



Misleading Marketing of Unhealthy Foods and Beverages to Children in South Africa as a Consumer Protection Issue

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Abstract

Childhood overweight and obesity, which predisposes children to various non-communicable diseases, is a fast-rising public health burden in South Africa. Children are growing up in an obesogenic food environment that features intense marketing of unhealthy food and beverages using various channels and appealing strategies including misleading health and nutrition claims. This paper examines the applicability of the Consumer Protection Act No. 68 of 2008 (the CPA) in addressing the misleading marketing of unhealthy foods to children. The Act provides certain standards to guide the marketing of goods, including the prohibition of false, misleading, or deceptive representation of material facts. The paper examines the legal prohibition of false, misleading, or deceptive representations in marketing and how they have been interpreted by the National Consumer Tribunal and the courts. It also explores avenues among the redress processes and mechanisms provided in the CPA in addressing misleading marketing of unhealthy food and beverages to children. The overall aim is to show that the South African consumer protection legal framework offers a viable opportunity amongst other legal and policy measures to address misleading marketing of unhealthy foods and beverages to children.

Keywords South Africa · Childhood overweight and obesity · Unhealthy food and beverage marketing to children · Misleading representation · Consumer Protection Act No. 68 of 2008

Highlights

- Misleading health/nutrition claims on otherwise unhealthy food products is a common strategy in child-directed marketing which contributes to childhood overweight and obesity in South Africa.
- Under the Consumer Protection Act No. 68 of 2008, misleading health/nutrition claims not only constitute material misrepresentation but are also reasonably likely to mislead or deceive children as well as their parents or caregivers.
- The South African consumer protection legal framework offers a viable opportunity, among other legal and policy measures, to address the misleading marketing of unhealthy foods and beverages to children.

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Introduction

The increase in childhood overweight and obesity worldwide, particularly in South Africa, has put child-directed marketing of calorie-dense and micronutrient-poor food and beverages which are high in sugar, salt, and fat in the spotlight (Boachie et al., 2023, p.1). Currently, South Africa is facing a childhood obesity crisis as the regular consumption of unhealthy foods continues to rise among this group (Dukhi et al., 2020, p. 1). It has been predicted that 28.2% of children aged five to nine and 27.1% of children aged 10–19 could be obese by 2030 in South Africa (World Obesity Atlas, 2019). This can be linked to the fact that South African children are growing up in an obesogenic food environment in which the food and beverage industry markets cheap, highly palatable, and unhealthy foods and beverages (Boachie et al., 2023).¹

While food marketing aims to influence consumer preference, it is important to acknowledge that for many South African households, the element of choice concerning food is out of touch with their reality. With the rising cost of living, high rates of unemployment, escalating food prices, and insufficient child support grants, the food choice of many households is constrained by what they can easily access and afford, which may be unhealthy (Labadarios et al., 2011; Madlala et al., 2022, p. 2). This is also because healthier food choices are considerably more expensive and mostly out of reach for poor households (Vermeulen et al., 2023). The aggressive marketing of unhealthy foods also targets vulnerable populations, including children from poor households, to influence their dietary preferences from a young age while also creating an impression that these foods are beneficial. Moreover, the risk factors for various non-communicable diseases tend to be higher in poor and marginalized populations who also have challenges in accessing adequate health care (Rasesemola et al., 2023 p.1). Addressing this inequality thus requires, among others, controlling the drivers of unhealthy diets through necessary legal and policy measures. Strategies to restrict the marketing of unhealthy food to children, as well as to make healthy and nutritious food more accessible and affordable, are important. While acknowledging the different socio-economic conditions of South African children which shapes their nutrition intake, this paper focuses on marketing to children as a homogenous group who are considered a lucrative but vulnerable consumer segment.

Food marketing has been shown to greatly influence consumer preferences (Modikeng, 2018; Sama, 2019), especially among children (Cairns et al., 2013, p. 209) who make up a lucrative consumer market segment because they can sometimes purchase food themselves; they influence their parent's food purchases (including through their pester power), and they are future consumers themselves (Veerasingam, 2012, p. 376). Studies have shown that unhealthy food marketing directed at children (including those to which children are exposed) creates a preference for such foods even into adulthood, discourages healthy eating, and influences family food purchases and consumption (Qutteina et al., 2019, p. 1708; Sadeghirad et al., 2016, p. 945). The strong influence on children is linked to the utilization of various channels and appealing techniques such as cartoon characters, colourful

¹ The food and beverage industry is used in this paper to describe large national or transnational commercial businesses who are dominant actors in the food and beverage environment as manufacturers, retailers, or food outlets. They have an identity with consumers in contrast with agribusinesses and local and small-scale producers or primary processors (Igumbor et al., 2012). The food and beverage industry is in the spotlight in the context of the rising obesity crisis because of their role in encouraging unhealthy diets while prioritizing profits over health.

packaging, exaggerated attributes of benefits derivable from the food product, etc., and the use of misleading health/nutrition claims (Khan et al., 2023, p. 2144, Yamoah et al., 2021, p. 3856). The challenge is that these strategies or techniques are mostly used in the marketing of unhealthy food and beverage products which are detrimental to the health of children.

Given the adverse effects of unhealthy food marketing (United Nations, 2016, para. 2, 14), States have been urged to protect children's health and well-being including through restricting the advertisement of energy-dense and micronutrient-poor foods to children (Committee on the Rights of the Child, 2013, para. 27). There have been various calls for mandatory, monitored, and enforced regulation of marketing to children (WHO, 2023), including in South Africa (Boachie et al., 2023; Erzse et al., 2021; Yamoah et al., 2021). Except for tobacco and alcohol, South Africa has no legal restriction or limitation on the marketing of food to children. The Food and Beverage Advertising Code (2008), as well as the South African Marketing to Children Pledge (2009), are private sector self-regulatory standards aimed at protecting children (12 years and under) from unhealthy food and beverage marketing. These codes have, however, not made a noticeable impact in reducing unhealthy food and beverage marketing to children due to various factors, including their voluntary nature, lack of compliance, and weak enforcement (Erzse et al., 2022, p. 650; Moodie et al., 2013, p. 670).² The government has been slow to put strict regulations in place to control the marketing of foods and drinks to children, partly influenced by opposition from the food and beverage industry (Claasen et al., 2016; Fabbri et al., 2018; Karim et al., 2020; Lake, 2024; Mialon et al., 2020).³ The ongoing advocacy for the South African government to adopt better food labelling (Front-of-Pack Warning Labels) and advertising regulations led to Draft Regulation R3337 Relating to the Labelling and Advertising of Foodstuffs made under the Foodstuffs, Cosmetic, and Disinfectant Act 54 of 1972. This Draft Regulation, which was published for public comments in April 2023 by the Department of Health, aims to introduce front-of-pack warning labels as well as impose restrictions on the use of health/nutrition claims and marketing to children based on a defined nutrient profile model. Until this regulation enters into force, South Africa remains without specific legal standards for protecting children from unhealthy food marketing.

This paper examines the applicability of the Consumer Protection Act No. 68 of 2008 (the CPA) in addressing the misleading marketing of unhealthy foods to children. The

² The fact that non-members are not bound by self-regulatory codes or to submit to the processes or rulings of self-regulatory bodies (*Advertising Standards Authority of South Africa v Herbex (Pty) Ltd* (902/16) [2017] ZASCA 132 par 16) is a problem in South Africa. In various complaints brought to the Advertising Regulatory Board (for alleged violation of the Code of Advertising Practice) against companies in the food industry, the advertisers who are not members of the ARB have always emphasized the lack of jurisdiction given that they are not members and therefore not bound (*Ernst van der Spuy v KFC South Africa*, 5 June 2022; *Patronella Korb v. Mars Consumer Products SA* of 14 March 2023; *Vaughan Greene v. Simba (Pty) Ltd*, 5 April 2022). Despite signing the South African Marketing to Children pledge, studies have found poor adherence to the TV advertising guidelines in South Africa (Mchiza et al., 2013; Delpont, 2015; Yamoah et al., 2021). The most frequent advertisements shown during periods when children are likely to be watching TV are for desserts and sweets, fast foods, hot sugar-sweetened beverages, starchy foods, and sweetened beverages, as found by Mchiza et al. (2013). With the many violations of the food and beverage advertising codes and the South African Marketing to Children pledge, it appears that the outcome of the self-regulatory approach adopted in South Africa is unsatisfactory.

³ Food and beverage industry giants continue to actively oppose nutrition-related health regulations through several means, including sponsoring research aimed at generating evidence towards solutions that align with industry interests, discrediting research findings, lobbying public officials to oppose public health policies, and employing tactics to delay the implementation of regulations or watering down their impact.

Act provides certain standards to guide the marketing of goods, including the prohibition of false, misleading, or deceptive representation of material facts (CPA, 2008, s. 29 and 41). The Act also regards children as disadvantaged or vulnerable consumers deserving of special protection (CPA, 2008, s. 3(1)(b)). This paper is framed around the following objectives. Firstly, to understand the context of child-directed marketing in South Africa, especially the use of misleading health/nutrition claims as a marketing strategy. Child-directed marketing is used in this paper to include marketing directly aimed to appeal to children as well as indirect marketing to children through their parents or primary caregivers. Given that children are mostly not in total control of their food choices or purchases, some marketing strategies, such as health/nutrition claims, are seen as designed to appeal concurrently to children as well as their parents or caregivers (*Australian Competition and Consumer Commission v H J Heinz Co Australia Ltd*, 2018, para. 101; Khan et al., 2023, p. 2145). The second objective is to examine the legal prohibition of false, misleading, or deceptive representations in marketing and how they have been interpreted by the courts and the National Consumer Tribunal (the Tribunal). The aim here is to understand the reasoning around what constitutes material misrepresentation and the reasonable likelihood of deception in the context of child-directed marketing of unhealthy food and beverages. The third objective is to explore avenues among the redress processes and mechanisms provided in the CPA in addressing misleading marketing of unhealthy food and beverages to children. The overall aim is to show that the South African consumer protection legal framework offers a viable opportunity, among other legal and policy measures, to address misleading marketing of unhealthy foods and beverages to children.

Misleading Marketing of Unhealthy Foods to Children in South Africa

The World Health Organization (WHO) defines marketing as any form of commercial communication, message, or action that acts to advertise or otherwise promote a product or service, or its related brand, and is designed to increase, or has the effect of increasing, the recognition, appeal, and/or consumption of products or services (WHO, 2023, p. vii). The impact of food marketing is determined by exposure and power. Exposure is related to channels through which the intended audience is reached, while power refers to the strength or impact of marketing communication (WHO, 2023, p. vii). As such, marketers are very intentional about every detail, including product packaging and labels, placement within retail outlets, the content and channels of advertising, etc. Food and beverage marketing to children appear on food packages, advertisements on television, magazines, billboards, posters, and the digital media frequented by children, in schools, sponsored events, etc. Marketing to children employs several strategies that are visually appealing, stimulating, engaging, imaginative, and fun, which aims to get them interested in the product (Elliott, 2008, p. 368; Scully et al., 2016, p. 616). Such strategies include the use of cartoon characters or animation, colourful packaging, catchy songs and slogans, gifts and tokens, the use of celebrities to promote specific products, the use of children in the adverts, etc. (Cairns et al., 2013).

The literature on marketing to children in South Africa has mostly focused on TV advertisements (Boachie et al., 2023; Temple et al., 2008; Van Vuuren, 2006; Yamoah et al., 2021). This is likely because it is easier to track TV programming, especially during children's/family viewing times compared to online platforms. TV advertising can also be a significant medium of exposure to child-directed marketing as the General

Household Survey of 2020 showed that 89.2% of households owned televisions (Department of Statistics, South Africa, 2020, p. 49). Studies have also assessed marketing to children through food packages (Khan et al., 2023), digital media such as online games and social media (Lewis et al., 2020), and on print media (Abrahams et al., 2017). Television advertisements are found to mostly promote the consumption of ultra-processed foods, sugar-sweetened beverages, and fast foods; utilize various appealing techniques; and are aired mostly during children and family viewing times (Boachie et al., 2023; Delpont, 2015; Kelly et al., 2010; Mchiza et al., 2013; Mushamiri, 2020; Yamoah et al., 2021). Food packages are used to target children directly through the use of attractive package shapes, bright colours, puzzles and games on the packaging, cartoon characters, brand mascots, children featured on the packaging, etc. (Delpont, 2015). These strategies have often been found on packages of various child-oriented foods (Gilfillan, 2022), especially breakfast cereals, which have a significantly high total carbohydrate and added sugar content (Delpont, 2015; Khan et al., 2023).

Food marketing to children often includes health claims (claims that a product is healthy or promotes well-being) or nutrition claims (claims that a food product contains specific ingredients/nutrients with health benefits), which have been found to make foods more appealing to consumers (Breen et al., 2020; Stones, 2009). Health or nutrition claims are made through verbal or written statements as well as visual presentations or displays indicating the health benefits of the product due to the presence of important ingredients (Castonguay et al., 2013). Claims about food's healthfulness, such as "low-fat," "all-natural," "provides essential nutrients," and "improves immunity" or depictions of physical activity or improved mental abilities (implying such benefits from consuming the product), are common in food advertising targeting children (Gantz et al., 2007). In addition to written or verbal claims, food advertisements and packages also contain various cues that portray the product as being healthy, such as displays of items children associate with healthy foods, like fresh fruits and vegetables, even when the product contains no real fruit or vegetable ingredients (Castonguay et al., 2013, p. 571; Noble et al., 2000, p. 413). The problem with this marketing strategy is that appeals to health/nutrition do not necessarily translate into healthy products (Elliott, 2012, p. 265). Health claims have been further criticized for increasing the appeal of ultra-processed foods with an otherwise poor nutritional profile (Breen et al., 2020; Hall et al., 2020; Mayhew et al., 2016). While in some cases, some claims may be factually correct in terms of the product containing beneficial nutrients, the product could still have a poor nutrition profile overall. An example is fruit juices which claim to be high in vitamin C despite being also high in sugar.

Television advertisements, food packages, and magazine adverts in South Africa often include various health/nutrition claims for otherwise unhealthy food products (Abrahams et al., 2017; Khan et al., 2023; Mchiza et al., 2013; Yamoah et al., 2021). Abrahams et al. (2017) conducted a study on various nutrition claims in food and beverage advertisements in print media in South Africa. The accuracy of health/nutrition claims in the adverts was assessed by comparing the claims with the nutrient table as well as the South African Food-Based Dietary Guidelines (Vorster et al., 2013). It showed that while some nutrition claims were, in some cases, accurate, they were misleading explicitly and implicitly because they only emphasized the positive nutritional qualities of the food. For instance, breakfast cereals often focus on healthy features such as fiber content with no mention of high sugar or salt content. Some advertisements for milk and dairy products had claims that emphasized the protein and calcium content despite having high amounts of added sugar. It was noted that such claims misled consumers or exploited their lack of knowledge

regarding the overall healthfulness of the advertised food product (Abrahams et al., 2017, pp. 437–438).

Yamoah et al., 2021 investigated the extent and nature of advertising of healthy versus unhealthy food and beverages in four free-to-air South African Television channels during children and family viewing hours—3.00 pm–7.00 pm. The results showed that of 582 food advertisements, 45% contained health and nutrient content claims with some having more than one claim. Examples are low fat, healthy diet, calcium, good for bones, etc. These claims were significantly higher in unhealthy food advertisements (1.7 claims/ch-h) compared to healthy food (1.2 claims/ch-h) (Yamoah et al., 2021, p. 6). Khan et al. (2023) study on 222 breakfast cereals sold in South African supermarkets had a high prevalence (95%) of nutrition/health claims which was considered misleading considering their high sugar content and being low in protein and fiber (Khan et al., 2023, p. 2145). Although packaged food products usually contain nutrition labels that provide a list and quantity of the various ingredients, they are often at the back and in small prints and not enough to detract from the claims that usually appear prominently on the front of the package.

The Consumer Protection Framework to Address Misleading Marketing

The CPA establishes a legal framework through which consumers are protected, as well as a system of redress (CPA, 2008, s. 3(1), s. 69). While the Act aims to protect and advance the interests of all consumers, it highlights the need to reduce or ameliorate the vulnerability or disadvantages experienced by certain consumers, including children (CPA, 2008, s. 3(1)(b)). The Act protects and promotes various consumer rights, including the right to fair and responsible marketing (CPA, 2008, s. 29–29) and the right to fair and honest dealing (CPA, 2008, s.40–47), which contain prohibitions against unfair, dishonest, misleading, or deceptive practices in the marketing of goods or services. These rights are consistent with the constitutional right of individuals to access adequate and accurate information (Constitution of the Republic of South Africa, 1996, s. 32), specifically in making informed consumer decisions.

Previous studies have examined the application of the Consumer Protection Act to address unhealthy food marketing in South Africa. Reddy considers the link between unhealthy food product marketing and non-communicable diseases, the applicability of various consumer rights in the CPA, and the corresponding obligations of food product suppliers relating to health risks associated with the consumption of their products (Reddy, 2018). The study by Hlongwane and Reddy in a community in KwaZulu-Natal, South Africa, showed a link between children's exposure to unhealthy food advertising and childhood obesity. They emphasized the CPA prohibitions on misleading marketing as a potential legal foundation for mitigating this problem (Hlongwane & Reddy, 2023). While both studies have looked into the applicability of various consumer rights in the CPA, this paper focuses on the prohibition of false, misleading, and deceptive marketing (s. 29 and 41) to children who are considered a vulnerable group deserving of special protection (s. 3(1)(b)). It delves deeper into assessing how the courts and the National Consumer Tribunal have interpreted misleading representations in marketing and their application in the context of child-directed marketing. It also considers the role of the various consumer redress mechanisms and their shortcomings in addressing unhealthy food and beverage marketing to children.

Prohibition of False, Misleading, or Deceptive Representations in Marketing

Among the purposes of the CPA is to protect consumers from misleading or deceptive conduct (CPA, 2008, s. 3(1)(d)(ii)). Also, Sect. 4(5)(b) provides that in dealing with a consumer in the ordinary course of business, a person must not engage in any conduct that is unconscionable, misleading, or deceptive, or that is reasonably likely to mislead or deceive. Sections 29 and 41 contain provisions that relate specifically to the marketing of goods to consumers. Section 29 provides that.

A producer, importer, distributor, retailer, or service provider must not market any goods or services—

- (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in Sect. 41;
- (b) in a manner that is misleading, fraudulent, or deceptive in any way, including in respect of—
 - (i) the nature, properties, advantages, or uses of the goods or services.

Section 29 of the Act can be read with Sect. 41 which provides various instances where a conduct amounts to false, misleading, or deceptive representation. Section 41 states that.

(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—

- (a) directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer;
- (b) use exaggeration, innuendo, or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
- (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading, or deceptive representation.

(3) Without limiting the generality of subsections (1) and (2), it is a false, misleading, or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—

- (b) any goods or services—
 - (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship, or approval that they do not have.

False, misleading, or deceptive representation in contravention of Sects. 29 and 41 constitute prohibited conduct which is any act or omission in contravention of the CPA as opposed to conduct that constitutes a criminal offence (*National Consumer Commission v. Nu Menu (Pty) Ltd T/A Nu Menu Solutions*, 2022, para. 52). In terms of Sect. 41, a misleading representation can be made expressly, impliedly, or through a failure to correct an apparent misapprehension on the part of a consumer in respect of a material fact. These provisions apply to various advertising methods or channels through which consumers can be reached. “*Market*,” used as a verb like in Sects. 29 and 41, means to promote or supply any goods or services, and to “*promote*” means, among others, to advertise any goods or services in the ordinary course of business, to all or part of the public for consideration. *Advertisement* is defined broadly in the Act to include any direct or indirect, visual or oral communication or representation transmitted by any medium through which a person seeks to bring to the attention of all or part of the public, the existence, nature, availability, properties, advantages, or uses of any goods or services that are available for supply or to promote the supply of any goods. As such, Sects. 29 and 41 can apply to marketing designed

to attract the attention of or be persuasive to a specific part of the public such as children and their parents or caregivers (Mupangavanhu & Kerchhoff, 2023, p. 86).

The focus of this section is on determining the applicability of Sects. 29 and 41 in the context of misleading marketing of unhealthy food and beverages to children. This involves assessing the interpretation of the misleading marketing prohibitions by the Tribunal as well as the courts. In terms of Sect. 29 read with Sect. 41, in determining if a prohibited conduct has occurred, two important elements have to be satisfied. First, it must be shown that there has been a misrepresentation of a material fact. This is because Sect. 41(1)(a) requires that the representation complained of must be about a “material fact.” Secondly, the misrepresentation should be such that it is likely to deceive a consumer. The determination of the existence of both elements must be based on the context in which the representation was made and assessed from the perspective of the intended or targeted consumers of the product.

Material Misrepresentation

A material fact has been defined as “a fact that is important, significant or essential to a reasonable person in deciding whether to engage or not to engage in a particular transaction, ... as distinguished from an insignificant, trivial or unimportant detail” (*SPF and Another v. LBCCT/A LB and Another*, 2016, para. 21). Examples in case law of South African courts include failure to disclose the closure of an important tenant (an entertainment center) which could create business opportunities for other tenants within the premises and likely to induce a potential lessee (*SPF and Another v. LBCCT/A LB and Another*, 2016); a property described as a commercial property which turned out to be false as the property was zoned only for agricultural purposes (*Morgan Air Cargo (Pty) Ltd v. Sim Road Investment CC & Anor*, 2009); misrepresentation of rental income obtainable from a property (*Tryzon Frontier (Pty) Ltd v Batchelor N.O. & Others*, 2018). From these cases, it is clear that a material representation must be such as to likely affect a consumer’s conduct or decision in respect of the product or service.

The Tribunal has considered alleged breaches of Sects. 29 and 41 of the CPA, mostly in complaints concerning second-hand motor vehicle purchase transactions and some other consumer goods.⁴ The Tribunal has noted that a material fact as used in the CPA conveys a “sense of substance or importance as opposed to trivial or irrelevant” (*James v. Noordhoek Motors (Pty) Ltd t/a Hyundai Pinetown*, 2018, para. 23). Examples of representations considered as material by the Tribunal include a representation that a vehicle has a full-service history which turned out to be untrue (*Krumm v Park An Ad CC trading as Autohaus Angel*, 2019); a representation that a car includes a sunroof (*MM Lubisi v. Araucan Properties (Pty) Ltd*, 2020); a description of a lounge suit as “upper leather, genuine and of good quality” (*Singh v. Ted’s Home Store CC*, 2021); a representation that a water filtration system could convert salty water into drinkable water as well as claims of having the approval of the South African Bureau of Standards (*National Consumer Commission v. Nu Menu (Pty) Ltd*, 2022), failure to disclose that a vehicle had been involved in a major collision (*Lucas Nare Ramangwa v Pro-Quick (Pty) Ltd and WesBank Limited*, 2023). The Tribunal’s assessment of the materiality of the representation has demonstrated a focus on

⁴ So far, there has been no decision relating to food products following a search of the judgments relating to claims based on Sects. 29 and 41 in the online repository of the Tribunal (2008- April 2024).

the conduct of the supplier and the overall impression created by the representation (*Brett Kramer v Claremont Holdings (Pty) Ltd*, 2021; *Dlekedla v Jason Wheels (Pty)*, 2021). In all these cases, the Tribunal was of the view that the representations were critical to the consumer's decision to enter into the transactions. The impression created by the various representations was that the goods purchased were in the necessary specification or condition to meet the purposes of the consumer.

Material Misrepresentation in the Context of Food Marketing to Children

In the context of food marketing to children, Sect. 29 expressly prohibits misleading representations that relate to the nature, properties, and advantages of the product. Health or nutrient content claims relate to these aspects of food products and emphasize that they meet the nutritional requirements of intended consumers. Similarly, Sect. 41 prohibits misrepresenting, exaggerating, providing ambiguous information, or failing to correct an apparent misapprehension of a material fact about a food product. Material facts relate among others to ingredients, performance characteristics, benefits, and qualities which are all reflected in nutrition/health claims about food products. It can also be related to exaggerated benefits depicted in unhealthy food advertisements about taste and enjoyment, fun, physical strength, and social and emotional connections derivable from such foods.

It has been noted that from the perspective of children, various advertising strategies used by food marketers can be considered as material given that they are intended to influence the conduct or choices of children regarding the product (The Network of Public Health Law, 2022). They are aimed at influencing children to desire a product and to purchase it themselves or pester their parents for it. This means that the use of various child-appealing cues including the portrayal of food as depicting fun, great taste and enjoyment, physical strength, social connection, and emotions, etc. (Mushamiri, 2020; Yamoah et al., 2021) are material from the perspective of children. These appeals are communicated through facial expressions, hand gestures, and affectionate physical contact such as hugging, laughter, happiness and humour, sacrifice, compassion, and empathy. The appeals are solidified using visual and audio tools such as colour, light, laughter, and music. The use of these strategies in marketing unhealthy foods to children is effective in influencing children's preference for such foods (Enax et al., 2015; Hota & Charry, 2014).

A representation in the marketing of a child-oriented food product that relates to its health/nutritional quality or benefit is a material representation intended to influence the conduct or decisions of children or their parents or caregivers. Given that food is consumed to enhance health and well-being, such representations have a positive influence on the perceived healthfulness of a food or beverage product and the choice of consumers (Nobrega et al., 2020). Health/nutrition claims capitalize on consumers' interest in/demand for healthy food products. For instance, the designation of specific health food aisles in shops, along with higher price points for such foods, have been found to strongly influence consumers by generating a misleading health halo effect (Hoek et al., 2017; Lee & Yun, 2015). Increased brand trust has also been associated with endorsements or approvals of health organizations (Creaven, 2020). Research has shown that children respond positively to health/nutrition claims, and this is attributed to marketers solidifying these claims with various audio and visual techniques that appeal to children. A study in the USA investigated children's (fourth and fifth graders) perception of the healthfulness of and preference for certain products based on their nutrition claims (Soldavini et al., 2012). Most children regarded the reduced-fat cookie, whole-grain cracker, or 100% juice as healthier and also

preferred its taste. A study investigated whether licensed characters on food packaging and nutrition cues affected young children's taste assessment of the products. It was found that the presence of cartoon characters made the products more appealing, as well as the health cues (the product named Healthy Bits compared to Sugar Bits) (Lapierre et al., 2011, p. 229). It was noted that the presence of cartoon characters was a strong factor in children liking a product despite the presence of nutrition cues (Lapierre et al., 2011, p. 233).

Health/nutrition claims also indirectly target children through their parents or caregivers, who might perceive certain foods as healthy and appropriate for their children (Hawkes, 2010; Hua et al., 2022; Khan et al., 2023). While children are mostly attracted by visually appealing cues like cartoon characters, adults are often more attracted to information cues such as health/nutrition claims (Hallez et al., 2020). As such, a combination of appealing cues as well as health or nutrition claims can be concurrently appealing to parents or caregivers and children (Hebden et al., 2011). Evidence exists to show that parents tend to assess the healthfulness of food products for their children based on nutrition or health claims (Abrams et al., 2015; Hall et al., 2015). Thus, a strategy for addressing the harmful impact of unhealthy food marketing should target restricting appealing marketing cues as well as nutrition/health claims (Hall et al., 2020). Moreover, warning statements on potentially harmful ingredients in large amounts over health claims are more effective in showing the overall nutritive value of food and beverage products (Nobrega et al., 2020; Todd et al., 2021). Flowing from above, in the context of unhealthy food marketing to children, various appealing cues and health/nutrition claims are material representations given that they are intended to and indeed influence the conduct or decisions of children and their parents or caregivers in choosing a food product.

Determining the Likelihood of Deception

The decisions of the National Consumer Tribunal have been mostly based on Sect. 41 hence the interest in determining the materiality of the representation which could have induced the consumer to enter the contract. In all the cases referred to, the consumers relied on the misrepresentation in deciding to conclude the contract. This follows the approach of courts in determining cases of misrepresentation which requires that there must have been a representation made to the plaintiff (including a non-disclosure), which turns out to be untrue; the plaintiff must have been induced by the misrepresentation to act and suffered damages as a result of the misrepresentation (*Tryzon Frontier (Pty) Ltd v Batchelor N.O. & Others*, 2018, para. 77). In establishing that there was inducement, the courts have often sought to establish a causal connection between the alleged misrepresentation and the conclusion of the contract (*Morgan Air Cargo (Pty) Ltd v. Sim Road Investment CC & Anor*, 2009, para. 79; *Trotman and Another v Edwick*, 1951, para. 446–447; *Tryzon Frontier (Pty) Ltd v Batchelor N.O. & Others*, 2019, para.110–113).

Like Sect. 4(5)(b), Sect. 29(a) of the CPA prohibits the marketing of goods in a manner that is “reasonably likely” to imply a false or misleading representation concerning those goods. By its literal meaning, it is not necessary to establish or prove that a consumer has indeed been misled or deceived by the representation, but sufficient that such a representation could likely mislead. Section 29 thus creates a broad restriction given that it does not require proof that a consumer has been misled. In the context of marketing to children, it could simplify the process of determining a violation of Sect. 29(a) read with Sect. 41 by dispensing with the need to prove that a child or parent/caregiver has indeed been misled. Also, requiring proof of reliance on a representation is an unjustifiable legal burden in a

constantly evolving marketing context where a complex combination of factors (economic, social, personal, cultural, etc.) interplay in consumers' purchasing decisions besides marketing (Whitman, 1981 pp. 742–743). It is more rewarding to consumers for a claim to be established based on the marketer's misrepresentation of the product.

Also important to note is that the CPA defines a "consumer" as any person to whom goods are marketed as well as any person who has entered into a transaction with the supplier. As noted previously, "market" in the CPA means to promote or supply any goods or services, and to "promote" means, among others, to advertise any goods or services in the ordinary course of business to all or part of the public for consideration. As such, a consumer is protected from the time of advertisement or promotion of the product to the purchase of goods and even thereafter. As such, Sect. 29 read with Sect. 41 can apply to the promotion or advertising of goods to consumers even if a transaction has not taken place. This approach also enables the focus to be on the overall impression that is created by the representation or conduct rather than its effects. This, like in determining the materiality of the representation, needs to consider the actual representation made, the context as well as the targeted consumers. In *Presidency Property Investments (Pty) Ltd v Patel* (2011), the Court noted that in determining an actionable representation, "what is decisive is a holistic view of the terms of the representation and the context in which it was made" (para. 28). This means that the representation in whatever format it is portrayed must be viewed in the context that gives meaning to it. In *Dormell Properties 658 (Pty) Ltd v Rowmoor Investments 513 (Pty) and Another* (2013), the Court took it a step further, noting that a misrepresentation must be assessed with reference to the context, surrounding circumstances, and the intended recipients (para. 106). In other cases, the courts have noted that it is important to interpret the representation through the eyes of the consumer (*Golden Fried Chicken (Pty) Ltd v Soul Kitchen Restaurant*, 2022, para. 65; *Siqalo Foods Pty Ltd v. Clover SA (Pty)Ltd*, 2023, para. 20; *Verimark (Pty) Ltd v. BMW AG*, 2007, para. 5, 7). This means that it is important to consider the nature of the targeted consumers and their likelihood of being misled.

The Likelihood of Deception in the Context of Marketing to Children

As noted above, in Sect. 29, it is unnecessary to prove that a representation has indeed misled a consumer, but enough that there is a likelihood of deception. In determining this likelihood, it is important to consider the class of consumers who would be interested in the product. In the context of child-directed marketing, determining the likelihood of being misled would involve considering the possible effect of the representation from the perspective of children or their parents/caregivers. The EU Unfair Commercial Practices Directive in Article 5(3) states that commercial practices are likely to materially distort the economic behavior only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age, or credulity, in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. It is necessary to determine the "nature of the class of consumers at whom the advertising is directed, particularly their age, geographical location, sophistication, unusual predilections (if any), and familiarity with the subject" (Corones, 2013, p. 150). This standard allows considering whether a significant proportion of a class is likely to be misled while understanding that there are different levels of knowledge and experience within that class. Here, for instance, if an advertisement can be seen as directed at both children and their parents, the fact that

the parent would not be misled by claims in the advertisement does not mean it would not amount to a representation that is reasonably likely to mislead child consumers.

Assessing whether a conduct is reasonably likely to mislead children needs to consider children's special needs and characteristics, for example, their background knowledge (or lack thereof) (Handsley & Duke, 2019, p. 5). This may lead to a conclusion that the representative child consumer is more likely or, in some contexts, less likely to be misled. It seems reasonable to suggest that consumer law could also take account of children's less sophisticated cognitive abilities when assessing whether advertising is likely to mislead or deceive them. Corones has noted that higher standards of accuracy are expected in connection with advertisements directed toward unsophisticated or impressionable audiences such as children or teenagers (Corones, 2013, p. 150). Due to age, immaturity, inexperience, which affects their understanding and interpretation of advertisements, and limited self-regulatory control, children, unlike adults, are more vulnerable to the effects of advertisements (Kelly et al., 2019; Kempes et al., 2021).

It has been argued that unhealthy food marketing to children is inherently misleading as it targets a group that is usually unable to distinguish between fact and puffery or understand the intent of the advertisement (The Network of Public Health Law, 2022). The WHO has also recognized that food and beverage advertising could exploit children's inexperience or credulity (WHO, 2004, p. 7). Children's poor self-regulatory control makes them vulnerable and more responsive to the persuasive effects of food and beverage marketing directed at them (Boyland et al., 2011; Bruce et al., 2016; Kempes et al., 2021). Research has shown that young children (under eight) have neither the cognitive ability to understand the selling intent of advertisements nor defend themselves against their persuasive effects (Folta et al., 2006). Even where older children can appreciate the selling intent of advertisements, they may not be able to defend themselves against the persuasive effects (Carter et al., 2011). This shows that current advertising strategies targeting children are likely to mislead or deceive, satisfying the requirements of Sect. 29. It is important to note that the CPA in Sect. 3(1)(b) recognizes children among vulnerable consumers who deserve special protection as their ability to understand an advertisement, label, or representation is limited.⁵

Marketers often position health/nutrition claims on unhealthy foods prominently on the packaging or other advertisements. Although packaged foods often contain nutritional labels indicating the amount of various ingredients, it is often placed in small font at the side or back of the label and not as conspicuous as other appealing features targeting children such as cartoon characters, pictures, or conspicuous health/nutrition claims. In *Siqalo Foods Pty Ltd v. Clover SA (Pty)Ltd* (2023), the respondent complained that the appellant was marketing its "Stork Butter Spread" (the product) as a butter product when it was, in fact, a modified butter product. On the label, the word "BUTTER" was dimensionally oversized, in bold blue font, capitalized, and superimposed on a white letter-shadowed

⁵ The CPA in Sect. 3(1)(b) recognizes certain groups that could be vulnerable and disadvantaged as consumers, thus deserving of special protection. These include persons of low income; persons who live in remote, isolated, or low-density population areas or communities; *minors*, seniors, or whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice, or other visual representation is limited because of low literacy, vision impairment, or limited fluency in the language in which the representation is produced, published, or presented. The court's approach to protecting vulnerable consumers is demonstrated in *Standard Bank of South Africa Limited v Dlamini* (2013) where the court took note of the fact that 52-year-old Mr. Dlamini was an unsophisticated African male, functionally illiterate, and could not read, in preventing consequences that could have resulted from his termination of a sale agreement where the conditions for repudiation were not explained to him (paras 23 and 57).

background to enhance its visual accentuation. The phrase “MEDIUM FAT MODIFIED BUTTER SPREAD WITH SUNFLOWER AND PALM OILS” was not written in bold and was in a much smaller font. The Court stated that “regard must be given to the role played by the dominant feature of the offending article, because consumers will be focused on that feature and will not necessarily be alerted to the fine points of distinction or definition in order to clear up confusion” (para. 20). The Court noted that despite the presence of the phrase “MEDIUM FAT MODIFIED BUTTER SPREAD WITH SUNFLOWER AND PALM OILS” indicating the composition of the product, given that the word “butter” was the dominant feature with the phrase perceptively invincible, the label is likely to convey or create a false or misleading impression that the product is a butter product (para. 35). There was a similar reasoning by the Court in *Cowbell AG v. ICS Holdings Ltd* (2001, para. 10).

In respect of food marketed to children, insights can be drawn from *Australian Competition and Consumer Commission (ACCC) v. H J Heinz Co Australia Ltd* (2018). The decision is based on Sects. 18, 29, and 33 of the Australian Consumer Law (ACL) which have similar provisions as Sect. 4(5)(b), Sects. 29 and 41 of the CPA.⁶ Importantly, this case relates to products that are primarily made for and marketed as appropriate for children aged one to three years. The Court had to determine among others “whether the packaging of the products conveyed representations that they were nutritious and beneficial to the health of children aged one to three years and, if so, whether the representations were misleading or deceptive, or likely to mislead or deceive.”

In the case, the ACCC alleged that the front of the package of Heinz “Little Kids” Shredz products was misleading, in contravention of Sects. 18, 29, and 33 of the ACL, which depicted an active young boy climbing a tree, pictures of fruits and vegetables, and a statement that the product was 99% fruit and vegetable (para. 7–14). The ACCC contended that the representation demonstrated that the product is of equivalent nutritional value as the fruits and vegetables depicted on the product; it is nutritious and beneficial for children aged one to three years and encourages the development of healthy eating habits in that age group (para. 23). The side panel also contained a list of ingredients as well as a nutritional information panel in small fonts, which disclosed, for example, the sugar content in the food which was approximately two-thirds of the product (para. 21–22). While the product sure contained some beneficial nutrients, it was overall unhealthy for young children because of its high sugar content (para. 234–236). The Court found the representation misleading as the overall impression created by the imagery and words was that the product was nutritious and beneficial for children (para. 100, 315). The nutritional information according to the Court did not detract from the overall impression created as an ordinary reasonable consumer is likely to pass over the nutritional information and respond to the dominant message conveyed by the words and imagery on the product package (para. 101). Here, the focus was on the overall impression created by the marketing communication against which fine print disclaimers or nutrition panels are often ineffective.

Besides the appeal of these marketing strategies, reliance on health/nutrition claims on otherwise unhealthy food is more likely given that nutrition label formats often found

⁶ Similar to Sect. 4(5)(b) of the CPA, Sect. 18 of the ACL provides that ‘a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive’. Section 29 of the ACL relates to false or misleading representations about goods including their quality, value, composition, uses, benefits, etc. similar to Sect. 29 read with Sect. 41. Section 33 of the ACL specifically prohibits engaging in conduct that is liable to mislead the public as to the characteristics or suitability of any goods for their purpose.

on the back of food packages have proved over time to be ineffective for consumer education due to their complexity (Chavasi et al., 2017). Research in South Africa showed that only 36.4% of consumers regularly read food labels (Koen et al., 2018). A study in Potchefstroom, South Africa, showed that while respondents demonstrated general health and label awareness, not all of them could calculate the servings properly (Van der Merwe et al., 2013). This informs the various calls for mandatory Front-of-Pack warning labels (FOPWL) which highlight excessive amounts of nutrients of concern—salt, fat, sugar, and artificial sweeteners (Hutton & Gresse, 2020; Labonté et al., 2019). FOPWL could also contribute to overriding the positive healthfulness associations generated by health/nutrition claims (Nobrega et al., 2020). As such, it is important to consider the overall impression created by health/nutrition claims in a context in which many consumers, including parents/caregivers, hardly read or understand nutrition labels, which are often placed at the back of food packages, less prominent than the claims.

CPA Avenues for Addressing the Misleading Marketing of Unhealthy Food and Beverages to Children

This section assesses the various redress mechanisms and processes provided in the CPA, which can be leveraged to address the marketing of unhealthy food and beverages that contravenes the provisions of the Act. The consumer right to redress in Sect. 4(1) of the Act extends to a person acting on his or her own; an authorized person acting on behalf of another who cannot act on his own; a member of a class or group of affected persons; a person acting in the public interest; and an association acting in the interest of its members. This means that issues around misleading marketing of unhealthy food to children could be pursued through individual or group complaints to relevant CPA mechanisms or pursued as a public interest case. According to Sect. 69, a person may seek to enforce any right in terms of the Act by referring the case to alternative dispute resolution (ADR) mechanisms, filing a complaint with the National Consumer Commission (the Commission or NCC), approaching the Tribunal where a direct referral is allowed, and “approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted” (s. 69(d)).

Section 69 has, however, posed some interpretational difficulty over time based on the notion that it creates a hierarchy of remedies, with the court only being the option of last resort. This is mostly illustrated by cases where the route taken by the dissatisfied consumer has avoided the ADR mechanism in terms of Sect. 69(b). In *Joroy 4440 CC v Potgieter and Another* (2016), the Court refused the application on the ground that other remedies prescribed in Sect. 69 had not been exhausted. The Tribunal has also noted that in terms of Sect. 69, a consumer cannot bring a matter directly to it without first going through ADR and then the Commission if the matter is still not resolved (*Monnapule and anor v. Robert Bosch (Pty) Ltd and Anor*, 2018, para.64–45). Although this hierarchy has been questioned in some cases as denying consumers access to effective protection (*Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and Others*, 2016, para. 43; *Motus Corporation (Pty) Ltd and Another v Wentzel*, 2021), there are still a rather small number of cases adjudicated by the courts in respect of the CPA (Du Plessis, 2016). More so, consumers would often approach cheaper redress mechanisms like ADR, the Commission, and the Tribunal compared to costly litigation processes.

ADR Mechanisms, the National Consumer Commission, and the National Consumer Tribunal

Industry ombud, ombud accredited in terms of the Act, or a private entity providing conciliation mediation or arbitration services and consumer courts operating in provinces are considered as ADR mechanisms under the Act (s. 1). Where an industry code provides for a scheme of ADR, the Minister of Trade and Industry may designate the scheme as an accredited industry ombud in terms of the Act (s. 82(6)). The Consumer Goods and Services Ombud (CGSO) is accredited by the Minister in terms of Sect. 82(6) to receive complaints from consumers against suppliers in the consumer goods and services industry. The Advertising Regulatory Board (ARB) regulates the Advertising industry. These industry self-regulatory bodies operate through codes of practice which must be consistent with the CPA. The aim of ADR mechanisms is to provide for a fast, simple, and cheap system of redress through mediation or conciliation.

A complaint relating to prohibited conduct in the CPA can be made to the Commission, and it can also initiate a complaint on its own or when directed by the Minister of Trade and Industry or at the request of a consumer protection authority, a regulatory authority, or a consumer protection group (s.71). The Commission has the mandate to enforce the CPA by encouraging informal resolution of disputes, receiving complaints regarding prohibited conduct, ensuring that prohibited conduct or offences are prevented or detected and prosecuted, and investigating prohibited conduct, among others (s. 99). In respect of individual complaints, the Commission can issue a notice of non-referral if the complaint lacks merit or where there is a reasonable suspicion that there has been a contravention of the CPA, refer the complaint to other CPA mechanisms, or initiate an investigation.

In line with its mandate under the Act to promote the informal resolution of complaints, the Commission often refers individual complaints to relevant accredited ombud schemes of industries such as the CGSO and the Motor Industry Ombudsman of South Africa (MIOSA) where significant complaints arise, and they report to the Commission on their operations (NCC, 2016/2017, p.22). As such, the Commission maintains a regulatory role of monitoring consumer disputes within each industry (NCC, 2016/2017, p.22). Between April 2016 and March 2017, 40% of the CGSO workload were referrals from the NCC. The Commission can also refer a case to the Tribunal for adjudication (CPA, s. 73; *National Consumer Commission v BNA Motors*, 2024; *National Consumer Commission v. Crystal Tears Investment 206 Cc T/A Misty River and Anor*, 2023).

The investigative role of the Commission is an important mandate that can be useful for addressing marketing that can potentially harm consumers. Individual complaints received from consumers are used by the Commission to determine trends in the marketplace and investigations that are necessary, especially those that have the potential to cause significant harm to consumers. (NCC, 2014/2015, p. 18; NCC, 2015/2016, p. 26, NCC, 2018/2019, p. 16)). This is why the number of investigations carried out by the Commission is small compared to the complaints it receives yearly. Upon completion of the investigation, if it is convinced that prohibited conduct has been committed, it could propose a draft consent order (which can be confirmed by a court of the Tribunal) (CPA, s.74). The Commission can also issue a compliance notice on steps to be taken to address the infringement (CPA, s. 100) or refer the case to the Tribunal for adjudication. The Commission has investigated the mislabeling of meat products (NCC, 2014/2015, p. 29), unfair contract terms in timeshare contracts (NCC, 2018/2019, p.16), harmful and defective products (NCC 2018/2019, p. 20), complaints relating to gyms (NCC, 2013/2014, p. 22), and paraffin stoves and heaters

(NCC, 2014/2015, p. 29), among others. These investigations were, however, not referred to the Tribunal for a determination of prohibited conduct and the imposition of penalties on suppliers. They have mostly issued compliance notices or entered consent agreements in which suppliers agree to abide by the legislation (NCC, 2014/2015, p. 29). Facilitating a consent agreement or issuing a compliance notice may be the end of the matter. It has thus been rightly noted that the most appropriate means of ensuring compliance with the Act within the marketplace is for the Commission to refer prohibited conduct matters to the Tribunal so that an appropriate order can be made (Woker, 2016). This order may include an administrative fine, the intention of which is to deter both the wrongdoer and similar role players from engaging in this conduct in the future (Woker, 2016). The point is that wrongdoers should not be allowed to resolve complaints only with individual consumers but should be made to face the effect of administrative fines.

The Tribunal is an independent adjudicative entity that derives its mandate jointly from the CPA and the National Credit Act 34 of 2005. The Tribunal offers a more cost-effective and speedy mechanism for consumers and businesses to resolve disputes compared to a court. Where the Commission issues a notice of non-referral, a consumer may bring the case before the Tribunal with leave of the Tribunal (CPA, s. 75(1)(b)). Whether referred by the Commission or brought directly by the complainant, the Tribunal must conduct a hearing into any matter referred to it in accordance with the requirements of the CPA, and it may make applicable orders as contemplated in the Act. The Tribunal has jurisdiction throughout South Africa, and its orders have the status of a High Court, although it does not possess the inherent jurisdiction of the High Court. In respect of prohibited conduct cases, the Tribunal can make orders to remedy the wrong, including refunding the cost of goods or services, rendering the required service, interdicting the supplier from engaging in such conduct in the future, and imposing an administrative fine (CPA, s.112) as a deterrent to the supplier and other similar players in the industry. The Tribunal, however, cannot award damages, as that can only be done by the court.⁷ Importantly, although it has not had the opportunity to interpret Sects. 29 and 41 in relation to food marketing or cases where there has been no contract entered, the Tribunal has maintained a consistent approach, especially its focus on the materiality of the representation in consumer decision-making, the conduct of the supplier, and the overall impression created.

The power of the Tribunal to impose an administrative penalty of up to R1 million or 10% of the supplier's annual turnover, whichever is greater (CPA, s. 112(1) and (2)), is seen as an important power that not only gives the CPA its teeth but also an incentive on businesses to comply with the Act or to resolve consumer complaints (Woker, 2016). The case of *National Consumer Commission v Vodacom (Pty) Ltd* (2023) demonstrates the importance of the investigative and adjudicative role of the Commission and the Tribunal, respectively, in addressing the negative impact of unfair business practices on consumers. This case was referred to the Tribunal following an investigation into 21 complaints received during the 2020/2021 and 2021/2022 financial years against Vodacom (a cellular phone and internet service provider). Several individual complaints lodged with the Commission against Vodacom prompted the investigation. According to the Acting Commissioner, over 700 complaints were received, although only 27 were sampled for the investigation. The complaints were mostly received during the peak of COVID-19 when job

⁷ Where a consumer claims to have incurred certain damages because of a prohibited conduct, the Chairperson of the Tribunal can issue a certificate in terms of Sect. 115(2)(b) of the CPA to claim damages in a civil court *Lucas Nare Ramangwa v. Pro-Quick (Pty) Ltd and Wesbank Limited* (2023).

losses and salary cuts were rampant, and customers could no longer keep up with their contracts (Moyo, 2023). The complaints relate to Vodacom charging customers 75% of their remaining contract period as a cancellation fee, delay in timeous cancellation of contracts upon customers' request, etc., in contravention of Sects. 14, 29, 41, 40 26 of the CPA (para. 9). The investigation revealed alleged contravention of 19 out of 21 complaints investigated. As such, the Commission sought, among others, a declaration that Vodacom has contravened the above sections, an interdict, and the imposition of an administrative fine. The Tribunal found that Vodacom had contravened these sections, constituting prohibited conduct. In deciding on an appropriate administrative fine, the Tribunal noted that the contraventions are serious as Vodacom acted in disregard for CPA in a market consisting of millions of consumers by imposing an unreasonable cancellation penalty, which was enough to aggravate the situation of customers in dire financial circumstances (para. 93.2 and 93.4). The Tribunal thus imposed an administrative fine of one million rands.

Challenges in the CPA Redress Processes

Resorting to various ADR mechanisms by consumers, especially industry ombuds, has been challenging due to delays in the resolution of disputes, limited orders they can make, and sometimes a lack of compliance with their orders, in addition to limited capacity to enforce sanctions. Given that membership in these industry associations is voluntary, they can only adjudicate on disputes that involve their members, and an erring member may withdraw (Woker, 2016, p. 33). In various complaints brought to the ARB, including against companies in the food and beverage industry, the advertisers who are not members of the ARB have successfully challenged the ARB's lack of jurisdiction given that they are not members and therefore not bound (*Ernst van der Spuy v KFC South Africa*, 2022; *Patronella Korb v. Mars Consumer Products SA*, 2023; *Vaughan Greene v. Simba (Pty) Ltd*, 2022). This is also a challenge that has been highlighted by the CGSO (CGSO, 2015/2016 10, 8). This position has also been confirmed by the court in *Advertising Standards Authority of South Africa v Herbex (Pty) Ltd* (2017, para. 16). Lack of compliance has also been a challenge with complaints filed with ADR mechanisms (CGSO, 2015/2016, 9). Moreover, industry ombuds cannot launch investigations; they only have the power to make recommendations but do not have the power to enforce their decisions (CGSO, 2015/2016 10). The aggrieved consumer resorted to the court in *Barnado v. National Consumer Commission and Others* (2021), as the supplier failed to comply with the recommendation of the MIOSA to refund the purchase price to the applicant for a defective vehicle sold to him and the Commission failed to enforce compliance. There is a need for more visible enforcement mechanisms against suppliers who fail to comply with industry ombuds, and the lack of consequences undermines their role as a consumer redress mechanism.

Another challenge in approaching the ADR mechanisms, the Commission, and the Tribunal is the delay in the resolution of disputes. In *MM Lubisi v. Araucan Properties (Pty) Ltd* (2020), the applicant's complaint remained unresolved by the Motor Industry Ombudsman of South Africa for 3 years and 4 months. Upon approaching the Commission, it took 8 months to issue a notice of non-referral in 2017 before the applicant could lodge the complaint with the Tribunal. The case was finally decided by the Tribunal in November 2020. In *Monnapule and Anor. v. Robert Bosch (Pty) Ltd and Anor.* (2021), the NCC took 1 year before issuing a notice of non-referral. These delays have been attributed to limited resources and capacity, although the Commission, in its 2022/2023

Annual report however, claims to have improved turnaround times due to various strategies, including an upgrade of its ICT infrastructure (NCC, 2022/2023, p. 23).

In certain cases, the Commission had referred a case back to ADR even when the complaint had been unsuccessfully resolved by the ADR mechanism. In *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* (2016), Dipico approached the Commission after the case was unresolved by the MIOSA. The Commission referred the case back to MIOSA, which again failed to resolve the case. Upon Dipico approaching the Commission again, it issued a notice of non-referral. A similar back-and-forth took place in *Lazarus and Another v RDB Project Management CC t/a Solid and Another* (2016). Such delays defeat the purpose of the legislation to ensure consumers can access an efficient and effective system of redress and can discourage consumers from seeking redress.

The issuance of notices of non-referral by the Commission has been problematic as this process appears to be used simply to enable the consumer to approach the Tribunal or other redress mechanisms. This is because while this process was designed to deter frivolous complaints, they have been used to delay or discourage aggrieved consumers with genuine claims. (Woker, 2017, p. 14). Where the Commission issues a notice of non-referral, consumers can approach the Tribunal directly for leave to have the case heard, which is not automatic, but the consumer has to provide sufficient information to prove to the Tribunal that the complaint has merits. This can be a great burden for inexperienced and unrepresented consumers. In the *Dipico* case, for instance, the reason given for the issuance of the notice of non-referral was that the matter needed adjudication and the Commission is not responsible for directly adjudicating any such dispute (*Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* (2016) para. 4.6). This has been considered as not a legitimate reason for the issuance of the notice, and the case could have been referred to the Tribunal, which has the mandate to adjudicate consumer complaints (Worker, 13). Such an approach is enough to discourage consumers from taking the issue further.

Various cases have come before the Tribunal alleging the facts that bring the issues within the ambit of the CPA, but the Commission has issued a notice of non-referral because it considered otherwise. In some of the cases cited earlier in this paper in which the Tribunal found that there was a violation of Sect. 41 due to misrepresentation of material facts, the consumers were initially issued a notice of non-referral by the Commission (*Brett Kramer v Claremont Holdings (Pty) Ltd* (2021), *Dlekedla v Jason Wheels (Pty) trading as Umngeni Auto Haus* (2021); *Paul August Winter v. Kove Empire CC t/a Pinetown Vehicles* (2021); *Singh v. Ted's Home Store CC* (2021). In *Paul August Winter v. Kove Empire CC t/a Pinetown Vehicles* (2021), the applicant approached the Commission following the failure of the respondent to comply with the ruling of the MIOSA, and it took the Commission 3 years before it issued a notice of non-referral on the ground that the case lack merit (para. 25–33). In *Dlekedla v Jason Wheels (Pty) trading as Umngeni Auto Haus* (2021), the case remained unresolved by the MIOSA because of the failure of the respondent to cooperate. The MIOSA advised the applicant to file the complaint with the Commission and was issued a notice of non-referral (para. 21–23). This begs the question of whether the Commission actually considered the complaints carefully before making such decisions or made a real effort to determine the best approach to providing redress to aggrieved consumers. The Commission, by its mandate, plays a central role in ensuring the resolution of disputes, and failure to handle complaints effectively and timeously can leave consumers frustrated, defeating the purpose of the CPA.

Engaging the CPA Mechanisms to Address Child-Directed Marketing

The challenges that consumers face while seeking redress for infringements on their consumer rights are significant, especially for the poor, uneducated, inexperienced, and unrepresented consumers. However, these redress mechanisms must still be engaged to hold businesses accountable for engaging in prohibited conduct within the market place. Public interest organizations, especially those committed to food justice and access to adequate nutrition through research and advocacy and those specialized in litigation, can play a vital role in engaging the processes and mechanisms in the CPA to address unhealthy food marketing to children. They can lodge complaints with ADR mechanisms, the Commission, or the Tribunal (with leave) in the public interest or assist consumers lodge complaints about misleading marketing of unhealthy food to children. They are also more capable than private individuals in pursuing litigation in courts if there is no satisfactory resolution of the issue as all other available remedies would have been exhausted in terms of Sect. 69.

Although the Commission can initiate an investigation into misleading marketing to children, lodging a complaint of prohibited conduct with the Commission by individuals, groups, or public interest organizations is important to prompt an investigation. It might be more successful to have several complaints, like in the case against Vodacom, given that the Commission could be prompted by several complaints regarding a specific issue to initiate an investigation (NCC, 2016/2019, p. 16). This could prompt the Commission to the seriousness of the issue as not just a marketing malpractice but a public health concern.

A finding of contravention of the Act, an interdict against future conduct, and administrative penalties for misleading marketing of unhealthy food to children will send a strong message to other food and beverage industry players. A challenge, however, is that as industry players become more alert, they may attempt to settle complaints without facing the prospects of administrative fines or damaging publicity, which may be counterproductive to behaviour change. Businesses may also attempt to defeat the right of consumers to redress by fixing the problem before a complaint is heard or investigated. With the resources at the disposal of food and beverage companies, for instance, they can easily amend their adverts or product packages to circumvent the consequences of their conduct.

In *National Consumer Commission v. Vodacom*, Vodacom as of 1 October 2022 amended its cancellation penalty of its own accord following complaints and investigation by the Commission (para. 51–52). This, according to the Tribunal, did not negate a finding that Vodacom had contravened provisions of Sect. 14 of the Act relating to the denial of a consumer's right to cancel a contract (para. 52). The Tribunal held that a 75% cancellation fee, even though discontinued, was not justifiable and negated the consumer's right to cancel their fixed-term contracts (para. 53). The Commission's Acting commissioner, Thezi Mabuza, noted in an interview that despite Vodacom's undertaking to pay the aggrieved consumers, its actions could not be overlooked (Illidge, 2024). The Tribunal, however, did not consider it necessary to interdict Vodacom from engaging in future conduct since it had already terminated the 75% cancellation penalty, and it was unlikely that such conduct would be repeated (para. 87). This approach of the Commission and the Tribunal, in this case, is commendable as the attempts to remedy the problem did not deter enforcement of the rights of the aggrieved consumers.

Also important is increasing awareness of the existence of and the role that consumer rights in the CPA can play in protecting children from the harmful effects of unhealthy food marketing, as well as social mobilization and advocacy around the issue. These strategies have been a key feature of the success of several public interest litigations in South

Africa on various socio-economic rights issues. Examples are the *Minister of Health and Others v. Treatment Action Campaign and Others* (2002) case on the prevention of mother-to-child transmission of HIV, the *Government of the Republic of South Africa and Others v. Grootboom and Others* (2001) case on the right to housing, etc.

The importance of publicity around the issue cannot be overemphasized. For instance, in 2011 when a Cape Town meat importer, Orion Cold Storage, was accused of mislabeling non-halal meat products as halal, the accusations gathered momentum through regular media coverage and the publicity caused widespread outrage and distrust and put the entire halal industry and other key players in the spotlight (Rafudeen, 2013). The decision in *NCC v Vodacom*, with the publicity it received, could make other service suppliers in the industry consider their contract terms and conduct and respect consumer rights (Crouth, 2023; Illidge, 2024; Moyo, 2023). Although the effect of fines could be minimal for food industry giants, however, where this is matched with negative publicity, it can engender more significant results in fostering behaviour change.

Conclusion

The paper aimed to show that the South African consumer protection framework offers a viable opportunity to challenge the misleading marketing of unhealthy foods to children. Misleading strategies, including health and nutrition claims in otherwise unhealthy foods, were shown to satisfy the CPA requirement regarding misrepresentation in marketing. First, various marketing strategies, including health or nutrition claims, are material representations in the context of child-directed marketing since they are designed to influence children as well as their parent's/caregivers' choices. Secondly, from the perspective of children and their parents or caregivers, it was shown that various appealing strategies, including health and nutrition claims, are reasonably likely to mislead.

South Africa has comprehensive consumer protection legislation that encapsulates important consumer rights and prohibited conduct within the marketplace and several redress mechanisms where misleading child-directed marketing of unhealthy food can be challenged. This does not, however, result in a radical reordering of society or the marketplace, although it can play a pivotal role where the mechanisms are effective in enforcing these rights. Ensuring that all consumers can enforce their rights in the most meaningful, timely, and cost-effective manner must be made a priority. There is a need for consumer enlightenment on the misleading marketing of unhealthy foods and beverages and the role that the CPA and its redress mechanisms can play in addressing the issue. Enhancing the capacity and effectiveness of the Commission and the Tribunal should be made a priority to give consumers an adequate and timely opportunity to challenge business practices that negatively impact the welfare of consumers. Holding erring businesses accountable through the rights in the CPA relevant to misleading marketing of unhealthy food and beverages can be a catalyst for tangible and sustainable impact in the food environment. It could have a positive effect on enhancing population health and addressing unhealthy dietary patterns in addition to other legal, regulatory, and fiscal measures.

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Author Contribution AJO and ED contributed to the design of the research. The manuscript was written by AJO, and ED commented on each draft. The final manuscript was approved by both authors.

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Data Availability The data that support the findings of this study were derived from publicly available sources, and links are provided in the reference section.

Declarations

Competing Interests The authors declare no competing interests.

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