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Suppliers, consumers and redress for defective vehicles — The reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings*

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Abstract

The National Consumer Tribunal has been inundated with disputes regarding the supply of defective motor vehicles by unscrupulous suppliers in terms of the Consumer Protection Act 68 of 2008. The purpose of this note is to disseminate the recent Tribunal decision of Tshehla v Aucamp Eiendoms Beleggings t/a CA Motors [2019] ZANCT 160 to illustrate the recurring prohibited conduct by suppliers as motor dealerships regarding not only the sale of defective goods, but also the representations, conduct and content of the preceding consumer sale agreements. The discussion will illustrate the Tribunal's efforts to provide effective redress and enforcement as a mandated enforcement institution in terms of the Act, despite the obstacles faced in this regard specifically because of the problematic wording and application of the Act.

Consumer Protection Act – National Consumer Tribunal – defective motor vehicles – prohibited conduct

Introduction

The National Consumer Tribunal ('NCT' or 'Tribunal') has been inundated with disputes regarding the Consumer Protection Act 68 of 2008 ('CPA' or 'the Act') over the past few years. Upon closer inspection it seems that consumers in search of redress against suppliers for the sale (or supply) of defective motor vehicles in terms of the CPA have become the rule rather than the exception. The purpose of this note is to disseminate the recent Tribunal decision of *Tshehla v Aucamp Eiendoms Beleggings t/a CA Motors* [2019] ZANCT 160 (*Tshehla*; also reported on SAFLII as [2019] ZANCT 92, although this reference is a duplicate) to illustrate the recurring prohibited conduct by suppliers as motor dealerships regarding not only the sale of defective goods, but also the representations, conduct and content of the preceding consumer sale agreements. The discussion illustrates the Tribunal's efforts to provide effective redress and enforcement as a mandated enforcement institution in terms of the CPA, despite the obstacles faced in this regard because of the problematic wording and application of the Act itself. An attempt is made to highlight the distinction between certain concepts, provisions and remedies that may not be correctly applied by the NCT regarding defective vehicles. The discussion however also exposes the inadequate limitations which are placed on the Tribunal's reach, and which hamper the Tribunal's ability to provide efficient and effective redress. The decision in *Tshehla* illustrates

how, despite unfortunate jurisdictional limitations on its powers, the Tribunal is attempting to address these obstacles indirectly in an effort to assist consumers. Ultimately, only legislative intervention can correct systematic problems such as the NCT's lack of ability to award damages or to adjudicate upon the fairness of terms in consumer agreements.

I must from the outset give full recognition to the preceding scholarly work by other authors regarding the role of the NCT in terms of the system of redress and enforcement as governed by the controversial s 69 and chaps 3–6 of the CPA (for example Corlia M van Heerden 'Chapter 3: Protection of consumer rights and consumer's voice' in Tjakie Naudé & Sieg Eiselen (eds) *Commentary on the Consumer Protection Act* (2018 service update) (Naudé & Eiselen (eds) *Commentary*); Tjakie Naudé & Elizabeth de Stadler ''Innovative orders' under the South African Consumer Protection Act 68 of 2008' (2019) 22 *PER/PELJ* 21; Tanya Woker 'Consumer protection and alternative dispute resolution' (2016) 28 *SA Merc LJ* 21; Tjakie Naudé & Jacolien Barnard 'Enforcement and effectiveness of consumer law in South Africa' in Hans Micklitz & Genevieve Saumier (eds) *Enforcement and Effectiveness of Consumer Law — Ius Comparatum — Global Studies in Comparative Law* (2018); Mihlali Magaqa 'The NCC and the NCT walk the long road to consumer protection' (2015) 27 *SA Merc LJ* 32). This includes scholarly work regarding the protection of consumers as buyers of defective consumer goods and the role of the common law where the CPA is applicable (Jacolien Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages' 2012 *De Jure* 455; Tjakie Naudé 'The consumer's right of safe, good quality goods and the implied warranty of quality under sections 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) 23 *SA Merc LJ* 336; Elizabeth de Stadler 'Section 55' in Naudé & Eiselen (eds) *Commentary* op cit; Graham Glover *Kerr's Law of Sale and Lease* 4th ed (2014) 272ff), as well as the mechanisms of redress for defectiveness in terms of the relevant consumer institutions (Michel M Koekemoer 'Consumer complaints and complaint forums employed in the South African motor car service industry: A survey of the literature' 2014 *Journal of Applied Business Research* 659; Evert van Eeden & Jacolien Barnard (eds) *Consumer Protection Law in South Africa* (2017); Corlia M van Heerden & Jacolien Barnard 'Caveat emptor: Second-hand motor vehicles and the Consumer Protection Act 68 of 2008' in *De Serie Legenda. Developments in Commercial Law Volume I: Law of Specific Contracts and Banking Law* (2019) 199).

Tshehla v Aucamp Eiendoms Beleggings t/a CA Motors

Background and facts

The applicant/consumer (Mr Tshehla) purchased a second-hand motor vehicle from the respondent/supplier (Aucamp Eiendomsbeleggings t/a CA Motors) for R55 000 in September 2016. As part of the agreement of sale the applicant signed a separate document entitled 'Declaration and Acknowledgement by the Purchaser'. The following provisions (which were also referred to in the 'Terms and Conditions' of the agreement of sale) deserve mentioning (para 8):

> '9.1 I hereby confirm that I was informed that the above vehicle is a used vehicle of a specific age and mileage as indicated above. I acknowledge that I have inspected the vehicle, conducted a road test, and that the condition was expressly disclosed and stipulated in the offer by the Seller.'

And

> '9.2 I hereby accept the vehicle in this condition and expressly confirm that the Seller offers no warranty on the vehicle in respect of mechanical failure, and defect of any material imperfection.'

The vehicle experienced performance problems within *one day* after the vehicle was bought, which the consumer immediately brought to the attention of the supplier. The vehicle was (seemingly) repaired by the supplier more than once within the first few months after the date of purchase, which included repair of the dashboard, water and oil problems, and performance issues (paras 9–10). None of these problems were however properly addressed, and in September 2016 the vehicle would not start at all. The consumer requested that the supplier bear the cost of towing the vehicle to the supplier's premises, which the supplier refused. The consumer thus had to tow the vehicle at his own risk and expense. He then requested an exchange of the vehicle, which the supplier also refused (para 10). The supplier was only prepared to further repair the vehicle, but on the condition that the consumer procure the spare parts himself — which he did after a list was provided to him by the supplier (ibid). The situation deteriorated to such an extent that the supplier eventually averred that the incorrect spare parts were bought

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(despite the fact that the parts were in accordance with the supplier's list), avoided feedback and communication with the consumer, and also diverted queries (para 12). After numerous attempts to engage with the supplier without success, the consumer approached the Motor Industry Ombudsman of South Africa ('MIOSA') in terms of s 72(1)*(a)* of the CPA.

MIOSA issued a finding in March 2017 that the vehicle had to be taken back to the supplier and 'inspected for quantum of damages and costs of usage calculated for the upliftment of this transaction' (para 14). The supplier failed to adhere to the finding of MIOSA in any manner or

form (ibid). It was also at this stage that the supplier alleged for the first time that the vehicle was involved in an accident while in the possession of the consumer. The consumer then approached the National Consumer Commission ('NCC') to assist in resolving the complaint. The NCC however issued a notice of non-referral in terms of s 73(1)*(a)* of the CPA for the sole reason that there was a dispute of fact between the parties (para 15). Due to the notice of non-referral by the NCC, there was a severe time delay as the consumer first had to apply for leave from the Tribunal for the complaint to be referred directly to the Tribunal in terms of s 75(1)*(b)*. This application was granted in December 2018. After the supplier filed an opposing affidavit, the hearing was finally set down for 1 April 2019 (i e two years and seven months after date of purchase, and after the consumer had brought the defects in the vehicle to the attention of the supplier). The consumer applied to get a full refund of the purchase price, a refund of the amounts paid for the spare parts and towing of the vehicle, 'or any other relief that the Tribunal deem[ed] fit' (paras 3 and 16).

Issues at the hearing and the NCT decision

As part of the supplier's averment that the vehicle was damaged due to a collision while in the possession of the consumer (which the consumer strongly denied (para 17)), the supplier attempted to argue that 'all of the mechanical problems related to the damage' to the vehicle were caused by the consumer (para 37). During the hearing the consumer presented two sets of photographs (incidentally provided to him by the supplier). The first set clearly showed an undamaged vehicle as returned to the supplier, whereas the second set was of a damaged, 'terribly neglected' and rusted bumper (para 21). The Tribunal agreed with the consumer that the second set of photographs was not proof of any damage but in fact created doubt that the photographs reflected the consumer's vehicle at all (paras 21 and 41(i)). The Tribunal ultimately rejected the supplier's submission that the damaged bumper was due to the conduct of the consumer or the cause of the mechanical problems (para 41(v)).

The fact that the supplier had ample opportunity to repair the vehicle in terms of MIOSA's finding, but failed to do so, was 'perceived as serious' and one of the reasons why the NCT found that the supplier had engaged in prohibited conduct in terms of the CPA (para 41(vi)). In light of the evidence presented by the consumer, the Tribunal made 'a negative deduction' of the supplier's failure to implement and respond to MIOSA's finding (para 43). The Tribunal did not however elaborate further on this issue, or whether any penalties or fines would be imposed in terms of the CPA.

Though there was a dispute between the consumer and supplier regarding the amounts to be paid for the spare parts that were bought by the consumer, the supplier did not dispute its responsibility to pay these

(para 39). The NCT found miscalculations by both parties in relation to the cost of the spares, and corrected these (paras 25–7). There was no proof of the amount it had cost to tow the vehicle to the supplier's premises and the fact that the towing was done at the consumer's risk and expense was not disputed by the supplier. The Tribunal found that the amount claimed by the consumer for towing (R1400) was reasonable in terms of industry norms, and should have been included (para 24).

The consumer identified a number of sections in the CPA that he alleged were relevant to the matter. However, the NCT primarily focused on s 54 (consumer's rights to demand quality service), s 55 (consumer's rights to safe, good quality goods), and s 56 (implied warranty of quality) (para 28). The Tribunal summarised the content and application of s 54 to the matter as follows (para 29):

> 'Section 54 provides that a consumer is entitled to safe, good quality goods, and to demand good quality service. The Applicant alleged that throughout his dealings with the Respondent he had been treated poorly and therefore the Respondent had acted in contravention of this section. In terms of section 54(2), when a supplier fails to perform a service to the standards contemplated in the section, the consumer may require the supplier to remedy any defect in the quality of the services performed or goods supplied; or refund the consumer a reasonable portion of the price paid for the services performed and goods supplied having regard to the extent of the failure.'

The Tribunal held that the supplier was engaged in prohibited conduct because the consumer 'did not receive good quality goods or services as required in terms of Section 54 of the CPA' (para 41(vii)).

The NCT then turned to s 55. As the Tribunal pointed out in para 30, s 55(2) provides:

> 'Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that —
>
> (i) Are reasonably suitable for the purposes for which they are generally intended;
>
> (ii) Are of good quality, in good working order and free of any defects;
>
> (iii) Will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
>
> (iv) Comply with any applicable standards set under the Standards Act, 1993 (Act 5 No. 29 of 1993), or any other public regulation.'

The Tribunal confirmed that s 55(2) 'is not without qualification' by referring in para 31 to s 55(6):

> '(6) Subsection (2)*(a)* and *(b)* do not apply to a transaction if the consumer —
>
> (a) Has been expressly informed that particular goods were offered in a specific condition; and
>
> (b) Has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.'

The Tribunal then applied the standard for safe, good quality goods in terms of s 55(2) to the defective vehicle, and held that the consumer had a right to receive a vehicle that was reasonably suitable for the purpose for which it was generally intended (para 32). This meant, said the Tribunal, that it had to be of good quality, in good working order, free of any defects, and usable and durable for a reasonable period of time (having regard to the use to which vehicles of that nature would normally undergo). The NCT confirmed that the consumer had successfully argued that his vehicle was defective from the start, and that all attempts to have this addressed by the supplier were unsuccessful (para 32). The NCT held that, contrary to s 55(2)*(c)* and the consumer's expectation of receiving a vehicle that was trustworthy and safe-and-sound at the time it was bought, it 'turned out to be unusable, untrustworthy and unsafe because of the oil leak and unpredictability with the engine' (para 34).

With regard to s 56 and the consumer's implied warranty of quality, the Tribunal referred specifically to s 56(3). This subsection is applicable where the supplier repaired goods (or any component thereof) and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or further defects are discovered. In such instances the supplier 'must replace the goods; or refund the consumer the price paid by the consumer for the goods' (para 35). The Tribunal added that, in line with s 56(4), the implied warranty of quality applicable under s 56(1) is additional to any other warranty given by the supplier or in law (para 36). The NCT found the supplier guilty of prohibited conduct in that the consumer did not receive a vehicle suitable for the purposes for which it was generally intended, 'namely the safe transport of people and goods', and further found that the vehicle was not of good quality, in good working order or free of any defects (para 41(viii)). The supplier, according to the Tribunal, engaged in prohibited conduct in this regard, as it did not remedy any further failures or defects that were discovered within three months after the initial repair, and found that the consumer had proved the quantum and payment for the spare parts and towing of the vehicle (para 41(x)). The Tribunal added that it was expected to make 'any appropriate order required to give effect to

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a consumer's right as contemplated in the CPA' (para 42). Importantly, the NCT added (para 42, emphasis supplied): '[T]he repayment of the costs of the vehicle and parts bought by the Applicant will assist in providing some relief as requested, *but it had been noted by the Tribunal that the Applicant was not able to use the vehicle he had bought for over two years*.'

The Tribunal then turned to the issue of the exclusion of the supplier's liability 'to provide any warranty on the vehicle' in terms of the agreement of sale, and how this related to the provisions of s 55(6) of the CPA. The NCT confirmed the content of s 55(6), and that the provisions of s 55(2)*(a)* and *(b)* could be contractually excluded if the supplier had brought

the particular condition of the vehicle to the attention of the consumer, and the consumer had expressly agreed to receiving the vehicle in that condition, or had acted in a manner indicating acceptance of the vehicle in that condition (para 44). However, the Tribunal added that s 55(6) does not 'apply unconditionally to the statutory implied warranty period of 6 months' applicable in terms of s 56' (ibid). The Tribunal noted in particular (ibid):

> 'The implication is therefore that, where the legislator decided to impose a specific standard or specification, contracting parties will not be able to lower the quality or safety standard, unless the actual detail of the poor quality goods are stipulated and the implications of the lack of safe or poor quality goods are detailed in the agreement.'

If, by contrast, the exclusion of the warranty was only referred to as part of a general limitation clause (ibid), the 'contractual stipulation will be perceived to be *ultra vires*, as section 56 of the CPA imposes an implied warranty of quality for a period of 6 months' (para 45).

The NCT found the limitation of the warranty by the supplier was not done in terms of s 55(6), and that the supplier was hence in contravention of s 56, 'based on the premise that the contractual exclusion of a warranty was *ultra vires*' (para 45).

Ultimately, the Tribunal ordered a full refund of R55 000 as well as the amounts for the spare parts and towing (R5218.80), these to be paid by the supplier to the consumer within 20 business days of the date of the Tribunal's order (para 46).

The distinction between a consumer's right to quality service (section 54) and the right to safe, good quality goods (section 55)

A distinction should be made between the consumer's right to quality service in terms of s 54 and the consumer's right to safe, good quality goods in terms of s 55 of the CPA. The sale of vehicles by a dealership or supplier (whether it is new or second-hand) to a consumer in the supplier's ordinary course of business for consideration (the purchase price) falls squarely within the ambit of the supply of *goods*, and is not the supply of a service. This can be deduced from the particular definitions in terms of s 1 of the CPA of 'service' (which includes 'any work or undertaking performed by another person') and 'goods' (which includes 'any tangible object'). The distinction is important as the approach to 'defectiveness', as well as the remedies available to consumers, differ in each instance. More importantly, the implied warranty of quality (including the remedies available to the consumer) under s 56(1) is only available in 'any transaction or agreement pertaining to the supply of *goods* to a consumer' (emphasis supplied). The premise underpinning s 54 is that a supplier must initially 'undertake to perform any service for or on behalf of a consumer' (s 54(1)).

If (as part of the service) goods are used, delivered or installed, they should be free of defects and of a quality persons are generally entitled to expect (s 54(4)). If a supplier fails to perform a service to the standard in terms of s 54(1), the consumer may require the supplier either to remedy the defective service *or* the goods supplied in terms of that service (there is thus a choice between the two); *or* the supplier must refund the consumer only a 'reasonable portion of the price paid for *services performed and goods supplied*, having regard to the extent of the failure' (s 54(2)*(a)* and *(b)*, emphasis supplied).

By contrast, the premise underpinning s 55 is a situation where the consumer *receives goods* from the supplier. These goods should comply with the standards set out in s 55(2) (read together with s 55(3)–(6)). If the requirements and standards of the goods do not comply with s 55(2), the consumer may (within six months after delivery) exercise the election of the remedies available in terms of s 56(2). Section 56 makes it clear that the choice between the remedies is the *consumer's* choice, not the supplier's. The remedies are either a repair or a replacement of the failed, unsafe or defective goods; or a refund of the purchase price. From the facts of the case it is clear that the initial choice of the consumer was a repair of the defective vehicle (para 9). This choice initiated the application of s 56(3), which provides that if the supplier repairs goods or components and, within three months after that repair, the failure or defect has not been remedied or further defects are discovered, the supplier *must* replace the goods, or refund the consumer not just a portion but the full purchase price. It is clear from the facts of this case that the supplier completely disregarded the clear provisions of s 56(3), as an opportunity to carry out further repair was not in accordance with the provisions of the Act.

It is understandable that the NCT might assume that the repair by the supplier (where the consumer purchased the spare parts based on a list provided by the supplier) is the supply of a service in terms of s 54, but upon a strict reading of the facts and the relevant provisions of the CPA it is clear that the consumer (prior to this arrangement) clearly exercised his right of replacement in terms of s 56(3) (para 11). The supplier however disregarded the choice of the consumer, and was therefore in clear contravention of s 56(3) — not s 54 — of the Act.

The distinction between the exclusion or limitation of a supplier's liability (section 55(6)) and the exclusion of the implied warranty of quality (section 56)

The limitation of the supplier's liability in terms of s 55(6) is qualified by the content of the section itself. First, even if the supplier complies with the information requirements in terms of s 55(6), only s 55(2)*(a)* and *(b)* will not be applicable to the transaction. The rest of s 55 and the

CPA itself *will* continue to apply. Secondly, the information requirements in terms of s 55(6) are clear: the supplier has to inform the consumer expressly that the vehicle was offered in a particular condition *and* the consumer must either expressly agree to such a condition or knowingly act in a manner indicating the consumer's acceptance of the particular goods. It has been correctly argued that s 55(6) is not a confirmation of the so-called voetstoots clause (selling goods 'as is') that was the norm in these types of consumer sales prior to the CPA, and that general 'sweeping' exclusion of liability clauses is not in line with the purposes and application of the Act (Barnard 2012 *De Jure* op cit; Van Eeden & Barnard op cit 357). Section 55(6) does, however, provide a supplier with the opportunity to *inform* the consumer in proper detail about the particular condition of goods, and to ensure that the consumer agrees to receive the goods in that particular *condition*. This is to the benefit of both the supplier and the consumer, as the supplier avoids unnecessary disputes and the consumer is properly informed of the condition of the goods.

It is a different matter entirely where a supplier attempts to exclude the statutory implied warranty of quality under s 56. This is unlawful. This was correctly confirmed by the NCT (para 44). It should be noted, however, that although compliance with s 55(6) can allow for the standard of goods to be of a lower quality, it can never be equated with an exclusion of the implied warranty of quality in s 56. Even if the standard of quality of the goods is lowered in terms of s 55(6), the implied warranty of quality will continue to apply to those particular goods in that particular condition. Thus, in *Tshehla*, even if the supplier had stipulated in detail the poor quality of the vehicle and the implications thereof, s 56 (including its remedies) would have continued to apply. This is also confirmed upon an inclusive reading of the CPA (see s 4(3)*(b)* and s 4(5)). The supplier in *Tshehla* deliberately attempted to exclude an implied warranty in terms of the CPA. That amounted to prohibited conduct. More importantly, the manner in which this was done, and the contents of the term expressing this, resulted in the supplier also being guilty of unconscionable conduct (s 40), making false, misleading and deceptive representations (s 41), and also including unfair and prohibited terms in the consumer sale agreement (ss 48 and 51 read together with reg 44 of the CPA).

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The distinction between prohibited conduct and 'unfair commercial practices'

A distinction should be drawn between prohibited conduct in terms of the CPA, and 'unfair commercial practices'. Section 1 of the CPA defines 'prohibited conduct' as 'an act or omission in contravention' of the Act, and has a wide field of application. It can be found throughout the Act, including the NCC's duty to investigate and address alleged prohibited conduct (chap 5 part C; chap 6 parts A and B); the offences relating to prohibited conduct

(s 110); and the administrative fines that the NCT may impose regarding prohibited conduct (s 112). In *Tshehla* the Tribunal correctly identified ten reasons why the supplier engaged in prohibited conduct in contravention of the CPA (para 41(a)–(x)). These reasons included not supplying safe, good quality goods (or services); ignoring the finding of MIOSA; acting in 'bad faith'; imposing an 'ultra vires' clause in the consumer agreement; and attempting to exclude an implied warranty. The NCT justifiably expressed its dissatisfaction with the supplier's conduct in this regard. Unfortunately, prohibited conduct by unscrupulous suppliers (including a complete disregard of the enforcement findings of institutions responsible for consumer redress, such as MIOSA) has increased significantly, as is apparent from numerous other court and Tribunal decisions (see e g *NM v John Wesley School & another*2019 (2) SA 557 (KZD); *Joroy 4440 CC v Potgieter & another NNO*2016 (3) SA 465 (FB); *Oos Vrystaat Kaap Bedryf Bpk v Cilliers* 2019 JDR 0049 (FB); *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 88 (ECG); *National Consumer Commission v Highends Trading and Projects (Pty) Ltd t/a Highends Auto Services* [2018] ZANCT 55; *National Consumer Commission v Western Car Sales CC t/a Western Car Sales* [2017] ZANCT 102; *Ngoza v Roque Quality Cars* [2017] ZANCT 104; *Perumal v South African Motorcycles (Pty) Ltd t/a Big Boy Scooters* [2018] ZANCT 4; *Phoffa v Peugeot Citroen South Africa (Pty) Ltd & others* [2013] ZANCT 46; *Powell v Auto Xtreme CC* [2019] ZANCT 2). Perhaps the NCT should have taken the opportunity to penalise the supplier for apparent and repeated prohibited conduct by instituting an administrative penalty against the supplier in terms of s 112 of the CPA (which may not exceed the greater of ten per cent of the supplier's turnover or R1 000 000, taking into account the factors in s 112(3): see for example the administrative fine ordered against a clearly unscrupulous supplier in *NCC v Western Car Sales* (supra)). It should be noted that the NCC could also have played a larger role in addressing the clear prohibited conduct of the supplier by foregoing the notice of non-referral solely based on the fact that the matter was opposed and there was a dispute of fact, and should rather have issued a compliance notice in terms of s 100 of the CPA.

'Unfair commercial practices'

It is now necessary to turn to the issue of 'unfair commercial practices'. Barnard identifies various acts, omissions and representations that form part of provisions seemingly scattered throughout the CPA, but which actually fall under the same concept of 'unfair commercial practices' (Jacolien Barnard 'The role of comparative law in consumer protection law: A South African perspective' (2017) 29 *SA Merc LJ* 353; Jacolien Barnard 'Consumer rights of the elderly as vulnerable consumers in South Africa: Some comparative aspects of the Consumer Protection Act 68 of 2008' (2015) 39 *IJCS* 223; Jacolien Barnard 'In search of the

ordinary consumer and plain language in South Africa' 2014 *Journal of Texas Consumer and Commercial Law* 1). The author draws this analogy by way of a detailed comparative analysis between the relevant provisions in the CPA and the provisions in the EU Unfair Commercial Practices Directive (2005/29/EC). Through her research above, Barnard illustrates how provisions that fall under separate fundamental consumer rights in terms of chap 2 of the CPA all have a common denominator — non-compliance with them indicates a certain type of unfair commercial practice (ibid). These provisions include: s 3(1)*(b)* and the categories or groups of vulnerable consumers that need particular protection from unfair commercial practices; the importance of complying with the plain-language requirement in s 22; the duties relating to unsolicited goods (s 21); duties concerning unconscionable conduct in terms of s 40; and duties concerning false, misleading and deceptive representations in terms of s 41.

The contents of ss 40 and 41 have been extensively and critically discussed from a constitutional and comparative perspective by others (see Philip N Stoop 'The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts' (2015) 18 *PER/PELJ* 1090; Jacques du Plessis 'Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008' (2012) 75 *THRHR* 27; Graham Glover 'Section 40 of the Consumer Protection Act in comparative perspective' 2013 *TSAR* 689; Jacques du Plessis 'Lessons from America? A South African perspective on the Draft Restatement of the Law, Consumer Contracts' (2018) 30 *SA Merc LJ* 189). For purposes of this discussion it should be noted that unconscionable conduct is defined in s 1, when used with reference to any conduct, as 'having a character contemplated in section 40'; or 'otherwise unethical or improper to a degree that would shock the conscience of a reasonable person'. In terms of s 40 the supplier (or its agent) is prohibited from using 'coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct' regarding any marketing or supply of goods; or pertaining to the 'conclusion, execution or enforcement of an agreement to supply any goods' or in the 'recovery of goods from a consumer'. Section 41 is not only directly related to fair and responsible marketing by the supplier (s 29*(a)* makes specific reference to s 41) but also to 'conduct' (s 41(1) and (2)). More specifically, the supplier (or its agent) must not make false, misleading or deceptive representations regarding 'goods that are of a particular standard, quality, grade, style or model' or regarding 'any service, part, replacement, maintenance or repair' that is necessary or advisable (s 41(2)).

The supplier in *Tshehla* was clearly engaging in unfair commercial practices when one considers the contents of ss 40 and 41. It must be noted that where contraventions of either of these sections occur, 'section 51

applies to any *court proceedings*' concerning these sections (s 40(3) and s 41(5): the emphasis placed on 'court proceedings' will be made clear in due course). Section 51 governs prohibited transactions, agreements, terms or conditions. That section prohibits suppliers from concluding consumer agreements on terms that purport to defeat the purposes of the CPA; that 'exclude, mislead or deceive the consumer; or subject the consumer to fraudulent conduct'; that attempt to *waive or deprive a consumer of a right in terms of this Act*; or that avoid a supplier's obligation or duty in terms of the Act. A notice, term, condition or consumer agreement that is the result of any or all of the above being present in the circumstances 'is void to the extent that it contravenes' s 51.

Du Plessis (2018 *SA Merc LJ* op cit at 206–7) correctly illustrates the important link between unconscionable conduct and unfair terms in a consumer agreement, as well as the *result* thereof. He explains that, in exercising fairness control under the CPA, South African courts should consider 'procedural unconscionability', which includes the bargaining positions between the parties in more 'serious cases of procedural unfairness covered by section 40, where substantive unfairness is not required' (ibid). In *Tshehla* (and in so many other similar cases that have come before the Tribunal) unfair commercial practices were clearly present, and not just 'prohibited conduct'. The question then becomes why the Tribunal has not directly addressed these unfair commercial practices and unfair terms within the so-called 'agreement of sale'? The reason, and consequently the problem, lies within the wording of the Act itself, and the limitations the Act imposes upon the Tribunal when it adjudicates disputes referred to it.

'The elephant in the room': Unfair contract terms and an 'ultra vires' clause — the reach of the NCT

There has been a thorough scholarly dissection of the unfair and prohibited terms in consumer agreements, and in particular the interpretation of Part G of the CPA (Tjakie Naudé 'Part G: Right to fair, just and reasonable terms and conditions' in Naudé & Eiselen (eds) *Commentary* op cit; Yeukai Mupangavanhu 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' 2015 *De Jure* 116; Tjakie Naudé 'Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008' 2017 *TSAR* 148; Du Plessis 2018 *SA Merc LJ* op cit at 206; Stoop op cit). Part G governs the consumer's right to fair, just and reasonable terms and conditions (ss 48–52 and reg 44). Many problematic issues have been identified by this research, but the issue most pertinent to this discussion

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is that only the *courts* (and not the NCT) can make a determination regarding fair or prohibited terms in a consumer agreement. Section 52

('powers of the *court* to ensure fair, just conduct, terms and conditions') specifically states (emphasis supplied):

> 'If, in any proceedings before a *court* concerning a transaction or agreement between a supplier and consumer, a person alleges that —
>
> (a) the supplier contravened section 40, 41 or 48; and
>
> (b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,
>
> the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).'

Section 48 goes on to set out certain considerations the *court* must take into account (s 48(2)), as well as the type of orders that may be granted which include restoring money and property, compensation, severing any relevant part of an agreement, or declaring the entire agreement void (s 48(3) and (4)). It is very seldom that a contravention of the CPA by a supplier only involves the unfairness of terms and conditions. It is clear from recent decisions before the Tribunal and the courts that there are mostly an infringement of more than one fundamental consumer right in terms of the CPA (*Oos Vrystaat Kaap Bedryf Bpk v Cilliers* (supra); *Vousvoukis v Queen Ace CC t/a Ace Motors* (supra); *NCC v Highends Trading* (supra); *NCC v Western Car Sales* (supra)). Where defective goods (defective vehicles in particular) are supplied the following rights and prohibited conduct are in most instances simultaneously present: the consumer's right to fair value good quality and safety (ss 55 and 56); unconscionable conduct by the supplier (s 40); false, misleading and deceptive representations (s 41); and unfair contract terms (s 48). The frustration that results from the jurisdictional divisions inherent in dealing with these separate issues is therefore two-fold. On the one hand, the consumer has to separate the clearly interlaced issues and bring them before separate enforcement institutions in terms of separate provisions and processes. On the other hand, the institutions tasked with making appropriate orders — one of which is the NCT — is restricted in carrying out its mandate to give effect to the purposes of the CPA itself, which includes '*providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers* (s 3(1)*(h)*, emphasis supplied). In this regard, the Tribunal has noted in the decision of *NCC v Western Car Sales* (supra) para 42:

> 'On a plain reading of section 48, read with section 52, it would appear that the power to apply the provisions of section 48 remain exclusively reserved for a court of law. It would in any event appear to be a case of splitting of charges to find a contravention of section 51 would also amount to a contravention of section 48.'

The Tribunal in that case also drew a distinction between ss 51 and 48 because of the difference in purpose and relief provided in terms of each section (ibid para 41). The NCT held (ibid para 42) that 'while the

Tribunal has the power to declare conduct which contravenes section 51 as prohibited, the same cannot be said for section 48' (ibid). The inability of the NCT to address the unfairness of terms and conditions in terms of s 48 clearly defeats the purpose of the CPA — to provide effective redress for consumers. This may also be the reason why in *Tshehla* the NCT attempted to indirectly address the issue of unfairness by referring to an 'ultra vires' clause in terms of the consumer sale agreement (para 41(v)). It is understandable that the NCT felt the need to address this, as the particular clause (and the unfairness thereof) went to the heart and merits of the case. The supplier, contrary to the Act, excluded the implied warranty of quality in terms of section 56. This 'exclusion' greatly influenced the consumer's actions and choices (or lack thereof) he perceived himself to have because of the express terms of the consumer sale agreement. However, the use of the wording 'ultra vires' may create other issues and unfavourable results in that it is not used in the correct legal context, and may unfortunately create further uncertainty. According to *Claassen's Dictionary of Legal Words and Phrases* (2019), 'ultra vires' refers to 'beyond the power' and is 'used of acts which purport to be done in virtue of a certain authority, but which are really in excess of such authority, or of acts which are otherwise unauthorised'. The term is most commonly used in relation to 'the acts of artificial persons and officials' (ibid), for example in respect of a municipal by-law or other statutory regulation (ibid).

The ultra vires doctrine also refers to the restriction, limit or qualification of the acts (including the conclusion of contracts on behalf of) a company or its directors in terms of its own Memorandum of Incorporation ('MOI') or in terms of the Companies Act 71 of 2008 (Piet Delport *The New Companies Act Manual* (2009) 38). The problem with the applicable clause in *Tshehla* was not that it was beyond the scope of the supplier's (or its director's) authority in terms of its own MOI, but rather that it affected the general validity of the contract and its specific terms. The problem related to the general principles of the law of contract and the *purpose* of the particular clause (the *contractual* issue of legality), or whether or not a factor such as undue influence or misrepresentation was present and thus influenced consensus (for a general discussion see Chris J Nagel & Birgit Kuschke (eds) *Commercial Law* 6 ed (2019) chs 4–6). If the contract or clause was found to be wanting in these respects, the contract or clause would then either be void, voidable or unenforceable. But it would not ever be correct to refer to it as being 'ultra vires'. Even if the clause was beyond the scope of the supplier's MOI, Delport explains that s 20(5) of the Companies Act provides that a fraudulent act can be ratified by special resolution (op cit at 38n11). Additionally, the basic rules regarding the interpretation of contracts (i e that the contract should be interpreted as a whole, the contra proferentem rule, and that the clause could be regarded as pro non scripto) could be considered (Nagel & Kuschke (eds)

op cit para 8.74). Nagel & Kuschke (ibid) remind us, however, that 'in some cases a statute introduces a specific approach or rule of interpretation' and refer to s 2 of the CPA, which prescribes that the interpretation that extends the greatest protection for the *consumer* must prevail (emphasis supplied). Section 2(10) also includes the preservation of the common-law rights of the *consumer* (not the supplier). It is regrettable that the NCT should attempt to go to such lengths to address the unfairness of a clearly unfair and prohibited contractual clause and thus illustrates the limitation of the reach of its jurisdictional powers, to the detriment of consumers.

Remedies to which the consumer should be entitled in terms of law, compared to the remedies the NCT is able to provide

The remedies available to a consumer in terms of s 56 where there has been a breach of the implied warranty of quality are the repair, replacement or refund of the defective goods. As discussed above, in *Tshehla*, the NCT systematically approached the contravention of the appropriate sections, confirmed the due diligence of the consumer as well as the prohibited conduct of the supplier, and ultimately ordered a full refund of the purchase price and the expenses pertaining to the towing of the defective vehicle and the procurement of the spare parts by the consumer. Can the order by the NCT, however, be equated to sufficient redress, taking into account that the order did not include interest on the purchase price or any possible damages suffered by the consumer as a result of the supplier's prohibited conduct? Note should be taken of the Tribunal's remarks in *Tshehla*, which were mentioned earlier:

> 'The repayment of the costs of the vehicle and parts brought by the Applicant will assist in providing *some relief* as requested *but it had been noted by the Tribunal that the Applicant was not able to use the vehicle he had bought for over two years* (para 42, emphasis supplied).'

It is submitted that the Tribunal is hinting at a more systemic problem when it comes to the granting of *sufficient* redress and enforcement by the NCT — its inability to make an award for damages, and the uncertainty regarding the calculation and award of interest. At this point it should be noted that the processes, duties and functions of the NCT are governed by both the National Credit Act 34 of 2005 ('NCA'), as well as the CPA. Though s 152 of the NCA provides that an order by the Tribunal has the same status as a high court order, the reach of the NCT is limited not only with regard to its ability to make a determination on the fairness of terms and conditions (s 52 and Part H of the Act) but also in awarding damages. The content of s 115 of the CPA is relevant. Section 115(2) provides that a consumer who suffered loss or damage as a result of a provision or agreement that has been declared void, may not institute a claim in a civil court for the assessment or award for damages if that person consented to a

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consent order in terms of the CPA; or without a certification by the NCT that the conduct that forms the basis of the claim was declared prohibited conduct by the Tribunal and duly filed by the clerk of the appropriate court. Section 76(1)*(c)* of the CPA furthermore only refers to the power of a *court* to award damages. Van Heerden ('Section 69' in Naudé & Eiselen *Commentary* op cit at 69-18) confirms the exclusive jurisdiction of the courts in this regard, citing previous decisions of the Tribunal to this end (see *CJ Digital SMS Marketing CC v National Consumer Commission* [2012] ZANCT 22; *Audi SA (Pty) Ltd v National Consumer Commission* [2013] ZANCT 4). The only situation at this stage where a Tribunal could award damages is where, in terms of s 70(4), the NCT confirms a consent order that *already includes* an award for damages. Van Heerden remarks that 'the Tribunal is thus a creature of statute that must operate within the parameters of the National Credit Act and the CPA' (op cit at 68-4). This is an unfortunate approach as can be seen from the decisions and application of the CPA in a case such as *Tshehla*.

Conclusion

The courts have an important role to play in the redress and enforcement of consumer disputes on various levels (Jacolien Barnard & Emilia Miscenic 'The role of the courts in the application of consumer protection law: A comparative perspective' (2019) 44 *JJS* 111). It is valuable to note the recent decision of *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC). Though the crux of that matter was a proper interpretation by the court of s 49 of the CPA ('notice required for certain terms and conditions'), the general sentiments expressed in para 81 should be noted for purposes of this discussion:

> 'This section clearly and unambiguously seeks to protect a consumer where, in terms of a notice or provision of the consumer agreement, such notice or agreement purports to limit the risk or liability of the supplier or any person; where such provision or agreement seeks to constitute an assumption of liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause; and lastly where such notice or consumer agreement requires an acknowledgement of any fact by the consumer. And it seeks to temper the unjust and unfair application of the *caveat subscriptor* rule, especially on unsuspecting and illiterate consumers.'

Ultimately, the court held that the exclusion of liability clause on which the supplier relied did not meet the requirements of the provisions (notably s 49) of the CPA, and therefore the supplier could not rely on the clause. The court furthermore ordered repayment of the purchase price (including interest) as well as damages (para 116).

How long would it have taken the consumer in *Tshehla* to get to the same stage of redress, bearing in mind that it had already taken almost three

years to have the matter dealt with by the Tribunal? It is submitted that the reach of the Tribunal should be extended to empower it to make decisions regarding the fairness of consumer clauses and consumer agreements, in the same way as a court may in terms of ss 51 and 52 of the CPA (thus following the approach in *Van Wyk v UPS* (supra)). The NCT should also be able to make an award for damages (albeit contractual damages) to avoid the unfair and cumbersome duties currently on consumers in this regard. This would avoid the unnecessary (and sometimes incorrect) lengths to which the NCT has to go to in attempting to provide *sufficient* and *efficient* redress for consumers. (One should also point out that the high court has the jurisdiction to review a decision of the NCT, and a participant in a hearing before a full panel of the NCT may appeal to the high court against such a decision in terms of s 148(2)*(a)* and *(b)* of the NCA, potentially prolonging the process even further).

Ultimately, clear and uncomplicated legislative amendments to both the CPA and NCA would be the most effective way to promote the purpose of consumer protection legislation, and to support the ideal of sufficient and efficient redress for those who are aggrieved by the conduct of suppliers. In *Van Wyk v UPS* (supra) para 74 it was said: 'This Court is required to interpret the provisions of the CPA in a way which gives effect to its fundamental values, of dignity, equality, human rights and freedom as set out in section 1. This is clearly what the CPA seeks to achieve.' It is disappointing that the Tribunal is, in the limitation of its jurisdictional powers, currently denied the opportunity to do just this.

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