CONSUMER GOODS & SERVICES OMBUD
Fairplay between consumer & supplier

BULLETIN: CASES 2017

Where to start

We discovered from our recent round of participant liaison meetings that there is a growing concern amongst suppliers about the multiplicity of dispute resolution options available to consumers under the Consumer Protection Act (CPA), such as the consumer protectors, the ombuds and the consumer courts. Added to this are the small claims courts, which are not specifically referred to in the CPA. Suppliers feel they are being beset by forum shoppers and are aggrieved that, although they fund the CGSO for the very purpose of resolving disputes, they are forced to defend themselves in other fora.

Van Heerden submits that there is an implied hierarchy in section 69: The preferred route of redress is first to approach an alternative dispute resolution body (the CGSO is the accredited ADR scheme for the consumer goods and services industry). [1]

As far as the small claims courts are concerned, Mupangavanhu concludes that, just as with the ordinary courts, they may not be approached before a consumer has exhausted their other remedies.[2] While this may appear to be unconstitutional, it might well be that it would be treated as a justifiable encroachment of the right to approach a court. [3]

As to whether a consumer must approach an ombud before a court where the supplier claimed against is a member of the ombud scheme, there is clear authority in the case of *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O. and Another*:[4] The consumer may approach the court only if all the avenues of redress listed in section 69 have been exhausted. With regard to the case before it, the court stated that:

> The dispute resolution mechanisms available to an aggrieved consumer in terms of Section 69(a), (b) and (c) of the CPA include referring the matter directly to the Tribunal; to the applicable ombud with jurisdiction; to the applicable industry ombud, accredited in terms of Section 82(6); to the consumer court; alternative dispute resolution and filing a complaint with the Commission. In the case of the motor industry an ombud in terms of Section 82(6) has been accredited. The Motor Industry Ombudsman of South Africa (MIOSA) deals specifically with dispute resolutions between consumers and the motor industry.

[1] In Naudé and Eiselen (eds): *Commentary on the Consumer Protection Act* 69-2 at para 3.
[2] Mupangavanhu, Y "An Analysis of the Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008' [2012] PER 54.
[3] See the similar reasoning in *Chrish v Commissioner- Small Claims Court- Butterworth and Others* (774/2005) [2007] ZAECHC 114 (26 July 2007).
[4] *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O. and Another* (4161/2015) [2016] ZAFSHC 10; 2016 (3) SA 465 (FB) (28 January 2016).

The Court referred to the Constitutional Court dicta that, where a specialised framework has been created for the resolutions of disputes, parties must pursue their claims primarily through such mechanisms. [5]

Who's who?:

The shocked consumer

Naturally, in order to "pass go" in a case brought in terms of the Consumer Protection Act (CPA), a party needs to show that they are indeed a consumer as defined in the CPA. The issue is by no means as clear cut as it appears on the face of it. The definition provided by the CPA goes beyond what the person in the street might expect:

> (a) a person to whom those particular goods or services <u>are marketed</u> in the ordinary course of the supplier's business [the person qualifies as a consumer without even entering into a transaction];
>
> (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, [this is what one might have expected]…;
>
> (c) if the context so requires or permits, <u>a user</u> of those particular goods or a <u>recipient or beneficiary</u> of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; [this broadens the concept of consumer potentially to include employees and family members of the "primary" consumers who entered the transactions and anyone to whom they donate goods.]

In a case that commenced in the High Court and then progressed on appeal to the Supreme Court of Appeal, the successive courts grappled with the definition of consumer. The Plaintiff was a cyclist who suffered severe burn injuries while cycling when he rode into a low hanging live power line spanning a footpath. He sought to hold Eskom strictly liable under section 61 of the CPA. The Defendant contended that the CPA is about consumerism and the protection of consumers and that had the Plaintiff suffered the electrical burns that he did in the course of utilising the supply of electricity to his home, or otherwise in the course of his use of electricity, then the CPA might well have applied: The CPA is not intended to apply to circumstances such as the present case.

[5] In *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC)

The court a quo rejected this reasoning and held the Defendant liable, partly on the grounds that it had accepted responsibility by rectifying the situation by switching off the electricity and dismantling the lines.

On appeal, this finding was reversed, the SCA holding that the respondent and Eskom were not in a consumer, producer or supplier relationship in respect of the electricity that caused the harm to the respondent and accordingly the respondent was not a consumer that was entitled to the protection of the CPA.[6]

It is noteworthy that regarding how the CPA is to be interpreted, the court stated:

"A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results…"

It wasn't me

At the other end of the spectrum, when is a person a supplier for the purposes of the CPA?

The National Consumer Tribunal considered this in its case of *Doyle v Killeen and Others*.[7] Briefly, the facts were that a consumer purchased a property through an estate agent and two days after taking transfer of the property, the Applicant (consumer) experienced roof leaks. The Applicant replaced the roof at his own expense and sought to institute action against the previous owner of the home (the seller) and the estate agent (together the Respondents) jointly and severally. The Tribunal held that neither of the Respondents could be regarded as a supplier for the purposes of the CPA. The seller had not sold the property in the ordinary course of business. She sold her property as a once-off transaction and does not in any way engage in the business of selling properties. As far as the Estate Agent was concerned, there was no evidence of a true agent and principle relationship as required by section 113. Based on the evidence available, the Estate Agent merely marketed the property on behalf of the seller but did not represent the seller in an agent and principle relationship which could make the provisions of section 113 relevant to the matter.

[6] *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016).
[7] (NCT/12984/2014/75(1)(b)CPA) [2014].

Publish and be damned

> Another matter in which the possible application of section 113 to hold a supplier liable for the actions of its agent arose in the CGSO case no. 201703-0012601. The complainant saw what he took to be an advertisement for a gazebo at the price of R399 in an outdoor magazine. The complainant placed an order for 10 gazebos at the store mentioned in the advertisement and paid a deposit. When he went to collect the items, he was told that the magazine had made an error: The correct price for the gazebo was R3499 each. The store refused to give him the 10 gazebos at the advertised price. The magazine contacted him and apologised. It insisted it was not the store's fault but its own. Further, the gazebo was mentioned not in a paid advertisement but in a feature in its publication.

The CGSO held that section 23 applies to displayed prices and section 30 governs the advertisement of goods in the media. Section 30(1) prohibits a supplier from advertising goods as being available at a specified price in a manner that may result in consumers being misled or deceived. Sub-section (2) binds the supplier to provide the goods at the advertised price if the advertisement expressly places a limitation on the number of goods available.

The CGSO concluded a reasonable person would not have been misled by such a massive error and, accordingly, the incorrect price was not binding. Of particular relevance was the feature of multiple orders being placed (the complainant ordered 10 gazebos). This fact linked to the massive discrepancy between the advertised price and the true price (R 399 as opposed to R3 499) precludes the possibility of the reasonable person being misled. It was not therefore necessary to consider whether the supplier was vicarious liable in terms of section 113 for the actions of the magazine as its agent. There was not in any event a transaction between the complainant and the magazine.

Note: Suppliers should be aware that they might well in appropriate circumstances be held liable for an error regarding price or availability made by their advertising agency or a newspaper or magazine in which an advert for their merchandise is placed. Given the widespread circulation of such publications, the potential magnitude of loss is great.