Available at http://www.gov.za/documents/downloads.php?f=67165 (accessed on 28 December 2018).
[133] 71 of 1988 (hereinafter "Business Practices Act").
[134] Preamble of the Business Practices Act.
[135] See definition in S1 of the Business Practices Act.
[136] *Ibid.*

This Business Practices Act was an enabling statute in that, it authorised the Consumer Affairs Committee (CAFCOM), to investigate business practices and report such practices to the Minister of Trade and Industry.[137] The Minister would accept recommendations made by the CAFCOM, and reserved the right to publish them in the Government Gazette as business practices that were unfair.[138]

The mechanism afforded by the Business Practices Act assisted consumers in terms of redress where they could lay a complaint, and investigation and possible prosecution followed.[139] Indirectly the CAFCOM also had education and compliance programmes that assisted consumers and made them aware of their rights.[140]

2.5. Conclusion

The intention of traversing through the regulatory framework on brining practice in the sale of consumer products, such as poultry meat products, was to highlight the regulatory and legal basis from which such a practice derives. The two critical statutes that provide a basis for ensuring quality and safety regarding the sale of poultry meat products are the APS Act and the FCD Act.

From a scientific perspective, it was shown that there are various additives that are added into poultry meat products, except grade A or B carcass, for which maximum limits had not been set -at least not until 2016. It has also been shown that there is no method that has been set out in the APS Act that allows for the analysis of the presence of phosphates and sodium chloride salts, although a limit for phosphate solution on a mass per mass basis was set at 0.5 percent. It has also been shown that the only method that has been set out in the APS Act was one for establishing and determining the amount of moisture that could have been injected into a whole bird (carcass), at least until 2016.

[137] Woker *OBITER* 217 - 219
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*

From a regulatory perspective, it is apparent from the definition of foodstuffs as encapsulated in the FCD Act that poultry meat products are a foodstuff, which means that they are not immune from being regulated under the FCD Act. Equally, the product is regulated under the APS Act merely for, among others, grading and classification purposes. However, in terms of the FCD Act there appears to be an exemption or abdication of regulatory responsibility in respect of poultry meat products, due to failure to establish food safety and health parameters for additives such as the water and sodium chloride (brine) that have to be added to the product. Hence, prior to the promulgation of the Poultry Amendment Regulation of 2016, the untrammelled addition (injection) of brine into IQF portions by the suppliers of poultry meat products was taking advantage of the legal arbitrage on the aspect of brining practice.

It has further been established that the limit of 8 percent for absorption (or addition) of moisture was only in respect of graded carcass. It was further established that no limits and methods of measurement had been established for moisture absorption in all poultry meat products except grade A or B carcasses, at least until 2016. It became apparent that IQF portions, amongst others, were not provided for in terms of regulatory provisions under the APS Act regarding limitation of how much water and sodium chloride can be added.

In 2010, under the FCD Act, the suppliers or sellers of poultry meat products were required to declare the amount of additives that were added to the product offered for sale - including absorbed water. However, they were also provided with an alternative to indicating or declaring (labelling) “brine” on their product label and trade description. There was, until 2016, no regulatory provision under the APS Act that required the suppliers or sellers of poultry meat products to inform buyers or consumers about the kind of treatment or water that the poultry meat products, including IQF portions, contained.

The publication of the Brining Regulations afforded consumers with minimal protection in terms of the imposition of a limit to the amount of moisture that could be injected into the IQF portion, but this protection did not extent to the limitation on the amount of salt that

could be added in such water solutions. It is submitted that the brining practice under the APS Act may not be predicated on food safety and human health reasons, but on the organoleptic[141]and economic basis (mass increase of the IQF portions). Hence, the lack of a settled quantity of sodium chloride and dearth of methods for analysing additives permitted in the brine solution. It is submitted that the publication of the Brining Regulations did not achieve much for consumer protection, since most of the aspects that occasioned their promulgation already existed in the R 146 published under the FCD Act. It is submitted that the Brining Regulations failed to offer consumer protection in respect of consumer products such as undergrade carcasses, pieces, and strips by failing to establish limits for brine injection for these classes.

With respect to all applicable statutes that pre-existed the CPA, they were found to be aspect-specific to a product. The statutes are enforced against the manufacturers, suppliers, and sellers of products at the behest of enforcement authorities, without due consideration given to consumers' participation; hence, the remedies prescribed are criminal in nature.

[141] Are quality grading factors such as, among others, juiciness and tasty.

CHAPTER 3: THE APPLICATION OF "CONSUMER PROTECTION LAW" IN THE CONTEXT OF THE AFFECTED CONSUMER RIGHTS, WITH PRIMARY FOCUS ON THE CPA

3.1. Introduction

The CPA is the most comprehensive framework legislation that addresses consumer rights, enforcement guidelines, and routes of redress to consumer rights.[142] Of course, prior to and after the promulgation of the CPA, statutes existed, which have the flavour of protecting consumers, but never expressly enunciating the protection of consumer rights.[143] The existence of those statutes did not in most cases, necessarily afford consumers claimable rights and the right to recourse when such rights were infringed.[144]

The sale of poultry meat products, specifically IQF portions, in a treated manner presupposes that the nature and quality of the good itself has been tampered with. It is against this background that consumer rights which could potentially be affected need to be considered. Chapter 2 of the CPA sets out consumer rights which must be protected and upheld, and the rights that will be the focus of this study are:

(a) The right to disclosure and information with specific focus on the plain and understandable language and product labelling and trade descriptions provisions;[145]
(b) The right to fair and honest dealing with special focus on the provision regarding false, misleading or deceptive representations;[146] and
(c) The right to fair value, good quality and safety with emphasis on safe, good quality goods, implied warranty of goods, warning concerning fact and nature of risks and liability for damage caused by goods.[147]

[142] J Barnard *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* LLD thesis UP (2013) 2.
[143] Woker 2010 *Obiter* 217 - 218.
[144] See legislations mentioned under chapter 2 in paragraph 2.4 Supra. See also chapter 3 in Parts A and C under sections 69 and 76 of the CPA.
[145] Ss 22 and 24 under Part D of the CPA.
[146] S 41 under Part F of the CPA.
[147] Ss 55, 56, 58 and 61 under Part H of the CPA.

The chapter will focus on the role of the common law position in the sale of goods, with respect to contract of sale, warranty of quality, and misrepresentation. The application of consumer rights in the sale of brined poultry meat products will be focused on. This includes the role of the suppliers to supply goods in a fair and transparent manner, so that there is balance between addressing the interest of the consumers and that of the suppliers in the market place.[148] The role of the CPA in upholding the rights of consumers within the regulated space which products (including IQFs) are sold will be evaluated. 'Consumers'[149] are the ultimate buyers of these poultry meat products that the poultry industry supplies to the market, and their consumer rights should be evaluated against this background. In the final analysis the chapter will reflect on how brining practices, as regulated under other statutes, affect the consumer rights as contained in the CPA.

3.2. Consumer rights that are affected by brining practices and associated regulatory interventions to brining

The promulgation of the CPA has to be seen and understood within the context of an intervention by a developmental state[150] within the parameters of section 27 of the Constitution.[151] The State has an obligation to introduce legislation in order to address socio-economic rights.

The CPA is an important framework legislation that has ushered the concept of consumer rights in South Africa.[152] The CPA has replaced and consolidated fragmented consumer protection laws into one statute.[153] The CPA came into force in 2011.[154] The CPA covers,

[148] L Hawthorne *THRHR* 336-370.
[149] See S 1 of the CPA, Consumer is defined as a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the CPA by section 5 (2) or section 5 (3).
[150] Bauling and Nagtegaal "Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008" 2015 *De Jure*153
[151] Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter "the Constitution")
[152] Woker *OBITER* 218
[153] M Gouws "A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act" 2010 *SA Merc LJ* 70-79.
[154] T Naude "Dissemination of Consumer Law and Policy in South Africa" 2018 *Springer* 411- 413

inter alia, consumer rights and the obligations of suppliers towards the upholding of those rights

The promotion of a fair, accessible, and sustainable marketplace in which consumer products and services are sold is a function of established national norms and standards relating to consumer protection.[155] The purpose of the CPA is, *inter alia*, to promote and advance the social and economic welfare of consumers, as well as to advance and protect consumer rights as enshrined in the CPA.[156] Furthermore, the CPA promotes fair business practices and protect consumers from unconscionable, unfair, unreasonable, unjust, and other improper trade practices, as well as from deceptive, misleading, unfair, or fraudulent conduct.[157] The CPA provides core fundamental consumer rights to consumers, thus obligating suppliers to uphold those rights.[158]

The CPA encapsulates the following consumer rights and its purpose hinges on the realisation of these rights:[159]

- "The right to equality in consumer markets;
- The right to privacy;
- The right to choose;
- The right to disclosure and information;
- The right to fair and honest dealing;
- The right to fair, just and reasonable terms and conditions;
- The right to fair value, good quality and safety; and
- The right of a consumer to have an accountable supplier."

Gouws states that the promulgation of the CPA brought the implementation of a consumer rights epoch in South Africa in 2011.[160] The consumer rights culture proves that the CPA

[155] Long title of the CPA.
[156] S 3 of the CPA.
[157] Woker, *OBITER* 224.
[158] Barnard *De Jure* 455.
[159] Part A to C of Ch 2
[160] Gouws *SA Merc LJ* 79.

is a social justice legislation, which has the transformative aspiration to kindle and drive socio-economic change in the impoverished South African Society.[161]

The production of IQF portions and the associated use of brine have the potential to compromise consumer rights as encapsulated in the CPA regarding the implied warranty of quality, safety, and value of the consumer products.[162] Other consumer rights that may be impacted upon relate to information disclosure such as product labelling, trade description, and the use of plain and understandable language, and will form part of the study. The relevance and potency of the CPA will be evaluated against other relevant statutes such as the APS Act and the FCD Act.

3.2.1. The right to disclosure and information: The plain and understandable language provisions

Section 22 is an elaborate and complex section to put into operation. However, the interpretation and simplification of the section is important for the application of CPA. The disclosure of information in a plain and understandable language is essential in enabling consumers to make an informed decision. The ethical sale of poultry meat products depends on the disclosure of information in a plain and understandable language.

3.2.1.1. Plain and understandable language

The need for the use of plain language was accentuated as far back as the sixteenth century. Gouws, in his article on *Plain Language Provision of the Consumer Protection Act,* refers to Edward VI, who declared that he wished that the "superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand."[163] In other words, plain language in respect of labels and trade description should be direct and straightforward, and designed to deliver the

[161] Bauling and Nagtegaal *De Jure* 151
[162] Ss 55 and 56 of the CPA.
[163] Gouws *SA Merc LJ* 70- 81.

message to the intended readers in a clear manner.[164] The intended consumer should be able, without assistance, to understand the language used in connection with the sale of the goods or services, which may be in the form of product labelling or in legislation. Stoop states that plain language remains a valuable tool in the effort to protect consumers and ensure that their bargaining position is improved.[165] Barnard states that, "plain language aims at addressing technical vocabulary, archaic words, overuse of passives, complex and long sentences, and poor organisation."[166]

Section 22 provides that, "the producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the prescribed form, or in plain language, if no form has been prescribed for that notice, document or visual representation."[167] Section 22(2) states, "a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of relevant goods or services, could be expected to understand the content, significance and importance of the notice, document or visual representation without undue effort, having regard to –

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;
(b) the organization, form and style of the notice, document or visual representation;
(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
(d) the use of any illustrations, examples, headings or other aids to reading and understanding."[168]

[164] *Ibid.*
[165] PN Stoop "Plain Language and Assessment of Plain Language" 2010 *Int. J. Private Law* 329-329.
[166] J Barnard "Where does the vulnerable consumer fit in? A comparative analysis" 2014 *Journal of Consumer & Commercial Law* 1-4.
[167] S 22 (1) of the CPA.
[168] S 22 (2) of the CPA.

Gouws is correct in his submission that section 22 seeks to ensure that consumers understand the terms and conditions of the transactions or agreements they enter into and that they are given the opportunity to make informed choices.[169] It is for this reason that Naude and Eiselen argue that information should be transparent, especially when dealing with procedural fairness.[170]

The CPA is meant to protect the most vulnerable individuals, such as low-income persons, rural people, young and old persons, and those who are illiterate.[171] Plain language has to enable ordinary consumers (vulnerable) with average literacy skills and minimal knowledge to understand the content, significance, and import of the notices and visual representation without undue effort.[172] Barnard discusses the concept of vulnerable consumers and states that in the case of South Africa, the vulnerable consumer should be included in any assessment as to the ordinary consumer of the class or group of persons for which particular goods and services are supplied, rather than dealing with them in isolated manner.[173] Gouws states that a consumer will be regarded as ordinary for purposes of the CPA if he or she has the two attributes of average skills and minimal experience as a consumer.[174] Stoop & Churr state that 'average literacy skills' implies that documents must cater for average South African consumers of the class for whom the notice, document, or representation is intended.[175] De Stadler & Van Zyl state that 'average literacy skills' means that the document must cater for the ordinary consumer from the target group.[176] With respect to minimal experience, they posit that drafters should write as if they are focusing on the first-time consumers of the particular goods or services.[177]However, Gouws argues that the point of departure in testing whether a

[169] Gouws *SA Merc LJ* 70- 85.
[170] T Naude and S Eiselen (eds) "Commentary on the Consumer Protection Act" (2018) Juta 22-3.
[171] S 3 of the CPA.
[172] S 22 of the CPA.
[173] Barnard *Journal of Consumer & Commercial Law* 1-12.
[174] Gouws *SA Merc LJ* 70 -87.
[175] PN Stoop & C Churr "Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008" 2013 (16) *Potchefstroom Electronic Law Journal* 514-532.
[176] E De Stadler & L Van Zyl "Plain language contracts: challenges and opportunities" 2017 (29) *SA Merc LJ* 108-109.
[177] Stoop & Churr *Potchefstroom Electronic Law Journal* 514-532.

consumer is average relies on the average literacy skills of the consumer at hand.[178] After all, section 22 applies to all consumers.[179]

Barnard states that guidelines or standards for the assessment of plain language have not been published in terms of the CPA.[180] It is for this reason that Stoop posits that, due to the absence of objective assessment measures or guidelines, the use of plain language within the context of the CPA has been successfully determined.[181] Van Eck concurs with Stoop by stating that the requirements contained in section 22 appear subjective, which makes it difficult to objectively determine whether the document is in plain language and therefore amenable to be understood or not.[182] Van Eck submits that the key to determine whether the document is in plain language rests on whether the reader understands it.[183]

Barnard states that plain words and short sentences should be used and, where possible, illustrations should be included to make the document more understandable.[184] Van Eck states that, before embarking on form of drafting, the intended reader of the document must be considered.[185] Barnard avers that the average consumer finds it difficult to comprehend legal grammatical formulation.[186] Van Eck states that the drafting style has to take into account the age, education, literacy level, and language of the consumer.[187] Stoop and Churr suggest that the National Consumer Commission might have to consider a style guide on plain language from foreign legislation, as instructed in section 2(2) of the CPA.[188] They further cite the law from the State of Pennsylvania and Connecticut in the United States of America which, *inter alia*, requires documents not to use technical

[178] Gouws *SA Merc LJ* 70 -87.
[179] Stoop *Int. J. Private Law* 329-333.
[180] Barnard *Journal of Consumer & Commercial Law* 1-4.
[181] Stoop *Int. J. Private Law* 329-322.
[182] M Van Eck "Guidelines for writing in plain language" 2012 (521) *De Rebus* 21-23.
[183] *Ibid*.
[184] Barnard *Journal of Consumer & Commercial Law* 1-4.
[185] Van Eck *De Rebus* 21-23.
[186] Barnard *Journal of Consumer & Commercial Law* 1-4.
[187] Van Eck *De Rebus* 21-23.
[188] Stoop & Churr *Potchefstroom Electronic Law Journal* 518-535.

legal terms or Latin and foreign words, as well as to include instances where words are defined using commonly understood meanings.[189]

Section 63 of the National Credit Act[190] provides that, every consumer has a right to receive any document that is required in terms of the NCA in an official language that he or she reads or understands to the extent that this reasonable, considering usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the person required to deliver that document. The CPA does not have the language and text in its provision on plain and understandable language, which compares to the aforesaid provision of the NCA, which would have placed a positive obligation on the sellers of poultry meat products to label their products in such a manner that, it is suitable to the comprehension abstract of the intended consumers.

In other words, consumers, especially vulnerable ones, should be assisted in their comprehension of labels or any visual material associated with the sale products through the employment of plain and understandable language.[191] In the *Standard Bank of South Africa Ltd v Dlamini*[192], it was stated with respect to section 63 or 64 of the NCA that, strictly interpreted that those section where meant to assist an illiterate consumer.[193] It was held that, purposively interpreted they embody the right of the consumer to be informed by reasonable means of the material terms of the documents he signs. The credit provider bears the onus to prove that it took reasonable measures to inform the consumer of the material terms of the agreement.[194] In the light of the fact that, section 64 of the NCA is identical to section 22 of the CPA as far as plain language is concerned,[195] it is therefore, imperative that suppliers of brined poultry meat products employ a language in their labelling that assist the illiterate. Suppliers must also take

[189] *Ibid*.
[190] 34 of 2005 (hereinafter "the NCA")
[191] Naude and Eiselen (2018) 22-4.
[192] 2013 (1) SA 219 (KZN)
[193] Para 48 s*upra*.
[194] *Ibid.*
[195]

measures to explain material terms such as brine so that consumers understand the labelling of the poultry meat products when making a purchasing decision.

3.2.1.2. Other legislative measures relevant to plain language

Poultry Meat Products Labelling Regulations will be considered in terms of the APS Act and FCD Act.

3.2.1.2.1. The APS Act

In terms of section 3 of the APS Act, control over the sale of products, the Minister may *inter alia* prohibit the sale of a poultry meat product unless it complies with prescribed requirements relating to marking and labelling.[196] The Poultry Meat Products Regulation and its amendment under the APS Act requires the following labelling (marking) requirements to be complied with when the poultry meat products are sold:[197]

(a) indication of the name and address of packers;
(b) class designation;
(c) applicable grade designation;
(d) indication of parts or cuts of poultry meat with the designation in accordance with normal trade practice;
(e) indication of species in the case of the sale of portions;
(f) the expression or indication of the state or condition in which the poultry meat product is sold, such as fresh, chilled, deep frozen and frozen, as the case may be;
(g) date or code as indication of the suitability for use of the poultry meat product;
(h) declaration of a production lot; and
(i) country of origin if the poultry meat product is imported.

[196] S 3(1) (a) (iii) of the APS.
[197] Reg 8 of Poultry Meat Products Regulation.

However, the regulation 8 (k) of the Brining Regulation in relation labelling requirements of raw processed meat products states that, the applicable designation or alternative class designation preceded or followed by the generic name(s) of the added formulated solution, or by any other wording reflecting a true description of the added formulated solution, must indicated.[198]

3.2.1.2.2 The FCD Act

The FCD Act plays an important role in fleshing out the labelling requirements that must be complied with by the foodstuffs manufacturers, producers, suppliers, and sellers. The FCD Act defines a 'label' as, "any brand or mark or any written pictorial or other descriptive matter appearing on or attached to or packed with any foodstuff, cosmetic or disinfectant or its package, and referring to foodstuffs, cosmetics or disinfectants; and, when used as a verb, means to brand or mark or attach or provide in any other manner with, any written, pictorial or other descriptive matter".[199] R146 that have been published under the FCD Act relate to the labelling and advertising of foodstuffs. The R 146 prohibits the importation, sale, or offer of any pre-packaged foodstuff for sale, unless the foodstuff container or the bulk stock from which it is taken is labelled accordingly.[200] Foodstuffs in pre-package must be labelled *inter alia* as follows:[201]

(a) name of the product (class designation);
(b) name and address of the manufacturer, importer or seller;
(c) where appropriate, instructions for use of a foodstuff;
(d) list of ingredients;
(e) where applicable, special storage conditions;
(f) net content of the container in accordance with Trade Metrology Act;
(g) country of origin;
(h) batch identification;
(i) date marking; and

[198] Reg 8 of the Brining Regulation.
[199] S1 of the FCD Act.
[200] Reg 3 of the R 146.
[201] Reg 9, 10, 11, 12 & 22, 25 of the R 146.

(j) QUID – raw processed meat products shall indicate the quantitative ingredient declaration as a percentage of meat and water content on the main panel in bold capital letters at least 3 mm in height.

Apart from the indication of grade designation, there is a difference between what must be labelled in terms of both the APS Act and the FCD Act. The APS Act, in terms of indication of added formulation, gives the option to indicate generic name (s) of the added formulated solution or any other wording reflecting a true description of the added formulated solution. On the other hand, the FCD Act allows for the use of the names such as 'salt' or 'sodium chloride' as part of the list of ingredients. The FCD Act states that where water is added as an ingredient of such a foodstuff, it must be declared in the list of ingredients of such foodstuff, unless it is part of brine and is declared as such. In other words, instead of declaring that the IQFs contain a certain percentage of water and salt, manufacturers, suppliers, or sellers is permitted to indicate brine as a percentage. It is submitted that, the indication of brine as a percentage as opposed to percentage of water and salt used as part of the formulation does not comply with the requirement of plain and understandable language.

According to the DAFF Final Report, the lower price of IQFs may give consumers the impression that the product is cheaper and therefore offers value for money.[202] An average consumer buys and makes purchasing decision based on price.[203] It was held in the *SAPA Case* that the majority of consumers of chickens in South Africa were either not sufficiently literate to read and interpret the scarcely visible labels in small print, or did not read them, but rather concentrated on price.[204] IQF portions constitute the biggest protein source for the millions of poor consumers.[205] The proper description and labelling, in a plain and understandable language, of the IQF portions in terms of the actual ingredients will assist the poor average consumer in making good informed purchasing decisions. This means that the legislation and whatever flows from it in the form of notice, document,

[202] The DAFF Final Report (2013) 2.
[203] *Ibid.*
[204] *SAPA Case* para 28.
[205] The DAFF Final Report (2013) 3.

or visual representation, should be written in such a manner that the intended targets easily understand them.

In the *Four Wheel Drive Accessory Distribution CC v Rattan NO,*[206] it was held that when interpreting legislation, what must be considered is the language used, context in which the relevant provision appears and the apparent purpose to which it is directed. The use of the term brine in the labelling requirements of poultry meat product offered for sale may not improve access to information. Hence, in *the Four Wheel Drive Case*, it was held in relation to terms of agreement that do not comply with the requirements of section 22 of the CPA, to be invalid since the consumer could not be expected to understand the content, significance and import thereof.[207] Axiomatically, the use of brine as a technical and scientific word under the APS Act in the labelling requirements may be non-compliant with the provisions of section of 22 of CPA.

3.2.2. The right to disclosure and information: product labelling and trade description

The right to disclosure extends to product labelling and trade description. The following paragraphs delve into product labelling and trade descriptions.

3.2.2.1 Product labelling and trade description in terms of the CPA

In terms of section 24 of the CPA, trade description applies "if (a) it is applied to goods, or to any covering label or reel in or on which goods are packaged or attached to the goods; (b) displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description, or; (c) is contained in any sign, advertisement, catalogue, brochure, circular, wine list invoices, business letter, business paper or other commercial communication based on which a

[206] (1048/17) [2018] ZASCA 124 (26 September 2018). Hereinafter "*Four Wheel Drive Case*"
[207] *Four Wheel Drive Case* para 31.

consumer may request or order the goods."[208] This means that the existence of a contract may be, *inter alia*, dependent on the product description that would have been derived from labelling and trade description. Section 24 further provides that a person must not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description, nor alter, deface the cover, remove, or obscure a trade description or trade mark applied to any goods in a manner designed to mislead consumers.[209]

Product labelling and trade description forms the basis upon which consensus between the buyer and the seller is reached. Van der Merwe and Venter argue that the food label is one source of information that consumers use to acquire knowledge about food items in order to make informed decisions regarding purchases[210] Prinsloo *et al* argue that product labelling and trade description provide information to potential consumers with regard to food products because most of the information that consumers require, such as trade description and product ingredients, is printed on the product labels that are prominently affixed to the packaging.[211] Stoop therefore submits that the CPA does contribute towards improving consumer choice and behaviour.[212]

Stoop states that false and misleading or deceptive representation in relation to the marketing of goods and services is prohibited, which in turn prevents unfair pre-contractual conduct in the process of marketing.[213] Hawthorne submits that the consumer can only enter into a negotiation and contract based on this acceptance of the product as informed by the label and trade description.[214]

---

[208] S 24 (1) (c) of the CPA.
[209] *Ibid*
[210] M Van der Merwe & K Venter "A Consumer perspective on food labelling: ethical or not" 2010 Vol (75)4 *Koers* 405 - 407.
[211] N Prinsloo. D Van der Merwe. M Bosman & A Erasmus "A critical review of the significance of food labelling during consumer decision making" 2012 Vol 40 *Journal of Family Ecology and Consumer Sciences* 83-84.
[212] *Idem.*
[213] PN Stoop "The Consumer Protection Act 68 of 2008 and procedural fairness in Consumer Contract" 2015 Vol (18) 4 *PER/PELJ* 1091-1111.
[214] Hawthorne *THRHR* 345-356.

Stoop further states that the disclosure of information through labelling and trade description empowers and protects the consumers from unfair dealings.[215] Kamanga submits that protection is offered to consumers against false and misleading information regarding the nature of goods sold and delivered through product labelling and trade description.[216] Hawthorne opines that pprocedural fairness calls upon suppliers (sellers) to avoid misleading trade descriptions or misleading alterations or the covering of trade description when products are sold to the consumers.[217]

3.2.2.2. Product labelling and trade description in terms of the APS Act and the FCD Act

In terms of product labelling and trade description, both the FCD Act and the APS Act are complementary of each other. The FCD Act provides for horizontal labelling for foodstuffs across different legislations in terms of product labelling and trade description, whereas the APS Act abstract from the horizontal label[218] and provide a vertical labelling guideline. The vertical label provided by the APS Act, in addition to horizontal labelling, relates to:[219]

(a) class designation;
(b) grade designation;
(c) indication of parts or cuts of poultry meat with the designation in accordance with normal trade practice; and
(d) indication of species in the case of the sale of portions.

In terms of the FCD Act, poultry meat product is classified as a foodstuff, which falls under raw processed meat products.[220] In the APS Act, a product description is attached to foodstuff for purposes of product identification, quality grading specification, and labelling.

[215] *Idem.*
[216] VV Kamanga *Product labelling and Trade Description: Failure to warn the consumer and the Consumer Protection Act 68 of 2008* LLM mini-dissertation UP (2017) 31.
[217] Hawthorne *THRHR* 345-368.
[218] Hawthorne *THRHR* 345-356
[219] See Reg 8 of the Poultry Meat Products Regulation.
[220] S 1 of the R 146. Raw processed meats means "raw meat products from all species of meat animals and birds intended for human consumption in South Africa, that resembles a cut, joint, slice, portion or carcass of meat, cured or uncured, or a combination thereof, pre-packaged or unpre-packed, that has not undergone any heat treatment and where any added ingredient and/or additive and added water, including brine, is retained in or on the product as sold, but exclude products covered by the SANS 885 standard".

There is no grade for IQFs save for the whole bird (carcass) which is graded into Grade A or B.[221] The class designation under which the IQFs for chicken falls under is termed 'portions.'[222] In the context of this research, IQFs are essentially frozen portions. IQFs are classified into, "barbeque ("braai") pack (several combinations of thighs, drumsticks, wings, breasts, and back), soup pack, half carcass, quarter carcass, legs, thighs, drumsticks, wings, breast, and back".[223] Product labelling and trade description in terms of the APS Act entails labelling or indicating, on the container in which IQFs are sold, the following:

(a) list of (ingredients) food additives or additives;
(b) product description, class of the product;
(c) country of origin of the product;
(d) name and address of the packer or manufacturer or seller;
(e) date of production or processing or packing of the product
(f) state of the product, e.g. frozen;
(g) net weight of the product and
(h) species the product originates from.

The indication or labelling of the above information in plain and understandable language complies with section 24 of the CPA regarding product labelling and trade description. In terms of the labelling requirements relating to the grade of the poultry meat product, class of the poultry meat product, state of the poultry meat product, weight, species including date of production and packaging of poultry meat product which are outlined in the APS Act, subsidiarity and complementarity with section 24 of the CPA is established.

[221] Reg 3 of the Poultry Meat Products Regulation.
[222] Reg 5 of the Poultry Meat Products Regulation.
[223] See Table 1 read in conjunction with Reg 3 of the Poultry Meat Products Regulation.

3.2.3. The right to fair and honest dealing: false or deceptive representations

Fairness and honesty in dealing with consumers where goods are supplied is critical for the advancement of the objectives of the CPA. The CPA deals with false or deceptive representations as set out below.

3.2.3.1. False or deceptive representations in terms of CPA

Section 41(1) provides that in relation to the marketing of any goods or services, the supplier must not, by words or conduct –

(a) "directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
(b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to deception; or
(c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation or permit or require any other person to do so on behalf of the supplier."[224]

Section 1 of the CPA defines marketing as the promotion or supply of any goods or services.[225] The section further provides that the promotion of good or services is a form of marketing, which means to "(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all public for consideration; (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction."[226] The advertisement, display, offer, representation, or any conduct that could be reasonably construed as inducement or an attempt thereof is seen as promotion and, by direct

[224] S 41 (1) of the CPA.
[225] S 1 of the CPA.
[226] *Ibid*.

extension, marketing. On the other hand, section 1 of the CPA further defines 'supply' in relation to goods as inclusive of the selling, rent, exchange, and hire in the ordinary course of business for consideration.[227]

Section 41(3) of the CPA provides that false, misleading, or deceptive representation is constituted when goods or service:[228]

(a) "have ingredients performance characteristics, accessories, uses , benefits, qualities, sponsorship or approval that they do not have;
(b) are of a particular standard, quality, grade, style or model;
(c) are new or unused, if they are not or if they are reconditioned or reclaimed;
(d) have been used for a period to an extent, or in a manner that is materially different from the facts;
(e) have been supplied in accordance with a previous representation; and
(f) are available or can be delivered or can be delivered or performed within specified time."

The addition of brine into the poultry meat product brings with possibility, amongst others, the dilution of nutrient content of the product, addition of the weight to the product and thus distorting the actual net weight of poultry meat product as well as the potential harmful effect of sodium chloride. It is against this background that the consumer has to be informed through labelling about the elements of quality, safety and value of the poultry product that are affected by brining. Section 48 (2) expatiates in material terms what is contained section 41 of the CPA, which reflects on the importance of the avoidance of false, misleading, and deceptive representation.[229]

Naude and Eiselen state that suppliers of goods or services often make representations to consumers to influence their decision when such goods or services are marketed.[230] They argue that, in principle, there is nothing wrong with making representations when

[227] S 1 of the CPA.
[228] S 41(3) of the CPA
[229] *Ibid*.
[230] Naude and Eiselen (2018) 41-2.

goods or services are marketed, since such representation assists in convincing consumers to purchase their goods or services.[231] However, there must a balance between the freedom of suppliers to market their goods or services using representations and the freedom of consumers to exercise their minds freely.[232] Since section 41 of the CPA is aimed at protecting consumers, Naude and Eiselen cautions against conduct by suppliers that may be prejudicial where false, misleading, or deceptive representation, or failure to disclose certain important facts, could lead to apparent misapprehension on the part of consumers.[233]

Van Eeden and Barnard state that a producer, importer, distributor, retailer, or service provider must not market any goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services as contemplated in section 41.[234] They further state that a producer, importer, distributor, retailer, or service provider must not market any goods or services in a manner that is misleading, fraudulent, or deceptive in respect of the price at which goods may be supplied, or the existence of or relation of the price to any previous price or a competitor's price for comparable or similar goods or services.[235]

According to Naude and Eiselen, a false representation is one which is incorrect, whereas misleading representation means leading one astray or causing someone to have an incorrect impression or belief.[236] Failure to produce a notice, document or visual representation in plain and understandable language in terms of section 22 of the CPA, as well as the use of misleading trade description in terms of section 24 of the CPA, constitutes a false, misleading, or deceptive representation.[237] This means that representations shrouded in scientific and technical terms in product labels and trade

[231] *Ibid.*
[232] *Ibid.*
[233] *Ibid.*
[234] E van Eeden & J Barnard *Consumer Protection Law in South Africa* (2017) 120.
[235] S 29 (b) (iii) of the CPA.
[236] Naude and Eiselen (2018) 41-5.
[237] Naude and Eiselen (2018) 41-3.

description can be regarded as misleading since they have the propensity to lead a person astray or cause him or her to labour under the wrong impression.

3.2.3.2. False or deceptive representations in terms of the APS Act

The APS Act is concerned, among others issues, with the control over the sale and importation of certain agricultural products.[238] One of the agricultural products over which control is exercised is poultry meat products. Section 1 of the APS Act defines 'sell' as agreeing to sell, offer, advertise, keep, expose, transmit, convey, deliver, prepare for sale, or to exchange or to dispose of a product in any way for any consideration.[239] Advertisement "in relation to a product means any written, illustrated, visual or other descriptive matter or oral statement, communication, representation or reference which is distributed among members of the public or otherwise brought to their notice, which is or purports to be intended to promote sale of the product or to encourage the use thereof or otherwise to draw attention thereto".[240] The definition of the words 'sell' (sale) and 'advertisement' from the APS Act resonates with the definitions for 'supply' and 'promotions' as set out in section 1 of the CPA respectively. This means that 'marketing' as set out in the CPA has a similar meaning to the words 'sell' and 'advertisement' as contained in the APS Act.

Section 6 of the APS Act prohibits false or misleading descriptions of products.[241] The section states that "no person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a product in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the nature, substance, quality, or other properties, or the class or grade, origin, identity, or manner or place of production, of that product".[242]

[238] Long title of the APS Act.
[239] S 1 of the APS Act.
[240] S 1 of the APS Act. The word 'advertise' has a corresponding meaning to the definition of 'advertisement'.
[241] S 6 of the APS Act.
[242] S 6 of the APS Act.

Section 6 of the APS Act prohibits falsehoods and misleading descriptions associated with the sale and advertisement of products in a reinforcing manner to section 41 of the CPA. Section 41 of the CPA is all about the use of plain and understandable language, which would not mislead or create a wrong impression about the product being sold equally the use of brine that is a technical scientific term has the potential to concealing the true state of the poultry meat. On contextual interpretation, section 6 of the APS Act read with section 41 of the CPA could be used to argue that the use of obscure terms such as brine is not plain and understandable to the vulnerable consumer. Therefore, it may create the possibility of misleading or creating a wrong impression about the poultry meat product offered for sale.

3.2.4. Consumers' rights to safe, good quality goods

When the consumer from any market place or any other place buys goods, there are expectations associated with the safety and good quality in respect of such products, hence the realization of these expectations into a right by the CPA.

3.2.4.1. The common law position on the sale of goods with respect to the contract of sale, warranty of quality, and misrepresentation

Common law remedies have always been available to the consumer in cases where their rights have been infringed on; however, their realization could only be accessed in court. There may be adequacy or inadequacy in the common law principles with respect to the contract of sale, warranty against latent defects, and misrepresentation regarding goods sold to consumers.

3.2.4.2. Contract of sale of goods

Bauling and Nagtegaal state that it is a trite law of contract that those who enter into legally binding agreements cannot argue that, the agreement does not reflect consensus,

or that there was an imbalance in terms of bargaining powers.[243] Worker argues that it is difficult to prove in court whether suppliers have exerted pressure or undue influence.[244] Van Eeden and Barnard argue that there is a hesitation to apply factors such as fairness, reasonableness, the *bonis mores*, and good faith as freestanding requirements for the discharge of a contractual right.[245] However, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd,*[246] it was stated by Jacoob, J that a higher value, *Ubuntu* and good faith, is subscribed to by the majority of the people, must be factored in when contract are negotiated.

Bauling and Nagtegaal state that in common law, parties are regarded as having contracted on an equal footing due to the consideration of the essential element of freedom of contracting.[247] However, they further argue that parties can never be contracting on equal basis if the one party is contracting out of necessity and the other in order to survive.[248] Therefore, it is instructive that a paternalistic approach is adopted to protect vulnerable consumers against the unscrupulous suppliers.[249] The Constitutional Court in *Napier v Barkhuizen*[250] stated that a term in a contract must be interpreted by reference to the values that underlie our constitutional democracy. Van Eeden and Barnard submit that the contractual autonomy still enjoys respect and significance within the interpretative realm of contracts by the Constitutional Court.[251]

3.2.4.3. Warranty of quality and misrepresentation

Goods sold by suppliers or merchant manufacturers are inherently assumed to possess certain qualities or quintessential properties. Therefore, the presumption does exist that the supplier or merchant manufacturer inherently offers warranty of goods against

[243] A Bauling and A Nagtegaal "Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 149 – 155.
[244] Woker *OBITER* 218 - 224.
[245] Van Eeden & Barnard (2017) 234.
[246] 2012 (1) SA 256 (CC).
[247] Bauling and Nagtegaal *De Jure* 149 -155.
[248] *Ibid.*
[249] Bauling and Nagtegaal *De Jure* 149-163.
[250] 2006 (4) SA (1) (SCA) at para 29.
[251] Van Eeden and Barnard (2017) 233.

defects.[252] Naude argues that the common law of sale requires that goods be fit for purpose, failing which common law remedies will be available to the consumer.[253]

Barnard states that latent defects impair the usefulness of the good sold and are not discernable upon reasonable inspection by an ordinary person.[254] In other words a defect is regarded as latent if an ordinary person could not discover or see it at the time of buying or contracting. She states that a latent defect is defined as an abnormal quality or attribute which substantially impairs the usefulness or the effectiveness of the *merx*.[255] Barnard further defines the converse of the latent defect as patent defects, which are those defects that can be noticed by a diligent person.

Warranty against latent defects derives either through the operation of the law (*ex lege*) and in the contract of sale, thereby occurring under *naturalia* terms, or the seller may have given express or tacit contractual warranty which will fall under the *incidentalia* terms.[256] In both cases, in common law, there are remedies associated with warranties derived from either the *naturalia* or *incidentalia* of contract, namely a*edilitian* and *actio emptio* remedies.[257] Barnard argues that *aedilitian* remedies can only be available to the consumer under the following conditions: (i) there is no express or tacit guarantee in terms of contract, (ii) where warranty has not been expressly excluded and (iii) purchaser is unaware of the defect at the time of the conclusion of contract.[258] The *aedilitian* remedies are either restitutive *(actio redhibitoria*) or, where a pro rata reduction in the purchase price may be claimed, *actio quantis minoris*.[259]

However, under the *actio emptio* remedies the consumer may opt to cancel the contract and claim damages if it is found that the seller or manufacturer falsely gave a warranty

[252] Naude and Eiselen (2018) 57-5.
[253] T Naude "The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008" 2011 *SA Merc LJ* 336 – 339.
[254]J Barnard "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages" 2012 *De Jure* 455- 456.
[255] Barnard *De Jure* 455- 457.
[256] *Ibid.*
[257] Barnard *De Jure* 455 – 459.
[258] Barnard *De Jure* 455 – 458.
[259] *Ibid.*

that goods sold are devoid of bad characteristics or have concealed a defect.[260] In other words, if the seller misrepresents the true state of the good in terms of its quality, the purchaser may claim for either cancellation or damages or both. The claim for damages is predicated on the breach of the contract and such a breach must be substantial to warrant such an action.[261]

The onus of proof outlined in the foregoing rests on the consumer (purchaser), and furthermore discounts the fact that there are vulnerable consumers who may not know about these common law remedies. Although common law principles are, generally, available to all of us, their availability is contingent on the consumer approaching the court of law, which renders them, paradoxically, unavailable to most vulnerable consumers due to high litigation costs.

3.2.4.4. The right to safe, good quality goods in terms of the CPA

Section 55 of the CPA deals with a consumer's right to safe, good quality goods, but is not applicable to goods bought at an auction.[262] Section 55(2) of the CPA provides that all goods must be reasonably suitable for the purpose for which they are generally intended, of good quality, in good working order, and free of any defects.[263] The implication is that goods must be useable and durable for a reasonable period, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply.[264] Furthermore, the goods need to comply with any applicable standards Act[265] or any other public regulation.[266]

[260] Barnard *De Jure* 455 - 459.
[261] *Ibid.*
[262] S 55(1) of the CPA.
[263] S 55(2)(a) and (b) of the CPA.
[264] *Ibid.*
[265] Act No. 29 of 1993.
[266] Section 55(2) (d) of the CPA.

There is, however, limitation of liability for certain defects in terms of section 55(6) of the CPA, which provides that section 55(2)(a) and (b) do not apply to a transaction if the consumer:[267]

> (a) "has been expressly informed that particular goods were offered in a specific condition; and
> (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition."

Naude and Eiselen state that the goods must be suitable for the purpose for which they are generally intended, of good quality, in good working order, and free of any defects.[268] They posit that "quality" is defined as "the standard of something as measured against other things of a similar kind or a particular class, kind, or grade of something, as determined by its character, especially its excellence".[269] This means that classification and grading is important in establishing the quality of goods or products. The goods must also comply with any other public regulation,[270] and in this context, the APS Act and the FCD Act provide mandatory standards against which compliance of consumer goods such as frozen poultry meat portions can be measured. In terms of sections of 11 and 17 of the APS Act and FCD Act respectively, it is an offence to sell products that fail to meet the prescribed standards, and therefore, punishable by a fine or imprisonment.[271]

Barnard states that the determination of whether goods are in line with the provisions of sections 55 and 53 of the CPA would be through the use to which they would normally be put, which seems to be an indication that normal wear and tear may be taken into account.[272] She further states that it is irrelevant whether a product or defect was latent or patent, or whether a consumer could have detected it before taking delivery of the goods. The implication is that the supplier must point out every defect before the seller

[267] S 55(6) of the CPA.
[268] Naude and Eiselen (2018) 55-8.
[269] Naude and Eiselen (2018) 55-8B.
[270] Naude and Eiselen (2018) 55-12.
[271] Ss 11 and 17 of the APS Act and FCD Act respectively.
[272] Barnard *De Jure* 455-467.

may escape liability; that is, the consumer would have a remedy in respect of defects not specifically pointed out.[273]

This means that the supplier must warrant the accuracy of the statement made regarding a product during the course of advertising or on the packaging of the product.[274] Naude and Eiselen submit that suppliers will be held liable if the product does not meet the expectation created by the manner through and purposes for which it was marketed.[275]

3.2.4.5. The rights to safe, good quality goods in terms of the APS Act

Section 3 of the APS Act, Control over the sale of products, provides that:[276]

(1) "The Minister may –

(a) Prohibit the sale of a prescribed product –

(i) unless that product is sold according to the prescribed class or grade;

(ii) unless that product complies with the prescribed standards regarding quality thereof, or a class or grade thereof;

(iii) unless the prescribed requirements in connection with the management control system, packing, marking and labelling of that product are complied with;

(iv) if that product contains a prescribed prohibited does not contain a prescribed substance; and

(v) unless that product is packed, marked and labelled in the prescribed manner or with the prescribed particulars."

The Regulations Regarding Control over the sale of Poultry Meat are made in terms of section 3 and published under section 15 of the APS Act.[277] These regulations include,

[273] Naude *SA Merc LJ* 336 – 342.
[274] Naude and Eiselen (2018) 55-19.
[275] *Ibid*.
[276] S 3 (1) (a) of the APS Act.
[277] Ss 3 and 15 of the APS Act. Section 15 of the APS empowers the Minister to make regulation, which gives expression to section 3 of the APS Act that is concerned with the regulation of products sold in the Republic of South Africa.

among others, grading regulations that set parameters for classes and grades of poultry meat products, including specifications as to the substances that may be added into the poultry meat product.[278] The manner in which poultry meat products are packed and labelled forms part of the regulations, as do methods of sampling, analysing, and determining the presence or absence of certain substance such as added or absorbed water and added salts (sodium chloride and phosphates salts).[279] The regulations give assurance to consumers about the quality of the product, in that they limit and regulate what could be added.

However, the regulation has deficiencies in that the established methods are unable to determine the amount of salts added.[280] The regulation cannot guarantee that the imported products have not been adulterated by way of addition of too much water (in excess of what is prescribed, including the quantity of salts) added.[281] Method C, which is used for determining water uptake or formulated solution inclusion, only gives an indication as to the amount of water and protein (protein that represents the actual meat).[282] In other words, the consumer cannot be guaranteed good quality and safe poultry meat products, in the light of the fact that both imported and locally produced poultry products are sold in the same retail and wholesale space.

In the *SAPA Case,* it was stated that, "the development of methodology to accurately determine the quantity of added brine in chicken is challenging and problematic".[283] It was further stated that the essence of the problem is that it is impossible to differentiate between the (approximately 70 percent) water that occurs naturally in chicken and the

[278] Poultry Meat Products Regulation.
[279] Reg(s) 3, 4,5,7,8,9,10,11,12 & 14 of the Poultry Meat Products Regulation.
[280] Reg 14 of the Poultry Meat Products Regulation. The Regulation only addresses itself to the determination of moisture uptake in frozen and deep frozen poultry portions.
[281] Reg 14 (9) of the Poultry Meat Products Regulation. The regulation states that Method C may only be used to get an indication of the percentage of absorbed moisture and formulated solution uptake of an inspection lot of frozen poultry cuts.
[282] *Ibid.*
[283] *SAPA Case* para 25.

water added in the form of brine.[284] It was therefore stated that, weighing before and after injection was the only accurate method to determine the added brine level.[285].

This means that brine in IQF portions can be accurately determined in a processing plant where the weight of the portions can be recorded before and after injection, with the difference between the two representing the absorbed water or brine. The implication is that the ingredients that went into the water solution (such as sodium chloride, phosphate salts, and other food additives) are not determined or analysed. Furthermore, it means that imported frozen portions will not be accurately analysed for exceedance of the set limit of brining, given the difficulty presented by the inability to differentiate between the naturally occurring moisture and the added moisture, unless such determination is made in the processing facility. In the end, the right to safe and good quality products or goods is interfered with due to the aforementioned *lacuna* created in the regulations.

3.2.5. Right to fair value, good quality, and safety: implied warranty of quality

The promise that is inherent in the product in terms of giving value and having certain quality and safety properties could be associated with implied warranty of quality. In this context, the CPA and the APS Act do provide a context to implied warranty of quality.

3.2.5.1. Implied warranty of quality in terms of CPA

Section 56(1) provides *inter alia* that every supplier in the supply chain warrants, by way of implied terms in agreement of sale, that the goods comply with the requirements and standards referred to in section 55, except when the goods have been altered contrary to the instructions or after leaving the control of the supplier in question.[286] Section 56(2) states that "within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and

[284] *Ibid.*
[285] *Ibid.*
[286] S 56(1) of the CPA.

expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer either – (a) repair or replace the failed, unsafe or defective goods; or (b) refund to the consumer the price paid, for the goods".[287] Quality and safety properties inherent to and being characteristic of the goods or products constitute a right in terms of which claims against the supplier can be instituted, should such inherent properties be found to be lacking.

Naude and Eiselen state that section 56 provides for an implied warranty in terms of which the producer or importer, the distributor, and the retailer each warrant that the goods sold comply with the requirements and standards as set out in section 55 of the CPA.[288] They argue that implied warranty liability extends beyond the boundaries of contractual privity, as producers or importers, distributors, and retailers all warrant that goods meet the standards as set out in section 55.[289]

According to Okharedia, a warranty is a statement or representation by the seller of goods in connection with the sale of goods, although collateral to the expressed object of it having reference to the character, quality, or title of goods, and by which he or she pronounces or undertakes to ensure that certain facts are or shall be as he/she then represents them.[290] He further submits that a warranty is an undertaking of liability for all damages that may arise from falsity of a statement or assurance of a fact.[291] Barnard states that warranty does not apply if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods in that condition.[292]

Jacobs, Stoop and Van Niekerk argue that implied warranty under section 56(1) is more comprehensive than the title of section 56 lets on, and more extensive than the implied

[287] S 56(2) of the CPA.
[288] Naude and Eiselen (2018) 56-1.
[289] Naude and Eiselen (2018) 56-2.
[290] AA Okharedia "Consumer's reliance on warranties: A comparative study of the United States of America and South Africa" 2012 Vol (27)2 *Journal for Juridical Science* 129 - 130.
[291] *Ibid.*
[292] Barnard 2012 *De Jure* 455 – 458.

warranties under the common law.[293] They opine that the warranty as in section 56 extends to producers, importers, and distributors, provided that a transaction or an agreement regarding the supply of good is in place.[294] Jacobs, Stoop and Van Niekerk further argue that implied warranty may apply between distributors and retailers, between distributors and other distributors, and between the importers or producers, as long as there is a transaction that is not exempted.[295] Barnard submits that the consumer has the choice, as far as redress is concerned, of a refund, the replacement, or the repair of the goods, in terms of section 56.[296]

3.2.5.2. Implied warranty of quality in terms of the APS Act

The application of the APS Act and its attendant regulations is meant to ensure that the quality and safety of the product is guaranteed. However, the use of brine in the production of IQF portions does not afford consumers with the necessary warranty in terms of weight, taste, nutritional value, and quality of the product. The use of brine increases the mass or weight of the IQFs by 15 percent.[297] Regulation 5, Standards for Portions, provides that individual portions shall at least comply with the quality standards regarding carcass parts as specified for Grade B classification.[298] Regulation 5(4) provides for the following:[299]

(a) "poultry portions may contain food additives in the amounts permissible in terms of the FCD Act;
(b) in the case of individual portions which are treated with a formulated solution, the mass increase of the individual portions as a result of such treatment shall not exceed 15 percent (QUID): Provided that --

[293] W Jacobs. PN Stoops and R Van Niekerk "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical overview and analysis" 2010 Vol (13)3 *PER/PELJ* 302- 371.
[294] *Ibid.*
[295] *Ibid.*
[296] Barnard 2012 *De Jure* 455 – 468.
[297] Reg 4(9) of the Poultry Meat Products Regulation.
[298] Reg 5(1) of the Poultry Meat Products Regulation.
[299] Reg 5(4) of the Poultry Meat Products Regulation.

(i) subject to the provisions of regulation 4(2), the combined percentage of the absorbed moisture and formulated solution shall not exceed 15 percent (QUID); and

(ii) the concentration of the phosphates and food additives in the formulated solution in the final, treated poultry meat shall be within the permissible levels prescribed by the FCD Act".

The weight of the IQF portions cannot be guaranteed, given that 15 percent of absorbed or added formulated water may be lost during cooking and thawing. According to the DAFF Final Report, customer complaints are centered on the shrinkage of chicken portions during cooking, jelly cooking out of chicken, and large amounts of water seeping out during thawing.[300] The FCD Act prohibits the sale, manufacture, or importation of any foodstuffs to which any substance has been added to increase the mass or volume of such foodstuff with the object to deceive.[301] Suppliers of frozen IQF portions may not be in a position where implied warranty can be given in terms of both weight and quality of the product, in light of the fact that more water may be lost during thawing and cooking.

The value of the product is diminished by the addition of brine in that nutrient content is diluted, with the protein and energy contents of commercially available IQF portions being lower than portions that are not brined.[302] The DAFF Final Report states that brine injection results in elevated salt levels in IQF portions.[303] Implied warranty in brined IQF portions is non-existent in view of the foregoing observations, and even the APS Act is meant to ensure that brine products are of value and good quality and are safe. The product description and grade of the poultry meat products, among other quality factors, implies an inherent quality associated with the sale of such a product in terms of section 3 of the APS Act and thereby heralding an implied warranty in respect of the quality of the product.

[300] DAFF Final Report (2013) 1.
[301] S 2(1)(c) (ii) of the FCD Act.
[302] *Ibid.*
[303] *Ibid.*

3.2.6. Warning concerning fact and nature of risks

Warning in any form and manner is important if the well-being of the consumer is to be protected**.** The elevation of the warning by the supplier to the consumer is appreciated.

3.2.6.1. Warning in terms of the CPA

Section 58(1) of the CPA provides that, where the supplier of any activity or facility that is subject to any (a) risk of an unusual character or nature; (b) risk of which a consumer could not reasonably be expected to contemplate, in the circumstances; or (c) risk that could result in serious injury or death, that such risks should be drawn to the attention of consumers.[304] The fact, nature, and potential effect of that risk must be drawn to the attention of consumers in a form and manner that meets the standards as set out in section 49(3) and (5) of the CPA.[305] Accordingly, sections 49(3) and (5) provides that any notice to consumers must be written in plain language and that consumers must be afforded the opportunity to receive and comprehend the notice.[306] In other words, the notice must put in a manner and form that would ensure that it is conspicuous to the consumer, such that it is likely to attract the attention of an ordinary alert consumer.[307] Section 58(2) provides that the person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 22 of the CPA and any other applicable standards, providing the consumers with adequate instructions for the safe handling and use of those goods.[308] The average ordinary consumer must be able to comprehend any warning regarding fact, nature, and risk on the notice that shall be made in a conspicuous manner. The manner in which the notice shall have been put out should be in a plain and understandable language.

[304] S 58 (1) of the CPA.
[305] *Ibid*.
[306] S 49 (3) and (5).
[307] S 49 (4).
[308] S 58(2) of the CPA.

Failure to warn the consumer is addressed in section 61, which is concerned with liability for damage caused by goods. In terms of section 61(5), harm for which a person may be held liable may also be as a result of inadequate instructions or warnings provided to the consumer relating to any hazard arising from the use of goods.[309]

Jacobs, Stoop and Van Niekerk argue that the fact that section 58(2) states that, only the packager is to be held responsible remains problematic.[310] They further argue that section 58 in concert with section 61 of the CPA provides that, the producer or importer, distributor, and installer of hazardous or unsafe goods may be held jointly and severally liable for any harm caused because of inadequate instruction or warning to the consumer in respect thereof.[311] The application and invocation of section 61 might be relevant in the sale of brined poultry meat products in instances where the consumption of highly salted poultry meat product because of brining may result in harm effect to the consumer. Furthermore, section 2 (8) of the CPA which advances subsidiarity principle[312] can give effect to the application of section 61 in the sale of brined poultry meat products in instances where salt content of the product give rise to harmful effect.

3.2.6.2. Warning in the context of the APS Act and FCD Act

Labelling in terms of the APS Act is essentially about the grade or class of the product, whereas the FCD Act dictates the basis for the other labelling requirements. Regulation 8(1)(k) provides that the class name of the IQF portions be preceded either by the generic name of the added formulated solution, or by any other wording reflecting a true description of the added formulated solution.[313] The regulation gives the supplier the opportunity to label the added formulation in a plain and understandable language. The mere indication of ‘saltwater’ instead of ‘brine solution’ will be warning enough to consumers. Average consumers understand the implications associated with salt and

[309] S 61(5).
[310] W Jacobs, PN Stoops and R Van Niekerk *PER*/*PELJ* 302- 379.
[311] *Ibid.*
[312] S 2(8) of the CPA
[313] Reg 8 (1) k of the APS Act.

furthermore, it would assist consumers with the fact that the product already contains salt and therefore addition of salt during cooking will be limited. According to the DAFF Final Report, IQF portions must be labelled as products containing salt and sodium.[314] In terms of the R 146, the naming of ingredients such as 'salt', or "'sodium chloride', 'vinegar' or 'acetic acid', 'brine', or 'syrup' may be used in the list of ingredients.[315] The use of a plain and understandable word such as 'salt' will allow the label to be comprehensible to the average ordinary consumer.

Under the mandatory warning on certain foodstuffs, Regulation 15 provides that "the label of a foodstuff packaged in a pressurized container shall contain the following statement in bold uppercase letters of not less than 3, 0 mm in height: "WARNING PRESSURISED – do not puncture or store above 50 degrees".[316] The DAFF Final Report states that brine injection result in increased salt levels in IQF portions.[317] The report further argues that elevated sodium chloride levels hold a risk for consumers suffering from hypertension and kidney failure.[318] The Heart and Stroke Foundation expressed concerns about the salt content in brine with reference to consumers' health issues.[319] Therefore, warnings in the terms of the FCD Act have to include foodstuffs where brine is added, or else products must be restricted in terms of Regulation Relating to the Reduction of Sodium Chloride in certain foodstuffs and related matters[320] in order to ensure consumer protection.

3.2.7. Liability for damage caused by goods

Most of the legislation such the APS Act, FCD Act and MA Act that predates the CPA remedies the non-compliance with consumer protection provisions by applying criminal sanctions, rather than focusing on civil remedies and other common law remedies.

[314] DAFF Final Report (2013) 1.
[315] Reg 25 of the R 146.
[316] Reg 15 of R146.
[317] DAFF Final Report (2013) 1
[318] *Ibid*.
[319] *SAPA Case* para 17.
[320] See GN R 214, 2013 in *GG* 36274 of 20 March 2013.

Liability for damage caused by goods bought by the consumer will be looked into from the perspective of the CPA and APS Act, as well as FCD Act.

3.2.7.1. Liability for damage caused by goods from CPA perspectives

Section 61(1) provides that, "the producer, importer, distributor, or retailer of any goods is liable for any harm caused wholly or partly as a consequence of (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or inadequate instructions or warning provided to the consumer pertaining to any hazard arising from or associated with the use of goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be".[321] 'Harm' in terms of section 61(5) includes (a) death of, or injury to, any natural person; (b) an illness of any natural person; (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and (d) any economic loss that suffered as consequence of the foregoing listed manners of harms.[322] This means that Section 61 provides for strict liability for suppliers in case, among other events, an unsafe product is supplied without adequate instruction or warning, and such a product causes harm to the consumer.

Naude and Eiselen state that one of the central elements in the reform of consumer law has the introduction of a strict liability delictual framework enabling consumers to claim redress from the producer, importer, distributor, or retailer where they have been injured or have sustained property damage because of a safety defect in a product.[323] They argue that section 61 relieves the consumer of the burden of proving fault, while at the same time requiring them to still prove that the unsafe product or defect, as set out in section 53, caused damage wholly or partly.[324] The supplier would have to qualify as a producer, importer, distributor, or retailer who supplies goods in the ordinary course of business, in

[321] S 61 (1).
[322] S 61 (5).
[323] Naude and Eiselen (2018) 61-2.
[324] *Ibid.*

order for liability to apply.[325] However, suppliers may not be held liable under section 61(1) if, among other factors, the unsafe product characteristic, failure, defect, or hazard that results in harm is attributable to any public regulation.[326] Suppliers of products will only be held liable for supplying an unsafe product in the event there is a dearth of legislation.

Van Eeden and Barnard state that the CPA has established a regime of what may be termed a 'modified liability', this being a form of liability where negligence *per se* is no longer a requirement.[327] Monty states that consumers will be able to sue for damages based on the CPA without having to prove the fault in the manufacturing process of the manufacturer, and this removes evidential burden on their part when courts are approached for a claim for damages.[328]

Barnard states that section 61 apportions liability jointly or severally to the producer, importer, distributor or retailers without any proof of negligence being necessary in the event there was a supply of an unsafe product or there was a product failure of whatever nature, or inadequate instructions or warnings to a consumer.[329] Hawthorne states that this strict liability on the producer, importer, distributor, or retailer of any goods for any harm caused by, among others, unsafe goods supplied, is upheld in terms of section 61 of the CPA.[330]

In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd,*[331] the appellant sold to the respondent (Nandos) spices that were contaminated with the banned artificial colourant Sudan Red 1, and these spices were unfit for human consumption. The court held that a distinction should be drawn between cases where the *res vendita* was unfit for the purpose for which it had been bought owing to the absence of certain required attributes,

[325] Naude and Eiselen (2018) 61-3.
[326] S 61 (4).
[327] Van Eeden and Barnard (2017) 34.
[328] S Monty "Liability of the supplier in terms of the Consumer Protection Act" 2010 *Milk & Juice* 33
[329] Barnard 2012 *De Jure* 455 – 478.
[330] *Ibid.*
[331] 2011 4 SA 277 (SCA). The case dealt with the delivery and selling of spices that were contaminated with Sudan Red (1). The appellant sued the respondent for payment of the purchase price of the spices. The respondent admitted the claim but raised defences by way of counterclaims based on delictual damages suffered because of defects.

and cases where the *res vendita*, notwithstanding the lack of such required attributes, was still fit for the purpose for which it had been bought.[332] It was held that one was not dealing with defect in a *res vendita,* but with the purchase of a *res vendita* that was different from that which it had been contracted for.[333] In this case, contractual liability was found against the appellant for having delivered a product that was different to what was agreed upon.

In *Wagener & Cutting v Pharmacare Ltd*,[334] the Supreme Court of appeal, on the question of the product liability, was expected to impose a strict liability on manufacturers where their defective products caused damage; however, the court, upon consideration of all factors, confirmed that fault as a requirement has to exist for delictual liability in product liability cases, and declined to impose strict liability. The court deferred the imposition of strict liability to the legislature.[335] The strict liability established in the *Pharmacare case* has been captured in section 61 of the CPA to the benefit of consumers.

In *Eskom Holdings Ltd v Halsteak-Cleak*,[336] the court held that the respondent did not qualify as a consumer against Eskom, because (a) the respondent did not enter into transaction with the appellant as a supplier or producer of electricity in the ordinary course of Eskom's business. The court further held that the respondent was not, at the time of injury, a user, recipient, or beneficiary of the electricity.[337] In other words, for Section 61 of the CPA to hold, there has to be a transaction in the ordinary course of business of either the producer, importer, distributor, or retailer in order for them to be held liable for safety defect in products. This means that section 61 of the CPA can only be relied upon if the supplier carries out ordinary business during ordinary business hours for them to be held liable for safety defects in their products. In other words, a person who ordinarily sells maize meal cannot be held liable for the bought poultry meat product that he could

[332] Supra paragraph 20.
[333] *Ibid.*
[334] 2003 4 SA 283 (SCA) (hereinafter referred "Pharmacare case"). The case concerns the use of a defective anaesthetic during shoulder operation, which left the patient with paralysis of the right arm and necrosis of the tissue and nerves.
[335] *Supra* paragraph 29-30.
[336] 2017 (1) SA 333 (SCA).
[337] *Supra* paragraph 24.

have donated to his workers in the event they suffer harm as a consequence of eating such products.

3.2.7.2. Liability for damage caused by goods from APS Act including the FCD Act

The APS Act and its attendant regulations prohibits the seller from selling products that are not classed or graded according to the prescribed standards.[338] Products that are not packed and labelled according to the regulations are prohibited from being sold.[339] False or misleading descriptions for products are also prohibited.[340] However, in the event of the contravention of the foregoing provisions by the seller, such contraventions are deemed offences for which criminal sanctions in the form of a fine and imprisonment are imposed.[341] The APS Act does not make provision for civil claims and remedies.
The FCD Act provides for liability of the importer, manufacturer, or packer, which is in the form of a presumption that every foodstuff that is sold by them was imported, manufactured, or packed by themselves.[342] The liability establishes ownership, as well as the premise upon which they could be convicted and sentenced in a criminal court, should it be established that they did not import, manufacture, or pack such products.[343] Civil actions and remedies are not provided for in the FCD Act.

3.3. Associated regulatory interventions

The CPA provisions yield to public regulations or legislations in instances where such aspects are regulated in terms thereof. Naude argues that the CPA is not a codification of consumer rights hence, different statutes apply in conjunction with it.[344] Sections 2(8) and (9) deal with the application of the CPA when its provisions conflict with other legislation.[345] Naude and Eiselen state that an Act that deals with a matter specifically

[338] S 3 of the APS Act.
[339] *Ibid*.
[340] S 6 of the APS Act.
[341] S 11 of the APS Act.
[342] S 9 (1) of the FCD Act.
[343] *Ibid*.
[344] Naude *Springer* 411-413.
[345] S 2(8) and (9) of the CPA.

should be preferred to an Act that deals with the matter in general.[346] It is in this context that associated statutes and regulations that deal specifically with certain matters should be explored, so that the principle of complementarity can be established. In other words, the potency and relevancy of the CPA is contingent on the potency and applicability of other associated regulatory interventions, specifically regarding the brining practice in IQF portions production. However, Naude posits that consumers may, under both the CPA and sector-specific legislation, still rely on their common law rights as set out under section 2(10) of the CPA.[347]

The associated regulatory interventions are drawn from three statutes, namely the APS Act, the FCD Act, and the LM Act. These regulatory interventions will all have something to do with brining. The following are associated regulatory interventions:

(a) Regulations regarding control over the sale of poultry meat products and their associated amendments[348] as published under the APS Act;
(b) Regulations relating to the labelling and advertisement of foods published under the FCD Act; and
(c) Trade metrology regulation[349] published under section 42 of the LM Act

3.3.1. Regulations regarding control over the sale of poultry meat (Brining Regulations)

The APS Act's main purpose is to ensure fair trade practices and consumer protection by providing for regulatory controls regarding the sale of local, imported, and exported regulated agricultural products.[350]."These regulatory controls concern the prohibition of the sale of products unless they are graded or classed and comply with quality standards and marking, packing, and labelling requirements.[351] Grading and classification of

[346] Naude and Eiselen (2018) 2-9.
[347] Naude *Springer* 411-413.
[348] See Brining Regulation.
[349] See GN 517, 2007 in *GG* 30003 of 21 June 2007.
[350] S 1 of the APS Act.
[351] S 15 of the APS Act.

products addresses the compositional properties of the product in terms of their fact and nature.

3.3.2. Regulations relating to the labelling and advertisement of foods published under the FCD Act

The FCD Act provides for regulatory control regarding the sale, manufacture, and importation of foodstuffs, cosmetics, and disinfectants, as well for matters connected therewith.[352] In other words, the FCD Act is concerned with, among others, foodstuffs or part thereof that are fit for human consumption. The regulation published under the FCD Act promotes ethical labelling and advertisement, including the need to have substantiated claims.

The regulation is aligned with provisions of the standards and guidelines of the Codex *Alimentarius* Commission. The Codex *Alimentarius* Commission adopts the Codex *Alimentarius,* or 'food law', which is a collection of standards, guidelines, and codes of practice that governments, may opt to use to ensure food safety, quality, and fair trade.[353]

3.3.3. The Regulation for the Sale of Goods[354] published under section 42 of Legal Metrology Act

The Legal Metrology Act strives to provide *inter alia* fair trade, and protects public health and safety through the implementation of regulatory and compliance systems for legal metrology.[355] Regulation 4 of the trade metrology regulation provides for the regulation of the declaration of quantity of any prepacked product that is imported and resold, and confirms the seller or importer to have known about the declared quantity and the country of origin[356]. In terms of price descriptions, the trade metrology regulation provides, under

[352] Long title of the FCD Act.
[353] Codex *Protecting Health, facilitating trade: A world full of standards* 2018 4.
[354] See GN 517, 2007 in *GG* 30003 of 21 June 2007 (hereinafter "LM Regulation").
[355] Long title of the LM Act.
[356] Reg 4 of the LM Regulation.

regulation 20, that products must be sold in line with price descriptions displayed in the retail space.[357]

3.4. Obligations of the supplier towards the upholding of consumer rights

Suppliers have a statutory duty to comply with provisions of the applicable legislations, especially the APS Act, the FCD Act, the LM Act, and the CPA.

3.4.1. Obligations under the FCD Act

The following are general labelling requirements:[358]

(a) "indication of the name of the particular foodstuffs;
(b) indication of the name and address of the manufacturer, importer or seller;
(c) indication of instruction for use of a foodstuff, where it would be difficult to make appropriate use of such foodstuff without such instruction;
(d) indication of the list of ingredients including the order and manner of indicating such ingredients as set out in regulation 16 to 29;
(e) indication of special storage conditions, where applicable;
(f) net contents of the container in accordance with the requirements of the LM Act;
(g) country of origin;
(h) batch identification; and
(i) date marking."

The supplier's obligations include upholding the negative duties as set out in the regulations published under the FCD Act, which are:[359]

(a) Misleading and misrepresentation in the form of *inter alia* words, pictorial representations, marks, logos, or descriptions which create an impression

[357] Reg 20 of the LM Regulation.
[358] See R 146.
[359] *Ibid.*

that such a foodstuff is supported, endorsed, complies with or has been manufactured with recommendations of health practitioners or organization; and

(b) The use of negative claims is prohibited, and this is manifested when a supplier claims, declares, or implies on the label of a foodstuff that only his or her foodstuff has certain characteristics, properties, or substances.

3.4.2. Obligations of suppliers under the APS Act

The supplier is positively obligated to indicate the brine-based mixture along with the amount injected, in terms of the horizontal food labelling requirements of the FCD Act. Furthermore, the quality of the product must be indicated by labelling the class and grade of the poultry meat product.[360]

3.4.3. Obligations of suppliers under the LM Act

Suppliers are obligated to, in terms of labelling, indicate the net weight of the product, especially for products displayed for sale.[361]

3.4.4. Obligations of suppliers under the CPA

The above regulations provide a firm basis from which certain CPA enshrined rights can find practical expression. In carrying out the obligations stated under the FCD Act, the APS Act, and LM Act, the supplier upholds the following consumer rights:

(a) Right to disclosure and information;[362]

(b) Right to fair and responsible marketing;[363]

(c) Right to fair and honest dealing;[364]and

---

[360] S 3 of the APS Act.
[361] See the LM Act.
[362] Part D of the CPA.
[363] Part E of the CPA.
[364] Part F of the CPA.

(d) Right to fair value, good quality and safety.[365]

It remains the responsibility of the supplier to communicate, through labelling, intelligible information, where the use of word “salt” should be used instead of ‘sodium chloride’.[366] This is because brine-based mixture is, essentially, a salt-based mixture[367]. This will, in turn, protect consumers from hazards to their wellbeing and safety.[368]

3.5. Conclusion

The CPA promotes and protects fundamental consumer rights.[369] The APS Act, FCD Act, and LM Act reinforces the content of the consumer rights enshrined in the CPA in terms of their comprehensive regulations that outline details, thus giving practical expression to the meaning of those consumer rights. Section 115 of the CPA provides for civil actions in addition to common law remedies, which can be taken by the consumer in the case of infringement of the enshrined rights.[370] Section 2(10) of the CPA provides that no provision of the CPA must be interpreted so as to preclude a consumer from exercising any right afforded in terms of common law.[371] This means that the CPA provides redress to the consumer in the event that consumer rights, which are inconsistent with the provisions of the APS, FCD, and LM Acts, are not complied with.

Consumer rights as encapsulated in the CPA find application when there is a transaction between the supplier of products and the consumer, and the CPA recognize the complementarity of different relevant statutes in the area of consumer protection. It has been shown that, the use of plain and understandable language, although it is pervasive, it is not adhered to in product labelling and trade description of consumer products such as in the sale of IQF portions. The APS Act and the FCD Act encourage the use of technical, obscure terminology such as ‘brine’ or ‘brine base mixture’ instead of the use

[365] Part G of the CPA.
[366] *Ibid* .
[367] *SAPA case* para 20.
[368] Preamble of the CPA.
[369] J Barnard & A Kok “A consumer’s Fundamental Right to Equality and the Role of Promotion and Prevention of unfair Discrimination Act”2015 Vol 78 *THRHR* 247-247.
[370] S115 of the CPA.
[371] S 2(10) of the CPA.

of clear and understandable terminology such as ‘saltwater solution’, however, section 22 of the CPA provides succor in terms of its requirements on the need for the use of plain and understandable language.

It has been revealed that the phraseology and the context of the characterization of what constitutes false or deceptive representations is the same throughout the CPA, APS Act, and the FCD Act. This implies that the right to fair and honest dealing is an entrenched and pervasive consumer right. However, the sale of IQF portions prior to the publication of labelling regulation in 2010 under the FCD Act, where it was made mandatory to declare the quantitative ingredients of the product, bordered on misleading the consumer as to the true nature and content of the product insofar as there was a failure to disclose. Post the publication of the R 146 Regulations and the Brining Regulations, consumers are still not protected in terms of the actual declaration of the content of salt that is added to their consumer product, IQF portions, in that there is no disclosure of the actual quantity of salt in poultry products. The expression or word ‘brine’ has the propensity to give a false or misleading impression as to the nature, substance, quality, and manner of production of the IQF portions.

The CPA guarantees the right to safe, good quality goods, and both the APS Act and FCD Act ensure that products are manufactured and sold according to particular standards of food safety and quality. The level of complementarity and subsidiarity is palpable in considering the objectives of these statutes. However, it was shown that the APS Act does not have established regulation on the scientific methods that are set out under its subordinate legislations regarding the assessment of the quantity and type of additives, other than water (moisture), added or absorbed. It was also revealed that the amount of added or absorbed water in case of imported IQF portions can only be given as an indication, rather than an absolute determinative. It was also shown that the FCD Act prohibits the sale, manufacture, or importation of any foodstuffs with the objective of deceit. It therefore follows that the suppliers of frozen IQF portions may not be in the position to warrant for the quality and safety of product given that both weight and quality of the product may be affected during thawing and cooking. Furthermore, the nutritional

value of the product may be altered, where protein and energy contents are diminished, ultimately affecting the implied warranty from both statutory and common-law perspectives.

Brine injection results in increased salt levels in IQF portions. Considering the risk that sodium chloride carries for consumers suffering from hypertension and kidney failure, it is warranted that a warning is made as part of the product labelling. This is significant because under the FCD Act, where a reduction in the levels of sodium chloride in foodstuffs has been prescribed, there is none set for poultry meat products, including in the APS Act.

The CPA, through section 61, provides for protection against unsafe, defective goods by holding producers, importers, distributors, or retailers liable for any harm caused wholly or partly by such products, where inadequate instructions or warnings have been provided pertaining to a hazard of that product. It has been revealed that the sale of brined IQF portions is carried out without explicit warning that they contain high salt content, and there is no regulation in terms of the levels that could be added to the frozen poultry meat products. The product label and trade description or classification of the product does not serve to warn or inform the consumer about the hazard inherent in the brined IQF portions under both the APS Act and the FCD Act. The brining practice is given effect to by legislations of the FCD Act and APS Act in the production of IQF portions, which lessens the applicability of the CPA with the implication that consumers are less protected.

The realisation of consumer rights as per the CPA is co-extensive with the public legislations that are in support of the advancement of consumer protection. Labelling and the inclusion of warnings regarding the fact and nature of formulations (brine) that are added to IQF portions remains a serious omission in the FCD and APS Acts, and this may hamper the full consumer protection benefit that consumers should be afforded, given the fact the CPA has, in this case, yielded to those very legislations.

It is submitted that the use of plain and understandable language can only be fully realized if technical and scientific words such as ‘brine’ and ‘sodium chloride’ can be avoided and replaced with words such as ‘saltwater’ and ‘salt’ respectively. Section 27 of the Constitution of the Republic, which is about health care, food, water, and social security, enjoins both the Departments of Agriculture, Forestry and Fisheries and the Department of Health to produce safe and quality food, in order to ensure that there is sufficient food that would boost the wellbeing of the consumers.[372] It is submitted that, there should be complementarity of regulations in terms of the integrity of production, labelling, trade description, quality, and safety of food, which in turn complements consumer rights that are imbedded in the CPA. It is submitted that there are, *inter alia*, weakness in the APS and FCD Acts that relate to the need for limits to be set (regulation) for salts that can be added to poultry meat products.

[372] Constitution of the Republic of South Africa 1996.

CHAPTER 4 – CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The stated purpose of this dissertation was to interrogate certain sections of the CPA, pertaining to the interpretation and applicability of the brining provisions as published in the Regulation Regarding Control over the Sale of Poultry Meat under the APS Act, in the sale of IQF products. These sections of the CPA relate to some consumer rights, including the right to information in plain and understandable language, product labelling and trade descriptions, false, misleading or deceptive representation, consumer's rights to safe, good quality goods, implied warranty of quality concerning fact and nature of risks, and liability for damages caused by goods.

It was shown that the regulation of brining practices straddles on a scientific and technical basis between the two statutes: FCD Act and APS Act. It was revealed that the regulatory basis of brining rests in the FCD Act as a definitional perspective and compositional content perspective, by setting out allowable ingredients to be added into foodstuffs such as IQF portions. It was also revealed through this dissertation that the APS Act only limits the amount of water that can absorbed or added into the poultry meat in so far as brine is concerned. Furthermore, limits for phosphate salts in the brine solution are set in the APS Act but there are no methods to determine whether such limits are met or exceeded. In neither, the FCD Act nor the APS Act were there a regulatory limit set out for sodium chloride (salt) content that is allowable in the production of poultry meat, or as a part-portion of the brine solution.

It was shown that brining is concerned with the addition of food additives to the foodstuffs (IQF), which is the purview of the FCD Act, and not the APS Act. Therefore, it is submitted that, for consumer protection, the limitation of the quantities of water and sodium chloride (brine) addition to IQF portions should not have been excluded or exempted from the Regulation Relating to the Labelling and Advertising of foodstuffs[373].

[373] Tan *et al South African Journal of Animal Science* 199-200.

Brining, as set out under the FCD Act, is limited to curing, preservation, and flavour addition as functional properties, and the same definition was adopted under the APS Act. However, the purpose for which brine is used under the APS Act includes the increasing of IQF mass (weight), juiciness, and tastiness, which is at variance with the functional properties for which brine is intended under the FCD Act. It is submitted that, the commercial suppliers and sellers of IQF portions are, at the expense of consumer protection, taking advantage of the legal arbitrage that exist. However, section 2(8) of the Act read with section 2(9) can be applied to effect the consumer rights encapsulated under the CPA by purposively interpreting section 2(1) of the CPA in terms of extend greater protection to the consumer.

This dissertation revealed that the APS Act should concern itself with, among others, the outlining of standards regarding the grading and classification of poultry meat products, because brine or brine-based mixtures are part of the manufacturing/production process; and, accordingly, should be regulated under the FCD Act. The FCD Act provides for regulation of universal aspects relating to food safety and nutrition such as regulation of food additives, nutritional requirement, fortification of food and labelling requirement whereas the APS Act only regulate aspects relating to quality and compositional properties of certain agricultural products in respect of classes and grade including labelling associated therewith. Therefore, the symbiotic relationship between the FCD Act and the APS Act is founded on the basis of food quality being a function of food safety, nutrition and labelling. The research also revealed that not all poultry products have regulatory brine content limits set out for them, which leaves vulnerable consumers devoid of any legal protection. The fact that, there is no limit for sodium chloride from both the FCD Act and the APS Act as well as elaborate methods for testing or determining the absence or presence of other additives that form the brine solution in the APS Act, attest to the vulnerability of consumers of brined poultry meat products.

The study showed that the use of the word ‘brine’ or the term ‘brine-based mixture’ does not accord with the use of plain and understandable language as envisioned in section 22 of the CPA. The use of the word ‘saltwater’ instead of brine will result in vulnerable

consumers understanding what the IQF portions are treated with. Proper product labelling and trade description is important so that consumers are made aware and able to make an informed decision. It is submitted that both the FCD Act and the APS Act fall short of protecting consumers through enforcing the use of plain and understandable language and warnings.

Poultry meat products, especially IQF portions, are sold by weight, and in most cases the prices for such products are indicated as a total mass inclusive of additional saltwater, without the disclosure being made to the consumer. It is submitted that the lack of disclosure of ingredients added, such as sodium chloride (salt), in a plain language constitutes false and misleading information, which disempowers consumers from making informed choices and decisions.

Consumers have the right to goods that are safe and of good quality. Vulnerable consumers are not guaranteed safe and good quality products when the weight of such products (IQF portions) is significantly decreased during thawing and cooking due to seepage of water from the meat, or increased salt content, which could pose health risks to consumers. It is submitted that implied warranty that is normally associated with poultry meat products is diminished in terms of brined IQF portions, in that the quantity (as per the declared weight) and the quality (including the safety of the product) are negatively affected. The practice of brining in the poultry meat products industry can only be construed as economically beneficial and important to the sellers, without reciprocal benefit accruing to consumers.

It was shown through the study that it might be difficult to exact the provisions of section 61 of the CPA regarding claiming liability from sellers or suppliers of IQF portions, given the fact that the brining practice is regulated under the APS Act and the FCD Act. Section 61 does not find application in cases where the aspect is regulated under a public legislation. In this case brining is an allowed practice under the APS and FCD Acts. It is submitted that consumers are, through inadequate regulatory controls, robbed of the envisaged protection and recourse under the CPA. However, section 2(8) of the CPA

read with section 2(9) of the CPA can be applied to effect the consumer rights encapsulated under the CPA by purposively interpreting section 2(1) of the CPA in terms of extend greater protection to the consumer.

The principle of subsidiarity and complementarity of consumer protection legislations is recognised in the CPA. The application and realisation of consumer rights should be at the centre of every legislative development in the country, in order to benefit the consumer in terms of protection and remedial actions or redress offered under the CPA. It is submitted that the realisation of consumer rights, as per the CPA, is coextensive with the other contributory consumer public legislations.

The study conclusively answered the research questions and purpose, which this dissertation rested on by dealing with brining and its value in the sale of IQF portions. It was found through this dissertation that brine does not add value to consumers, to the extent that regulatory controls in applicable statutes that favour and uphold consumer rights as embedded in the CPA are inadequate.

4.2. Recommendations

The researcher would like to recommend that the amount of water and salt (sodium chloride), relative to their impact on nutritional value and safety of the product, be determined and set out under the FCD Act in the same manner as other food additives are treated regarding other foodstuffs. It is hereby further recommended that all poultry products such as undergrade carcasses, pieces, and strips, should have an upper limit set for water and salt (brine) content under either the APS Act or FCD Act.

It is further recommended that the regulations under the APS Act should only refer to what is laid out in regulations published under the FCD Act in terms of limits and permissible food additives, water, and sodium chloride. It is recommended that no additional functional properties of brine, other than those mentioned under the FCD Act, should be added under any subordinate legislation of the APS Act.

It is recommended that the word ‘warning’ be made part of the labelling requirements as far as the addition of sodium chloride into IQFs is concerned. It is further recommended that plain and understandable language be used instead, including the replacement of words such as brine with the likes of ‘salt/saltwater solution’ as part of the labelling requirements.

It is recommended that the National Consumer Commission and consumer representative organisations exercise a vigilant role during the development of public legislations that protect consumers’ interests and rights. Engagement with the authorities that are charged with the responsibility of administering the various consumer protection legislations, bar the CPA, must be established with a view of reviewing provisions of those legislations that do not adequately protect interests and rights of vulnerable consumers.

It is further recommended that every legislation that has aspects lending itself to consumer protection should, prior to promulgation, be measured or tested against compliance with the consumer protection rights as encapsulated in the CPA.

5. BIBLIOGRAPHY

Primary and Secondary Legislations

5.1. Agricultural Product Standards Act 119 of 1990

5.2. Business Practices Act 71 of 1998

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

5.4. Constitution of the Republic of South Africa Act 104 of 1996

5.5. Consumer Protection Act 68 of 2008

5.6. Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

5.7. Harmful Business Practices Act 71 of 1985

5.8. Legal Metrology Act 9 of 2014

5.9. Meat Safety Act 40 of 2000

5.10. Measuring Units and National Measuring Standards Act 76 of 1973

5.11. Measuring Units and Measurement Standards Act 18 of 2006

5.12. National Credit Act 34 of 2005

5.13. Price Control Act 25 of 1964

5.14. Regulations Regarding Control over the Sale of Poultry Meat GN R.946, 1992 in *GG* 13876 of 27 March 1992

5.15. Regulations Regarding Control over the Sale of Poultry Meat: Amendment GN R.988, 1997 in *GG* 18155 of 25 July 1997

5.16. Regulations Regarding Control over the Sale of Poultry Meat: Amendment GN R.471, 2016 in *GG* 39944 of 22 April 2016

5.17. Regulations Relating to the Labelling and Advertising of Foodstuffs GN R.146, 2010 in *GG* 32975 of 01 March 2010

5.18. Regulations Relating to the Reduction of Sodium Chloride in certain Foodstuffs and Related Matters GN R.214, 2013 in *GG* 36274 of 20 March 2013

5.19. Regulations Governing the Additives and Amounts as well as Tolerances for Certain substances in wine, other fermented beverages and spirits GN 1425, 2016 in *GG 40432* of 17 November 2016

5.20. Trade Metrology Regulations GN 517, 2007 in *GG* 30003 of 21 June 2007

5.21. Trade Practices Act 76 of 1976

Case Law

5.22. *Eskom Holdings Ltd v Halsteak-Cleak* 2017 (1) SA 333 (SCA)

5.23. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2006 (4) SA 1 (SCA)

5.24. *Four Wheel Drive CC V Leshni Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018)

5.25. *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011(2) SA 277 (SCA)

5.26. *South African Poultry Association v Minister of Agriculture, Forestry and Fisheries and others* (39597/2016) [2016] ZAGPPHC 862 (21 September 2016)

5.27. *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZN)

5.28. *Wagener & Cutting v Pharmacare (Pty) Ltd* 2003 (4) SA 283 (SCA)

Books

5.29. D Mc Quoid. T Woker. L Greenbaum. I Konyn. C Lakhani & T Cohen *Consumer Law in South Africa* (1997) Juta Legal and Academic Publishers

5.30. E van Eeden & J Barnard Consumer Protection Law in South Africa (2017) LexisNexis

5.31. T Naudė & S Eiselen *Commentary on the Consumer Protection Act* (2018) Juta Cape Town

Journals

5.32. AA Okharedia “Consumer’s reliance on warranties: A comparative study of the United States of America and South Africa” 2012 Vol (27)2 *Journal for Juridical Science* 129 – 130

5.33. A Bauling and A Nagtegaal “Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008” 2015 *De Jure* 149 – 155

5.34. E De Stadler & L Van Zyl “Plain language contracts: challenges and opportunities” 2017 (29) *SA Merc LJ* 108-109

5.35. J Barnard & A Kok “A consumer’s Fundamental Right to Equality and the Role of Promotion and Prevention of unfair Discrimination Act” 2015 Vol 78 *THRHR* 247-281

5.36. J Barnard “The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages” 2012 *De Jure* 455- 477

5.37. J Barnard “Where does the vulnerable consumer fit in? A comparative analysis” 2014 *Journal of Consumer & Commercial Law* 1-14

5.38. L Hawthorne “Public Governance: Unpacking the Consumer Protection Act 68 of 2008” 2012 *THRHR* 345 -370

5.39. M Gouws “A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act” 2010 *SA Merc LJ* 79-94

5.40. M Van der Merwe & K Venter “A Consumer perspective on food labelling: ethical or not” 2010 Vol (75)4 *Koers* 405 - 428

5.41. M Van Eck “Guidelines for writing in plain language” 2012 (521) *De Rebus* 21-23

5.42. N Prinsloo. D Van der Merwe. M Bosman & A Erasmus “A critical Review of the significance of food labelling during consumer decision making” 2012 Vol 40 *Journal of Family Ecology and Consumer Sciences* 83-93

5.43. PN Stoop & C Churr “Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008” 2013 (16) *Potchefstroom Electronic Law Journal* 518-617

5.44. PN Stoop “Plain Language and Assessment of Plain Language” 2010 *Int. J. Private Law* 329-329

5.45. PN Stoop “The Consumer Protection Act 68 of 2008 and procedural fairness in Consumer Contract” 2015 Vol (18) 4 *PER/PELJ* 1091-1122

5.46. SM Tan. HL de Kock. GA Dykes. R Coorey & EM Buys “Enhance of poultry meat: Trends, nutritional profile, legislation and challenges” 2018 (2) *South African Journal of Animal Science* 199-212

5.47. S Monty “Liability of the supplier in terms of the Consumer Protection Act” 2010 *Milk & Juice* 33-37

5.48. T Naude “Dissemination of Consumer Law and Policy in South Africa” 2018 *Springer* 411-434

5.49. T Naude “The Consumer’s Right to Safe, Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008” 2011 *SA Merc LJ* 336 – 351

5.50. T Woker “Why the need for Consumer Protection Legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 *OBITER* 217 -231

5.51. W Jacobs. PN Stoops & R Van Niekerk “Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical overview and analysis” 2010 Vol (13)3 *PER*/*PELJ* 302- 389

Theses and Dissertations

5.52. J Barnard *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* LLD thesis UP (2013)

5.53. VV Kamanga *Product labelling and Trade Description: Failure to warn the consumer and the Consumer Protection Act 68 of 2008* LLM mini-dissertation UP (2017)

Websites

5.54. Department of Agriculture, Forestry and Fisheries “DAFF Media Release: Publication of amendments on Poultry Meat Product Regulation 22 April 2016” www.daff.gov.za (Accessed on 26 July 2018)

5.55. Department of Agriculture, Forestry and Fisheries “DAFF Media Release: Publication of amendments on Poultry Meat Product Regulation 22 April 2016” www.daff.gov.za (Accessed on 26 July 2018)

5.56. Trade Practices Amendment Bill 34 of 2001. Available at http://www.gov.za/documents/downloads.php?f=67165 (accessed on 28 December 2018)

Government Reports and other related publications

5.57. Department of Agriculture, Forestry and Fisheries A Hugo. IB Zondagh & E Maholisa *Effect of brine injection on broiler meat quality and its implications for the South African consumer* 2013

5.58. Measuring Units and National Standards Amendments Bill 1998 [B25-98]

5.59. Memorandum on the objects of the Measuring Units and National Measuring Standards Amendments Bill 1998

International Standards and Guidelines

5.60. Codex *Protecting Health, facilitating trade: A world full of standards* (2018)

5.61. Joint FAO/WHO Food Standards Programme *Codex Alimentarius*; *Codex General Standards for Food Additives Codex Stan 192 – 1995* (1995)

5.62. Joint FAO/WHO Food Standards Programme *Codex Alimentarius: Food Import and export inspection and certification systems* (2012)