confidentiality agreement by a supplier to its own clients or members of a joint venture agreement is a standard commercial practice and cannot in any way undermine the objectives of the B-BBEE Act of 2003 (as amended). The aim of this provision is not to look at the "identity" of suppliers, clients or customers from a confidentiality point of view, but rather whether the agreement limits the commercial activities and independence of a B-BBEE enterprise in terms of its choice of suppliers, customers and clients in respect of undue control by an established entity over a B-BBEE company.

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"FOR WHOM THE BELL TOLLS": THE APPLICATION OF SECTION 14 OF THE CONSUMER PROTECTION ACT 68 OF 2008 TO RESIDENTIAL LEASE AGREEMENTS

Transcend Residential Property Fund Limited v Mati
2018 4 SA 515 (WCC)

OPSOMMING

Die toepassing van artikel 14 van die Wet op Verbruikersbeskerming 68 van 2008 op residensiële huurkontrakte

Sedert die volle implementering van die Wet op Verbruikersbeskerming 68 van 2008 (WVB) het die wye toepassing van die Wet op verskeie soorte transaksies duidelik geword. So 'n wye implementering stem ooreen met die Wet se doel om 'n omvattende wetlike raamwerk vir die bereiking en instandhouding van 'n verbruikersmark te bied wat regverdig, toeganklik, doeltreffend, volhoubaar en verantwoordelik vir verbruikers in die *algemeen* is (a 3(1)(a)). Daar het tot onlangs onsekerheid geheers oor die toepassing van die WVB in die algemeen maar veral oor die toepassing van artikel 14 op residensiële huurkontrakte. Artikel 14 reguleer die verstryking en hernuwing van vaste termyn-ooreenkomste. Die toepassing van artikel 14 op residensiële huurkontrakte is egter bevestig in *Transcend Residential Property Fund Limited v Mati* wat hieronder bespreek word. 'n Kritiese evaluering van die regsposisie word ingesluit asook die redes waarom daar sterk teen die toepassing van artikel 14 (saamgelees met regulasie 5) op residensiële huurkontrakte geargumenteer word. Die bespreking eindig met 'n uiteindelike vasstelling of die toepassing van artikel 14 op residensiële huurkontrakte "volhoubaar en verantwoordelik vir verbruikers in die *algemeen*" is of nie.

1 Introduction

Since the full implementation of the Consumer Protection Act 68 of 2008 (CPA) the extensive reach of the Act to many types of transactions has become clear. On the one hand this accords with the Act's purpose to provide a comprehensive "legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of

consumers *generally*" (s 3, own emphasis). There has been some debate on whether or not the CPA and, in particular, section 14 should be applicable to residential lease agreements (Delport "Problematic aspects of the Consumer Protection Act 28 of 2008 in relation to property transactions: Linked transactions, fixed-term contracts and unsigned sale agreements" 2014 *Obiter* 60–80; Viljoen *The law of landlord and tenant* (2016) 72–73; Laubscher *The impact of section 14 of the Consumer Protection Act on fixed term lease agreements* (LLM diss NWU 2016); Van Eeden and Barnard *Consumer protection law in South Africa* (2018) ch 18: "Residential Tenants"). However, the application of section 14 to residential lease agreements was confirmed in *Transcend Residential Property Fund Limited v Mati* 2018 4 SA 515 (WCC) ("*Transcend*") which is discussed below. On the one hand it could be argued that the leasing industry has come to terms with the application of section 14 to lease agreements. For example, landlords have implemented some protective measures to manage the risks introduced by section 14 in the market place by the significant increase of deposits; incorporating references to section 14 into written contracts; the use of a type of *rouwkoop* clause to manage cancellation penalties and clearly distinguishing between fixed-term leases and periodic ones. However, it would not be correct to assume that the industry as a whole has come to terms with the result of the application of section 14. The need for this case note not only stems from the recent judgments of (primarily) *Transcend* and *Makah* (*Makah v Magic Vending (Pty) Ltd* 2018 3 SA 241 (WCC)) but also from the overwhelming response by practitioners and their concerns in this regard. During July and August of this year the author had the opportunity to lecture at seminars for the Law Society of the Northern Provinces in various cities. The attendees were legal practitioners who act on behalf of both landlords and tenants and deal with this issue almost on a daily basis. It soon became clear that there most certainly is no general acceptance of the application of section 14 of the CPA to residential leases. The purpose of this note therefore is not only to critically discuss the current legal position, but also to provide a platform for further research and, should the matter be taken to a higher court, a basis for careful consideration before mere confirmation of *Transcend*. In this regard, a mere regurgitation of existing legal interpretation by scholars is not sufficient and a realistic holistic approach displaying both sides of the coin is warranted. A critical evaluation of the legal position is included. The reasons why there has been an argument against the application of section 14 (read together with reg 5) to residential lease agreements are highlighted. The discussion concludes with a determination whether or not the application of section 14 to residential lease agreements is "for the benefit of consumer *generally*" (own emphasis).

2 Facts and judgment

The applicant (landlord) concluded a lease agreement with the first respondent (lessee) although it became apparent through the course of the trial that the first respondent only initially occupied the leased premises (if at all) and that the third respondent paid the rental amount and occupied the premises since inception of the lease (para 12). The third respondent was referred to as an "occupant" in the lease agreement. The lease period was from 1 March 2017 to 28 February 2018 whereafter it would continue on a month-to-month basis (para 6). The court indicated that the agreement between the parties provided that:

> "[I]n the event of the first respondent failing to pay any amount due to the applicant on the due date during the initial period, and remaining in default for 20 business

> days after despatch of a written notice calling upon her to remedy such breach, the applicant shall be entitled forthwith to cancel the lease and claim all arrear rentals and/or any other damages from her, and claim repossession of the premises" (para 11).

The third respondent fell into arrears with rental and charges owed to the appellant and a letter of demand (9 May 2017) was served on him to make payment of all arrear amounts in full. The letter of demand required the outstanding amount (R6 290) to be paid in full within seven days of date of the letter of demand failing which further action would be taken against the third respondent including issuance of a summons and in "certain circumstances" cancellation of the lease (para 23). Although the third respondent did pay an amount of R6 000 (not full payment) this was done after the seven-day period in terms of the letter of demand but within the 20 business days in terms of section 14 of the CPA. The third respondent argued that he did not pay the full amount as the R290 was not agreed upon and deducted unilaterally by the appellant (para 18). On 6 June 2017 the appellant delivered a letter of cancellation due to non-payment of the full amount despite the letter of demand which included a request to vacate the premises by 15 June 2017.

The third respondent argued that the notice of cancellation was flawed as it did not take into account the R6 000 already paid by him but more importantly did not comply with section 14(2)(b)(ii) of the CPA in terms of which he was afforded 20 business days in which to rectify his breach (paras 26 30). The third respondent further argued that proper notice should have been given to him regarding the opportunity he had in terms of section 14 to rectify his breach, which the court referred to as the "so-called CPA defence" (para 31).

The court at that stage attempted to determine whether or not the third respondent, as an occupant of the leased property, was also a "consumer" in terms of the CPA and consequently, whether or not was afforded the protection under section 14. In its determination the court referred to *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA). The case dealt with liability for damages in terms of section 61 ("product liability") and whether or not the injured party was a "consumer" in terms of the CPA. The court agreed with the approach in *Eskom* that not only the intention of the legislature but also the "words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being" should be taken into account (para 41). The court followed the same approach and referred to the long title, purpose (s 3), interpretation (s 2) and application (s 5) of the CPA (paras 42–47) and ultimately confirmed that the Act must be interpreted to give effect to its purpose which is to protect consumers (para 47). The court found that the third respondent did fall within the definition of "consumer" due his occupancy of the property and accordingly also enjoyed the protection of the CPA and had a right to the 20 business days' notice in terms of section 14.

The appellant relied on the provisions of the Rental Housing Act 50 of 1999 (s (3)(o)) but the court did not deem it necessary to make a finding in this regard because the agreement (according to the court) was in fact validly cancelled (paras 49–52).

The court then had to determine whether, despite the "erroneous" 7-day period given in the letter of demand, the third respondent as a consumer was still afforded the 20 business days to rectify his breach in terms of section 14. The court rejected the third respondent's argument that the mere failure to inform the

third respondent of his right to rectify the breach within 20 days in terms of section 14 renders the cancellation invalid (paras 55–57). The court noted that such an approach would read "too much into what is required in terms of the CPA. There is no requirement, express or implied, that the consumer must be expressly notified of the fact that he has 20 business days to remedy the defect" (para 56). The actual letter of cancellation (not the letter of demand) was delivered after the full 20 business days had elapsed wherein full payment of the amount due was still not made and a cancellation in terms of section 14 of the CPA was therefore valid (para 56). Due to the validity of the cancellation, the court held that the third respondent was an unlawful occupier in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) and thus ordered eviction of the third respondent from the premises, holding that it was just and equitable to do so in the circumstances (paras 57–81).

3 Critical evaluation of the legal position

The critical evaluation focuses on the problematic wording and application of section 14 to lease agreements and whether or not its application to residential lease agreements will be for the benefit of consumers as tenants *generally* (own emphasis).

3 1 Application of the CPA to residential lease agreements

Since the full inception of the CPA (31 March 2011 being the "general effective date") there has been uncertainty as to the extent to which the CPA applies (or should apply) to residential lease agreements. The uncertainty was primarily based on two issues: The seemingly contradictory provisions within the CPA and the fact that residential lease agreements are already governed by more than one piece of legislation as well as the common law. The primary legislative framework for the governance of residential lease agreements starts with enforcement of section 26 of the Constitution. The Rental Housing Act 50 of 1999 (RHA) was implemented *inter alia* to give effect to the right to adequate housing in terms of section 26 and should be seen as the primary piece of legislation governing residential lease agreements (Van Eeden and Barnard (2018) 605–606). The Rental Housing Amendment Act of 2014 (RHAA), once it is fully implemented, will bring about significant changes to the RHA and will address some of the interpretational and protective issues that have transpired in the application of RHA (Bapela and Stoop "Unpacking the Rental Housing Amendment Act 35 of 2014" 2016 March *De Rebus* 12–13). The PIE Act applies together with the RHA to ensure just and equitable eviction and eviction procedures whereas the Extension of Security of Tenure Act 62 of 1997 (ESTA) provides statutory protection to an occupier that has consent, or another right in law, to occupy the leased premises; it also determines under which circum-stances such persons may be evicted from land after termination of their rights of residence (preamble to ESTA). Due to the shortage of housing in South Africa (in particular low to medium income families) the government has instituted a housing project to give further effect to the right to adequate housing by implementation of the Social Housing Policy (The National Housing Code: Social Housing Policy Part 2 Vol 6 (2009) and the Community Residential Units Programme as explained in Part 3 Vol 6 (2009)) and the Social Housing Act 16 of 2008 (see also Viljoen (2016) 72–73; Van Eeden and Barnard (2018) 605–607). The common law as one of the primary sources of law in South Africa functions within this legal framework and should

be interpreted to give effect to the values enshrined in the Constitution where residential lease agreements are concerned.

Over and above all of the measures mentioned above, the CPA aims to

> "promote and advance the social and economic welfare of consumers in South Africa by . . . establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally" (s 3(1)(a)).

The Act specifically purports to protect categories of vulnerable consumers listed in section 3(1)(b) which include consumers from low-density populated areas; low-income consumers; the young and the elderly; and consumers whose ability to comprehend an agreement is influenced by, for example, visual impairment or difficulty to understand the particular language in which the agreement is presented or published. The CPA aims to promote fair business practices and protect consumers from unconscionable conduct, false and misleading representations and unfair, unreasonable and unjust contracts, terms and conditions (ss 3 4 40 41 48 49 51). "Rental" is defined in section 1 as

> "an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act".

"Service" includes the provision of "access to or use of any premises or other property in terms of a rental" irrespective of whether the person involved in the promoting, offering or providing of the service does so directly or indirectly (s 1(e)(v) definition of "service"). "Service" also includes (s 1(f)) a right of occupancy in connection with any land or other immovable property *other than in terms of a rental* (own emphasis). Section 4(3) of the CPA provides that if a provision within the Act can be construed to have more than one meaning, preference must be given to the meaning that best promotes the spirit and purpose of the Act and, in particular, improves the rights of vulnerable consumers listed in section 3(1)(b). The supply of a service includes granting access to any premises in the ordinary course of business for consideration (s 1(b) definition of "supply") whereas "premises" includes "land or any building or structure" (s 1).

There can be no doubt that the CPA as overarching enactment should in general apply to residential lease agreements in order to prevent discriminatory practices; promote fair and honest dealings with tenants as consumers (which include the marketing practices of landlords and their agents); and provide fair, just and reasonable lease agreements worded in plain language (s 22 CPA). However, this should be done in conjunction with the primary legislative framework (the RHA, PIE and ESTA in particular) as mentioned above. Section 2(9) provides that where there is an inconsistency between CPA and another piece of legislation, the provisions of both Acts should be applied concurrently. To the extent that this is not possible, the provision that extends the greater protection to a consumer should prevail (s 2(9)). Barnard correctly argues that provisions that extend greater protection to the consumer are not always necessarily the provisions of the CPA ("An appraisal of the consumer's cooling-off right in terms of section 16 of the Consumer Protection Act 68 of 2008" 2016 *THRHR* 1 7 where the writer discusses the cooling-off rights in terms of s 29A of the Alienation of Land Act 68 of 1981 (ALA) and s 16 of the CPA and argues that

the provisions of the ALA provide better protection to consumers than s 16 of the CPA due to their legal certainty and clarity).

There has been some doubt as to what exactly is meant by "in the ordinary course of business". The CPA (in general) applies where suppliers supply goods and or services *in the ordinary course of business* (own emphasis) for consideration and to simply look at whether or not the lessee/tenant falls under the definition of "consumer" in terms of the Act to determine whether the Act applies, would be incorrect. Where a rental company (as was the case in *Transcend*) concludes lease agreements in their ordinary course of business with tenants this is clearly done within "the ordinary course of business" and the Act should apply. The situation becomes a bit more complicated where a person does not lease property in the ordinary course of business, for example, where a teacher or dentist leases out a holiday home or an additional property but their ordinary course of business is clearly not the lease of residential property. Should the CPA apply just because of the *frequency* of supply that forms part and parcel of the nature of a lease agreement as only temporary use and enjoyment are provided for a particular period agreed upon? The Supreme Court of Appeal in *Eskom* had to interpret "consumer" as well as the ordinary course of business in relation to the CPA. The court had to determine whether or not section 61 and the product liability regime introduced in terms of the CPA applied to the particular set of facts. (In this regard, the decision raised more questions than answers and the decision not to develop the product liability regime in terms of s 61 is regrettable. A critical analysis of this issue falls outside the scope of this discussion. For a general discussion, see Loubser and Reid "section 53" and "section 61" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* (2017 update)). The court in *Eskom* referred to the application of the term with regard to insolvency matters and that the test of what constitutes in the "ordinary course of business" is an objective one where all the circumstances including the actions of both parties to the transaction must be taken into account (para 20). This approach was also referred to with approval by the court in *Transcend* (para 46).

A broad definition is given to the concept of "consumer" in the CPA (s 1) and it includes both natural and juristic persons. It also includes the user, recipient and beneficiary of goods. ("Juristic person" includes a trust, partnership or body corporate and will only be regarded as a consumer where its asset value or annual turnover is less than R2 million (s 1 read together with s 6 CPA)). The court in *Transcend* held that, taking into account the purpose of the Act and the broad definition of "consumer" in the CPA, the third respondent as "occupant" in terms of the lease agreement was also a consumer in terms of the Act and, therefore, also protected by section 14 (paras 47–48). The court therefore correspondingly confirmed the application of section 14 to lease agreements. It is at this stage that a critical analysis of section 14 (expiry and renewal of fixed-term agreements) read together with regulation 5 is warranted.

3 2 Critical analysis of section 14 and the implication thereof for residential lease agreements

Section 14 forms part of the consumer's right to choose (Part C). Laubscher (LLM (2016) 144) correctly states that when one considers the cancellation and renewal of fixed-term agreements it is easy to imagine gym contracts and cell phone contracts concluded for a fixed term. These contracts have a history of being difficult to cancel and when they are cancelled the full outstanding amount

is in any event payable as a "cancellation fee". Glover also suggests building supply contracts or the supply of foodstuffs "that are subject to regular market-based fluctuations in commodity pricing" as other examples (Glover *Kerr's Law of sale and lease* (2014) 338). Section 14 is not applicable where both the supplier and consumer are juristic persons regardless of their annual turnover or asset value (s 14(1)). The provision determines a maximum period for fixed-term agreements as being 24 months unless the consumer *expressly* agrees on a longer term *and* the supplier can show a *demonstrable* financial benefit to the consumer (s 14(2)(a) read together with reg 5(1) own emphasis). Though commercial lease agreements fall outside the scope of this discussion, reference may be made to Delport (2014) 73 who states that commercial lease agreements are usually for a minimum period of more than 24 months and that landlords would most likely in future prefer to conclude commercial lease agreements with other juristic persons rather than natural persons to avoid the application of section 14. Glover (2014) 338 likewise expressed concern regarding the cancellation of long-term lease agreements (10 years or more) where section 14 is applicable as the section surely was not intended to overturn the law on long leases. Section 14(2)(c) contains what are most likely the most controversial provisions of the Act and governs the circumstances in which the supplier and the consumer may cancel the lease agreement. The provisions of section 14(2)(b) will apply despite any provision to the contrary in the lease agreement. The supplier may only cancel the lease agreement where there is a *material* breach by the consumer and only after 20 business days' written notice is given to the consumer *and* the consumer has been given an opportunity to rectify the breach within the 20 business days (own emphasis). On the other hand, the consumer may cancel the agreement either upon expiry of the lease or *at any other time,* by giving the supplier 20 business days' notice in writing or any other recorded form (s 14(2)(b)(i); own emphasis). Where the consumer cancels the lease upon expiry of the fixed term the consumer remains liable for any amounts owed to the supplier in terms of the agreement (s 14(3)(a)). Where the consumer cancels the agreement at any other time the supplier may impose a reasonable cancellation penalty and must credit the consumer with any amount that remains the property of the consumer on the date of cancellation (s 14(3)(b) and (c)). Guidelines as to what should be considered a reasonable credit or charge are listed in regulation 5(2). The practical application of taking into account existing legal principles is questioned by Laubscher ((2016) 135 and fn 705).

The first question that may be posed is what is meant by a material failure by the supplier. Would "traditional" forms of breach such as *mora debitoris*, *mora creditoris* or malperformance suffice? Would the breach of the common law duties of a lessee, namely, payment of rent, proper use of the property and return of the property on termination of the lease (see, eg, Nagel (ed) *Commercial law* (2015) paras 17.42–17.70) be considered material? Non-payment of rental or serious damage to the leased property would be the most recurring issues in practice (and was also the case in *Transcend* para 13). Most property lawyers, landlords and rental agencies indicate that section 14(2)(b)(ii) is "abused" by unscrupulous tenants (consumers) who do not comply with the date of payment as agreed upon in the lease agreements but rather wait for the written notice of material breach and non-payment in terms of section 14 which extends the opportunity to pay the arrear rental with a further 4 weeks (20 business days). Because section 14(2)(c) applies despite any provision to the contrary it seems that the consumer must be given an opportunity to rectify a material breach every

time it occurs. Surely it is not the intention of the CPA to allow tenants to avoid their obligations in terms of a valid lease agreement? Such an interpretation does not coincide with the purposes of the Act, but unfortunately happens in practice due to the wording of section 14. In this regard the provisions of the primary legislation governing residential lease agreements should be considered which may provide some prevention of such practices by tenants (consumers). It could be argued that the late payment of rental is an "unfair practice" in terms of the RHA. Section 4A(8) of the RHAA (not yet in force) provides that the tenant is liable on the due date for rental and other costs agreed. The landlord has a right to prompt and regular payment of rental in terms of section 4B(9). The landlord also has a right to terminate the lease on grounds that do not constitute an unfair practice and section 4(5) of the current RHA makes provision for a landlord's right to prompt payments. Furthermore, any act or omission by a landlord or tenant (such as late payment) in contravention of the RHA is regarded as an "unfair practice". The landlord may lodge a complaint with the Rental Housing Tribunal (RHT) in this regard and the Tribunal is provided with certain powers in terms of section 13(4) RHA if an unfair practice occurs or took place.

On the other hand, the tenant may cancel the lease at any time as long as 20 business days' written notice (or any other recorded form) is given. Section 14(2)(b) results in tenants cancelling lease agreements on a "whim" without material breach on the part of the landlord and will surely destabilise the rental housing market as suppliers will now have to think of other measures to pro tect their interests (financial and otherwise) and the substantial costs in this regard. (This is despite the fact that lessors have the right to at least some "compensation" in terms of s 14(3)(a) and (b).) The manner in which the lease may be cancelled is also problematic. The term "in writing" is defined in the CPA regulations ("definitions") to include electronic communications and "any other recorded form" for which there is no definition seems superfluous, unless pigeon post is making a return. It would also be difficult for a landlord to keep proper record of a "sms" or a "whatsapp" (electronic communications), for example, as a valid form of cancellation. This will add to the costs and the risks of concluding lease agreements.

The court in *Transcend* made an important distinction between the right of a tenant to rectify a material breach within 20 business days and the right to be *informed* of such an opportunity (own emphasis). The court correctly held that "there is no requirement, express or implied, that the consumer must be expressly notified of the fact that he has 20 business days to remedy his defect" and failure to do so will not render the cancellation void. Prior to the CPA there was no statutory cancellation period for residential lease agreements. The RHA only refers to a cancellation period after expiry of the lease agreement where the tenant remains in occupation of the property with the express or tacit consent of the landlord. Section 5(5) of the RHA provides:

> "If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease."

Section 5(6)(f) of the RHA provides that all lease agreements must include information on the lease period, or, if there is no lease period determined, the notice period requested for termination of the lease. However, the only provincial legislation that refers to a specific cancellation period is regulation 3(6)(f) of

the Gauteng Unfair Practices Regulations of 2001 in terms of which a lease for residential property that falls within the ambit of the RHA must include information regarding "the lease period, or, if there is no lease period determined, the notice period requested for termination, which period must not to be less than one calendar month period". Having a consistent notice period for the termination of residential lease agreements in principle provides certainty and consistency. It is submitted that the circumstances and the *manner* in which residential lease agreements may be cancelled in terms of section 14 is problematic.

Section 14(2)(c) and (d) provides that a supplier must notify a consumer (in writing or another recordable form) no less than 40 business days and no more than 80 business days before expiry of the impending expiry date of the lease. Such a notice must include any material changes to the lease should it be renewed; and that on expiry date the lease will automatically continue on a month-to-month basis subject to the notified material changes unless the tenant either expressly confirms the cancellation or agrees to the renewal for a further fixed term. De Stadler ("section 14" in Naudé and Eiselen *Commentary* 14-11) submits that the lease will renew automatically on a month-to-month basis until the consumer exercises his or her discretion and that, although the Act does not mention this specifically, the supplier can (and should) be able to elect not to continue with the lease upon termination of the fixed period after notice was given. Taking into account the minimum number of business days in which a notice of impending expiry must be given it is doubtful whether lease agreements concluded on a month-to-month basis would fall under the application of section 14. This approach was confirmed in *Makah v Magic Vending (Pty) Ltd* 2018 3 SA 241 (WCC). The court held that section 14 did not apply to a month-to-month residential lease but only applied to fixed-term agreements (paras 11 13–14). The court further correctly stated that to read into the CPA that the 20-day notice requirement applied to a monthly and indefinite lease, would be "to offer protection in circumstances not envisaged by the Act" (para 14). The court rejected the tenants' argument that the conclusion of a month-to-month lease was prohibited in terms of section 51 because it aimed to circumvent the application of section 14 (paras 10 14). It should further be noted that in general the conclusion of month-to-month residential lease agreements (with the main purpose of circumventing section 14 of the CPA) would not be practical or beneficial to landlords and would most likely not be attempted or concluded for this reason.

The final serious hurdle for effective application of section 14 is the routes of redress and enforcement. The primary legislation (RHA) provides for complaints concerning unfair practices (in terms of the Act) to be taken to the Rental Housing Tribunal (RHT) in the particular province. The process of investigation and hearing of the complaint is regulated by the Act as well as relevant provincial legislation (eg, Gauteng Unfair Practices Regulations, 2001; Northern Cape Unfair Practices Regulations 2006). (The importance of the RHT was confirmed in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC).) The RHAA (once fully implemented) will require local municipalities (no longer discretionary) to establish Rental Housing Information Offices (ss 2(5) and 3(6) RHAA read together with s 14 RHA) and all provinces to have fully functional Rental Housing Tribunals. (It could be argued that this may also be one of the primary reasons why the RHAA has not come into full force as the financial and infrastructure implications on provincial and local government for the establishment of such Information Offices are significant.) The current problematic and

practical consequences of section 69 of the CPA and the enforcement and redress measures to be followed for consumer disputes in terms of the Act are unfortunately even more problematic (for a comprehensive discussion, see Van Heerden in Naudé and Eiselen *Commentary* 68-1–69-25; Woker "Consumer protection and alternative dispute resolution" 2015 *SA Merc LJ* 43–45; Naudé and Barnard "Enforcement and effectiveness of consumer law in South Africa" in Micklitz and Saummier (eds) *Enforcement and effectiveness of consumer law, Part of the series:* – Ius comparatum – *Global studies in comparative law* (2018) 565–590). Though a critical evaluation of the legal position regarding the routes of redress and enforcement for consumers (tenants) warrants a comprehensive discussion of its own, a few of the most prevalent issues are highlighted. Section 69 provides for a particular hierarchy to be followed. In terms of section 69, a person may refer a matter directly to the National Consumer Tribunal (NCT, "if such a direct referral is permitted in the case of the particular dispute" s 69(a)); refer it to an Alternative Dispute Resolution Agent (ADR agent s 70) which include an applicable ombud with jurisdiction (s 69(b)); industry ombud (as accredited in terms of s 82(6)); a provincial consumer court with jurisdiction; the National Consumer Commission (NCC); or another ADR agent (s 69(c)). Only "if all other remedies available to that person in terms of national legislation have been exhausted" may a "regular" court be approached (s 69(d)). The hierarchy in terms of section 69 coincides with the purpose of the CPA being consensual dispute resolution (s 3). In *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) the court confirmed that where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms. In reality, the hierarchy in terms of section 69 is approached differently and faces systemic problems. Though the NCT is listed first it should be noted that it may only be approached directly in exceptional circumstances (s 75) and, therefore, it is not as a general rule regarded as the institution of first instance for initiating a complaint. The NCC is central to successful redress and enforcement but has taken a stance not to hear and adjudicate individual disputes. It will only deal with matters that are systemic in certain industries, conduct general proactive investigations and provide consumer education (23 Annual Report 2014/2015; Consumer protection: Input from Department of Trade and Industry (*Consumer Corporate Regulation Division), National Consumer Commission, National Credit Regulator and National Consumer Tribunal*, minutes of a meeting of the *Parliamentary Portfolio Committee on Trade and Industry* of 29 July 2014). Due to the implementation of the Twin Peaks model into South African law by way of the Financial Sector Regulation Act of 9 of 2017, government is in the process of streamlining and restructuring the current ombud system. Until such restructuring has been finalised, "ombuds with jurisdiction" in terms of section 69(b) are not appropriate options for redress. There are currently only two accredited industry ombuds, namely, the Motor Industry Ombud and the Consumer Goods and Services Ombud. There has been problems with the hierarchy and whether the correct interpretation of section 69(c) should be that the consumer should approach all the possible ADR Agents within that tier of redress (eg, industry ombud, provincial consumer court, NCC) or approach one of the possible ADR Agents before approaching the next tier (ie the NCT). The courts seem to follow the latter approach (*Joroy 440 CC v Potgieter* 2016 3 SA 465 (FB); *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC Economic Development, Environmental Affairs and Tourism, Free State* [2016] ZAFSHC 105; *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico* [2016] ZANCHC). The infringement of certain provisions of the CPA provides exclusive jurisdiction to

"normal" courts and is mostly concerned with unconscionable conduct (s 40); false, misleading and deceptive representations (s 41), unfair contract terms (ss 48, 51 and reg 44) and exemption clauses (s 49). Section 52 provides for exclusive jurisdiction of the courts in this regard. The practical problem is that it is possible for a supplier to infringe more than one fundamental right of the consumer. Should such a matter serve before the NCT (keep in mind the consumer has by this time already gone through other tiers of redress in terms of s 69), only matters that fall within the jurisdiction of the NCT can be adjudicated. This excludes making decisions regarding the fairness or unfairness of contract terms in terms of section 48 as well as an award for damages (s 76(1)). The frustration in this regard can be seen from the comments by the Tribunal in *National Consumer Commission v Western Car Sales CC* NCT 81554/2017/73(2)(b). The supplier *in casu* was guilty of infringing many of the provisions of the CPA (in particular the consumer's warranty to quality in terms of Part H), but also unfair terms in the contracts concluded. The NCT commented as follows:

> "While the Tribunal has the power to declare conduct which contravenes section 51 as prohibited, the same cannot be said for section 48. On a plain reading of section 48, read with section 52, it would appear that the power to apply the provisions of section 48 remain exclusively reserved for a court of law. It would in any event appear to be a case of splitting of charges to find a contravention of section 51 would also amount to a contravention of section 48."

The NCT found the supplier guilty of prohibited conduct and ordered an administrative fine against the supplier. Though this certainly is a step in the right direction, the splitting of charges (after the consumer has gone through the whole process in terms of s 69) only to initiate a separate claim again in the "regular" courts is not ideal. The same approached has to be followed for any claim for damages. It should be noted that the NCT may confirm a consent order which could include a claim for damage (s 74(3)) but may not make an award out of its own accord. Clearly the consumer's right to redress is frustrated and a tenant/ consumer will be faced with the same frustration. If the supplier does not co-operate, the process could be delayed to such an extent that prescription becomes an issue as can be seen from the decision of *Lazarus v RDB Project Management CC* [2016] ZANCT 20. The NCT held that prescription is interrupted once a consumer enters into a particular tier of redress in terms of section 69.

A final argument is that suppliers can simply choose to "side step" section 69 and initiate litigation directly in the courts without relying on the CPA based on, for example, breach of the contract. The consumer must, however, follow the routes in terms of section 69 if it wants to rely on the contravention of the provisions of the Act. This is in direct contradiction of the consumer's constitutional right to access to the courts (s 34 of the Constitution). The irony, however, is that if the suppliers did not bring these disputes to a regular court (as was the case in *Transcend*) we would not have the benefit of having insight into the approach by the judiciary in this regard nor a *precedent in positive law to follow and perhaps in future to be reconsidered.* (A short reference should be made to the recent judgment of *Nedbank Limited vs Thobejane and 12 Others* [2018] ZAGPPHC 692 (26 September 2018). A full bench of the Gauteng High Court (Pretoria) held that commercial institutions (including banks) could no longer institute litigation in the High Court just because it is more convenient to do so even though the monetary value of the claim was within the jurisdiction of the Magistrate's Court. The High Court could refer these matters to the appropriate

Magistrate's Court if it was in the interest of justice and closer for the parties involved and also to prevent the unnecessary high cost of litigation to consumers to defend claims in the high court (paras 58 89 92 93)). This will clearly have severe consequences for commercial suppliers (landlords who are juristic persons or rental agencies acting on behalf of the landlord) but unfortunately does not address the issues of section 69 or the separation of claims as explained above.

In this regard the redress measures instituted in terms of the RHA (and the RHAA once it is implemented) and the jurisdiction of the RHT hopefully will ensure quicker and more effective redress for tenants (and landlords) than the cumbersome processes currently governed by section 69.

4 Conclusion

Glover correctly comments that section 14 undermines the "very nature and legitimate socio-economic purpose of a lease for a fixed term for both the lessor and lessee" (338). Delport comprehensively argues for a purposive interpretation of section 14 of the CPA which suggests that the context of the Act and its objectives must be taken into account and that such an approach would exclude lease agreements for a fixed period from the application of section 14 (73; see also Laubscher 173). More importantly, the question should be whether (taking into account such "general acceptance") the application of section 14 is to the benefit of the rental industry and the tenants/consumers it aims (and should aim) to protect *as a whole* (taking into account its social, economic and constitutional premise). Leasing agencies have increased administration costs to manage the forms in which notice of cancellation may be given by tenants in terms section 14 and undoubtedly also to manage the increase in cancellation notices to tenants for non-payment. The increase in deposits have the effect of excluding, in particular, the vulnerable categories of consumers (tenants) which the CPA aims to protect regarding their constitutional right to adequate housing. It therefore is submitted that the application of section 14 to residential lease agreements is not "for the benefit of consumers *generally*" (s 3 CPA; own emphasis) and should be reconsidered. A further significant issue (as highlighted above) is the current problematic and practical consequence of section 69 of the CPA and the enforcement and redress measures to be followed for consumer disputes in terms of the Act. Urgent legislative intervention by the Minister is needed in terms of which immovable property is formally excluded from the application of section 14 of the CPA. Alternatively the CPA should be applied generally (concurrent with the main legislative framework governing residential lease agreements as mentioned above) and the courts could consider a holistic approach to whether or not section 14 should be applicable to residential lease agreements and whether such an application would be to the benefit of tenants *generally* and not just in a particular case.

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