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**An Analysis of the Role and Mandate of the Motor Industry Ombud of South
Africa Under the Consumer Protection Act 68 of 2008**

Dissertation submitted in fulfilment of the requirements for
the degree Master of Laws in Mercantile Law: Consumer Protection Law

by

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in the

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ACKNOWLEDGEMENTS

First and foremost, I would like to acknowledge the Almighty for blessing me with the strength, patience, and ability to complete this dissertation.

Dr Phemelo Magau, my supervisor, I sincerely appreciate your patience, dedication, and assistance during this journey. Your assistance is more than words can express.

To my family, Thank you for your understanding and support.

ABSTRACT

This study is aimed at analysing the role and mandate of the Motor Industry Ombudsman of South Africa (MIOSA) under the *Consumer Protection Act* 68 of 2008 (*CPA*). The MIOSA was established as an organisation that regulates the interaction between suppliers and consumers and provides for alternative dispute resolution between the automotive industry and consumers as well as among participants in the automotive and related industries in South Africa. Moreover, the MIOSA is an impartial organisation that focuses on the resolution of disputes where a deadlock has been reached between the automotive and related industries and their customers, as well as relationships among participants in the automotive and related industries to the benefit of the parties. The role of the MIOSA is to make recommendations in cases referred to it where all parties are unable to reach mutually acceptable agreements when a dispute arises. This research seeks to discuss the role and mandate of the MIOSA as well as the challenges that prevent the MIOSA from effectively carrying out its mandate under the *CPA*. Furthermore, this study seeks to investigate the relevant provisions of the *CPA* to determine whether they contain adequate and clear guidelines that the MIOSA could adhere to when carrying out its role and mandate.

Keywords: MIOSA, role, mandate, consumer dispute, automotive industry.

DEDICATION

This mini dissertation is dedicated to my entire family, especially my children, and to all young and old people who want to better their lives through education.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CPA	Consumer Protection Act
CGSO	Consumer Goods and Service Ombuds
DTI	Department of Trade and Industry
MIOSA	Motor Industry Ombudsman of South Africa
MP	Member of Parliament
NCC	National Consumer Commission
NCT	National Consumer Tribunal
PCPO	Provincial Consumer Protection Officer
SABS	South African Bureau of Standards

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CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

1.1. Introduction

The focus of this research is to examine the role and mandate of the Motor Industry Ombudsman of South Africa (MIOSA) under the *Consumer Protection Act*.¹ The MIOSA was established in the year 2000 as a voluntary scheme and it was accredited under the *CPA* as an industry ombuds.² The *CPA* emphasises resolving, providing for an effective, efficient, accessible, and system of redress for consumers. Moreover, it provides for a consistent, accessible, system of consensual resolution of disputes resulting from consumer transactions.³ The *CPA* also addresses [the disadvantages](#) experienced by low-income earners or persons with limited access to capital in accessing any supply of goods or services.⁴ Notwithstanding this, most consumers are still struggling with accessing adequate and efficient redress of disputes in the automotive industry in South Africa.

The South African Automotive Industry Code (the Code) was proposed by the automotive industry or the MIOSA and recommended to the Minister of Trade by the National Consumer Commission (NCC).⁵ The Code governs how those doing business in the automotive sector engage with one another and with [the](#) customers.⁶ According to the Code, [the MIOSA was established to assist in the](#) resolution of complaints that could occur over any goods or services offered to such consumers by the automotive industry, including suppliers who are in turn consumers within the

¹ *Consumer Protection Act* 68 of 2008 (*CPA*); see section 82(6) of the *CPA*; Van Heerden CM "section 69,70" in Naudé and Eiselen Commentary on the *CPA* RS 5, 2020, 69–1, RS 4, 2019, 70–1.

² See section 82(6) of the *CPA*; also see Naudé T and Barnard J "Enforcement and Effectiveness of Consumer Law in South Africa" in Micklitz HW and Saumier G (eds) *Enforcement and Effectiveness of Consumer Law* (Springer International Publishing New York 2018) 590-578; Koekemoer M "Consumer Complaints and Complaint Forums Employed in the South African Motor Vehicle Service Industry: A Survey of the Literature" 2014 *Journal of Applied Business Research* 659, 665.

³ See section 3 of the *CPA*, Naudé T and Eiselen S (eds) *Commentary on the Consumer Protection Act* (Juta and Co. Cape Town 2015) RS 2, 2017, 3–1.

⁴ See section 3 of the *CPA*; de Stadler E and du Plessis E *Commentary* RS 2, 2017, 3–1.

⁵ See section 82(3) of the *CPA*; The South African Automotive Industry Code of Conduct (the Code) 3.

⁶ See section 82(3) of the *CPA*; See clause 1 of the Code 3.

industry supply chain.⁷ In this regard, this study seeks to provide an analysis of the role and mandate of the MIOSA by discussing the challenges preventing the MIOSA from carrying out its mandate to recommend solutions to such challenges.

1.2. Background to the Study

Before the inception of the CPA, South Africa did not have a specific legislative framework that was intended to broadly deal with consumer and supplier disputes. However, different pieces of legislation provided consumer protection measures. For instance, the *Consumer Affairs (Unfair Business Practices) Act*,⁸ the *Business Names Act*,⁹ the *Price Control Act*,¹⁰ the *Sale and Service Matters Act*,¹¹ and the *Trade Practices Act*¹² made partial provision for consumer protection.¹³ The predecessor legislative framework for consumer protection provided for the investigation, prohibition, and control of unfair business practices in the interest of the protection of consumers. Notwithstanding this, the researcher submits that the predecessor legislative framework was ineffective because of the lack of coordination amongst the regulators and the inconsistent application of the framework; as a result, the consumer received little protection.¹⁴ Another challenge with the legislative framework which preceded the CPA was that the contravention of a particular statute resulted in a criminal offence. This was a challenge because contravening any of the predecessor legislative frameworks meant the matter had to be prosecuted by the prosecuting authorities in the ordinary criminal court and both these entities are overloaded with

⁷ Clause 2.10 of the Code 4; <https://www.miosa.co.za/history.php> (accessed 10 October 2023); See the Constitution of the Motor Industry Ombudsman of South Africa 2022/23 Annual Report.

⁸ *Consumer Affairs (Unfair Business Practices) Act* 71 of 1988 (*Consumer Affairs Act*), see section 4(1)(c) and 8(1)(a); also see Woker, T "Business Practices and the Consumer Affairs (Harmful Business Practices) Act 71 of 1988" 2001 *South African Mercantile Law Journal* 316, 317.

⁹ *Business Names Act* 27 of 1960; see section 2 of the CPA; Woker T "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, 219.

¹⁰ *Price Control Act* 25 of 1964; see section 1(a)(b) of the CPA; Woker 2010 *Obiter* 219.

¹¹ *Sale and Service Matters Act* 25 of 1964; See sections 2 – 13 and sections 16 – 17 of the CPA; Woker 2010 *Obiter* 219.

¹² *Trade Practices Act* 76 of 1976; See sections 13 and 14; Woker 2010 *Obiter* 219; also see Devnish GE "New Legislation" 1976 *De Rebus Procuratoriis* 448, 448.

¹³ See related discussion in Du Plessis MA "Towards Better Service Delivery by Consumer Courts" 2008 *South African Mercantile Law Journal* 74, 77; also see Woker 2010 *Obiter* 219; see also Van Eeden E and Barnard J *Consumer Protection Law of South Africa* 2nd edition (LexisNexis Johannesburg 2017) 23.

¹⁴ See related discussion in Du Plessis 2008 *South Africa Merc Law Journal* 74; also see Woker *Obiter* 219; see related discussion Woker T "Consumer Protection: An Overview Since 1994" 2019 *Stellenbosch Law Review* 97, 110.

other criminal matters. As such, consumer issues did not receive the necessary attention.¹⁵

When resolving consumer disputes before the CPA came into force, the MIOSA utilised and relied on the CPA predecessor legislative framework, the common and the law of contract in terms of sale agreements.¹⁶ This is because in South Africa contracts between consumers and suppliers are regulated by the common law of contract and case law, since no legislation that governs the law of contract.¹⁷ However, the introduction of the CPA introduced several provisions that have an impact on, *inter alia*, the general principles of the law of contract and the common law of sale.¹⁸ Furthermore, the CPA does not preclude the consumer from relying on any right available under the common law.¹⁹ The CPA also recognised the ombuds that offers consumers access to redress and one of those ombuds is the MIOSA which deals with complaints against suppliers of motor vehicles and has been assisting the NCC or Commission with disputes since 2013.²⁰

In recent years there has been an increase in the number of consumers complaining about defective vehicles they had purchased.²¹ This applies both to brand new and second-hand vehicles. The second-hand vehicle market has a lot of unscrupulous and

¹⁵ Woker 2010 *Obiter* 2219-22; Du Plessis MA "Enforcement and Execution Shortcomings of Consumer Courts" 2010 *South African Mercantile Law Journal* 531, 522.

¹⁶ Naudé and Eiselen *Commentary on the Consumer Protection Act 1-21*; Woker 2010 *Obiter* 222.

¹⁷ See related discussion Naudé and Eiselen *Commentary on the Consumer Protection Act 1-21*; Woker 2010 *Obiter* 222.

¹⁸ See Sections 2(10), 5, 55, 56, and 61 of the CPA; also see Naudé T "The Impact of the CPA on the Law of Contract and on Specific Contracts" in Naudé T and Eiselen S (eds) *Commentary on the Consumer Protection Act* (Juta and Co. Cape Town 2015) 29; see related discussion regarding the need for the courts to develop common law in Van Eeden and Barnard *Consumer Protection Law of South Africa* 59 and 58.

¹⁹ Section 2(10) of the CPA; Naudé "The Impact of the CPA on the Law of Contract and on Specific Contracts" 29; also see related discussion by Van Eeden and Barnard *Consumer Protection Law of South Africa* 58 and 59.

²⁰ Section 69(ii) and 82(6) of the CPA; Woker 2019 *Stellenbosch Law Review* 103.

²¹ Barnard J and Botha MM "The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products that Cause Harm" *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39; also see related comments by Shi W, Leng K, Van Nieuwenhuyse I; Liu Y and Chen X "Vehicle Recalls Performance in An Emerging Market: Evidence from the Comparison between China and U.S." 2020 *Transportation Research Part A-Policy and Practice* 290, 292; see related comments Mpshe TT and Kanakana MG "Dynamics of a Relationship between Quality and Productivity in the Automotive Manufacturing Industry" 2015 *International Conference on Industrial Engineering and Engineering Management (IEEE)* 441, 443.

non-compliant retailers.²² There have also been several recalls by manufacturers regarding defective brand-new vehicles, moreover, some of the Original Equipment Manufacturers (OEMs) that recently recalled vehicles is Honda in 2010.²³ In 2013 Volkswagen announced a recall of more than 15 000 Amarok and 4270 Tiguan models from across South Africa.²⁴ In 2015 Ford South Africa also recalled 4,500 Ford Kuga 1.6 vehicles manufactured between 2012 and 2014 after they caught alight and allegedly a motorist died while trapped inside his burning vehicle, it was stated in the article that fires were caused by overheating that led to engine cylinder heads cracking and oil leaking.²⁵ On 25 January 2018 Toyota South Africa Motors recalled more than 700 000 vehicles over airbag safety concerns which affected models dating back over 15 years.²⁶

The aforementioned recalls are an indication that the consumer can purchase a vehicle with latent defects or where the retailer conceals or fails to disclose the defects on a pre-owned vehicle.²⁷ Taking advantage of consumers' vulnerability goes against the purpose of the CPA in promoting and advancing the social and economic well-being of vulnerable consumers.²⁸ The CPA established remedial actions in respect of the sale of poor-quality goods, claims which may arise from the sale of defective goods and maps the route for the enforcement consumer rights under the CPA.²⁹ The Act

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- ²² See NCC, SAPS to Conduct Inspections at Pretoria North Second Hand Motor Dealers to Turn the Tide on After Sale Consumer Challenges 2017 http://www.thecc.gov.za/sites/default/files/news/media_advisory_dec_campaign041217.pdf accessed 04 April 2023; also see a related discussion in Chimba S Information Asymmetry, Persuasion and Marketing Communication Practices by Selected Motor Vehicle Dealerships in Midrand, Gauteng (Masters in Communication Studies-Dissertation University of Johannesburg 2021) 4.
- ²³ Chang K and Motsoeneng T 2010 *Honda Recalls Fit/Jazz Cars Over Window Fault* <https://www.reuters.com/article/us-honda-recall-idUSTRE60S271-20100129> accessed 4 April 2023.
- ²⁴ Maharaj P Examining the Rights of Consumers Who May Have Purchased Defective Vehicles (LLM – Dissertation University of KwaZulu-Natal 2019) 1.
- ²⁵ Barnard and Botha *De Serie Legenda Vol 11* 39-50; Van Heerden CM "Section 69" in Naudé T and Eiselen S (eds) *Commentary on the Consumer Protection Act* (Juta and Co. Cape Town 2015) 69–75; Naude T "Dissemination of Consumer Law and Policy in South Africa" 2018 *Journal of Consumer Policy* 418; Kempen A "Community Safety Tips: Escaping from a Vehicle Fire and a Submerged Vehicle" 2021 *Servamus Community-based Safety and Security Magazine* 50.
- ²⁶ Maharaj Examining the Rights of Consumers Who May Have Purchased Defective Vehicles 1.
- ²⁷ Naudé and Eiselen *Commentary on the Consumer Protection Act* 55–2; see Barnard J Suppliers, "Consumers, and Redress for Defective Vehicles — The reach of the National Consumer Tribunal: Tshehla v Aucamp Eiendoms Beleggings" 2020 *South African Law Journal* 229, 231.
- ²⁸ See section 3 of the CPA; see the Preamble to the CPA; Van Eeden and Barnard *Consumer Protection Law of South Africa* 40.
- ²⁹ Section 69 of the CPA; Naudé and Eiselen *Commentary on the Consumer Protection Act* 55-2; Van Eeden and Barnard *Consumer Protection Law of South Africa* 517.

provides for the redress mechanisms that are available to the consumer and this is in line with the CPA's efforts to safeguard the interest of consumers who do not have the financial muscle to pursue a dispute against suppliers, and therefore are afforded sufficient access to redress.³⁰

One of the routes of redress provided under the CPA³¹ in terms of enforcing the rights of consumers *inter alia*, the good quality goods, the right to safe goods is to refer a matter to the applicable industry ombud that is accredited in terms of the CPA,³² provided that the supplier is subject to that ombuds.³³ Woker highlights the importance of achieving a quick and effective redress, by providing that the legislature had to introduce new avenues for consumers to access redress since the civil court route is not a practical option for the most consumer.³⁴ This follows that litigation can be very expensive, complicated, time-consuming and some consumers may find it to be very intimidation.³⁵ The focus of this dissertation is on the role and mandate of the MIOSA, as one of the redress mechanisms under the CPA. The MIOSA plays a role in resolving consumer disputes and has a restricted jurisdiction over motor industry related

³⁰ Section 3(1)(h) of the CPA; Naudé and Eiselen *Commentary on the Consumer Protection Act* 69-1; see related discussion in Van Eeden and Barnard *Consumer Protection Law of South Africa* 517; see related discussion in Van Heerden C and Barnard J "Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion" 2011 *Journal of International Commercial Law and Technology* 131, 144.

³¹ Section 69 and 70 of the CPA; Barnard J and Van Heerden C "Chapter 11 Caveat Emptor: Second-Hand Cars and the Consumer Protection Act 68 of 2008" *De Serie Legenda: Developments in Commercial Law Volume I: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 99-220.

³² Section 82(6) and 70 of the CPA; Van Heerden on Naudé and Eiselen *Commentary on the Consumer Protection Act* 69-1; Woker 2019 *Stellenbosch Law Review* 102.

³³ Section 69 (c)(i) of the CPA; Van Heerden CM & Barnard J *De Serie Legenda Developments in Specific Contracts and Consumer Protection Law Vol I* (2019) 208 99 and 220; Naudé and Eiselen *Commentary on the Consumer Protection Act* 1.

³⁴ Woker 2019 *Stellenbosch Law Review* 104; see related discussion in Woker T "Consumer Protection and Alternative Dispute Resolution" 2016 *South Africa Mercantile Law Journal* 21, 24; also see related discussion in Van Eeden and Barnard *Consumer Protection Law of South Africa* 93.

³⁵ Woker 2019 *Stellenbosch Law Review* 104; see related discussion in Woker T "Consumer Protection and Alternative Dispute Resolution" 2016 *South Africa Mercantile Law Journal* 21, 24; also see related discussion in Van Eeden and Barnard *Consumer Protection Law of South Africa* 93.

complaints.³⁶ A consumer that desires to bring a complaint against a [supplier has to](#) have *locus standi* as a consumer within the meaning of the CPA.³⁷

1.3. Statement of the Problem

The CPA provides various ways of redress that any person with *locus standi* who may wish to enforce any right or resolve a dispute with a supplier in terms of the Act or in terms of a transaction or agreement by taking the matter to the relevant industry ombud.³⁸ According to Van Heerden and Barnard, the CPA has created an extensive redress network that hinges largely on informal dispute resolution.³⁹ Consumers that are unable to correctly navigate their way through this maze may find themselves being sent from pillar to post without getting any proper redress because of the lack of awareness. Moreover, consumers also have a challenge in understanding the procedure and processes on how to approach a specific industry ombud or consult the relevant industry Code for the application procedures.⁴⁰ It is submitted that the CPA is also not clear with regard to the process that should be followed as it is applied in practice.⁴¹ The CPA provides that the consumer should first refer a matter to the National Consumer Tribunal (NCT). The question of whether the CPA contains an implied hierarchy was further discussed in *Imperial Group (Pty) Ltd*

³⁶ Woker 2019 *Stellenbosch Law Review* 113; see the MIOSA 'Annual Report 2017' 3; see the definition of the MIOSA in National Consumer Commission *South African Automotive Industry Code No 36155* 9, 6: the meaning provides that the MIOSA is established to assist in [resolving the](#) dispute that [arises](#) in terms of the Act regarding any goods or service provided by the Automotive Industry to such consumer, including supplier [is](#) are in turn also consumers within the industry supply chain.

³⁷ Van Heerden CM "Section 69" in Naudé and Eiselen *Commentary on the Consumer Protection Act*, 2021, 5; also see related discussion in Van Eeden and Barnard *Consumer Protection Law of South Africa* 515; Van Heerden CM and Barnard J "Narrowing the Reach of the Strict Product Liability Provisions in section 61 of the *Consumer Protection Act* 68 of 2008 in view of *Eskom Holdings Ltd v Halstead Cleak* 2017 (1) SA 333 (SCA)" 2019 *THRHR* 444, 445; also see Naudé T and Barnard J "Enforcement and Effectiveness of Consumer Law in South Africa" 568; Scott T *The Realisation Of Rights In Terms of the Consumer Protection Act 68 of 2008* (LLD-Thesis University of South Africa 2018) 45.

³⁸ Section 69(b) and (c)(i) of the CPA; Van Heerden and Barnard 2019 *De Serie Legenda Developments in Specific Contracts and Consumer Protection Law* 99 and 220; Naudé and Eiselen *Commentary on the Consumer Protection Act*, 5, 2020, 1.

³⁹ Section 69 of the CPA.

⁴⁰ Naudé and Eiselen *Commentary on the Consumer Protection Act* 69–11 ; Van Heerden and Barnard 2019 *De Serie Legenda Developments in Specific Contracts and Consumer Protection Law* 99 and 220; see related discussion on Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 9.

⁴¹ Section 69 of the CPA; See Van Heerden and Barnard 2019 *De Serie Legenda Developments in Specific Contracts and Consumer Protection Law* 99 and 220.

t/a Cargo Motors Klerksdorp v Dipico and Others.⁴² In the same case, there was a concern regarding the MIOSA's failure to **resolve disputes timeously**.⁴³ The different redress mechanism may also lead to the MIOSA having problems in terms of resolving disputes by causing confusion and forum-shopping when an aggrieved consumer must choose the suitable forum to seek redress under the CPA. This is because of the overlap in jurisdiction of the **respective Codes** and respective dispute resolution schemes.⁴⁴

The main problem with the MIOSA is that the decisions by industry ombuds are not binding on the parties, they are regarded as mere recommendations.⁴⁵ This led to the attempts by the ombuds to resolve disputes being disregarded by suppliers which delayed redress for consumers.⁴⁶ In *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise*,⁴⁷ the NCT referred to the failure by the respondent to respond to queries from the MIOSA wherein it was held that this failure was concerning because the MIOSA is recognised under the CPA as the industry ombud for the motor vehicle industry. The CPA requires that all suppliers abide by their applicable industry Codes and failure to comply with an industry code constitutes prohibited conduct under

⁴² Section 70(1) of the CPA provides the correct process that if followed in practice; also see Van Heerden & Barnard 2019 *De Serie Legenda Developments in Specific Contracts and Consumer Protection Law* 99 and 220; van Heerden in Naudé, T and Eiselen, S *commentary* RS 5, 2020, 69–24; see *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANHC 1 (unreported case no 1260/2015 (NCK) (1 April 2016)); also see the related discussion Woker 2016 *South African Mercantile Law Journal* 47; see related discussion on Scott *The Realisation Of Rights In Terms of the Consumer Protection Act 68 of 2008* 226.

⁴³ *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANHC 1 (unreported case no 1260/2015 (NCK) (1 April 2016)), in this case, the consumer referred his complaint to the ombud during November 2012 but the dispute remained unresolved and the Ombudsman failed to make a ruling by March 2014; Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 585 - 579; Woker 2019 *Stellenbosch Law Review* 106.

⁴⁴ Melville N and Yeats J "Industry Codes of Conduct" in Naudé and Eiselen *Commentary on the Consumer Protection Act* 82–6; Jacobs W, Stoop and Van Niekerk R "Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis" 2010 *PER/PELJ* 302, 308; see Du Preez ML "The Consumer Protection Bill: A Few Preliminary Comments" 2009 *TSAR* 58, 81; Woker 2019 *Stellenbosch Law Review* 105.

⁴⁵ Naudé and Eiselen *Commentary on the Consumer Protection Act* 69–72; also see The MIOSA 'Annual Report 2017' 3, also see Melville and Yeats "Industry Codes of Conduct" 82–14 the authors correctly provide that Although the MI code does not expressly state that the MIOSA's determinations are not binding, this may be implied from its lack of jurisdiction in respect of disputes which require either the ombud to act as arbitrator; Woker 2019 *Stellenbosch Law Review* 108.

⁴⁶ Naudé and Eiselen *Commentary on the Consumer Protection Act* 69; see Barnard and Van Heerden *De Serie Legenda* 101.

⁴⁷ *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise* (NCT/83884/2017/75(1)) [2018] ZANCT 150 (18 July 2018); Woker 2019 *Stellenbosch Law Review* 108.

the CPA.⁴⁸ According to Barnard, over the past few years to date, the NCT has been overwhelmed with consumer disputes.⁴⁹ To this end, this necessitates an effective and efficient redress of consumer disputes by the MIOSA.

Another problem affecting the MIOSA from executing its mandate effectively is the issue of accessibility. Naudé and Barnard correctly pointed out that some consumers might find it problematic that the ombuds offices are centrally located and out of reach for many low-income consumers.⁵⁰ It is submitted that this is not in line with the purpose of the CPA which is to promote and advance the social and economic welfare of consumer in South Africa.⁵¹

Accordingly, it is submitted that the CPA and South African Automotive Industry Code of Conduct (the code) needs to be revised to provide the MIOSA with adequate substantive and procedural measures that could be consistently enforced to ensure that it functions optimally in fulfilling its role and mandate. Such measures include having a clear jurisdiction, timeframes in terms of the delivery of its recommendations, and adequate procedural measures.

1.4. Aims and Objectives

1.4.1. Aims

The aims of the study include the overall goals that the researcher seeks to achieve. In this regard, the researcher seeks to:

- a) examine the relevant provisions of the CPA to establish whether they provide adequate and clear provisions that could be followed by the MIOSA when conducting its role and mandate.⁵²

⁴⁸ Section 82 of the CPA; Naudé and Eiselen *Commentary on the Consumer Protection Act* 69–31; Naudé and Barnard 2018 "Enforcement and Effectiveness" 565; Woker 2019 *Stellenbosch Law Review* 108.

⁴⁹ Barnard 2020 *South African Law Journal* 229; Woker 2016 *South African Mercantile Law Journal* 22; Koekemoer 2014 *Journal of Applied Business Research* 660.

⁵⁰ Naudé and Eiselen *Commentary on the Consumer Protection Act* 69–30; Woker 2016 *South African Mercantile Law Journal* 35.

⁵¹ See section 3(1)(b) of the CPA; also see Woker 2016 *South African Mercantile Law Journal* 47; see further Woker 2019 *Stellenbosch Law Review* 115.

⁵² Section 69 and 82 of the CPA; Naudé and Eiselen *Commentary on the Consumer Protection Act* 69–31

- b) analyse the role and mandate of the MIOSA as an ombud scheme as outlined under the provisions of the *CPA*; and
- c) discuss the challenges affecting the MIOSA from effectively fulfilling its mandate under the *CPA*.

1.4.2. Objectives

The objectives include measures that the researcher takes to achieve the aims of the study. Accordingly, the objectives of this study include to:

- a) examine whether the provisions of the *CPA* are robust enough to deal with the regulatory and enforcement aspects of the MIOSA;
- b) analyse the role and mandate of the ombud schemes under the *CPA* in order to outline the challenges faced by the MIOSA;
- c) provide possible recommendations that could be adopted by the MIOSA to enhance how it performs its role and mandate.

1.5. Research Question

This research seeks to address the following question:

Whether the provisions of the *CPA* dealing with the role and mandate of the ombuds have sufficient measures that could be enforced by the MIOSA to ensure that it fulfills its role and mandate effectively?

1.6. Rationale for the Study

Hundreds of consumers complain about defective vehicles every year, some suffer injuries through accidents, and some lose their lives because of these defective and unsafe vehicles.⁵³ Despite all the consumer legislative framework, regulations, safety, quality standards, and measures that have been put in place by the suppliers to

⁵³ See related discussion on Barnard J and Botha, MM "The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products That Cause Harm" *De Serie Legenda* 39-40; E de Stadler *Commentary* 2015 60, for a discussion on product recall guidelines and in para 30 the author gives examples of product recalls handled by the NCC; also see Barnard 2020 *South African Law Journal* 229; see related discussion in Tennant S *Strict Product Liability in South Africa: An Analysis of the Concept of "Defect" and the Statutory Defences Available to the Supply Chain* (LLD-Thesis University of Pretoria 2018) 13.

eradicate defective vehicles, these goods still find their way into the market.⁵⁴ The researcher argues that the suppliers working together with the MIOSA, and the National Consumer Commission (NCC) should put additional measures in place to eliminate such through tightening regulations, enforcing compliance, creating awareness, and educating consumers of their rights.

The purpose of this research is to analyse the role of the MIOSA, **prior to the** introduction of *CPA*, and to also discuss the influence of the *CPA*⁵⁵ on the enforcement and redress of consumer rights. Furthermore, it is to analyse the challenges that are faced by the MIOSA and to investigate whether they play a role in preventing the ombud **from executing** its mandate. The significance of this study **is to** address how these challenges are moreover impacting particularly the vulnerable low-income consumers in remote areas, consumers who are ill-informed about their rights, who do not have financial resources to fight for their rights and to scrutinise the protection that the *CPA* offers. The importance of this dissertation is to also address the role of the NTC in terms of providing adequate redress and enforcement where the MIOSA fails to resolve a dispute to the consumer's satisfaction. This dissertation will further examine if any other avenues are available for consumers in terms of enforcement and redress of consumer rights.

1.7. Limitations of the Study

This research is only confined to the provisions of the *CPA* and only limits the discussion to provisions relevant to the topic that deals with analysing the role and mandate of MIOSA.⁵⁶ The researcher is limited by the **confined** objectives of the study and the jurisdiction of the MIOSA. Furthermore, this research is not a comparative study and does not consider foreign jurisdictions. **Another current limitation** is the length of the dissertation, in that only the most relevant topics are discussed and analysed. In this regard the focus is on the role and mandate of the MIOSA only and no other ombuds. This is because focusing on other ombud schemes would be beyond

⁵⁴ Koekemoer 2014 *Journal of Applied Business Research* 670-660; Van Zyl "Section 29" in Naudé & Eiselen, *Commentary on the Consumer Protection Act 2014*, 2, Woker 2019 *Stellenbosch Law Review* 99.

⁵⁵ Section 20, 55, 56, 61, 69, 70 and 82 of the *CPA*.

⁵⁶ Section 82(6) of the *CPA*; Woker 2019 *Stellenbosch Law Review* 102; see the discussion in Naudé & Eiselen, *Commentary on the Consumer Protection Act* 69–110.

the scope of the topic. The literature that is available on the topic is limited locally and the literature is mostly materials accessed through the internet.

1.8. Research Methodology

This research focuses on an analysis of the role and mandate of the MIOSA. In this regard, the research follows a qualitative research methodology. The qualitative research methodology entails a review of literature pertinent to the study as well as an analysis of primary sources and secondary sources of law. The research is focused on the South African position, a comparative analysis will not be undertaken when analysing this material to formulate answers to the research question. Finally, all the sources utilised will be acknowledged accordingly. For the purposes of this research, the *Potchefstroom Electronic Law Journal* referencing style will be utilised.

The following research methods will be used:

a) Primary and Secondary Sources

This research will analyse primary and secondary sources of law. Primary sources will include case law, and legislation dealing with the role and mandate of the MIOSA. Secondary sources of law will include textbooks, articles, journals, and internet sources dealing with the historical aspect of ombuds, recalls by the OEMs, the power that the MIOSA has in terms of executing its mandate, and the role that it plays in terms of resolving consumers disputes.

b) Relevant Legislation

The legislation that will be used is the CPA, since it is the primary legislation dealing with consumer protection. Moreover, the CPA is also the primary legislation that recognises the MIOSA as an industry ombud and likewise provides for the enforcement and redress of consumer rights, industry codes and alternative dispute resolution.

c) Relevant Case Law

Relevant case law dealing with the role and mandate of the MIOSA as well as case law dealing with the enforcement and redress of consumer rights will be analysed.

d) Historical Analysis

Chapter Two of the research deals with historical aspects of the ombud schemes in South Africa. This will be done to trace when the ombuds were introduced in South Africa. Moreover, this chapter will also discuss how disputes were resolved prior to the introduction of the CPA and when the MIOSA was recognised by the CPA.

1.9. Framework and Outline of Chapters

Chapter One – Research Outline and Context

This chapter provides an outline and context of the research. The chapter will consist of the background of the research, the problem statement, the research question, the aims and objectives of the study and the rationale for the study. Moreover, the chapter will also explain the research methodology, provide the limitations in answering the research question and include the outline of the chapters.

Chapter Two – Historical Aspects of the Regulation of Ombuds

This chapter will set out the historical aspects of the regulation of ombud schemes in South Africa. In particular, this chapter will provide the background to the introduction of the MIOSA in order to establish why it was introduced. Furthermore, to investigate how disputes between consumers and suppliers in the motor industry were resolved prior to the introduction of the MIOSA. Lastly, this chapter will investigate the strengths and weaknesses of measures that were adopted before the inception of the ombuds under the CPA in resolving consumer disputes.

Chapter Three – An Overview of the Role and Mandate of the MIOSA under the Consumer Protection Act 68 of 2008

This chapter will focus on an analysis of the role and mandate of the MIOSA in line South African automotive industry code of conduct, and the power of the ombud regarding investigating disputes and providing recommendations.

Chapter Four – The Challenges Affecting the MIOSA from Fulfilling its Mandate.

This chapter will discuss the challenges affecting the MIOSA from fulfilling its mandate. In particular, the chapter will focus on challenges such as, *inter alia*, the question of independence, location, and jurisdictional limits regarding the powers that the MIOSA has in terms of enforcing its recommendations.

Chapter Five - Conclusion and Recommendations

This final chapter will provide the conclusion and recommendations on what should be done to enhance the regulation of the role and mandate of the MIOSA in providing effective dispute resolution for consumers in South Africa.

CHAPTER TWO

HISTORICAL ASPECTS OF THE REGULATION OF OMBUDS

2.1 Introduction

The term "ombudsman," is derived from the Old Norse word "umbodhs- madhr," which means "deputy, agent, or plenipotentiary."⁵⁷ In the early Germanic tribes, the ombud's job was to seek restitution for the family harmed by another family's wrongdoing. The first statutory ombudsman was established in 1809.⁵⁸ The notion of an ombudsman gained international recognition in the latter years of the 20th century, and it is now prevalent at the national level in about 120 countries.⁵⁹ Nevertheless, many nations would contend that the same idea and institution have existed throughout their histories.⁶⁰ It is submitted that the concept is not foreign to traditional African customs. Across Africa before the colonial influence, African societies have been using traditional conflict resolution concepts through kings or chiefs or headmen to resolve disputes amongst communities or families.⁶¹

⁵⁷ Melville N "Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" 2010 *South African Mercantile Law Journal* 50; <https://www.merriam-webster.com/dictionary/ombudsman#:> (accessed 20/07/2023) It defines the terms Ombudsman as a borrowed word from Swedish, where it means "representative," and ultimately derives from the Old Norse words umboth ("commission") and mathr ("man"). It further provides that Sweden became the first country to appoint an independent official known as an ombudsman to investigate complaints against government officials and agencies; also see Rudolph H "The Ombudsman and South Africa" 1983 *South African Law Journal* 92-109, 93.

⁵⁸ Melville 2010 *South African Mercantile Law Journal* 50; see Woker 2016 *South African Mercantile Law Journal* 21, 35, and 67; also see related discussion on Rudolph 1983 *South African Law Journal*, 98: The author also defines an Ombudsman 'Ombudsman is an office provided for by the constitution or by the action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his motion, and who has the power to investigate, recommend corrective action, and issue reports'; Osakede KO and Ijimakinwa SO "The Role of Ombudsman As A Means Of Citizen Redress In Nigeria" 2014 *Review of Public Administration and Management*, 125.

⁵⁹ Melville 2010 *South African Mercantile Law Journal* 50; also see related discussion on Rudolph 1983 *South African Law Journal* 93; see related discussion on Kucsko-Stadlmayer G "The Spread of the Ombudsman Idea in Europe" 2009 *Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions* 4; Osakede K O and Ijimakinwa S O "Review of Public Administration and Management" 2014 *The Role of Ombudsman as A Means of Citizen Redress in Nigeria*, 126.

⁶⁰ Melville 2010 *South African Mercantile Law Journal* 50; also see related discussion on Rudolph 1983 South Africa. *South African Law Journal* 93: the statement by the author is evident that in 1722 Russia had a similar statement.

⁶¹ Researcher's submission that In the olden times Kings and Chiefs played a mediator's role in terms of resolving inter alia family disputes, a dispute between a seller and buyer of live stocks, in their community or respective villages; Melville 2010 *South African Mercantile Law Journal* 50; also see related discussion in Rukuni T, Machingambi Z, Musingafi, Kwaedza E. Kaseke "The Role of

An ombudsman is an independent dispute-resolution mediator with high-level responsibilities in nations where citizens share a common ideal of effectiveness, objectivity, fairness, and good governance.⁶² It is submitted that an ombudsman performs best in nations where the rule of law and citizens' rights are respected.⁶³ The South African government has made several attempts to establish an ombudsman office in South Africa. The first attempt was made in 1945 by a Member of Parliament (MP), who proposed that an ombudsman be appointed, but it was ultimately rejected by the House of Assembly on the grounds of its "impracticality".⁶⁴ The government's main speaker opposing the motion on the grounds that (a) the cost of such an office would not be justified, (b) the complaints the Ombudsman would receive would be about unimportant issues, so there would be little for the Ombudsman to do, (c) members of Parliament are already ombudsmen, (d) that the public ought not to be urged to file dishonest complaints; (e) that while the White population of South Africa may be able to accept such a position, the rest of the population may not be able to do so; (f) that caution should be exercised when introducing a welfare state in South Africa; and (g) that the Ombudsman's office in South Africa could result in it becoming a local branch office of the United Nations. The issue was then brought up again in 1973 by an MP, who listed the proposed duties of the ombudsman, which include, *inter alia*, the protection of citizens against the actions of the government.⁶⁵

Traditional Leadership in Conflict Resolution and Peace Building in Zimbabwean Rural Communities" 2015 *The Case of Bikita District* 75; also see a related discussion on Choudree R B G 1999 "Traditions of Conflict Resolution in South Africa" *Traditions of Conflict Resolution in South Africa* 10; Mkhize P "Conflict Resolution: An African Style" 1990 *Family and Conciliation Courts Review* 71-72, 71.

⁶² Mupangavanhu Y "An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008." 2012 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 330 / 638; Naudé T and Barnard J "Enforcement and Effectiveness of Consumer Law in South Africa." 2018 *Enforcement and Effectiveness of Consumer Law* 565-590, 578; Melville N "Has Ombudsmania Reached South Africa the Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" 2010 *South African Mercantile Law Journal* 50-65, 55 -59.

⁶³ Rudolph 1983 *South African Law Journal* 92, 98; see related discussion Dlamini C "An Ombudsman for South Africa" 1993 *De Rebus* 71-75, 71, 72.

⁶⁴ Rudolph 1983 *South African Law Journal* 92 (a), 99; see related discussion Dlamini C 1993 *De Rebus* 71, 72; see related discussion Brynard D J 1986 *Advocate-General: South Africa's version of an Ombudsman. International Ombudsman Institute* 1 -28.

⁶⁵ Rudolph 1983 *South African Law Journal* 92 (a), 99; see related discussion Dlamini 1993 *De Rebus* 73-75; see related discussion Brynard 1986 *Advocate-General: South Africa's Version of an Ombudsman, International Ombudsman Institute*, 1 -28.

The office of the Advocate General, which was established by the apartheid government, served as an ombudsman,⁶⁶ and after apartheid, the Public Protector, who was appointed in accordance with the *Interim Constitution*.⁶⁷ According to Melville, Alternative Dispute Resolution (ADR) and arbitration have struggled in South Africa since 1997 and 1999, respectively.⁶⁸ This was due to a lack of effective consumer redress and enforcement measures. Moreover it forced the democratic government's Department of Trade and Industry (DTI) to establish efficient consumer redress and enforcement mechanisms, including the procedures to be followed before contacting the National Consumer Tribunal (NCT or Tribunal), as well as industry-funded alternate dispute resolution mechanisms.⁶⁹ These procedures are outlined in the *Consumer Protection Act*⁷⁰, which states that a complaint against any supplier who is not a member of a statutory ombud may be handled by an industry ombud accredited under the *CPA*, provided that the supplier is a member of any such ombud.⁷¹ The current consumer ombuds in South Africa, which are regulated by industries, differ noticeably from the original concept of the ombudsman, which developed in Sweden to address maladministration and grievances against the government.⁷² There are now ombudsmen in various nations, and the idea has been

⁶⁶ Melville 2010 *South African Mercantile Law Journal* 57; see related discussion Dlamini 1993 *De Rebus* 73-75; see related discussion Brynard, 1986 *Advocate-General: South Africa's Version of an Ombudsman. International Ombudsman Institute*, 1 -28.

⁶⁷ Melville 2010 *South African Mercantile Law Journal* 57; see related discussion Dlamini 1993 *De Rebus* 73-75; see related discussion Brynard, 1986 *Advocate-General: South Africa's Version of an Ombudsman. International Ombudsman Institute* 1 -28. Constitution of the Republic of South Africa, Act 200 of 1993 (*Interim Constitution*).

⁶⁸ Melville 2010 *South African Mercantile Law Journal* 59; Hutchison A, Rycroft A, Porter-Wright M "Private Ordering and Dispute Resolution" 2018 *The South African Law Journal* 339: The authors provide that "Not much has come from these serious contributions, including the compelling argument on the urgent need to bring South African arbitration law in line with international norms. It was only on 13 April 2016 that the cabinet approved the draft International Arbitration Bill for submission to Parliament for debate and approval. After considerable delay, the *Act* was passed as *Act 15 of 2017* and took effect on 20 December 2017".

⁶⁹ Section 69 and 70 of the *CPA*; Melville, 2010 *South African Mercantile Law Journal* 59; van Heerden: *Commentary RS 5, 2020*, 69–1.

⁷⁰ *Consumer Protection Act 68 of 2008 (CPA)*; Naudé and Barnard 2018 Enforcement and Effectiveness of Consumer Law 565-590, 1; Mupangavanhu 2012 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 320 / 638.

⁷¹ Section 69, 70 and 80(6) of the *CPA*; Van Heerden C and Barnard J "Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion" 2011 *Journal of International Commercial Law and Technology* 134; van Heerden: *Commentary RS 4, 2019*, 70–1; Reddy S: "Implementing A South African E-Dispute Resolution System for Consumer Disputes" 2020 *Obiter* 374.

⁷² Van Heerden and Barnard 2011 *Journal of International Commercial Law and Technology* 135.

used in a startlingly wide range of industries.⁷³ In 1809, Sweden enacted a new Constitution that created the Parliamentary Ombudsman Office to function to oversee governmental operations and the administration of justice.⁷⁴ The Ombudsman used its prosecutorial authority as a primary tool to combat negligent or dishonest public management.⁷⁵

Accordingly, this chapter seeks to set out the historical aspects of the regulation of ombud schemes in South Africa. This chapter also provides the role that the common law played prior to the establishment of the MIOSA. The background to the introduction of the MIOSA is to establish why it was introduced, and to investigate how disputes between consumers and suppliers in the motor industry were resolved prior to the introduction of the MIOSA. Lastly, this chapter investigates the strengths and weaknesses of measures that were adopted before the inception of the ombuds under the CPA in resolving consumer disputes in South Africa.

2.2. Common Law

The aspects of private law that are immediately relevant to consumer protection are the law of delict and the law of contract, which are embodied in the common law.⁷⁶ The law of obligations, which is a subset of private law, includes among other things the law of contract, specific contracts, purchases, and sales, as well as the law of delict. Put differently, two areas of private law that have a direct bearing on how the law operates and serves consumers are the law of delict and the law of contract, which includes the law governing more particular contracts like those for sales and services.⁷⁷ Prior to the CPA coming into effect, supplier and consumer relationships

⁷³ Melville 2010 *South African Mercantile Law Journal* 93; Rudolph 1983 *South African Law Journal*, 51; Osakede and Ijimakinwa 2014 *The Role of Ombudsman as A Means of Citizen Redress in Nigeria*, 125,126.

⁷⁴ Melville 2010 *South African Mercantile Law Journal* 93; Rudolph 1983 *South African Law Journal*, 51 ; Osakede and Ijimakinwa 2014 *The Role of Ombudsman as A Means of Citizen Redress in Nigeria*, 125,126.

⁷⁵ Melville 2010 *South African Mercantile Law Journal* 93; Rudolph 1983 *South African Law Journal*, 51 ; Osakede and Ijimakinwa 2014 *The Role of Ombudsman as A Means of Citizen Redress in Nigeria*, 125,126.

⁷⁶ Van Eeden and Barnard 2017 *Consumer Protection Law of South Africa* 62; Neethling J and Potgieter J 2015 "The Law of Delict"(LexisNexis South Africa) *Ann. Surv. S. African L*, 3; Hawthorne LL "Materialisation and Differentiation of Contract Law: Can Solidarity Maintain the Thread of Principle which links the Classical Ideal of Freedom of Contract with Modern Corrective Intervention" 2008 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 440.

⁷⁷ Van Eeden and Barnard "Consumer Protection Law of South Africa 2nd edition" 62; Neethling and Potgieter (2015) 2017 *Ann. Surv. S. African L*, 3.

were largely governed by the common law in regard to the freedom of contract.⁷⁸ The law of contract regulates principles relating to, unfair contractual terms, liability for defective goods, consent to enter into an agreement, and misleading consumers during contract negotiations.⁷⁹ The common law of contract is premised on the basis that there must be a meeting of the minds between two parties before there is a legally binding agreement.⁸⁰ Contracts that were clearly one-sided or oppressive were condemned by the courts.⁸¹ It is submitted that the requirement for contractual freedom is that both contracting parties are equal in terms of contractual freedom.⁸² Commercial agreements in South Africa are subject only to common law and other applicable legislation.⁸³ Currently, the common law still forms the basis for all consumer contracts unless excluded or amended by the CPA.⁸⁴ However, unfair practice in regard to consumer contract or consumer law were widespread at the past and this was as the result of the inequality that existed in transaction between a large corporation and a consumer, and this follows parties not practicing the concept of good faith when entering into a contract.⁸⁵ The following conditions must be met for consumers to be eligible for common law remedies for latent defects, and it is their responsibility to establish these conditions. A substantial defect exists in the goods; B the defect must be latent; C the defect existed at the time the contract was made; D the consumer was unaware of the problem at the time the contract was made.⁸⁶ **The**

⁷⁸ Naude 2018 *Journal of Consumer Policy* 413; Woker 2010 *Obiter* 2023; also see Kriek C 2017 The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law-A Comparative Analysis (Doctoral dissertation, Stellenbosch: Stellenbosch University) 36.

⁷⁹ Naude 2018 *Journal of Consumer Policy*, 413; Woker 2010 *Obiter* 2023; also see Kriek C 2017 The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law-A Comparative Analysis (Doctoral dissertation, Stellenbosch: Stellenbosch University) 36.

⁸⁰ Woker 2010 *Obiter* 2027.

⁸¹ Woker 2010 *Obiter* 2028; also see *Sasfin v Beukes* 1989 1 SA 1 (A) and *Baart v Malan* 1990 2 SA 862 (E).

⁸² Hawthorne 2008 *THRHR* 441; Du Plessis J "Fairness in the Law of Contract: Reflections on Beadica." 2022 *Constitutional Court Review* 197-222.

⁸³ Section 2(10) of the CPA specifically provides that nothing in the CPA precludes a consumer from relying on a right that he or she may have under the common law; Eiselen and Naudé *Commentary RS* 4, 2019, Introduction-1; de Stadler and du Plessis *Commentary RS* 2, 2017, 2-10.

⁸⁴ Section 2(10) of the CPA specifically provides that nothing in the CPA precludes a consumer from relying on a right that he or she may have under the common law; Eiselen S and Naudé T *Commentary RS* 4, 2019, Introduction-1; de Stadler and du Plessis *Commentary RS* 2, 2017, 2-10.

⁸⁵ Eiselen and Naudé *Commentary OS*, 2014, Introduction-11; also see *Commentary RS* 4, 2019, Introduction-3 where the authors discussed cases interpreting the concept of good faith.

⁸⁶ Barnard J The influence of the *Consumer Protection Act* 68 of 2008 on the Common Law of Sale (LLD Thesis, University of Pretoria, 2013) 362; Havenga M, Hurter E, Schulze H, Havenga P,

Common law does provide remedies for defective goods and agreements on the *merx* and moreover, remedies that fall under the law of contract and the law of delict.⁸⁷ However, the common law does not provide for the role and mandate of ombuds.

2.3. Legal Framework for Resolving Consumer Disputes Prior to the Enactment of the CPA

2.3.1 Consumer Affairs (Unfair Business Practices) Act⁸⁸

The *Consumer Affairs (Unfair Business Practices) Act* was the first consumer protection legislation before the CPA. The *Consumer Affairs (Unfair Business Practices) Act* was initially called the *Harmful Business Practices Act*,⁸⁹ later amended by the *Harmful Business Practices Amendment Act ('the Amendment Act')*.⁹⁰ This Act did not explicitly defend consumers' rights, instead relying on individual complaints alleging "unfair business practices" to a Consumer Affairs Committee (committee).⁹¹ The committee would make a recommendation to the Minister who would then order the business to refrain from unfair business practices.⁹² It was regarded criminal offence to ignore an order or the direction by the Minister and any person guilty of this offence would be liable to a fine not exceeding R 200 000 or imprisonment not

Kelbrick R, Manamela E, Manamela T, Stoop P 2010 General Principles of Commercial Law (Paperback, 7th Edition) *Juta Law* 154; Barnard 2012 *De Jure* 455.

⁸⁷ van Heerden C and Barnard L Caveat Emptor: Second-hand Motor Vehicles and the Consumer Protection Act 68 of 2008 in De Serie Legenda: 2019 *Developments in Commercial Law Volume I: Law of Specific Contracts and Banking Law* Lexisnexis 190 – 221, 201-204; Field R A 1977 "Common Law Look at the Law of Latent Defects in Quebec and the Proposals for Its Reform." *Can. Bus. LJ* 209; Otto J, Van Heerden C and Barnard J "Redress in terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in Terms of an Instalment Agreement." 2014 *South African Mercantile Law Journal* 248-249; Kriek C The Scope of liability for Product defects under the South African *Consumer Protection Act 68 of 2005* and Common Law - A Comparative Analysis (LLD thesis, Stellenbosch University, 2017) 36.

⁸⁸ *Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (Consumer Affairs Act)*.

⁸⁹ *Harmful Business Practices Amendment Act 71 of 1988*; The Act's goal was to provide for the prohibition or regulation of certain business practices. An unfair business practice is described as any business practice that could undermine the relationship between businesses and consumers or that will unduly prejudice, deceive, or influence consumers unfairly.

⁹⁰ *Harmful Business Practices Amendment Act 23 of 1999 ('the Amendment Act')*; Woker 2001 *South African Mercantile Law Journal*, 316; Naude, 2018 *Journal of Consumer Policy*, 413.

⁹¹ Naude T "Dissemination of Consumer Law and Policy in South Africa" 2018 *Journal of Consumer Policy*, 413; Woker T "Business Practices and the Consumer Affairs (Harmful Business Practices) Act 71 of 1988" 2001 *South African Mercantile Law Journal* 316; Reddy K and Rampersad R "Ethical Business Practices: The Consumer Protection Act and Socio-Economic Transformation in South Africa" 2012 *African Journal of Business Management* 7404.

⁹² Woker T "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, 219; Du Plessis, M. A. "Enforcement and Execution Shortcomings of Consumer Courts." 2010 *South African Mercantile Law Journal* 517-531.

exceeding five years or both a fine and imprisonment.⁹³ The disadvantage of the *Consumer Affairs (Unfair Business Practices) Act* is that it did not list practices that were regarded as unfair.⁹⁴ The *Consumer Affairs (Unfair Business Practices) Act* did not make provision for private structures for dispute resolution similar to those contained in the *CPA* and the accreditation of industry ombuds.⁹⁵ However, it did advocate for self-regulation business structures which are improved under the *CPA*.⁹⁶

After democracy, several regulatory bodies including the DTI, the South African Bureau of Standards (SABS), and the Departments of Agriculture, Health, and Environmental Affairs, were in responsibility for enforcing compliance with the *Consumer Affairs Act*.⁹⁷ Unfortunately, this resulted in a lack of coordination among the regulators, which made the regulations ineffective and offered little protection to consumers.⁹⁸ *The Business Names Act* was aimed to regulate business names and address issues related thereto.⁹⁹ The *Act* shall not apply to a corporate body, established or registered under the provisions of any law, in respect of any business carried on by it under the name by which it is so established or registered.¹⁰⁰ The Registrar may prohibit use of certain business names by any person who conducts business under a name, title, or description that the Registrar determines is intended to mislead the public, frustrate or offend any individual or group of individuals, or is suggestive of blasphemy or indecency may be given a written order by the Registrar to stop doing so. This order may be given upon the written request of any aggrieved party.¹⁰¹ The *Price Control Act*, later amended to *Price Control Amendment Act 1976*

⁹³ Woker 2001 *South African Mercantile Law Journal* 316; Du Plessis M A 2008 "Towards better service delivery by consumer courts" *South African Mercantile Law Journal* 74; Woker *Obiter* 2010, 2020.

⁹⁴ Woker 2001 *South African Mercantile Law Journal* 316; Du Plessis 2008 *South African Mercantile Law Journal* 74; Woker 2010 *Obiter*, 2019.

⁹⁵ Section 70, 82 of the *CPA*; Van Eeden E and Barnard J *Consumer Protection Law of South Africa 2nd edition* (LexisNexis Johannesburg 2017) 34.

⁹⁶ Van Eeden and Barnard *Consumer Protection Law of South Africa* 34; Woker 2010 *Obiter* 217-231, 221 -223.

⁹⁷ Woker 2010 *Obiter* 219; Consumer-Protection-Guide-for-Lawyers, *Law Society of South Africa* 2011, 8

⁹⁸ Woker 2010 *Obiter* 219; Consumer-Protection-Guide-for-Lawyers, *Law Society of South Africa* 2011, 8

⁹⁹ *Business Names Act 27 of 1960*, Preamble, Consumer-Protection-Guide-for-Lawyers, *Law Society of South Africa* 2011, 8.

¹⁰⁰ Section 2 of *Business Names Act*.

¹⁰¹ Section 5(1) of *Business Names Act*.

Act,¹⁰² the *Sale and Service Matters Act*,¹⁰³ and the *Trade Practises Act* and the purpose of this act is to protect the consumer public against certain undesirable trade practices.¹⁰⁴ There are other pieces of statutes that the CPA repealed.

2.4 The Weaknesses of the Consumer Legislative Framework Before the CPA

The problem with the *Consumer Affairs (Unfair Business Practices) Act* was that the definition of an 'unfair business practice' is extremely wide.¹⁰⁵ An unfair business practice is defined as 'any business practice which directly or indirectly has or is likely to have the effect of harming relations between business and consumers, unreasonably prejudicing any consumer, deceiving any consumer, or unfairly affecting any consume.'¹⁰⁶ Another weakness or problem was that the *Consumer Affairs (Unfair Business Practices) Act* had to be applied with other legislation to offer better protection..¹⁰⁷ This created an opportunity for suppliers or retailers to abuse consumers' rights and exploit consumers.¹⁰⁸ Even though the MIOSA came into existence before the CPA was promulgated, consumers did not have suitable platforms to lodge their complaints due to a lack of compliance from suppliers and a

¹⁰² *Price Control Act 25 of 1964, Price Control Amendment Act 1976. Act No. 39, 1976: aimed to amend the provisions of the Price Control Act, 1964, relating to definitions; the prohibition on the sale of goods 'and the rendering of services on certain conditions; the powers of price control supervisors and inspectors; the power of the Price Controller to grant exemptions; and the penalties which may be imposed for offences under the said Act; and to provide for incidental matters.*

¹⁰³ *Sale and Service Matters Act 25 of 1964; amended to Sale and Service Matters Amendment Act No 80, 1995*

¹⁰⁴ *Trade Practises Act 76 of 1976; Devenish GE University of the Western Cape, De Rebus Procuratoriis, September 1976, 448*

¹⁰⁵ Report In Terms of Section 10(1) of *The Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 Of 1988)*, "Draft Report Investigation into the business practice of Zhauns Group of Companies" 31 MARCH 2011, 6; Woker 2001 *South African Mercantile Law Journal* 316.

¹⁰⁶ Mugobo V and Malunga P "Consumer Protection in South Africa: Challenges and Opportunities for Furniture Retailers in Cape Town, South Africa" 2015 *Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy*, 225; Woker 2001 *South African Mercantile Law Journal* 317; Report In Terms Of Section 10(1) Of *The Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 Of 1988)*, "Draft Report Investigation into the Business Practice of Zhauns Group of Companies" 31 MARCH 2011, 6.

¹⁰⁷ Du Plessis M A "Towards Better Service Delivery by Consumer Courts" 2008 *South African Mercantile Law Journal*, 74; The pieces of legislation are the *Merchandise Mark Act of 1941* -that regulated the marking of merchandise and of coverings in or with which merchandise was sold and the use of certain words or emblems by businesses; *the Sales and Service Matters Act of 1964* provided control of the sale of goods and rendering of services and other incidental matters. The *Price Control Act of 1964* sought to control the prices that sellers charged for their goods and services. The act thus sought to protect consumers against overpricing by sellers. The *Trade Practises Act of 1976* sought to protect consumers against false or misleading advertisements.

¹⁰⁸ Mugobo and Malunga 2015 *Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy*, 225; Du Plessis 2008 *South African Mercantile Law Journal*, 74

lack of education, as most of the consumers did not fully understand their rights, and that made them vulnerable to exploitation.¹⁰⁹ Where the MIOSA could not resolve a consumer's dispute, the next available avenue for redress was for the consumer to approach the courts. However, this did not favour most consumers, especially the vulnerable since litigation is expensive.¹¹⁰

The researcher argues that the South African consumer protection law consisted of patches of outdated ineffective laws that was restricted to a few small areas of law, such as credit agreements, usury, price control, insurance agreements, promotional competitions, and unfair business practices.¹¹¹ Furthermore, some parts of the common law did not offer consumers full protection against latent defects which could be excluded in an agreement.¹¹² Common law also provided limited protection against unfair contract terms, unfair direct marketing practises, poor quality or dangerous goods and services, unfair or irresponsible marketing practises, unfair discrimination in the marketplace, the consumer's right to choose, and the provision of insufficient information on products and services, among other things.¹¹³

2.5 Conclusion

In the premises there is historical evidence that Ombuds existed in this county, such as the introduction of the Advocate-General Act in 1979.¹¹⁴ The Act provides for the

¹⁰⁹ Mugobo and Malunga 2015 *Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy*, 225; Du Plessis 2008 *South African Mercantile Law Journal*, 74.

¹¹⁰ See Woker 2019 *Stellenbosch Law Review* 105; Van Eeden and Barnard *Consumer Protection* 2017 182 -185; Du Plessis 2008 20 *South African Mercantile Law Journal*, 80; de Stadler E and du Plessis E *Commentary RS 2*, 2017, 2–11.

¹¹¹ Eiselen and Naudé *commentary RS 4*, 2019, Introduction–1; also see Woker 2010 *Obiter* 217–231; Van Eeden and Barnard 2017 *Consumer Protection in South Africa* 2; Du Preez 2009 "The Consumer Protection Bill: A few Preliminary Comments" *TSAR* 58.

¹¹² Mupangavanhu Y "Fairness a Slippery Concept: The Common Law of Contract and the *Consumer Protection Act 68 of 2008*" 2015 *De Jure Law Journal*, 116-135; see Barnard J "The Influence of the *Consumer Protection Act 68 of 2008* on the Warranty Against Latent Defects, Voetstoets Clauses and Liability for Damages." 2012 *De Jure* 455-459; also see Naude T "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 *South African Mercantile Law Journal* 336-351.

¹¹³ Eiselen and Naudé *commentary RS 4*, 2019, Introduction–1; Du Preez 2009 *TSAR* 58; also see Kelly-Louw M "Better Consumer Protection under the Statutory in Duplum rule" 2007 *South African Mercantile Law Journal*, 339-344 – where the author discusses The statutory rule drastically alters the common-law rule and provides for better protection for debtors and how the statutory law in duplum rule offers better consumer protection than its common-law counterpart; also see Mupangavanhu Y "Fairness a Slippery Concept: The Common Law of Contract and the *Consumer Protection Act 68 of 2008*" 2015 *De Jure Law Journal*, 116-135.

¹¹⁴ *Advocate-General Act 118 of 1979*; Rudolph 1983 *South African Law Journal*, 100; Dlamini C "An Ombudsman for South Africa." 1993 *De Rebus*, 71-75, 71, 72.; Brynard DJ "Supporting

appointment of an Advocate-General to look into, among other things, whether (a) state funds have been or are being handled dishonestly; (b) anyone has been, or is being, directly or indirectly, enriched, or has received, or is receiving any advantage, in an unlawful or unjust manner through, or as a result of any act or omission.¹¹⁵ The Advocate-General, however, was not exempt from criticism, such as the limitations on media freedom, the limited scope of the investigation, and the process for filing complaints.¹¹⁶ The researcher suggests that the Advocate General's jurisdiction and terms of reference should have been **expanded to address this criticism**. The *Advocate-General Amendment Act* amended the *Advocate-General Act*, and now it is referred to as the *Ombudsman Act*, which establishes the criteria, responsibilities, and powers of an ombudsman.¹¹⁷ The *Ombudsman Act*, which provided for the appointment of an ombudsman, was eventually replaced by the Public Protector under the Interim Constitution.¹¹⁸ According to the researcher, for an ombudsman scheme to be credible, it must be able to act independently, free of opposition from the entity or industry, have enough budget to accomplish its functions and be effective, and be accessible. The method of self-regulation promoted under the *Consumer Affairs (Unfair Business Practises) Act* resembles the dispute resolution allowed for in the *CPA*, as well as industry codes of conduct and accreditation of industry ombuds provided for in the *CPA*. However, the *CPA* method appears to give these (self-regulatory) corporate structures a much-widened responsibility when compared to the position under the *Consumer Affairs (Unfair Corporate Practises) Act*.¹¹⁹ For self-regulation to be truly effective there must be an industry body that has the capacity to

constitutional democracy in South Africa: an assessment of the Public Protector (Ombudsman)." 1999 *SAIPA*, 8.

¹¹⁵ Section 4(1) of the *Advocate-General Act 118 of 1979*; further provides that (i) related to state matters; (ii) by anyone while they are working for the state as an employee; or (iii) at the state's expense; Rudolph 1983 *South African Law Journal*, 100; see Dlamini 1993 *De Rebus* 72 -73.

¹¹⁶ Rudolph 1983 *South African Law Journal*, 101 -103; Brynard DJ "Supporting Constitutional Democracy in South Africa: An Assessment of the Public Protector (Ombudsman)." 1999 *SAIPA* 8; see Dlamini 1993 *De Rebus* 72 -73.

¹¹⁷ *Advocate-General Amendment Act 104 of 1991, Ombudsman Act 118 of 1979*; see Dlamini 1993 *De Rebus* 72 -73; Brynard DJ 1999 *SAIPA* 8.

¹¹⁸ Chapter 8 of the *Constitution of the Republic of South Africa, Act 200 of 1993*; see the *Public Protector Act 23 of 1994*; Brynard 1999 *SAIPA* 8; Van Heerden C and Barnard J "Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion." 2011 *Journal of International Commercial Law and Technology* 134.

¹¹⁹ *Consumer Affairs (Unfair Business Practises) Act of 1988*; Section 70, 82 of the *CPA*; Van Eeden E and Barnard J 2017 "Consumer Protection Law of South Africa 2nd edition" 34.

monitor the industry **and deal** with transgressors effectively. There must also be a telling sanction **that** will deter businesspeople from transgressing their code.¹²⁰

The researcher submits that the common law remedies that were available to consumers in circumstances where they **were** in possession of defective goods were restricted and offered limited protection to consumers, merely they could cancel their contracts with the supplier **and were** expected to settle the amount owed. When it came to latent defects, consumers had to demonstrate that the goods were defective, which was difficult when the defects were either not obvious or had not yet materialised. Consumers will not be able to demonstrate that their vehicles had defects at the time the agreement was finalised in such a situation. As a result, consumers will not be able to rely on the common law remedies to which they are entitled.

This next chapter will focus on an analysis of the role and mandate of the MIOSA in line with the South African automotive industry code of conduct and outline the powers of the ombud regarding investigating consumer disputes **and** providing recommendations. The next chapter will outline the jurisdiction and the ambit of the role and mandate of the MIOSA.

¹²⁰ Woker T "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, 221 -223; also see Van Eeden E and Barnard J 2017 "Consumer Protection Law of South Africa 2nd edition" 34-35.

CHAPTER THREE

AN OVERVIEW OF THE ROLE AND MANDATE OF THE MOTOR INDUSTRY OMBUDSMAN OF SOUTH AFRICA UNDER THE *CONSUMER PROTECTION ACT* 68 OF 2008

3.1. Introduction

According to the *Consumer Protection Act*, any person with *locus standi* may seek to enforce their rights under the *Act* or under a transaction or agreement, or otherwise resolve any dispute with a supplier, by referring the matter to the applicable industry ombud, accredited under the *CPA*, if the supplier is subject to any such ombud.¹²¹ A proposed industry code may contain an alternative dispute resolution scheme if the National Consumer Commission (NCC or Commission) determines that the scheme is sufficiently set up and equipped to offer Alternative Dispute Resolution (ADR) services equivalent to those typically offered under any public regulation, the *CPA* will regulate the code.¹²² Furthermore, the NCC may also recommend that the scheme be accredited as an industry ombud.¹²³ The Motor Industry Ombudsman of South Africa (MIOSA) is an industry ombud accredited in terms of the *CPA* and it was empowered to provide a role of conciliation, mediation or arbitration services to assist in the resolution of consumer disputes in the motor industry in South Africa.¹²⁴ The office began as a volunteer entity in 2000 but was accredited under the *CPA* in 2015.¹²⁵ The MIOSA resolves disputes between industry participants and consumers, however, ombud schemes recognised under the *CPA*,

¹²¹ Section 69 of the *Consumer Protection Act* 68 of 2008 (*CPA*); Naudé T and Eiselen S (eds) *Commentary on the Consumer Protection Act* (Juta and Co. Cape Town 2015) RS 5, 2020 69–1; Van Vreden J 2010 *Ombudsman's Annual Reports* 4-5; Motor Industry Ombudsman of South Africa 2019/20, *Annual Reports* 2.

¹²² Section 82 of the *CPA*; Van Vreden 2017 *Ombudsman's Annual Reports* 3; Motor Industry Ombudsman of South Africa 2019/20, *Annual Reports* 2.

¹²³ Section 82 of the *CPA*; van Heerden *Commentary* RS 6, 2021 69–11 in Naudé, T & Eiselen, S (eds) *Commentary on the Consumer Protection Act* (Juta and Co. Cape Town 2015) ; Van Vreden 2017 *Ombudsman's Annual Reports* 3; Motor Industry Ombudsman of South Africa 2019/20, *Annual Reports* 2.

¹²⁴ Section 82 of the *CPA*; *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71 para 1.

¹²⁵ <https://www.businesslive.co.za/bd/life/motoring/2021-09-23-motor-ombudsman-fees-slammed-for-being-too-expensive/> (accessed 01/07/2023) Naudé T and Barnard J "Enforcement and Effectiveness of Consumer Law in South Africa" in Micklitz HW and Saumier G (eds) *Enforcement and Effectiveness of Consumer Law* (Springer International Publishing New York 2018) 590-578 579.

as well as other industry ombuds, do not have the authority to make binding decisions, although their decisions are often accepted by both parties.¹²⁶

Since its accreditation as an industry ombudsman, the MIOSA has remained in compliance with the Codes and the King IV code of corporate governance.¹²⁷ The governance framework of the MIOSA is built around the ideals of accountability, transparency, ethical management, justice, and upholds the requirements as set out in the preamble of the *CPA*.¹²⁸ The governing board of the MIOSA recognises that excellent governance may build long-term value and improve equity performance through an ethical culture, competitive performance, effective control, and legitimacy.¹²⁹ The MIOSA also provides consumer advice and training on the *CPA* to motor-related service providers. It also maintains solid connections with automotive trade organisations and consumer groups, and its jurisdiction is legally enforced.¹³⁰

The *CPA* enables the Minister of the Department of Trade, [Industry, and Competition](#) to issue industry codes of conduct. This is a valuable and effective legislative approach to dealing with a wide range of economic sectors. This follows that the sector codes are an essential source of supplier-consumer obligations that are acknowledged, accepted, and followed by suppliers in a certain industry.¹³¹ The Minister has accepted the Industry Code, and accredited the industry ombuds as the appropriate conflict resolution programmes they produce. As a result of its determination that the bulk of

¹²⁶ Naudé and Barnard 2018 *Enforcement and Effectiveness of Consumer Law* 11; Section 70 of the *CPA*; van Heerden *Commentary* RS 6 2021 70–3.

¹²⁷ Van Vreden 2017 *Ombudsman's Annual Reports* 3; South African Automotive Industry Code of Conduct Government Gazette 2014 (the Code) 7.

¹²⁸ See Preamble to the *CPA*; also see Van Vreden 2010 *Ombudsman's Annual Reports* 5; Motor Industry Ombudsman of South Africa 2019/20, *Annual Reports* 2; Motor Industry Ombudsman of South Africa 2021/22, *Annual Reports* 2.

¹²⁹ Van Vreden 2010 *Ombudsman's Annual Reports* 5; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 10.

¹³⁰ Van Vreden 2011 *Ombudsman's Annual Reports* 5; Motor Industry Ombudsman of South Africa 2019/20, *Annual Reports* 2; Motor Industry Ombudsman of South Africa 2019/20, *Annual Reports* 2.

¹³¹ Section 82 of the *CPA* ; van Heerden *Commentary* OS, 2014 82–2.

customer complaints emanate from the motor industry.¹³² The Code mandates that the MIOSA comply with all relevant governance-related legislation and principles.¹³³

In this chapter, the researcher seeks to focus on an analysis of the role and mandate of the MIOSA in line South African automotive industry code of conduct. This is done to investigate the powers of the MIOSA regarding investigating consumer disputes and providing recommendations.

3.2. The Role and Mandate of the MIOSA

3.2.1 Providing Access to Alternative Dispute Resolution

The MIOSA office was founded in the year 2000 to create an independent ombudsman that would cover the retail industry in addition to car manufacturers and importers.¹³⁴ The MIOSA was established to provide consumers and all sectors involved with access to alternative dispute resolution.¹³⁵ The retail industry took some time to embrace the idea of an independent alternative dispute resolution organisation and there was also a perception that it would be a threat to their companies.¹³⁶ However,

¹³² van Heerden *Commentary RS 2*, 2017 82–6; also see "Prescription of the South African Automotive Industry Code and Accreditation of the Alternative Dispute Resolution Scheme Administered by the Motor Industry Ombud of South Africa" as an Accredited Industry Ombud (GN 817 in GG 38107 of 17 October 2014); also see National Consumer Commission, "Remarks by Commissioner Ebrahim Mohamed at the Launch of the Consumer Goods and Services Code of Conduct" Paper Presented at the Launch of the Consumer Goods and Services Code of Conduct, 2015, 5.

¹³³ van Heerden *Commentary RS 2*, 2017, 82–7; The Code 2014, 12.1.2–4; also see *Consumer Goods and Services Ombud NPC and Another v Voltex (Pty) Ltd and Others* (18096/2017) 2021 ZAGPPHC 309 : The court held that the Code is mandatory for all suppliers belonging to the industry and the Ombud is empowered to enforce compliance with the Code; Woker "Consumer protection and alternative dispute resolution" 2016, 28 *South African Mercantile Law Journal* 21.

¹³⁴<https://www.miosa.co.za/history.php#:~:text=The%20office%20of%20the%20Motor,organisation%20in%20the%20year%202000> History | MIOSA (accessed on 21 May 2023); Ofori-Boateng C, "Factors to Consider when Establishing an Effective Tax Ombudsman in South Africa" *Mini-dissertation submitted in partial fulfilment of the requirements for the degree Magister Commercii in South African and International Taxation at the Potchefstroom Campus of the North West University*, 2014, 81: the author provides that MIOSA was established in 1999 to resolve differences arising between service providers within the industry and their customers; van Vreden J "Motor Industry Ombuds Annual Report" 2011 1, 3 and 4: The author provided that the MIOSA was established twelve years ago to adjudicate and conciliate in matters where service providers in the motor industry and their customers have reached an impasse and a dispute is declared; Naudé and Barnard 2019 *Enforcement and Effectiveness of Consumer Law in South Africa* 578.

¹³⁵ Motor Industry Ombudsman of South Africa 2020/21 *Annual Report 2*; Motor Industry Ombudsman of South Africa 2019/20 *Annual Report 2*

¹³⁶ Vreden JV Ombudsman's *Annual Report* 2017 3; van Vreden J 2011 " Motor Industry Ombuds Annual Report" 3.

the vehicle manufacturers and importers backed the idea from the beginning.¹³⁷ All sides thought it would be advantageous for South African consumers to have a specialised industry ombud to assist in resolving consumer disputes.

The MIOSA is currently funded by the automotive industry in South Africa. Given this funding model, there was concern about the independence of the MIOSA after it was established.¹³⁸ Most consumers were worried that they would be prejudiced and be left more vulnerable and that the decisions of the MIOSA would benefit the industry. To guard against this perceived bias, the MIOSA entered into a contractual agreement that precludes any car manufacturer or related company from interfering with its day-to-day operations to discourage criticism and questions about its independence.¹³⁹ The manufacturer, importer, and retail sectors are required to accept and adhere to the ombudsman's recommendations. Consumers are also required to accept the ombuds' decisions.¹⁴⁰ Since the MIOSA, was established prior to the enactment of the *CPA*, it has faced problems with training its personnel to comprehend and be able to use the *CPA*'s rules when resolving disputes. Since its establishment, the MIOSA has played a significant role regarding consumer disputes considering the NCC, which was created under the *CPA*, lacked automotive-related professionals.¹⁴¹ The NCC was also given the task of assembling a group to draft the South African Automotive Industry Code of Conduct (the Codes) of Practice for the sector, which received accreditation from the Minister of Trade and Industry in October 2014.¹⁴²

¹³⁷ History | MIOSA (accessed on 21 May 2023); Ofori-Boateng 2014 "Factors to Consider When Establishing an Effective Tax Ombudsman in South Africa" *Mini-dissertation Submitted in Partial Fulfilment of the requirements for the Degree Magister Commercii in South African and International Taxation at the Potchefstroom Campus of the Northwest University*, 81; Naudé & Eiselen *Commentary RS 2*, 2017, 82–9.

¹³⁸ History | MIOSA; van Vreden 2011 "Motor Industry Ombudsman *Annual Report*" 5; Koekemoer MM. "Consumer complaints and complaint forums employed in the South African motor vehicle service industry: A Survey of the Literature." *Journal of Applied Business Research* (2014): 659-670, 665; See www.miosa.co.za/articles/MIOSA_issue4_vol5.pdf (accessed 10/07/2023).

¹³⁹ History | MIOSA; van Vreden 2011 "Motor Industry Ombudsman *Annual Report*" 5; Koekemoer M.M 2014 *Journal of Applied Business Research* 665; See www.miosa.co.za/articles/MIOSA_issue4_vol5.pdf.

¹⁴⁰ See the Motor Industry Ombudsman *Annual Report* 2014/2015 29, it was stated that the commission enters into a consent agreement with non-complying suppliers to agree to abide by the legislation; Woker T "Consumer protection: an overview since 1994." *Stellenbosch Law Review* 2019: 97-115, 107.

¹⁴¹ Information regarding MIOSA is available at <http://www.moisa.co.za>; Woker 2019 *Stellenbosch Law Review* 107.

¹⁴² History | MIOSA; also see Naudé and Barnard 2019 "Enforcement and Effectiveness of Consumer Law in South Africa" 567 and 569; See www.miosa.co.za/articles/MIOSA_issue4_vol5.pdf

Most consumers in South Africa were not given enough recourse under previous consumer protection regime.¹⁴³ As a result of this, it became challenging for ordinary consumers to exercise their rights; thus, the CPA regulations were codified, creating new avenues for consumers to enforce their rights in South Africa.¹⁴⁴ The MIOSA was established as an additional complaint forum for consumers, and in order for them to file a complaint in accordance with the proper procedure, they must be better informed about the MIOSA's rules and procedures.¹⁴⁵ The complaint forums like the MIOSA are made available for consumers to enforce their consumer rights. The researcher submits that there was a need for an industry-specific ombud that would be exclusively responsible for motor industry-related disputes, and this follows that a vehicle is an expensive commodity. The application of the rules and/or procedure should be different in terms of materialistic defects that can allow a product to be repaired, replaced, or for a consumer to be reimbursed.¹⁴⁶

3.2.2. Enforcement of the Industry Code

The CPA provides that the supplier or a service provider must not violate any applicable industry code in the ordinary course of business.¹⁴⁷ The CPA furthermore empowers the MIOSA to prevent any party from supplying information if it fails to reply to the MIOSA request within 10 business days. The MIOSA is required to report any noncompliance with the Code or the CPA by a supplier or service provider to the Automotive Industry Association, of which it is a member, and/or the NCC so that the non-complaints can be investigated.¹⁴⁸ If any supplier, the MIOSA, or its staff become aware of a criminal act being committed or intended to be committed within the automotive industry, or of a practice that might be considered or alleged to be a

¹⁴³ Koekemoer M.M "Consumer Complaints and Complaint Forums Employed in the South African Motor Vehicle Service Industry: A Survey of the Literature" 2014 *Journal of Applied Business Research* 660; Jacobs W, Stoop P N and Van Niekerk R 2010 "Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis" *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 307-508.

¹⁴⁴ Koekemoer 2014 *Journal of Applied Business Research* 660; Jacobs , Stoop and Van Niekerk 2010 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 307-508.

¹⁴⁵ Koekemoer 2014 *Journal of Applied Business Research* 660.

¹⁴⁶ Section 56 of the CPA; de Stadler E, *Commentary* OS, 2014, 56–1

¹⁴⁷ Section 82(8) of the CPA; Melville and Yeats *Commentary* RS 2, 2017, 82–13; The Code 2014, 6.

¹⁴⁸ The Code 2014, 12; Melville and Yeats *Commentary* RS 2, 2017, 82–13.

criminal offence, they will be required to report the act or behaviour to the appropriate authority.¹⁴⁹

3.3 The Jurisdiction of the MIOSA

The MIOSA's jurisdiction covers the relationship between the party conducting business in the automotive industry space and their relations with consumers.¹⁵⁰ The suppliers or service providers that form part of the automotive industry are defined as including:

“importers, distributors, manufacturers, retailers, franchisors, franchisees; suppliers, and intermediaries who import, distribute, produce, retail or supply passenger, recreational, agricultural, industrial, or commercial vehicles, including but not limited to passenger vehicles, trucks, motorcycles, quad cycles, whether self-propelled or not or an internal combustion propelled engine for a boat, or import, distribute, manufacture, retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles; and trailers, and anyone who modifies, converts or adapts vehicles”.¹⁵¹

The same definition of what constitutes a supplier was discussed in the case of *The Motor Industry Ombudsman of South Africa v Silver Park Motors CC*.¹⁵² In this case, a MIOSA officer of the appellant visited the first respondent's premises on November 30, 2015, where it operates as a fuel retailer. The appellant asked the respondent, why their business is not registered as a retailer under the CPA and the Code.¹⁵³ The official was informed that the first respondent would not register with the appellant because it does not fall under the scope of the Code's definition of the motor

¹⁴⁹ The Code 2014, 12; The Motor Industry Ombudsman of South Africa, 2017 *Annual Report*: some of the requirements for reporting under King IV code of corporate governance include *inter alia* accountability, transparency, ethical management, and fairness, and Conducting business based on fair commercial competitive practices.

¹⁵⁰ The Code 3; Melville and Yeats *Commentary RS 2*, 2017, 82–9.

¹⁵¹ The Code 3; See *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71, 4.

¹⁵² In *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71, 4, 12.

¹⁵³ Section 82 of the CPA; Melville and Yeats *Commentary RS 2*, 2017, 82–9; Clause 2.3 of the Code 4.

industry.¹⁵⁴ The appeal judge provided that the consumers of fuel and lubricants are protected by the Consumer Goods and Services Industry Code of Conduct (the Consumer Goods Code), which has been prescribed by the Minister as the industry code for the consumer goods and services industry, and under which the Consumer Goods and Services Ombud (CGSO) is the accredited industry ombud under the CPA.¹⁵⁵ Therefore, the court held that the first respondent was not a retailer of accessories, nor did it provide consumers with repair or replacement services as defined under the statute. As a result, the application was denied.¹⁵⁶ The court *a quo* did not deem it necessary to decide the review application since it determined that the first respondent did not meet the definition. As a result, the court *a quo* was correct and the appeal must fail, the appeal is dismissed with costs.¹⁵⁷

With respect to the aforementioned case, the MIOSA's jurisdiction does not extend to any disputes that fall under [the sole](#) responsibility of another ombud.¹⁵⁸ The jurisdiction also excludes any dispute [that has](#) been prescribed under the *Prescription Act*.¹⁵⁹ In the case of *Ngoza v Roque Quality Cars* both the NCC or Commission and Roque Quality Cars, ("Roque") raised the issue that the matter had prescribed.¹⁶⁰ The NCT held that the referral to MIOSA halted prescription because the CPA requires a consumer to exhaust all available remedies before proceeding to civil court.¹⁶¹ Referring the matter to the applicable industry ombud is one of the dispute resolution options open to an aggrieved customer. The MIOSA is the recognised industry ombudsman in charge of resolving consumer concerns in the motor vehicle industry. Its code of behaviour applies to all industry participants. As a result of filing a complaint with MIOSA, the NCT determined [that the prescription](#) had been interrupted while the

¹⁵⁴ See Melville and Yeats *Commentary RS 2*, 2017, 82–9; Clause 2.3 of the Code 4; also see *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71, 4, 12.

¹⁵⁵ In *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71, 4, 12.

¹⁵⁶ In *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71, 4, 12.

¹⁵⁷ In *Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) 2019 ZASCA 71, 4, 12.; Section 82 of the CPA; The Code 2014, 12; The Motor Industry Ombudsman of South Africa, 2017 *Annual Reports* 4.

¹⁵⁸ Melville and Yeats *Commentary RS 2*, 2017, 82–9; The Code 2014, 10.

¹⁵⁹ Section 10(1), 11(d) of the *Prescription Act 68 of 1969*; see Clause 17.2 of the Code 10

¹⁶⁰ In *Ngoza v Roque Quality Cars CC* (NCT/79905/2017/73(3)&75(1)(b)) ZANCT 110, 28 June 2018; Section 69 of the CPA; Melville and Yeats *Commentary RS 2*, 2017, 82–9; The Code 10.

¹⁶¹ Section 69 and 70 of the CPA; In *Ngoza v Roque Quality Cars CC* (NCT/79905/2017/73(3)&75(1)(b)) ZANCT 110.

complaint was being handled by MIOSA, because Ngoza could not have contacted a civil court before exhausting his other remedies.¹⁶²

Moreover, the jurisdiction of the MIOSA excludes disputes that require the determination of the merits and the amount for damages. In the *case of Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and Others*¹⁶³ the court stated that the industry ombud lacked jurisdiction in the case at hand since she or he could not decide the merits of the complaint or the quantum of damages. Moreover, if it appears that either party has committed a crime, the MIOSA will only address the facts outside the scope of the suspected crime if either party has already initiated legal action, unless the complaint was received by the MIOSA prior to the institution of such legal action.¹⁶⁴ The MIOSA's jurisdiction is further constrained in that it is not permitted to consider a complaint or dispute involving a juristic person who is a consumer and whose total assets or annual revenue equals or exceeds the threshold set by the Minister by regulation issued under the *CPA* from time to time. Additionally, the MIOSA is also not permitted to make a decision regarding product liability.¹⁶⁵

3.4 Dispute Resolution and/or Complaint Process of the MIOSA

The dispute resolution procedure of the MIOSA entails that a consumer is supposed to first approach the supplier's internal complaint handling procedure, and if that fails, then escalate the complaint to the ombud scheme.¹⁶⁶ In terms of the *CPA*, if customers desire to resolve their dispute, they should follow the procedures outlined in the *CPA*.¹⁶⁷ As a result, the *CPA* seeks to empower consumers through awareness and education, while also providing customers with an efficient and accessible means of

¹⁶² In *Ngoza v Roque Quality Cars CC* (NCT/79905/2017/73(3)&75(1)(b)) ZANCT 110, 28 June 2018; Section 69 of the *CPA*; Melville and Yeats *Commentary RS 2*, 2017, 82–9; The Code 10.

¹⁶³ *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and Others* 2016 ZAFSHC 105 (unreported case no A169/2014 (FB)); van Heerden *Commentary RS 5*, 2020, 69–25; Melville and Yeats *Commentary RS 2*, 2017, 82–9

¹⁶⁴ Melville and Yeats *Commentary RS 2*, 2017, 82–9 and 82-10; The Code 2014, 10.

¹⁶⁵ Section 5(2) of the *CPA*; Melville and Yeats *Commentary RS 2*, 2017, 82-10.

¹⁶⁶ Section 69, 70, 82 of the *CPA*; van Heerden *Commentary RS 5*, 2020, 69–20; *Nzwana v Dukes Motors t/a Dampier Nissan* 2019 ZAECHGHC 81, 31, where this preferred route of redress was endorsed.

¹⁶⁷ Section 69, 70, 82 of the *CPA*; van Heerden *Commentary RS 5*, 2020, 69–20; *Nzwana v Dukes Motors t/a Dampier Nissan* 2019 ZAECHGHC 81, 31, where this preferred route of redress was endorsed.

dispute resolution.¹⁶⁸ Aside from outlining several routes for customers to pursue if they have a complaint against a supplier, the *CPA* also permits consumers to exercise their consumer rights using the channels set out in the *CPA*.¹⁶⁹ According to the MIOSA process, once all essential information regarding a complaint or dispute is obtained, the MIOSA must first seek to mediate the dispute between the parties.¹⁷⁰ Should mediation fail to resolve the dispute, the MIOSA must present the parties with a certificate to that effect. In the event that oral evidence is required to resolve the disagreement, the MIOSA may request that the parties attend a hearing with at least 10 days written notice.¹⁷¹ It is furthermore possible to arrange for the hearing to be recorded or to have *an* interpreter present, and the parties may even be helped by a legal counsel.¹⁷² The MIOSA has 10 business days following the conclusion of the hearings to present its ruling. If a settlement is reached with the support of the MIOSA, the outcome may be recorded in the form of an order in accordance with the *CPA* and, at the request of a party to a dispute, submitted to the National Consumer Tribunal (NCT) or the High Court for the purpose of making a consent order.¹⁷³ If a consumer is dissatisfied with the outcome of the procedure, they may request that the process be terminated so that they can submit a complaint with other redress mechanism in line with the *CPA*.¹⁷⁴

In *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* the court dealt with differing viewpoints on routes of redress.¹⁷⁵ The court took a more liberal

¹⁶⁸ Section 3(f)–(g) of the *CPA*; Reddy S "Implementing a South African E-Dispute Resolution System for Consumer Disputes" *Obiter* 2020 373; Melville N and Yeats J *Commentary* RS 7, 2022, 82–7; South African Automotive Industry Code of Conduct (the Code) 2014, 9.

¹⁶⁹ Section 69 of the *CPA*; Section 70 of the *CPA*; van Heerden C *Commentary* RS 5, 2020, 69–1; van Heerden *Commentary* RS 4, 2019, 70–1; also see *Wingfield Motors (Pty) Ltd v National Consumer Commission* (NCT/3882/2012/101(1)(P) *CPA*) 2012 ZANCT 27, 4.

¹⁷⁰ South African Automotive Industry Code of Conduct *Government Gazette* 2014 18 (the Code); Section 82 of the *CPA*; Melville N and Yeats J *Commentary* OS, 2014, 82–1; Melville and Yeats *Commentary* RS 2, 2017, 82–13.

¹⁷¹ The Code Schedule 2, 15; Melville and Yeats *Commentary* RS 2, 2017, 82–13

¹⁷² The Code Schedule 2, 16; Koekemoer 2014 *Journal of Applied Business Research* 668; <https://www.rmi.org.za/dealing-with-car-woes-understand-the-complaints-process/> (accessed 01/08/2023)

¹⁷³ Section 70(3)(a) and 70(3)(b) of the *CPA*; The Code 12; Melville and Yeats *Commentary* RS 2, 2017, 82–13.

¹⁷⁴ Section 69, 70, 71 of the *CPA*; Melville and Yeats *Commentary* RS 2, 2017, 82–13; van Heerden *Commentary* RS 5, 2020, 69-1; also see *Wingfield Motors (Pty) Ltd v National Consumer Commission* (NCT/3882/2012/101(1)(P) *CPA*) 2012, 4.

¹⁷⁵ *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* 2016 ZANHC 1 (unreported case no 1260/2015 (NCK) ; Section 69, 70 of the *CPA*; van Heerden C *Commentary* RS 5, 2020, 69–24; Naudé T and Barnard J "Enforcement and Effectiveness of Consumer Law in

approach, in connection with the CPA and the aim of the statutory legislation, must be read contextually.¹⁷⁶ The court considered whether a consumer is required to approach a statutory ombuds to the exclusion of other institutions that are part of the CPA's alternative dispute resolution layer.¹⁷⁷ In *Wingfield Motors (Pty) Ltd v National Consumer Commission* the complainant referred the matter to the NCC for conciliation where the parties failed to resolve the dispute. The NCC alleged that it attempted on numerous occasions to engage with the applicant without success.¹⁷⁸ Such conduct by the applicant, the NCC alleged amounts to a failure to cooperate with the NCC and therefore, issued a compliance notice. The NCC then demanded that the applicant cancel the contract and settle the balance owed to the bank, refund the complainant all the money he paid towards the vehicle, being R12 000,00 deposit and R3 200,00 in respect of the monthly instalments paid towards the vehicle; and refund the amount of R6 503;00 for towing the vehicle from Bloemfontein to Cape Town and the pre-delivery service fees incurred by the complainant. If the Applicant fails to comply with the notice, the NCC will apply to the NCT for an order imposing an R300,000 administrative fine. The applicant averred further that this matter would have appropriately been attended to by the MIOSA and that the NCC lacked jurisdiction to handle this matter. The applicant claimed that it did not ignore the NCC's efforts to resolve the issue, and that the NCC did not react to its correspondence. As a result, the compliance notice was cancelled.¹⁷⁹ In this case the complainant did not follow the redress routes provided in the CPA.

South Africa" in Micklitz HW and Saumier G (eds) *Enforcement and Effectiveness of Consumer Law* (Springer International Publishing New York 2018) 590-578, 11.

¹⁷⁶ *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* 2016 ZANCHC 1 (unreported case no 1260/2015 (NCK) ; Section 69, 70 of the CPA; van Heerden C *Commentary* RS 5, 2020, 69–24.

¹⁷⁷ 2016 ZANCHC 1 (unreported case no 1260/2015 (NCK) ; Section 69, 70 of the CPA; van Heerden C *Commentary* RS 5, 2020, 69–24; Naudé and Barnard 2018 *Enforcement and Effectiveness of Consumer Law*, 11.

¹⁷⁸ Section 69 and 70 of the CPA; In *Wingfield Motors (Pty) Ltd v National Consumer Commission* (NCT/3882/2012/101(1)(P) CPA) 2012 ZANCT 27, 27; Section 33(1) of the *Constitution of the Republic of South Africa*, 1996 ; Section 3 and 4 of *Promotion of Administrative Justice Act* 3 of 2000.

¹⁷⁹ Section 69 and 70 of the CPA; In *Wingfield Motors (Pty) Ltd v National Consumer Commission* (NCT/3882/2012/101(1)(P) CPA) 2012 ZANCT 27, 27; Section 33(1) of the *Constitution of the Republic of South Africa*, 1996 ; Section 3 and 4 of *Promotion of Administrative Justice Act* 3 of 2000.

3.5 Conclusion

In premises the researcher submits that the *CPA* specifically supports ADR in the *Act*, which stipulates that a consumer may refer their complaint to an ombud with jurisdiction, an industry-accredited ombud, a person or organisation that offers conciliation, arbitration, or mediation services, or an ombud with any of those options.¹⁸⁰ The Codes outline the powers and responsibilities of the ombud schemes and ombuds.¹⁸¹ The Code is significant for consumers as it establishes performance requirements that manufacturers must meet and outlines a complaint procedure that consumers must follow to resolve their disputes.¹⁸² The researcher argues that the MIOSA, through the Code, should do more to equip the consumers with knowledge through education and awareness. Moreover, the complaint procedures should be made available or accessible on all the manufactures' outlets and websites.

Moreover, the researcher further argues that the MIOSA's jurisdiction should be restricted as specified in the Code so that it can concentrate on its main function to execute its mandate. The MIOSA's jurisdiction does not extend to investigating complaints regarding claimed damages.¹⁸³ However, scholars argue that an industry ombud should endeavour to mediate a dispute in which damages are sought because the parties may ultimately agree to damages.¹⁸⁴ From the discussion above, it is clear that the MIOSA plays an important and vital role for the effective, affordable and accessible dispute resolution which is in line with the objectives of the *CPA*.¹⁸⁵

The next chapter discusses the challenges affecting MIOSA in executing its mandate. The aim will be to analyse how challenges such as lack of adequate capacity, jurisdictional limits, and non-binding effect of the MIOSA's recommendations impact

¹⁸⁰ Section 70 of the *CPA*, Reddy S "Implementing A South African E-Dispute Resolution System for Consumer Disputes" *Obiter* 2020 371-395, 374.

¹⁸¹ Melville and Yeats *Commentary* RS 7, 2022, 82–7; South African Automotive Industry Code of Conduct 2014 (The Code), 9.

¹⁸² Koekemoer 2014 *Journal of Applied Business Research* 663; The Code 2014, 3 and 21.

¹⁸³ Melville and Yeats *Commentary* RS 2, 2017, 82–9, Van Heerden "Section 69" in *Commentary on the CPA* 69-31; Du Plessis 2022 *Stellenbosch Law Review* 240.

¹⁸⁴ Melville and Yeats *Commentary* RS 2, 2017, 82–9, Van Heerden "Section 69" in *Commentary on the CPA* 69-31; Du Plessis 2022 *Stellenbosch Law Review* 240.

¹⁸⁵ Section 3 of the *CPA*; the Preamble of the *CPA*; de Stadler E and du Plessis E *Commentary* RS 2, 2017, 3–3 see Van Eeden E and Barnard J *Consumer Protection Law of South Africa* 2nd edition (LexisNexis Johannesburg 2017) 33-34; also see Reddy S 2020 "Implementing A South African E-Dispute Resolution System for Consumer Disputes" *Obiter*, 372.

the consumer in terms relief. This is done to suggest and propose possible measures on what could be done by South African policymakers to address these challenges to improve the process of resolving consumer disputes by the MIOSA.

CHAPTER FOUR

THE CHALLENGES AFFECTING THE MOTOR INDUSTRY OMBUDSMAN OF SOUTH AFRICA FROM FULFILLING ITS MANDATE

4.1 Introduction

The Motor Industry Ombudsman of South Africa (MIOSA) has been in existence for a number of years providing consumers in the motor vehicle sector with dispute resolution services. It also teaches consumers and suppliers regarding the complaint procedures.¹⁸⁶ In addition, the complainant is responsible for paying the technical assessor's or technician's fees when MIOSA receives a complaint that needs a technical investigation.¹⁸⁷ The MIOSA can resolve a complaint made by or on behalf of a customer who is a natural person or a juristic person, such as a small business, trust, or partnership, may be considered by the MIOSA. The MIOSA can also resolve disputes between consumers themselves, between consumers and suppliers, or complaints alleging violations of the *Consumer Protection Act* or the South African Automotive Industry Code of Conduct (the Codes).¹⁸⁸ Additionally, the MIOSA has the authority to decide a dispute that a supplier has referred on behalf of a customer.¹⁸⁹ The MIOSA will, however, have jurisdiction to the extent that the dispute relates to the automotive industry where more than one ombud has jurisdiction to consider the subject.¹⁹⁰

The South African economy has faced major challenges over the previous years, including a general recession in the global economy, interruptions brought on by power

¹⁸⁶ Koekemoer MM "Consumer Complaints and Complaint Forums Employed in The South African Motor Vehicle Service Industry: A Survey of The Literature" 2014 *Journal of Applied Business Research* 659, 665; Naudé T and Barnard J "Enforcement and Effectiveness of Consumer Law in South Africa" in Micklitz H-W and Saumier G (eds.), *Enforcement and Effectiveness of Consumer Law, Ius Comparatum – (Global Studies in Comparative Law* Springer 2019) 578.

¹⁸⁷ Koekemoer 2014 *Journal of Applied Business Research* 665; also see the Code 12; also see Du Plessis MA "Redress for Consumers in Terms of The Consumer Protection Act 68 Of 2008: The Watchdog's Failure to Support an Accredited Industry Ombud - Alternative Suggestions" 2022 *Stellenbosch Law Review* 244; Section 70(3)(b) of the CPA.

¹⁸⁸ *Consumer Protection Act* 68 of 2008 (CPA); South African Automotive Industry Code of Conduct (the Codes) 2014 Government Gazette 3, 11; *Consumer Goods and Services Ombud NPC and Another v Voltex (Pty) Ltd and Others* (18096/2017) [2021] ZAGPPHC 309 (26 March 2021) in this case the court determined that all industry suppliers must abide by the Code, and that the Ombud is authorised to enforce compliance with the Code.

¹⁸⁹ The Codes 6, 11; Koekemoer 2014 *Journal of Applied Business Research* 665.

¹⁹⁰ The Codes 11; Mupangavanhu Y "An Analysis of The Dispute Settlement Mechanism Under the Consumer Protection Act 68 Of 2008" 2012 *Potchefstroom Electronic Law Journal* 320- 330.

outages, and the inefficiency of state-owned firms.¹⁹¹ The economy has barely expanded since 2019, growing by 2% between 2021 and 2022 despite the COVID-19 fallout still being felt.¹⁹² Under normal circumstances, the aforementioned economic challenges would prevent the MIOSA from carrying out its mission. However, the MIOSA has played a significant role in maintaining the harmony between the South African automotive industry and its customers for the past 23 years. Nonetheless, an investigation needs to be done to analyse the challenges hampering the MIOSA from offering an unwavering service to consumers and to ensure that it does not stray from its initial objective of resolving consumer disputes and ensuring fairness in the marketplace as being guided by the rule of law.¹⁹³

This chapter provides an overall analysis of the challenges that are affecting the MIOSA in executing its mandate. The focus is on challenges such as *inter alia*, conflict of interest, accessibility, capacity constraints, independence regarding how it is funded, membership, enforcement of recommendations, and jurisdictional limits.

4.2. Jurisdictional Limitation

It is important to note that the provisions of the *CPA* do not explicitly set forth a clear hierarchy of alternative dispute resolution agents or provide an order in which such agents may be contacted with reference to the order in which the alternative dispute resolution agencies indicated in the *CPA* should be approached.¹⁹⁴ The consumer may be perplexed about which ombudsman to contact to resolve an issue because there appears to be a grey area in this regard. In the case of *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and Others*, the court indicated that it is unclear from the *CPA*'s phrasing whether an express hierarchy of Alternative Dispute Resolution

¹⁹¹ Motor Industry Ombudsman of South Africa 2022/23 Annual Report 3; Tregenna F et al. "Challenges and Complexities of the South African Economy." *The Oxford Handbook of the South African Economy* 2021, 3; Motor Industry Ombudsman of South Africa 2021/22 Annual Report, 2.

¹⁹² Motor Industry Ombudsman of South Africa 2022/23 Annual Report 3; Otto WH 2022) *The Impact of the Business Environment in South Africa on the Management of Trade Credit in SMEs* (Doctoral dissertation, University of Johannesburg) 11; Motor Industry Ombudsman of South Africa 2021/22 Annual Report 2, 5.

¹⁹³ Motor Industry Ombudsman of South Africa 2022/23 Annual Report 3; Koekemoer 2014 *Journal of Applied Business Research* 665.

¹⁹⁴ Section 69 and 70 of the *CPA*; van Heerden C *Commentary* RS 4, 2019, 70–1; van Heerden *Commentary* RS 6, 2021, 69–22 and RS 5, 69–1.

(ADR) agents **have** been established.¹⁹⁵ According to van Heerden, choosing which ADR agent to contact should be based on the nature of the conflict and whether the consumer resides in a region of the nation where such ADR agents are accessible.¹⁹⁶ From this submission, it seems to be implied that to resolve a dispute between a supplier and a consumer, the ideal ombud that should be contacted is where a supplier is subject to the jurisdiction of an ombud with jurisdiction under specific legislation.¹⁹⁷ However, consumers are not required to approach ombuds with jurisdiction prior to exercising any other remedy provided for in the *CPA*.¹⁹⁸

The *CPA* states that matters should be referred to an industry ombud if the supplier is subject to the jurisdiction of such ombud.¹⁹⁹ In *Ngoza v Roque Quality Cars*, the National Consumer Tribunal (NCT or Tribunal) confirmed the MIOSA's position as an industry ombud that is authorised to handle consumer issues in the automotive sector.²⁰⁰ The MIOSA's jurisdiction, however, excludes complaints requiring a finding of merits and the level of damages, while the National Consumer Commission (NCC) does not investigate claims for damages.²⁰¹ In order to secure adequate compensation for consumers, the NCT confirmed its inability to make a damages judgement as well

¹⁹⁵ *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and Others* [2016] ZAFSHC 105; Section 69 and 70 of the *CPA*.

¹⁹⁶ van Heerden *Commentary RS 5*, 2020, 69–23; also see van Heerden C and Barnard J "Chapter 11 Caveat Emptor: Second-Hand Cars and the Consumer Protection Act 6 of 2008" in 2020 *De Serie Legenda: Developments in Commercial Law Volume I: Law of Specific Contracts and Banking Law LexisNexis*, 209.

¹⁹⁷ van Heerden C *Commentary RS 5*, 2020, 69–23; also see van Heerden and Barnard 2020 "Chapter 11 Caveat emptor: Second-Hand Cars and the Consumer Protection Act 6 of 2008" 209.

¹⁹⁸ Section 69(c) of the *CPA*; also see In *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANCHC 1; in *Wentzel v Autofit Fitment Centre Renault (Pty) Ltd Zamezi and Others*, [2019] ZAGPPHC 522 in this case the consumer was also accused of approaching the court too soon because the case she brought up, MIOSA, had not yet been decided.

¹⁹⁹ Section 70(1)(b) of the *CPA*; Du Plessis MA "Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: The Watchdog's Failure to Support an Accredited Industry Ombud-Alternative Suggestions." 2022 *Stellenbosch Law Review* 234; also see Consumers' Rights to be Heard and Obtain Redress: van Heerden *Commentary RS 4*, 2019, 70–1; Woker T "Consumer protection and alternative dispute resolution" 2016 *South African Mercantile Law Journal*, 21, 42.

²⁰⁰ *Ngoza v Roque Quality Cars* (NCT/79905/2017/73(3)&75(1)(b)) [2017] ZANCT 104 (28 September 2017); Koekemoer 2014 *Journal of Applied Business Research* 665, 666; Naude and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" in *Micklitz and Saumier (eds) Enforcement and Effectiveness of Consumer Law – Ius Comparatum - Global Studies in Comparative Law* 2018, 5.

²⁰¹ The Code 10; Van Heerden "Section 69" in *Commentary on the CPA* 2021 69–32; Du Plessis MA 2022 *Stellenbosch Law Review* 247.

as the uncertainty surrounding the calculation and award of interest.²⁰² The NCT cannot issue an order for damages unless those damages are agreed upon in a consent order under the *CPA*.²⁰³ However, this does not preclude the NCT from ruling on related issues.²⁰⁴ The MIOSA is not permitted to rule on product liability, which further restricts its jurisdiction.²⁰⁵ According to the *CPA*, a supplier is responsible for any harm that results from selling unsafe goods, any kind of product failure, or inadequate usage instructions or warnings, even in the absence of evidence of wrongdoing on his part.²⁰⁶ Any loss or physical damage to any property, any death, disease, or injury to a natural person, as well as any monetary loss brought on by the aforementioned are all examples of harm for which a supplier may be held accountable.²⁰⁷ However the MIOSA does not have jurisdiction on the aforementioned.

4.2.1 Membership Fee

According to the MOISA, membership in their schemes is now required for all service providers operating within each industry.²⁰⁸ One of the ways the MIOSA receives funding is by the collection of all due and owing payments from members of the automotive industry by the ombud.²⁰⁹ According to the Code, the MIOSA should be supported by retailers and players in the motor industry in South Africa. The Original

²⁰² Barnard J "Suppliers, Consumers and Redress for Defective Vehicles — The reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*" 2020 *South African Law Journal* 232 – 234; van Heerden C and Barnard J 2020 "Chapter 11 Caveat Emptor: Second-hand Cars and the Consumer Protection Act 6 of 2008" 214.

²⁰³ Section 74 of the *CPA*; see *Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes* (NCT /95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018) 13.

²⁰⁴ van Heerden C and Barnard J "Chapter 11 Caveat Emptor: Second-Hand Cars and the Consumer Protection Act 6 of 2008" 2020 *DE SERJE LEGENDA?* 214; see *Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes* (NCT /95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018) 13.

²⁰⁵ The Code 10; Melville N and Yeats J *Commentary RS 2*, 2017, 82–10.

²⁰⁶ Section 61 (1) of the *CPA*; Barnard J "The Influence of The Consumer Protection Act 68 Of 2008 On the Warranty Against Latent Defects, Voetstoets Clauses and Liability for Damages." 2012 *De Jure* 455-484, 478; also see Van Heerden C M and Barnard J "Narrowing the Reach of the Strict Product Liability Provisions in Section 61 of the Consumer Protection Act 68 of 2008 in View of *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA)." 2019 *THRHR* 444.

²⁰⁷ Section 61 (3) of the *CPA*; Barnard J "The Influence of the Consumer Protection Act 68 of 2008 on the Warranty Against Latent Defects, Voetstoets Clauses and Liability for Damages." 2012 *De Jure* 455, 478.

²⁰⁸ See section 82 of the *CPA*; also see Woker T "Consumer Protection and Alternative Dispute Resolution" 2016 *South African Mercantile Law Journal*, 21, 42; also see *The Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) [2019] ZASCA 71 (30 May 2019) 4, 12. .

²⁰⁹ The Code 8; Motor Industry Ombudsman of South Africa 2010 *Annual Report* 5. The Ombudsman stated that the MIOSA derives its income from motor manufacturers, importers, all the major retail groups and a large number of retail outlets and workshops.

Equipment Manufacturers (OEMs) and importers are each required to contribute 20% of the approved budget, and the individual OEM or importer's share is determined by dividing 20% of the approved budget by the total number of organisations that directly import or produce goods.²¹⁰ The retailers are required to contribute 80% of the approved budget, and each retailer's share is determined by dividing 80% of the approved budget by the total number of retail locations from which business is being conducted in the automotive industry.²¹¹

The Legal Department of the MIOSA has been instrumental in protecting the interests of the MIOSA by using efficient methods to collect unpaid fees in line with the MIOSA's commitment to sound financial management and ethical business practices. In 2022, 547 summonses were issued against non-compliant industry participants, while 443 industry participants got letters of demand for unpaid contributions.²¹² The MIOSA was successful in getting a judgment in its favour in 105 court proceedings, and 174 of those cases have been set down or are currently undergoing execution, and court proceedings are still ongoing in 42 cases.²¹³ However, most defended cases are resolved outside of court. Following the start of legal action, 104 industry participants planned for payment over a period, while 247 industry participants made payment of the full arrears contribution. Meanwhile, 143 payment agreements carried over from the prior fiscal year, and the arrear contribution collection is difficult by nature and frequently necessitates careful negotiation and dispute resolution.²¹⁴ The pandemic had a significant impact on the Legal Department's efforts to collect contributions since courts were frequently closed as a result of successful COVID-19 cases.²¹⁵ According to a decision by the court in *Consumer Goods and Services Ombud NPC and Another v Voltex (Pty) Ltd and Others*, industry participants are required by law to make their

²¹⁰ The Code 23, 24; Motor Industry Ombudsman of South Africa 2019/20 *Annual Report* 7.

²¹¹ The Code 24; Motor Industry Ombudsman of South Africa 2019/20 *Annual Report* 7.

²¹² Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 13; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 3.

²¹³ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 13; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 8.

²¹⁴ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 13; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 8.

²¹⁵ Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 8, 11; Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 12.

contributions, and the Magistrates Court for the district of Pretoria has the authority to do so.²¹⁶

4.3. Accessibility and Capacity

Consumers can file complaints by filling out a form that can be downloaded from the MIOSA website. Unlike the NCC complaint form, the MIOSA's complaint form cannot be submitted electronically. Consumers can either hand deliver the completed form to MIOSA, mail it, fax it, or email it.²¹⁷ In early April 2012, the MIOSA upgraded its complaints system and unveiled a new telephone system. 10150 of the 24952 complaints that the MIOSA received in 2011 were resolved after the first interaction with the customer.²¹⁸ Most consumers live in rural parts of the country where there are no consumer courts or alternative dispute resolution agents to utilise to file complaints and there are no ombuds with jurisdiction nor industry ombuds available to assist them.²¹⁹ In this situation, the consumer would normally file a complaint with the NCC as a first step in seeking redress, and the NCC will then either handle the dispute by referring to the correct ombud or divert it in accordance with the *CPA*.²²⁰ Regarding the referral of cases to the NCT, the fact that the NCT is listed first in the *CPA* does not support the conclusion that the NCT may ordinarily be contacted as a "point of first entry" in matters involving violations of consumer rights.²²¹ The challenge in this regard is that some consumers from disadvantaged backgrounds or areas may not have access to the internet to download and/or email their complaint forms, and would

²¹⁶ Melville N and Yeats J *Commentary RS 7, 2022, 82–7*; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 8, 11; Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 12; *Consumer Goods and Services Ombud NPC and Another v Voltex (Pty) Ltd and Others* (18096/2017) [2021] ZAGPPHC 309 (26 March 2021); Woker C "Consumer protection and alternative dispute resolution" 2016 *South African Mercantile Law Journal* 21.

²¹⁷ Koekemoer 2014 *Journal of Applied Business Research* 665; The Code 19, The MIOSA *Annual Report* 2011, 11 -12.

²¹⁸ Koekemoer 2014 *Journal of Applied Business Research* 665; Herbst F and Berndt A "Service Quality in the Motor Vehicle Industry in South Africa: An Exploratory Study." 2006 *Southern African Business Review* 97-110, 98.

²¹⁹ van Heerden C "Consumers' Rights to be Heard and Obtain Redress" *Commentary RS 6, 2021, 69–22*; also see Melville N "Has Ombudsmania Reached South Africa the Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" 2010 *South African Mercantile Law Journal* 50-65,54.

²²⁰ Section 72 of the *CPA*; van Heerden C "Consumers' Rights to be Heard and Obtain Redress" *Commentary RS 6, 2021, 69–22*; see Naudé T and Barnard J 2018 "Enforcement and effectiveness of consumer law in South Africa" 565-590, 568.

²²¹ Section 69 of the *CPA*; van Heerden C "Consumers' Rights to be Heard and Obtain Redress" *Commentary RS 6, 2021, 69–22*.

prefer to just walk into the offices to lodge a dispute. The nearest office might be that of the Provincial Consumer Protection Offices (PCPOs).²²²

The NCC has stated that it will no longer be handling all individual consumer complaints and will instead refer these to accredited industry ombuds.²²³ This will free up the NCC to concentrate on systemic issues in specific industries, proactive investigations, endemic harmful business practises, and consumer education.²²⁴ The researcher argues that the MIOSA is burdened by cases that exceed its capacity as a result. The head of the case management department oversees three senior case managers who each supervise teams of five workers, consisting of two case managers and three assistants.²²⁵ Case managers examine each other's work since each has a co-signer.²²⁶ During the years 2022–2023, the MIOSA received 8 123 new applications as opposed to 7 472 during the years 2021–2022.²²⁷ This demonstrates an increase in the number of cases, and it further indicates that the productivity of the MIOSA will suffer if the trend continues. As such, there is a need to strengthen the capacity of the MIOSA by employing more skilled personnel. This approach will go a long way in resolving consumer disputes in the motor industry in South Africa.

4.4. Independence and Conflict of Interest

The MIOSA has over the years encountered substantial challenges from all sides to uphold its independence.²²⁸ Most consumers as well as the motor and related industries have placed their trust in the MIOSA, recognising that every dispute will be

²²² See Newman S and Mark T "Resolving Provincial Cross-Border Disputes Under the Consumer Protection Act." 2018 *Obiter* 684-700; also see Du Plessis M A "Gauteng Consumer Affairs Court: enforcement of s 56 of the Consumer Protection Act." 2016 *South African Mercantile Law Journal* 147-157; Naudé and Barnard 2018 "Enforcement and Effectiveness of Consumer Law in South Africa" 568. The author provides that the main shortcoming of these agencies is that they are situated only in some major cities; see Section 84 of the CPA.

²²³ Naudé and Barnard 2018 "Enforcement and Effectiveness of Consumer Law in South Africa", 567; See also Barnard J "Suppliers, Consumers, and Redress for Defective Vehicles — The Reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*" 2020 *South African Law Journal* 229.

²²⁴ Naudé and Barnard 2018 "Enforcement and Effectiveness of Consumer Law in South Africa" 567; See also Barnard 2020 *SALJ* 229; van Heerden C *Commentary RS* 6, 2021, 69–30.

²²⁵ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 14; Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 13.

²²⁶ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 14; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 12. Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 13.

²²⁷ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 14; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 12.

²²⁸ Motor Industry Ombudsman of South Africa 2019/20 *Annual Report* 4; The Code 6.

investigated and resolved quickly.²²⁹ However, the researcher argues that some customers and suppliers continue to doubt the MIOSA's independence as it is supported by the automotive industry and some suppliers are reluctant to pay the membership fee.²³⁰ The researcher agrees with Woker's research that there were several other issues in addition to challenges about the independence of the voluntary ombuds, such as consumers' lack of knowledge or awareness of ombud schemes; ambiguity, misunderstanding, and complexity surrounding the jurisdictional boundaries of several ombuds; the need for greater cooperation between the various ombuds; forum shopping; ineffective administrative processes; and governance difficulties.²³¹

According to the Codes, the MIOSA is required to adopt a conflict of interest policy that includes identifying conflicts of interest in which the Ombud, any director, or any employee of the MIOSA has an actual or potential interest that could affect their objectivity.²³² The policy outlines procedures for disclosing any conflicts of interest, rules for the giving and receiving of gifts, vouchers, incentives, hospitality, and other benefits, as well as the establishment and maintenance of a gift register. It also includes provisions for avoiding conflicts of interest and, when this is not possible, justifications for doing so.²³³ The MIOSA has internal policies and processes in place to ensure that all employees abide by the values of honesty, objectivity, and independence in support of this commitment to prevent conflicts of interest.²³⁴ The researcher submits that because the automotive industry funds the MIOSA through levies and/or membership fees, there is a conflict of interest that may influence the MIOSA's ability to accomplish its objective. Furthermore, to increase customer

²²⁹ Motor Industry Ombudsman of South Africa 2019/20 *Annual Report* 4; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 6,10.

²³⁰ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 13; also see *The Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) [2019] ZASCA 71 (30 May 2019) 4, 12; The Code 8, 23.

²³¹ Woker T "Consumer Protection and Alternative Dispute Resolution" 2016 *South African Mercantile Law Journal*, 21-48, 40; also see Mupangavanhu Y "An Analysis of the Dispute Settlement Mechanism Under The Consumer Protection Act 68 of 2008." 2012 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 330; Du Preez ML "The Consumer Protection Bill: A Few Preliminary Comments." 2009 *Journal of South African Law* 58-83, 81 ;Melville 2010 *South African Mercantile Law Journal* 54,55.

²³² The Code 9; Motor Industry Ombudsman of South Africa 2011 *Annual Report* 5; Motor Industry Ombudsman of South Africa 2015 *Annual Report* 7.

²³³ The Codes 9; Motor Industry Ombudsman of South Africa 2011 *Annual Report* 5.

²³⁴ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 6.

confidence, the MIOSA has established a code of conduct, and all MIOSA personnel are required to disclose any conflicts of interest.

4.5 The Lack of Binding Effect of the MIOSA's Recommendations

Both industry ombuds and ombuds accredited under the *CPA* do not have the authority to issue decisions that are legally binding.²³⁵ However, if the consumer's is dissatisfied with the outcome of the process, they still have the option of contacting the NCC. In circumstances of threats to the consumer's safety and gross violations, the ombud may also report issues to the NCC.²³⁶ It is alarming to learn that, in practise, some suppliers fail to adhere to or respond to the "ruling" of industry ombuds, which could delay customer relief.²³⁷ It is not clear if the *CPA* can be used to "force" suppliers to comply with "rulings" or "decisions", which are in reality recommendations made by industry ombuds.²³⁸ The clause states that a supplier is forbidden to disregard an accredited industry code in the normal course of business.²³⁹ The NCT has made it clear that a non-cooperative attitude on the part of suppliers who are bound by an authorised industry code constitutes non-compliance with said industry code and is therefore prohibited behaviour.²⁴⁰ In the year 2022/23, the MIOSA received 8 123 new applications; 912 of these were deemed to fall outside of MIOSA's jurisdiction and were forwarded to other forums. The remaining 6 715 cases were forwarded to the industry for response and of these, 4 750 members of the industry responded to the

²³⁵ van Heerden *Commentary RS 6*, 2021, 69–30; also see Melville 2010 *South African Mercantile Law Journal* 54; Du Plessis 2022 *Stellenbosch Law Review* 234.

²³⁶ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 2018 *Enforcement and Effectiveness of Consumer Law*, 565-590, 578; See e.g., CGSO, *Annual Report 2014/2015* 8; also see Melville 2010 *South African Mercantile Law Journal* 54.

²³⁷ See *Mogotsi v Car Finance Company* (NCT/85798/2017/75(1)) [2018] ZANCT 18 (4 February 2018) 4; *Perumal v South African Motorcycles (Pty) Ltd t/a Big Boy Scooters* (NCT/86201/2017/75(1)(b)) [2018] ZANCT 4 (21 March 2018) 3; *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise* (NCT/83884/2017/75(1)(b)) [2018] ZANCT 21 (25 March 2018) 4, 5; *Vatsha v Shalom Motors (Pty) Ltd* (NCT/95174/2017/75(1)(b)) [2018] ZANCT 67 (15 May 2018).

²³⁸ Section 82(8) of the *CPA*; van Heerden *Commentary RS 6*, 2021, 69–30.

²³⁹ van Heerden C *Commentary RS 6*, 2021, 69–30; *James v Noordhoek Motors (Pty) Ltd t/a Hyundai Pinetown* (NCT/103531/2018/75(1)(b)) [2018] ZANCT 96 (11 October 2018) 7, 8; Section 82(8) of the *CPA* requires that all suppliers abide by their applicable industry codes. Failure to abide by an industry code constitutes prohibited conduct under the *CPA*.

²⁴⁰ van Heerden *Commentary RS 6*, 2021, 69–31; Van Heerden & Barnard J "Caveat Emptor: Second-hand Cars and the Consumer Protection Act 68 of 2008" 2019 1 *De Serie Legenda: Developments in Commercial Law* 199.

allegations within the allotted time.²⁴¹ The MIOSA's request was not followed by 1,965 industry participants, leaving them non-compliant and this conduct is regarded as a violation of the *CPA*.²⁴²

4.6 Conclusion

To guarantee that consumers have access to redress when they experience discrimination in the marketplace, the *CPA* has developed a number of ADR forums.²⁴³ ADR is reasonably inexpensive, gives the consumer more power, takes little time, and as a result expands access to justice.²⁴⁴ The MIOSA is a consumer protection agency that will hear complaints from consumers regarding motor vehicles or related issues free of charge.²⁴⁵ It is submitted that the MIOSA should also pay for the cost of the technical assessor or technician because doing so would encourage consumers to bring their complaints to the ombud without worrying about the expense. According to Du Plessis, costs are not addressed under the *CPA* nonetheless it is addressed in the Code.²⁴⁶ It is argued that the MIOSA's cost-related clause runs counteracts both the declared objectives of the MIOSA and the spirit of the *CPA* as stated in its Preamble.²⁴⁷ The researcher disagrees with the judgement in *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico* that the consumers are not required to approach ombuds with jurisdiction prior to exercising any other remedy

²⁴¹ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 14; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 12; Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 13.

²⁴² Section 82(8) of the *CPA*; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 14

²⁴³ Woker T "Evaluating the Role of The National Consumer Commission in Ensuring That Consumers Have Access to Redress" 2017 *South African Mercantile Law Journal*, 1-16, 2; Woker 2016 *South African Mercantile Law Journal* 23

²⁴⁴ Mupangavanhu 2012 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 329; Section 70 of the *CPA*; Melville 2010 *South African Mercantile Law Journal* 55.

²⁴⁵ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* "Constitution"; Koekemoer MM 2014 "Consumer Complaints and Complaint Forums Employed in The South African Motor Vehicle Service Industry: A Survey of The Literature" *Journal of Applied Business Research* 659-670, 665; Laing HC 2021 *The efficacy of the enforcement mechanisms provided for in terms of the consumer protection act 68 of 2008 (master's thesis, Faculty of Law)*, 12.

²⁴⁶ Section 70(3)(b) of the *CPA*; van Heerden *Commentary RS* 4, 2019, 70–1; Du Plessis 2022 *Stellenbosch Law Review* 244. clause 23.1.2 of the code 12.

²⁴⁷ Section 3 of the *CPA*; and Preamble; Du Plessis 2022 *Stellenbosch Law Review* 244; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* "Constitution"; The *CPA* aims to provide consumers with accessible, efficient, and affordable (often free, such as with consumer courts) redress, precisely a reason why ombuds, ADR agencies and consumer courts were established.

provided for in the CPA.²⁴⁸ It is submitted that the ombud route offers the cheapest avenue of redress and this would be in line with the objective of the CPA.²⁴⁹

The ombudsman's role is constrained; as a result, it can only render rulings on issues that fall under its jurisdiction. Regarding jurisdiction, the issue is whether there is an implicit hierarchical structure that consumers must adhere to seek remedy under the CPA.²⁵⁰ According to the researcher, this misunderstanding over the hierarchy encourages forum shopping. The numerous forums offered by the CPA raise the prospect of confusion and could encourage forum-hopping when a harmed consumer must select the proper venue to pursue remedies under the Act.²⁵¹ Due to the institutional frameworks outlined in the bill, there is a risk of lengthy delays, forum-hopping, redundancy, and uncertainty on the appropriate forum to employ.²⁵² The notion that forum-hopping won't happen because the many forums for complaint resolution are all dependent on one another and complement one another does not seem plausible, according to Mupangavanhu.²⁵³ The MIOSA will have jurisdiction to the extent that the issue relates to the automobile industry, the Code provides, "where more than one Ombud has jurisdiction to decide a matter."²⁵⁴ The MIOSA's jurisdiction would be further constrained as a result of the delay brought on by forum shopping, which would result in issues prescribed.

²⁴⁸ (2212/2017) 2018 ZANCHC 23 (25 April 2018) SAFLII ; Section 69(c) of the CPA; also see In *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANCHC 1; in *Wentzel v Autofit Fitment Centre Renault (Pty) Ltd Zambezi and Others*, [2019] ZAGPPHC 522 in this case the consumer was also accused of approaching the court too soon because the case she brought up, MIOSA, had not yet been decided.

²⁴⁹ See the Preamble and section 3 of the CPA; also see Woker T "Evaluating the Role of The National Consumer Commission in Ensuring That Consumers Have Access to Redress" 2017 *South African Mercantile Law Journal* 1-16, 2; see the discussion Du Plessis 2022 *Stellenbosch Law Review* 245 -246.

²⁵⁰ See Section 69, 70 of the CPA; Woker 2017 *South African Mercantile Law Journal* 5; Du Plessis 2022 *Stellenbosch Law Review* 245.

²⁵¹ Du Preez ML "The Consumer Protection Bill: A Few Preliminary Comments." 2009 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse* 58-83, 81; Mupangavanhu 2012 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 332.

²⁵² van Heerden *Commentary RS* 5, 2020, 69–25; Du Preez 2009 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse* 81; Woker T "Consumer protection and alternative dispute resolution" 2009 *South African Mercantile Law Journal*, 21-48, 40.

²⁵³ Woker T "Consumer protection: an overview since 1994." 2019 *Stellenbosch Law Review* 97-115, 114; Mupangavanhu 2012 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 332.

²⁵⁴ Clause 22.3 of the Code; Du Plessis 2022 *Stellenbosch Law Review* 245; Mupangavanhu 2012 *Potchefstroom Electronic Law Journal* 332.

After analysing the challenges that are preventing the MIOSA from carrying out its mandate, the next chapter offers [the conclusions](#) and possible recommendations that the MIOSA could adopt to enhance its systems, processes, and procedures in resolving consumer disputes.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Prior to the enactment of the *Consumer Protection Act*, there were common law remedies that were available to consumers who had purchased defective goods including defective motor vehicles.²⁵⁵ As discussed in Chapter Two of this research, the common law did not provide adequate and easily accessible protections for consumers.²⁵⁶ Accordingly, the *CPA* was passed to safeguard consumer rights in the marketplace to "promote fairness, openness, and good business practices between suppliers of goods and services and consumers of these goods and services".²⁵⁷ The *CPA* has replaced numerous pieces of legislation which were previously regulating consumer protection, since it is a single comprehensive framework for defending consumer rights in South Africa.²⁵⁸ As such, the *CPA* serves as an overarching framework for consumer protection and all other laws that regulate the relationship between buyers and sellers on the market.²⁵⁹

The researcher submits that it is important to address the challenges that the Motor Industry Ombudsman of South Africa (MIOSA) encounters in carrying out its mandate. Accordingly, this chapter provides various recommendations and an overall conclusion on the MIOSA's role and mandate within the context of the *CPA*. It is hoped that the recommendations in this chapter will be implemented to improve the role of the MIOSA in terms of raising consumer awareness and understanding, expanding

²⁵⁵ *Consumer Protection Act 68 of 2008 (CPA)* Avoid dissertations and thesis; Gowar C "Product Liability: A Changing Playing Field?" 2011 *Obiter* 521-536, 525.

²⁵⁶ Mupangavanhu Y "Fairness a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008" 2015 *De Jure Law Journal* 116, 135; see Barnard J "The Influence of the Consumer Protection Act 68 of 2008 on the Warranty Against Latent Defects, Voetstoets Clauses and Liability for Damages." 2012 *De Jure* 455-459; also see Naude T "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 *South African Mercantile Law Journal* 336-351.

²⁵⁷ Hawthorne L 2008 *Reg THRHR* 440; Eiselen and Naudé *commentry* OS, 2014, Introduction–18; see Woker 2019 *Stellenbosch Law Review* 99.

²⁵⁸ *Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (Consumer Affairs Act)*; *Business Names Act 27 of 1960*; *Price Control Act 25 of 1964*; *Trade Practices Act 76 of 1976*; *Sale and Service Matters Act 25 of 1964*.

²⁵⁹ Mugobo and Malunga 2015 *Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy*, 225, also see Jacobs, Stoop, and van Niekerk *PER / PELJ* 2010 303 -304; Hawthorne L "Public Governance: Unpacking the Consumer Protection Act 68 of 2008" 2013 *THRHR* 345-369, 355.

the ombud's jurisdiction, improving accessibility, and navigating the challenge of the enforceability of the MIOSA's recommendations.

5.2 General Observations

The primary research question for this dissertation was whether the provisions of the CPA dealing with the role and mandate of the ombuds have sufficient measures that could be enforced by the MIOSA to ensure that it fulfils its role and mandate effectively. In addressing this question, the aim of this study was threefold. The first aim of this study was to examine the relevant provisions of the CPA to establish whether they provide adequate and clear provisions that could be followed by the MIOSA when conducting its role and mandate.²⁶⁰ In this regard, the researcher submitted that the CPA it is not clear regarding the process redress that should be followed by consumers as it is applied in practice.²⁶¹ This follows that the CPA provides that the consumer should first refer a matter to the National Consumer Tribunal (NCT). The CPA was intended to have a positive effect on all Alternative Dispute Resolution (ADR) in 2011. However, it promptly became evident that the interpretation of the CPA was a problem from its inception.²⁶² The second aim of this study was to analyse the role and mandate of the MIOSA as an ombud scheme as outlined under the provisions of the CPA. The MIOSA was established to provide consumers and all sectors involved with access to alternative dispute resolution. Moreover, the MIOSA also assists motor related service providers with advice on consumer issues, training as well as advice on the CPA.²⁶³ Furthermore, the MIOSA plays a role of an additional complaint forum for consumers to enforce their consumer rights. The third aim of this study was to discuss the challenges affecting the MIOSA from effectively fulfilling its mandate under the CPA. In addition to other organisational and operational difficulties, the COVID-19 pandemic

²⁶⁰ See Section 69 of the CPA; Section 70 of the CPA; Section 82 of the CPA.

²⁶¹ Section 69 of the CPA; See Van Heerden and Barnard 2019 De Serie Legenda Developments in Specific Contracts and Consumer Protection Law 99 and 220.

²⁶² Motor Industry Ombudsman of South Africa 2011 *Annual Report* 4; The interpretation in terms of Section 69 and 70 of the CPA; also see *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANCHC 1 (unreported case no 1260/2015) (NCK) (1 April 2016) para 27-28; van Heerden C *Commentary* RS 6, 2021, 69–22A.

²⁶³ Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 2; Motor Industry Ombudsman of South Africa 2019/20 *Annual Report* 2; Motor Industry Ombudsman of South Africa 2011 *Annual Report* 5.

had a significant negative impact on the office of the MIOSA.²⁶⁴ The researcher submitted that the ombudsman should implement measures to ensure compliance by all participants in the automotive and associated industries in terms of membership fee payment in the event that the industry is affected by a similar pandemic in the future.

The researcher observed that **another** challenge that has negatively impacted the MIOSA over the years was the non-compliance and/or non-subscription from the after-sales repair centres, **and** pre-owned vehicle dealerships amongst others.²⁶⁵ The researcher argues that this should be considered unscrupulous behaviour in the aftermarket. According to Van Heerden and Barnard, it is evident that used cars are the subject of the majority of complaints about defective vehicles.²⁶⁶ It also turns out that numerous consumers who decide to file complaints under the *CPA* are unable to get redress because they are not familiar with the principles underlying such redress.²⁶⁷

5.3 Recommendations

The researcher provides some recommendations below to enhance the efficiency of the MIOSA in discharging its role and mandate in addressing consumer disputes in the motor industry in South Africa. Accordingly, it is recommended that:

²⁶⁴ Motor Industry Ombudsman of South Africa 2021/22 *Annual Report 2*; Motor Industry Ombudsman of South Africa 2020/21 *Annual Report 2*; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report 3*.

²⁶⁵ Motor Industry Ombudsman of South Africa 2012 *Annual Report 13*; See NCC, SAPS to Conduct Inspections at Pretoria North Second Hand Motor Dealers to Turn the Tide on After Sale Consumer Challenges 2017 http://www.thencc.gov.za/sites/default/files/news/media_advisory_dec_campaign041217.pdf accessed 04 April 2023; also see a related discussion in Chimba S Information Asymmetry, Persuasion and Marketing Communication Practices by Selected Motor Vehicle Dealerships in Midrand, Gauteng (Masters in Communication Studies-Dissertation University of Johannesburg 2021) 4.

²⁶⁶ Van Heerden and Barnard 2019 *Developments in Commercial Law* from 207 -208; Motor Industry Ombudsman of South Africa 2010 *Annual Report 15*; Motor Industry Ombudsman of South Africa 2013 *Annual Report 13*; Barnard J "Suppliers, Consumers and Redress for Defective Vehicles — The Reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*" 2020 *South Africa Law Journal* 229; Barnard J and Van Heerden C "Chapter 11 Caveat Emptor: Second-Hand Cars and the Consumer Protection Act 68 of 2008" *De Serie Legenda: Developments in Commercial Law Volume I: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 99-220, 207.

²⁶⁷ Section 69 or 70 of the *CPA*; Van Heerden and Barnard 2019: *Developments in Commercial Law* 207 -208.

5.3.1. *Sufficient Measures Should be Adopted to Create Public Awareness of the Role and Mandate of the MIOSA*

The MIOSA has long been in existence. However, most consumers in South Africa are not aware of the role and mandate of the MIOSA. For instance, the MIOSA's main emailing account receives emails year after year, with some of these emails mostly consisting of queries about how to file a complaint or seek advice on existing disputes.²⁶⁸ According to the researcher, the aforementioned remark reflects a lack of knowledge and awareness on the part of consumers, which leads to consumer forum shopping and/or customers approaching the wrong agency for redress. The researcher notes that the annual reports of both the National Consumer Commission (NCC) and the MIOSA do not provide statistics on consumer awareness apart from different ages and race groups from the complaints received.²⁶⁹ The 2023 annual report suggests insufficient awareness of the agencies amongst blacks and the difficulty of accessing enforcement agencies for low-income consumers.²⁷⁰ The researcher recommends that raising awareness should not be solely the responsibility of the MIOSA but of the MIOSA, the NCC, and the suppliers. The MIOSA and the NCC should **conduct serious** awareness campaigns, visit remote areas to educate consumers about their rights, and they should also put additional measures in place to eliminate consumer exploitation by tightening regulations, enforcing compliance, creating awareness, and educating consumers about their rights.²⁷¹ Suppliers should also play a role in educating consumers by prominently displaying the MIOSA contact information within the walls of their premises, on their websites, and/or on the receipt. The researcher also recommends that suppliers should include information about the role of the MIOSA in contractual agreements they conclude with consumers.

²⁶⁸ Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 11; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 11; Motor Industry Ombudsman of South Africa 2020/21 *Annual Report* 12; Motor Industry Ombudsman of South Africa 2019/20 *Annual Report* 13.

²⁶⁹ Naudé T and Barnard J 2018 "Enforcement and Effectiveness of Consumer Law in South Africa" *Enforcement and Effectiveness of Consumer Law* 565-590, 569; ; NCC, *Annual Report* 2015/2016, 28–29; NCC, *Annual Report* 2015/2016, 29; Motor Industry Ombudsman of South Africa 2021/22 *Annual Report* 14.

²⁷⁰ Naudé and Barnard 2018 *Enforcement and Effectiveness of Consumer Law* 569; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 14.

²⁷¹ See recommendation chapter 1 under heading 4 of this thesis.

5.3.2. *The Jurisdiction of the MIOSA Should be Expanded.*

Currently, the MIOSA has jurisdiction to the extent that the dispute relates to the automobile industry.²⁷² Pursuant to the Code, the MIOSA lacks jurisdiction over any dispute that calls for determining the merits and the extent of the damages.²⁷³ In this regard, the researcher recommends that, given that the NCT is unable to award damages, the NCC should also make an effort to settle these disputes since it may determine that there was forbidden behaviour, which the NCT can confirm and serve as the foundation for a damages claim in a civil court.²⁷⁴ Because the MIOISA and the NCT have limited jurisdiction and were created to help consumers who lack the finances for litigation, this will prevent the consumer from having to approach the civil court in this matter. The researcher also suggests that the definition of the automotive industry be expanded to widen the scope and/or include other service providers and that the MIOSA's jurisdiction should be expanded to [include deciding](#) about product liability.

According to the Code, all suppliers who work within the relevant industry sectors must now participate in or be a member of the ombuds programmes.²⁷⁵ Woker asserts that while suppliers cannot be compelled to participate in an ombuds system, doing so

²⁷² Clause 22.3 of the Code 11; Woker 2017 *South African Mercantile Law Journal* 5; Du Plessis MA "Redress for Consumers in Terms of The Consumer Protection Act 68 Of 2008: The Watchdog's Failure to Support an Accredited Industry Ombud-Alternative Suggestions" 2022 *Stellenbosch Law Review* 245.

²⁷³ Clause 17.2.3 of the Code 10; Barnard adds that "unless such damages are agreed to in a consent order as per section 74 of the CPA" in Van Heerden and Barnard 2019 "Caveat Emptor" in De Serie Legenda 214; Melville N and Yeats J *commentary* RS 2, 2017, 82–9.

²⁷⁴ Du Plessis 2022 *Stellenbosch Law Review* 245; Van Heerden *Commentary* 69–32 and RS 6, 2021, 69–10; Van Heerden and Barnard 2019 "Caveat Emptor" in De Serie Legenda 214; Barnard J 2020 "Suppliers, Consumers and Redress for Defective Vehicles — The Reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*" SALJ 243; In *Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes* (NCT/95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018) The MIOSA terminated their file after determining that they have 'no jurisdiction to pursue matters for compensation and damages' and that 'there is a factual dispute between the parties that only a court of law can pronounce on'. Notably, [the Commission later](#) declined to refer the complaint on the identical grounds. However, it is argued that the mere fact that a consumer seeks damages should not preclude attempts by industry ombudsmen to mediate a disagreement, because the parties may agree to a damages award within the course of such dispute resolution. The Commission shouldn't be discouraged from looking into the complaint even if the consumer later files a claim for damages because the investigation could reveal that prohibited behaviour took place, which could then be forwarded to the Tribunal for a finding that could serve as the foundation for further legal action for damages in a civil court.

²⁷⁵ Clause 13.2 and Schedule 5 of the Code 8,23,24; Melville and Yeats *commentary* RS 7, 2022, 82–7.

could have severe financial repercussions, particularly for small suppliers.²⁷⁶ If the supplier is not subject to the ombud's jurisdiction, the author continues, the NCC, a consumer court, or another ADR agent may handle the issue. The *CPA* stipulates that a supplier may not, in the ordinary course of business, violate a relevant industry code, therefore regardless of membership, the industry code will be the standard that the supplier must abide by.²⁷⁷ The researcher recommends suppliers be forced to join the ombud and pay the requisite levies, which is crucial for the ombud's operation and ensuring that it achieves its objective.²⁷⁸

5.3.3. *The MIOSA Should be Made More Accessible*

The MIOSA was established in the year 2000. Nonetheless, the MIOSA does not have physical offices across all provinces in South Africa. This limits the accessibility of the MIOSA by consumers, especially those who reside in remote and rural areas. The researcher recommends that, in order to further improve accessibility, the MIOSA should also have an office or a satellite office in each province. This would be beneficial for walk-in consumers, consumers from remote areas with limited access to the internet or email, or customers with inadequate telephone network coverage. Moreover, it will also address the challenges of lack of capacity in this regard.

5.3.4. *Clear Measures Should be Adopted to Ensure the Independence of the MIOSA.*

The Department of Trade and Industry accredited the office of the MIOSA and the Code for the motor industry in October 2014, and the Code mandates that all participants in the motor industry should register with the MIOSA and pay a monthly levy.²⁷⁹ The first to support the new registration and fee process were

²⁷⁶ Woker T "Consumer Protection and Alternative Dispute Resolution" 2016 *South African Mercantile Law Journal*, 21-48, 42; in the BusinessDay article it was stated that "One of them is automotive supplier Grip-Tech, which is accusing MIOSA of charging exorbitant fees that threaten the livelihood of smaller companies. <https://www.businesslive.co.za> accessed on 10 September 2023.

²⁷⁷ Section 82(8) of the *CPA*; Woker 2016 *South African Mercantile Law Journal*, 42.

²⁷⁸ In *Consumer Goods and Services Ombud NPC and Another v VoLTE (Pty) Ltd and Others*. (18096/2017) [2021] ZAGPPHC 309 (26 March 2021) The court held that the Code is mandatory for all suppliers belonging to the industry and the Ombud is empowered to enforce compliance with the Code, including in relation to compulsory membership and the levying of compulsory fees and other levies, whether by instituting legal proceedings, or via the NCT or the NCC. The Ombud sought the declaratory order to encourage suppliers/participants in the industry to register in terms of the Industry Code, which some suppliers did not consider binding on them.

²⁷⁹ Section 82(6) of the *CPA*; Motor Industry Ombudsman of South Africa 2015 *Annual Report* 9; South African Automotive Industry Code of Conduct (the Codes) 2014 Government Gazette clause 7, 6; Naudé and Barnard J 2028 "Enforcement and Effectiveness of Consumer Law in South Africa"

major manufacturers, importers, and retailers. These participants received emails alerting them of their legal requirement to register with the MIOSA and pay the levies starting in December 2014. Nonetheless, the 2015 annual reports suggest a lack of compliance in this regard.²⁸⁰ The researcher claims that this has an adverse effect on the MIOSA fulfilling its mandate and the levies form a part of the MIOSA revenues stream.

The researcher recommends that the MIOSA should continue funding itself through the collection of levies, and also come up with stricter measures to ensure compliance in this regard. Furthermore, the MIOSA should develop a policy that would encourage its employees to disclose any conflicts of interest and/or gifts that they receive amongst others. These should continue to be recorded in the annual reports, which will assist in terms of visibility and transparency.

5.3.5. The CPA and the Code Should be Amended to Ensure that the Recommendations of the MIOSA Have a Binding Effect

Notwithstanding years of consulting, educating, and promoting its services to suppliers and service providers in the motor industry, there are still certain businesses that do not accept the recommendations of the MIOSA.²⁸¹ These recommendations are nonbinding because the Code does not contain any clauses that require suppliers or service providers to abide by them.²⁸² However, these rules do contain additional clauses related to managing complaints and resolving disputes, which suppliers must abide by and in violation of which they would engage in forbidden behaviour.²⁸³ The researcher recommends that the recommendations of the MIOSA should be legally enforceable and have a binding effect, just like all other ombudsmen in the South

in Micklitz and Saumier (eds) *Enforcement and Effectiveness of Consumer Law — Ius Comparatum — Global Studies in Comparative Law* 577; <http://www.moisa.co.za>, accessed on 07 Sep. 23, 2023.

²⁸⁰ Motor Industry Ombudsman of South Africa 2015 *Annual Report* 9; Woker T 2016 "Consumer Protection and Alternative Dispute Resolution" *South African Mercantile Law Journal*, 21-48, 42; Motor Industry Ombudsman of South Africa 2022/23 *Annual Report* 13.

²⁸¹ Motor Industry Ombudsman of South Africa 2015 *Annual Report* 7; The Motor Industry Ombudsman of South Africa 2016 *Annual Report* 9.

²⁸² Van Heerden *Commentary RS* 6, 2021, 69–31; Du Plessis 2022 *Stellenbosch Law Review* 237; Melville N "Has Ombudsman Reached South Africa the Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" 2010 *South African Mercantile Law Journal*, 50-65, 54.

²⁸³ Van Heerden *Commentary RS* 6, 2021, 69–31; see clause 4.1.4 of the Code 5; Du Plessis 2022 *Stellenbosch Law Review* 237; Melville 2010 *South African Mercantile Law Journal* 54.

African financial sector, as this frustrates consumers.²⁸⁴ This follows that ADR systems exist to provide remedies to those who cannot approach the courts to enforce their rights. In this regard, both the CPA and the Code need to be amended to give effect to the binding authority of the recommendations of the MIOSA.

5.4 Conclusion

The CPA provides the routes for a remedy that is open to consumers if their rights have been infringed.²⁸⁵ The forums available to the consumer for redress including the NCT;²⁸⁶ a competent ombud with jurisdiction;²⁸⁷ an accredited industry ombud;²⁸⁸ a consumer court that has jurisdiction to hear the matter;²⁸⁹ an alternative dispute resolution agent;²⁹⁰ the NCC;²⁹¹ and finally, approaching a court that has jurisdiction over the matter, provided that the aforementioned avenues have been explored and exhausted.²⁹² Consumers seeking redress faced a number of problems as a result of the CPA's misinterpretation of the hierarchy problem, which the courts eventually resolved.²⁹³ According to this interpretation, a consumer must exhaust all CPA remedies before approaching to the civil courts for redress.²⁹⁴

²⁸⁴ Melville 2010 *South African Mercantile Law Journal* 54; Naudé and Barnard 2018 "Enforcement and Effectiveness of Consumer Law in South Africa" 579; Section 27(5)(c) of the *Financial Advisory and Intermediary Services Act 37 of 2002*; Woker T "Consumer Protection and Alternative Dispute Resolution" 2016 *South African Mercantile Law Journal* 21-48, 41.

²⁸⁵ Section 69 and 70 of the CPA; *Simelane v Pretoria Franchise Support Services (Pty) Ltd t/a Fastway Couriers* (Pretoria) NCT/8742/2013/73(3) & 75(1)(b) & (2) para 50.

²⁸⁶ Section 69(a) of the CPA; Section 70(3)(b) of the CPA; Van Heerden C 2020 "Section 69" in Naudé & Eiselen, *Commentary on the Consumer Protection Act*, 69–1; Du Plessis MA "Enforcement and Execution Shortcomings of Consumer Courts." 2010 *SA Mercantile Law Journal*, 517.

²⁸⁷ Section 69(b) of the CPA; Section 70(1)(a) of the CPA; van Heerden C *Commentary RS 5*, 2020, 69–1.

²⁸⁸ Section 69(c)(i) of the CPA; Section 70(1)(b) of the CPA. ; Du Plessis 2010 *SA Mercantile Law Journal*, 517.

²⁸⁹ Section 69(c)(ii) of the CPA; Section 70(1)(d) of the CPA; Du Plessis 2010 *SA Mercantile Law Journal*, 517

²⁹⁰ Section 69(c)(iii) of the CPA; Section 70(1)(c) of the CPA; Du Plessis 2010 *SA Mercantile Law Journal*, 517

²⁹¹ Section 69(c)(iv) of the CPA; Section 70(2) of the CPA; Du Plessis 2010 *SA Mercantile Law Journal*, 517

²⁹² Section 69(d) of the CPA; van Heerden C *Commentary RS 5*, 2020, 69–1; Du Plessis 2010 *SA Mercantile Law Journal*, 517

²⁹³ Section 69 of the CPA and Section 70 of the CPA; Van Heerden *Commentary* 2014, 69-17; *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) paras 6-8; *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) para 77.

²⁹⁴ Van Heerden *Commentary RS 5*, 2020, 69–2A, Section 69(d) of the CPA; Naudé T and Barnard J 2019 "Enforcement and Effectiveness of Consumer Law in South Africa" 565-590 in Micklitz H-W and Saumier G (eds.), *Enforcement and Effectiveness of Consumer Law, Ius Comparatum – Global Studies in Comparative Law* Springe, 581.

When it comes to addressing consumer disputes through the *CPA*'s available avenues of redress, the MIOSA plays a crucial role in the automotive industry.²⁹⁵ This research demonstrated a number of challenges confronting the MIOSAs, such as consumers' lack of knowledge or awareness of ombud schemes, the complexity and ambiguity of the ombud's jurisdiction, and forum shopping when consumers are dissatisfied with the decision of the ombud or when they do not know which forum to approach for redress.²⁹⁶ To this end, the researcher has provided a number of recommendations to enhance the role and mandate of the MIOSA in resolving consumer disputes in the South African automotive industry. Firstly, it was recommended that sufficient measures should be adopted to create public awareness of the role and mandate of the MIOSA. Secondly, the jurisdiction of the MIOSA should be expanded to enhance its efficiency. Thirdly, the MIOSA should be made more accessible, especially to consumers who reside in remote and rural areas. **Fourthly, clear** measures should be adopted to ensure the independence of the MIOSA. Finally, it was also recommended that the *CPA* and the Code should be amended to ensure that the recommendations of the MIOSA have a binding effect.

²⁹⁵ Sections 69, 70 of the *CPA*; van Heerden *Commentary RS 5*, 2020,69–1, *RS 4*, 2019, p 70–1.

²⁹⁶ See recommendation chapter 4 under heading 4.7 of this thesis.

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