



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: A169/2014

In the matter between:

IMPERIAL GROUP (PTY) LTD
t/a AUTO NICHE BLOEMFONTEIN

Applicant

and

**MEC: ECONOMIC DEVELOPMENT,
ENVIRONMENTAL AFFAIRS AND TOURISM
FREE STATE GOVERNMENT**
N J GROBLER N.O.

1st Respondent

(In his capacity as ACTING CHAIRPERSON:
FREE STATE CONSUMER AFFAIRS COURT)
**CHAIRPERSON: FREE STATE CONSUMER
AFFAIRS COURT**

2nd Respondent

**DR NICOLAAS RUDOLPH JOHANNES
VAN ZYL**

3rd Respondent

ACROTEK CC t/a L R SPARES

4th Respondent

DOVER PARTS (PTY) LTD

5th Respondent

ENGINE WORLD BLOEMFONTEIN

6th Respondent

CONSUMER PROTECTOR:

7th Respondent

FREE STATE CONSUMER AFFAIRS COURT

8th Respondent

CORAM:

VAN ZYL, J *et* DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 9 JUNE 2016

I INTRODUCTION

- [1] Legislation to protect customers against unfairness in the commercial world has long been overdue in South Africa. Several national acts have been promulgated over the years with limited success and consequently repealed recently. Two pieces of legislation, the one a provincial and the other a national Act, i.e. the Free State Consumer Affairs (Unfair Business Practice) Act, 14 of 1998 (“the Free State Act”) and the Consumer Protection Act, 68 of 2008 (“the CPA”) respectively, play a cardinal role in the dispute between the litigants *in casu* and need to be considered in order to adjudicate the dispute.
- [2] If anyone believed that the application of the CPA would ensure that an aggrieved consumer would in future be in a position to have his/her dispute with a supplier resolved in a fair, inexpensive and speedy manner, the facts emerging from this judgment will change that belief.
- [3] Early in 2012 a dispute arose about service delivery between the Imperial Group’s Auto Niche dealership in Bloemfontein and a motor vehicle owner, Dr NRJ van Zyl (“Van Zyl”). It is now four years later and there is still no

light in the proverbial tunnel. The ruling of the Acting Chairperson of the Free State Consumer Affairs Court that that court had jurisdiction to adjudicate the dispute between the parties has been taken on review to the Free State High Court and this application must be adjudicated now.

II THE PARTIES

[4] Applicant in the review application is Imperial Group (Pty) Ltd, trading as Auto Niche, Bloemfontein. Auto Niche is a motor vehicle dealer in Volvo and Land Rover motor vehicles and it also operates a service centre.

[5] The MEC for Economic Development, Environmental Affairs and Tourism, Free State Provincial Government is cited as first respondent. Mr N J Grobler in his capacity as the Acting Chairperson of the Free State Consumer Affairs Court is cited as second respondent and the Chairperson of the Free State Consumer Affairs Court as third respondent. Van Zyl, the consumer and the original complainant, is cited as fourth respondent. Acrotek CC, trading as L R Spares, Dover Parts (Pty) Ltd and Engine World Bloemfontein are cited as fifth, sixth and seventh respondents respectively insofar as they have been cited as parties before the Free State Consumer Affairs Court. They did not play any role in the proceedings before the High Court. The Consumer Protector: Free State Consumer Affairs Court is cited as eighth respondent. First, second, third and eighth respondents are represented by the Office of the State

Attorney, Bloemfontein, while Van Zyl is represented by the attorney, Frans F Erasmus. Applicant is represented by Symington & De Kok. In order to avoid confusion I shall refer to first, second, third and eighth respondents as the respondents, unless it is necessary to refer to a specific respondent.

III THE RELIEF CLAIMED

[6] Applicant claims the following relief *ex facie* the notice of motion which is quoted *verbatim*:

- (a) “Reviewing, setting aside and substituting a decision of the Free State Consumer Affairs Court contained in a judgment issued by Second Respondent on **28 January 2014**, under case number **FSCAC 2013/10-28** (contained in annexure “MH2” to the founding affidavit appended hereto), to the effect that the Free State Consumer Affairs Court has jurisdiction to entertain an action instituted by Fourth Respondent against, *inter alia*, Applicant (“the decision”);
- (b) Substituting the decision with one in terms whereof it is held that “*the Free State Consumer Affairs Court does not have jurisdiction to entertain the action instituted by Fourth Respondent against Applicant as well as Fifth, Sixth and Seventh Respondents under case number **FSCAC 2013/10-28**; Alternatively, setting aside the decision and remitting it back to the Free State Consumer Affairs Court for adjudication before a differently constituted Tribunal;*
- (c) Directing First Respondent to pay the costs of this application and in the event of it being opposed by any of the other Respondents, that such Respondents (together with First

Respondent) pay the costs of this application jointly and severally.”

The alternative prayer in prayer (b) is in direct conflict with the essence of the relief claimed. Applicant eventually comprehended its predicament and this alternative prayer was abandoned in the heads of argument.

IV THE DISPUTES TO BE ADJUDICATED

[7] The following disputes need to be adjudicated:

- 7.1 Whether or not the High Court has jurisdiction to entertain applicant’s review application;
- 7.2 If it has jurisdiction, the merits of the review application have to be considered with reference to *inter alia* the contrasting and divergent submissions of the parties pertaining to the Free State Act and the CPA insofar as enforcement action by a consumer is applicable.

V MATERIAL FACTS IN CHRONOLOGICAL ORDER

[8] The following material facts are undisputed:

- 8.1 On 28 November 2011 Van Zyl complained with applicant about a noise and fluid loss which allegedly occurred after a previous service on his 2000 model Land Rover Discovery (“the vehicle”).
- 8.2 On 2 December 2011 Acrotek CC (the fifth

respondent) provided a quote for certain engine parts.

- 8.3 On 6 December 2011 applicant provided a quotation for labour to fit the engine parts to be supplied and delivered by fifth respondent.
- 8.4 On 20 December 2011 the engine parts arrived at applicant.
- 8.5 On 15 January 2012 applicant commenced with the works on the vehicle.
- 8.6 On 27 January 2012 applicant requested permission from Van Zyl to open the engine and remove the cylinder head for testing as it did not function correctly post assembly of the engine parts.
- 8.7 On 1 March 2012 Engine World (seventh respondent) provided a technical report on the damaged engine.
- 8.8 On 5 March 2012 applicant denied any responsibility and claimed that Van Zyl supplied his own parts.
- 8.9 On 24 April 2012 Van Zyl complained to the National Client Service Department of applicant.
- 8.10 During the period 20 January 2012 to 29 August 2012 and prior to the involvement of the attorneys, Van Zyl on his own tried to resolve the matter with applicant internally without any success.
- 8.11 On 30 August 2012 Van Zyl caused a letter of demand to be written to applicant.
- 8.12 On 14 December 2012 applicant forwarded a letter, through its attorneys, to Van Zyl.
- 8.13 On 26 March 2013 the Free State Consumer Affairs

Protector (eighth respondent) made contact with applicant in order to investigate the complaint, but applicant failed to respond.

- 8.14 On 24 May 2013 the Free State Consumer Affairs Protector again made contact with applicant in order to investigate the complaint, but without any success as applicant failed to respond.
- 8.15 On 27 May 2013 another attempt was made by the Free State Consumer Affairs Protector to contact applicant who failed to respond.
- 8.16 On the same day, 27 May 2013, the Free State Consumer Affairs Protector warned applicant that the matter would be referred to the court.
- 8.17 On 31 October 2013 the Free State Consumer Affairs Court convened and a point *in limine* relating to that court's lack of jurisdiction was taken by applicant and argued. Second respondent reserved judgment.
- 8.18 On 28 January 2014 second respondent ruled in favour of Van Zyl to the effect that the Free State Consumer Affairs Court had jurisdiction to entertain the claim.
- 8.19 On 18 July 2014 the review application was issued out of the Free State High Court which application was eventually heard on 5 October 2015.

VI LEGAL PRINCIPLES AND SUBMISSIONS PERTAINING TO THE HIGH COURT'S JURISDICTION TO ADJUDICATE THE REVIEW APPLICATION

[9] Applicant seeks an order in terms whereof the decision of the Free State Consumer Affairs Court issued by second respondent in his capacity as Acting Chairperson of that court is reviewed, corrected and set aside. The basis for the relief claimed is contained in paragraphs 13 and 14 of the founding affidavit which I quote *verbatim*:

“13. More in particular, applicant seeks to review and set aside the ultimate decision (contained on p 15 of annexure “MH2”) that ‘... the claim brought by the Complainant may be adjudicated by the Consumer Court as a forum’ which is ultimately a decision that the Court has jurisdiction to entertain a dispute/complaint/claim/action referred directly to it or initiated in it as a Court of first instance.

14. To the extent that the Court constitutes a Tribunal and the Second Respondent as an officer of the Tribunal performing judicial functions, this application is brought under the provisions of section 33 of the Constitution of the Republic of South Africa, 1996, read together with the common law and the provisions of rule 53 of the rules of the above Honourable Court.” (emphasis added)

[10] Applicant referred to the provisions of the CPA and particularly relied on the procedures contained in ss 69 to 73 thereof, stating that Van Zyl failed to allege compliance with any of the procedures contained in these sections and in particular that he failed to refer the dispute to the Motor

Industry Ombud (MIO), or an alternative dispute resolution agent or the National Consumer Commission (“the Commission”).

- [11] It is also alleged by applicant that the Free State Consumer Affairs Court is a creature of statute and does not have powers to entertain an action for specific performance and damages. That court has only those powers assigned to it by the Free State Act. It went on to state in paragraph 25 of the founding affidavit that “it did not appear from the particulars of claim that fourth respondent sought to rely on any provisions of the CPA”. This last statement is wrong. Van Zyl’s particulars of claim that served before the court *a quo* is annexed to applicant’s founding affidavit. Van Zyl concluded in paragraph 15 thereof that “(F)irst, second and third defendants (first defendant is the applicant herein), have transgressed sections 54, 55, 56 and 57 of the Consumer Protection Act.” Consequently Van Zyl claimed from applicant the following: “(1) The effective completion of the work on Plaintiff’s vehicle at First Defendant’s own expense. (2) The return of Plaintiff’s vehicle in a sound working order. (3) Payment of any and all legal costs which Plaintiff may be ordered to pay Second and/or Third Defendants. (4) Costs of suit.” There is also an alternative claim that does not have to be considered at this stage. It needs to be emphasised that this court is not concerned with the merits of Van Zyl’s claim. It is specifically kept in mind that applicant’s version of the events is quite the opposite of that of Van Zyl. Applicant’s version as set out in paragraph 16 of the founding affidavit is that “the engine still malfunctioned, as a result of defective parts supplied by Fourth Respondent (Van Zyl)

and allegedly purchased from Fifth Respondent (Acrotek).”

- [12] The national legislation anticipated and eventually adopted in terms of s 33 of the Constitution is the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”). The grounds of review on which an applicant may rely, are set out in s 6 of PAJA. It must also be considered that we are dealing with a review application and not an appeal. Generally speaking, the process followed by a tribunal or functionary may be attacked on review, but the outcome is to be attacked on appeal and not review.
- [13] There is no clear indication on which common law grounds applicant relies for the allegation that it has a right to review the decision of second respondent.
- [14] Van Zyl pertinently raised the point in his answering affidavit and through submissions of his counsel that the High Court does not have jurisdiction to entertain the review. In short, it is his case that applicant should have appealed against the judgment of the Free State Consumer Affairs Court to the National Consumer Tribunal (“NCT”), and in the event of dissatisfaction, to lodge a review application or an appeal to the High Court in terms of s 148(2) of the National Credit Act, 34 of 2005 (“the NCA”). It is therefore necessary to consider whether this court has jurisdiction to adjudicate the review application.
- [15] Section 24 of the Supreme Court Act, 59 of 1959, which

has now been repealed, stipulated as follows:

“24. Grounds of review of proceedings of inferior courts

- 1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are-
 - a) absence of jurisdiction on the part of the court;
 - b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;
 - c) gross irregularity in the proceedings; and
 - d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- 2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts.” (emphasis added)

[16] The amendments to s 24 as are apparent from ss 21 and 22 of the Superior Courts Act, 10 of 2013 are significant. I quote these two sections for a better understanding of the argument.

“21 Persons over whom and matters in relation to which Divisions have jurisdiction

- (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of

which it may according to law take cognisance, and has the power-

- (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
 - (b) to review the proceedings of all such courts;
 - (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.
- (2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.
- (3) Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation, 1983 (105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction.

22 Grounds for review of proceedings of Magistrates' Court

- (1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts." (emphasis added)

It follows from the above that the statutory right of review of the High Court to review decisions in terms of the Superior Courts Act has been limited to proceedings of the Magistrates' Court. There is no provision in ss 21 and 22 for the High Court to review and set aside a judgment or ruling of the Free State Consumer Affairs Court. These consumer affairs courts are also referred to as tribunals, but if one considers the difference in wording between the repealed s 24 and the present ss 21 and 22 of the Superior Courts Act no reference to tribunals is found in either of the two Acts, whilst the repealed s 24 referred to "inferior courts". If the Free State Consumer Affairs Court is regarded as a court of law, then this court does not have jurisdiction because of the repeal of s 24 of Act 59 of 1959. If the ruling or judgment of the Free State Consumer Affairs Court is considered to be administrative action, the review application should have been brought in terms of PAJA.

- [17] Applicant also relies on rule 53 of the Uniform Rules of Court, apparently to indicate the procedure to be followed in review applications. This rule is applicable to reviews in terms of the Superior Courts Act and the common law, but reviews under PAJA are governed by the rules of procedure

for judicial review of administrative action published under regulation R966 in the Government Gazette of 9 October 2009.

- [18] Applicant's counsel submitted that, subject to statutory limitation or modification in a particular case, a High Court has an inherent right to review the proceedings of anybody or tribunal on which statutory duties are imposed without the necessity of any special machinery of review created by the legislature. He identified this form of review as a review under the common law. He submitted that the mere creation of a statutory right of review does not oust the High Court's inherent right of review, unless it is excluded expressly or by necessary implication. He referred in this regard to Herbstein & Van Winsen: **The Civil Practice of the Supreme Court of South Africa**, 4th ed at 938 and **Johannesburg Consolidated Investment Co v Johannesburg Town Council** 1903 TS 111 at 116 and **Zulu v Minister of Defence and Others** 2006 JOL 17436 (TPD). Since these two judgments were pronounced and the 4th edition of Herbstein & Van Winsen was issued, the Superior Courts Act and the rules of procedure for judicial review of administrative action were promulgated. However it is apparent that applicant is relying on the extra-ordinary power of inherent jurisdiction of the High Court.
- [19] The legislature has created a statutory framework in adopting the CPA to deal with the rights and obligations of suppliers and consumers to ensure speedy, inexpensive

and fair procedures. A specialised framework has been created for consumers and suppliers to resolve disputes. Parties must pursue their claims primarily through these mechanisms. See: **Chirwa v Transnet Ltd & Others** 2008 (4) SA 367 (CC). The Constitutional Court has repeatedly held that where legislation has been enacted to give effect to a constitutional right(s), a litigant should rely on that legislation to give effect to the right(s), or else to challenge that legislation as being inconsistent with the Constitution. See *inter alia*: **Mazibuko & Others v City of Johannesburg** 2010 (4) SA 1 (CC) at para [73]. The NCA, CPA and the Free State Act were specifically enacted to entrench and govern the realisation of the fundamental consumer rights under the Constitution as will be shown in more detail below.

- [20] Applicant *inter alia* relies on s 148(2)(b) of the NCA. The particular subsection deals with appeals. Section 148(2)(a) deals with reviews and it reads as follows:

“ Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may –

- (a) apply to the High Court to review the decision of the Tribunal in that matter;” (emphasis added, the significance which will become clear in the next paragraph).

- [21] The High Court’s right of review is limited *in casu*. The remedies provided in the CPA, read with s 148 of the NCA have to be pursued. I do not agree with Van Zyl’s

submission that this court does not have jurisdiction *in casu* and/or that applicant is barred from approaching the court because of its failure to exhaust internal remedies. Section 148 of the NCA must be read in proper context and also with ss 26 and 31 of the NCA and the definition of “Tribunal” in s 1. “Tribunal” is defined as “the National Consumer Tribunal established by section 26.” Section 31 distinguishes between a Tribunal consisting of a single member and a panel composed of any three members of the Tribunal. Contrary to s 148(2) which deals with appeals and reviews from the full panel of the Tribunal, s 148(1) stipulates that a participant in a hearing before a single member of the Tribunal may appeal a decision by that member to the full panel of the Tribunal. *In casu* the record reflects that second respondent chaired the Consumer Court Panel which was composed of him and four other Panel members. I hold the view that this panel must be regarded as a full panel of the Tribunal, i.e. the Free State Consumer Affairs Court. This leaves no room for a finding that applicant should have followed a different avenue from the one it elected to pursue.

- [22] I therefore find that the High Court has jurisdiction to adjudicate the application for review. It is now necessary to consider the merits of the review application.

VII ADJUDICATION OF THE MERITS OF THE REVIEW WITH REFERENCE TO CONSUMER LEGISLATION

[23] As indicated *supra* the Free State Act and the CPA are cardinal to the proceedings before us. It is not difficult to ascertain how the Free State Act and the CPA have to be applied *in casu*. Section 83 of the CPA provides for the co-operative exercise of concurrent jurisdiction between national and provincial consumer authorities. Section 84 gives some practical effect to the provisions of s 83 and I quote this section for clarity:

“84. Provincial consumer protection authorities –

A provincial consumer protection authority has jurisdiction within its province to –

- (a) issue compliance notices in terms of this Act on behalf of the Commission to any person carrying on business exclusively within that province;
- (b) facilitate the mediation or conciliation of a dispute arising in terms of this Act between or among persons resident, or carrying on business exclusively within that province;
- (c) refer a dispute contemplated in paragraph (b) to the provincial consumer court within that province, if there is one; and
- (d) request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act arising within that province.”

[24] It is necessary to consider the present approach to statutory interpretation before the particular legislation is considered. Wallis JA dealt with the matter as follows in **NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY** 2012 (4) SA 593 (SCA) at para [18]:

“[18] ... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence ... The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

- [25] Wallis JA submitted that his approach to the statutory interpretation was consistent with the “emerging trend in statutory construction” mentioned in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (CC) at para [90]. Recently the Constitutional Court set out what it deemed to be the correct approach to statutory interpretation somewhat differently in **Bakgatla-Ba-Kgafela Community Property Association v Bakgatla-Ba-Kgafela Tribal Authority & Others** 2015 (6) SA 32 at paras [34] – [36]:

“[34] It is by now trite that s 39(2) of the Constitution has introduced a new approach to the interpretation of statutes. The section obliges courts to promote 'the spirit, purport and objects of the Bill of Rights' when construing legislation. This new approach has been described as 'a mandatory constitutional canon of statutory interpretation'. The duty to seek an interpretation that promotes the objects of the Bill of Rights

arises, even where the parties have not raised the issue, because the obligation imposed by the section is, as was observed in *Phumelela*, mandatory.

[35] Consistent with s 39(2) this court laid down the right approach to construing legislation similar to the Act, in *Goedgelegen Tropical Fruits*. There Moseneke DCJ reaffirmed the approach in these terms:

'It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing as a result of past racially discriminatory laws or practices in its setting of s 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.'

[36] Therefore, in construing s 5(4) of the Act, we are obliged not only to avoid an interpretation that clashes with the Bill of Rights but also to seek a meaning of the section that promotes the

rights of the Bakgatla-Ba-Kgafela Traditional Community to restitution of land. Had the Supreme Court of Appeal borne this duty in mind, it could have attached a different meaning to the section — a meaning that would be consonant with the purpose of the Act.”

- [26] It is thus clear from the approach of the Constitutional Court that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the Bill of Rights and to avoid an interpretation that clashes therewith. As mentioned by Moseneke DCJ in the *dictum* quoted with approval by the Constitutional Court in the passage above, the mischief to be remedied must be sought and due attention must be paid to the social and historical background of the legislation.
- [27] A reading of the long title of the CPA, its preamble and ss 2 to 4 thereof confirm that the CPA is concerned primarily with the social and economic welfare of consumers in a market-based society. The preamble confirms recognition of the fact that *inter alia* “...it is necessary to develop and employ innovative means to - (b) protect the interests of consumers, to ensure accessible, transparent and effective redress for consumers who are subject to abuse or exploitation in the marketplace;” Section 2(9) provides that in the event of an inconsistency between any provision of the CPA and any provision of any Act not contemplated in ss (8), “(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and (b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails

over the alternative provision.” Section 4(3) reads as follows:

“If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).”

[28] A fragmented and out-dated body of consumer law contained in several pieces of legislation has been repealed and replaced by the CPA as is apparent from s 121. One such Act is the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988.

[29] Victor J set out the legislative framework of the CPA in **Afri-forum v Minister of Trade and Industry** 2013 (4) SA 63 (GNP) from paras [11] to [17]. I agree with his viewpoint that the extensive reach of consumer protection is imbedded in the CPA itself, that s 3 thereof defines its purpose and policy in minute detail and that these detailed provisions provide in particular for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally. As mentioned in para [13] of **Afri-forum**, the ambit of the CPA is to develop and employ innovative means to promote the full participation of consumers and to ensure accessible, transparent and efficient redress.

- [30] Before the CPA is considered in more detail, it is necessary to deal with some aspects contained in the Free State Act. A Consumer Affairs Court was established for the Province in terms of s 13 of the Free State Act. It appears from the application papers that the Free State Consumer Affairs Court has been in existence for at least the last six years, conducting the business for which it was established.
- [31] Business practice is defined in s 1 of the Act. It includes *inter alia* “(d) any act or omission on the part of any person whether acting independently or in concert with any other person”. Unfair business practice is defined in the particular section as “any business practice which, directly or indirectly, has or is likely to have the effect of prejudicing unreasonably or deceiving any consumer”.
- [32] The Free State Act provides for the lodging of complaints with the Office for the Investigation of Unfair Business Practices, the functions of which office are to be performed by the Consumer Protector. See: s 3 read with ss 5 and 6. The Consumer Protector may conduct an investigation and *inter alia* summon and question persons and instruct them to produce books and documents for the purposes of investigation. The Consumer Protector may also negotiate and conclude arrangements in terms of s 11 with any person for the discontinuance or avoidance of any unfair business practice. In accordance with s 12 and upon completion of an investigation the Consumer Protector may institute proceedings in the Free State Consumer Affairs Court against the person alleged to be responsible for the

unfair business practice.

[33] The functions, powers and duties of the Free State Consumer Affairs Court are set out in s 17 while s 22 provides for orders to be issued prohibiting unfair business practice. A right of appeal is provided in s 25, but this section is meaningless insofar as it provides for an appeal to the special court established in terms of s 13 of the Harmful Business Practices Act, 71 of 1988 which Act has been repealed as mentioned above.

[34] Unlike applicant's version as contained in its founding affidavit, Van Zyl pertinently relied on the provisions of the CPA and s 53 to 56 in particular, dealing with the right to fair value, good quality and safety. It is therefore necessary to briefly refer to these sections. A defect is defined in s 53 as follows:

- "i. any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- ii. any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances."

Failure is defined as "the inability of the goods to perform in the intended manner or to the intended effect."

[35] A consumer's rights to demand quality service is expressed in the following manner in s 54:

- “(1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to –
 - (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
 - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
 - (c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and
 - (d) the return of any property or control over any property of the consumer in at least as a good condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.
- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1) the consumer may require the supplier to either –
 - (a) remedy any defect in the quality of the services performed or goods supplied; or
 - (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.”

[36] Section 55 deals with a consumer's rights to safe, good quality goods, whilst s 56 provides for an implied warranty

of quality. The implied warranty of quality is to the effect that in any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in s 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be. Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier without penalty and at the supplier's risk and expense if the goods fail to satisfy the requirements and standards contemplated in s 55 and the supplier must at the direction of the consumer, either – (a) repair or replace the failed, unsafe or defective goods or (b) refund to the consumer the price paid by the consumer for the goods. Further obligations are placed upon the supplier in s 56(3) and (4).

- [37] Chapter 3 of the CPA deals with the protection of consumer rights and consumers' voice. Part A of chapter 3 pertinently deals with the consumer's right to be heard and to obtain redress. Sections 68 to 71 are contained in Part A. Section 68 deals with the protection of consumer rights whilst s 69 deals with the enforcement of those rights; s 70 is concerned with alternative dispute resolution and s 71 with the initiation of a complaint to the National Consumer Commission ("the Commission") established in accordance

with s 85. I shall deal with ss 69 and 70 in particular in more detail *infra*.

[38] Part B of chapter 3 deals with Commission investigations. Section 75 provides that when the Commission issues a notice of non-referral in response to a complaint, the complainant may in certain circumstances refer the matter to a consumer court with jurisdiction or to the Tribunal with leave of the Tribunal.

[39] In Part C of chapter 3 the legislature has addressed the redress by the court in s 76 of the CPA. It is important to remember that the reference to “court” in this section and throughout the CPA does not include a consumer affairs court. Therefore unless one finds a specific reference to a consumer court in any of the sections of the CPA, the reference to court excludes the consumer court.

[40] I deem it necessary to quote ss 69, 70 and 71 of the CPA in full. These sections read as follows:

“69 Enforcement of rights by consumer

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

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

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

70 Alternative dispute resolution

- (1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be-
 - (a) an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
 - (b) an industry ombud accredited in terms of section 82 (6), if the supplier is subject to the jurisdiction of any such ombud;
 - (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of

consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud; or

- (d) 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.

(2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties, whereafter the party who referred the matter to the agent may file a complaint with the Commission in accordance with section 71.

(3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may-

- (a) record the resolution of that dispute in the form of an order, and
- (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.

(4) With the consent of a complainant, a consent order confirmed in terms of subsection (3) (b) may include an award of damages to that complainant.

71 Initiating complaint to Commission

(1) Any person may file a complaint concerning a matter contemplated in section 69 (c) (iv) with the Commission in the prescribed manner and form, alleging that a person has

acted in a manner inconsistent with this Act.

(2) The Commission may directly initiate a complaint concerning any alleged prohibited conduct on its own motion, or-

(a) when directed to do so by the Minister in terms of section 86 (b); or

(b) on the request of-

(i) a provincial consumer protection authority;

(ii) another regulatory authority; or

(iii) an accredited consumer protection group.”

(emphasis added).

[41] “Ombud with jurisdiction” is defined in s 1 of the CPA as “ in respect of any particular dispute arising out of any agreement or transaction between a consumer and a supplier who is – (a) subject to the jurisdiction of an “ombud” or “statutory ombud”, in terms of any national legislation means that ombud, or statutory ombud, or (b) ...” Although an industry ombud as mentioned in s 69(c) is not defined in the Act, such industry ombud must be accredited in terms of s 82(6) of the CPA. Section 82 deals with industry codes and specifically provides in ss 82(6) that if a proposed industry code provides for a scheme of alternative dispute resolution and the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation, the

Commission when recommending that code to the Minister, may also recommend that the scheme be accredited as an accredited industry ombud.

- [42] I shall more fully deal with this aspect later, but wish to mention at this stage that notice 817 dated 17 October 2014 issued by the Minister of Trade and Industry provided for the prescription of a South African Automotive Industry Code and accreditation of the alternative dispute resolution scheme administered by the motor industry ombud of South Africa as an accredited ombud in terms of s 82 of the CPA. It was directed that the notice would come into effect three months after publication in the Government Gazette, i.e. on 17 January 2015. Detailed provisions appear in the Code pertaining to the obligations of suppliers regarding complaints, the alternative dispute processes to be followed and the like. Suppliers shall *inter alia* display at all their trading premises notices reflecting that there is a Code which bind suppliers and when requested by consumers they have to, at no costs, provide them with contact details of the particular internal complaints handling department and the motor industry ombud of South Africa. Suppliers must also attempt to resolve complaints and disputes in accordance with the spirit and provisions of the Code, the Act and Regulations and dispute procedures. Every reasonable effort must be made to resolve complaints within thirty days. If a matter is not resolved within thirty days of the dispute between the consumer and the supplier, the consumer may approach the motor industry ombud of

South Africa.

- [43] It is not clear from the wording of ss 69 and 70 whether an express hierarchy of alternative dispute resolution agents has been set out. Bearing in mind the use of the word “may” instead of “must”, and the provisions of the Act in general, its context and the relevant background, it may be argued that s 69 in particular has not set down an implied hierarchy either. It cannot be found with certainty that the legislature intended consumers to follow a preferred route of redress in accordance with an implied hierarchy. The word “may” is generally not used to indicate a peremptory meaning, unlike the word “must”. Section 69 (and s 70) may be open to more than one interpretation. Various choices are available from which an election may be made by the consumer in order to obtain effective protection under the CPA. I again emphasise that insofar as any provision of the CPA, read in its context, can reasonably be construed to have more than one meaning, a court must prefer the meaning that best promotes the spirit and purposes of the Act and will best improve the realisation and enjoyment of consumer rights generally.
- [44] In Naudé and Eiselen (managing editors), **Commentary on the Consumer Protection Act**, loose leave edition by Juta, Van Heerden, the author of chapter 3, submits at 69-11 with reference to the apparent hierarchy created in s 69 that a consumer may approach a consumer court before approaching another dispute resolution agent, “especially

since section 70(1)(d) of the Act indicates that a consumer court may be approached to resolve a dispute as an alternative to approaching any of the alternative dispute resolution agents mentioned in section 70(1)(a), (b) and (c) of the CPA.” The author found support in the view expressed by Du Plessis (2008) **20 SA Merc LJ** 74 at 80 where she concluded that a consumer court may be regarded as point of first entry in all consumer “litigation”.

[45] Van Heerden continues at 69-18 as follows:

“With regard to the order in which the alternative dispute resolution agents mentioned in ss 69 and 70 should be approached, it is to be noted that these sections do not expressly lay down a hierarchy of alternative dispute resolution agents providing an order in which such agents may be approached. The aforementioned sections, however, appear to imply a preferred “order” in which the alternative dispute resolution agents should be approached, depending on their existence. This implied hierarchy is nevertheless not absolute as it may for instance occur that in a given situation one or more of these alternative dispute resolution agents such as an ombud with jurisdiction or an industry ombud does not exist..... Thus it is clear that where ombuds exist, whether ombuds with jurisdiction or industry ombuds, they are to be preferred to approaching other dispute resolution agents. Alternatively to approaching the above alternative dispute resolution bodies a consumer may approach a consumer court of the province with jurisdiction, if there is such a consumer court. Therefore, if a consumer resides in a province where there is a consumer court, such a consumer is not barred from approaching the consumer court even if an ombud with jurisdiction exists. However, there is a distinct possibility that the consumer court

may decline to hear the matter and refer the dispute to the ombud with jurisdiction instead, on the basis that such ombud has the appropriate expertise to deal with the matter.”

- [46] The Northern Cape Division considered the particular legislation recently. I refer to **Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others** (1260/2015) [2016] ZANCHC 1 (1 April 2016). In paragraph 27 Phatshoane, J found that s 69 should be read contextually, in conjunction with s 70 and the purpose of the statutory enactment.
- [47] When the matter was argued before the Free State Consumer Affairs Court in November 2013, there was no industry ombud accredited in terms of s 82(6) of the CPA. Applicant’s submission that the Free State Consumer Affairs Court did not have jurisdiction to entertain the dispute is without substance. The whole purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa. When the CPA is considered any ambiguous provision must be interpreted in favour of the consumer. The CPA is aimed at a speedy, fair and inexpensive procedure. Contrary to the purpose of the legislation, the consumer was dragged into litigation that was totally unnecessary.
- [48] Even if there was an industry ombud accredited in accordance with s 82(6) at the time when the dispute arose or even in the event of a finding that the dispute falls within

the ambit of s 69(b) dealing with an ombud with jurisdiction, Van Zyl's neglect to follow the route of referring the dispute to either of these ombuds shall not be held against him. It is clear that applicant was not prepared to enter into any kind of alternative dispute resolution processes. It even failed to communicate and/or negotiate with the Consumer Protector on several occasions. Furthermore, the industry ombud does not have jurisdiction in the matter at hand as he/she may not determine the "merits and the quantum of damages." See clause 17.2 of the Code referred to *supra*.

[49] I have referred to the preamble and ss 2(9) and 4(3) of the CPA above and wish to emphasise that the protection of the interests of consumers and effective redress are of paramount importance. In concluding as he did, second respondent endeavoured to follow the desired approach which I fully subscribe to and I quote the following *dicta* appearing on pages 11 and 14 of the judgment respectively: "More extensive powers are provided to Consumer Courts by the National Credit Act, 2005 and the Consumer Protection Act, 2008. These Acts cannot be ignored when considering the powers of the creature of statute....." and "The Consumer Affairs Act, 2008 extends the jurisdiction of the Consumer Affairs Court. If that had not been the case, the whole purpose of providing protection to consumers (prescribed by section 3 of Act 68 of 2008) would fail....."

[50] At best for applicant, the Free State Consumer Affairs Court might have found that the institution of action was premature and should be stayed pending a referral of the

dispute to an ombud with jurisdiction or the industry ombud (if such a person existed at all which is clearly not the case) and the outcome of such proceedings. This is a totally different scenario from the one advocated for by applicant. Van Zyl's alleged failure to comply with internal remedies could not have the effect that the Free State Consumer Affairs Court's jurisdiction to entertain the dispute disappeared in thin air.

- [51] Applicant's submission that unless the Commission has referred a dispute directly to the Consumer Affairs Court, or a certificate of non-resolution has been issued by the Commission, a Consumer Affairs Court will not have jurisdiction to entertain a dispute is, without merit. This only applies if a consumer has elected to make use of alternative dispute resolution provided for in ss 70 to 75. Van Zyl did not follow that route. In any event ss 72 to 75 must be read in context. The Commission is responsible for enforcing the CPA by *inter alia* promoting the informal resolution of any dispute arising in terms of the CPA between a consumer and a supplier, but it is not expected to intervene in or directly adjudicate any such dispute. See: s 99 of the CPA. The Commission will only investigate complaints which could not be resolved through any of the other mechanisms provided for in the CPA and even then there is no obligation imposed upon it to intervene or directly adjudicate any dispute between the parties. It is not in dispute that the Commission may refer matters to the Tribunal established in s 26 of the NCA and may appear

before the Tribunal as required or permitted by the CPA.

- [52] I have shown that the jurisdiction of the Free State Consumer Affairs Court has been established. At best for applicant, it might have argued that that court should have held that the action was premature and that the dispute should have been referred to an ombud first. This is not the case respondents were asked to meet.

VIII CONCLUSION

- [53] I am satisfied that applicant failed to establish proper grounds for review and therefor the application is doomed to fail. There is no reason why applicant shall not be ordered to pay the costs of the application including the costs of opposition of all respondents that opposed the application. It was argued on behalf of first, third and eighth respondents that even in the event of the application being successful, these three parties should not have been joined in the proceedings and therefore a misjoinder has occurred. Consequently, so it was argued, even if applicant was successful, it should have borne the costs of these three respondents. I agree with these submissions and confirm that I would have ordered applicant to pay their costs accordingly. These three parties do not have a direct and substantial interest in the outcome of the litigation and would not to be materially and substantially affected by any order in favour of applicant. However, bearing in mind the conclusion to which I arrived, it is unnecessary to deal with

this issue any further.

IX ORDER

[54] Therefore the following order is issued:

The application is dismissed with costs, such costs to include the costs of opposition of first, second, third, fourth and eighth respondents.

J.P. DAFFUE, J

I concur.

C. VAN ZYL, J

On behalf of the applicant: Adv. M. C. Louw
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the first, second, third
and eighth respondents: Adv. L. C. Sibeko SC
and Adv. N. P. Yina
Instructed by:
State Attorney
BLOEMFONTEIN

On behalf of the fourth respondent:

Adv. P. R. Cronje
Instructed by:
Phatshoane Henney
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