

Prescription and Access to Redress for Consumers: A Consideration of the Prescription Provisions Under the Consumer Protection Acts of South Africa and India

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Abstract

The limitation that is placed on the institution of legal proceedings is considered as being important for the purposes of ensuring legal certainty. Considering this, the *Prescription Act* 68 of 1969 has continued to co-exist alongside section 34 of the *Constitution*, which guarantees the right to access redress. The *Consumer Protection Act* 68 of 2008 (CPA) also introduces a specific statutory limitation that applies to transactions that fall within its scope. However, the provision is less nuanced and does not consider instances in which prescription might be interrupted. In many instances this has been to the detriment of consumers. In alignment with the CPA's dispute resolution process, consumers generally initiate their complaints with alternative dispute resolution agents, such as the accredited industry ombuds. Alternatively, consumers might refer their matters to the National Consumer Commission. Unfortunately, cases before the Tribunal have exposed the fact that consumers experience inordinate delays that lead to their complaints prescribing in terms of section 116(1) of the CPA. This article considers how this might be remedied, bearing in mind the prescription provision under the *Consumer Protection Act*, 2019 of India.

Keywords

Consumer; prescription; access to redress; section 116 of the *Consumer Protection Act* 68 of 2008; section 69 of the *Consumer Protection Act*, 2019.

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1 Introduction

Prescription is a legal construct that attaches a limitation to the time period within which a claim can be pursued. It is important in so far as it promotes legal certainty, which is imperative in the commercial world.¹ Generally in civil matters before the South African courts, the *Prescription Act* 68 of 1969 (the *Prescription Act*) sets out the periods within which claims can be pursued by claimants. However, any other statute may also impose a limitation for the institution of a claim by a complainant under its provisions.² The *Consumer Protection Act* 68 of 2008 (the CPA) is an example of such a statute. The overarching provision in the CPA that imposes a limitation on the lodging of a consumer complaint is section 116(1). However, other provisions in the CPA impose limitations that apply in specific restricted instances. For example, sections 55 and 56 of the CPA require that a consumer enforce the right to request a repair or refund in respect of unsafe or bad quality goods within a 6 month period. Another limitation is imposed by section 16 of the CPA, which requires a consumer to exercise a cooling-off right to rescind an agreement entered into as a result of direct marketing, without reason or penalty, within a period of 5 business days.³ The focus of this article will be on the overarching provision, namely section 116(1) of the CPA. This provision is considered particularly following the prejudicial dispensation created by the case of *First Rand Bank Limited v Ludick*.⁴

The CPA has created a legal framework that seeks to ensure that the South African consumer market is accessible, fair and efficient.⁵ As part of its objectives the CPA seeks to ensure *inter alia* that: (i) vulnerable consumers are protected;⁶ and (ii) consumers are provided with a redress system that is "accessible, consistent, harmonised, effective and efficient".⁷ Despite these purposes, the narrow interpretation that has recently been adopted by the National Consumer Tribunal (the Tribunal) when interpreting section 116(1) of the CPA has been to the detriment of consumers broadly, including vulnerable consumers. This article initiates this discussion by considering the constitutional backdrop of access to courts, which is provided for in section 34 of the *Constitution of the Republic of South Africa*,

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¹ Van Heerden "Section 116" 116-1; Scott *Realization of Rights in terms of the Consumer Protection Act* 108.

² See for example s 24(1) of the *Alienation of Land Act* 68 of 1981.

³ Section 16(3) read with s 32 of the *Consumer Protection Act* 68 of 2008 (the CPA).

⁴ *First Rand Bank Ltd v Ludick* (A277/2019) [2020] ZAGPPHC 821 (18 June 2020) (hereafter the *Ludick* case). See discussion under para 4 below.

⁵ Section 3(1)(a) of the CPA.

⁶ Section 3(1)(b) of the CPA.

⁷ Section 3(1)(h) of the CPA.

1996 (the *Constitution*). It then analyses the *Prescription Act* from the perspective of how the statute manages prescription issues whilst balancing the right of creditors to access the civil courts. This is followed by an in-depth analysis of section 116(1) of the CPA and a critical discussion on how the provision needs to be reconsidered to better align it with the relevant purposes of the CPA. This discussion considers section 69 of the CPA and key forums that are involved in the dispute resolution process. Finally, the article provides recommendations on how to remedy the current prescription dilemma, considering the position in India, and suggests an approach that ought to be followed while the Tribunal awaits any legislative amendments. The conclusion of the article also emphasises the role that dispute resolution fora ought to play in mitigating the risk of prescription in consumer matters.

2 Section 34 of the *Constitution*

A comprehensive discussion on prescription cannot be held without considering the constitutional backdrop.⁸ In this regard section 34 of the *Constitution* guarantees everyone's right to have their dispute settled by the courts, including tribunals.⁹ The legal construct of prescription is a limitation of this right and so is the implementation of a provision such as section 116(1) of the CPA. The Constitutional Court described the rationale behind prescription in the *Mohlomi v Minister of Defence* decision in the following terms:

Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.¹⁰

Despite the necessity for prescription in the interests of justice and for the sake of legal certainty, it is not surprising that the imposition of prescriptive provisions often creates a degree of discord when considered in the context

⁸ Section 2 of the Constitution of the Republic of South Africa, 1996 (the *Constitution*) provides for the supremacy of the *Constitution*. Furthermore s 39(2) of the *Constitution* requires that the interpretation of any legislation by any forum, including the courts and tribunals, "must promote the spirit purport and objects of the Bill of Rights".

⁹ Section 34 of the *Constitution* specifically provides that—
"[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

¹⁰ *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) para 11 (hereafter the *Mohlomi* case). Also see Kelly-Louw and Stoop 2019 *PELJ* 2.

of the constitutional right to access courts. The Constitutional Court has grappled with the issue of prescription in various contexts on multiple occasions.¹¹ In some cases the Constitutional Court has successfully declared certain statutory limitations to be unconstitutional.¹² In the *Mohlomi* case, the Constitutional Court highlighted certain considerations in the South African context that contribute towards the misalignment of limiting statutes with the constitutional right to access courts. In this regard the court indicated that South Africa is a—

land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.¹³

This acknowledgement by the Constitutional Court of the vulnerability of the members of South African society echoes the recognition thereof in the CPA and the aim to protect vulnerable and disadvantaged consumers.¹⁴ Section 3(1)(b) of the CPA seeks to reduce the adverse experiences of consumers during the process of procuring goods or services, with a specific focus on consumers who: (i) form part of low-income communities or earn low-incomes;¹⁵ (ii) live in areas or communities that are considered to be remote, low-density or isolated;¹⁶ (iii) are minors, are senior members of society or are similarly vulnerable;¹⁷ or (iv) have a limited ability to read and comprehend material due to their low literacy, visual impairment, or limited fluency with respect to a language used in documents or products.¹⁸ It ought to be borne in mind that vulnerable consumers are often unsophisticated and less likely to know of their rights or pursue litigation due to costs and the daunting nature of enforcement procedures. Accordingly, such

¹¹ See *Mohlomi* case para 2, *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) para 2; *Road Accident Fund v Mdeyide (Minister of Transport Intervening)* 2008 1 SA 535 (CC) para 3; *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 4 SA 414 (CC) (hereafter the *Links* case) para 1; *Makate v Vodacom* 2016 4 SA 121 (CC) para 1 (hereafter the *Makate* case); *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Limited* 2017 5 SA 9 (CC); *Loni v MEC for Health* 2018 3 SA 335 (CC) para 1; *Mogaila v Coca Cola Fortune (Pty) Ltd* 2018 1 SA 82 (CC) para 1; *Mtokonya v Minister of Police* 2018 5 SA 22 (CC) para 1; *Myathaza v Johannesburg* 2018 1 SA 38 (CC) para 1; *Trinity Asset Management v Grindstone Investments* 2018 1 SA 94 (CC) para 1; *Ethekwini Municipality v Mounthaven (Pty) Limited* 2019 4 SA 394 (CC) para 1.

¹² *Mohlomi* case para 26.

¹³ *Mohlomi* case para 14.

¹⁴ Section 3(1)(b) of the CPA. Also see Barnard 2014 *Journal of Texas Consumer and Commercial Law* 3.

¹⁵ Section 3(1)(b)(i) of the CPA.

¹⁶ Section 3(1)(b)(ii) of the CPA.

¹⁷ Section 3(1)(b)(iii) of the CPA.

¹⁸ Section 3(1)(b)(iv) of the CPA.

consumers should not be allowed to suffer at the hands of the consumer dispute resolution framework that was enacted to offer them protection. In the context of vulnerable consumers in particular, a strict enforcement of prescription provisions, such as section 116(1) would be contrary to the CPA's objective of protecting vulnerable consumers.

3 *Prescription Act*

As mentioned above, the main statute that limitation provisions are compared against is the *Prescription Act*, which does not apply specifically to the CPA but serves as a useful guide. The *Prescription Act* was enacted to "consolidate and amend the laws relating to prescription."¹⁹ It regulates various aspects of prescription such as the acquisition of ownership by way of prescription,²⁰ the acquisition and extinction of servitudes through prescription²¹ and the prescription of debts after the effluxion of certain periods of time.²² In essence, rights are acquired through acquisitive prescription, whilst obligations are released through extinctive prescription.²³ Depending on the nature of the debt, the prescription period can vary between three and thirty years.²⁴ Ordinary contractual debts prescribe after a period of three years, unless there is a different statutory limitation that is placed on that transaction. The meaning of a debt under the *Prescription Act* has been interpreted to be "an obligation to pay money, deliver goods or render services".²⁵ The approach to the prescription of debts in terms of the *Prescription Act* is also nuanced, as the Act specifically: (i) considers the knowledge of the claimant regarding the identity of the debtor and the facts that gave rise to the claim (or the knowledge that he

¹⁹ Preamble of the *Prescription Act* 68 of 1969 (the *Prescription Act*).

²⁰ Chapter I of the *Prescription Act*.

²¹ Chapter II of the *Prescription Act*.

²² Chapter III of the *Prescription Act*.

²³ Kelly-Louw and Stoop 2019 *PELJ* 2.

²⁴ In this regard, s 11 of the *Prescription Act* reads as follows:

"The periods of debts shall be the following:

(a) thirty years in respect of –

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

²⁵ *Makate* case para 92.

ought to have had by exercising reasonable care);²⁶ and (ii) allows for the running of prescription to be interrupted in certain instances.²⁷ In this regard the *Prescription Act* lists certain instances which would either delay or interrupt prescription. Section 13 of the *Prescription Act* provides for the delay of prescription under the circumstances listed therein. Section 14 provides for the interruption of prescription in instances where the debtor acknowledges liability. The effect of this interruption is that prescription will run afresh from the date when the interruption takes place.²⁸ Alternatively, prescription will begin to run from the new due date in instances where the parties decide to postpone the date on which the debt is due.²⁹ Lastly section 15 of the *Prescription Act* makes provision for the judicial interruption of prescription. This will occur where the creditor claims the debt and serves a process on the debtor to this effect.³⁰ A "process" for the purposes of this section is defined to include the various documents that commence legal proceedings.³¹ The interruption of prescription will lapse, however, where the creditor fails to successfully prosecute the claim, abandons the claim or the judgment is set aside.³² If during this process the debtor acknowledges liability and the creditor fails to prosecute the claim, then prescription will commence from the date of the debtor's acknowledgement of liability or from the postponed due date.³³ In the event that the creditor is successful in the prosecution, prescription will commence afresh from the date when the court's judgment becomes executable.³⁴ A review of the various provisions of the *Prescription Act* makes it clear that a nuanced approach is followed in respect of the limitation of claims under this statute. Importantly, the creditor's knowledge and actions are considered when calculating the prescription period at any given time. This is unlike the current formulation and interpretation of section 116(1) of the CPA. A discussion of this provision follows.

4 Section 116(1) of the CPA

Naude and De Stadler³⁵ submit with merit that matters that are referred to the courts will be governed by the *Prescription Act*, whilst section 116 of the CPA governs matters that are referred to the consumer courts or the

²⁶ Section 12(3) of the *Prescription Act*. See *Mohlomi* case para 19. Also see *Links* case para 28.

²⁷ See ss 14 and 15 of the *Prescription Act*.

²⁸ Sections 14(2) and 15(3) of the *Prescription Act*. See Naudé and De Stadler 2019 *PELJ* 11.

²⁹ Section 14(2) of the *Prescription Act*.

³⁰ Section 15(1) of the *Prescription Act*.

³¹ Section 15(6) of the *Prescription Act*.

³² Section 15(2) of the *Prescription Act*.

³³ Section 15(3) of the *Prescription Act*.

³⁴ Section 15(4) of the *Prescription Act*.

³⁵ Naudé and De Stadler 2019 *PELJ* 11.

Tribunal. This approach is aligned with section 16(1) of the *Prescription Act*, which provides for the application of the statute to any debt unless it is inconsistent with another Act of Parliament that prescribes a time period within which a claim may be made. Accordingly, the *Prescription Act* does not apply to referrals made to consumer courts or the Tribunal.³⁶ As mentioned above, the focal provision for the purposes of this article is section 116(1) of the CPA, which reads as follows:

116. Limitations of bringing action

- (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -
 - (a) the act or omission that is the cause of the complaint; or
 - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

Accordingly, the section places a three-year limitation on when actions can be brought before the Tribunal or consumer courts. Similar to the *Prescription Act*, this provision seeks to provide legal certainty in so far as a referral of a complaint to the consumer court or Tribunal is concerned.³⁷ The period is calculated from either the date of the course of conduct or the date on which a conduct or practice ceased – where one is dealing with continuous conduct. As alluded to above, section 116(1) of the CPA is less nuanced than the *Prescription Act* in that it does not expressly provide for the interruption of prescription, nor does it specifically state that prescription will begin to run once the consumer is aware that there is an actionable claim.³⁸ A component that has proven to be particularly problematic in recent judgments by the Tribunal is the lack of an interrupting mechanism. This has proven to be a challenge, particularly considering the enforcement procedure that is set out in section 69 of the CPA.³⁹

Prior to the matter of *Ludick* the Tribunal favoured a wider interpretation of section 116(1) of the CPA.⁴⁰ This wider interpretation was bolstered by the

³⁶ Also see *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 77 (hereafter the *Chirwa* case); and Van Heerden "Section 116" 116-1.

³⁷ Also see Van Heerden "Section 116" 116-1.

³⁸ Scott *Realization of Rights in terms of the Consumer Protection Act* 108.

³⁹ Scott *Realization of Rights in terms of the Consumer Protection Act* 108-109. Naudé and De Stadler 2019 *PELJ* 11.

⁴⁰ *Lazarus v RDB Project Management CC t/a Solid* (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016) (hereafter the *Lazarus* case) para 31; *Mpofu v Terry's Auto* (NCT/78117/2017/75(1)(b)) [2017] ZACONAF 5 (3 July 2017) (hereafter the *Mpofu* case) para 19; *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multi Franchise* (NCT/83884/2017/75(1)) [2018] ZANCT 150 (18 July 2018) para 8; *Littlewood Building and Garden Services Projects CC v Hyundai Automotive South Africa (Pty) Ltd t/a Hyundai Springfield* (NCT/87578/2017/75(1)(b)) [2018] ZANCT 91 (26 June 2018) (hereafter the *Littlewood Building and Garden Services Projects CC* case) para 33; *Auto Glen Motors (Pty) Ltd t/a Auto Glen v Barnes In Re: Barnes v Auto Glen Motors (Pty) Ltd t/a Auto Glen* (NCT/106425/2018/148(1)) [2018] ZANCT 51

view that section 4(2) of the CPA⁴¹ enjoined the Tribunal to "promote the spirit and purposes" of the CPA and make orders that give effect to the right of the consumer to access redress by making an order in terms of the Act or making an innovative order to advance, promote, protect and guarantee that the rights of the consumer are realised under the CPA.⁴² In addition, the Tribunal often considered the elaborate dispute resolution process set out in section 69 of the CPA.⁴³ These Tribunal judgments took the CPA's dispute resolution system into account when resolving that the steps taken by the consumer interrupted prescription.⁴⁴ Consumers generally have no control over how fast their complaints will be handled by a dispute resolution forum.⁴⁵ Accordingly, the interpretation of the Tribunal was that when a consumer approaches any of the forums contemplated in section 69 of the CPA, that will interrupt the running of prescription.⁴⁶

(23 July 2018) (hereafter the *Auto Glen Motors* case) para 21; *Lubisi v Imperial Select Multifranchise (Pty) Ltd t/a East Rand Multifranchise* (NCT/85401/2017/75(1)(b)) [2019] ZANCT 31 (18 March 2019) para 45. Also see Scott *Realization of Rights in terms of the Consumer Protection Act* 109.

⁴¹ Section 4(2)(b) of the CPA provides that when matters are brought before the Tribunal or court in terms of the CPA, then it is the duty of the Tribunal or court to—
 "(i) promote the spirit and purposes of this Act; and
 (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—
 (aa) any order provided for in this Act; and
 (bb) any innovative order that better advances, protects, promoted and assures the realisation by consumers of their rights in terms of this Act."

⁴² See *Lazarus* case para 28; *Auto Glen Motors* case para 21.

⁴³ Section 69 of the CPA provides that:
 "A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by -
 (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
 (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
 (c) if the matter does not concern a supplier contemplated in paragraph (b) -
 (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or
 (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
 (iv) filing a complaint with the Commission in accordance with section 71; or
 (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."

⁴⁴ *Auto Glen Motors* case para 21; *Lazarus* case paras 29-32; *Lubisi* case paras 41-43. *Littlewood Building and Garden Services Projects CC* case paras 32-34.

⁴⁵ Naudé and De Stadler 2019 *PELJ* 12.

⁴⁶ Naudé and De Stadler 2019 *PELJ* 12.

Naude and De Stadler⁴⁷ highlight that the Tribunal's approach was to suspend the running of prescription, as opposed to interrupting it, as prescription was not considered to run afresh once the matter had been referred to the provincial authority. In this regard the running of prescription was merely paused during the period of referral and did not start afresh, as is the case when a "process" is served under the *Prescription Act*.⁴⁸

The line of Tribunal judgments on prescription took an about turn after the *Ludick* decision of the High Court. In this case the court interpreted section 166(1) of the *National Credit Act 34 of 2005* (NCA). The provision limits the time period within which a claim can be brought by a consumer in terms of the NCA. The provision reads as follows:

166. Limitations of bringing action

- (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -
 - (a) the act or omission that is the cause of the complaint; or
 - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

In respect of section 166(1) of the NCA, the Tribunal in *Ludick* held that:

The Tribunal does not have the authority to find that the three year period in section [166] was interrupted while the matter was delayed at the office of the NCR.⁴⁹

Following the *Ludick* decision, when interpreting section 116(1) of the CPA, the Tribunal has generally adopted the approach that it does not have the discretion to interrupt or suspend the running of prescription, even in instances where the consumer might have approached one of the alternative dispute resolution (ADR) agents within the three year period.⁵⁰ This has occurred even in circumstances where the delay was the fault of the consumer protection bodies, which is gravely unfair to the consumer.

⁴⁷ Naudé and De Stadler 2019 *PELJ* 12.

⁴⁸ Naudé and De Stadler 2019 *PELJ* 12.

⁴⁹ See *Ludick* case paras 27-28.

⁵⁰ *National Consumer Commission v National Auto Brokers CC trading as Omars Auto City* (NCT/172929/2020/73(3)) [2021] ZANCT 10 (25 June 2021) (hereafter the *National Auto Brokers* case) para 20; *National Consumer Commission v Jida Auto Investments (Pty) Ltd t/a Auto Elegance* (NCT/158339/2020/73(2)(b)) [2022] ZANCT 12 (8 March 2022) (hereafter the *Jida Auto Investments* case) para 101; *Bester v Naushaad's Car Sales Auto CC t/a Auto Belgravia* (NCT/227713/2022/75(1)(b)) [2022] ZANCT 39 (18 July 2022) (hereafter the *Bester* case) paras 16-18; *Mphasane v Afropulse 145 (Pty) Ltd Trading as Kingdom Doors* (NCT/237419/2022/75(1)(b)) [2022] ZANCT 46 (29 September 2022) (hereafter the *Mphasane* case) para 20; *Khoare v Celsius Multi-Franchise (Pty) Ltd* (NCT/237873/2022/75(1)(b) CPA - Rule 34) [2022] ZANCT 49 (6 October 2022) (hereafter the *Khoare* case) para 22.

In a 2021 judgment the Tribunal in *Winter v Kove Empire CC* was of the view that despite the two provisions in the NCA and the CPA having similar wording, the application of the prescription provisions in each statute might not be the same.⁵¹ The Tribunal's approach in *Winter* was informed by the powers given to the Tribunal by the CPA to make innovative orders, to develop the law in a manner that promotes the spirit and objectives of the CPA in the best way, and to ensure the realisation and enjoyment of consumer rights for consumers generally, and vulnerable consumers in particular.⁵² It considered an order for the interruption of prescription while a matter is with one of the dispute resolution fora in the CPA as being an example of an innovative order contemplated under section 4(2)(b)(ii)(bb).⁵³ Accordingly its view was that the Tribunal has the statutory authority to consider the interruption of prescription, depending on the circumstances of a case that has been referred under the provisions of the CPA.⁵⁴ However, the Tribunal did not rule definitively on this matter.

Despite the obiter observations made by the court in *Winter*, subsequent decisions of the Tribunal considered a number of prescription cases and still followed the narrow interpretation, attributing this approach to the court's finding in *Ludick*.⁵⁵

5 Section 69 of the Indian CPA

From a comparative perspective, it is also helpful to investigate the status of prescription in consumer matters in another developing country, such as India. India is useful as a comparative jurisdiction as it has a legal history similar to that of South Africa (in that it has been influenced by English law) and it is a developing country, like South Africa.⁵⁶ India has also had a longstanding and focussed consumer protection framework.⁵⁷ The current Indian CPA was preceded by the *Consumer Protection Act* 68 of 1986 (1986 CPA), which sought to ensure that: (i) consumer interests are better protected; and (ii) consumer councils and other relevant authorities in respect of the resolution of consumer disputes are established.⁵⁸

⁵¹ *Winter v Kove Empire CC* (NCT/176395/2021/75(1)(b)) [2021] ZANCT 35 (17 September 2021) (hereafter the *Winter* case) para 54.

⁵² Section 4(3) of the CPA. *Winter* case para 57.

⁵³ *Winter* case para 58.

⁵⁴ *Winter* case para 58.

⁵⁵ *Shabangu v RSM Auto CC t/a Autotique Pre-Owned* (NCT/203718/2021/75(1)(b)) [2022] ZANCT 10 (31 January 2022) para 15; *Jida Auto Investments* case paras 27-32; *Bester* case paras 17-20; *Pepeta v Mitchell Munck (Pty) Ltd* (NCT/245274/2022/148(1)) [2023] ZANCT 6 (9 February 2023) para 18; *Mphasane* case para 20; *Khoare* case para 22; and *Nadan v Madupha Business Enterprise* (NCT/239043/2022/75(1)(b)) [2022] ZANCT 50 (28 October 2022) para 16.

⁵⁶ See Scott *Realization of Rights in terms of the Consumer Protection Act* 118.

⁵⁷ See Scott *Realization of Rights in terms of the Consumer Protection Act* 118.

⁵⁸ Preamble of the *Consumer Protection Act* 68 of 1986 (the 1986 CPA).

Section 24A of the 1986 CPA provided for a limitation period. In terms of this provision a two-year time bar after the cause of action arose was placed on complaints filed with the District Forum, the State Commission or the National Commission.⁵⁹ It also made provision for an exception to this rule where sufficient cause for the delay could be shown by the applicant and such reason for condonation needed to be documented by the relevant forum. In *State Bank of India v BS Agriculture Industries*⁶⁰ the Supreme Court of India emphasised the importance of the time-bar that was imposed by section 24A of the 1986 CPA by finding that considering a matter which is time-barred in terms of the 1986 CPA would amount to illegality and entitle an aggrieved party to have the order set aside. Accordingly, consumer forums are required to deal with the merits of a complaint only to the extent that it has been filed within the two-year period.⁶¹ Any complaints that are received after that period can be considered only to the extent that sufficient cause has been shown and the reason for the delay has been recorded in writing.⁶² Consumer forums were thus cautioned by the apex court to act within their powers to avoid their orders being set aside. It cannot be gainsaid that such a result might cause undue frustration to the very consumer that the forum might have been seeking to assist by exercising undue lenience.

The 1986 CPA was repealed by the Indian CPA.⁶³ One of the purposes of the Indian CPA is to ensure that consumer disputes are administered and settled in a timely and effective manner.⁶⁴ While this purpose is not an aspect that had been expressly set out in its predecessor; it speaks to the importance of having a time bar of this nature in the Indian CPA, i.e. ensuring that matters do not remain open indefinitely, which is in the interests of legal certainty. This purpose is similar to one of the purposes of the South African CPA, namely ensuring that the consensual dispute resolution system is efficient.⁶⁵

The current Indian CPA places a similar limitation on claims that are brought by consumers in terms of its provisions. Like its predecessor, section 69(1) of the Indian CPA provides a two-year limitation period for applicants wishing to admit complaints before the District Commission, the State Commission or the National Commission.⁶⁶ Again there is an exception to

⁵⁹ Section 24(1) of the 1986 CPA.

⁶⁰ *State Bank of India v BS Agriculture Industries (I)* (2009) 5 SCC para 8.

⁶¹ *State Bank of India v BS Agriculture Industries (I)* (2009) 5 SCC para 8.

⁶² *State Bank of India v BS Agriculture Industries (I)* (2009) 5 SCC para 8.

⁶³ Section 107 of the *Consumer Protection Act 35 of 2019* (the Indian CPA).

⁶⁴ Preamble of Indian CPA.

⁶⁵ Section 3(1)(g) of the CPA.

⁶⁶ See also Majumdar and Gupta 2020 *Supremo Amicus* 515; Mohd 2021 *Supremo Amicus* [797]; Mushtaq and Faya 2023 *International Journal of Law Management and Humanities* 658.

this limitation, namely that the relevant forum must be satisfied that the consumer "had sufficient cause for not filing the complaint within such period" and this reason must be duly recorded by the relevant forum.⁶⁷

Against the backdrop of the decision taken by the apex court in *State Bank of India v BS Agriculture Industries*, the consumer dispute resolution forums have on more than one occasion considered the meaning of "sufficient cause" as contemplated in the exception to the two-year limitation period.⁶⁸ In this regard the State Commission confirmed in *Biswas v MS Padmalaya Projects LLP* that "sufficient cause" means that a consumer must not have acted negligently and there should not be an absence of bona fides on the part of the consumer. In the *Basawaraj v The Spl. Land Officer* matter⁶⁹ the State Commission flagged that "sufficient cause" requires that the consumer in question must also have acted diligently and not been inactive. The facts and circumstances are also an important consideration when a court exercises its discretion to determine whether the exception will apply.⁷⁰ Ultimately the court needs to be satisfied that there was indeed a *bona fide* mistake, and the delay was not "merely a device to cover an ulterior purpose".⁷¹ In 2024 the National Commission in *Virmani v M/S Vaidehi Akash Housing Pvt Ltd*,⁷² considering the apex court's dictum in *State Bank of India*, confirmed that section 69 is a jurisdictional fact that has to be decided upon when considering consumer matters.

The limitation period that is provided under the Indian CPA is a year shorter than its South African counterpart. However, the provision is more flexible than the South African equivalent as it expressly permits the District Commission, the State Commission or the National Commission to entertain complaints that are not filed within the prescribed two-year period on condition that "sufficient cause" for failing to file the complaint within the two-year period is present.⁷³ The South African counterpart provides no exceptions to the time limitations set out in section 116(1) of the CPA.

What is evident from the cases that have considered the prescription provisions of the Indian CPA is that the exception does not frustrate the purpose of prescription, being the maintenance of legal certainty.⁷⁴ A number of cases brought before consumer dispute resolution bodies have

⁶⁷ Section 69(2) of the Indian CPA.

⁶⁸ *Biswas v MS Padmalaya Projects LLP* (2022) SC. Also see *Basawaraj v The Spl. Land Officer* AIR 2014 SC 746 para 9; *Kumar Sharma v United Indian Insurance Co Ltd* IV (2015) CPJ 453 (NC) para 13.

⁶⁹ *Basawaraj v The Spl. Land Officer* AIR 2014 SC 746 para 9.

⁷⁰ *Basawaraj v The Spl. Land Officer* AIR 2014 SC 746 para 9.

⁷¹ *Basawaraj v The Spl. Land Officer* AIR 2014 SC 746 para 9.

⁷² *Virmani v M/S Vaidehi Akash Housing Pvt Ltd* (2024) 06 NCDRC CK 005 para 39.

⁷³ Section 69(2) of the Indian CPA.

⁷⁴ See discussion under para 1 above.

considered the exception but condonation applications of this nature have been rejected.⁷⁵ Accordingly, providing a similar provision in the South African consumer protection framework, would not frustrate the abovementioned purpose of the CPA to resolve consumer disputes efficiently.⁷⁶

It is also important that the relevant forum record the reason for condoning the delay.⁷⁷ This process should ensure that there is no abuse of process by complainants approaching these forums. It would also allow them to develop their own precedents on what they deem to be an acceptable reason for delay and what may not qualify as acceptable.⁷⁸

6 Rethinking section 116(1) of the CPA

As highlighted above, one of the purposes of the CPA is to create a redress system that is "accessible, consistent, harmonised, effective and efficient".⁷⁹

In this light section 116(1) of the CPA should be considered in the context of the CPA's objective and against the backdrop of section 34 of the *Constitution*. Unfortunately, a pattern appears to have emerged in respect of Tribunal judgments on section 116(1) of the CPA subsequent to the *Ludick* judgment. As mentioned above,⁸⁰ the Tribunal has followed a narrow and strict interpretation of section 116(1) to the consumer's detriment. An approach by the Tribunal that accepts that a matter has prescribed, even in instances where the consumer might have referred the matter to a forum listed in section 69 of the CPA, is contrary to the CPA's purpose of having a redress system that is consistent, accessible and harmonised. It creates an anomaly in that a consumer is expected to approach the section 69 fora, such as the accredited industry ombuds or other ADR agents, at the risk of having the matter prescribe if the particular forum delays in resolving the matter. That creates a clear inconsistency and lack of harmonisation in the redress system. It further makes redress for consumers inaccessible, which is contrary to the purpose of the CPA.

This is further aggravated by the reality of the vulnerable consumer in South Africa, with challenges such as low literacy, income and a limited fluency in

⁷⁵ *Biswas v MS Padmalaya Projects LLP* (2022) SC; *Kumar Sharma v United Indian Insurance Co Ltd IV* (2015) CPJ 453 (NC) paras 18-19.

⁷⁶ Section 3(1)(g) of the CPA.

⁷⁷ Section 69 of the Indian CPA.

⁷⁸ *Biswas v MS Padmalaya Projects LLP* (2022) SC; *Kumar Sharma v United Indian Insurance Co Ltd IV* (2015) CPJ 453 (NC) paras 18-19.

⁷⁹ Section 3(1)(h) of the CPA. See also *Ngoza v Roque Quality Cars* (NCT/79905/2017/73(3)&75(1)(b)) [2017] ZANCT 104 (28 September 2017) (hereafter the *Ngoza* case) para 26.

⁸⁰ Paragraph 4 above.

the English language.⁸¹ These vulnerable consumers, who might not even be aware of their rights, might find themselves severely prejudiced by a stringent interpretation of section 116(1) of the CPA. Overall, the lack of alignment between the redress that is afforded on paper and that which is provided in practice makes it necessary for the current interpretation of section 116(1) of the CPA to be re-considered and remodelled.

7 The dispute resolution process

As mentioned above, consumers often find themselves with prescribed matters when following the dispute resolution process prescribed by the CPA.⁸² Section 69 provides for the enforcement of rights by consumers in terms of the CPA. Consumers often face a challenge when navigating the section 69 enforcement process while racing against the time restriction imposed by section 116(1).⁸³ The issue of the courts being a forum of last resort under the CPA has been litigated on extensively but is not the focal point of this article.⁸⁴ Civil courts aside, Tribunal judgments have illustrated that a consumer's complaint can at times become clogged in the system due to the respondents' refusal to co-operate or comply with the recommendation of the accredited industry ombud⁸⁵ or due to procedural or otherwise inexplicable delays by dispute resolution forums.⁸⁶ In other instances there is a frustrating back and forth between the various dispute resolution forums coupled together with a respondent's refusal to comply.⁸⁷ The following challenges become evident from these matters, namely that: (i) accredited industry ombuds are often undermined by members of industry; and (ii) at times there appears to be a lack of accountability with respect to the dispute resolution forums that are meant to assist consumers under the CPA. Each of these issues will be addressed in turn.

⁸¹ Naudé and De Stadler 2019 *PELJ* 12.

⁸² Paragraph 4 above.

⁸³ Also see Van Heerden "Section 116" 116-9.

⁸⁴ See generally *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government* 2016 3 All SA 794 (FB); *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico* (1260/2015) [2016] ZANCHC 1 (1 April 2016); *Joroy 4440 CC v Potgieter* 2016 3 SA 465 (FB); *First Engineering & Stainless v Euro Steel Services* [2022] 1139-2018 (ECP); *Motus Corporation (Pty) Ltd v Wentzel* 2021 3 All SA 98 (SCA).

⁸⁵ *Mpofu* case para 7; *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise* (NCT/83884/2017/75(1)(b)) [2018] ZANCT 21 (25 March 2018) (hereafter the *Stemmet* case) paras 13-15; *Winter* case para 27; *National Auto Brokers* case paras 12 and 14; and *Mphasane* case para 5.

⁸⁶ *Littlewood Building and Garden Services Projects CC* case para 14; *Lubisi* case para 40; *Winter* case para 29; *Khoare* case para 7.

⁸⁷ *Mpofu* case paras 7-8.

7.1 Accredited industry ombuds

Accredited industry ombuds are considered as some of the ADR agents that are available under the CPA.⁸⁸ They are also specifically accredited by the Minister of Trade, Industry and Competition.⁸⁹ An industry ombud can be accredited in instances where its code of conduct prescribes a scheme of ADR and the National Consumer Commission (Commission) is of the view that it is sufficiently placed to provide dispute resolution services that are comparable to those that are provided in terms of public regulation.⁹⁰ In *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* the court found that membership of industry ombuds, specifically the Consumer Goods and Services Ombud (CGSO) in this case, is mandatory for industry members.⁹¹ This was an important first step for the purposes of encouraging greater participation and co-operation by industry members. The two accredited industry ombuds under the CPA at this stage are the Motor Industry Ombud of South Africa (MIOSA) and the CGSO. Accredited industry ombuds are considered a form of "legal self-regulation" as the implication of their accreditation is that their industry codes are prescribed through regulations issued by the Minister.⁹² However, it has been evident from Tribunal judgments that industry members appear to disregard the decisions of these accredited industry ombuds, despite their statutory backing.⁹³

Nonetheless, the accredited industry ombuds' codes of conduct attempt to impose consequences on industry members for non-compliance. For example, under MIOSA's Code of Conduct a supplier's non-compliance with the Code or the Act must be reported to the Automotive Industry Association.⁹⁴ Schedule 1 of the code of conduct sets out a list of the current automotive industry associations.⁹⁵ The CGSO appears to follow an even more lax approach. In this regard the recommendation of the CGSO is not considered binding on either of the parties.⁹⁶ However, where the industry

⁸⁸ See s 1 of the CPA, definition of "alternative dispute resolution agent".

⁸⁹ See s 82(6) of the CPA.

⁹⁰ Section 82(6) of the CPA.

⁹¹ *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* (18096/2017) [2021] ZAGPPHC 309 (26 March 2021) para 71. Also see Scott and Van Dyk 2022 SALJ 264-268.

⁹² Scott and Van Dyk 2022 SALJ 260.

⁹³ *Mpofu* case para 7; *Stemmet* case paras 13-15; *Winter* case para 27.

⁹⁴ Clause 23.1.4 of GN 817 in GG 38107 of 17 October 2014 (*South African Automotive Industry Code of Conduct*) (hereafter the MIOSA Code).

⁹⁵ The Associations set out in this schedule are the Association of Motorcycle Importers and Distributors, the Independent Dealers Association, the National Association of Automotive Components and Allied Manufacturers, the National Association of Automobile Manufacturers of South Africa and the Retail Motor Industry Organisation.

⁹⁶ Clause 11.7.4 of GN R271 in GG 38637 of 30 March 2015 (*Consumer Goods and Services Industry Code of Conduct*) (hereafter the CGSO Code).

member rejects a recommendation that has been accepted by the consumer, the CGSO is required to publish that information, i.e. the number of cases and details in relation thereto, in its annual report or through an alternative means that it deems fit.⁹⁷ This seems to be an attempt to encourage compliance by industry members in order to preserve their reputations. In the event that either of the parties fails to comply with the recommendation or a resolution is not agreed upon, the CGSO Code provides that the parties need to be informed of the other options that are available to them, including referrals to the Commission or Tribunal.⁹⁸ However, the disregard of recommendations by accredited industry ombuds shows that neither of these codes imposes meaningful sanctions for a lack of co-operation by industry members.⁹⁹ The Advertising Regulation Board, previously known as the Advertising Standards Authority, was considered to be an effective self-regulatory body as it had a very effective sanction, i.e. the withholding of advertising time from industry members.¹⁰⁰ More meaningful sanctions might need to be considered for recalcitrant industry members in the CPA context.

The CPA provides for the resolution of a dispute by ADR agents (including accredited industry ombuds) to be made an order in terms of section 70(3)(a) of the CPA.¹⁰¹ Furthermore, there is scope for the order to be made a consent order by the Tribunal or the high court in terms of section 70(3)(b) of the CPA.¹⁰² A consent order in terms of this provision may also include an award of damages to the complainant.¹⁰³ A Tribunal order is "binding and enforceable upon the parties" and non-compliance constitutes an offence under the CPA.¹⁰⁴ Where a party is convicted of an offence, a fine may be issued or the party may be imprisoned for a period that does not exceed twelve months (or both imprisonment and a fine may be imposed).¹⁰⁵

It would, however, be prudent for a clear sanction to be introduced for non-compliance with the ADR process." For example, a suitable sanction might be similar to the current formulation of section 134(3) of the NCA. This provision allows the Tribunal to make an exceptional costs order against the respondent, where the Tribunal's view is that the matter could have been resolved properly if the ADR process had been carried out in good faith. This would be the case where the Tribunal resolves a matter in which the

⁹⁷ Clause 11.7.4 of the CGSO Code.

⁹⁸ Clause 11.7.7 and 11.7.8 of the CGSO Code.

⁹⁹ See *Mpofu* case para 7; *Stemmet* case paras 13-15; *Winter* case para 27.

¹⁰⁰ See Woker 2010 *Obiter* 222.

¹⁰¹ Also see Clause 9.1.4 of the CGSO Code and Clause 23.1.1 of the MIOSA Code.

¹⁰² Clause 9.1.5 of the CGSO Code and Clause 23.1.2 of the MIOSA Code.

¹⁰³ Section 70(4) of the CPA.

¹⁰⁴ Section 109 of the CPA; Scott and Van Dyk 2022 *SALJ* 264.

¹⁰⁵ Section 111(1)(b) of the CPA; Scott and Van Dyk 2022 *SALJ* 264.

respondent had not agreed to the referral of a matter to an ADR process.¹⁰⁶ In the CPA context this could be adjusted to cater for matters where the respondent refuses to co-operate. This would mean that there would be financial consequences for a failure to co-operate where there was a reasonable prospect of the matter being resolved by the ADR agent.

7.2 Accountability – the Commission

It is evident from the above discussion that difficulties with lodging a complaint with the Tribunal within the prescribed period often arise while the consumer is following the mandatory ADR process that is set out in section 69.¹⁰⁷ As such, delays in the ADR process have an impact on when the complaint will reach the Tribunal and be considered to have prescribed in terms of section 116(1) of the CPA.¹⁰⁸ Certain matters such as *Winter v Kove Empire* indicate instances where a lack of accountability by the Commission comes to the fore. In this case, after the consumer referred a matter to MIOSA and it was not resolved successfully the consumer referred the matter to the Commission.¹⁰⁹ The Commission took more than three years to respond to the consumer's complaint. When the consumer enquired about the progress of the matter he was told that his file could not be located and, on another occasion, that the official dealing with the matter was no longer available.¹¹⁰ The consumer even went to the extent of approaching the office of the Public Protector out of desperation due to a lack of responsiveness experienced from the Commission.¹¹¹ After the consumer took this drastic step the Commission issued a notice of non-referral.¹¹² This notice simply indicated that the evidence to the effect that the car had defects was unsatisfactory.¹¹³ However, the Commission failed to clarify the reason for its prolonged delay of more than three years.¹¹⁴ Whilst there is a focus in the CPA on ensuring that there is compliance and co-operation with consumer protection enforcement bodies such as the Commission,¹¹⁵ it is similarly important to consider how the Act regulates the accountability of institutions like the Commission. The Commission has already been subject to criticism by scholars regarding the role it ought to

¹⁰⁶ Section 134(3) of the NCA.

¹⁰⁷ Also see Van Heerden "Section 116" 116-3.

¹⁰⁸ Also see Van Heerden "Section 116" 116-3.

¹⁰⁹ *Winter* case para 28.

¹¹⁰ *Winter* case para 29.

¹¹¹ *Winter* case para 30. The office of the Public Protector is a Chapter 9 institution in terms of the *Constitution*. It has the powers to investigate conduct "in public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice."

¹¹² *Winter* case para 30.

¹¹³ *Winter* case para 32.

¹¹⁴ *Winter* case para 33.

¹¹⁵ See ss 108 and 109 of the CPA.

play in the enforcement process.¹¹⁶ However, the focus of this discussion will be on how the accountability of a critical forum like the Commission can be improved in the dispute resolution process.¹¹⁷

As submitted by Van Eeden and Barnard,¹¹⁸ the accountability of an institution such as the Commission entails its thorough adherence to the CPA and the principles of the *Constitution*, as well as the exercise of their powers by Commissioners in an "impartial and unbiased" manner. In this regard section 85(1) of the CPA establishes the Commission as an organ of state that is within the public administration but outside of the public service.¹¹⁹ According to Van Heerden,¹²⁰ this means that the Commission has a degree of independence from the government. Whilst that might be the case, it is still accountable to certain arms of the state, as is discussed further below.

The Commission is expected to exercise its functions in terms of the CPA, any other law or as assigned by the Minister in a manner that is cost-effective and efficient.¹²¹ The execution of its functions should also be in alignment with the principles and values listed in section 195 of the *Constitution*.¹²² In this regard section 195 of the *Constitution* requires that public administration be governed in accordance with the democratic values and principles that are enshrined in the *Constitution*.¹²³ These principles include a "high standard of professional ethics" that ought to be promoted and maintained¹²⁴ and the accountability of public administration, to name a few.¹²⁵ These principles are applicable to organs of state and administration in every sphere of government.¹²⁶ Thus as an organ of state the Commission has constitutional obligations.

¹¹⁶ See Du Plessis 2022 *Stell Law Review* 241; Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 570.

¹¹⁷ Also see 99 of the CPA.

¹¹⁸ Van Eeden and Barnard *Consumer Protection Law* 407-408.

¹¹⁹ An "organ of state" is defined in s 239 of the *Constitution* as:

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer."

¹²⁰ Van Heerden "Section 85" 85-2.

¹²¹ Section 85(2)(c)(i) of the CPA.

¹²² Section 85(2)(c)(ii) of the CPA.

¹²³ Section 195(1) of the *Constitution*.

¹²⁴ Section 195(1)(a) of the *Constitution*.

¹²⁵ Section 195(1)(f) of the *Constitution*.

¹²⁶ Section 195(2) of the *Constitution*.

Finally, section 55 of the *Constitution* requires the National Assembly to provide mechanisms that *inter alia* maintain adequate oversight over "any organ of state". Therefore Parliament must oversee the Commission.¹²⁷ This oversight function is served by the portfolio committee on Trade, Industry and Competition.¹²⁸ The executive also exercises an oversight role through the Department of Trade, Industry and Competition.¹²⁹ Accordingly, the Minister is required to conduct an audit review of the Commission on the exercise of its powers and functions every five years.¹³⁰ The Commission is also required to report to the Minister annually regarding its activities in terms of the *Public Finance Management Act* 1 of 1999.¹³¹ Given that it is an organ of state accountable to the legislature and the executive, Parliament and the Minister need to ensure that the legislative and constitutional obligations of the Commission are upheld. This should include ensuring that matters do not sit with the Commission for inordinately long periods of time, as this frustrates a consumer's access to redress. The Commission also appears to require more resources for it to adequately handle the complaints that come before it.¹³² Therefore it should be provided with that support to ensure that it does not sit with matters for long periods due to capacity constraints. The exercise of the requisite level of oversight and the provision of support should assist the Commission in fulfilling its role for the consumer's benefit; while also avoiding situations where consumers are so frustrated that they opt to approach Chapter 9 institutions such as the Office of the Public Protector to hold the Commission accountable.

8 Concluding remarks

The CPA was enacted in the recognition that—

it is necessary to develop and employ innovative means to—

- (a) Fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
- (b) Protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and

¹²⁷ Van Eeden and Barnard *Consumer Protection Law* 408.

¹²⁸ *National Consumer Commission 2022* https://static.pmg.org.za/30_September_2022__NCC_Annual_Report_2021-22.pdf 54.

¹²⁹ *National Consumer Commission 2022* https://static.pmg.org.za/30_September_2022__NCC_Annual_Report_2021-22.pdf 54.

¹³⁰ Section 91(1) of the CPA. See also Van Eeden and Barnard *Consumer Protection Law* 408.

¹³¹ Section 91(2) of the CPA; Van Eeden and Barnard *Consumer Protection Law* 408.

¹³² *National Consumer Commission 2022* https://static.pmg.org.za/30_September_2022__NCC_Annual_Report_2021-22.pdf 27.

- (c) To give effect to internationally recognized consumer rights.¹³³

This article has highlighted where the CPA has fallen short in giving effect to the above ideals in so far as the issue of prescription is concerned. This is so particularly given the recent interpretation that has been ascribed to section 116(1) of the CPA. Considering the CPA's objectives, it is critical that section 116(1) be interpreted in a manner closely aligned with the objectives of the statute. Making access to redress difficult and inaccessible to consumers, particularly where consumer matters prescribe while they are being handled by one of the consumer protection dispute resolution forums, is counterintuitive and unjust. It also is not well aligned with the constitutional right to access courts or tribunals.

There is indeed a necessity for section 116(1) of the CPA to be amended to ensure that a consumer who follows through with the section 69 procedure is not prejudiced. Commentators have proffered various solutions that might be considered to provide more clarity when interpreting section 116(1), particularly in instances where the consumer is not necessarily at fault.¹³⁴ For instance, writers have suggested that the *Prescription Act* and the CPA be amended, considering applicable rules and enforcement practices in terms of the CPA, the objectives of the CPA and how these affect the consumer.¹³⁵ The approach that the legislature should consider factoring in an express provision that either suspends or interrupts the running of prescription in respect of section 116(1) of the CPA is also supported.¹³⁶ This should be the case in instances where the consumer has referred the matter to any of the dispute resolution forums mentioned in section 69 of the CPA.

However, there is an alternative approach to interrupting or suspending prescription. From the comparative component of this article, section 69 of the Indian CPA can be considered as an example of a possible solution. Without being drafted in an overly complex manner, the Indian CPA allows a complaint to be entertained after it has prescribed if the relevant forum is satisfied that there was "sufficient cause" for that complaint not being filed within that period. As discussed above, this provision does not result in a disregard of the time limitation and the consumer forum ought to be satisfied that there is a *bona fide* reason for the complainant's delay.¹³⁷ It is submitted that, subsequent to the inclusion of a similar provision, a similar posture should be adopted by the South African Tribunal and consumer courts to avoid an abuse of such an exception. This type of provision allows for the

¹³³ Preamble of the CPA.

¹³⁴ Also see Van Heerden "Section 116" 119-10.

¹³⁵ Naudé and De Stadler 2019 *PELJ* 12; Van Heerden "Section 116" 116-10.

¹³⁶ See Scott *Realization of Rights in terms of the Consumer Protection Act* 191.

¹³⁷ See discussion under paragraph 5 above.

flexibility that is required to give effect to access to justice, as was highlighted by the court in *Ngoza*.¹³⁸ This approach is also one which the South African legislature could consider, should it not wish to provide for instances in which prescription is either interrupted or suspended.

In the meantime, the Tribunal ought to consider the critical considerations that were highlighted in the matter of *Winter v Kove* regarding section 116(1) of the CPA. These considerations were in context of the statutory authority of the Tribunal and the consumer court to make innovative orders and to specifically adopt a purposive interpretation of the CPA that gives effect to the realisation of consumer rights.¹³⁹ Section 4(2)(a) of the CPA also makes specific reference to vulnerable consumers as a key consideration for the court when developing the common law to improve the realisation of consumer rights. It is submitted that the *Ludick* decision should not be applied in the context of section 116(1) of the CPA, as the NCA does not give the Tribunal the authority to make innovative orders, as is the case under section 4 of the CPA.¹⁴⁰

It is important for consumer protection bodies to realise the role they play in the running of prescription in consumer matters. First, all ADR agents as well as the Commission need to handle consumer matters expeditiously. Not only is this aligned with the objectives of the CPA, but it is also critical in ensuring that consumer access to redress, which is also constitutionally enshrined, is not undermined.¹⁴¹ Accredited industry ombuds ought to put in place more meaningful mechanisms for addressing non-compliance into their Codes of Conduct, with a view to deterring non-cooperative behaviour from industry members. Alternatively, where there is a lack of co-operation from the outset, then the ADR process should be terminated in terms of section 70(2) of the CPA to ensure that the consumer's claim does not *prescribe*. Furthermore, the Commission too should be held accountable and also be adequately supported as an organ of state, to avoid instances where consumer matters prescribe due to its slow progress in consumer matters.

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¹³⁸ *Ngoza* case para 26.

¹³⁹ See discussion in paragraph 4 above.

¹⁴⁰ Also see *Winter* case para 65.

¹⁴¹ Section 3 of the CPA. Also see discussion under paragraphs 1 and 2 above.

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National Consumer Commission *National Consumer Commission Annual Report 2021/22* https://static.pmg.org.za/30_September_2022__NCC_Annual_Report_2021-22.pdf accessed 6 July 2023

List of Abbreviations

ADR	alternative dispute resolution
CPA	Consumer Protection Act 68 of 2008
NCA	National Credit Act 34 of 2005
CGSO	Consumer Goods and Services Ombud
MIOSA	Motor Industry Ombud of South Africa
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review