THE ROLE OF CONSUMER COURTS AND THE MOTOR INDUSTRY OMBUDSMAN OF SOUTH AFRICA IN THE REALISATION OF RIGHTS FOR CONSUMERS: A CRITICAL ANALYSIS OF KWAZULU-NATAL CONSUMER PROTECTOR V JATRU TRADING (PTY) LTD T/A TRUCKING TRADERS *[2023] ZANCT 14*

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I INTRODUCTION

Disputes permeate all transactions and agreements, and consumer transactions are no exception. The Consumer Protection Act 68 of 2008 ('CPA') introduced a dispute resolution framework that is intended to apply to the resolution of consumer disputes (see s 69 of the CPA). The objectives of the CPA are, amongst other things, to ensure that consumers have access to speedy and efficient systems of redress in general; and to afford consumers and suppliers the opportunity to subject their disputes to consensual dispute resolution processes (see s 3(1)(*g*) and (*h*) of the CPA). Provincial consumer courts and accredited industry ombuds are components of the CPA's dispute resolution process and play an important role in giving consumers access to redress. However, it is necessary to consider the extent to which these bodies are effective and, at times, whether they are acting within their powers. Where these consumer protection bodies are found to be lacking in light of these considerations, possible solutions should be tabled with the intention of improving access to redress for consumers. Accordingly, the purpose of this case note is to examine the role played by the Motor Industry Ombudsman of South Africa ('MIOSA') and the KwaZulu-Natal Consumer Tribunal ('KZN Tribunal') in the resolution of a consumer dispute in the matter of *KwaZulu Natal Consumer Protector v Jatru Trading (Pty) Ltd t/a Trucking Traders* [2023] ZANCT 14 ('*Jatru Trading*').

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II FACTUAL BACKGROUND

The consumer, Mr Mlondolozi Dlamini ('Mr Dlamini') was looking for a 4-ton truck for business purposes (para 13.3). Following an advert he had seen on Facebook; he scheduled a meeting on 8 June 2022 to view trucks that were on display at the premises of Jatru Trading (Pty) Ltd t/a Trucking Traders Ballito ('the supplier') (paras 13.2–13.3). He was reassured by the supplier's representative that all the trucks on display were 4-ton trucks (para 13.4). Mr Dlamini was specifically interested in the 2012 Hyundai H65 drop side model (para 13.4). After identifying this truck, the supplier's representative convinced him that he should urgently pay for the truck, as it was apparently in high demand (para 13.5). Since he was repeatedly reassured by the supplier's representative that the truck was indeed a 4-ton truck, Mr Dlamini decided to purchase the truck and immediately paid an amount of R200 000 (para 13.6).

The truck was ready for collection on 13 June 2022. Mr Dlamini realised, upon collection, that the truck he bought was in fact a 2.5-ton truck and not a 4-ton truck. This was brought to his attention by his friend who had accompanied him to collect the truck and had physically measured it (para 13.7). The supplier's representative was present when this discovery was made (para 13.8). The representative immediately acknowledged that the representation of the truck as a 4-ton truck was a mistake. Accordingly, he immediately cancelled the agreement and promised to process the refund the next day. However, the promise to make this refund was never fulfilled (para 13.9).

On 24 June 2022, Mr Dlamini lodged a complaint with MIOSA against the supplier. This complaint was investigated by MIOSA in terms of s 55 of the CPA. This provision entitles every consumer to 'receive goods that are reasonably suitable for the purposes for which they are generally intended'. Following their investigation, MIOSA concluded, inter alia, that the truck was represented as a 4-ton truck and the supplier confirmed that this was a mistake on their end (para 13.10.1). Despite the supplier's representative undertaking to refund Mr Dlamini, the refund had to date not been processed (para 13.10.4). The supplier had subsequently indicated that it would first need to be refunded by the previous owner before they could refund Mr Dlamini — which MIOSA found to be unacceptable (para 13.10.4). On 6 September 2022, MIOSA issued a recommendation that the supplier should refund Mr Dlamini the full purchase price within 15 days from the correspondence date (para 13.10.5). However, the supplier ignored the recommendations of MIOSA (para 13.10.6).

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The supplier provided a written acknowledgement of debt to Mr Dlamini on 16 November 2022, but still failed to honour the refund undertaking (para 13.10.7).

This led to Mr Dlamini approaching the KwaZulu-Natal Consumer Protector ('KZN Consumer Protector') for assistance on 25 October 2022 (para 13.11). However, the KZN Consumer Protector's attempts to resolve the matter amicably failed due to the supplier's failure to co-operate with the KZN Consumer Protector (para 14.1). As a result, the KZN Tribunal was approached to adjudicate the matter (para 14.2).

III KZN TRIBUNAL PROCEEDINGS AND FINDINGS

Before the KZN Tribunal, Mr Dlamini sought an order confirming the termination of the agreement and declaring the conduct of the supplier as being prohibited conduct in contravention of the CPA (para 27). In this regard, the submission was that the misrepresentation regarding the truck being a 4-ton truck was a contravention of s 41 of the CPA (para 27.1). The excuse that the supplier had made, ie, that it had to await a refund from the original owner, before refunding Mr Dlamini was unacceptable and a contravention of s 51 of the CPA (para 27.2).

The KZN Tribunal noted that the supplier had completely ignored the MIOSA recommendations that Mr Dlamini be refunded (para 21). It was also noted that the supplier ignored and even frustrated the KZN Consumer Protector's attempts to mediate the matter (para 22). Mr Dlamini had even gone to the extent of instructing a firm of attorneys to serve the supplier with a letter of demand, which was also ignored (para 23). The KZN Tribunal noted that Mr Dlamini sought to expand into the delivery sector of hardware for income-earning purposes; however, he had lost the contract, due to the delay in processing the refund (para 24). It was also noted that the matter was only brought to the KZN Tribunal, once all the avenues had been exhausted (para 25). The refusal of the supplier to co-operate with MIOSA and the KZN Consumer Protector was considered as behaviour 'deliberately calculated to frustrate or defeat the purposes of the CPA, namely, the [realisation] of consumer rights' and was thus a contravention of s 4(5)(*a*) of the CPA (para 27.3). Accordingly, the KZN Tribunal was of the view that the supplier's 'contemptuous attitude' towards MIOSA was one of the bases for finding that the supplier's conduct was indeed prohibited conduct in contravention of the CPA (para 27.4).

In its order, the KZN Tribunal declared that the supplier had engaged in prohibited conduct, in contravening ss 51, 55(2)(*a*), 55(3) and 56(2) of the CPA (para 30). The supplier was ordered to refund Mr Dlamini

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the full purchase price of R200 000, with interest on that amount calculated at the prescribed rate *tempore morae* (para 31 and 32). Finally, the supplier was ordered to pay an administrative penalty of R250 000 to the KwaZulu-Natal Provincial Revenue Fund (para 33).

IV DISCUSSION

MIOSA is an industry ombud that has been accredited in terms of s 82(6) of the CPA (see Government Notice No. 817, 17 October 2014). As an accredited industry ombud, the South African Automotive Industry Code (MIOSA Code) is, in essence, endorsed by the Minister and codified in a government notice. It is thus a form of legal self-regulation (Melville & Yeats 'Section 82' in Naude & Eiselen *Commentary on the Consumer Protection Act 68 of 2008* (Juta, Revision Service 7, 2022) 82–3; and Scott & Van Dyk 'The legitimacy of the South African Consumer Goods and Services Ombud's Code of Conduct: An analysis of *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd*' (2022) 139(2) *South African Law Journal* (2022) 259 at 260). Accredited industry ombuds form part of the Alternative Dispute Resolution ('ADR') framework, within the scope of the ADR agents contemplated in the CPA (see ss 1 and 70 of the CPA). They play a critical role given that the CPA applies to a broad range of industries using high-level principles (Melville & Yeats 'Section 82' (Juta, Original Service, 2014) 82–2). Accordingly, the existence of accredited industry ombuds introduces a specialised avenue for ADR, which also ensures that consumer redress is expedited due to familiarity with the issues presented in a dispute. In addition to an expedited process, an accredited industry ombud such as MIOSA, is available to the consumer free of charge (Koekemoer 'Consumer complaints and complaint forums employed in the South African motor vehicle service industry: A survey of the literature' (2014) 30(3) *The Journal of Applied Business Research* 665; Melville 'Has ombudsmania reached South Africa: The burgeoning role of ombudsmen in commercial dispute resolution' (2010) 22(1) *SA Merc LJ* 50 at 56). However, as was the case in the *Jatru Trading* case, it is unfortunately quite common for suppliers to fail to co-operate with MIOSA or follow its recommendations ((para 27.3) see also *Mpofu v Terry's Auto* (NCT/78117/2017/75(1)(b)) [2017] ZACONAF 5 para 7, available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACONAF/2017/5.html&query=Mpofu; *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise* (NCT/83884/2017/75(1)(b)) [2018] ZANCT 21 paras 13–15, available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZANCT/2018/21.html&query=stemmet;

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Winter v Kove Empire CC (NCT/176395/2021/75(1)(b)) [2021] ZANCT 35 para 27, available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZANCT/2021/35.html&query=winter%20v%20Kove). This was also frowned upon by the KZN Tribunal in *Jatru Trading* (para 27.4). Accordingly, the effectiveness of MIOSA and the role it plays in giving effect to consumer redress and enforcing consumer rights, is an aspect that is further scrutinised in this case note.

Furthermore, a provincial consumer tribunal, such as the KZN Tribunal, falls within the definition of 'consumer courts' as defined in the CPA (s 1 of the CPA). Consumer courts play an important role in the realisation of consumer rights, as they make redress readily accessible to consumers at a provincial level. In the *Jatru Trading* decision, the KZN Tribunal did its best to ensure that Mr Dlamini had a justiciable order in his favour. However, despite the positive outcome for Mr Dlamini, it is important for consumer courts, such as the KZN Tribunal, to act within the scope of their powers, as provided for in their establishing provincial legislation. This is an aspect of the *Jatru Trading* matter that also requires critical examination.

(a) The role of MIOSA in the resolution of consumer disputes

MIOSA is considered as an ADR agent under the CPA (ss 1 and 70(1)*(b)* of the CPA). In instances where accredited industry ombuds, as ADR agents, have assisted the parties with resolving a dispute, they may record the resolution as an order (s 70(3)(*a*) of the CPA). Furthermore, if the parties consent to that order, it may be submitted to the National Consumer Tribunal ('NCT') or the High Court to be made a consent order (s 70(3)(*b*) of the CPA). This may even include an award of damages, where the complainant consents to this (s 70(4) of the CPA). The CPA does however, provide that in instances where the ADR agent—

> concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties, whereafter the party who referred the matter to the agent may file a complaint with the Commission in accordance with section 71. (s 70(2) of the CPA).

Therefore, the CPA appears to envisage a situation where the ADR process is only followed to the end where it appears that the ADR agent has the capacity to successfully resolve the dispute. Where this is not the case, the process should be terminated, and the parties duly notified. In some cases, as alluded to above; the suppliers have failed to co-operate with MIOSA as an ADR agent. Therefore, MIOSA should, in such

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instances, evoke the provisions of the CPA to terminate the process by way of written notice. This will avoid situations where matters end up prescribing due to recalcitrant suppliers who refuse to co-operate in the ADR process or follow the recommendations made by MIOSA (s 116(1) of the CPA; see also *Mpofu* para 7; *Stemmet* paras 13–15; *Winter* para 27; Du Plessis 'Redress for consumers in terms of the Consumer Protection Act 68 of 2008: The watchdog's failure to support an accredited industry ombud — alternative suggestions' (2022) *Stell LR* 230 at 240; Scott-Ngoepe 'An unjust interpretation of section 116(1) of the Consumer Protection Act 68 of 2008: The impact of *First Rand Bank Limited v Ludick GP* (unreported) 2020–06–18 Case no A277/2019' (2024) 45(3) *Obiter* 711 at 720).

Procedurally, the MIOSA Code requires that MIOSA must investigate and evaluate the complaints before it and try to reach a settlement between the parties thereafter — providing a recommendation regarding such settlement, where it is possible (clause 21.2 of the MIOSA Code). A settlement, in the general context of disputes, refers to a determination concerning that dispute by agreement between the parties (see Black *Black's Law Dictionary* 4 ed (West Publishing Co, 1951) 1538–1539). Furthermore, the schedule to the MIOSA Code provides that if the mediation is unsuccessful, then MIOSA will issue a certificate to the parties to this effect (item 20, schedule 2 of MIOSA Code). This is aligned with s 70(2) of the CPA, which envisages that an unsuccessful attempt to resolve a dispute through ADR should be terminated for the parties to refer the matter to the National Consumer Commission. However, it appears that MIOSA, in *Jatru Trading*, made a recommendation in circumstances where there was no meeting of minds between the parties. In *Jatru Trading*, the supplier indicated before MIOSA that it would refund Mr Dlamini, only after receiving a refund from the original owner (para 13.10.4). The view of MIOSA was that this was unacceptable. However, MIOSA proceeded to issue a recommendation that a refund be made (para 13.10.5). At the date of the hearing before the KZN Tribunal, this recommendation had not been honoured (para 13.10.6). This outcome is not surprising given that the supplier had already set out its condition to processing the refund to Mr Dlamini before MIOSA. Whilst it is respectable that ADR agents such as MIOSA wish to provide solutions to the parties, where there is no settlement in the true sense, any recommendations made to the parties will be futile. This results in the consumer being frustrated in the enforcement process as the recommendations are subsequently ignored by suppliers. It is submitted that recommendations from accredited

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industry ombuds such as MIOSA, are only suitable where there is in fact a settlement, which involves a meeting of minds between the parties involved. Instead of making a recommendation where no settlement between the parties has been reached, the attempt to resolve the dispute should be terminated and a certificate issued as per item 20, schedule 2 of the MIOSA Code. This would ensure that the ADR process is efficient and gives the consumer enough time to refer the matter to another forum for final resolution.

(b) Powers of the KZN Tribunal

A provincial consumer tribunal, such as the KZN Tribunal, falls within the definition of 'consumer courts' as defined in the CPA (s 1 of the CPA). Van Heerden submits with merit that the fact that 'consumer courts' are excluded from the definition of 'courts' in the CPA, indicates that they 'are not courts in the formal sense, but rather administrative tribunals' (Van Heerden 'section 69' in Naude & Eiselen *Commentary on the Consumer Protection Act* (Juta, Revision Service 8, 2022) 69–12A). In this regard, consumer courts are established in terms of the applicable provincial legislation. In matters that cannot be referred directly to the NCT, an ombud with jurisdiction can be approached where applicable. Alternatively, other platforms may also be approached, including the consumer court (s 69(*c*) of the CPA). A consumer court is also referred to as one of the means of ADR that may be utilised to resolve a dispute (s 70(1)(*d*) of the CPA).

Section 8(1) of the KwaZulu-Natal Consumer Protection Act 4 of 2013 ('KZN CPA') empowers the relevant Member of the Executive Council to establish one or more consumer tribunals for the KwaZulu-Natal province within 12 months of the KZN CPA coming into effect. In this regard, the KZN CPA came into operation on 1 May 2020 (*Provincial Gazette* No. 2181, Provincial Notice No. 42 of 2020, Department of Economic Development, Tourism and Environmental Affairs, 23 April 2020). The KZN Tribunal was formerly launched in March 2022 (see Mtshali 'Newly-formed KZN Consumer Tribunal soon to outline its purpose to KZN businesses' *IOL* 23 March 2022, available at https://www.iol.co.za/news/politics/newly-formed-kzn-consumer-tribunal-soon-to-outline-its-purpose-to-kzn-businesses-066d00fe-e417–40eb-97a8-a11d60d5b44a, accessed on 6 July 2023).

The purpose of the KZN Tribunal is to adjudicate any consumer matter that it receives (s 9 of the KZN CPA). Amongst its powers, duties and functions, the KZN Tribunal is required to: (i) adjudicate consumer complaints before it; (ii) sit on the days determined by the Chairperson

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or presiding officer; (iii) hold sittings in areas of the province as determined by the presiding officer or the Consumer Protector; (iv) apply the relevant South African law to the assessment of the complaint; (v) establish general principles for the governance of dispute resolution between consumers and businesses; (vi) order that a list of adverse notations be maintained and kept by the office of the Consumer Protector (s 10(1) of the KZN CPA). Furthermore, the KZN Tribunal is permitted to award costs against persons found to be liable towards a consumer as a result of any unlawful conduct (s 10(2)(*a*) of the KZN CPA). The KZN Tribunal may also make a finding to the effect that certain conduct was, inter alia, inequitable, unfair and grossly unreasonable to the consumer (s 10(2)(*b*) of the KZN CPA). Where the KZN Tribunal is of the view that a complaint by a consumer was lodged frivolously or vexatiously, it may award costs against the consumer (s 10(2)(*c*) of the KZN CPA). Finally, the KZN Tribunal may generally deal with all matters that are considered to be 'necessary or incidental to the performance of its functions' (s 10(2)(*d*) of the KZN CPA).

As mentioned above, the KZN Tribunal declared that the supplier had engaged in prohibited conduct, in contravening ss 51, 55(2)(*a*), 55(3) and 56(2) of the CPA (para 30). The result of a finding that the supplier had engaged in prohibited conduct under the CPA was an order that required the processing of a refund to Mr Dlamini, with interest; and the imposition of an administrative penalty on the supplier (paras 30–33). Whilst these orders appear to be commendable and send a strong message to suppliers regarding their engagements with consumers, they are not without criticism. Two questions that arise are whether (i) the KZN Tribunal had the power to declare that the supplier had engaged in prohibited conduct, by contravening the abovementioned provisions of the CPA; and (ii) whether it is within the KZN Tribunal's powers to impose an administrative penalty on the supplier. These are particularly important considerations given that tribunals are creatures of statute (*Ngoza v Rogue Quality Cars* (NCT/79905/2017/73(3)&75(1)(b)) [2018] ZANCT 110 para 19, available at http://www.saflii.org/za/cases/ZANCT/2018/110.html). These questions are considered in turn.

(i) Prohibited conduct and order

'[P]rohibited conduct' is defined as either an omission or an act that is a contravention of the KZN CPA (s 1 of the KZN CPA). In so far as consumer rights are concerned, the KZN CPA sets out its own list of consumer rights in s 23 of the KZN CPA (see also Woker 'Consumer protection: An overview since 1994' (2019) 30(1) *Stell LR* 97 at 111).

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These rights read as follows:

> **Consumer rights**
>
> (1) Every consumer has a right:—
>
> *(a)* to have access to basic goods and services such as adequate food, clothing, housing, health care, education, clean water and sanitation;
>
> *(b)* to safety from and protection against production processes, products and services that are dangerous to health or life;
>
> *(c)* to be informed of, and to be provided with, the facts needed to make informed choices and to be protected against dishonest or misleading advertising and labelling;
>
> *(d)* to choose from a range of products and services, offered at competitive prices, with an assurance of satisfactory quality;
>
> *(e)* to have his or her interests represented in the making and execution of government policy and the development of products and services;
>
> *(f)* to redress or to receive a fair settlement of just claims, including compensation for misrepresentation, or shoddy goods or services;
>
> *(g)* to education as a consumer and to acquire knowledge and skills needed to make informed and confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them; and
>
> *(h)* to live and work in a healthy environment that is not threatening to the well-being of present and future generations.
>
> (2) The Office must take reasonable steps in ensuring that the rights contemplated in subsection (1) are realised by all consumers in the Province.

Given that prohibited conduct under the KZN CPA is limited to a contravention of its provisions, the KZN Tribunal would need to ensure that any order of prohibited conduct is in terms of its own provisions. As is evident from the quotation above, the rights that are provided for in the KZN CPA are somewhat condensed, compared to those provided under the CPA. Notably, the full scope of rights provided for under the CPA is not necessarily repeated in the KZN CPA or incorporated by reference therein. It might be argued that the CPA provisions may indeed be considered as prohibited conduct, in light of s 10(1)*(d)* of the KZN CPA, which allows the KZN Tribunal to 'apply the existing law of South Africa' when assessing a consumer complaint or dispute. Existing law in the context of consumer complaints and disputes would refer to all laws that regulate various aspects of consumer transactions. This would give the KZN Tribunal the capacity to apply existing legislation such as the CPA, the National Credit Act 34 of 2005 ('NCA'), Electronic Communications and Transactions Act 25 of 2002, the Protection of Personal Information Act 4 of 2013 and even components of the

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Competition Act 89 of 1998. Although the KZN CPA is meant to be a statute that gives effect to the CPA, its current drafting of s 10(1)*(d)* implies that it might have power to consider a wider range of legislation that affects consumer disputes and complaints than the CPA itself. This is an aspect that ought to be revisited by the provincial legislature to better align the KZN CPA with its enabling legislation.

More importantly, a distinction must be drawn between the application of existing law by the KZN Tribunal and *prohibited conduct*, as defined in the KZN CPA. In terms of the latter, the KZN CPA has specifically defined prohibited conduct as a contravention of its provisions. The scope of the KZN Tribunal to consider other existing laws when assessing a consumer dispute, does not equate to the definition of prohibited conduct being inclusive of contraventions under other existing laws that affect consumer transactions. Applying such an interpretation to the already defined term would be an interpretative exercise that would result in absurdity (*Chisuse v Director-General, Department of Home Affairs and* 2020 (6) SA 14 (CC) para 47). The KZN CPA, when defining a 'consumer protection group', for example, defines it as 'any consumer protection group as defined in section 1 of the Consumer Protection Act, 2008 (68 of 2008)'. Therefore, when the provincial legislature in KZN seeks to draw a linkage to the CPA in certain limited circumstances, it does so expressly. Without having properly drawn a connection to the CPA, an infringement of the CPA cannot be interpreted to constitute prohibited conduct under the KZN CPA.

Similar provincial consumer legislation, such as the Limpopo Consumer Protection Act 4 of 2015 ('the Limpopo CPA'), expressly refers to the CPA in its provisions. For instance, it indicates that its purpose is to, inter alia, adjudicate alleged consumer right infringements as set out in Chapter 2 of the CPA (s 2 of the Limpopo CPA). Section 18 of the Limpopo CPA re-establishes the Limpopo Consumer Court, which was initially established in terms of the provisions of the Consumer Affairs (Unfair Business Practices Act 7 of 1996). The Limpopo Consumer Court is required to adjudicate matters that are referred to it in terms of its provisions, the provisions of the CPA or the NCA; and make the appropriate order as provided for either in terms of the Limpopo CPA, the CPA or the NCA, as the case may be (s 19 of the Limpopo CPA). These provisions illustrate the linkages that have been clearly drawn between the CPA as the empowering national legislation and the Limpopo CPA as the provincial legislation. These clear connections have not been drawn between the CPA and the KZN CPA.

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The implication, considering that the KZN Tribunal is a creature of statute, is that the powers of the KZN Tribunal are restricted to the provisions of the KZN CPA, as the legislation that establishes it (*Ngoza* para 19). Such an approach would be in alignment with the rule of law (s 1*(c)* of the Constitution of the Republic of South Africa, 1996). An exercise, by the KZN Tribunal of powers that are beyond the legislation that establishes it, would be in breach of the principle of legality (see Scott & Van Dyk (2022) 139(2) *South African Law Journal* 259, 271).

Reverting to the order made by the KZN Tribunal in *Jatru Trading*, it was found by the Tribunal that the supplier had committed prohibited conduct, in contravening certain provisions of the CPA. However, bearing in mind that the KZN CPA does not, in any way, make a direct link with provisions in the CPA in so far as consumer rights and prohibited conduct are concerned, this finding is outside the scope and powers of the KZN Tribunal. In this regard, the rights afforded to consumers in terms of s 23 of the KZN CPA do not directly incorporate or restate the rights of consumers in terms of ss 41 or 51 of the CPA. Section 41 of the CPA regulates false, misleading or deceptive representations. In context of the facts in the *Jatru Trading* case, this provision prevents the supplier from directly or indirectly expressing or implying 'a false, misleading or deceptive representation concerning a material fact to a consumer' either through words or conduct (s 41(1) of the CPA). The KZN Tribunal in *Jatru Trading* found that the social media advertisements as well as the repeated representations regarding the truck being a 4-ton truck when it was in fact a 2.5-ton truck, constituted false misrepresentations in breach of s 41 of the CPA (para 27.1).

On the other hand, s 51 of the CPA regulates '[p]rohibited transactions, agreements, terms or conditions'. Again, the KZN Tribunal in the *Jatru Trading* case indicated that s 51(1) of the CPA prohibits a supplier from making a transaction or agreement subject to a term or condition that has the effect or overall purpose of defeating the purpose of the CPA, misleading or deceiving the consumer or subjecting the consumer to conduct that is fraudulent. The KZN Tribunal highlighted that the supplier's argument that it could only refund Mr Dlamini once it had received a refund from the owner was unacceptable — somehow implying that the sale was one of consignment (para 27.2).

In the final order of the KZN Tribunal, it held that the supplier had contravened s 41, read together with ss 51, 55(2)(*a*), 55(3) and 56(2) of

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the CPA. Whilst the relevant subsecs of ss 55 and 56 are quoted in the judgment, the KZN Tribunal did not expressly draw further connections to these provisions. Nothing turns on this in any event as the connection to the set of facts is clear. Read together, the relevant subsections provide that:

(i) a consumer has the right to receive goods that are suitable for the generally intended purpose (s 55(2)(*a*) of the CPA);
(ii) where the consumer has communicated the intended use of the goods to the supplier, the consumer is entitled to expect that the goods are reasonably suitable for that particular purpose (s 55(3) of the CPA); and
(iii) the consumer is entitled to return the goods to the supplier where the goods fail to satisfy the required standards and specifications (s 56(2) of the CPA).

However, despite the conduct of the supplier clearly being prohibited conduct in terms of the CPA, it did not constitute 'prohibited conduct' under the KZN CPA, which is restricted to acts or omissions that are in contravention of the KZN CPA specifically (s 1 of the KZN CPA). Without a direct linkage to the provisions of the CPA, the KZN Tribunal did not act within its powers when making this order (see Scott T *The realisation of consumer rights* (LLD thesis, 2018) 70).

In such circumstances, it would have been prudent for the KZN Consumer Protector to assist Mr Dlamini by linking the supplier's conduct in *Jatru Trading*, to the relevant provisions of the KZN CPA. As mentioned above, s 23(1)(*c*) of the KZN CPA provides that consumers have the right to be properly informed of facts that they need to make choices that are well-informed and protected from misleading advertising. In addition, s 23(1)(*f*) of the KZN CPA provides that consumers are entitled to redress, which is inclusive of compensation in instances of misrepresentation. On the facts of *Jatru Trading*, this would have led to a finding of prohibited conduct as envisaged within the KZN CPA. This would also have ensured that the ruling made by the KZN Tribunal was within the scope of its powers, as a creature of statute. However, it would be most beneficial for the KZN CPA to be better aligned with the CPA to avoid inconsistencies.

(ii) Administrative penalty

The KZN Tribunal also went to the extent of imposing an administrative penalty of R250 000 on the supplier (para 33). The imposition of the administrative penalty was motivated by the KZN Consumer Protector's

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submissions to the effect that imposing a penalty of this nature would deter the supplier from continuing to engage in prohibited conduct and would also prevent other dealerships from engaging in similar prohibited conduct (para 29). In terms of s 112(1) of the CPA, the NCT, at a national level, is authorised to impose a fine not exceeding either 10 per cent of the respondent's annual turnover or R1 000 000, whichever is greater. The annual turnover of the respondent is determined by considering the gross income of the respondent in the preceding year (s 112(4) of the CPA). The fine is payable into the National Revenue Fund as contemplated in s 213 of the Constitution of the Republic of South Africa, 1996 (s 112(5) of the CPA). Section 112(3) of the CPA further sets out the factors that need to be considered when the NCT determines a suitable administrative fine. These factors include the following:

(a) The nature, duration, gravity and extent of the contravention;
(b) any loss or damage suffered as a result of the contravention;
(c) the behaviour of the respondent;
(d) the market circumstances in which the contravention took place;
(e) the level of profit derived from the contravention;
(f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and
(g) whether the respondent has previously been found in contravention of this Act.

The KZN Tribunal does not have a similar mandate to impose an administrative penalty in terms of the KZN CPA (see Woker (2019) 30(1) *Stell LR* 97 at 111). Section 10 of the KZN CPA does not provide the KZN Tribunal with the power to make any order in terms of existing law. Section 10 of the KZN CPA only empowers the KZN Tribunal to make an award for costs or to order the KZN consumer protector to make a list of adverse notations concerning businesses that have infringed the KZN CPA (s 10(1)*(f)* and 10(2)*(a)* of the KZN CPA). This can be contrasted with the Limpopo CPA which empowers the consumer court in Limpopo to make any competent order as provided for in the CPA or NCA.

The KZN CPA also does not incorporate the provisions of s 112 of the CPA, into its scope. Although the KZN Tribunal imposed an 'administrative penalty' on the supplier; neither the term 'administrative penalty' nor 'administrative fine' is defined in the KZN CPA. Despite the laudable objective of ensuring that justice is served to Mr Dlamini, it appears again as if the KZN Tribunal acted beyond the scope of its powers. It is also unclear how the penalty was calculated by the KZN

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Tribunal, or which factors it took into account in arriving at its final figure of R250 000. The KZN Tribunal did not elaborate on how it reached this administrative penalty amount. Whilst R200 000 was the amount paid by Mr Dlamini for the truck, an administrative penalty is not just the value of the claim and it should be properly legislated as is the case in the CPA. Unlike, s 112(3) of the CPA which provides for the thresholds to be considered when an administrative fine is being imposed by the NCT, a similar framework is not provided for in the KZN CPA, which makes the operation and implementation of an administrative penalty by the KZN Tribunal subject to uncertainty.

V CONCLUSION

The specialised enforcement framework that is provided for under the CPA is important for purposes of ensuring that access to redress is made more tangible for consumers, in alignment with the purposes of the CPA (s 3(1)(*g*) and (*h*) of the CPA). As discussed above, two critical forums that play a role in giving effect to this purpose include accredited industry ombuds, such as MIOSA and consumer courts, like the KZN Tribunal.

In respect of MIOSA, it is evident that it plays an important role in the ADR process where motor vehicles are concerned. However, as discussed earlier, it is important for accredited industry ombuds, such as MIOSA, to be mindful of the level of co-operation and meeting of minds between the parties prior to making a recommendation. The provisions of the CPA and the MIOSA Code, seem to both envisage instances where an attempt at resolving a consumer dispute through ADR might be fruitless and should rather be terminated. However, this appears to be an aspect that is not actively enforced by MIOSA in certain instances. Realising that there is no meeting of minds and terminating the MIOSA ADR process might save consumers a lot of time and ensure that they have a better prospect of finalising their claim through other forums such as the consumer court, or the NCT.

In addition, consumer courts would be in a better position to ensure that consumer rights are protected, if the provincial statutes that establish these courts are better aligned with the CPA. This would ensure that the conduct of consumer courts, such as the KZN Tribunal, is within the scope of its powers and functions. It would be prudent for the KZN CPA to be amended in alignment with the provisions of the CPA. The unique framework created by the KZN CPA may create enforcement challenges, as the KZN Tribunal is a creature of statute. The condensed version of consumer rights under the KZN CPA also

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means that all the specific rights provided for under the CPA, might not be enforceable at provincial level by the KZN Tribunal. Therefore, even though a favourable outcome was reached in the *Jatru Trading* matter, following the approach of the KZN Tribunal may give rise to cases that are potentially susceptible to review. This would be to the detriment of the consumer.

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