



cgso

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Dear Queen

1. INTRODUCTION

- 1.1. We have been instructed by the Consumer Goods and Services Ombud (“**CGSO**”) to consider its jurisdiction in relation to matters within the purview of the Consumer Protection Act 68 of 2008 (“**CPA**”). More specifically, the CGSO wishes to know whether suppliers such as importers or online retailers, who are merely conduits for the supply of goods and services, could be held to be liable under the CPA and should, as a result, be included as industry participants under the aegis of the CGSO.
- 1.2. We are further instructed to consider whether the CGSO is empowered by GNR.271 of 30 March 2015: Prescription of the Consumer Goods and Services Industry Code and accreditation of the alternative Dispute Resolution Scheme administered by Consumer Goods and Industry Ombud as an accredited Industry Ombud in terms of section 82 of the Act (Government Gazette No. 38637) (“**Code**”) to grant exemptions to entities which are of the opinion that they do not fall within the jurisdiction of the CGSO and as such should not be considered industry participants.
- 1.3. We discuss first the jurisdiction of the various ombuds, secondly we consider the role of the CGSO and thereafter we address the specific queries set out above.

2. JURISDICTION OF THE VARIOUS OMBUDS

- 2.1. Section 69 (*Enforcement of rights by consumer*) of the CPA provides:

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by—

- (a) *referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;*

- (b) referring the matter to the applicable ombud with jurisdiction, if the **supplier**¹ is subject to the jurisdiction of any such ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)—
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
 - (iv) filing a complaint with the Commission in accordance with section 71; or
- (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. (*emphasis added*)

2.2. The definition of an "ombud with jurisdiction" in the CPA recognises two kinds of ombuds with jurisdiction:

- 2.2.1. a "statutory ombud" appointed for an industry in terms of any national legislation; and
- 2.2.2. an ombud for a "financial institution", as defined in the Financial Services Ombud Schemes Act 37 of 2004.

Statutory Ombuds

2.3. Ombuds which have been appointed as statutory ombuds in terms of a statute include the Ombud for Financial Services Providers appointed in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 and the Pension Fund Adjudicator appointed in terms of the Pension Funds Act 24 of 1956.

Industry Ombud

2.4. "Industry ombud" in subsection (c)(i) of section 69 of the CPA refers to an industry-appointed ombud. The National Consumer Commission ("**Commission**") may, in terms of section 82(6)

¹ "Supplier" means a person who markets any goods or services; "market", when used as a verb, means to promote or supply any goods or services; "promote" means to advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction; and "supply", when used as a verb in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

of the CPA, recommend to the Minister that a particular code of conduct is to be recognised as the code which regulates the conduct of persons conducting business within a particular industry. The Commission may furthermore recommend that the scheme be an "accredited industry ombud".

- 2.5. It should further be noted that the Commission has published Guidelines for the Accreditation of Ombud-Schemes in terms of the CPA.²

Industry codes of conduct

- 2.6. In terms of section 82 of the CPA the Minister, by regulation, may prescribe an industry code³ on the recommendation of the Commission (acting on its own initiative, or in response to a proposal from persons conducting business within a particular industry) or withdraw all or part of a previously prescribed industry code, on the recommendation of the Commission.
- 2.7. If a proposed industry code provides for a scheme of alternative dispute resolution; and the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation, the Commission, when recommending that code to the Minister, may also recommend that the scheme be accredited as an "accredited industry ombud".
- 2.8. Woker argues that suppliers cannot be compelled to join an ombud scheme, as section 70(1)(b) of the CPA provides that matters will be referred to an industry ombud if the supplier is subject to the jurisdiction of such ombud. In our view, this is incorrect as this provision applies to the situation where the supplier is part of an industry that has an accredited ombud scheme. There are still various industry sectors, such as the cellular network providers, that do not belong to ombud schemes.⁴
- 2.9. In addition, section 82(2)(b), read with section 81(1)(a) of the CPA, gives the Minister the power to prescribe an industry code regulating to the interaction between or among persons conducting business within an industry (as opposed to some persons conducting business within an industry). Section 82(3)(c)(i) envisages that the Commission will consult more widely in the industry than the persons who made the original proposal, and section 82(3)(a) makes it mandatory that the code be published for public comment, thereby giving any persons conducting business within the industry who do not wish to subscribe to the envisaged ombud scheme the opportunity to raise objections. In addition, it would be pointless for the Minister to prescribe a code only for those persons conducting business within an industry who have

² See GN 174 of 25 March 2011: (*Government Gazette* No. 34163)

³ "Industry code" means a code regulating the interaction between or among persons conducting business within an industry; or regulating the interaction, or providing for alternative dispute resolution, between a person contemplated above and consumers.

⁴ See Melville, N, *Commentary on the Consumer Protection Act*; Jutastat e-publications; p82-7.

already voluntarily subscribed to the code. It follows that once prescribed the code applies to the entire industry (this term is defined in each individual code).⁵

- 2.10. A supplier must thus not, in the ordinary course of business, contravene an applicable industry code.

3. THE CODE AND THE CGSO

- 3.1. The Consumer Goods and Services Code of Conduct (“**Code**”) and the CGSO are the industry code and ombud scheme for the “Consumer Goods and Services Industry” set up in accordance with, and accredited in terms of, section 82 of the CPA.⁶

- 3.2. In light of the Code being recognised under the CPA, it is enforceable against suppliers within the “Consumer Goods and Services Industry”.¹ It follows that any person who promotes any goods or services, or sells, rents, exchanges, hires and the like goods, or sells or performs services, or causes them to be performed or provided, or grants access to any premises, event, activity or facility, to all or part of the public for consideration; or makes any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to do so; or engages in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction, should adhere to the Code and falls within the jurisdiction of the CGSO.⁷

- 3.3. From a supplier’s perspective, the most important change brought about by the Code is that participation in or membership of the CGSO scheme is now compulsory for all suppliers who operate within the “Consumer Goods and Services Industry”, subject to certain exceptions stipulated in the Code. Eligible suppliers are thus obliged to comply with the provisions of the Code and the CGSO procedures, as well as contribute towards the funding of the scheme.⁸

- 3.4. “Consumer Goods and Services Industry” is broadly defined in the Code to include “*all Participants and/or entities involved in the Supply Chain that provides, markets and/or offers*

⁵ Ibid p82-8.

⁶ See GNR.271 of 30 March 2015: Prescription of the Consumer Goods and Services Industry Code and accreditation of the alternative Dispute Resolution Scheme administered by Consumer Goods and Industry Ombud as an accredited Industry Ombud in terms of section 82 of the Act.

⁷ See fn 1 above.

⁸ See Code para 6.2.1.

to supply Goods and Services to Consumers unless excluded in terms of clause 4.4 hereof.⁹ In turn, “participant” is defined as “*any entity operating within the industry bound by the Code unless expressly excluded by clause 4.4.*”¹⁰

- 3.5. The Code applies to all participants, unless they are regulated elsewhere by other public regulation, a code prescribed by the Minister in terms of section 82 of the CPA, or where a complaint falls within the jurisdiction of an ombud with jurisdiction, or an industry ombud accredited in terms of section 82(6) of the CPA.¹¹
- 3.6. It is mandatory for all participants to comply with the provisions of the Code, to register with the CGSO and contribute towards the funding of the CGSO.¹²
- 3.7. Excluded from the application of the Code are:¹³
- 3.7.1. transactions that are not covered by the CPA which for the sake of completeness are the following:
- 3.7.1.1. where goods and services are promoted or supplied to the State;
- 3.7.1.2. where a consumer is a juristic person whose asset value or annual turnover, at the time of transaction, equals or exceeds R2,000,000 (two million Rand)¹⁴
- 3.7.1.3. credit agreements under the National Credit Act 34 of 2005 (“**NCA**”) (but goods and services provided under the agreement are not excluded from the ambit of the CPA);
- 3.7.1.4. employment contracts;
- 3.7.1.5. collective bargaining and collective agreements as defined in the Labour Relations Act 66 of 1995 and the Constitution; and

⁹ See Code para 3.1.10.

¹⁰ See Code para 3.1.29.

¹¹ See Code para 4.1

¹² See Code para 4.2.

¹³ See Code para 4.4.

¹⁴ The Regulations were published in Government Notice 293 in Government Gazette No 34180 of 1 April 2011

- 3.7.1.6. if the transaction falls within an industry-wide exemption granted by the Minister on application by the relevant regulatory authority. The regulatory authority (and not the supplier itself) may apply to the Minister for an industry-wide exemption from one or more provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of national legislation or any treaty, international law, convention or protocol. The powers of the Minister to grant the exemption are however limited in that after receiving the advice of the Commission he can only grant an exemption to the extent that the relevant regulatory scheme ensures the achievement of the purpose of the CPA and then subject to any limits or conditions necessary to ensure the achievement of the purposes of the CPA. (Regulatory authority is defined to mean “an organ of state or entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry”).
- 3.7.2. transactions that are governed by other public regulation;
- 3.7.3. the automotive industry;
- 3.7.4. electronic communications services as defined in section 1 of the Electronic Communications Act 36 of 2005; and
- 3.7.5. transactions with organs of state or financial institutions.
- 3.8. In addition, the jurisdiction of the CGSO is limited in respect of:¹⁵
- 3.8.1. **Amounts involved:** the CGSO may not consider a complaint by a juristic person whose asset value or annual turnover equals or exceeds R2 000 000 (two million rand);
- 3.8.2. **Time limit:** The CGSO may not consider a complaint or dispute that relates to an act or omission which occurred before 1 April 2011 or more than 3 (three) years prior to the date when the complaint was lodged with the CGSO;
- 3.8.3. **Other processes:** the CGSO may not consider a complaint or dispute that falls within the jurisdiction of any other ombud with jurisdiction; or is based on the same event and facts as any matter which is, was, or becomes, the subject of any proceedings in any court, tribunal or regulatory body or any ombud with

¹⁵ See Code para 10.3.

jurisdiction of any jurisdiction; or could more appropriately be dealt with by, among others, the police or a court of law.

- 3.9. Excluded from the jurisdiction of the CGSO is any complaint that:¹⁶
- 3.9.1. is being pursued in an unreasonable, frivolous, vexatious, offensive, threatening or abusive manner or if the complainant fails to co-operate with the process;
 - 3.9.2. does not allege any facts which, if true, would constitute grounds for a remedy under the Code or CPA;
 - 3.9.3. is lacking in substantive merit;
 - 3.9.4. has been substantially dealt with by the CGSO;
 - 3.9.5. is based on the same events and facts as any matter which is, was or becomes, the subject of any proceedings in any court or other independent dispute-resolving body;
 - 3.9.6. is under consideration by a legal practitioner on behalf of a consumer unless the ombud determines that the involvement of a legal practitioner is appropriate in the circumstances.
- 3.10. A failure by a supplier to comply with the Code amounts to a contravention of section 82(8) of the CPA, which would constitute prohibited conduct in the form of “*an act or omission in contravention of*” the CPA, which may lead to the imposition of an administrative fine.¹⁷
- 3.11. In addition, in terms of paragraph 6.2.6 of the Code, the CGSO is entitled to take legal action to recover any outstanding fees or levies owed by a supplier that falls within its jurisdiction.

4. SPECIFIC QUERIES

Could suppliers such as importers or online retailers, who are merely conduits for the supply of goods and services, be held liable under the CPA and, as a result, be included as industry participants under the aegis of the CGSO?

- 4.1. In our view, all suppliers, including importers and online retailers, will fall within the scope of the CPA (see paragraph 3.2 above) and all “participants” in the “Consumer Goods and Services Industry” fall under the aegis of the CGSO. (See paragraphs 3.4ff above.)

¹⁶ See Code para 10.3.4.

¹⁷ See the definition of “prohibited conduct” in section 1 of the CPA.

- 4.2. Online retailers may seek to argue that they are not located in South Africa and/or their servers are located outside of South Africa and/or they do not have any presence (bricks or mortar) in South Africa and as such, that the CPA does not have extra-territorial jurisdiction making them fall outside of the ambit of the Code.
- 4.3. In our opinion, this position may be found to be incorrect. In the case of *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board and others* [2011] 4 All SA 573 (SCA) dated 28 September 2011, albeit within the context of online gambling and the gambling legislation, our courts found that notwithstanding the foreign location of an operator's business or servers, on-line gambling that is made available to persons in South Africa on the internet nevertheless takes place in South Africa for the purposes of the National Gambling Act 7 of 2004.
- 4.4. Applying this within the context of online retailers, the sale can be said to take place when a consumer located in South Africa places an order. The fact that any actions subsequent to such activation take place outside of South Africa is irrelevant to the central issue and none of such subsequent actions changes the reality that a consumer at his computer, in South Africa, committed himself to placing an order for goods with the retailer. The legislature is concerned with substance, not form, and if the purchase takes place in South Africa, it is of no consequence what means are employed to facilitate it and whether those means are employed outside the country.
- 4.5. In conclusion, notwithstanding the foreign location of an online retailer's business and/or servers, online retailer stores made available in South Africa on the internet may very well be found to take place in South Africa for purposes of the CPA and such online retailers would fall within the ambit of a "supplier".

Is the CGSO empowered by the Code to grant exemptions to entities who are of the opinion that they do not fall within the jurisdiction of the CGSO and as such should not be considered industry participants/ members?

In our view, nothing in the Code permits the CGSO to grant exemptions to industry participants or members in respect of the jurisdiction of the CGSO. All suppliers in the "Consumer Goods and Services Industry" fall within the scope of the CGSO's jurisdiction (unless specifically excluded as set out in paragraph 3.5 above).

Please do not hesitate to contact us should you wish to discuss this matter further.