

18 JANUARY 2017



# CORPORATE AND COMMERCIAL ALERT

## IN THIS ISSUE

THE WESTERN CAPE'S CONSUMER PROTECTOR

CONSUMER PROTECTION ACT: BEST PRACTICES  
APPLICABLE TO THE MOTOR INDUSTRY

ENFORCING CONSUMER RIGHTS THROUGH  
COURTS – MUST ONE FIRST EXHAUST ALL  
OTHER REMEDIES?

# THE WESTERN CAPE'S CONSUMER PROTECTOR

*In the Western Cape, the provincial legislature enacted the Western Cape Consumer Affairs (Unfair Business Practices) Act, 2002 (Act).*

*Consumers may approach the Consumer Protector with complaints regarding unfair business practices.*



**With most consumer related press focusing on the Consumer Protection Act, No 68 of 2008 (CPA) and national institutions such as the Consumer Commission and Consumer Tribunal, you would be forgiven for not having heard of the Western Cape Consumer Protector.**

Schedule 4, Part A of the Constitution provides that consumer protection is a functional area of concurrent national and provincial competence. Thus, provincial legislatures are empowered to legislate around consumer protection. In the Western Cape, the provincial legislature enacted the Western Cape Consumer Affairs (Unfair Business Practices) Act, 2002 (Act).

The Act is intended to provide for the investigation, prohibition and control of unfair business practices. "Business practice" has a very wide definition and includes "an agreement... in connection with business ... between two or more persons". "Business" is defined as including "offering... a commodity", and a "commodity" is defined as including "any service".

Importantly, it also established the office of the Consumer Protector which consists of three sub-directorates: Complaints Management, Consumer Education and Marketing, and a Consumer Affairs Tribunal.

#### **How does the Consumer Protector operate in practice?**

The Consumer Protector acts as a prosecutor on behalf of complainants, prosecuting their complaints before the Consumer Affairs Tribunal. Consumers may approach the Consumer Protector with complaints regarding unfair business practices. The National Consumer Commission is also empowered to refer complaints to the Consumer Protector.

In practice, where a complaint has been lodged or referred to it, the office of the Consumer Protector may institute an investigation into the alleged unfair business practice where it has reason to believe such a practice has taken place or continues to take place. The purpose of the meeting is threefold:

- (i) to inform the respondent more fully of the complaint;
- (ii) to obtain the views of the respondent regarding the complaint and the factual averments on which the complaint is based; and
- (iii) where appropriate, negotiate a settlement arrangement.

It is therefore simply intended to be an exploratory meeting and an opportunity to negotiate a settlement. This settlement can be made at any time after the institution of an investigation, but before a tribunal has made a final order.

If a matter does not settle during this stage, and if the Consumer Protector believes that there are grounds to take the matter further, the complaint will be referred to the Consumer Affairs Tribunal for adjudication (this being the Western Cape Consumer Tribunal, also established pursuant to the Act). The matter is referred to the Tribunal by way of a summons initiating the referral. It is at this point that proceedings take on an adversarial

# THE WESTERN CAPE'S CONSUMER PROTECTOR

CONTINUED

*A person who contravenes an order of a Tribunal is guilty of an offence and is liable for a fine not exceeding R200,000 or to imprisonment not exceeding five years, or both.*



character. The Tribunal is an administrative tribunal and thus a 'creature of statute' with no inherent powers.

The chairperson of the Tribunal is expressly empowered to determine the procedure to be followed (subject of course to fundamental principles of natural justice). The process contemplates the calling and cross-examination of witnesses, in a similar manner to ordinary court proceedings. All proceedings are open to the public and a person against whom proceedings are instituted is entitled to participate in such proceedings and may appear in person, or be represented or assisted by an advocate, attorney or any other person.

The Tribunal has very wide powers under s23 of the Act to make orders, among others, directing that a party engaged in an unfair business practice desist in engaging in that practice, and that the consumer be refunded together with interest. It may also "make any order that is necessary to restore the consumer to the position he or she would have been in if that unfair business practice had not taken place". A person who contravenes an order of a Tribunal is guilty of an offence and is liable for a fine not exceeding R200,000 or to imprisonment not exceeding five years, or both.

#### Interplay with the CPA

If the Consumer Protector is of the opinion that a complaint may more appropriately be dealt with by another competent authority, the matter may at any time be referred to that other authority, including a national authority. Thus, the Consumer Protector is empowered to refer matters to the National Consumer Commission. This would enable

the Commission to issue compliance notices under the CPA, requiring a respondent to cease engaging in a particular course of conduct that infringes the CPA.

If the Commission was to issue a compliance notice as a result of a respondent failing to comply with the provisions of the Consumer Protection Act, the respondent would have an opportunity to respond to any such compliance notice. If a compliance notice is not complied with, the Commission can directly apply to the National Consumer Tribunal for the imposition of an administrative fine, or refer the matter to the National Prosecuting Authority for prosecution as an offence. In principle, administrative fines imposed may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 million.

Importantly, in the case of *Joroy 4440 CC v Potgieter and Another NNO 2016 (3) SA 465 (FB)*, the court held that the remedies available to consumers (including approaching the Commission or an industry ombud) must first be exhausted before approaching a court for redress under section.

#### Conclusion

If utilised properly by consumers, the Western Cape Consumer Protector may assist in alleviating the current burden on the National Consumer Commission of dealing with complaints. In order to be truly effective, however, more needs to be done to promote the office of the Consumer Protector to foster a greater awareness of its mandate.

.....  
*Justine Krige*

# CONSUMER PROTECTION ACT: BEST PRACTICES APPLICABLE TO THE MOTOR INDUSTRY

*On 11 July 2016, the Commissioner of the National Consumer Commission published draft best practice guidelines for comment, pursuant to s93(2) of the Consumer Protection Act.*

*The automotive industry is the leading South African industry, in respect of establishing policies and procedures for the protection and enforcement of consumer rights.*



During 2014 the Minister of Trade and Industry published the Motor Industry Code of Conduct, which serves as a framework for dispute resolution between consumers and participants in the motor industry. On 11 July 2016, the Commissioner of the National Consumer Commission published draft best practice guidelines for comment, pursuant to s93(2) of the Consumer Protection Act, No 68 of 2008 (CPA). This set of best practices is intended to provide procedural clarity in regard to alternative dispute resolution mechanisms for handling complaints involving the automotive industry.

## South African Industry Codes

In terms of s82(2) of the CPA, the Minister may prescribe an industry code regulating the interaction between or among persons conducting business within an industry, or between an industry and consumers. To date, only two industries have issued codes of conduct in terms of this provision. The first is the automotive industry (South African Automotive Industry Code of Conduct) and second is the goods and services industry (Goods and Services Industry Code of Conduct).

The automotive industry is the leading South African industry, in respect of establishing policies and procedures for the protection and enforcement of consumer rights. The Motor Industry Ombudsman of South Africa (MIOSA) was accredited by the Department of Trade and Industry on 3 October 2014 and provides a welcome forum for the resolution of disputes relating to the automotive industry.

## Best Practices applicable to the Motor Industry

The set of best practices sets out, among other things, the following:

- the steps to be followed by a consumer in initiating and pursuing a complaint against a supplier (from the initial complaint at retail level, to escalation to MIOSA or the NCC);
- the steps to be followed by suppliers in regard to pre-authorization of repairs;
- the steps to be followed by suppliers in regard to the supply of grey and parallel parts to consumers;
- the steps to be followed by suppliers in regard to sub-contracting of work by suppliers;
- the applicability of product warranties; and
- the return of goods by consumers.

# CONSUMER PROTECTION ACT: BEST PRACTICES APPLICABLE TO THE MOTOR INDUSTRY

CONTINUED

*A person who contravenes an order of a Tribunal is guilty of an offence and is liable for a fine not exceeding R200,000 or to imprisonment not exceeding five years, or both.*



The value in the set of draft best practices is that it assists in further complementing the South African Automotive Industry Code of Conduct by providing practical steps to be followed in regard to the alternative dispute resolution mechanisms as set out in the CPA, an otherwise largely legal document. It is drafted in a manner that is accessible to consumers and service providers, and sets out the parties' various rights and obligations in scenarios that arise every day in the industry (for example, the pre-authorisation of repairs to a vehicle).

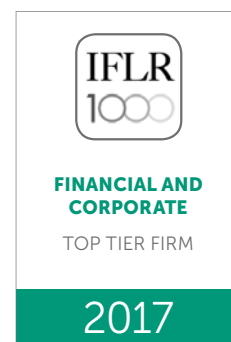
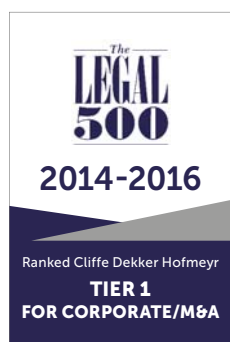
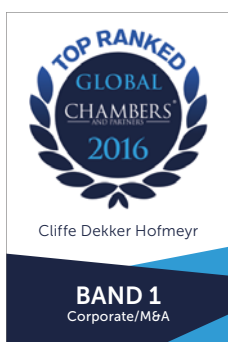
The draft best practices also address the practical measures to be taken by both consumers (for example, in respect of

examining parts before taking delivery) and suppliers (for example, in respect of explaining product warranties) and, in doing so, will go some way to limiting unnecessary litigation.

## Conclusion

The best practices guideline is still in draft form and has not been formally adopted. When it is adopted it will be of assistance in resolving disputes in the automotive industry. The general public is invited to submit comments on the draft best practices to the Department of Trade and Industry.

*Justine Krige*



# ENFORCING CONSUMER RIGHTS THROUGH COURTS – MUST ONE FIRST EXHAUST ALL OTHER REMEDIES?

*Section 69(d) provides that "if" a consumer has exhausted these remedies, it may then approach a court with jurisdiction to hear the dispute.*

*It was common cause that the applicant had not exhausted these remedies. The debate before the High Court thus turned on the proper interpretation of s69(d).*



Section 69 of the Consumer Protection Act, No 68 of 2008 (CPA) sets out a variety of statutory remedies for the enforcement of consumer rights under the CPA. These include filing a complaint with the National Consumer Commission (Commission), referring a dispute to the Consumer Tribunal (Tribunal) or approaching an industry ombud.

Importantly, s69(d) provides that "if" a consumer has exhausted these remedies, it may then approach a court with jurisdiction to hear the dispute. What is the effect of this provision? Does it mean that the courts have to decline to hear matters where consumers approach them before, for example, filing a complaint with the Commission? Precisely this issue arose in the case of *Joroy 4440 CC v Potgieter and Another NNO 2016 (3) SA 465 (FB)*.

#### **The Joroy case**

In this case the applicant sought the refund of the purchase price that it paid the respondent for a motor vehicle. It brought its claim before the High Court in Bloemfontein and its cause of action was based on s55 and s56 of the CPA, dealing with a consumer's right to good quality goods and services.

The respondent took the point that the court did not have jurisdiction to hear the matter by virtue of the fact that, properly interpreted, the effect of s69(d) was that the applicant had not exhausted its other remedies provided for in s69(a) to s69(c). It was common cause that the applicant had not exhausted these remedies. The debate before the High Court thus turned on the proper interpretation of s69(d).

Section 69 of the CPA states as follows:

A person contemplated in s4(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 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 s82(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;

# ENFORCING CONSUMER RIGHTS THROUGH COURTS – MUST ONE FIRST EXHAUST ALL OTHER REMEDIES?

CONTINUED

*Although not expressly stated, the court essentially held that a necessary jurisdictional fact was not present for the applicant to pursue its claim, namely that it exhausted its internal remedies.*



- (iii) referring the matter to another alternative dispute resolution agent contemplated in s70; or
- (iv) filing a complaint with the Commission in accordance with s71; 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.*

In determining the matter the court had regard to the principle articulated by the Constitutional Court in *Chirwa v Transnet Limited & Others* 2008 (4) SA 367 (CC) to the effect that where a specialised framework has been created by the legislature for the resolution of disputes, parties must as a general principle pursue their claims through such frameworks.

In addition, the court had regard to the plain meaning of the word "if" as it appears in s69(d). It held that what the section contemplates is that only "if" the remedies outlined in s69(a) to s69(c) of the CPA have been exhausted (for example, the remedies of complaining to the Commission or referring a dispute to the Tribunal), will a court then exercise its discretion to hear a matter in which relief in terms of the CPA is sought. It made particular reference to the Motor Industry Ombudsman, which has been established under the CPA to adjudicate upon these kinds of disputes. The court, accordingly, refused the application.

## Conclusion

As a general principle the courts do not readily find their jurisdiction to be ousted. In the *Joroy* case, although not expressly stated, the court essentially held that a necessary jurisdictional fact was not present for the applicant to pursue its claim, namely that it exhausted its internal remedies. It did not find that it could not in due course assert jurisdiction.

It remains to be seen whether the judgment will be interpreted as finding that there is an absolute bar to proceedings being brought to courts in cases where a party has not exhausted the other remedies provided for in s69(a) to s69(c) of the CPA. It would have perhaps been preferable for the court to have made it clear that on the facts of that particular case (where an ombud does exist to resolve precisely the kind of dispute at issue) a case had not been made out for the court to assert jurisdiction. This would have allowed for some flexibility for courts to assert jurisdiction in circumstances where, although a different remedy may exist, a court may be better placed to deal with the dispute in the first instance.

*Justine Krige*

## OUR TEAM

For more information about our Corporate and Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate and Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate and Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Chris Baird**  
Director  
T +27 (0)11 562 1556  
M +27 (0)82 544 4988  
E chris.baird@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Michael Bromley**  
Director  
T +27 (0)21 405 6021  
M +27 (0)82 826 3493  
E michael.bromley@cdhlegal.com

**Ian Burger**  
Director  
T +27 (0)11 562 1177  
M +27 (0)83 215 8266  
E ian.burger@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesselning**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselning@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Roelf Horn**  
Director  
T +27 (0)21 405 6036  
M +27 (0)82 458 3293  
E roelf.horn@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Johan Latsky**  
Director  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Badian Maasdorp**  
Director  
T +27 (0)11 562 1777  
M +27 (0)82 924 8429  
E badian.maasdorp@cdhlegal.com

**Banzi Malinga**  
Director  
T +27 (0)11 562 1100  
M +27 (0)82 469 5758  
E banzi.malinga@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)21 405 6122  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jo Nesor**  
Director  
T +27 (0)21 481 6329  
M +27 (0)82 577 3199  
E jo.nesor@cdhlegal.com

**Francis Newham**  
Director  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

**Gasant Orrie**  
Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

**Verushca Pillay**  
Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

**David Pinnock**  
Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

**Allan Reid**  
Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

**Luntu Sebataane**  
Director  
T +27 (0)11 562 1087  
M +27 (0)72 651 7001  
E luntu.sebatane@cdhlegal.com

**Ludwig Smith**  
Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

**Sibongile Solombela**  
Director  
T +27 (0)11 562 1534  
M +27 (0)71 360 3196  
E sibongile.solombela@cdhlegal.com

**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

**Deepa Vallabh**  
Head: Cross-border M&A,  
Africa and Asia  
Director  
Corporate and Commercial  
T +27 (0)11 562 1188  
M +27 (0)82 571 0707  
E deepa.vallabh@cdhlegal.com

**Roux van der Merwe**  
Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

**Charl Williams**  
Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E charl.williams@cdhlegal.com

**Lauren Wilson**  
Director  
T +27 (0)11 562 1223  
M +27 (0)82 414 8549  
E lauren.wilson@cdhlegal.com

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1456/JAN

