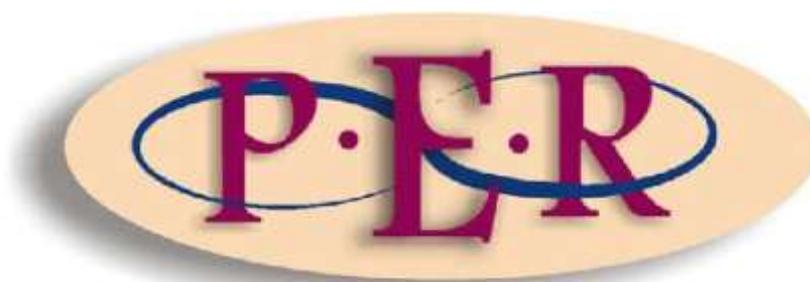


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AN ANALYSIS OF THE DISPUTE SETTLEMENT MECHANISM UNDER THE CONSUMER PROTECTION ACT 68 OF 2008

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1 Introduction

The *Consumer Protection Act*¹ (hereafter the Act) has received numerous criticisms, with some of the critics arguing that it over-protects consumers to the potential detriment of business in South Africa.² Others argue that organised commerce has, for example, been concerned about the introduction of strict liability for defective products.³ In addition, the Act is generally seen as being bound to have a significant impact upon the conduct of business in South Africa and on the terms and conditions of a contract.⁴ Of greater concern are seen to be the implications of having various forums for redress and the role of the national courts in the light of the existence of these forums.

This article examines and evaluates the consumer redress mechanism, which is an essential component of the Act.⁵ The article specifically analyses how consumer rights are protected and enforced in terms of the Act and the challenges posed by having various forums in which to take action. It commences with an overview of the different forums where a consumer can seek redress. The second part investigates the implications of having these various forums available. It underscores the

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1 *Consumer Protection Act 68 of 2008*. The Act was signed into law on 24 April 2009, but most of its provisions took effect on 1 April 2011. The Act makes provision for eight fundamental rights, namely: the right to equality in the consumer market; the consumer's right to privacy; the consumer's right to choose; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions; and the right to fair value, good quality and safety. These rights are internationally recognised and the Act clearly emphasises the need for their realisation and enforcement.

2 Manyati 2011 *De Rebus* 28. Also see Kirby 2010 www.werksmans.co.za.

3 Temkin 2010 www.businessday.co.za.

4 Hutchison and Pretorius (eds) *Law of Contract in South Africa* 32, 34. The provision in s 14 for a notice of twenty business days, after which a party is entitled to cancel the contract subject to the imposition of a reasonable penalty, is also a concern, and suppliers argue that this provision can affect the stability of businesses, particularly those dealing with fixed contracts.

5 Lake 2011 *De Rebus* 46.

challenge of the existence of both sections 69(d) and 52(1)(b) of the Act, as the two provisions seem to contradict each other on the topic of the jurisdiction of the ordinary courts, which contradiction could be to the detriment of consumers. The article concludes by proposing that the power to declare contracts to be unfair, unreasonable and unjust should be extended to one of the forums provided in terms of the Act.

The drafting history of the Act has been dealt with elsewhere and will not, therefore, be dealt with in this contribution.⁶

2 Overview of the national consumer protection institutions

The aim of the Act is to protect consumers from exploitation and abuse in the marketplace.⁷ It therefore provides consumers with a bill of rights. A bill of consumer rights may not, however, be very useful unless there is an efficient, effective and affordable mechanism for the enforcement of the rights. In addition, it is important for both consumers and suppliers to understand the relevant provisions that are critical in ensuring that consumer rights are properly enforced, understood and respected. There is no doubt that the majority of consumers in South Africa are vulnerable to the machinations of unscrupulous dealers as a result of ignorance or illiteracy.⁸ There is, therefore, a need to educate consumers about their rights and to ensure that the rights are adequately protected.⁹ Du Preez correctly points out that "vulnerable and/or illiterate consumers should not only be protected, but also empowered."¹⁰ Empowering consumers is essential to society as a whole as "informed and empowered consumers are a powerful social and economic force in

6 SALRC 1998 www.justice.gov.za and Du Preez 2009 *TSAR* 63-64.

7 The Act recognises the high levels of illiteracy, poverty and other forms of social and economic inequality which are a legacy of apartheid. The Act is therefore premised on ensuring full enjoyment of consumer rights as well as providing means for efficient redress. See the Preamble of the *Consumer Protection Act* 68 of 2008.

8 The Preamble of the *Constitution of the Republic of South Africa*, 1996 recognises the injustices of the past which contributed to the high levels of illiteracy and poverty, and therefore seeks to improve the quality of life of all citizens. The *Consumer Protection Act* 68 of 2008 gives effect to the object of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*). Also see the Preamble of the *Consumer Protection Act* 68 of 2008.

9 Aronstam *Consumer Protection* 233.

10 Du Preez 2009 *TSAR* 63.

that they can improve their overall standard of living and they can drive innovation in the enterprise sector".¹¹

It is important to note that the Act seeks to ensure that consumers have access to fast, effective and economical redress for disputes.¹² This is because litigation is generally costly, complex and time-consuming.¹³ In most cases parties to the dispute end up becoming frustrated by the whole litigation process. The Act, therefore, provides consumers with other less costly and cumbersome avenues of redress. By so doing, the Act empowers consumers to be able to enforce their rights. Christie and Bradfield correctly argue that "...the real value in the legislation rather lies in the mechanisms it has introduced for the relatively more accessible and informal resolution of consumer disputes".¹⁴

Choosing the most appropriate dispute resolution mechanism often depends on the circumstances of the particular complaint, namely: the value of the claim; the level of complexity; the number of consumers involved; the incentive for the parties to find a mutually agreeable solution; whether there was fraud, negligence or just misunderstanding; the time, money and effort the consumer or business is willing to spend in resolving the dispute; if any policy elements are involved; and if there are any cross-border elements involved.¹⁵ The above factors are vital when choosing an appropriate forum to approach for redress, but the list is not exhaustive. The discussion below examines the various forums for redress which are provided under the Act.

2.1 National Consumer Commission

The National Consumer Commission (hereafter the Commission) is an administrative agency and has jurisdiction throughout South Africa.¹⁶ It is primarily an investigative and enforcement body that has to discharge its duties in the most cost-effective and

11 Law Reform Commission 2008 www.lawreform.ie.

12 See the Preamble of the *Consumer Protection Act 68 of 2008*.

13 Paleker 2003 *ADR Bulletin* 48.

14 Christie and Bradfield *Law of Contract* 22.

15 Centre for European Economic Law 2007 ec.europa.eu.

16 See s 85(2)(a) *Consumer Protection Act 68 of 2008*.

efficient manner.¹⁷ In addition, the Commission must exercise its functions in accordance with the values and principles enshrined in the *Constitution*, specifically in section 195.¹⁸ With regard to the Commission's investigative function, its responsibilities are, *inter alia*, to receive complaints relating to alleged prohibited conduct or offences and then to investigate and evaluate them. The investigation involves interrogations and searches.¹⁹ The Commission makes a finding based on the information received from the inspector responsible for the investigation.²⁰

In terms of its enforcement function, the Commission negotiates and concludes undertakings and consent orders.²¹ After the conclusion of an investigation, the Commission may propose a consent order to the National Consumer Tribunal (the Tribunal) or court if it believes that a person has engaged in prohibited conduct. When the consent order is granted by the Tribunal or court it may include an award of damages to the complainant.²² It is significant to note that the Commission does not have prosecuting authority. The Commission must refer disputes that arise in relation to anti-competitive behaviour or market share²³ to the Competition Commission.²⁴

The Commission may also issue a compliance notice to a person or association of persons that it on reasonable grounds believes has engaged in prohibited conduct.²⁵ Failure to comply with the notice within the specified time results in the Commission either applying to the Tribunal to impose an administrative fine or referring the matter to the National Prosecuting Authority (NPA) for prosecution.²⁶ In cases where the

17 See s 85(2)(c) *Consumer Protection Act* 68 of 2008.

18 The basic values and principles governing administration include: the promotion of high standards of professional ethics; the efficient, economic and effective use of resources; that services must be promoted impartially, fairly, equitably and without bias; and that public administration must be accountable.

19 See ss 102-105 *Consumer Protection Act* 68 of 2008.

20 Van Eeden *Guide to the Consumer Protection Act* 264. Also see s 72(1)(d) *Consumer Protection Act* 68 of 2008.

21 See s 74 *Consumer Protection Act* 68 of 2008.

22 See s 74(1) *Consumer Protection Act* 68 of 2008.

23 The behaviour or conduct must be prohibited in terms of the *Competition Act* 89 of 1998.

24 See s 99(g) *Consumer Protection Act* 68 of 2008.

25 See s 73(1)(c)(iv) read with s 100(1) *Consumer Protection Act* 68 of 2008.

26 See s 99(i) *Consumer Protection Act* 68 of 2008.

compliance notice has been complied with, the Commission is required to issue a compliance certificate.²⁷

The Commission also has a monitoring function. It is therefore obliged to monitor the consumer market to ensure that prohibited conduct and offences are prevented, detected and prosecuted. The Commission must further monitor the effectiveness of accredited consumer groups, industry codes, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry.²⁸ It must also monitor the effectiveness of entities, such as consumer protection authorities, ombuds and consumer protection groups, with respect to the goods and services supplied to consumers by or through organs of state.²⁹

From the above it is clear that the Commission has a big task. It remains to be seen whether or not the Commission is, or will be, able to successfully discharge its responsibilities.³⁰ It is nevertheless notable that the Commission has been able to publish the rules regulating its functions or operations and its draft guidelines, which set out the core values of the Commission, which include respect, confidentiality, consistency, responsiveness and timeliness.³¹ In addition, the Commission has made progress in establishing an opt-out registry whereby any person may register a pre-emptive block to restrict direct marketing.³²

Some consumers and even suppliers are grappling with the Act, however, and the Commission would still be required to educate consumers as regards the provisions of the Act, particularly the procedure that one needs to follow to enforce one's right to redress.³³ The Commission is responsible for increasing knowledge regarding the nature and dynamics of the consumer market. Furthermore, the Commission should promote public awareness of consumer protection matters *inter alia* by implementing

27 See s 100(5) *Consumer Protection Act* 68 of 2008.

28 See s 99(c) *Consumer Protection Act* 68 of 2008.

29 See s 95(2)(a) *Consumer Protection Act* 68 of 2008.

30 Lake 2011 *De Rebus* 46.

31 Lake 2011 *De Rebus* 46.

32 The Direct Marketing Association of South Africa has been identified as the preferred service provider that should operate the registry, and the Commission is still receiving comments and objections to the proposal from interested parties.

33 Lewis 2012 www.iol.co.za.

education and information measures to develop public awareness of the provisions of this Act and by providing guidance to the public.³⁴

It should be noted that section 72(1)(b), read with section 72(1) d), suggests that the Commission will not investigate a complaint until the parties have unsuccessfully attempted to resolve the dispute by consent through an alternative dispute resolution agent, a provincial consumer protection authority, or a consumer court.³⁵ The implication is that the Commission is required to encourage consumers to first approach the ombuds or consumer court for legal relief.

2.2 National Consumer Tribunal

The Tribunal is a regulatory body in terms of the Act, whilst the Commission is more of a "watchdog". The Tribunal is a juristic person and has jurisdiction throughout South Africa.³⁶ A consumer can directly refer a matter to the Tribunal³⁷ if such direct referral is permitted by the Act in the case of the particular dispute. Alternatively, if the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to the Tribunal, with the leave of the Tribunal.³⁸ It is significant to observe that the Act limits the time period within which a dispute can be referred to the Tribunal and referrals must be done within the prescribed three years.

It is crucial to note that the Tribunal is mandated to promote the spirit and purposes of the Act in discharging its duties.³⁹ Furthermore, the Tribunal must make appropriate orders to give practical effect to the consumer's right of access to redress. The Act makes it clear that the Tribunal is empowered to make innovative orders which must be able to advance, protect and ensure the realisation and

34 For example, by issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act. See s 96 *Consumer Protection Act* 68 of 2008.

35 Naudé 2010 *SALJ* 523 and Van Eeden *Guide to the Consumer Protection Act* 263.

36 Section 26(1)(c) *Consumer Protection Act* 68 of 2008. See also Van Eeden *Guide to the Consumer Protection Act* 279.

37 See s 69(a) *Consumer Protection Act* 68 of 2008.

38 See s 75(b) *Consumer Protection Act* 68 of 2008.

39 See s 4(2)(b)(i) *Consumer Protection Act* 68 of 2008.

enjoyment of consumer rights.⁴⁰ The Act does not, however, define words such as "appropriate" and "practical effect", which creates a difficulty in that the meaning of these words is left to the discretion of the presiding officer in the consumer-related dispute.

The orders that may be made by the Tribunal include the confirmation of negotiated settlements made by the Commission as consent orders.⁴¹ The Tribunal can also impose an administrative fine in respect of prohibited conduct.⁴² The amount may not exceed the greater of 10 percent of the respondent's annual turnover during the preceding financial year or R1 000 000.⁴³ The Tribunal is also empowered to make an order declaring particular conduct as prohibited and to interdicting such prohibited conduct.

2.3 Provincial consumer protection authority and provincial consumer courts

A provincial consumer protection authority has the following jurisdiction within its province. First, to issue compliance notices in terms of the Act on behalf of the Commission to any person carrying on business exclusively within that province.⁴⁴ Second, to facilitate the mediation or conciliation of a dispute arising in terms of the Act between or among persons resident in, or carrying on business exclusively within that province. Third, to refer a dispute to the provincial consumer court within that province, if there is one. Lastly, to request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of the Act arising within that province.⁴⁵ Section 84(c) of the Act authorises a provincial consumer protection authority to refer disputes to a provincial consumer court.

40 See s 4(2)(b) *Consumer Protection Act* 68 of 2008.

41 See s 74(1) *Consumer Protection Act* 68 of 2008. Also see Hutchison and Pretorius (eds) *Law of Contract in South Africa* 144.

42 The fine is paid into the National Revenue Fund: s 112(5) *Consumer Protection Act* 68 of 2008.

43 See s 112(2)(a) and (b) *Consumer Protection Act* 68 of 2008.

44 See s 84 *Consumer Protection Act* 68 of 2008.

45 See s 84 *Consumer Protection Act* 68 of 2008.

A consumer may also seek to enforce any rights in terms of the Act, a transaction or agreement by also applying to the consumer court with jurisdiction.⁴⁶ The Act differentiates the ordinary courts from consumer courts.⁴⁷ Provincial consumer courts are regulated by the provincial legislation of each province and every province in South Africa is supposed to establish a consumer court.⁴⁸ Currently consumer courts have been established and are operational in Gauteng, the Free State and Limpopo.⁴⁹ The Western Cape is in the process of establishing a court.⁵⁰

Van Heerden and Barnard correctly point out that if a limited number of consumer courts are established, it means that:⁵¹

This form of redress [will be] unavailable or costly to access for many indigent consumers in other parts of South Africa, and even in the more remote parts of the provinces where these courts actually exist.

This implies that the establishment of consumer courts in all provinces will be a step towards better service delivery for consumer disputes.⁵²

An order of a consumer court has the same effect as if it had been made by the Tribunal. What this means is that the consumer court may record the settlement as a consent order.⁵³ Du Plessis, however, argues that whilst consumer courts may have the powers to deliver extensive orders including recording a settlement, the enforcement and execution of these orders remain unaddressed.⁵⁴ The need for a proper enforcement and execution procedure cannot be overstressed.

46 See s 69(c)(ii) *Consumer Protection Act* 68 of 2008.

47 The Act provides that a "consumer court" is established in terms of applicable provincial consumer legislation and that the word "court" does not include a consumer court. See s 1 *Consumer Protection Act* 68 of 2008.

48 Du Plessis 2010 *SA Merc LJ* 518.

49 Du Plessis 2010 *SA Merc LJ* 518.

50 Lewis 2012 www.iol.co.za.

51 Van Heerden and Barnard 2011 *JICIT* 135.

52 Du Plessis 2008 *SA Merc LJ* 87.

53 See s 70(1)(a) and (b) *Consumer Protection Act* 68 of 2008.

54 Du Plessis 2010 *SA Merc LJ* 518.

2.4 Equality Court

The function of the Equality Court is to adjudicate on matters where the right of equality in consumer markets has been infringed, impaired or threatened, for example, where there has been differential treatment contemplated in section 8 as unfair discrimination. In terms of the Act, the role of the Equality Court is restricted to equality-related complaints only.⁵⁵ An equality-related complaint filed with the Commission must be referred to the Equality Court if it appears to be valid.

Subject to section 9 of the Act, a supplier of goods or services must not unfairly exclude any person from accessing any goods or services offered by the supplier, grant any person exclusive access to any goods or services offered by the supplier, assign priority of supply of goods or services offered by the supplier to any person or supply a different quality of goods or services to any person. A supplier further must not charge different prices, target particular communities, make preferential supply of any goods or services offered, or exclude a particular community from the supply of any goods or services offered by the supplier on the basis of one or more of the grounds of unfair discrimination contemplated in section 9 of the *Constitution* or Chapter 2 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*.⁵⁶ The constitutional grounds for discrimination include age, sex, religion, colour, disability and culture. A supplier is also prohibited from directly or indirectly treating any person differently from any other in a manner which amounts to unfair discrimination.

It is significant to note that it is not discrimination *per se* that is prohibited, but rather discrimination which is unfair.⁵⁷ Section 9 of the Act makes provision for reasonable grounds for differential treatment in specific circumstances, such as where a supplier can refuse to provide access to any particular goods or services to a minor, or require the consent of a parent in accordance with any public regulation.⁵⁸

55 In any proceeding contemplated in Part A of Chapter 2 of the Act there is a presumption that any differential treatment contemplated in s 8 is unfair discrimination unless it is established otherwise and therefore fair.

56 See s 8(1)(a)-(g) *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

57 Van Eeden *Guide to the Consumer Protection Act* 149.

58 See s 9(1)(a)(i) *Consumer Protection Act* 68 of 2008.

2.5 *Alternative dispute resolution*

The alternative dispute resolution (hereafter ADR) mechanism benefits both the consumer and the supplier by bridging the gap between an unresolved matter and litigation.⁵⁹ Alternative dispute resolution is relatively affordable and empowering to the consumer,⁶⁰ and is not time consuming. It consequently increases access to justice. It should, however, be noted that private arbitration might be more expensive than litigation as the arbitrator will charge fees while magistrates or judges do not. The Act, however, provides that an aggrieved consumer may seek redress in respect of a transaction with a supplier by referring the matter to an ADR agent.⁶¹ In terms of the Act an "agent" could be an ombudsman with jurisdiction, an industry ombudsman accredited in terms of section 82(6), or a person or entity providing conciliation, mediation or arbitration services to consumer disputes. From the above, we see that a consumer may approach any of these persons to conciliate, mediate or arbitrate on the matter, as long as the supplier is subject to the jurisdiction of the respective ombud or agent.⁶² In cases where the ADR agent concludes that there is no possibility of resolving the dispute, the parties to the dispute should be notified and the consumer can thereafter file a complaint with the Commission.⁶³ If the dispute is successfully resolved by the ADR agent, they may record the resolution thereof in the form of an order.⁶⁴ With the consent of the parties, the order can then be submitted to the Tribunal or High Court to be made a consent order.⁶⁵

Many businesses also have internal complaints procedures in place, which the consumer can use to resolve a dispute. More often than not, consumers are interested in receiving a quick solution to their problems through direct negotiation rather than in asserting their rights.⁶⁶ A quick redress can be achieved through replacement, refund of a product or service, or repair of the product. The Act does not, however, require a consumer to exhaust the internal complaints procedures. An

59 Law Reform Commission 2008 www.lawreform.ie.

60 Paleker 2003 *ADR Bulletin* 48.

61 See s 70(1) *Consumer Protection Act* 68 of 2008.

62 See s 70(1) *Consumer Protection Act* 68 of 2008.

63 See s 70(2) *Consumer Protection Act* 68 of 2008.

64 The consent order may include an award of damages to the complainant.

65 See s 70(3) *Consumer Protection Act* 68 of 2008.

66 Law Reform Commission 2008 www.lawreform.ie.

allegation that a consumer's right in terms of the Act has been threatened or infringed suffices.

2.5.1 Ombud

A dispute that involves a supplier and a consumer may be referred to the ombud with jurisdiction.⁶⁷ Some of the most important characteristics of the office of the ombud are its credibility to its users, its accessibility and its efficiency. The ombud, therefore, must be able to operate independently, free of opposition by the entity or industry in respect of which it operates.⁶⁸ The inclusion of the office of the ombud is commendable in that it goes a long way to bringing access to justice to consumers who would otherwise be powerless to enforce their rights. The ombud also provides faster, cheaper and less formal resolution of disputes than do ordinary courts.⁶⁹ A quick and effective redress of disputes is essential as rights in law have little meaning if they are not effectively enforced.⁷⁰

In terms of the Act, the responsibility of the ombud is to resolve consumer disputes. If the matter is not resolved, the complainant may approach either the Commission or the Tribunal. Industry ombuds are accredited in terms of section 82(6), and if the supplier against whom a consumer complains falls under such an ombud, that ombud will have jurisdiction in the matter. The ombud may facilitate the dispute through the use of conciliation, mediation or arbitration.⁷¹ The approach which the ombud office uses is crucial in that it encourages a settlement, as it is not adversarial, threatening or confrontational.

2.6 National or ordinary courts

A consumer can also seek relief from the national courts (the ordinary courts) with jurisdiction in the matter, if all the other remedies available in terms of the Act have

67 See ss 70(a), (b) and (c) read with s 77 *Consumer Protection Act* 68 of 2008.

68 Melville 2010 *SA Merc LJ* 54.

69 Melville 2010 *SA Merc LJ* 55.

70 SALRC 2001 www.justice.gov.za.

71 Melville 2010 *SA Merc LJ* 55.

been exhausted.⁷² The courts in most cases can be approached only as a last resort, implying that a consumer can still approach the ordinary courts after exhausting all of the remedies relating to consumer issues.

The ordinary courts deal with claims for damages and the enforcement of rights.⁷³ Where a consumer has suffered loss as a result of prohibited conduct as defined by the Act, she/he may institute proceedings provided that she/he can produce a notice from the Tribunal stating whether the Tribunal decided that the conduct complained of was prohibited by the Act, and the date as well as the details of the Tribunal's finding.⁷⁴

The lower courts, for example, are empowered to impose penalties in the form of fines or imprisonment in respect of offences created by the Act.⁷⁵ A Small Claims Court is empowered to deal with an unresolved dispute that involves an amount of money that falls within its jurisdictional limit, which is currently R12 000. The procedure in the Small Claims Court is less complex and cheap. Most consumers would prefer this court to others, as it is easily accessible.

3 Analysis of the national consumer protection institutions

The Act makes provision for various forums that a consumer may approach for relief, as shown above. An aggrieved consumer generally has a right to choose the course of action which suits her/him, and to choose which court to approach.⁷⁶ The Act, however, stipulates that a consumer should approach the ombud for the sector first.⁷⁷

The basis for the provision of various forums under the Act can be viewed in the light of the need to ensure that consumers have access to fast, effective and economical redress. Although the legislature has sought to limit the role of the ordinary courts in

72 See s 69(d) *Consumer Protection Act 68 of 2008*.

73 Van Heerden and Barnard 2011 *JICIT* 136.

74 Van Heerden and Barnard 2011 *JICIT* 136.

75 Section 11(1)(b) *Consumer Protection Act 68 of 2008*.

76 Sharrock 2010 *SA Merc LJ* 324.

77 Section 69 *Consumer Protection Act 68 of 2008*.

an effort to protect consumers against protracted and costly litigation, the Act gives the ordinary courts jurisdiction in certain cases.⁷⁸ The two questions that spring to mind are: what are the challenges posed by providing consumers with various forums? Second, what are the implications of the inclusion of section 52, which empowers only the ordinary courts to declare contract terms as unfair, unjust or unreasonable? It is attempted to answer these questions in the subsequent paragraphs.

3.1 The possibility of forum-shopping under the Act

The various forums provided for in the Act create the possibility of confusion and may lead to forum-shopping in cases where an aggrieved consumer has to choose the appropriate forum to obtain redress under the Act.⁷⁹ Unfortunately, the argument that forum-shopping will not occur since the multiple forums dealing with the resolution of complaints are all dependent on one another and complement one another does not seem valid. A consumer can institute proceedings in one forum and later decide to approach another forum which he/she regards as more likely to give a favourable decision.

The former National Consumer Commissioner acknowledged that the Act provides various forums.⁸⁰ However, she contended that the consumer is not prejudiced by the forum chosen as long as it is not changed. The Commissioner further contended that there will be no room for forum-shopping as the other forums lack jurisdiction where the same matter is pending in one forum.⁸¹ The Commissioner's reasoning was flawed. Various forums usually pose the challenge of forum-shopping, as is evidenced by the problems which have been experienced with the forums provided by the *Labour Relations Act*⁸² vis-à-vis the ordinary courts.⁸³

78 Van Heerden and Barnard 2011 *JICIT* 137.

79 See Jacobs, Stoop and Van Niekerk 2010 *PELJ* (13)3 and Du Preez 2009 *TSAR* 81.

80 Manyati 2011 *De Rebus* 28.

81 Manyati 2011 *De Rebus* 28.

82 *Labour Relations Act* 66 of 1995.

83 *Chirwa v Transnet Limited* 2008 4 SA 367 (CC) and *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC).

3.2 *Challenges posed by sections 52 and 69(d) of the Act*

Section 52 bestows powers on the ordinary courts in respect of unfair contract terms. It empowers such courts to ensure fair and just conduct, terms and conditions. The ordinary courts, therefore, have the power to intervene where a supplier has contravened sections 40, 41 or 48 of the Act. Section 52, therefore, does not only apply to unfair contract terms, but also to contraventions of section 40 as regards "unconscionable conduct" and section 41 in respect of misrepresentation.⁸⁴ It is significant to note that according to its wording section 52 concerns an actual agreement between a particular supplier and a particular consumer.

Section 52 enumerates the possible orders that a court may make in a case where the agreement is in whole or in part unfair or unconscionable. If a court determines that a transaction between a supplier and a consumer is unconscionable, unjust, unreasonable or unfair, it may make a declaration to that effect.⁸⁵ A declaration means that the court should declare the contract unfair. Also, the court may make any further order it considers just and reasonable to ensure fairness.⁸⁶ The orders that a court can make include, *inter alia*, an order to restore money or property to the consumer and an order to compensate the consumer for loss suffered.⁸⁷

If a consumer alleges that the agreement or a term of the agreement is void, the court has the power to make an order to sever the part or term to the extent required to render the agreement lawful. The court may also declare the whole agreement void where severability is not possible.⁸⁸ The doctrine of severability is used where a portion of an agreement is unreasonable. The unreasonable part is severed by the court and the remainder which is reasonable is enforced.⁸⁹ Severing the unreasonable part of the agreement prevents the injustice that could have been caused by enforcing the original agreement. Although the fundamental rule is that courts may not make a contract for the parties, the rigid application of this rule may

84 Naude 2009 SALJ 524.

85 Section 52(3)(a) *Consumer Protection Act* 68 of 2008.

86 Section 52(3)(b) *Consumer Protection Act* 68 of 2008.

87 Section 52(3)(i) and (ii) *Consumer Protection Act* 68 of 2008.

88 Section 52(4)(ii) *Consumer Protection Act* 68 of 2008.

89 See Christie and Bradfield *Law of Contract* 381 and Kerr *Principles of the Law of Contract* 165.

lead to injustice.⁹⁰ Courts are able to decide whether the unreasonable part of the agreement is severable or not. Where the unreasonable part is not severable, the whole agreement fails.⁹¹

A court may also make an order that it deems just and reasonable in the circumstances regarding the agreement that is allegedly void. This suggests that a court has the discretion to make an appropriate order depending on the circumstances of the case. It can, however, be construed to mean a court should consider making the orders provided for in the section, and that it may make an order it deems just and reasonable as a last resort. The idea of leaving discretion as a last option is premised on trying to avoid problems that can be experienced if the Act gives too much discretion to a court.

It is clear from the above discussion that the Act gives ordinary courts exclusive jurisdiction over "unfair, unjust and unreasonable terms". This is so because section 52 specifically sets out the factors that a court should take into account as well as the orders that can be made.⁹² Naudé asserts that there are persuasive grounds for granting ordinary courts sole jurisdiction over disputes about alleged unfair terms, and that these include the fact that the ordinary courts follow a system of precedent and that their decisions are reported, which "bodes better for legal certainty".⁹³ Ordinary courts are also composed of magistrates and judges who have legal training and who would understand contract law better than non-lawyers, who might serve in the specialised consumer tribunals.⁹⁴ It should, however, be noted that most consumer disputes will be heard in the lower courts, the decisions of which go unreported.⁹⁵ Most consumers will also not be able to afford to take their disputes to the High Court, especially where small amounts are involved, as it is expensive to do so.

90 Christie and Bradfield *Law of Contract* 381.

91 Christie and Bradfield *Law of Contract* 381.

92 The factors which a court must take into consideration include: the fair value of the goods or services in question; the nature of the parties to that transaction or agreement; and whether those circumstances of the transaction existed or were reasonably foreseeable at the time the transaction was concluded. See s 52(2)(a) to (f) *Consumer Protection Act* 68 of 2008.

93 Naudé 2010 *SALJ* 527.

94 Naudé 2010 *SALJ* 527.

95 Naudé 2010 *SALJ* 527.

Although section 52 confers exclusive jurisdiction on the ordinary courts, the provision appears to contradict other provisions of the Act such as sections 72 and 69(d). The argument that has been mooted regarding the contradiction is that the use of a contract term becomes "prohibited conduct" only once a court has declared it to be unfair. The implication, therefore, is that the Commission, provincial courts or Tribunal will have jurisdiction to act only against a supplier who has used a particular term after such a term has been declared unfair by an ordinary court.⁹⁶ It has been correctly argued that such an interpretation is not clearly borne out by the Act, because the literal interpretation of section 48 implies that the use of unfair terms is prohibited in terms of the Act.⁹⁷

It is worth noting that section 69(d) provides that:

A person contemplated in section 4(1)⁹⁸ may seek to enforce any right in terms of the Act or in terms of a transaction or agreement, or otherwise resolve a dispute with a supplier by ...approaching a court with jurisdiction over the matter; if all other remedies available to that person in terms of national legislation have been exhausted.

Section 69(d), therefore, requires the exhaustion of all other remedies provided by the Act before an aggrieved consumer approaches an ordinary court. Section 69 unfortunately appears to deny consumers the opportunity to approach an ordinary court directly with a complaint as they must first approach the ombud, provincial court or the Commission for legal relief. The Act thus envisages the possibility of the dispute being resolved by ADR mechanisms. According to Naudé it is:⁹⁹

...questionable whether consumers should be denied the alternative option of approaching the ordinary court directly when dealing with a particular intractable

96 Naudé 2010 *SALJ* 525.

97 Naudé 2010 *SALJ* 525.

98 Applicants who may approach a court in terms of the Act are specified in s 4(1)(a)-(e) as: a person acting on his or her own behalf; an authorised person acting on behalf of another person who cannot act in his or her own name; a person acting as a member of, or in the interest of, a group or class of affected persons; a person acting in the public interest, with leave of the National Consumer Tribunal or court, as the case may be; or an association acting in the interest of its members.

99 Naudé 2010 *SALJ* 526.

supplier, especially when the dispute about the alleged unfair terms forms part of the claim for damages.

This concern is valid since section 69(d) implies that a consumer may not even approach a Small Claims Court available in his or her own district for relief, even if it is more convenient to do so. The restriction imposed in terms of section 69(d) is therefore to the detriment of the consumer because the implication of section 69 is that it unduly restricts the consumer's right of access to court, which is a constitutional right.¹⁰⁰ It is obvious, however, that the denial of consumers' access to redress or justice through the courts is an unintended consequence of the desire expressed in the Act to ensure that the consumer has access to quick effective and efficient redress of disputes.

It would generally be less expensive to approach a forum under the Act than to approach the ordinary courts, unless the consumer wishes to use the Small Claims Court route.¹⁰¹ It is, however, a cause for concern that the Act does not clearly explain how section 69(d) should be applied in the light of the other provisions such as section 52, which give only an ordinary court the power to declare contracts to be unfair.

As present, it appears that the process that must be followed by the consumer is that a sectoral regulator or ombud must be approached first. If an office of the sectoral regulator or ombud is not available, the consumer must then approach a provincial consumer court or an ADR agent or a provincial authority in order to try to resolve the dispute. It is only thereafter that the Commission may investigate the complaint, following which the consumer will then be entitled to approach an ordinary court.¹⁰² A consumer is accordingly entitled to approach an ordinary court only when all of these forums have been exhausted.¹⁰³ The above inference could also be made, based on the fact that section 69(1)(d) appears after the reference to the consumer's right to use the other possible dispute resolution mechanisms set out in section 69(1)(a) to

100 Van Eeden *Guide to the Consumer Protection Act* 38.

101 Du Plessis 2010 *SA Merc LJ* 531.

102 See Naudé 2010 *SALJ* 527 and Naudé 2009 *SALJ* 525.

103 Jacobs, Stoop and Van Niekerk 2010 *PELJ* (13)3.

(c).¹⁰⁴ It should, however, be noted that the process which the complaint should follow is not entirely clear.¹⁰⁵

Section 69 does not address the problem of multiple forums *per se*, as the Act itself makes provision for multiple forums where a consumer can seek redress. While it may, on the one hand, be argued that providing for a choice between approaching the ordinary courts or the other specialised consumer tribunals would be more beneficial to consumers,¹⁰⁶ such a provision might, on the other hand, encourage forum-shopping. Problems are also created by reading section 52 with section 69 as regards which forum has jurisdiction to declare a contract term to be unfair. The fact that only the ordinary courts may declare a contract term to be unfair implies that a consumer is sent to and fro by requiring him or her first to approach the provincial consumer courts when the same court has no power to decide the dispute. It appears as if the intention of the legislature was to encourage voluntary settlement. It is a concern, however, that the dispute would have to be referred to an ordinary court to obtain relief after the consumer has gone through the motions of arguing the matter before a provincial consumer court. There appears to be an anomaly in section 52 in that it does not extend the same powers to any of the forums provided in terms of the Act. The question that remains is if it can be construed that the consumer, therefore, may approach an ordinary court even before exhausting the forums provided by the Act. The contradiction between sections 69 and 52 rightly needs court intervention.¹⁰⁷ The question that arises is how this contradiction can be addressed. This question is turned to in the next part.

3.3 *The spirit and purpose of the Consumer Protection Act*

The object of the statute should be taken into account if there is a statutory provision that is ambiguous and unclear, in order to resolve the ambiguity.¹⁰⁸ This is done in order to determine the intention of the legislature. The Preamble to the Act

104 Naudé 2010 *SALJ* 527.

105 Naudé 2009 *SALJ* 525.

106 Naudé 2010 *SALJ* 528.

107 Sharrock 2010 *SA Merc LJ* 324.

108 De Ville *Constitutional and Statutory Interpretation* 246.

recognises the historical background and the imbalances of the past which gave rise to social and economic inequalities.¹⁰⁹

The purpose of the Act is, therefore, "to promote and advance the social and economic welfare of consumers in South Africa."¹¹⁰ In addition, the Act aims to promote consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism.¹¹¹ It also aims to improve consumer awareness and information as well as to encourage responsible and informed consumer choice and behaviour.¹¹² Based on the stated purposes of the Act, the Tribunal or court must not only prefer a meaning that best promotes the spirit and purposes of the Act but one that will also best improve the realisation and enjoyment of consumer rights.¹¹³ Van Eeden points out that the word "spirit" may be inferred not to mean an overly literal interpretation of the Act, but that the interpretation thereof should facilitate the realisation and enjoyment of consumer rights.¹¹⁴

It is submitted that in interpreting section 69(d) a purposive approach must be adopted to give effect to the Act.¹¹⁵ It cannot, however, be ignored that apart from promoting the spirit and purposes of the Act, the Tribunal or court must make appropriate orders to give practical effect to the consumer's right of access to redress. An appropriate order is critical in that it advances, protects and promotes the realisation of consumer rights. When the order is not appropriate or "sufficient," an aggrieved consumer will be justified in seeking redress in an ordinary court. Similarly, if the Act gives exclusive power to the ordinary courts to deal with alleged unfair terms, this means that a consumer should be allowed to approach an ordinary court. It is therefore important for the legislature to extend to the Tribunal the powers granted to ordinary courts in section 52, so that consumers do not find it necessary

109 This is in accordance with the *Constitution*, which recognises the injustices of the past and therefore seeks to address the imbalances. See the Preamble to the *Constitution*.

110 See s 3(1) *Consumer Protection Act* 68 of 2008.

111 See s 3(1)(f) *Consumer Protection Act* 68 of 2008.

112 See s 3(1)(e) *Consumer Protection Act* 68 of 2008.

113 See s 4(3) *Consumer Protection Act* 68 of 2008.

114 Van Eeden *Guide to the Consumer Protection Act* 301.

115 Christie and Bradfield assert that the provisions of the Act will have to be interpreted to give effect to the Act's purposes and policies: Christie and Bradfield *Law of Contract* 22.

to approach ordinary courts regarding unfair terms. It is important that the legislature equally ensures that the forums provided in terms of the Act have the power to grant appropriate and "sufficient" remedies, such as declaring a term to be unfair or setting aside an agreement for failing to meet the requirements of the Act.¹¹⁶ Indeed, it does not make sense for section 52 to grant only an ordinary court powers to make orders regarding unfair terms, and not to grant such powers to either the Tribunal or provincial consumer courts as well.¹¹⁷ To give exclusive jurisdiction to ordinary courts defeats the purpose of the Act, which is to ensure a quick and efficient resolution of disputes. It should be noted that the reason for having various forums should have been to avoid protracted and costly litigation. While the existence of the Small Claims Court would provide some relief to consumers at an affordable fee, most consumers would struggle to afford litigation in the Magistrate's Court and High Court.¹¹⁸ Consumers may also be deterred from bringing cases to court because of their ignorance of the law.¹¹⁹ Section 52, therefore, must be amended to include the Tribunal so that consumer disputes can be resolved in the forums provided by the Act. This would also give effect to section 69(d) in that the ordinary courts would be approached if all of the remedies available to the consumer have been exhausted.

For the amendment to be effective it will be important to ensure that the Tribunal employs people who have legal training, such as lawyers. The rationale for this is that there is a need for those who will apply section 52 to understand the provisions of the Act dealing with contractual fairness, including the relevance of constitutional rights and common law standards such as good faith, and the importance of balancing these principles with legal certainty.¹²⁰ The setting aside of an agreement on the basis of unfairness is a serious and complex issue that requires the exercise of the judgment of people with a legal background.¹²¹

116 The court has the power to declare the whole agreement void: s 52(4) *Consumer Protection Act* 68 of 2008.

117 Naudé 2009 *SALJ* 525.

118 Naudé 2009 *SALJ* 526.

119 Naudé 2009 *SALJ* 527.

120 Naudé 2010 *SALJ* 527.

121 See *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); and *Potgieter v Potgieter* 2011 ZASCA 181.

If section 69(d) takes precedence over section 52, and particularly subsection 52(1)(b), this means that the forums provided under the Act must be able to provide sufficient remedies to ensure that the consumer, whom the Act is trying to protect, is not prejudiced by being denied the opportunity to seek redress from an ordinary court. The Act should not harm the very persons it is designed to protect by denying them access to court justice.¹²² Section 34 of the *Constitution* imposes a positive obligation on the state to provide consumers with the means of access to appropriate forums for the resolution of disputes.¹²³ A consumer, therefore, cannot be restricted to forums under the Act, particularly in cases where the agreement or terms of the agreement are unfair and unreasonable, because ordinary courts have exclusive jurisdiction over such terms. It would also be erroneous to limit access to ordinary courts where the available forums do not have the power to deal with unfair terms or to provide a sufficient remedy to the consumer, or where there is no proper enforcement of rulings.

4 Concluding remarks

It was demonstrated in this contribution that the consumer's redress mechanism is an essential component of the Act. The Act notably aims to provide not only an accessible but also an effective and efficient system of redress. The rationale is to ensure that disputes are addressed quickly and effectively. It is submitted that a consumer, therefore, must be able to approach the forums provided under the Act to resolve any consumer-related dispute. If the forums provided by the Act, however, are not able to afford consumers "sufficient" remedies, as has been shown in this article, this runs counter to the main purpose of the Act. It is recommended that section 69 can be an effective instrument to give effect to this object of the Act, provided that the following conditions are satisfied. First, it must be interpreted in a manner that gives effect to the purpose of the Act. A purposive approach rather than a traditional approach to interpretation must be adopted. Second, section 69 must be narrowly interpreted, which means that courts should not allow consumers to

¹²² Section 34 of the *Constitution* states: "Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

¹²³ Currie and De Waal *Bill of Rights Handbook* 708.

approach the ordinary courts before exhausting the remedies provided under the Act. Third, it is argued that the forums provided under the Act must be given the power to deal with unfair contract terms and that they should be empowered to make appropriate orders and provide "sufficient" remedies to avoid the involvement of the ordinary courts.

Due to the fact that the Act gives exclusive jurisdiction to the ordinary courts regarding unfair terms, it is submitted that urgent change in and reform of the law is required. Section 52 should be amended and the power to deal with alleged unfair terms must be extended to one of the forums provided in terms of the Act, such as the Tribunal. Ordinary courts, therefore, should not have exclusive jurisdiction as regards unfair terms. Empowering the Tribunal to ensure fair and just terms is essential in that it would justify the exhaustion of remedies requirement provided for by section 69(d). It goes without saying that the forums provided by the Act should not only be effective, efficient and accessible, but should also create public confidence by fulfilling the legal needs of the people of South Africa.

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List of abbreviations

ADR	Alternative dispute resolution
JICIT	Journal of International Commercial Law and Technology
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALRC	South African Law Reform Commission
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Fla L Rev	University of Florida Law Review