

**A Comparative and critical discussion of the redress
available to consumers by Consumer Courts in terms
of the Consumer Protection Act 68 of 2008.**

By

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Summary of my dissertation: A Comparative and critical discussion of the redress available to consumers by Consumer Courts in terms of the Consumer Protection Act 68 of 2008.

The fundamental consumer rights granted to consumers by the Consumer Protection Act 68 of 2008 (hereinafter referred to as the CPA) would be without meaning if no avenues of redress were available to enforce them. The National Consumer Commission as well as the National Consumer Tribunal and the consumer courts will enforce the Act. One of the more central and important aims of the CPA (section 69) is to ensure that an aggrieved consumer has access to redress, this also being one of the European Union's consumer protection rights.

The CPA therefore empowers the consumer by setting out redress options where a consumer believes that his or her right has been infringed. There is a wide range of options available to consumers if they have a complaint in terms of the CPA. Sections 68 to 76, which are found in Chapter 3 Part A to C, are the provisions that deal with the protection of Consumer Rights.

In terms of the CPA, consumers are not obliged to approach the supplier against whom they have a complaint before first going somewhere else. In terms of section 69 of the Act, the category of persons listed in section 4(1) can enforce a right in terms of the Act or in terms of a transaction or agreement, or resolve a dispute with a supplier by: Referring the matter directly to the National Consumer Tribunal; referring the matter to the applicable recognised ombud with jurisdiction over the supplier and if the matter does not concern the supplier contemplated in s 69(b), referring the matter to the applicable accredited industry ombud with jurisdiction. The consumer may also apply to the relevant consumer court of the province with jurisdiction (subject to the provincial legislation governing it). A dispute may also be referred to an alternative dispute agent, filing a complaint with the National Consumer Commission or approaching a court with jurisdiction over the matter (only when all the other remedies available to that person in terms of national legislation have been exhausted).

The main focus of the research will be the role of consumer courts in particular and their possible enforcement and execution shortcomings. The consumer courts are regulated on a national level in terms of the CPA and on provincial level in terms of provincial legislation of the various provinces. I will illustrate these shortcomings in a discussion of two relevant cases. A short discussion of the other options available to the consumers for redress in terms of the CPA will also be included. Other avenues of redress that will briefly be discussed are complaints lodged to the National Consumer Tribunal, the National Consumer Commission and alternative dispute resolution.

Since the CPA became fully effective on the 31 of March 2011 and is more in line with international trends in consumer protection law, a short comparative study is necessary. I will be looking at the consumer law in Scotland, which is affected, by the UK consumer law in the United Kingdom.

Table of Contents

Chapter 1: Introduction.....	1
Chapter 2: The different routes of redress	4
2.1 Important definitions in terms of section 5.....	4
2.2 Purpose, interpretation and application of the CPA	6
2.3 Routes of redress	10
2.4 The National Consumer Tribunal and the National Consumer Commission	13
2.4.1 The National Consumer tribunal.....	13
2.4.2 The National Consumer Commission	13
Chapter 3: Alternative Dispute resolution	16
Chapter 4: The consumer courts and their possible shortcomings	20
4.1 The Consumer Courts.....	20
4.2 The Office for the Investigation of Unfair Business Practices and the Consumer Courts.....	22
4.3 Case study on the drawback identified in legislation	23
4.3.1 Rakgadi Nyusawa v Patwell Funerals CC GCC 240/13/06/06.....	23
4.3.2 S v Mhlongo CAS 154/01/08	25
4.4 Conflicting roles allocated to the consumer courts.....	27
4.5 Amendment to provincial legislation regarding Consumer Courts.....	29
4.6 Partial conclusion.....	31
Chapter 5: A comparative discussion with the Consumer Law in Scotland	32
5.1: Introduction	32
5.2: Institutions of Consumer Protection in Scotland	32
5.2.1: The Office of Fair Trading.....	32
5.2.2: The National Consumer Council.....	33
5.2.2.1: The Scottish Consumer Council.....	34
5.2.3: Local Authorities	34
5.3: Consumer redress and enforcement	35
5.3.1: Introduction.....	35
5.3.2: Court proceedings.....	36
5.3.2.1: Procedure.....	37
5.3.3: Alternative dispute resolution.....	38
5.4: Final remarks on the access to justice	39
Chapter 6: Conclusion	41
Bibliography:.....	43
Legislation:.....	43
Books:	43
Journals:.....	43
Cases:.....	44

Chapter 1: Introduction

The Consumer Protection Act 68 of 2008¹ came into effect incrementally in 2010. This comprehensive and progressive Act was brought into being with the intention to promote fair business practices and the protection of vulnerable consumers such as low-income communities and minors.² It is said that this legislation marks the dawn of a new era in consumer protection in South Africa.³ The Act follows hard on the heels of the National Credit Act 34 of 2005⁴ (NCA), which is credited as having saved South Africa from the worst of the international credit crunch⁵. The CPA has a much broader effect as it has affected virtually every type of business that trades in South Africa. Not only does the Act apply to the supply of goods and services, but it also applies to the promotion and marketing of them.⁶

The most contentious part of the Act concerns the fundamental consumer rights contained in Chapter 2.⁷ These consumer rights are internationally recognised and thus confirm South Africa's commitment to international consumer rights. These eight fundamental rights are: the right to equality in the consumer market,⁸ the consumer's right to privacy,⁹ the consumer's right to choose (this right includes a consumer's cooling-off right, the right to cancellation and the right to examine the goods),¹⁰ the right to disclosure of information,¹¹ the right to fair and reasonable marketing,¹² the right to fair and honest dealing,¹³ the right to fair, just and reasonable terms and conditions (which include prohibited transactions, terms and conditions)¹⁴

¹ Herein after referred to as the CPA.

² Melville (2010) p 1.

³ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* : 649.

⁴ Herein after referred to as the NCA.

⁵ Melville (2010) 2.

⁶ Section 5 of the CPA.

⁷ Part A-I sections 8-67.

⁸ Part A Sections 8-10.

⁹ Part B Sections 11-12.

¹⁰ Part C Sections 13-21.

¹¹ Part D Sections 22-28.

¹² Part E Sections 29-39.

¹³ Part F Sections 40-47.

¹⁴ Part G Sections 48-52.

and the right to fair value, good quality and safety (includes safety recall and liability for damaged goods)¹⁵.

The aim of this dissertation is to discuss the different routes of redress available to consumers in terms of the Consumer Protection Act, specifically those dealing with the Consumer Courts and the shortcomings in terms of the enforcement and execution of their orders. The different routes of redress that I will be looking at are contained in section 69 of the CPA. This section provides that a person contemplated in section 4 (1) of the CPA may seek to enforce any right in terms of the Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by implementing anyone of the option available from section 69 (a)-(d). One of the most important things to remember is the fact that litigation is often complex, time-consuming and costly within the realm of redress in terms of consumer rights. This may impede or frustrate access to justice rather than accommodating it. I will touch on the different routes of redress available, specifically that alternative dispute resolution¹⁶ agents and the consumer courts. I will also do a comparative discussion with the Scottish law and the provisions relating to the redress available to their consumers.

As stated above, litigation is often complex, time consuming and costly. In order to provide sufficient redress for consumers a model that allows not only for consumers to approach courts for resolving disputes and enforcing rights, but also provides for other, less costly and cumbersome avenues of redress which is more appropriate and very much needed.¹⁷ The legislature has recognised this fundamental principle of consumer protection and consequently various institutions such as the National Consumer Commission, the National Consumer Tribunal, ombuds, alternative dispute resolution agents, consumer courts, equality courts and ordinary civil courts and criminal courts have been given the responsibility of applying and enforcing the CPA and the consumer rights contained therein¹⁸. It is already

¹⁵ Part H Sections 53-61.

¹⁶ Herein after referred to as ADR.

¹⁷ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* :650.

¹⁸ *Idem* at 650.

clear that various avenues of redress are available to consumers, but their effectiveness will be questioned in this discussion.

There could actually be too many redress routes available to the consumer in terms of the CPA, this creating gaps for the suppliers to deal with the consumers in a way that suits them. What is also clear is the fact that consumers need to start educating themselves about the various routes of redress, this being specifically important to the more vulnerable of consumers.

Chapter 2: The different routes of redress

2.1 Important definitions in terms of section 5

In order to determine the field of application of the CPA, the most important definitions given in section 5 of the Act should be analysed. The Act applies to every transaction occurring within South Africa for the supply of goods and services or the promotion of goods and services and the goods and services themselves, unless the transaction is exempted.¹⁹

The first important definition would be that of “transaction”.²⁰ A transaction refers to transactions in the ordinary course of business and once-off transactions are therefore not transactions in terms of the Act. A transaction is an agreement between two or more persons for the supply of goods or services for consideration.²¹ This must be interpreted with caution, because supply for consideration is not always a requirement of a “transaction”, since, in terms of section 5(6), certain arrangements must be regarded or deemed as a “transaction” irrespective of whether a charge or economic contribution is required.²² The Act applies to “transactions” in terms of section 5, irrespective of whether the supplier resides or has principal office outside South Africa, or irrespective of the supplier’s nature²³ or the fact that a license is required to supply the products or services or part thereof to the public.²⁴

The second important definition is that of a “consumer”. A “consumer” is any person, which would include an individual, partnership, trust, organ of state, an entity directed or owned by an organ of state or a public-private partnership. The word “person” is defined in section 1, includes a juristic person, to whom goods or services are marketed or supplied in the ordinary course of a supplier’s business, unless the transaction is exempted from the application of the Act by section 5(2) or 5(3).²⁵ It is important to note here that there is a threshold determination in terms of juristic persons. The Act does

¹⁹ Jacobs *et al* (2010) *PER* 13 (3) 311-315.

²⁰ S 1

²¹ *Id*

²² Jacobs *et al* (2010) *PER* 13 (3) 311-315.

²³ S 5(8) (c)

²⁴ S 5(8) (a)-(d)

²⁵ Jacobs *et al* (2010) *PER* 13 (3) 311-315.

not apply to transactions in which the consumer is a juristic person whose asset value or annual turnover equals or exceeds the monetary threshold value determined by the Minister, which is two million rands. Even if a person is not a party to a transaction for the purposes of the supply of the goods or services does not mean they are not a consumer. A user, recipient or beneficiary of a product or service is considered as a consumer.²⁶

The third definition to take note of is that of “goods”.²⁷ “Goods” includes anything marketed for human consumption, any tangible objects, literature, music, photographs, motion pictures, games, information, data, software, codes or other intangible products written on any medium, licences to use such intangible objects, legal interests in land or other immovable property, gas, water and electricity.²⁸ A definition related to “goods” is that of “services”.²⁹ This includes, but is not limited to, work performed by a person for the direct or indirect benefit of another; the provision of education, information, advice or consultation; banking or similar financial services; transport of goods or of an individual; accommodation; entertainment or access to entertainment; access to electronic communication infrastructure; access or a right of access to an event, premises, activity or facility; or access to or use of property in terms of a “rental”.³⁰ “Service” also includes the right of occupancy of, or power or privilege over, land or immovable property, and the rights of a franchise in terms of a franchise agreement to the extent provided for in section 5(6).³¹

In order to determine the field of application of the Act, it is further necessary to analyse the definition of “supplier”.³² A “supplier” is any person who markets goods or services. To market means to “supply” or “promote” goods or services. In terms of section 1, “promote” means to advertise, display or offer to supply services or goods in the ordinary course of business for consideration. “Supply” in relation to goods includes to sell, rent, exchange

²⁶ *Id* at 311-315

²⁷ S 1

²⁸ Jacobs *et al* (2010) *PER* 13 (3) 311-315.

²⁹ S 1

³⁰ *Id*

³¹ Jacobs *et al* (2010) *PER* 13 (3) 311-315.

³² S 1.

and hire in the ordinary course of business for consideration,³³ and in relation to services, it means to sell services, to perform or to cause services to be performed or provided, and to grant access to premises, events, facilities or activities in the ordinary course of business for consideration. These definitions of “supplier” and “supply” are wide, and the Act will therefore affect a very wide range of suppliers of goods and services.³⁴

2.2 Purpose, interpretation and application of the CPA

The existing consumer protection measures previously in play were outdated and fragmented.³⁵ The consumer protection framework in South Africa had to be reviewed. South Africa needed a comprehensive outline to provide a framework of legislation, policies and government authorities to regulate the consumer-supplier relationship.³⁶ The CPA now provides for an extensive framework for consumer protection and aims to develop, enhance and protect the rights of the consumer and to eliminate unethical suppliers and improper business practices.³⁷

One of the purposes stated in the Act is to ‘promote and advance the social and economic welfare of consumers in South Africa’ by providing them with an ‘accessible, effective and efficient system of redress’.³⁸ The Act has its own interpretation clause,³⁹ and so the stated purposes of the Act are important in this aspect because section 2(1) provides that the Act must be interpreted in a manner that gives effect to these purposes.⁴⁰ A purposive method of interpretation may produce results that differ from those that would be obtained following the traditional approach of to interpretation.⁴¹ For example, the Act specifically states that none of its provisions must be interpreted so as to preclude a consumer from exercising any rights afforded

³³ S 1.

³⁴ Jacobs *et al* (2010) *PER* 13 (3) 311-315.

³⁵ *Id* at 311-315.

³⁶ DTI *Draft Green Paper on the Consumer Policy Framework 09/04* 9 GN 1957 in GG 26774 of 9 September 2004.

³⁷ See the Preamble of the CPA.

³⁸ S 3 (1) (h).

³⁹ S 2.

⁴⁰ S 2 (1).

⁴¹ Sharrock (2010) *SA Merc LJ* (22) 295-325 .

in terms of the common law.⁴² Usually, legislation is interpreted according to the ordinary grammatical meaning of words,⁴³ but contextual interpretation (meaning to interpret the meaning that the words have ascertained in their broader legal context in the rest of the world) is not known to our law. The Act further states that any decision of a consumer court, ombud or arbitrator in terms of this Act that has not been set aside by a higher court may also be considered when interpreting the Act. Another important part of the interpretation clause is section 2(8) and 2(9), which prescribe rules in case of conflict between the act and other legislation. Should there be an inconsistency between any provisions of Chapter 5 (which deal with national consumer protection institutions) and the *Public Finance Management Act*⁴⁴ or the *Public Service Act*,⁴⁵ the last mentioned Acts would apply. In other instances in which there is an inconsistency between any provision of the act and other legislation, the provisions of both acts will apply concurrently to the extent that it is possible. If it is not possible to apply the provisions concurrently, the provisions that extend the greater protection to consumers must prevail.

As stated above, the Act has its own interpretation clause in section 2, which provides that it must be interpreted in a manner that gives effect to the purposes that are set out in section 3 of the Act.⁴⁶ From its objectives, we can see that it is evident that the Act is set on the recognition that justice and redress is often out of reach for consumers. In 1983 the Hoexter Commission⁴⁷ specifically noted the inaccessibility of the courts, the slow pace of justice, the impediments posed by poverty and ignorance and the

⁴² S 2 (10).

⁴³ This is in terms of the literal interpretation principle, which is firmly entrenched in our law (*De Ville Constitutional and Statutory Interpretation 94 et seq*). In interpreting an Act, a court must start with the words and phrases used in the Act and the contexts in which they occur. There is, however, often room for interpretation of the wording. The CPA contains explicit indications about its purpose and policy, as well as its interpretation. This is seen in section 3 and 2 of the Act. It also provides indications about the interpretation of certain documents, ie on standard form, contract or other document prepared or published by or on behalf of a supplier, or required by the Act to be produced by a supplier.

⁴⁴ 1 of 1999.

⁴⁵ 103 of 1994.

⁴⁶ S 2 (1) of the CPA.

⁴⁷ In 1984 Hoexter JA was appointed as chairperson to the Commission of Enquiries into the Structure and Functioning of the Court (hereinafter referred to as the Hoexter Commission).

psychological barrier between the layman and the legal process.⁴⁸ The implementation of the CPA aims to rectify such a situation by laying the groundwork for a new role to be played by the courts in the context of the legal framework for the consumer market.⁴⁹

Section 4(1) of the CPA allows any of the following persons to approach a court⁵⁰ alleging that a consumer's rights in terms of the Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:⁵¹

- a) A person acting on his or her own behalf;⁵²
- b) An authorised person acting on behalf of another person who cannot act in his or her own name,⁵³
- c) A person acting as a member of, or in the interest of, a group or class of affected persons;⁵⁴
- d) A person acting in the public interest, with leave of the court, as the case may be;⁵⁵ and
- e) An association acting in the interest of its members.⁵⁶

Section 38(c) of the Constitution of the Republic of South Africa, 1996,⁵⁷ makes provision for a group or class action of persons to approach a court in cases in which there has been an infringement of a right of the Bill of Rights. The Act also makes provision for class actions in section 4(1) (c). A member of a group or class of affected persons who seek redress for infringement of his, her or their rights may institute action against a particular supplier. Should the action be successful, all members of a group or class may benefit from the settlement or award. These class actions are to the benefit of individual

⁴⁸ Van Eeden (2009) 22.

⁴⁹ *Ibid.*

⁵⁰ In terms of this section, the persons listed may also approach the National Consumer Tribunal, which is established in terms of section 26 of the NCA, and they may approach the National Consumer Commission, which was established in terms of section 85(1) of the CPA.

⁵¹ Sharrock (2010) *SA Merc LJ* (22) 295-325.

⁵² S 4 (1) (a).

⁵³ S 4 (1) (b).

⁵⁴ S 4 (1) (c).

⁵⁵ S 4 (1) (d).

⁵⁶ S 4 (1) (e).

⁵⁷ Hereafter referred to as the Constitution.

consumers who do not have the ability or financial means to institute action against a supplier.⁵⁸

In terms of section 4(2), the Tribunal or court has an obligation to develop the common law to the extent that it improves the realisation and enjoyment of consumer rights in a general sense, and specifically those rights of vulnerable consumers.⁵⁹ Another important fact is that the tribunal or the court must promote the spirit and purposes of the Act.⁶⁰ If a provision can be interpreted to have more than one specific meaning, the tribunal or court must interpret the specific provision in a manner which that promotes the purposes of the Act and improves the realisation of consumer rights, especially the rights of vulnerable consumers.⁶¹

Section 4(5) is a clause of general application that prohibits certain conduct in the ordinary course of business with consumers. The prohibitions include conduct that defeats the purposes of the Act, is misleading, or constitutes a false representation of facts.

The Act has a wide field of application. The act applies to every transaction occurring within South Africa for the supply of goods and services or the promotion of goods and services and the goods and services themselves, unless the transaction is exempt from the application of the Act.⁶² The CPA does not apply to a transaction in which the consumer is the state⁶³ or a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6.⁶⁴ Also exempt from the Act are employment contracts,⁶⁵ collective bargaining agreements within the meaning of section 23 of the Constitution and the Labour Relations Act 66 of 1995⁶⁶ and collective agreements as defined in section 213 of the Labour Relations Act.⁶⁷ Credit agreements governed by the NCA are also excluded, but this exclusion is

⁵⁸ Sharrock (2010) *SA Merc LJ* (22) 295-325.

⁵⁹ Jacobs *et al* (2010) *PER* 13 (3) 309.

⁶⁰ Section 4(2) (a)-(b).

⁶¹ Jacobs *et al* (2010) *PER* 13 (3) 310.

⁶² S 5 (1) (a)-(d).

⁶³ S 5 (2) (a).

⁶⁴ S 5 (2) (b).

⁶⁵ S 5 (2) (e).

⁶⁶ S 5 (2) (f).

⁶⁷ S 5 (2) (g).

qualified to the extent that the goods or services that are the subject of the credit agreement are not excluded from the ambit of the Act^{68, 69}.

Since the CPA only applies to transactions ‘occurring’ within South Africa,⁷⁰ a transaction that does not take place or ‘occur’ within the country is excluded from the Act. The word ‘occurring’ may give rise, in this context, to conflicting interpretations.⁷¹ It is a pity that the legislature did not simply follow section 4 of the NCA which makes that Act applicable to credit agreements ‘made’ or ‘having effect within South Africa.’⁷²

2.3 Routes of redress

Section 69 of the CPA provides that a person contemplated in section 4(1) may seek to enforce any right in terms of the Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by:

Referring the matter directly to the tribunal, if such a direct referral is permitted by the Act in the case of a particular dispute.⁷³ A referral to the Tribunal must be in the prescribe form and manner as provided for in section 75 of the Act. In matters referred to the Tribunal, a hearing must be conducted in accordance with the requirements of the Act and the applicable provisions of the NCA.⁷⁴ The Tribunal may make any order provided for in the Act or in the relevant sections of the NCA. Hearings before the Tribunal are held in public, are as informal as possible and are of inquisitorial in nature. Should the supplier be subject to the jurisdiction of an applicable ombud, the matter may be referred to that ombud.⁷⁵ Legislation has been implemented in many countries to provide for the office of the ombudsman to deal with grievances against the state and instances of maladministration.

In South Africa, the function of the ombudsman is entrusted to the Public Protector.⁷⁶ The Public Protector is competent to investigate any form

⁶⁸ S 5 (2) (d).

⁶⁹ Sharrock (2010) *SA Merc LJ* (22) 295-325 .

⁷⁰ S 5(1) (a).

⁷¹ Du Preez (2009) *TSAR* 67.

⁷² Sharrock (2010) *SA Merc LJ* (22) 295-325.

⁷³ S 69 (a).

⁷⁴ See in particular Chapter 7 part D-E.

⁷⁵ S 69(b).

⁷⁶ Van Eeden (2009) 96.

or allegation of maladministration, abuse of power, unfair and improper conduct.⁷⁷ The Public Protector may also investigate corruption with respect to public money and improper or unlawful enrichment.⁷⁸ Though the term ‘ombud’ is derived from the institution of the ombudsman, there are fundamental differences between the respective institutions. The ‘statutory ombud’ is for example the ombud for Financial Service Providers and appointed by the Financial Service Board.⁷⁹ If a consumer complains against a supplier which is a financial institution that belongs to an ombud scheme recognised under the Financial Services Ombud Schemes (FSOS) Act⁸⁰, the matter can, as one of a number of alternatives, be referred to the ombud scheme for resolution in terms of section 70 (1) (a) of the CPA. However, complaints against a supplier, which does not belong to such a scheme, may be dealt with by an industry ombud, which would be accredited in terms of section 82 (6).⁸¹ An ombud may record a resolution or settlement as an order, which, in turn, can be made into a consent order by a court or the Tribunal. If the matter has not been resolved by such an ombud, the complainant may approach either the NCC or the NCT.⁸²

If the matter does not concern a supplier contemplated in section 69(b), whom is subject to an ombud with jurisdiction, the matter may be referred to an applicable industry ombud, or to a provincial consumer court, should one exist, for alternative dispute resolution, or a complaint may be lodged with the National Consumer Commission (NCC). The NCC falls outside the public service but is an organ of state in terms of section 85(1). It is furthermore a juristic person with jurisdiction throughout South Africa in terms of section 85(2) (a)-(b). The Commission must therefore also exercise its functions in accordance with the principles listed in section 195 of the Constitution.⁸³ Section 69(d) is of grave importance in terms of its understanding and interpretation. This section states that ‘a consumer may approach a court with

⁷⁷ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* :653.

⁷⁸ *Idem*.

⁷⁹ *Idem*.

⁸⁰ Act 37 of 2004.

⁸¹ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* :653.

⁸² Melville (2010) 130.

⁸³ Jacobs *et al* (2010) *PER* 13 (3) 302-508.

jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted'. This implies that a court of law may not be approached, unless a consumer has first approached the Tribunal, ombud, provincial consumer court or Commission, or referred the matter to an alternative dispute resolution agent.

These different enforcement mechanisms may lead to confusion and forum shopping in an instance in which an aggrieved consumer has to choose the appropriate forum to seek relief and redress under the Act.⁸⁴

A court hearing a matter under the Act may make an order to the effect that any conduct that is inconsistent with this Act should be changed and stopped or may make an order that is specifically provided for in the Act.⁸⁵ Damages may also be awarded including damages to a class of consumers, on any terms and conditions that the court may deem to be just and reasonable and in accordance with the purposes of the Act.⁸⁶

Generally the Act provides for severe penalties and administrative fines for non-compliance with its provisions. It provides for a fine, or imprisonment not exceeding 12 months, or both a fine and imprisonment if a person is convicted of an offence in terms of the Act.⁸⁷ The Act also provides for a fine, or imprisonment for a term not longer than 10 years, or both. For example section 107 of the Act, which prohibits the supplier to disclose any private or personal information. The fact that the Act makes provision for such severe penalties indicates that the legislature regards these contraventions in a very serious light.⁸⁸ The tribunal may impose an administrative fine⁸⁹ that does not exceed the greater of ten per cent of the suppliers turn over during the previous financial year⁹⁰ or R1 million⁹¹ for prohibited or required conduct.⁹²

⁸⁴ Du Preez (2009) *TSAR* 81.

⁸⁵ S 76(1) (a)-(b).

⁸⁶ S 76(1) (c).

⁸⁷ S 111(1) (b).

⁸⁸ Jacobs *et al* (2010) *PER* 13 (3) 302-508.

⁸⁹ S 112(3) (a)-(g).

⁹⁰ S 112(2) (a).

⁹¹ S 112(2) (b).

⁹² Jacobs *et al* (2010) *PER* 13 (3) 302-508.

2.4 The National Consumer Tribunal and the National Consumer Commission

2.4.1 The National Consumer tribunal

The National Consumer Tribunal has been established in terms of the National Credit Act 34 of 2005. The Tribunal is situated in Centurion, Gauteng. If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds stated in section 116 of the CPA, the complainant may refer the matter directly to the consumer court, if any, in the province within which the complainant resides.⁹³ The complainant may alternatively refer the matter to the Tribunal, with leave of the Tribunal.⁹⁴ However if a matter is directly referred to the consumer court with jurisdiction, the respondent may apply to the Tribunal, based on the balance of convenience or interests of justice.⁹⁵ The tribunal must conduct a hearing in respect of any matter referred to it and may make any applicable order contemplated in the CPA or in section 150 and 151 of the NCA⁹⁶, such as declaring the conduct to be prohibited, interdicting a prohibited conduct, imposing fines, confirming consent orders or condoning non-compliance with its rules.⁹⁷

The administrative penalties or fines in respect of prohibited conduct or required conduct, which may be imposed by the Tribunal, are governed by section 112(1). These may not exceed the greater of 10 per cent of the respondent's annual turnover during the preceding financial year or R1 million.

2.4.2 The National Consumer Commission

The National Consumer Commission is responsible, in terms of section 99, to enforce the CPA by promoting informal resolution of any dispute that may arise in terms of the CPA between a consumer and a supplier; receiving complaints concerning alleged prohibited conduct or offences; investigating

⁹³ S 75 (a).

⁹⁴ S 75 (b).

⁹⁵ Barnard and Van Heerden (2011) *Journal of International Commercial Law and Technology* 6 (3) 652.

⁹⁶ S 75 (4)(a) and (b).

⁹⁷ Barnard and Van Heerden (2011) *Journal of International Commercial Law and Technology* 6 (3) 652.

and evaluating alleged prohibited conduct and offences; issuing and enforcing compliance notices and negotiating and concluding undertakings and consent orders.⁹⁸

In terms of section 71 of the CPA, any person may file a complaint with the NCC in the prescribed manner and form. The complainant may allege that a person has acted in an inconsistent manner to the Act.⁹⁹ The Commission may also directly initiate a complaint, on its own motion, concerning any alleged prohibited conduct, or when directed to do so by the Minister or on the request of a provincial consumer protection authority, another regulatory authority, or an accredited consumer protection group.¹⁰⁰

Once the Commission has concluded an investigation into an alleged offence, it may then issue a notice of non-referral to the complainant, or if the Commission has alleged that an offence has been committed, it may then refer the matter to the National Prosecution Authority.¹⁰¹ The Commission may, alternatively, believe that a person has engaged in prohibited conduct, it may then refer the matter to the equality court or propose a draft consent order in terms of section 74 or make a referral to the consumer court of the province where the supplier has its principal place of business or to the Tribunal.¹⁰²

Where the Commission has investigated the matter and the Commission and the respondent agree to the proposed terms of the appropriate order, the Tribunal or a court may, without hearing any evidence, confirm that agreement in the form of a consent order.¹⁰³

The respective natures and functions of the NCT and the NCC must be distinguished from one another. Guidance in this respect can be found in a comparison of the two institutions, and also by comparing them to their counterparts in the competitive law area, i.e. the Competition Commission¹⁰⁴

⁹⁸ Barnard and Van Heerden (2011) *Journal of International Commercial Law and Technology* 6 (3) 651.

⁹⁹ S 71(1).

¹⁰⁰ S71(2) (a) and (b) (i) (ii) and (iii).

¹⁰¹ S 73 (1) (a) and (b).

¹⁰² Barnard and Van Heerden (2011) *Journal of International Commercial Law and Technology* 6 (3) 652.

¹⁰³ S 74 (3).

¹⁰⁴ S 19 of the Competition Act 89 of 1998.

and the Competition Tribunal,¹⁰⁵ which are similar but not identical. This duo is established in terms of the Competition Act.¹⁰⁶

A comparison of the wording of sections 85 of the CPA and 19 of the CA, i.e. the respective sections dealing with the establishment and composition of the NCC and the Competition Commission, and sections 26 of both the NCA and the CA, which provides for the establishment and composition of the NCT and the Competition Tribunal, will indicate that, while there are some differences between the two Commissions and Tribunals, there are many similarities, both in the natures and functions of the respective entities.¹⁰⁷

The major differences are not between the two Commissions or the two Tribunals, but between the nature and subject matter with which the consumer bodies are concerned, compared to the nature of the subject matter with which the competition bodies are concerned. The respective consumer and competition bodies are organisationally and administratively so similar that either pair of bodies could, with relatively small adjustments, be entrusted with the tasks of the other. Indeed, in some countries, consumer protection activities and competition regulation are entrusted to one body, although this is with provision for specialisation.¹⁰⁸

¹⁰⁵ S 26 of the Competition Act 89 of 1998.

¹⁰⁶ Van Eeden (2009) 289.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

Chapter 3: Alternative Dispute resolution

Section 70 of the CPA, in similar terms to section 134 of the NCA, seeks to balance the bargaining strengths of the consumer and the supplier and provide the consumer with a cheap and speedy system of resolving disputes. Under section 70 of the CPA, a consumer may seek to resolve a dispute by referring the matter to an ADR agent who may be either an ombud with jurisdiction;¹⁰⁹ or an accredited industry ombud;¹¹⁰ or a person or entity providing mediation, conciliation or arbitration services.¹¹¹

A consumer who wishes to prosecute a complaint under the CPA is likely first to approach an ombud or a consumer interest group for assistance, as this is likely to be cheaper than mediation. If this fails or is not possible then mediation seems to be the preferred alternative to conciliation or arbitration.¹¹² Arbitration is well understood but in many instances is conducted in the same way as litigation, which brings with it disadvantages when it comes to costs, delay and wasted management time. While conciliation is not defined in the CPA, it probably means a structured negotiation process with a third party as conciliator who makes a formal recommendation as to how to resolve a dispute.

The objective of mediation on the other hand, is the consensual resolution of a dispute which is incorporated in a settlement agreement. Mediation thus leaves the parties with an agreed and binding final solution opposed to conciliation which recommends a solution and which may not achieve finality.¹¹³

Mediation can be defined as a flexible and confidential process that is private and without prejudice and is conducted by a neutral independent party known as the mediator. The mediator's role is to actively assist the parties to work towards a negotiated settlement of a dispute or difference to allow them to retain control over the process and outcomes.¹¹⁴ If the parties decide to settle, they also decide on what terms. Mediation is however not binding until

¹⁰⁹ S 70 (1) (a).

¹¹⁰ S 70 (1) (b).

¹¹¹ S 70 (1) (c).

¹¹² Arthur P (2010) *Without Prejudice* Feb 8-10.

¹¹³ *Ibid.*

¹¹⁴ Arthur P (2010) *Without Prejudice* Feb 8-10.

and unless a written settlement agreement is signed by the parties to the mediation, this then enabling them to withdraw from the mediation at will and then litigate if so wished.¹¹⁵

As said above the mediation process is without prejudice and this further enables the parties to explore all options freely and without commitment. The task of the mediator is to assist the parties to explore their options and to focus on areas of possible agreement. By bringing a fresh and independent mind to the matter and no attachment to the outcome, the mediator adds a valuable dimension to the resolution of the dispute at hand and thus enabling progress where negotiations may have failed.¹¹⁶

The merits of mediation can be portrayed by Brassey AJ in a judgment given on August 25 2009 in the South Gauteng High Court in the *Brownlee v Brownlee* case in terms of the following:

“Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisors, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.”¹¹⁷

In other words, there are experts in the field of mediation, and the result of their knowledge and competence is that the significant costs and delays in litigation, the substantial amount of management time and effort involved and the potential for disrupting of commercial relationships, is minimised for those willing to undergo a much speedier and cheap alternative to civil courts. (My emphasis)

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

If such an agent manages to resolve the dispute, the resolution or settlement may be recorded, which can include an award of damages to the complainant.¹¹⁸ If the parties to the dispute consent to that order, it can be submitted to the NCT or High Court for it to be made into a consent order.¹¹⁹ If, however, the ADR agent decides that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by informing the parties,¹²⁰ and the complainant can then refer the matter to the NCC.¹²¹ The Act does not elaborate as to how the tribunal or the High Court should deal with an application to have a settlement made a consent order. It is, however, likely that a court would take the approach set out in section 74 (2) for dealing with settlements reached between the NCC and respondents (suppliers).¹²² The Tribunal or the High Court must hear the application as a motion and then; make an order as agreed to; indicate any changes that must be made in the draft consent order before it makes the order; or refuse the order.¹²³

One of the weaknesses of mediation is that it is a consensual process and while one party may be willing to mediate, the other party may refuse or may participate in the mediation in such a way that there is no reasonable prospect of resolving the dispute.¹²⁴ However, in the hands of a skilful mediator, that party will have what Brassey AJ referred to as:

*“an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.”*¹²⁵

And will likely rapidly conclude that mediation is a far better bet than litigation.¹²⁶

I would think that in the near future, or already now, in South Africa, ADR and especially mediation are likely to play a significant role in the resolution of disputes, whether these arise between consumers and suppliers

¹¹⁸ Melville (2010) 128.

¹¹⁹ S 70 (3) (a).

¹²⁰ S 70 (2).

¹²¹ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* : 654. Section 70 (3) (b).

¹²² Melville (2010) 129.

¹²³ *Ibid.*

¹²⁴ Arthur P (2010) *Without Prejudice* Feb 8-10.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

of credit or goods and services or under the many statutes that provide for mediation. I would think that in a country where consumer protection is now a priority, after the implementation of the Consumer Protection Act, that consumers and suppliers would jump at the opportunity to use the services of ADR agents whom are readily available for a cheaper and speedier process of adjudication of commercial disputes. But unfortunately ADR will only earn its stripes as an alternative to litigation when individuals begin to perceive it as a suitable alternative that caters for their specific circumstances.¹²⁷

¹²⁷ Burger J (2010) *Without Prejudice* Feb 10-11.

Chapter 4: The consumer courts and their possible shortcomings

4.1 The Consumer Courts

In this chapter I will concentrate on the role of the consumer courts, which are regulated in terms of the provincial legislation of the various provinces. The problem I will want to address is the fact that, although these courts have the power to deliver extensive orders, the enforcement and the execution of these orders by the consumer courts remain unaddressed. It is because of this gap in the provincial legislation that consumer complaints, although formally addressed, remain unsatisfied.

The role and structure of the consumer courts can be usefully contrasted with their respective counterparts in the now repealed Consumer Affairs (Unfair Business Practices) Act¹²⁸, (referred to herein as “the repealed Act”).¹²⁹ In terms of the consumer protection regime under the repealed Act, the Consumer Affairs Committee had a role broadly similar to that of the NCC, in that complaints could be lodged with it and the Consumer Affairs Committee was empowered to undertake investigations regarding the ‘unfair business practices’.¹³⁰ Upon a finding by the Consumer Affairs Committee about the existence of an unfair business practice and a report thereon to the Minister, the Minister was the empowered to declare an unfair business practice to be unlawful and to direct certain steps, under pain of criminal sanction, to ensure the discontinuation of the unfair business practice.¹³¹

Under the CPA, a consumer court is a court or tribunal set up in terms of provincial legislation.¹³² Such courts exist in Gauteng and Mpumalanga. The consumer courts are, like ombuds and ADR agents, an alternative avenue of redress other than the National Consumer Commission¹³³ and National Consumer Tribunal¹³⁴ to which complaints against suppliers may be

¹²⁸ Act 71 of 1988.

¹²⁹ The Consumer Affairs Committee, and the Minister of Trade and Industry.

¹³⁰ Van Eeden (2009) 292.

¹³¹ Van Eeden (2009) 292.

¹³² S 1 of the CPA.

¹³³ Herein after referred to as the NCC.

¹³⁴ Herein after referred to as the NCT.

referred¹³⁵. In section 1 of the CPA, a consumer court is defined as ‘a body of that name, or a consumer tribunal, that has been established in terms of applicable consumer legislation’. Provincial consumer courts are therefore the responsibility of the various provincial governments, and their establishment flows from the division of responsibilities between the national and the provincial governments¹³⁶. A consumer court is therefore not a normal civil court of law, but a tribunal. A ‘court’ as defined in the CPA (s1) does not include the consumer courts. So, for example, when section 76 of the CPA gives a court certain powers to enforce a consumer right, this provision is not referring to the powers of a ‘consumer court’.

As said above, legislation in respect of market practices and consumer courts have been enacted in Gauteng, the Western Cape, Mpumalanga, the North-West Province, the Northern Cape, the Eastern Cape, the Free State and the Northern Provinces¹³⁷. The role and structure of the consumer courts can be usefully contrasted with their respective counterparts in the now repealed Consumer Affairs Act¹³⁸, (referred to herein as “the repealed Act”) ie the Consumer Affairs Committee and the Minister of Trade and Industry. In terms of the consumer protection regime under the repealed Act, the Consumer Affairs Committee had a role broadly similar to that of the NCC, in that complaints could be lodged with it and the Consumer Affairs Committee was empowered to undertake investigations regarding ‘unfair business practices’. Upon a finding by the Committee of an unfair business practice and a report thereon to the Minister, the Minister was then empowered to declare an unfair business practice to be unlawful and to direct certain steps to ensure the discontinuance of the practice¹³⁹.

In terms of the provincial consumer protection legislation, complaints are lodged with, and investigations carried out by, the provincial consumer protection authorities which may then institute proceedings before a consumer affairs court or tribunal of that province, as the case may be¹⁴⁰. In terms of this paper, we will look at the provincial consumer legislature and procedures in

¹³⁵ Melville (2010) 126.

¹³⁶ Du Plessis (2010) *SA Merc LJ* 22 : 517-518.

¹³⁷ Van Eeden (2009).

¹³⁸ Act 71 of 1988.

¹³⁹ Van Eeden (2009).

¹⁴⁰ Van Eeden (2009).

terms of the Gauteng Consumer Affairs Court which was established in terms of section 13 of the Unfair Practices Act¹⁴¹ through the enactment by the Provincial Legislature of Gauteng¹⁴².

In term of the Gauteng legislation, complaints are lodged with, and investigations into complaints of alleged unfair business practices are carried out by, the Consumer Protector, in terms of section 6 and 5 of the Consumer Affairs (Unfair business Practices) Act¹⁴³ respectively. The consumer protector is appointed in terms of section 4. The investigations are carried out in terms of section 5 and 7. Section 8 provides the consumer protector with the power to summon and question any person who is believed to be able to furnish any information on the subject of the investigation. This person may be summoned to produce any book or documentation that may be in his possession or under his control. The consumer protector may then retain such book, document or other object for further information or for safe custody. Proceedings before the Court must be prosecuted by the Office for the Investigation of Unfair Business Practices, which was established by section 3. The Court judgments are rendered by a chairperson and between two and four other court members.

4.2 The Office for the Investigation of Unfair Business Practices and the Consumer Courts

The investigation into complaints of alleged unfair business practices are carried out in terms of sections 5 and 7¹⁴⁴ as seen from above. Upon such completion, the consumer protector would initiate the proceedings in the Court by way of summons.

A consumer may seek to enforce any rights in terms of the CPA, a transaction or agreement or to resolve a dispute with a supplier, by applying to the consumer court with jurisdiction. This may only happen if there is such

¹⁴¹ Act 7 of 1996.

¹⁴² Provincial Gazette Extraordinary No 435, 24 December 1997.

¹⁴³ Act 7 of 1996.

¹⁴⁴ Act 7 of 1996.

a court and the matter does not concern a supplier that is subject to an ombud with jurisdiction in terms of section 69(b)¹⁴⁵.

In terms of section 71(1) of the CPA, any person may file a complaint with the National Consumer Commission, who will either investigate or refer the complaint or even issue a notice of non-referral¹⁴⁶. The NCC may refer the matter to a provincial consumer protection authority, and in the case of Gauteng, that would be the Offices of Unfair Business Practices or to a consumer court. The NCC may only refer a matter to a consumer court if the supplier is not subject to an ombud with jurisdiction in terms of section 69(b) of the CPA¹⁴⁷. An order from a consumer court has the same force and effects as if it had been made by the National Consumer Tribunal.

The NCT was established in terms of Section 26 of the National Credit Act¹⁴⁸. The status and enforcement of orders by the NCT are dealt with in terms of section 152 of the NCA. In terms of section 152(1), 'any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court'.

4.3 Case study on the drawback identified in legislation

Although both the CPA and the provincial legislation confer extensive powers on provincial consumer authorities and consumer courts, the enforcement and execution of orders by consumer courts remain unaddressed.¹⁴⁹ It is still unknown whether the CPA will address and improve the situation and deal with the issues stated in the case studies discussed below.

4.3.1 Rakgadi Nyusawa v Patwell Funerals CC GCC 240/13/06/06

The judgment in this case was given by the Gauteng Consumer Affairs Court on the 18 October 2006. The facts of the matter are as follows: the respondent placed an advertisement of a specific type of tombstone together with a photograph representing the tombstone in a newspaper. In response to

¹⁴⁵ S 69 (c) (ii) of the CPA.

¹⁴⁶ S 72 of the CPA.

¹⁴⁷ S 71(1) of the CPA refers to section 69 (c) (ii).

¹⁴⁸ Act 34 of 2005.

¹⁴⁹ Du Plessis (2010) *SA Merc LJ* 22 : 521.

this advertisement in the newspaper, the complainant contracted with the respondent to have that specific tombstone erected on her late husband's grave. The complainant also had paid the full contract price. The respondent then erected a tombstone which was materially different to the one that had been agreed upon. After a complaint was lodged with the respondent, a second tombstone was erected by the respondent, but this one was also materially different and did not accord with the plaintiff's instructions. The respondents conduct amounted to a breach of a material term in the contract. The complainant was then entitled to cancel the contract because of the breach, and also demanded a refund of the full purchase price, which had obviously been paid, this enabling her to source a tombstone which fitted her requirements in design and execution.

The complainant went on to prove her case against the respondent in the Consumer Court on a balance of probabilities. The Court then found in favour of the complainant that there had been a material breach of contract. This breach was deemed to constitute an Unfair Business Practice by the respondent.¹⁵⁰ The Consumer Court awarded the complainant compensation as prayed for in her summons.

As the provincial legislation which governs the Consumer Court, fails to provide for the enforcement and execution of the order given by the court, the consumer protector was left with one remedy afforded by the legislation. Section 30¹⁵¹ and 31¹⁵² of the Gauteng Consumer Affairs (Unfair Business Practices) Act read:

Section 30 relates to the offences in relation to prohibited business practices. If a person fails to comply with or contravenes a specific order of

¹⁵⁰ Section 1 of the Gauteng Consumer Affairs Act 7 of 1996; "**unfair business practice**" means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer.

¹⁵¹ **30. Offences in relation to prohibited business practices**

Any person who contravenes or fails to comply with an order of the court which has been made known by notice in the Provincial Gazette shall be guilty of an offence.

¹⁵² **31. Penalties**

Any person who is convicted of an offence in terms of this Act shall be liable, in the case of an offence referred to in -

(a) *Section 30, to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment;*
(b) *Any other provision of this Act, to a fine or to imprisonment for a period not exceeding 12 months or to both that fine and that imprisonment.*

the court which has been published in the Government Gazette, will be guilty of an offence. Section 31 then relates to the penalties involved when a person is convicted of an offence. The penalties vary between an offence stated in section 30, which would involve a fine not exceeding R200 000 or to a term of imprisonment not exceeding five years or a fine and imprisonment. If a person is convicted of an offence referred to in any other provision of the Act, they will be guilty to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and imprisonment.

It is clear therefore that the provincial legislation and regulations do not provide for the enforcement or execution of the Consumer Court's orders. Therefore the only sanction in the legislation, if a respondent ignores a Consumer Court's order, is that he may be found to be guilty of an offence. This would then carry the penalties to which a Criminal Court may impose. So we can see that the only available remedy to the consumer protector in the present matter would be to lay a charge of contempt of court against the respondent with the South African Police Service (SAPS). After an investigation by the SAPS, the respondent was handed over to the National Prosecution Authority (NPA) for the prosecution on a criminal charge of contempt of court. This matter was then referred to the Criminal Court in Benoni Gauteng for prosecution as *S v Mhlongo*¹⁵³.

4.3.2 *S v Mhlongo* CAS 154/01/08

In this criminal matter held in the Benoni Court, the consumer protector was cited as the complainant. The prosecutor to this case was requested to follow a criminal case of contempt of court, which would be in accordance with the Gauteng consumer legislation. It was noted that in the court files that the prosecutor and the attorney for the accused acknowledged the order made by the consumer court and agreed that 'the state cannot overrule the consumer court's order'. The attorney for the accused entered a plea of guilty in terms of section 112(2) of the criminal Procedure Act¹⁵⁴ on behalf of the accused. What does not make sense here is the fact that the prosecutor accepted a

¹⁵³ CAS 154/01/08.

¹⁵⁴ Act 51 of 1977.

plea of guilty to a charge of fraud, as opposed to that of contempt of court. There was no evidence as to a plea bargain, or to the alteration of a charge in the court file. The complainant also did not lay a charge of fraud, as the consumer court had already adjudicated, in civil law, on the matter finding the respondent accused in breach of contract. From this we can deduce that the charge is clearly that of contempt of court, because the accused had ignored the order of the consumer court.

The magistrate accepted the plea, and after relating the facts as proved in the consumer court, found the accused guilty of fraud. This charge carries a sentence of 12 months' imprisonment, suspended for 12 months. Although Mhlongo was punished in a criminal court, the complainant in the consumer court remained financially unsatisfied. This is because the compensation award by the consumer court as a result of the breach of contract could not be enforced.

It is clear from the cases discussed above both of which resulted from an initial breach of contract that a number of deficiencies in the enforcement and execution abilities of the consumer courts exist. As we can see from the above discussion the provincial legislation governing the consumer court fails to provide for the enforcement and execution of the court order, resulting in the respondent failing to adhere to the consumer court order. As a direct result of this, the consumer is only left with the remedy afforded in the legislation.¹⁵⁵ And since the provincial legislation and regulations do not provide for the enforcement and execution of the consumer court's orders, the only satisfaction left for the consumer, if a respondent ignores a consumer court order, is that the latter be found guilty of an offence, and such a penalty can only be imposed by a criminal court. This would require drastic legislative intervention¹⁵⁶ such as:

The provincial legislation needs to be amended to provide for the enforcement and execution of orders by the consumer courts;

The National Prosecution Authority needs to work in tandem with the office of the consumer protector in prosecuting matters resulting from their legislation;

¹⁵⁵ The Gauteng Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

¹⁵⁶ Du Plessis (2010) *SA Merc LJ* 22: 523.

The public prosecutor, through criminal prosecution resulting from a criminal charge, could have ensured financial satisfaction for the respondent, by requesting the magistrate to make a civil order for compensation in terms of section 300 of the Criminal Procedure Act.¹⁵⁷

4.4 Conflicting roles allocated to the consumer courts

From the discussion above, it is clear that consumers may approach the consumer courts through various provisions of the CPA, provided of course that such a consumer court has been established in the specific province and subject to the law establishing or governing that consumer court.

Section 70(1) provided for a consumer, who wishes to resolve a dispute with a supplier, to refer the matter to an Alternative Dispute Resolution agent (ADR). The different ADR agents appear to be set out in the CPA¹⁵⁸. From the reading of these sections, the identification of ADR agents seems to be unsatisfactory, and especially that in section 70(1) (d). The wording in sections 70(1) (a) to (c) is clear, but section 70(1) (d) seems to be open to interpretation. Du Plessis¹⁵⁹ states that when one reads section 70(1) (a) – (d) as a whole, the impression is created that in par (d) that a consumer court is, for the purposes of this section, regarded as an ADR agent. Van Eeden, who states that ‘dispute resolution agents’ includes a consumer court of the province with jurisdiction over the matter’, confirms this interpretation¹⁶⁰. When we look at the general purpose of the CPA and one reads section 70(1) (a) – (d), we realize that there is a need for varying interpretations because of the unfortunate drafting of this section. When analyzing this section there are various interpretations possible:

The intention that can be deduced from the wording used in the beginning of section 70(1) (a) – (c) was to identify the ADR agents in section

¹⁵⁷ Act 51 of 1977. S 300 reads: (1) Where a person is convicted by a superior court, a regional court or a magistrate’s court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.....(3) (a) An award made under this section –

(1) by a magistrate’s court, shall have the effect of a civil judgment of that court...’.

¹⁵⁸ S 70(1)(a) – (d).

¹⁵⁹ Du Plessis (2010) *SA Merc LJ* 22: 525.

¹⁶⁰ *Ibid* at 521.

70(1) (a) – (c)¹⁶¹. As argued by Du Plessis ‘the beginning of the wording in section 70(1) (d) is different and does not flow as a sentence: that is:

‘70. **Alternative dispute resolution.** (1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be – . . . (d) applying to the consumer court.’

I believe that section 70(1)(d) could be separated from the rest of section 70(1) and agree with Du Plessis that the suggested wording would then transpire to be: ‘A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who *may apply to the consumer court*’¹⁶².

Should Van Eeden’s interpretation be correct, and a consumer court is approached as an ADR agent, then the execution of orders is provided for in section 70(3).¹⁶³ I tend to disagree with this interpretation because as we know the enforcement and execution of the orders of a consumer court are the responsibility and the function of the provincial legislation under which the consumer courts are established. Van Eeden’s interpretation seems to be ‘an easy way out’. In general, the CPA does not provide for the enforcement and execution of the orders of a consumer court. This does not mean that we should try and find an alternative route or reasoning to provide for such remedy (my emphasis). As seen above, however, when a consumer court is approached by a consumer as an ADR agent in terms of section 70(1) (d), special provision¹⁶³ is made for the enforcement and execution of the orders of a consumer court.

Here we see a conflict of legislation. The provincial legislation that established the consumer court does not provide for the execution of its orders, whereas the CPA, which is national legislation, does provide for

¹⁶¹ *Ibid* at 521.

¹⁶² *Ibid* at 523.

¹⁶³ (3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may-

(a) record the resolution of that dispute in the form of an order, and

(b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.’

compliance notices to be issued in terms of section 84(a), and where section 70(3) (d) is applied and a consumer court makes an order in terms thereof.¹⁶⁴ This result places national and provincial legislation in conflict with regard to the execution of the particular order. Section 146 of the Constitution¹⁶⁵ regulates such conflict¹⁶⁶. When applying section 146 of the Constitution, with regard to the execution and enforcement of the consumer courts orders, provincial legislation will prevail, leaving the consumer court unable to have its orders enforced and executed. As we can deduce from the above, Van Eedens' interpretation would be unsound and the only possibility would be amending the provincial legislation so as to provide for the enforcement and execution of consumer court orders.

4.5 Amendment to provincial legislation regarding Consumer Courts

It can be concluded from the above discussion that the provinces must ensure that their respective legislation be amended, so as to provide for the enforcement and execution of consumer court orders. One suggested amendment to the provincial legislation could possibly read as follows: 'Any decision, judgment or order of the consumer court is final and binding and may be served, executed and enforced as if it were an order of the National Consumer Tribunal.'¹⁶⁷

Du Plessis states that this reasoning can be found in section 73 and 75 of the CPA¹⁶⁸. In terms of section 73(2) (a), the NCC may refer a matter to a consumer court, and an order coming from the consumer court after hearing a matter which had been referred to it in terms of this section has the same

¹⁶⁴ Du Plessis (2010) *SA Merc LJ* 22: 527.

¹⁶⁵ Act 108 of 1996.

¹⁶⁶ Section 146 reads:

' . . . (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

. . .

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply. . . .'

¹⁶⁷ Du Plessis (2010) *SA Merc LJ* (22): 527.

¹⁶⁸ *Ibid.*

force and effect as if it had been made by the NCT¹⁶⁹. There are however certain problems with this suggestion. In terms of section 152(1)¹⁷⁰ of the NCA, the NCT's decisions, judgments or orders, effectively then also those of the consumer courts, will be binding on the National Credit Regulators, provincial credit regulators, other consumer courts, an ADR agent or the ombud with jurisdiction, a debt counsellor and a magistrate's court. It is however doubtful that the legislature intended granting such powers to the consumer courts.

A further and preferable, suggested amendment would read as follows: 'Any decision, judgment or order of the consumer court is final and binding and is deemed to be an order of a magistrates' court in terms of the Magistrates' Court Act¹⁷¹, and is enforced in terms of that Act.'¹⁷² Orders of the consumer court may then be certified and entered into the magistrates' court's judgment book. The sheriff may then enforce and execute the consumer court orders as if they were orders of the magistrate's court.

A problem occurs here as to the monetary jurisdictional limit imposed for the magistrate's court, this being three hundred thousand rands¹⁷³. This problem can be solved by limiting the monetary jurisdictional limit of the consumer court to that of the magistrate's court.

However, a preferable alternative would be one where the provincial legislation could be amended to provide for the referral of a matter, after investigation by the Office for the Investigation of Unfair Business Practices and where a decision was made to proceed with summons, for determination by the NCC, if the matter was found to exceed the monetary jurisdiction of the magistrate's court. Here the NCC would be able to refer a matter, if it believed that the issues raised by the compliant could be dealt with expeditiously and fully by such a referral, to a consumer court for hearing. Such an order will then have the same effect as if it were an order of the NCT, which will be executed and enforced as if it were an order of the High Court.

¹⁶⁹ S 73(6) of the CPA.

¹⁷⁰ This section states that 'any decision, judgment or order of the NCT may be served, executed and enforced as if it were an order of the High Court.'

¹⁷¹ Act 32 of 1944.

¹⁷² Du Plessis (2010) *SA Merc LJ* (22) 528.

¹⁷³ S 29 of the Magistrate Courts Act 32 of 1944.

I agree with Du Plessis,¹⁷⁴ where he states that the following solution is preferable. All consumer court orders falling within the monetary jurisdiction of the magistrates' court will be deemed to be orders of the magistrates' court in terms of the Magistrate court's Act and will be enforced in terms of that Act. But, if however, a matter falls outside the monetary jurisdiction of the magistrates' court, it will be referred to the NCC. Once there, the NCC will have to determine the nature of the complaint, or whether the matter is to be referred to the NCT for hearing¹⁷⁵. It is therefore recommended that the provincial legislation be amended to provide for the referral of matters to the NCC where the monetary jurisdiction of the magistrate's court is exceeded.

4.6 Partial conclusion

The preamble of the CPA states amongst other things, that to give effect to the international law obligations of the Republic, 'a law is to be enacted in order to 'promote and protect the economic interests of consumers: and to develop effective means of redress for consumers'.

The failure of the Gauteng provincial legislature to provide for the enforcement and execution of consumer court orders falls short of the picture portrayed by the preamble of the CPA. As was stated above, the utilisation of consumer courts is a less expensive means of redress for consumers such as opposed to the use of conventional courts of law¹⁷⁶. The only alternative left for a consumer is to approach a conventional court of law, to have the consumer court's order made into an order of such court that has a provision for the enforcement and execution of its orders.

It is therefore suggested that the provincial legislation be amended, to ensure the effective enforcement and execution of orders coming from the consumer courts. If this does not happen, consumer will continue to be left with the cold comfort of witnessing a criminal conviction of a respondent, but with no resultant economic relief.¹⁷⁷

¹⁷⁴ Du Plessis (2010) *SA Merc LJ* 2(2) 529.

¹⁷⁵ S 73(2) (b) of the CPA.

¹⁷⁶ Du Plessis (2007) *Journal for Juridical Science* (32) 53-56.

¹⁷⁷ Du Plessis (2010) *SA Merc LJ* (22) 531.

Chapter 5: A comparative discussion with the Consumer Law in Scotland

5.1: Introduction

On may 12, 1999 for the first time for almost three hundred years a Scottish Parliament met in Edinburgh. This developed Parliament was created by the Scotland Act 1998 and has wide legislative competence.¹⁷⁸ It can legislate on all matters within Scotland except those that have been reserved to the Westminster Parliament. Many of the areas dealing with consumer protection are some of these reserved matters. The precise list is set out in Schedule 5, section C7 to C9 of the Scotland Act. The one of interest is that of C7 which is entitled “Consumer Protection” and cover the regulation of the sale and supply of goods and services and fair trading. But it is important to note here that the Scottish Parliament can promulgate legislation concerning the courts, civil and criminal procedure. It is submitted that these areas impinge directly on consumer protection.¹⁷⁹

While the role of the Scottish Parliament and Executive in consumer protection should not be overlooked, the government department with the greatest responsibility for consumer protection is the Westminster Department of Trade and Industry,¹⁸⁰ many of whose functions are carried out throughout the entire United Kingdom (including England, Scotland and Wales). The DTI is responsible for policy and legislation on trading standards, weights and measures, consumer credit and consumer safety. The DTI is also the sponsoring department for the National Consumer Council, including the Scottish Consumer Council and the British Standards Institution.¹⁸¹

5.2: Institutions of Consumer Protection in Scotland

5.2.1: The Office of Fair Trading¹⁸²

One of the most important of the organisations with consumer protection functions is the Office of Fair Trading, created by the Fair Trading Act 1973.¹⁸³

¹⁷⁸ Ervine (2000) 4.

¹⁷⁹ *Ibid* at 5.

¹⁸⁰ Hereafter cited as the DTI.

¹⁸¹ Ervine (2000) 6.

¹⁸² Hereafter known as the OFT.

The OFT is not a government department. Its structures were formed in terms of the Enterprise Act 2002 and are discussed below. The OFT has been the main government body responsible for the protection of the consumer's interest since it was enacted by the Fair Trading Act. It is both a competition authority and a consumer protection authority. This traight has both advantages as well as disadvantages.¹⁸⁴ There are close connections between the consumer and competition policy and the housing of both responsibilities under one roof should help consumer values be represented within competition policy. Equally, however, competition is by far the larger high profile side of the OFT's work. This being said, it could leave the consumer protection as the "Cinderella operation".¹⁸⁵ To date this has been avoided, but it is said that there is a need for constant vigilance to avoid what the consumer protection side unattended to because of the competition priority overrulling it.

The OFT has a number of functions. It provides the consumers with the required knowledge of their rights and educates them to make the right choices. It also acts as a co-ordinating body with other regulatory bodies at the national and international level. But by far the largest time is spent on credit matters where its role as credit licensor gives considerable influence on the market. Many consumer businesses need a credit license to operate.

5.2.2: The National Consumer Council¹⁸⁶

This is a government sponsored body, which does not represent individual consumers, but seeks to ensure the consumer voice is heard in policy debates. It takes particular pains in looking after the interests of vulnerable consumers.¹⁸⁷

Given the distinctive socio-economic, geographic and cultural issues as well as the separate legal, administrative and educational system in Scotland, it was appropriate that a Scottish Consumer Council should have been set up.

¹⁸³ See the Fair Trading Act 1973, S 1.

¹⁸⁴ Howells (2005) 574.

¹⁸⁵ *Ibid.*

¹⁸⁶ Hereafter known as the NCC.

¹⁸⁷ *Ibid* at 575.

5.2.2.1: The Scottish Consumer Council¹⁸⁸

The SCC which has offices in Glasgow, is technically a sub-committee of the NCC.¹⁸⁹ Its structure is similar to the parent body. The NCC and its associate councils adopt the same strategy for carrying out their tasks. As they have no statutory powers they can only achieve their objectives by persuasion. They have built up a formidable record of achievement based on thorough research and effective lobbying and campaigning.¹⁹⁰

Since its creation the SCC has come to play a prominent role in public affairs in Scotland¹⁹¹. Much of its work involves responding to proposals of the Government but it also, where possible, attempts to set its own agenda. Good examples of this have occurred in legal reform where the SCC was prominent in the campaigning for small claims procedure and the inclusion of Scotland in the Unfair Contract Terms Act of 1977.¹⁹²

5.2.3: Local Authorities

It has been a tradition of the UK consumer law for the bulk of enforcement to be carried out at a local level by Trading Standards Departments. Much of this work involves enforcement of criminal law.¹⁹³ However, increasingly Trading Standards is seeing its role as one of prevention of consumer problems and the education of consumers.

Trading Standards Departments are found within local authorities. There is one in each unitary authority. Where two layers of local government exist this function will typically be carried on by the country council. The growth of unitary authorities has meant that the number of trading standards departments has increased. This in turn has caused problems as smaller authorities have less resources and may be less able to perform the wide range of function required of them due to both the lack of resources and also shortage of expertise.¹⁹⁴

¹⁸⁸ Hereafter know as the SCC.

¹⁸⁹ Ervine (2000) 14.

¹⁹⁰ *Ibid* at 15.

¹⁹¹ *Ibid* at 14.

¹⁹² *Ibid*.

¹⁹³ Howells (2005) 576.

¹⁹⁴ *Ibid* at 577.

Local enforcement is considered effective because officers are aware of local circumstances and priorities. Here we find the Local Authorities Co-ordinators of Regulatory Services¹⁹⁵ which provides an important co-ordinating role.¹⁹⁶

Two aspects of LACORS work are of particular noteworthy attempts to address the problem of inconsistent application of the law between Trading Standards Departments. The Trading Standards Departments can seek advice on the interpretation of the law from LACORS. Also the 'Home Authority' principle has been developed, under which the Trading Standards Department where a company has its head quarters will advise and liaise with that company and in particular act as the source of legal interpretation. Though it is not formally binding, the advantages of the Home Authority principle are such that it is in practice largely, though not uniformly, adhered to.¹⁹⁷

5.3: Consumer redress and enforcement

5.3.1: Introduction

As was shown above, there is now an impressive body of law protecting the consumer as well as various organisations, notably the LACORS, who enforce it and provide advice to the consumers. However, in many cases, it is up to the individual consumers to take action to assert their rights.¹⁹⁸

It is a commonplace of debate on consumer protection that settling disputes between consumers and traders is a major problem. The SCC, like its parent body the NCC, has devoted considerable resources to it. The OFT has also been in the van efforts to deal with the issue.¹⁹⁹

To understand the nature of what is to follow it would be useful to indicate the scale of consumer complaints about goods and services. The best source of information on this is derived from the statistics of consumer complaints published by the OFT and the annual consumer dissatisfaction

¹⁹⁵ Hereafter known as the LACORS.

¹⁹⁶ Howells (2005) 577.

¹⁹⁷ *Ibid.*

¹⁹⁸ Ervine (2000) 286.

¹⁹⁹ *Ibid.*

surveys that it has published.²⁰⁰ These surveys show a consistently high level of complaints. Around 40 percent of the adult population of the United Kingdom felt that they had some cause for complaint and 76 per cent took action. Those complaining about goods were more likely to succeed, 74 per cent being successful as against 34 per cent of those complaining about services. Within these categories, success was more likely if the complaint related to a low value item such as food, drink or clothing rather than higher value products such as household equipment or cars.²⁰¹

These surveys showed that approximately three out of four consumers took some action about their complaints, but few went beyond a complaint to the supplier. Less than one in a thousand of all consumers, resorted to any kind of redress mechanism.²⁰² A complaint to a supplier of the goods or services is the appropriate first step and in many cases this will resolve the problem with, or without, the assistance of some other agency.²⁰³ Should it not be possible to arrive to some sort of a settlement, what course are available to the consumer?

5.3.2: Court proceedings

In Scotland the appropriate court for most consumer disputes is the sheriff court. There are three main procedures, which may have to be used to resolve a dispute. The ordinary cause will be the appropriate one where the value of the claim is over £1,500.²⁰⁴ This is a relatively complex procedure, which, in practice, requires professional assistance. If the claim is between £750²⁰⁵ and £1,500 the summary cause procedure may be used. This was introduced in 1975 in an attempt to provide a simpler and quicker procedure. While it is certainly simpler than the ordinary cause procedure it has lengthy and complicated rules and does little to provide realistic access to justice for

²⁰⁰ *Ibid.*

²⁰¹ *Ibid* at 287.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Taking the exchange rate at this time this would be R19,155.

²⁰⁵ R9577.

consumers. To try and achieve this, a small claims procedure was introduced into the sheriff court in 1988.²⁰⁶

The legislative reasoning for the small claims procedure is to be found in section 35 of the Sheriff Court Act 1971 as amended by section 18 of the Law Reform Act 1985. The definition of a small claim is to be found in the Small Claims Order 1988.²⁰⁷ This definition is wide enough to cover most of consumer claims where the amount does not exceed £750.²⁰⁸

The small claims limit has now been raised to £1,500 and the Summary Cause limit to £5,000.²⁰⁹ At the same time, it was said that personal injury claims would no longer be competent as small claims.²¹⁰

5.3.2.1: Procedure

A small claim is begun like all other claims by issue of a claim form, otherwise known as a summons. This form, together with the appropriate fee,²¹¹ is lodged with the sheriff clerk who, where the pursuer is an individual, will arrange for it to be served to the defender. Where the defender decides to dispute such a claim this is done by completing and returning the appropriate part of the summons.²¹²

Originally, in a disputed case the next step was called the preliminary hearing and was intended to focus the issues prior to the full hearing at which a decision will be reached. It was believed that this step would help resolve their disputes, or at least speed the matter up and make that actual trial more effective. However, experience showed that these advantages did not accrue. Preliminary hearings are still possible, but are rarely used.²¹³

A major barrier to going to court is expense, or the fear of it. It is significant that in a system where the losing party will normally have to meet the expenses of the winner. This “loser pays” rule was resolved by the Small

²⁰⁶ *Ibid* at 288.

²⁰⁷ Section of Order 1988.

²⁰⁸ Howells (2005) 614.

²⁰⁹ R63,850.

²¹⁰ *Ibid*.

²¹¹ The minimum issue fee is currently £30 for claims of less than £300 rising to £120 for claims of just under £5,000.

²¹² Ervine (2000) 288.

²¹³ Howells (2005) 616.

Claims procedure by providing that in disputed cases involving less than £200 no expenses of any kind are recoverable by the successful party; and that above this figure an award of expenses is limited to £75.²¹⁴

The Scottish small claims procedure deals rapidly with cases in a way that bears favourable comparison with its English equivalent and trade arbitration schemes.²¹⁵

An important fact to remember here is that much depends on the approach of the sheriff whose role is central to the operation of the process. The research into its operation revealed a variety of approaches in different courts. Variation, while it cannot be entirely eliminated, is inimical to the development of confidence within the system by consumers. Too often to procedures take place in an atmosphere, which does not encourage the individual consumer to represent himself or herself, or where the procedure takes place in a courtroom, where the sheriff is in formal court dress and other solicitors are waiting to deal with other business.²¹⁶ This type of small claim procedure should be held in other rooms such as jury rooms or conference rooms (My Emphasis). However, there are examples of good practices, such as the “consumer court”, as it is commonly named in Glasgow, which deals with cases involving unrepresented parties.²¹⁷

5.3.3: Alternative dispute resolution

Small claims tribunals represent a step away from formal court-provided justice towards informal justice. Given the difficulties experienced by consumers in using the courts to resolve disputes. It is not surprising that other avenues have been explored. Recent years have seen a growth in a number of institutions which represent a further stage in the ‘delegalisation’ of consumer disputes. These are now often known as Alternative Dispute resolution.²¹⁸ Mediation and arbitration are two classic examples of this. There is no definitive or agreed definition for ADR but one that might be used is that it is any means of providing a resolution of a dispute between two or more

²¹⁴ Ervine (2000) 289.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid* at 290.

²¹⁸ Hereafter known as ADR.

parties which does not involve traditional court procedures.²¹⁹ We have already seen above that as the small claims courts have evolved there have been a number of debates as to the extent to which traditional safeguards of the legal system, such as legal representation, rules of evidence and strict application of substantive law can be sacrificed to make justice affordable.²²⁰ Access to justice has also raised issues about the cost of participating, including the need to remove the need for lawyers. However, the small claims courts works within the overall safeguards of the legal system and one can accept the compromises arrived at with a certain degree of equanimity.²²¹ These issues become far more sensitive in ADR procedures, which have often been established by private bodies, where the very impartiality of the decision maker is added to the concerns raised above.²²²

There have been some attempts to set down criteria by which ADR schemes should be judged. Some of the most important have been by the European Commission.²²³ The ADR Recommendation recommended that bodies responsible for the out-of-court settlement of consumer disputes respect the following principles: Independence; transparency; adversarial; effectiveness; legality; liberty and representation.²²⁴

5.4: Final remarks on the access to justice

Consumer rights are only as effective as their enforcement, be that through individual initiative or by public authorities as discussed in this chapter. The greatest challenges are often in actually enforcing the laws. Many less developed countries have wonderful laws on paper, but consumers have great difficulty in accessing them and governments do not have the resources

²¹⁹ Ervine (2000) 291.

²²⁰ Howells (2005) 622.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ In 1998 the Commission adopted a *Communication on the out-of-court settlement of consumer disputes* (COM (1998) 198) which included the *Council Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes* (98/257/EC) and in 2001 the Commission adopted a *Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes* (OJ 2001 L109/56).

²²⁴ Howells (2005) 623.

to enforce them.²²⁵ Even in the UK enforcement is problematic. It is expensive to access lawyers or have effective enforcement regimes.²²⁶ On the other side of the matter, businesses will also be complain if they feel the full force of the law being applied to them. Scotland and the UK do, however, feel an important shift in policy, since the significance of access to justice and effective enforcement has been appreciated and these issues have forced their way up the agenda of National Policymaking.²²⁷

This should ideally not only mean that individual problems are resolved, but also that businesses may use complaints to improve their standards and law informers can draw on them to inform debate about the future direction of the law.²²⁸

²²⁵ Howells (2005) 666.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

Chapter 6: Conclusion

One could say that there are too many redress options available to a consumer in terms of the CPA, this leaving the door open to suppliers to direct the consumer disputes to the most convenient redress option available to them.²²⁹ It can also be concluded that consumers need to become more educated about the consumer laws available to them, especially the different routes of redress. This would apply to the more vulnerable consumers such as uneducated or illiterate consumers.²³⁰

In the past, the civil courts were a primary and costly redress option for dispute resolution, however, the legislator in terms of section 69 (d) of the CPA limits the role of the civil courts as one of last resort in order to protect the consumers from the costs and delays involved with such litigation procedures. However, the CPA provides that the consumer may approach a consumer court, which will focus on the dispute of consumers, and aim's to settle such disputes more efficiently.²³¹ Unfortunately the failure of the provincial legislature (the Gauteng legislature in particular) to provide for the enforcement and execution of orders made by such a court falls short of the vision articulated in the preamble of the CPA.²³²

In South Africa, it would seem that ADR mechanisms will be utilised more frequently because of the other redress issues faced by consumers, especially those faced in consumer courts. As we have seen in chapter 5, ADR in the UK and Scotland seems to be a successful means for consumer redress. South Africa can learn from the UK in terms of their small claims court system and the role that it plays in smaller consumer matters. The following opinion by Barnard and Van Heerden is referred as an emphasis to this argument:

“The international trend of collective redress that is also included in the CPA is definitely a consideration for future redress action and also

²²⁹ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* 665.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² S 2(2) of the CPA where it is stated that when interpreting the CPA, any person, court or tribunal may take into consideration any decision of a consumer court, as long as it had not been overruled or set aside by the High Court, the Supreme Court of Appeal or the Constitutional Court.

gives the individual consumer a chance to add his or her complaint to something with teeth”²³³.

Consumers do not have the financial resources to fight for their rights in South Africa. As was stated previously,²³⁴ litigation is notoriously expensive and because of the relatively small sums that are often involved with consumer complaints, it does not make financial sense for the consumer to take his or her matter to court. This could be the reason why the CPA has made other viable options available to the consumer before having to take their matter to civil court. The consumers have to complain for the CPA to work. It would seem that in South African society there is a negative view on complaining. If the current situation is to change in the consumer arena, the consumers attitude towards making a complaint will have to change. The CPA is here to make our lives easier as consumers. We as consumers will have to voice our concerns when receiving unsatisfactory products or services and take the responsibility to initiate our complaint and to enforce our own rights. We will have to take the initiative to access the redress options available to us (as consumers) in terms of the CPA. If we do not do so, all the redress options made available by the CPA will not reach its initial aims as mentioned in its preamble.

As we have seen the CPA has many shortcomings but especially with regard to the consumer courts.²³⁵ If these “malfunctions” are not amended then such a redress option is in vain. The legislature has to realise that a South African market without significant, working consumer protection measures, together with a proper regulatory framework, could become dangerous especially for vulnerable consumers whom will continue to be exploited.²³⁶

As a final remark I would like to argue that the current process and legislation provided for to consumers in South Africa is insufficient for the adequate protection of consumers.

²³³ Van Heerden and Barnard (2011) *Journal of International Commercial Law and Technology* 665.

²³⁴ In chapter 1 above.

²³⁵ See chapter 4.

²³⁶ Woker T (2010) *Obiter* 231.

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