IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES

DATE: 26 MARCH 2021 SIGNATURE:

CASE NO: 18096/2017

In the matter between:

CONSUMER GOODS AND SERVICES OMBUD NPC	First Applicant
CONSUMER GOODS AND SERVICES OMBUDSMAN	Second Applicant

And

VOLTEX (PTY) LTD	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
THE CONSUMER GOODS COUNCIL	Third respondent
ASTRAL OPERATIONS LIMITED	Fourth Respondent

JUDGEMENT

STRIJDOM AJ

Introduction

1. This is an application for a declaratory relief. The "Ombud" seeks to vindicate the provisions of the Consumer Goods and Services Industry Code ("the Code"), which was promulgated in 2015 by the second respondent ("the Minister") purportedly acting on the recommendation of the National Consumer Commission ("the Commission"). The Ombud submits that the declaratory relief is necessary inter alia because industry suppliers are not complying with its provisions.
2. The first and fourth respondents oppose the application, and furthermore brought different counter-applications.

    2.1 The first respondent ("Voltex") seeks an order for repayment of the levies thus far paid to the Ombud in terms of the Code.

    2.2 The fourth respondent ("Astral") challenges the validity of the Code and asks that it be struck down.

Common Cause Facts

3. The following facts are common cause between the parties;[1]

[1] V ide: Joint Practice Note, Caselines p024-1 to 5

3.1 Publication of the first draft of the Consumer Goods and Services Industry Code in the Government Gazette 36439 by way of notice No 451/13 for public comment on 9 May 2013.

3.2 Publication of the second draft of the Consumer Goods and Services Industry Code in the Government Gazette 38058 by way of notice No 850/14 for public comment on 3 October 2014.

3.3 Publication of the final version of the Consumer Goods Services Industry Code in the Government Gazette 38637 by way of Notice No GNR 271 on 30 March 2015 (defined above as the Code).

3.4 The Code came into operation on the 29 April 2015.

3.5 In publishing the Code on 30 March 2015 the Minister purported to do so in terms of section 82 of the Consumer Protection Act, 108 of 1996 ("the Act").

3.6 The application was launched on 14 March 2017.

Issues to be Determined.

4. Does the application fall to be dismissed by virtue of the non-joinder of persons who have a material interest in the outcome thereof.
5. Whether or not the Code, in terms of which the first and second applicants have purportedly been constituted, was lawfully and properly proclaimed by the Minister in terms of section 82 of the Act.
6. If it was not, then should the fourth respondents' counter-application for the setting aside of the proclamation by the Minister of the Code succeed.
7. In the event that the Code has been lawfully and properly proclaimed by the Minister, then whether or not the content of the Code is intra or ultra vires the Ministers' powers under the Act.

8. In particular, in relation to the aforegoing, whether or not the Minister can validly proclaim a Code that provides for-

    8.1 Compulsory membership of the first applicants by persons who do not voluntarily undertake participation;

    8.2 The levying, by the first and second applicant of membership levies or fees and/or any other levies;

9. In considering whether or not the substantive provisions of the Code are intra or ultra vires the powers of the Minister, the following ancillary issues arise:

    9.1 The proper interpretation of the Act;

    9.2 Can the Minister proclaim the Code allowing for the levying of fees in circumstances where the Act was not passed by the Legislature as a money bill;

    9.3 Is there justification for a violation of section 18 of the Constitution;

    9.4 Is the power on the part of the first applicant to levy fees a necessary incident of the other purposes and powers affording the Minister 's authority to proclaim the Code;

    9.5 Does the proclamation of the Code give rise to jurisdictional anomalies' and other conflicts, that would render the Ministers' conduct irrational or unreasonable;

10. Do the applicants have standing to enforce compliance with the Code, including in relation to compulsory membership and the levying of compulsory fees and other levies on the terms determined by the Board of the first applicant, whether-

    10.1 by instituting legal proceedings, or

10.2 via the National Consumer Tribunal established under section 26 of the National Credit act, 35 of 2005 or the National Consumer Commission established under section 85 of the Act;

11. Whether or not the Code as proclaimed by the Minister permits the first and/or second applicants to levy the fees which they have purported to do in relation to the first or fourth respondents;

12. In the event that the answer to the aforegoing is in the negative then whether or not the first respondent is entitled to repayment of the R285 000.00 fee already paid by it to the first applicant;[2]

13. The issues in dispute are largely of a legal nature, requiring the proper interpretation of the Act and the Code.

The Salient Facts

14. During 2012, the Consumer Goods Council of South Africa (CFCSA) having identified a lacuna in the processing of complaints by the National Consumer Commission which was being swamped by complaints in respect of the retail industry resolved to compile an industry code and set out to create a Consumer Goods and Services Ombud (CGSO) to provide alternative Dispute Resolution services.

15. This was in keeping with the purposes of the Consumer Protection Act 68 of 2008 (CPA).

16. There was consultation with the major industry players and organizations representing consumers. This was followed by the launch of the (GSO) during March 2013.

[2] Vide: Joint Practice Note, Caselines pp 024-6 to 8

17. The draft Industry Code was published in the Government Gazette on 9 May 2013 and public comments were due on or before 31 May 2013. The CGSO ombudsman was appointed in June 2013.
18. Further consultations transpired taking into account the comments received from the public participation and a second draft Industry Code was published for public comment in the Government Gazette of 3 October 2014. Comments were to be submitted not later than 30 days from date of publication.
19. The Minister of Trade and Industry (The Minister), by regulation, prescribed the Industry Code on the recommendation of the National Consumer Commission in terms of section 82(3) of the CPA in April 2015. The Consumer Goods and Services Ombud Scheme was accredited on 29 April 2015.
20. The Ombudsman felt it necessary to apply for this declaratory order in order to encourage suppliers/ participants in the industry to register in terms of the Industry Code which some suppliers do not consider binding on them and believe it to be ultra vires the Minister and /or contrary to section 77 of the Constitution.

The Law.

21. The purpose of the CPA, as stated in the Act, is:

> "*To promote a fair accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behavior, to*

promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the national Consumer Commission."

22. The preamble to the CPA provides that the people of South Africa recognize that it is necessary to develop and employ innovative means to:

"...protect the interest of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace.

...and to give effect to the international law obligations of the Republic, a law is to be enacted in order to develop effective means of redress for consumers."

23. Section 82 of the CPA is the empowering provisions for the accreditation of the CGSO which states that:

"(1) in this section-

(a) "industry code" means a code-

(i) regulating the interaction or providing for alternative dispute resolution, between a person contemplated in subparagraph (i) and consumers: and

(b) "proposal" or proposed industry code" includes any existing scheme that has been voluntarily established within an industry to regulate the conduct of persons conducting business within that industry.

(2) The Minister, by regulation, may

(a) prescribe an industry code on the recommendation of the commission in terms of subsection (3); or

(b) withdraw all or part of a previously prescribed industry code, on the recommendation of the Commission in terms of subsection (5).

(3) The Commission, acting on its own initiative, or in response to a proposal from persons conducting business within a particular industry, may recommend a proposed industry code to the Minister after-

(a) publishing the proposed industry code for public comment;

(b) considering any submissions made during the public comment period;

(c) consulting with –(i) persons conducting business within the relevant industry code as published or comment;

(d) making any revisions to the proposed industry code as published for comment;

(4) An industry code must be consistent with the purpose and policies of the Act.

(5) The Commission-

(a) on the request of the Minister, must review the effectiveness of an industry code relative to the purpose and policies of the Act.

(b) *may otherwise conduct a review contemplated in paragraph (a) at intervals of at least five years; and*

(c) *after conducting a review contemplated in this subsection, and taking the steps required by subsection (3), may make further recommendations to the Minister, including a*

recommendation to amend or withdraw all or part of a previously prescribed code.

(6) If-

(a) a proposed industry code provides for a scheme of alternative dispute resolution, and

(b) the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution service 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.

(7) The Commission-

(a) must monitor the effectiveness of any industry code relative to the purposes and policies of this Act; and

(b) may reasonably require persons conducting business within the relevant industry to provide information necessary for the purpose of-

(i) monitoring in terms of paragraph (a) or

(ii) a review in terms of subsection 5.

(8) *A supplier must not, in the ordinary course of business contravene an applicable industry code."*

The first Respondent Submissions.

24. The submissions made by the first respondent can be summarized as follows:

24.1 The CGSO's powers arising from its accreditation by the Minister are purely a matter of interpretation of section 82 of the CPA. The CPA was

not passed as a money bill. It contains no express provisions authorizing the imposition of levies or providing for compulsory membership.

24.2 Nothing in the text, context, or purpose of section 82 of the CPA empowers the CGSO to insist upon compulsory participation or payment of levies.

24.3 The text of section 82 on its own indicates that participation in accredited industry ombuds is voluntarily. This is apparent from the definition of the proposals in section 82 (1) which forms the foundation of the accreditation.

24.4 If the Legislature intended compulsory participation, it would have said so in express terms. This is especially so in circumstances where compulsory participation offends against rights of freedom of association enshrined in section 18 of the Constitution of the Republic of South Africa, 1996. (The Constitution).

24.5 The omission of (1) express provisions requiring participation, and (ii) provisions for resolving jurisdictional demarcation disputes points towards a system of voluntary (contractual) participation in self-regulation.

24.6 This construction is consistent with the context and purpose of the CPA. Accreditation unlocks the ombudsmans' power to adjudicate disputes within its industry, as provided for in sections 69 and 70 of the CPA. Both of these sections contemplate voluntary participation by suppliers.

24.7 Consequently, any provisions of the code that render participation in its mandatory, are ultra vires the CPA. In effect, the CGSO usurps powers and jurisdiction that are not afforded to it in the CPA. The Minister was not empowered to promulgate a code that provides for this.

The Second Respondents' Submissions.

25. It is submitted by the second respondent that the declaratory relief sought by the applicants is justified and that the respective counter-applications should be dismissed.

The Third Respondent.

26. The third respondent withdrew its opposition to the applicants' application.[3]

The Fourth Respondents' Submissions.

27. The submissions made by the fourth respondent can be summarized as follows:

27.1 There is no evidence that consultation took place.

27.2 Astral contends that the Minister is only authorized to prescribe a Code for purposes of regulating the issues listed and nothing else.

27.3 Astral contends that the Code, is ultra vires the CPA. It further contends that the Code is unconstitutional and unlawful for the reasons that the Code is alleged to be irrational.

27.4 Astral also contends that the Ministers' decision was unlawful on the basis of unreasonableness.

27.5 Astral takes issue with the reference to the factor of "relative market share" as a valid consideration in determining the joining fee.

[3] Vide : Suppplementary Affidavit, caselines p 016-4

27.6 Astral finally contends that the application should fall to be dismissed by virtue of non joinder of persons who have a material interest in the outcome of this application.

Non joinder.

28. The fourth respondent avers that the relief sought in paragraphs 2, 3 and 4 of the applicants' amended Notice of motion, if granted would purport to apply against "participants" who are not before the Court.

29. The fourth respondent was joined by their own request, after the launching of this application and after publications of Notice in four major newspaper.[4]

30. "Participants" are defined in the Consumer Goods and Services Code of Conduct as an entity operating within the Consumer Goods Industry, which is all participants and/or entities involved in the Supply Chain that provides, markets and/or offers to supply Goods and Services to Consumers unless excluded in terms of clause 4.1 and 4.4 of the Code.[5]

31. The third respondent was joined as a means of notifying the greater consumer goods and services industry who are members of the third respondent. It was submitted by the applicants that it would have been inconvenient, costly and unnecessary for a cash strapped Ombud to join each of these members or the entire Consumer Goods and Services Industry. The participants within the consumer goods and services industry have become aware of the application and could have applied to be joined as they so wished.

32. It is trite law that the joinder of a party is only required as a matter of necessity- as opposed to a matter of convenience-if that party has a direct and substantial interest which may be affected prejudicially by the judgment of

[4] Vide: Caselines, p 005-1 to 2 and 002-1 to 4 002-1 to 002-10.

[5] Clause 3.1 .29 read with Clause 3.1.21 and 3.1.10 of the Code.

the court in the proceedings concerned. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non- joinder plea. The objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.[6]

33. In my view there is no merit in the fourth respondents' contention that the application should be dismissed by virtue of non joinder of persons who might have a material interest in the outcome of this application.

Interpretation Of The Act.

34. The first and fourth respondents do not question the validity of the CPA.

35. It was stated in **Natal Joint Municipal Pension Fund v Endumeni Municipality** [7] that:

"... consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose of the documents."

[6] Rosebank Mall (Pty) Ltd vs Cradock Heights (Pty) Ltd 2004(2) SA 353 W
[7] 2012 (2) ALL SA 262 (SCA)

36. In **Cool Ideas 1186 CC v Hubbard** [8]It was stated that:

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity. There are three important interrelated riders to this general principle namely:

(a) the statutory provision should always be interpreted purposively;

(b) the relevant statutory provisions must be properly contextualised; and

*(c) all statutes must be construed consistently with the Constitution, that is , where reas*onably *possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."*

37. The preamble of the CPA provides that the CPA was promulgated on the basis that "[t]he people of South Africa recognized… [t]hat it is necessary to develop and employ innovative means to give effect to internationally recognized customer rights, and that the CPA was promulgated to "give effect to the international law obligations of the Republic."

38. Section 2(1) provides that its provisions must be interpreted purposively.

39. Section 3(1) (b) of the CPPA states as follows:

"3(1) The purpose of the Act are to promote and advance the social and economic welfare of consumers in South Africa by-

[8] 2014 (8) BCLR 869 (CC)

(c) Reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-

(i) who are law- income persons or persons comprising law- low income communities.

(ii) who live in remote, isolated or low density population areas or communities;

(iii) who are minors, seniors or other similarly vulnerable consumers; or

(iv) *whose ability to read and comprehend any advertisement agreement, mark, instruction, label, warning, notice or other usual representation is limited by reason of law literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented*".

40. Section 4, headed 'the realisation of consumer rights', contains provisions relevant to the manner in which the act must be interpreted.

Section 18 Of The Constitution.

41. In most constitutional jurisdictions the State is entitled to place substantial burdens upon economic association. [9] The primary reasons is that business associations choices the distribution of important social (public) goods and must be subject to fair play.

[9] Oostelike Gauteng Diensteraad v Transvaalse munisipale Pensioenfonds en 'n ander 1997 (8) BCLR 1066, 1077 G

42. Where existing regulations strike far into the heart of an associations membership policies or limit the associational choices of an individual, a constitutional attack is more likely to be based upon infringements of the rights to trade or occupation or the right to property. [10]

Money Bills.

43. Section 77 of the Constitution defines a money bill a follows:

> *"A bill is a money bill if it:*
>
> *(a) Appropriates money;*
>
> *(b) Imposes national taxes, levies or surcharges;*
>
> *(c) Abolishes or reduces, or grants exemption from any national taxes, levies, duties or surcharges; or*
>
> (d) *Authorizes direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorizing direct charges.*"

44. It was submitted by the applicants that the CPA is not a money bill and that Section 77 of the Constitution deals with money bills.

45. The industry code was created by Regulation and in my view is not a bill which requires a much more stringent process. The CPA is not a money bill as it is not an appropriation bill which parliament is requested to authorize the raising of national taxes and the spending of public funds. Neither is the National treasury or the National Revenue Fund affected by the fees raised to fund an industry code.

Jurisdiction Of CGSO.

[10] Bill of Rights, Handbook, Iain Currie & Johan De Waal Sixth edition p 410.

46. 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.

47. Participant" is defined as 'an entity' operating within the industry bound by the Code unless expressly excluded by clause 4.4.

48. The exclusions are:

    48.1 transactions that are not covered by the CPA or that are governed by other public regulation;

    48.2 the automotive industry;

    48.3 electronic communications services as defined in section 1 of the Electronic Communications Act 36 of 2005; and

    48.4 transactions with organs of state or financial institutions.

49. The jurisdiction of the CGSO is limited in respect of:

    49.1 Amounts involved: The CGSO may not consider a complaint by a juristic person whose asset value or annual turnover equals or exceeds the threshold amount determined from time to time by the Minister in terms of section (6) (1) of the CPA.

    49.2 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, in any event, more than 3 (three) years prior to the date when the complaint was lodged with the CGSO.

    49.3 Other processes: the CGSO may not consider a complaint or dispute that-

        49.3.1 falls within the jurisdiction of any other Ombud within jurisdiction; or

49.3.2 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 jurisdiction of any jurisdiction; or

49.3.3 could more appropriately be dealt with by the police a court of law, by any regulatory body or through any other dispute resolution process.

50. In my view there are no anomalies as alluded by the first respondent.

The Industry Code.

51. The fourth respondent in its counter claim seeks an order to the effect that the Minister decision to enact the Code was unconstitutional and unlawful and should be set aside.

52. The Commissions' recommendation is presumptively valid, as it is not challenged in these proceedings. After receipt of the recommendation, the Minister received further advice on the Commissions' recommendation, jointly from various officials within the Department of Trade and Industry ("dti").

53. On 16 February 2015, the dti expressly confirmed that the process followed complied with the requirements of the CPA, as set out in the confidential Submissions of the dti.[11]

54. The Ministers' decision to enact the Code was made acting on the recommendations that he was furnished with by the Commission. The

[11] Vide: Annexure D2 paras 3.3 and 3.4 vol 5 p 445

Minister confirms in his answering affidavit that he was satisfied that there had been an "extensive public" comment and participation process", and the code "enjoys widespread support from stakeholders in the industry."[12]

55. The CPA sets out the procedure to be followed when an industry code is to be prescribed and an Ombud accredited.

56. While the lawfulness of the Code is disputed, neither the First or Fourth respondent made any objection during the public participation process.

57. The fourth respondent failed to take the process on review which would have afforded it access to the record which would have been made available in terms of review proceedings under Rule 53.

58. "It has been stated that where a party can, with ordinary diligence, ascertain his rights, he cannot remain supine for an indeterminate period and seek to enforce his rights when it suits him: it is public policy to have finality in the affairs of men. The maxim vigilantibus non dormientibus jura subveniunt, which is of general application, is equally applicable here. Courts of justice should not come to the aid of parties who slept on there rights."[13]

59. The Ministers' enactment of the Code constitutes an exercise of his regulation making discretion, vested in the Minister by the provisions of the CPA.

60. It was stated in **Albutt v Centre for the Study of Violence and Reconciliation and Others** [14] that;

> "The executive has a wide discretion in selecting the means to achieve its conditionally permissible objectives. Courts may not interfere with the means selected simply bcause they do not like them, because there

[12] Vide : Answering affidavit para 7 vol 4 pages 297-298

[13] Vide: Wolgroeiers Afslaers (Edms) Bpk v Muni van Kaapstad 1978(1) SA 13 (A).

[14] 2010 (3) SA 293 (CC).

are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objectives sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."

61. Section 82(4) states that any industry code must be consistent with the purpose and policies of this Act.

62. Section 120 of the CPA is aimed at providing the Minister with the necessary regulatory powers to make regulations where specifically required in the Act or in general to ensure the efficient functioning of the Act. Like all regulatory powers, these are subordinate delegated legislative powers which must comply with the provisions of the Act and may not contradict the Act.

63. In order to bring the Code into operation, the Minister had to decide how the model of the Ombud-or "alternative dispute resolution agent" would be funded. The Minister was required to make this decision because the CPA expressly regulates the manner in which the Commission shall be funded, and it is trite principle of statutory interpretation that expressia unuis est exclusio alterius.

64. In **Makhasa,**[15] the Appellate Division held that a power would be implied by legislation "where an enactment expressly permits achieving a certain result." In those circumstances, Grosskoph, JA held that the statute will also be

[15] Makhasa v Minister of Law and Order, Lebowa Government 1988 (3) SA 701 (A).

interpreted to permit "*everything necessary to achieve the result by implication.*"

65. In **Mohamed** [16] The Constitutional Court held that a power would be implied where it was "necessary in order to realise the ostensible legislative intention or to make the [Statute] workable.

66. The implication of an implied power on the Ministers' part would meet the definition that Hoexter proposes:

> *"Implied powers may... be ancillary to the express powers, or exist either as a necessary or reasonable consequence of the express powers. Thus 'what is reasonably incidental to the proper carrying out of an authorized act must be considered as implied authorised' '. Just as the power to make omelettes must necessarily include the power to break eggs, so the power to build the dam, includes the power to expropriate property or to remove silt."*[17]

67. The National Consumer Commission published guidelines for the development of industry codes of conduct for accreditation under the CPA. [18] In Part C of the guidelines it sets out the sustainable funding model for the code:

> *"(i) A code of conduct must propose a funding model for the maintenance and effective operation of the office of the Ombud;*
>
> *(ii) Provision must be made in the code for collection of fees from all suppliers demarcated into the industry and who voluntarily subscribe to the Ombud.*

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[16] National Director of Public Prosecutions & Another v Mohamed NO & Others 2003 (4) SA 1 CC

[17] Hoexster, Administrative Law in Sa (2ed:2012) at 43 to 44

[18] Guidelines for the Development in Industry Codes of Conduct Act 68/2008 GN 415 in GG 35375 of 23 May 2012

(iii) *Effect of non payment of fee (provision on effect of non-payment which may be appropriate and effective within the industry).*

(iv) *Automatic annual increase of fee (mechanism automatic rise in fee);*

(v) *Fees may be billed to none subscribing suppliers, within the accredited industry code value chain or demarcation, for Ombud services rendered.*

(vi) *The above proposed principles of funding model are simply suggestive to industry codes in nature; they are by no means prescriptive. These principles are intended to ensure independence and transparency regarding operations of an accredited Ombud scheme.*

68. In my view, the Code for the CGSO was drafted in accordance with the above guidelines and was within the Ministers' powers in terms of the Act.

Voluntary Participation In the Code.

69. Section 82(1) (b) provides;

> *"proposal" or proposed industry code" includes any existing scheme that has been voluntarily established within an industry to regulate the conduct of persons conducting business within that industry."*

70. A proper interpretation of Section 82(1) (b) is that an existing scheme which has been voluntarily established with the industry will also be included.[19]

[19] Section 2(7) of the Act, confirms that the use of the words 'includes' or including' in relation to a list means that the list is not closed.

71. The Section does not stipulate that members of a particular industry must first agree to be bound by the industry code. It means that if there is a scheme that already exists and if it is was voluntarily established, it is not precluded from the industry code. In terms of the guidelines for drafting the codes, the code should be made mandatory for all suppliers belonging to the industry.

Conclusion.

72. In conclusion I am of the view that a proper case has been made out by the applicants for a declaratory order based on the following primary findings;

72.1 The jurisdictional prerequisites are established on the evidence before me;

72.2 The code is not irrational or unreasonable;

72.3 The power to levy a fee is not ultra vires the Ministers' powers under the CPA;

72.4 The decision is not vitiated by irrelevant considerations;

72.5 The power to levy a fee is necessary and incidental;

72.6 The code is mandatory for all suppliers belonging to the industry;

73. The counter application of voltex is based on the principle of unjust enrichment. The general requirements to found a successful claim for enrichment are threefold:

73.1 The defendant must have been enriched , and the plaintiff must have been impoverished;

73.2 There must be a causal link between the enrichment and impoverishment, in that the defendant must have been enriched at the expense of the plaintiff;

73.3 The defendants' enrichment must be unjustified, or sine causa;

74. What is fatal to the counter-application is that the 'legal basis" for the payments is the Code, which Voltex has elected not to challenge in these proceedings.[20]

75. In the result, the following order is made:

75.1 A declaratory order is granted with prayers 1,2,3,4,5,6 and 7.1, 7.2 and 8 of the amended notice of motion.

75.2 The counter-application of the first respondent is dismissed with costs.

75.3 The counter-application of the fourth respondent is dismissed with costs.

STRIJDOM JJ

ACTING JUDGE OF THE HIGHT COURT

GAUTENG DIVISION, PRETORIA

Date of Hearing : 3 February 2021

Date of Judgement: 26 March 2021

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 March 2021.

[20] Voltexs' JOA at para 78

Appearances:

COUNSEL FOR APPLICANTS	ADV N GAFFOOR
Attorney for the first and second Applicants:	HAHN &HAHN
COUNSEL FOR THE FIRST RESPONDENT:	ADV BE LEECH SC
INSTRUCTED BY:	STATE ATTORNEY
FOR THE FOURTH RESPONDENT:	ADV M STUBBS
INSTRUCTED BY :	CLIFF DEKKER HOFMEYER INC