"Innovative Orders" under the South African *Consumer Protection Act* 68 of 2008

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Abstract

This article considers section 4(2)(b) of the South African *Consumer Protection Act* 68 of 2008 (hereafter the CPA), which grants a power to courts and the National Consumer Tribunal to make "appropriate orders to give practical effect to the consumer's right of access to redress", including, but not limited to, "any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights" in terms of the CPA (in addition to any order provided for in the CPA). First, a brief overview of the provisions on interpretation of the CPA is given, to give context to the interpretation of the power of the courts to make innovative orders. Thereafter, instances are discussed where it is undoubtedly clear that innovative orders are needed, that is, where the CPA creates a right without a remedy. Examples are the consumer's right to receive delivery of the goods or performance of the services within a reasonable time where no time for performance was agreed upon, and the consumer's right to assume that "the supplier has the legal right, or the authority of the legal owner", to supply the goods. This part includes analysis and criticism of the only reported decision which discusses the delineation of the power to grant innovative orders, and which unjustifiably refused to grant such an order in respect of the consumer's right that the goods supplied "remain useable and durable for a reasonable time".

The article then considers situations where there is no clear gap in the CPA such as a right without a remedy, but the CPA is nevertheless ambiguous and policy considerations call for an innovative order. This part gives an example of a case where the National Consumer Tribunal briefly referred to section 4(2)(b) on innovative orders in support of a new rule on the suspension of prescription (time limitation) not recognised in the text of the CPA. Part 5 of the article considers the types of orders that were probably envisaged by the legislature when drafting section 4(2)(b) on innovative orders, such as publicity and compliance programme orders, which serve to increase the effectiveness and preventative effect of orders on prohibited conduct. This part of the article considers legislation from the United Kingdom on such orders, which is referred to as "enhanced consumer measures".

Keywords

Consumer Protection Act; consumer protection; innovative orders; enhanced consumer measures.

1 Introduction

Section 4(2)(b) of the South African *Consumer Protection Act* 68 of 2008 (hereafter the CPA) provides that the National Consumer Tribunal or court must

> (i) promote the spirit and purposes of this Act; and
>
> (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to
>
> (aa) any order provided for in this Act; and
>
> (bb) any innovative order that better advances protects, promotes and assures the realisation by consumers of their rights in terms of this Act.

Is this power to make innovative orders a good thing? When should it be used? An example of an instance where the court or Tribunal should grant innovative orders to protect consumer rights is where the CPA creates a right but is silent on the remedies. Examples are the consumer's right to receive delivery of the goods or performance of the services within a reasonable time where no time for performance was agreed upon[1] and the consumer's right to assume that "the supplier has the legal right or the authority of the legal owner to supply" the goods.[2] However, as will be discussed below, there are other instances in which it is not as clear that the court or tribunal should make an innovative order. There is thus a need to determine the limits of the power to make an innovative order, in order not to transgress the rule of law, and to delineate in which circumstances such an order is desirable and consistent with the rest of the CPA, particularly the provisions on the interpretation and purposes of the Act.

A question that arises is whether the CPA should empower enforcement agencies such as the National Consumer Commission (hereafter the NCC) and provincial consumer protection authorities to propose remedies which are not specifically provided for in the CPA to suppliers who breached

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1 Section 19(2)(a) of the CPA.

2 Section 44 of the CPA.

consumers' rights, and failing agreement with the suppliers on the proposed remedies, to apply to the National Consumer Tribunal (hereafter the NCT) or court for such "innovative orders" on behalf of consumers.

This article is structured as follows. First, the provisions on the interpretation of the CPA will be referred to in order to give context to the interpretation of the power to give innovative orders (Part 2 below). Thereafter, Part 3 will consider instances where it is clear that innovative orders are needed, namely where the CPA creates a right without a remedy. This will include discussion of a case where the court unjustifiably rejected an argument that an innovative order should be made and gave the only reported decision which discusses the delineation of the power to grant innovative orders. Part 4 discusses situations where there is no clear gap in the legislation such as a right without a remedy, but the CPA is nevertheless ambiguous and policy considerations call for an innovative order. This Part gives an example of a case where the NCT briefly referred to the relevant sub-section allowing innovative orders in support of a new rule on prescription (time limitation) not recognised in the text of the CPA. Part 5 considers the types of orders that were probably envisaged by the legislature when providing for the power to make innovative orders, such as publicity and compliance programme orders, which serve to increase the effectiveness and preventative effect of orders on prohibited conduct. Part 6 will set out conclusions.

2 The power to make innovative orders in the light of the provisions on interpretation of the CPA

Section 2(1) of the CPA provides that the Act must be "interpreted in a manner that gives effect to the purposes set out in section 3".[3] Section 4(2)*(b)*(i) reiterates that the NCT or the court must "promote the spirit and purposes of [the CPA]". Section 4(3) confirms that a court or Tribunal, when faced with more than one reasonable meaning of a provision in the Act, read in its context,

> 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)*.

[3] For a detailed discussion of s 3(1)(b) of the CPA and the nature and impact of vulnerability, see De Stadler "Section 3" para 5.

Section 3(1) sets out the purposes of the Act. It provides that

> [t]he purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—
>
> (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
>
> (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
>
> (i) who are low-income persons or persons comprising of low-income communities;
>
> (ii) who live in remote, isolated or low-density population areas or communities;
>
> (iii) who are minors, seniors or other similarly vulnerable consumers; or
>
> (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
>
> (c) promoting fair business practices;
>
> (d) protecting consumers from—
>
> (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
>
> (ii) deceptive, misleading, unfair or fraudulent conduct;
>
> (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
>
> (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
>
> (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
>
> (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

Most of the purposes in the sub-section indicate that any ambiguous provision in the Act must be interpreted in favour of the consumer, particularly consumers who are "vulnerable" as a result of a low income, low literacy, old age or any other similar factor.[4]

However, even though the purpose of the legislation is relevant, the language remains the primary consideration.[5] After all, "it is not the function

4 See s 3(1)(b) of the CPA. See De Stadler and Du Plessis "Section 2" para 11.

5 Du Plessis 1981 *SALJ* 211; De Stadler and Du Plessis "Section 2" para 11.

of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be".[6] The court or Tribunal cannot disregard the language of the statute in order to reach an outcome with favours vulnerable consumers.[7] In the common law there is a presumption that "in case of doubt, the most beneficial interpretation is preferred". In this particular instance, the legislation adds that the interpretation must be beneficial to vulnerable consumers. Even in this context this does not give the court or Tribunal licence to create legislation.[8] In addition, it may be noted that an interpretation skewed in favour of consumers may ultimately prejudice them if the supplier has to drive up prices to provide for drastic consumer remedies. Thus the interpretation process should also have due regard to suppliers' interests and what effect the particular interpretation will have on them, and thus indirectly on consumers. This interpretation that suppliers' interests must also be taken into account for the benefit of consumers generally is bolstered by section 3(1)(a), which emphasises the attainment of a consumer market that is "fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally".

As far as the power to make innovative orders is concerned, it is clear from section 4(2)(b) that these orders go beyond orders specified in the Act. It is also clear that these orders must be "appropriate" and must be made if such an order "better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act". Thus, where consumers have a right under the Act, courts or the Tribunal may make innovative orders that protect or promote or advance such rights. This applies particularly strongly to instances where the CPA creates a right without mentioning a remedy, as will be discussed below.

3 Instances where the CPA creates a right without a remedy so that an innovative order is justified

6 *Standard Bank Investment Corporation v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) 810D based on *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 543, as also cited by De Stadler and Du Plessis "Section 2" para 10. As noted by De Stadler and Du Plessis "Section 2" para 11, this principle was discussed with specific reference to the CPA in *Afriforum v Minister of Trade and Industry* 2013 4 SA 63 (GNP) and *Byleveld v Execor Twelve (Pty) Ltd t/a Motor City* 2014 ZANCT 2 (24 February 2014).

7 De Stadler and Du Plessis "Section 2" para 11.

8 Du Plessis *Re-Interpretation of Statutes* 161; De Stadler and Du Plessis "Section 2" para 11.

The CPA is not perfectly drafted. In various instances, it creates rights without stating a remedy. This calls for the amendment of the Act, but as this takes time, in the meantime these situations probably call for innovative orders to give effect to the rights recognised in the Act.

An example is the consumer's right in section 55(2)(c) that goods must remain "useable and durable for a reasonable period of time", which is in addition to the right that goods be free of defects at delivery. The remedies for the breach of the rights in section 55 are set out in section 56, namely a choice between repair, replacement or refund within six months of delivery. However, some goods can reasonably be expected to remain durable for more than six months. Yet the Act does not give a remedy beyond six months. Thus there is a right without a remedy. Often suppliers will give contractual guarantees extending beyond six months, but sometimes they do not. An amendment of the CPA is called for to clarify the position. But in the meantime, the court or Tribunal should fashion an appropriate remedy.[9] For example, a court could order that after the conclusion of the six months period the consumer should be entitled only to a repair or a reduction in price, but perhaps to a replacement or refund in the case of a serious defect, making provision for the value of the use the consumer has received.[10] In other words, a court or Tribunal should grant a remedy beyond the six month period on the basis of its power to make an innovative order that protects the consumer's right that the goods remain useable and durable for a reasonable period.[11]

However, the court in *Vousvoukis v Queen Ace CC t/a Ace Motors*[12] specifically rejected an argument that it should use its power to make an innovative order to grant a remedy when the goods could be expected to endure for longer than six months.[13] It concluded that

> The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in section 56(2). There is no question of section 56(2) being ambiguous in any way. In my view, it is not open to a court, under the guise of making an "innovative order", to extend this period. Any innovative order made under section 56(2) must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided for in the Act.[14]

9 Naude 2011 *SA Merc LJ* 347; De Stadler "Section 56" para 9.
10 Naude 2011 *SA Merc LJ* 347; De Stadler "Section 56" para 9.
11 Naude 2011 *SA Merc LJ* 347; De Stadler "Section 56" para 9.
12 *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 3 SA 188 (ECG).
13 The court cited the argument by De Stadler "Section 56" para 9.
14 *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 3 SA 188 (ECG) para 110.

The court's arguments are not persuasive. It does not matter whether or not section 56 is ambiguous. Rather, the point is that section 55(2)(c) creates a right without a remedy. The court did not engage with arguments that some goods can reasonably be expected to endure beyond six months. As such, granting a remedy beyond the six months period is still "within the constraints of the legislation", given the clear right in section 55(2)(c), which is not protected by a remedy.

It should also be noted that the Consumer Goods and Services Ombud (hereafter the CGSO), in its latest Advisory Note on consumer's rights regarding defective goods, specifically rejects the conclusions in *Vousvoukis* in this regard.[15] The Ombud argues that the court's interpretation

> … has the unintended consequence of undermining or rendering nugatory the right to goods that are durable for a reasonable period of time… particularly so in respect of so-called durable goods (defined as a category of consumer products that do not need to be purchased frequently because they are made to last for a long time, usually lasting for three years or more). Examples would be motor vehicles, furniture, televisions, washing machines and refrigerators.[16]

The Ombud rejected the conclusion in *Vousvoukis* that section 56(2) is unambiguous. The Ombud argued that this sub-section is arguably ambiguous by emphasising the words "at the direction of the consumer" in section 56(2).[17] The Ombud stated that this can mean that within the six months period the consumer may choose between repair, replacement or refund, but that after the six months period it is not the consumer who may choose between these remedies, but the supplier.[18] The Ombud relied on the views of Naude[19] and Barnard[20] and the position in several foreign jurisdictions which also recognise a right that goods must remain durable for a reasonable period of time.[21]

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15 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66.

16 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66 12.

17 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66 12.

18 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66 12.

19 Naude 2011 *SA Merc LJ* 347.

20 Barnard 2012 *De Jure* 467-468.

21 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66 9-12.

Barnard argues that the implied warranty in section 56 does not expire after six months, but that the six months limitation period applies to the "execution of the remedies" so that "the implied warranty will exist indefinitely and the normal prescription rules regarding the institution of a claim will prevail".[22] However, she does not spell out which remedies will still be available after the six months period. In support of her view, she cites an article by Jacobs, Stoop and Van Niekerk, who suggest that after the six months period, the consumer still has a claim for damages (presumably then not a claim for refund, replacement or repair).[23]

However, it is submitted that confining the consumer to a damages claim after the six months is not desirable. The NCT may not make an award for damages, for example, and neither would the CGSO, and the requirements for obtaining damages are arduous for consumers. The consumer would have to approach a court, and only after obtaining a certificate from the NCT confirming that prohibited conduct did occur.[24]

A court or the NCT should rather decide what remedies could fairly be granted to consumers after six months, taking into account the severity of the defect and the beneficial use that the consumer has obtained from the goods until the defect manifested. An even better solution would be for the legislature to overhaul section 56 to make the position clear.[25]

In the meantime, not granting consumers any remedies after six months for infringement of their right that goods must remain useable and durable for a reasonable period of time, which may exceed six months, implicates the purpose of the Act of providing for an accessible and effective system of redress for consumers,[26] and also of maintaining an accessible marketplace.[27] If a consumer is denied the right to return goods that are defective and that could have been expected to remain durable for longer than six months, or to obtain a repair, the consumer is left without access to a replacement. Low-income consumers especially do not have the resources to self-fund a replacement or repair. Thus the purpose of the CPA to ameliorate the disadvantages experienced by vulnerable consumers in accessing goods or services comes into play.

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22 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66 9-12.

23 Jacobs, Stoop and Van Niekerk 2010 *PELJ* 373.

24 Section 115 of the CPA.

25 CGSO Date unknown http://www.cgso.org.za/wp-content/uploads/2016/05/CGSO-ADVISORY-NOTE-1-RETURNS-REVISION-3.pdf?87ab66&87ab66 12.

26 Section 3(1)(g) of the CPA.

27 Section 3(1)(a) of the CPA.

Another example of a right without a remedy in the CPA is the consumer's right to assume that the supplier has the legal title or authority of the owner to sell the goods.[28] The CPA does not set out any remedies for the breach of this right by suppliers, and so does not deal with the controversy whether the consumer who is evicted by the true owner can claim damages with the purchase price as a minimum or rather only the lower value of the goods at eviction, where the goods decreased in value from the time of the purchase. The courts will probably follow the common law in this regard, where the point of departure is that foreseeable damages with the purchase price as a minimum can be claimed by the ultimate purchaser of the goods.[29] However, some uncertainty has been created by an obiter dictum in the leading case of *Alpha Trust (Edms) Bpk v Van der Watt,*[30] that in the case of a rapidly depreciating asset, a lesser amount than the purchase price ought perhaps to be recoverable. In any event, it is clear that an innovative order is called for to give effect to the consumer's right under section 44.

Consumers' right to be informed of their cooling-off right after direct marketing is another right without a remedy in the CPA.[31] The Act is silent on the effect of a failure to so inform the consumer. Obviously, it would be prohibited conduct which could be punished by an administrative penalty under section 111. However, the supplier's obligation to inform the consumer would have been more effective if the CPA had provided for an extension of the cooling-off period if the obligation was breached. Again, until the CPA is amended, an innovative order should be considered here. There are various ways in which a legislative amendment could be formulated to give a remedy for consumers' right to be informed of their cooling-off right. One option would be for the cooling-off period to start to run once the consumer is properly informed of the cooling-off right. Another option would be to provide that the cooling-off period expires only 12 months after the end of the initial cooling-off period, but if the trader did inform the consumer of the cooling-off right within those 12 months, the cooling-off period could expire 14 days after the consumer receives the information.[32] In *Section Three Dolphin Coast Medical Centre CC v Cowar*

28 Section 44 of the CPA.

29 *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A).

30 *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A).

31 Section 32 of the CPA.

32 This is the rule in art 10 of the EC Consumer Rights Directive (*Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights* OJ L 304/64 (22 November 2011)). Section 82(3)(d) of the Australian *Consumer Law* (Schedule 2 to the *Competition and Consumer Act*, 2010) provides for a six months cooling-off period if the supplier failed to inform the consumer of the cooling-off period upon contracting with the consumer.

Investments (Pty) Ltd,[33] a court held that a contract for the sale of land was voidable where the seller failed to include a reference to the statutory cooling-off right of the buyer under the *Alienation of Land Act*.[34] This would be another option. Until the CPA is amended in this regard, a court or the Tribunal should be willing to order that the cooling-off period starts to run only once the consumer is informed thereof. That would be an innovative order designed to better advance, protect, promote and ensures the realisation of the consumer's right to be informed of the cooling-off right.[35]

Another example of a right recognised by the CPA with no remedy is the consumer's rights to delivery of the goods or performance of the services within a reasonable time where no date or time for performance was agreed upon by the parties.[36] The Act is silent on the consumer's remedies for the breach of this right. Should the consumer immediately have the right to cancel the contract after this reasonable time has elapsed? Or are the consumer's remedies the same as under the common law, namely that the creditor may cancel for *mora debitoris* (delay on the part of the debtor) only after a demand and notice of rescission (a warning of the possible cancellation if performance is not forthcoming by a date specified in the notice), unless "time is of the essence under the contract"?[37] Until the legislature clarifies the position, courts and the NCT will have to make a decision on the basis of an innovative order whether to follow the common law or rather to allow the immediate cancellation after a reasonable time.

4 Ambiguity in the CPA and policy considerations call for an innovative order

Should innovative orders be granted in circumstances where there is no clear gap in the legislation in the form of a right without a remedy, but the Act is arguably ambiguous and policy considerations cry out for an innovative order?

4.1 Suspension of prescription under section 116 CPA

The NCT has fashioned a new rule on the interruption or suspension of extinctive prescription (time limitation) not contained in either the

33 *Section Three Dolphin Coast Medical Centre CC v Cowar Investments (Pty) Ltd* 2006 2 SA 15 (D).
34 *Alienation of Land Act* 68 of 1981.
35 See the wording of s 4(2)(b) of the CPA in this regard.
36 Section 19(2)(a) of the CPA.
37 Van Huyssteen, Lubbe and Reinecke *Contract* 294-301.

Prescription Act[38] or the CPA, in *Lazarus v RDB Project Management CC t/a Solid* (hereafter *Lazarus*).[39] The NCT referred briefly as justification to section 4(2)(b) of the CPA, which includes the power to make innovative orders, without expressly stating that it was exercising its power to make an innovative order. Before this decision is discussed, a brief background to the relevant statutory provisions will be supplied.

Section 116(1) CPA provides that

> [a] complaint in terms of the CPA may not be referred or made to the Tribunal or a consumer court more than three years after
>
> (a) the act or omission that is the cause of the complaint; or
>
> (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

The *Prescription Act* therefore governs complaints referred to the courts, but the very simplistic section 116 governs complaints referred to the NCT or provincial consumer courts. The *Prescription Act* (which generally provides for a three-year prescription period for debts) provides for the judicial interruption of prescription if the creditor serves any "process" on the debtor.[40] In this context "process" is defined as including

> … a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.[41]

"Legal proceedings" are not defined. However, "a document whereby legal proceedings are commenced" probably does not encompass forms filled in or letters written to refer consumer complaints to ombuds, provincial consumer protection authorities, Alternative Dispute Resolution agents or the NCC. Neither does the CPA contain an equivalent provision on the interruption of prescription when the consumer lays a complaint with these other enforcement agencies provided for in the CPA. This is problematic, because section 69 of the CPA prescribes that consumers must first exhaust all other remedies available under national legislation before approaching a court. Therefore, the consumer is expected to approach an accredited industry ombud, provincial consumer court (in respect of suppliers operating in that province) and the NCC before the consumer may approach a court. In cases where direct referral to the NCT is possible, the consumer is also expected to approach the NCT first before approaching a

38 *Prescription Act* 68 of 1969.
39 *Lazarus v RDB Project Management CC t/a Solid* 2016 ZANCT 15 (9 June 2016).
40 Section 15(1) of the *Prescription Act* 68 of 1969.
41 Section 15(6) of the *Prescription Act* 68 of 1969.

court. To approach the NCT, the consumer must typically first obtain a notice of non-referral from the NCC.[42] The NCC often does not take on individual complaints but typically first refers consumers to ombuds, whose decisions are not binding.[43] So the consumer may be sent from pillar to post and may have an interest in eventually getting a ruling from the NCT or a court. The consumer also has the option of approaching another Alternative Dispute Resolution Agent. All of these steps take time. The speed at which a complaint is dealt with also depends on the efficiency of the various enforcement agencies, over which the consumer has no control. As Van Heerden points out,

> … [t]he practical implementation of the framework of section 69 as it concerns the alternative dispute resolution routes, the consumer courts and the National Consumer Commission has not been a seamlessly easy, quick and effective process and in many instances has occasioned greater delay than would have been the case had consumers not been barred from approaching civil courts without first having to exhaust all remedies as required by section 96(d).[44]

Vulnerable consumers may be especially hard hit by the three-year limitation period when read against the consumer's duties to first approach an industry ombud, the NCC and a provincial consumer court. Factors like a low income, low literacy, limited fluency in English, and residence in a remote area may have an impact on the likelihood of a consumer's understanding of his or her rights and on the ability to enforce these rights. This problem is more acute for socio-economically vulnerable consumers who are excluded from redress due to obstacles such as a lack of access to consumer protection authorities and the communication channels used to make complaints.[45]

The best solution would once again be for the CPA and the *Prescription Act* to be amended to take cognisance of the rules and practice on enforcement of the CPA and their impact on consumers. In the meantime, the NCT has ameliorated the impact of section 116 by providing in effect that prescription is suspended once the consumer takes action to bring a complaint under the CPA. This could be regarded as an innovative order to protect the consumer's right to approach the enforcement agencies listed in section 69, including the NCT and courts.

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42 Section 75 of the CPA.

43 However, note that in *National Consumer Commission v Western Car Sales CC t/a Western Car Sales* 2017 ZANCT 102 (14 September 2017), the NCC brought to the NCT a supplier who had refused to adhere to an industry ombud's ruling and *inter alia* obtained an order that the purchase price be refunded to the consumer.

44 Van Heerden "Section 116" para 4.

45 See the discussion of s 3(1)*(b)* read with ss 2 and 4 of the CPA in Part II of this article.

The NCT in *Lazarus* held that prescription is interrupted during the time that the consumer's complaint is dealt with by a provincial consumer protection authority, even though the CPA contains no provisions on the interruption or delay in the completion of prescription. It should be noted, however, that the Tribunal clearly intended suspension rather than interruption, as it did not consider that prescription started running afresh upon referral of the complaint to the provincial authority, as judicial interruption under the *Prescription Act* implies.[46] Rather, the NCT held that prescription did not run during the period that the complaint was under consideration by that authority – thus, suspension of prescription was intended. This is clear from the NCT's conclusion that

> … [i]n the circumstances the Tribunal finds that prescription was interrupted during the time that the complaint was being dealt with by the Western Cape Consumer Protector Office. This would be from December 2012 until October 2013, when the matter was referred to the NCC. The three year period therefore started on 19 October 2012 (when the crack in the counter occurred) and would have ended on 19 October 2015. Due to the interruption of the prescription period for 11 months, the prescription period only ends on 19 September 2016.[47]

The NCT may have implicitly regarded its order that prescription was interrupted (suspended) as an innovative order in terms of section 4(2)(b). It held that

> … [o]n the face of it, it would appear that the Applicant's claim has prescribed. The CPA is however very clear in its intent to ensure that consumer's rights are protected. There are numerous sections in the CPA where this intention is made very clear but for the current purposes Section 4(2)(b) of the CPA will suffice … .[48]

Section 4(2)(b) refers to the NCT's and courts' duty to promote the spirit and purposes of the CPA and to make orders provided for in the Act, or innovative orders.[49]

In *Ngoza v Roque Quality Cars*,[50] the NCT extended the reasoning in the *Lazarus* judgment to confirm that referral to an industry ombud also "interrupts" prescription under section 116. Subsequently the NCT confirmed that

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46 Section 15 of the *Prescription Act* 68 of 1969.

47 *Lazarus v RDB Project Management CC t/a Solid* 2016 ZANCT 15 (9 June 2016) para 31.

48 *Lazarus v RDB Project Management CC t/a Solid* 2016 ZANCT 15 (9 June 2016) para 28.

49 Van Heerden "Section 116" para 4 agrees that this relief could be regarded as an "innovative order" and notes the NCT's reference to s 4(2) of the CPA.

50 *Ngoza v Roque Quality Cars* 2017 ZANCT 104 (28 September 2017).

> … a referral of a complaint to one or more of the forums mentioned under section 69 of the CPA *interrupts prescription*.[51]

Again, the application of this principle to the facts of this case shows that the NCT has suspension of prescription in mind, rather than interruption.[52]

This interpretation of the CPA is consistent with the purpose of the CPA of

> … providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.[53]

Exactly because the Tribunal's interpretation could be related to the consumer's right to approach the agencies mentioned in section 69, granting an innovative order in this instance serves to "give practical effect to the consumer's right of access to redress" and "better advances, protects, promotes and assures the realisation by consumers of their rights" as section 4(2)(b) on innovative orders requires. For that reason, the *Lazarus* judgment and those following upon it mentioned above do not militate against the rule of law.

In the first judgement in *Motswai v House and Home*,[54] the NCT went even further and effectively held that prescription under section 116 of the CPA is suspended for as long as the supplier is considering the consumer's complaint.[55] However, this judgment was subsequently set aside by agreement between the parties and remitted to a fresh panel of members of the NCT who, firstly, correctly rejected the consumer's claim on the basis that the CPA provisions on defective goods did not apply to goods bought and delivered before the general effective date, and secondly, indicated that the suspension of prescription was not relevant as the consumer approached the NCC only more than three years after the defect had been discovered.[56] This implies that prescription under section 116 CPA is not

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51 *Auto* Glen Motors (Pty) Ltd t/a Auto Glen v Barnes In Re: Barnes v Auto Glen Motors (Pty) Ltd t/a Auto Glen 2018 ZANCT 51 (23 July 2018) para 21. Also see Littlewood Building and Garden Services Projects CC v Hyundai Automotive South Africa (Pty) Ltd t/a Hyundai Springfield 2018 ZANCT 91 (26 June 2018) para 33.

52 As is also the case in the *Littlewood* judgment cited in the previous footnote.

53 Section 3(1)(h) of the CPA.

54 *Motswai v House and Home* 2016 ZANCT 20 (7 July 2016).

55 The NCT held that "[i]n essence, the Applicant reported the matter to the Respondent within 2 years and 11 months (11 January 2012 - 12 December 2014) of discovering the peeling off of the couches. The Applicant was within the period required by the Act to refer the matter directly to the Tribunal. The limitation of bringing action as prescribed by section 116 of the CPA does not apply in this matter" (*Motswai v House and Home* 2016 ZANCT 20 (7 July 2016) para 22).

56 *Motswai v House and Home* 2017 ZANCT 57 (13 April 2017).

suspended merely during consideration of the consumer's complaint by the supplier, although it would be upon a complaint being made to the NCC.

The more radical conclusion in the first *Motswai* judgment that referral of the complaint to the supplier suspends prescription under section 116 CPA is less obviously desirable.[57] On the one hand, all the enforcement agencies mentioned in section 69 generally require consumers who complain to them to first lodge a complaint with the supplier.[58] As such, waiting for the supplier to make a decision on the complaint is arguably part of the enforcement process that the consumer is expected to follow under section 69, and thus necessary "to give practical effect to the consumer's right of access to redress". Thus, it could be argued that prescription should also be suspended while the supplier is considering a complaint by the consumer. Vulnerable consumers may not know that they should approach an enforcement agency if the supplier takes a long time to decide on the complaint. However, a question that arises is how actively the consumer has to pursue the claim before prescription is suspended. Would a telephone call to the supplier's call centre suffice to suspend prescription or would a written complaint be required? What is the position if the supplier did not record all calls and denies that the oral complaint was made? Would prescription be suspended only once the consumer has submitted the proof of purchase to the supplier? These practical considerations militate against the argument that prescription should be suspended once the consumer takes any steps to complain to the supplier. In addition, as time elapses, the ability to properly investigate and defend a claim becomes almost impossible for the supplier. Rather, prescription should not be suspended by anything short of referring the matter to an enforcement agency listed in the Act, such as an accredited industry ombud, a provincial consumer

57 Van Heerden "Section 116" para 4 rejects the NCT's conclusion.

58 Eg the Consumer Goods and Services Industry Code of Conduct provides that "[i]f the Complaint is one that appears to fall within the CGSO's jurisdiction and the Complainant has not taken the matter up directly with the Participant as a first step in trying to resolve the matter, the CGSO will advise the Complainant to refer the matter to the Participant to give the Participant the opportunity to resolve the Complaint. Alternatively, the CGSO may directly refer the matter to the Participant with the permission of the Complainant" (s 11.2.7.3 of GN 271 in GG 38637 of 3 March 2015). Section 11.2.7.5 adds that "Any Complainant who is advised to refer the matter to the Participant will also be informed that he or she can again approach the CGSO, if the Complaint is not resolved to the satisfaction of the Complainant within 15 (fifteen) Business Days or such extended period as agreed between the Parties". However, s 11.2.7.6 provides that "If it would, in the CGSO's opinion, with particular reference to section 3 (1) (b) of the CPA (vulnerable consumers), cause a Complainant undue hardship or inconvenience to refer to the Participant before obtaining the CGSO's assistance, the CGSO may deal with the Complaint as if the Complainant has approached the Participant".

protection agency or the NCC. The Act should be amended to require suppliers to inform consumers complaining to them of their rights to approach the industry ombud, provincial consumer protection agency or the NCC, and to make the contact details of these agencies available on request.[59] Prescription should not start to run against consumers until the supplier has so informed the consumers of their right to approach these agencies, and the burden of proof should be on the supplier in this regard.

The legislature may also consider rather providing for a longer prescription period for consumers who are natural persons, say 5 years.

4.2 Cancellation of agreements in perpetuity and agreements for the lifetime of the consumer under section 14

Under section 14, fixed-term agreements may be cancelled by the consumer on 20 business days' notice against the payment of a reasonable cancellation penalty. The Minister has also prescribed the maximum duration for fixed-terms agreements, as allowed by section 14 CPA.[60] The purpose of these provisions is to prevent consumers' being bound for overly long periods in long-term agreements. It recognises that consumers may have good reasons to cancel fixed-term agreements early, such as changed financial circumstances. The term "fixed-term agreement" is not defined in the Act. Does it apply to agreements to which the consumer is bound "in perpetuity" or for the life of the consumer? Examples would be some timeshare club agreements and leases. Due to numerous complaints against timeshare suppliers, the NCC has appointed a Panel of Inquiry to consider the effectiveness of current legislation regulating this sector.[61] Hopefully the *Property Time-sharing Control Act*[62] will be amended to provide effective consumer protection. In the meantime it should be noted

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59 Paragraph 5.1.3 of the Consumer Goods and Services Industry Code provides that subscribers to the code and/or their staff "shall notify the Consumer of their right to refer Complaints to the CGSO in the event that they are unsatisfied with the Participant's Internal Complaints-Handling Process". In addition, the supplier must display a notice on its premises that it subscribes to this Code, which also provides the contact details of the CGSO. Para 11.3.1.8 also provides that "[w]hen dealing with Complaints, the Participant should make readily available to customers, complainants and other interested parties information concerning the Internal Complaint-Handling Process, including the CGSO's brochures and the member's pamphlets, or electric-based information [sic]".

60 Regulation 5 of the Consumer Protection Act Regulations of 2011, which in principle creates a maximum duration of two years, with some listed exceptions (GN R293 in GG 34180 of 1 April 2011).

61 Mohamed 2017 http://www.gov.za/speeches/address-commissioner-ebrahim-mohamed-media-briefing-launch-public-inquiry-vacation; PMG 2017 https://pmg.org.za/committee-meeting/25126/.

62 *Property Time-sharing Control Act* 75 of 1983.

that timeshare suppliers have tried to evade the provisions on unfair contract terms in the CPA by structuring their agreements as consumer credit agreements, to which the CPA does not apply (although the goods and services which form the subject of the credit agreement are subject to the CPA).[63] If one accepts that a points-based timeshare agreement in perpetuity and a lease for the life of the lessee are subject to the CPA, does section 14 apply to such agreements? It is not entirely clear whether it could be argued that a contract for the life of the consumer or in perpetuity is a fixed-term agreement. Nevertheless, the purpose of section 14 applies even stronger to these long-term agreements. This may lead courts or the Tribunal to make an innovative order that the consumer has the rights in section 14 in relation to all long-term agreements that are not terminable upon notice.

5 Publicity orders, compliance programme and awareness orders, phased-in penalties and redress orders

It is likely that what the legislature actually had in mind when drafting section 4(2)(b) on innovative orders was truly innovative orders aimed at increasing the effectiveness of the court's or NCT's main order, such as publicity orders and what has been termed in the UK "enhanced consumer measures".[64] The latter include orders that the supplier institutes a compliance programme to ensure that the prohibited conduct will not be repeated. It would have been preferable for the CPA to at least spell out in broad terms what types of orders could be made in this regard, to alert courts and the NCT to the possibilities available. Otherwise the NCT, as a creature of statute, may perhaps err on the side of caution and not grant such orders. The legislation should also provide that an enforcer, namely the NCC or the provincial consumer protection authority, should have the right to apply to the NCT or the court for such orders. Furthermore, the CPA should provide that an enforcer wishing to apply to the court or NCT for this type of order should first consult the relevant supplier in order to elicit proposals and input on a possible voluntary undertaking to take an enhanced consumer measure.[65] Currently the NCC has an apparently wide

63 Section 5(2)(d) of the CPA.

64 These measures are defined in s 219A of the *Enterprise Act*, 2002, inserted by Schedule 7 of the *Consumer Rights Act*, 2015. See generally Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf and Cartwright 2016 *CLJ* 271.

65 Section 214 of the UK *Enterprise Act*, 2002 requires such consultation and provides that the enforcer must wait at least 14 days (or 28 days in situations where an extended consultation period is required) after the supplier has received the request

power to issue compliance notices to a party that the NCC believes on reasonable grounds has engaged in prohibited conduct.[66] Such a compliance notice must set out "any steps that are required to be taken and the period within which those steps must be taken".[67] At least the National Consumer Commission Enforcement Guidelines of 2011 requires that "if a supplier is suspected of having breached NCC administered legislation, the allegation should be personally put to the supplier" and the supplier's response should be recorded *et cetera*.[68] However, section 100 does not clearly entitle the NCC to require "enhanced consumer measures" in a compliance notice that go beyond steps that must be taken to desist from the prohibited conduct. Nor do the Enforcement Guidelines clearly require the NCC to consult with the supplier to give input on possible measures proposed to deal with the alleged prohibited conduct. To give the NCC the power to impose such enhanced consumer measures merely by issuing a compliance notice, leaving it up to the supplier to take the matter on review to the NCT, is too extreme. Rather, the CPA should provide that the NCC or other enforcers should have to apply to a court or the NCT for such orders, after due consultation with the supplier. Compliance notices should rather be used to order the supplier to stop the prohibited conduct.

5.1 Publicity orders

Orders that the supplier publish the court or Tribunal order in some way are likely to increase the chance of the order having a preventative effect.[69] They also inform other consumers adversely affected by prohibited conduct of their right to seek redress from the supplier. Such publicity orders are specifically allowed by legislation in some jurisdictions. The *EC Injunctions Directive* of 2009 specifically mentions the possibility of such publicity

for consultation before applying for an order or wait 7 days in the case of an interim enforcement order. However, no prior consultation is required where the Conduct Market Authority (CMA) considers an application should be made without delay (s 214(3)). The extended consultation period is required where the supplier is represented by "a trade association or other business representative body that operates a consumer code of practice that has been approved by a public enforcer" (Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 10 para 42).

66 Section 100 of the CPA.

67 Section 100(1)(d) of the CPA.

68 GN 492 in GG 34484 of 25 July 2011 (Part C para 2).

69 Naudé 2010 *SALJ* 532, who suggested that courts make any such just and equitable publicity orders under their power when declaring a contract or term unconscionable or unfair *etc* under s 52 of the CPA.

orders.[70] The UK *Enterprise Act* 2002 also allows a court enforcing the *Consumer Rights Act* 2015 to "require a person against whom the order is made to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement (a) the order; (b) a corrective statement." Similarly, the Australian *Consumer Law* allows courts to make publicity orders.[71]

Such publicity orders could include an order that existing customers be informed in writing of the court's or Tribunal's order, or should detail the prohibited conduct and the steps to be taken to correct it, e.g. on the supplier's website, in the press, through social media, and/or on notices at the supplier's premises.[72] In addition, the supplier could be ordered to inform the NCC, provincial consumer protection authorities and the relevant accredited industry ombud of the order against the supplier.[73]

The UK *Enterprise Act* 2002 recognises a related category of enhanced consumer measures in addition to publicity orders, namely measures in the "choice category", or "consumer information measures".[74] It is foreseen that

> … [t]he choice category gives the enforcer the flexibility to seek orders for the business to give consumers more information of the businesses [sic] past performance on complying with consumer law.[75]

This will enable consumers to make more informed decisions when purchasing products.

The court or NCT should specify the period within which the publicity order (or other enhanced consumer measure) should be complied with.

5.2 Compliance programme and education and awareness programme orders

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70 Article 2(1)(b) of *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interests* OJ L110 (1 May 2009**).**

71 Section 246 of the Australian *Consumer Law*, 2010.

72 See Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 12, para 46.

73 See Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 12, para 46.

74 See Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 24.

75 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 24.

The second type of innovative order that courts and the NCT should consider making is compliance programme or education and awareness programme orders, that is, orders that the supplier institute a compliance programme or education programme for its employees and others involved in its supply of goods or services to ensure that consumer rights are upheld and that the prohibited conduct is not repeated.[76] Such orders are also allowed by the Australian *Consumer Law*[77] and are one of the three types of "enhanced consumer measures" recognised by the UK *Enterprise Act* 2002. The latter Act purposefully defines these orders in broad terms so as to give enforcers suggesting such measures to suppliers, suppliers suggesting their own measures, and courts considering such measures the flexibility to propose suitable measures to "achieve better outcomes for consumers and compliant businesses".[78] The definition of "measures in the compliance category" is

> … measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct to which the enforcement order or undertaking relates (including measures with that purpose which may have the effect of improving compliance with consumer law more generally).[79]

As is the case with all the enhanced consumer measures, an enforcement order or undertaking by a supplier may include only such measures "as the court or enforcer … considers to be just and reasonable."[80]

In this regard,

> … the court or enforcer must in particular consider whether any proposed enhanced consumer measures are proportionate, taking into account (a) the likely benefit of the measures to consumers, (b) the costs likely to be incurred by the subject of the enforcement order or undertaking, and (c) the likely cost to consumers of obtaining the benefit of the measures.[81]

The costs to the supplier which are considered include not only the actual cost of the measures but also the reasonable associated administrative

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76 Paragraph 11.3 of the Consumer Goods and Services Industry Code already sets requirements for participants' complaints handling process, but the compliance programme orders referred to above go beyond orders requiring a particular complaints handling process.

77 Section 246 of the Australian *Consumer Law*, 2010.

78 Explanatory Notes to the *Consumer Rights Act*, 2015 paras 372 and 375; Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf para 9.

79 Section 219A(3) of the *Enterprise Act*, 2002 (UK).

80 Section 219B(1) of the *Enterprise Act*, 2002 (UK).

81 Section 219B(2) of the *Enterprise Act*, 2002 (UK).

costs.[82] The Explanatory Notes to the *Consumer Rights Act,* 2015 give some examples of measures in the compliance and choice categories, namely an order or undertaking

> … appointing a compliance officer; introducing a complaints handling process; improving their record keeping; signing up to an established consumer review / feedback site; or publicising details of the breach or potential breach, and what they have done to put the situation right in the local or national press or on social media.[83]

The relevant government Department's Guidance for enforcers on enhanced consumer measures gives the following additional examples:

> … providing better staff training / guidance to staff; undertaking internal spot checks (and maintaining records of these); collecting (and acting on) customer feedback; signing up to a certified ADR scheme and committing to be bound by its decisions.[84]

5.3 Phased-in penalty orders

Another type of innovative order aimed at strengthening the effectiveness of a court or NCT order that prohibited conduct discontinue is phased-in penalties. For example, a court or the NCT could order that if the prohibited conduct continue beyond a one-month phase-in period of a new system, the supplier pays a monthly penalty to the National Revenue Fund. Section 112 of the CPA already gives the NCT the power to "impose an administrative fine in respect of prohibited or required conduct" to be paid into this fund. The CPA should be amended to specifically give courts the power to impose penalties too. The *EC Injunctions Directive* specifically provides for such penalties.[85]

5.4 Redress orders

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82 Section 219B(3) of the *Enterprise Act*, 2002 (UK).

83 Explanatory notes to the *Consumer Rights Act*, 2015 para 397. Note that some of these steps may be disproportionate in the case of a small business, e.g. the appointment of a full-time compliance officer (Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 23.

84 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 12 para 46.

85 Article 2(1)(c) of *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interests* OJ L110 (1 May 2009)**.** Naude has argued that courts should consider such an order in exercising their s 52 power to make any order considered just and equitable when finding a contract or term to be unfair or unconscionable (Naude 2010 *SALJ* 532).

A fourth type of innovative order that the CPA should provide for is a "redress order" applied for by an enforcer, namely the NCC or a provincial consumer protection authority. Currently, the CPA foresees that the NCC or provincial consumer protection authority may enforce the Act by issuing compliance notices ordering the supplier to stop the prohibited conduct.[86] If the person to whom the compliance notice was issued fails to comply therewith, the NCC may apply to the NCT "for imposition of an administrative fine; or refer the matter to the National Prosecuting Authority for prosecution as an offence."[87] The NCC has in the past attempted to use a compliance notice to order a supplier who delivered a defective product to refund the consumer.[88] However, the NCT held that section 100 on compliance notices does not allow the NCC to do this.[89] Section 73 of the CPA does, however, allow the NCC, when it believes that a person has engaged in prohibited conduct, to refer the matter to the NCT or to a provincial consumer court of the province where the supplier's principal place of business in the country is situated.[90] The NCT may then "make any applicable order contemplated in the Act".[91] In this regard, the NCT has in the past, in an application brought by the NCC, ordered a supplier to refund the consumer when goods were held to be defective under section 55, but where the supplier failed to adhere to a ruling by the applicable industry ombud.[92] Enforcers should probably also be given the power to ask for measures giving redress to consumers who have not yet submitted a complaint to the NCC, but where it is clear that the supplier caused such consumers loss or that such consumers should be entitled to cancel their contract. This is also the position in the UK, where the *Enterprise Act* 2002 defines enhanced consumer measures falling within the redress category as

> (a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking,

86 Sections 100 and 84 of the CPA.

87 Section 100(6) of the CPA. A person issued with a compliance order may approach the NCT for a review of that notice (s 101).

88 *Volkswagen South Africa v National Consumer Commission* 2013 ZANCT 10 (13 February 2013) para 46; *Accordian Investments (Pty) Limited v National Consumer Commission* 2013 ZANCT 57 (11 November 2013) paras 31-32.

89 *Volkswagen South Africa v National Consumer Commission* 2013 ZANCT 10 (13 February 2013) para 46; *Accordian Investments (Pty) Limited v National Consumer Commission* 2013 ZANCT 57 (11 November 2013) paras 31-32.

90 Section 73(1)(c)(iii) and s 73(2) of the CPA.

91 Section 75(4)(b) of the CPA.

92 *National Consumer Commission v Western Car Sales CC t/a Western Car Sales* 2017 ZANCT 102 (14 September 2017).

> (b) where the conduct referred to in paragraph (a) relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract,
>
> (c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers.[93]

The relevant UK Department's Guidance for enforcers on enhanced consumer measures states that if an order for measures in all three categories (redress, compliance and choice) would be disproportionate, the enforcer should first consider whether a redress measure should be prioritised.[94] The enforcer or court must also ensure that the cost of the redress scheme for the supplier will not be more than the consumer's loss.[95] However, the cost of the scheme does not encompass administrative costs of the scheme, for example, the cost of contacting consumers to offer them redress, although the administrative costs are considered in the proportionality enquiry.[96] Measures in the collective interests of consumers may be apposite, for example, where it is unreasonably onerous for the supplier to contact all the affected consumers, e.g. where many consumers each suffered a small amount of loss.[97] The Guidance refers to an example where some of a petrol station's pumps were wrongly calibrated so that less petrol was dispensed than was paid for.[98] It was then calculated that about 5000 consumers had each been overcharged by an average of £3. Given the difficulties of identifying which consumers used the defective pumps, and that some of them paid in cash and that credit card payments could not be linked to specific pumps, it would be more appropriate for the enforcer to seek an order that the supplier pay £15,000 to a local consumer charity.

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93 Section 219A(2) of the UK *Enterprise Act*, 2002.

94 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 14 para 48.

95 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 14 para 50; see also s 219B(2) of the UK *Enterprise Act*, 2002.

96 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 14; s 219B(5) of the UK *Enterprise Act*, 2002.

97 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 19 para 62.

98 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 20.

The possibility of such an order is also recognised by section 76 CPA, which allows a court to award

> … damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act.[99]

Damages for collective injury to all consumers could conceivably also lead to an order that the supplier pays a certain amount to a consumer organisation, as specifically foreseen by the UK *Enterprise Act* 2002.

The UK Guidance also points out that a business will have to show that it took appropriate steps to identify the consumers who suffered loss, e.g. through social media, before considering the possibility of payment to a consumer charity.[100] In addition, consumers are not obliged to accept the offers of redress sought by enforcers and ordered by a court. They may institute action against the supplier for their actual loss.[101]

5.5 Some questions raised

Should a court or the NCT have the right to order at least some "enhanced consumer measures" of its own accord in order to prevent future prohibited conduct where it is not an enforcer who applies for such measures, but a matter was brought by an individual consumer? There is some precedent for this possibility in section 52 of the CPA, headed "Powers of court to ensure fair and just conduct, terms and conditions".

Section 52 of the CPA is written with the paradigm in mind of an individual consumer challenging his/her individual agreement or terms thereof on the basis of unconscionability or unfairness. Nevertheless, section 52(3) gives a court finding that a transaction "was in whole or in part, unconscionable, unjust, unreasonable or unfair" the power to make "any further order the court considers just and reasonable" including an order

> … requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

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99 Section 76(1)(c) of the CPA.

100 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 21.

101 Department for Business Innovation and Skills 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431158/bis-15-292-guidance-for-enforcers-of-consumer-law.pdf 21.

This power should be used to make publicity orders such as an order that the supplier must publicise the fact that a particular term in its standards terms was found to be unfair under section 48, in order to increase the effectiveness of the order that the term is unfair. This could include an order that existing customers be informed in writing of the court order.[102] In addition, the supplier could be ordered to inform the National Consumer Commission and provincial consumer protection authorities of an order that a particular term or terms was held to be unfair.[103] In addition, it has been argued that courts should consider ordering penalties for the continued use of unfair terms by the supplier, after an initial phase-out period.[104] For example, the court could order the payment per month of a certain penalty for the use of each term held to be unfair.[105]

The court's abovementioned power to award "damages against a supplier for collective injury to all or a class of consumers generally" is granted to any court "considering a matter in terms of this Act". This seems to imply that a court may make such an order even where an individual consumer, and not an enforcer, seeks relief from the court. However, it would be more appropriate for a court to award this type of damages at the instance of a regulator or in response to a class action seeking such damages.

The CPA should give courts and the NCT the power to make orders of their own accord aimed at enhanced consumer measures, after affording the supplier a sufficient opportunity to respond.

5.6 Powers that should be granted to enforcers in relation to innovative orders

As noted above, enforcers should probably not be granted the power to order innovative measures as understood in this Part of this article through compliance notices, but they should be given the power to seek undertakings from suppliers to take appropriate measures to best protect consumers. If no undertaking can be agreed upon within a specified reasonable consultation period (probably 14 days, or 28 days if a trade association is involved, as in the UK), enforcers should be given the power to apply to the NCT or a court for the types of orders mentioned in this Part above.

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102 See also Naude 2010 *SALJ* 532.
103 Naude 2010 *SALJ* 532.
104 Naude 2010 *SALJ* 532.
105 Naude 2010 *SALJ* 532.

When seeking such an order or an undertaking, the enforcer should propose the time within which the measures must be taken, and the undertaking or order should provide for such a time period.[106] The legislation should provide that an undertaking or order

> … may include requirements as to the provision of information or documents to the court [or NCT] by the person in order that the court may determine if the person is taking those measures.[107]

The enforcer should also be given powers to determine whether the measures undertaken or ordered by a court or the NCT are complied with and to bring the matter back to the court or NCT in the case of non-compliance.

The UK *Enterprise Act* not only empowers public enforcers to apply for enhanced consumer measures, but provides for the availability of such measures to private enforcers specified by the Secretary of State, provided certain conditions are satisfied, such as that the enforcer or an associated undertaking would not be directly advantaged by the enhanced consumer measures.[108] These provisions could be considered when giving accredited South African consumer organisations the power to seek such undertakings and orders from suppliers.

The NCC or Department of Trade and Industry should also issue a Guidance on these types of orders once such provisions are included in the legislation.

Giving the NCT and courts some flexibility to make proposals to suppliers on what would be appropriate measures to enhance consumer rights is in line with a trend in the European Union, for instance, towards "experimentalist governance", which *inter alia* renders "rule making more flexible and responsive to contextual differences and changing circumstances"[109] and therefore "seeks to encourage experimentation by a range of alternative methods."[110] As the courts or NCT is proposed to be the final arbiter if the enforcer and supplier cannot agree on what measures would be appropriate, and as some parameters should be set for what an enforcer may propose, this is a hybrid approach which uses some elements of the experimentalist governance approach and some elements of a more

106 Also see s 217(10A) of the UK *Enterprise Act*, 2002.
107 Section 217(10D) of the UK *Enterprise Act*, 2002.
108 Section 219C of the UK *Enterprise Act*, 2002.
109 Sabel and Zeitlin 2008 *ELJ* 303.
110 De Búrca and Scott 2007 *Colum J Eur L* 515.

traditional "command-and-control" model of governance[111] (the latter being based on "carefully delegated mandates" to administrative bodies and "nearly self-enforcing rules".)[112]

6 Conclusion

The courts' and the National Consumer Tribunal's power to make an unspecified innovative order "that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act" is a useful one. However, the legislation should be amended to provide some broad parameters for the types of innovative orders that could be made and the procedure enforcers should follow before applying for such orders (including requiring a consultation period), whilst allowing enforcers, courts and the NCT the flexibility to propose voluntary undertakings or orders that are best suited to the particular case. The provisions on publicity orders and "enhanced consumer measures" in the UK *Enterprise Act* 2002 may serve as a good model in this regard.

The courts and the NCT hearing a matter brought by an individual consumer (as opposed to an enforcer) should probably also have the power to consider such innovative orders aimed at preventing the supplier from continuing with the prohibited conduct towards other consumers, provided the supplier is given sufficient chance to make submissions. Orders that the supplier publish the order in an appropriate way are unlikely to be too onerous in this regard.

Currently the power to make unspecified innovative orders plays a further important role in the application of the CPA as a number of provisions create a consumer right without a remedy. It is not satisfactory that an administrative fine be the only sanction for the breach of such rights. Rather, the consumer should have a right to redress. The CPA should therefore be amended to fill the gaps and set out the consumer's remedies in all such instances. In the meantime, courts and the NCT should use their power to make innovative orders to fashion appropriate remedies in such instances. Innovative orders are also sometimes appropriate "to give practical effect to the consumer's right of access to redress", such as the NCT's creation of an innovative order that the prescription of the right to approach the NCT is suspended while the consumer has exercised his or her right to approach any of the enforcement agencies listed in section 69. This rule is necessary to "assure the realisation by consumers of their

111 De Búrca and Scott 2007 *Colum J Eur L* 514, 517.
112 Sabel and Zeitlin 2008 *ELJ* 275.

rights" in terms of section 69. Where a provision is arguably ambiguous and a purposive interpretation cries out for a consumer remedy not explicitly granted by the text of the CPA, the legislation should be amended to provide for a remedy. In the meantime, courts and the NCT may use their power to make innovative orders to provide such a remedy. An example would be the consumer's right to terminate a fixed-term agreement on notice upon payment of a reasonable cancellation penalty (section 14). The purpose of protecting consumers from being bound for overly long periods applies with even greater force to agreements "in perpetuity" or "for the lifetime of the consumer", even though strictly speaking such agreements can probably not be described as "fixed term" agreements. Thus, until section 14 is amended, courts and the NCT should grant consumers the right to cancel such agreements as well.

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List of Abbreviations

CGSO	Consumer Goods and Services Ombud
CLJ	Cambridge Law Journal
Colum J Eur L	Columbia Journal of European Law
CPA	Consumer Protection Act 68 of 2008
ELJ	European Law Journal
NCC	National Consumer Commission
NCT	National Consumer Tribunal
PELJ	Potchefstroom Electronic Law Journal
PMG	Parliamentary Monitoring Group
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal