AN UNJUST INTERPRETATION OF SECTION 116(1) OF THE CONSUMER PROTECTION ACT 68 OF 2008: THE IMPACT OF

First Rand Bank Limited v Ludick GP (unreported) 2020-06-18 Case no A277/2019

1 Introduction

One of the key objectives of the Consumer Protection Act (68 of 2008) (CPA) is to ensure that consumers are provided with "an accessible, consistent, harmonised, effective and efficient system of redress" (s 3(1)(*h*) of the CPA). This has not been an easy task. Some difficulties have arisen with the interpretation of the detailed, yet unclear, system of redress set out in section 69 of the CPA, particularly in relation to when the court can be approached, and whether there is an implied hierarchy that applies in the dispute-resolution process (see generally *Imperial Group (Pty) Ltd v Dipico* 2016 ZANCHC 1; *Joroy 4440 v Potgieter* 2016 (3) SA 465 (FB); *Imperial Group t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government* 2016 (3) SA 564 (FB); *Motus Corporation v Wentzel* [2021] ZASCA 40). In other instances, the reluctance of industry members to cooperate with accredited industry ombuds has made the work of these dispute-resolution agents challenging (see generally *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* [2021] ZAGPPHC 309; see also definition of "alternative dispute resolution agent" in s 1 of the CPA). Furthermore, an aspect that has undermined the key objective of the CPA to ensure that consumers have access to redress is the interpretation that has been afforded to section 116(1) of the CPA following the decision of the High Court in *FirstRand Bank Limited v Ludick* (GP (unreported) 2020-06-18 Case no A277/2019) (*Ludick*). Section 116(1) of the CPA regulates prescription in terms of the statute. It provides that consumers ought to approach the consumer court or the National Consumer Tribunal (Tribunal) within a period of three years from the date of the act or omission, or, in the case of conduct that is ongoing or continuing, from the date upon which, the conduct in question ceased. The court in *Ludick* considered the equivalent provision in the National Credit Act (34 of 2005) (NCA), namely, section 166(1) of the NCA. Before *Ludick*, the Tribunal adopted a less stringent approach when interpreting section 116(1) of the CPA. Where circumstances required, such as where a consumer had referred a matter to an alternative-dispute-resolution agent (ADR agent), prescription was considered to have been suspended or interrupted (see, for e.g., *Lazarus v RDB Project Management CC t/a Solid* [2016] ZANCT 15 par 31; *Mpofu v Terry's Auto* [2017]

ZACONAF 5 par 19; *Stemmet v Motus Corporation* [2018] ZANCT 150 par 8; *Littlewood Building and Garden Services Projects CC v Hyundai Automative SA* [2018] ZANCT 91 par 33; *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 par 21; *Mountville Mkhalemba Lubisi v Imperial Select Multifranchise (Pty) Ltd* [2018] ZANCT 141 par 45).

Following *Ludick*, however, the approach of the Tribunal in CPA-related matters concerning the interpretation of section 116(1) of the CPA changed – arguably for the worse. This note analyses the decision in *Ludick* and its application over the past few years to CPA-prescription matters. This discussion is prefaced by a discussion of the facts and the finding of *Ludick*. Following thereon is a critical discussion of the court's prescription-related findings, which assesses: (i) the nature of the prohibited conduct, rights and purposes of the NCA and the CPA respectively; (ii) the Tribunal's establishment and powers; (iii) the enforcement processes under the NCA and the CPA respectively; (iv) the adverse impact of *Ludick* on the Tribunal's interpretation of section 116(1) of the CPA; and (v) the need to afford section 116(1) of the CPA a constitutionally aligned interpretation.

2 Factual background

During the course of 2015, Annet Ludick (Ludick) received large amounts of credit, in the form of various credit agreements, from First Rand Bank (the Bank) (*Ludick* par 6). The credit received comprised, *inter alia*, an overdraft, which was increased to R68 000 and then R80 000 between October and December 2015 (*Ludick v First National Bank, A Division of Firstrand Bank Limited* [2019] ZANCT 28 par 9 and 10) (Tribunal judgment). Ludick was also granted a revolving loan of R10 000 (Tribunal judgment par 8); and her FNB credit limit was increased to R61 000 (Tribunal judgment par 7). According to Ludick, all of these requested increases were granted to her without any further request for information by the Bank. Around March 2016, Ludick experienced financial difficulties owing to being over-indebted (Tribunal judgment par 11). Given that she was struggling to pay her accounts, she approached Zero Debt and began a process of debt review (*Ludick* par 9 and Tribunal judgment par 11). A reckless credit complaint was lodged on Ludick's behalf by Zero Debt with the National Credit Regulator (NCR) in September 2016 (*Ludick* par 9). Ludick's contention was that the Bank had not conducted an adequate assessment of her ability to afford repayment of the credit received (*Ludick* par 6). After investigating the matter, the NCR reached the conclusion that there had not been an instance of reckless credit lending, which was confirmed in a letter to Zero Debt dated 22 June 2017 (*Ludick* par 10). Following further submissions that the NCR received on behalf of Ludick, the NCR re-opened the case and issued a non-referral letter on 28 June 2018 (*Ludick* par 11). The non-referral letter was limited to only two of the credit agreements (*Ludick* par 11). The NCR indicated that it could not find that any provisions of the NCA had been contravened (par 12). Ludick applied for leave to refer the matter to the Tribunal (Tribunal judgment par 3).

Before the Tribunal, the Bank raised certain points *in limine* (*Ludick* par 18). The first point *in limine* pertained to the referral of the matter to the Tribunal. In this regard, it was first argued that after receiving the NCR letter, the matter was not referred within the prescribed 20 business days as required in terms of section 141(1)(*b*) of the NCA (Tribunal judgment par 20). In addition, it was argued *in limine* that the matter was not referred to the Tribunal within the three years prescribed in terms of section 166(1)(*a*) of the NCA (*Ludick* par 26–27 and Tribunal judgment par 21). Accordingly, the Bank submitted that two of the credit agreements fell outside of the prescribed three-year period, given that they were concluded on 6 November 2007 and 7 May 2015 respectively (Tribunal judgment par 21).

The second point *in limine* raised by the Bank was, *inter alia*, that the application before the Tribunal lacked a basis and sufficient information in order to support a reckless credit allegation or an over-indebtedness declaration, contrary to the requirements of sections 80 and 83 of the NCA (Tribunal judgment par 22).

The third point *in limine* raised by the Bank was that the Tribunal did not have jurisdiction to grant the relief sought by the applicant (*Ludick* par 23). This was based on the Bank's submission that no case was made by Ludick for any of the credit agreements to be set aside; and, further, no provision permitted a refund to consumers once a finding of reckless credit was made under section 83 of the NCA, as allegedly sought by Ludick (Tribunal judgment par 23).

On the merits of the matter, the Bank denied the allegation of reckless trading and illustrated to the Tribunal how it had applied affordability assessments in respect of each credit agreement that was granted to Ludick (Tribunal judgment par 31–43).

The Tribunal granted leave for the matter to be referred to it (Tribunal judgment par 61). On the merits, the Tribunal declared the three credit agreements concluded by Ludick and the Bank to be reckless, and set aside three of the four credit agreements entered into by the parties (par 1–2). According to the Tribunal order, the future rights and obligations of Ludick were set aside, releasing Ludick from any liability or future payments (par 3). The Tribunal further ordered the Bank to credit the relevant accounts with payments that had been made on the account by Ludick, including interest, fees and charges. It was further ordered by the Tribunal that the revolving loan and all the additional credit that had been granted, be considered as settled with effect from 30 September 2015 (*Ludick* par 4). The decision of the Tribunal was taken on appeal by the Bank to the High Court (*Ludick* par 1).

3 Court findings

The High Court highlighted that the Tribunal's decision to consider all the credit agreements as opposed to those provided for in the non-referral notice was contrary to the Tribunal's jurisdiction in terms of section 141 of the NCA (*Ludick* par 19, 21–25). It therefore usurped the inherent jurisdiction to investigate the credit accounts, despite the fact that they were not included in the notice of non-referral (par 19). This made the decision of the Tribunal in respect of these additional agreements *ultra vires* (par 24).

Furthermore, and most importantly for purposes of this case note, the High Court held that the Tribunal did not have the authority to make the determination that the three-year period had been interrupted while the matter was before the NCR (par 28). In this regard, the High Court held that the wording of section 166 of the NCA does not give the Tribunal a discretion (par 28). Accordingly, the High Court found that the Tribunal acted contrary to its powers and that its order should be set aside (*Ludick* par 30).

4 Discussion

As mentioned above, the main impact of the *Ludick* decision in the CPA context concerns the interpretation of section 116(1) of the CPA. As such, this is the focal point of this note. Accordingly, the most critical component of the *Ludick* decision for purposes of this note is the High Court's finding that, in terms of section 166(1) of the NCA: (i) the Tribunal did not have the power to decide that the three-year prescription period had been interrupted; and (ii) the Tribunal could not exercise any discretion in this regard (*Ludick* par 28). The High Court's approach in *Ludick* is understandable, given that the Tribunal is a creature of statute (*Ngoza v Rogue Quality Cars* [2018] ZANCT 110 par 19). However, as evidenced in the discussion below, the interpretation of legislative provisions is not as simple as looking through the wording of the provision; a unitary approach should be adopted (see discussion under heading 4 4 below). For the sake of completeness, the disputed provision in *Ludick* reads as follows:

> "166. Limitations of bringing action
>
> (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to 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." (s 166(1) of the NCA)

As mentioned above, prescription matters under the CPA are regulated by section 116(1) of the CPA, which uses exactly the same wording as section 166(1) of the NCA quoted above. The Tribunal in *National Consumer Commission* (*NCC) v Auto Brokers cc t/a Omar Auto City* ([2021] ZANCT 10) held that the *Ludick* High Court judgment is binding on it when considering matters under the CPA (*NCC v Auto Brokers supra* par 20. See also Van Heerden "Section 116" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* (Revision Service 9 2023) 116–10)). The Tribunal further indicated that sections 116(1) and 166(1) of the CPA and NCA, respectively, have identical wording; and highlighted that the applicant too had made a concession that the Tribunal has no "additional powers to override section 116" (NCC v *Auto Brokers supra* par 20).

However, the following alternative outlook was highlighted by the Tribunal in *Winter v Kove Empire CC* ([2021] ZANCT 35):

> "As the two clauses in the two different acts are similarly worded, the perception may be created that the two clauses must be applied the same. Such a deduction is misplaced. Although similarly worded, the application of the two sections may be different due to the nature of the prohibited conduct being regulated in the two pieces of legislation and the nature of the complaint being lodged." (*Winter v Kove Empire CC supra* par 54, footnotes omitted)

It is submitted that the approach to *Ludick* adopted by the Tribunal in *NCC v Auto Brokers* was narrow and unduly restrictive of the rights of the consumer under the CPA. The Tribunal in *Winter v Kove Empire CC* (*supra*) correctly highlighted the intricacies that ought to be considered in the application of the *Ludick* decision in the CPA context. Despite exactly the same wording being used for the prescription provisions of the NCA and the CPA respectively, transplanting the finding of *Ludick* in respect of section 166(1) of the NCA to section 116(1) of the CPA is inappropriate in light of: (i) the differing nature of the purposes, rights and prohibited conduct regulated by the two statutes; (ii) the variation in the powers of the Tribunal, when dealing with matters in terms of either the CPA or the NCA; and (iii) the dispute-resolution process followed under each statute. A discussion on each of these aspects follows.

4 1 The nature of prohibited conduct, rights and purposes under the NCA and the CPA

Both the NCA and the CPA provide that "prohibited conduct" consists of acts or omissions that are in contravention of the respective statutes (s 1 of both the NCA and the CPA). However, the definition of "prohibited conduct" under the NCA excludes acts or omissions in terms of section 55(2)(*b*) of the Act, which are contraventions of provisions in the NCA that are subject to the compliance procedure set out in the Protection of Personal Information Act (4 of 2013). The definition further excludes acts or omissions that are considered offences under the NCA by: unregistered persons who should be registered for purposes of engaging in a particular act; or credit providers, credit bureaus or debt counsellors (s 1 of the NCA).

Save for certain exceptions, the NCA generally applies to all credit agreements in South Africa that are concluded at arm's length (s 4 of the NCA; see also ss 1 and 8 of the NCA for the meaning of "credit agreement"). The broad purpose of the NCA is, through various means, to ensure that the socio-economic welfare of South Africans is promoted and advanced (s 3 of the NCA). The NCA essentially ensures that consumers are protected when entering into credit agreements, and seeks to ensure, *inter alia*, that access to credit is fair and responsible (see s 3(*a*)–(*d*) of the NCA, for example). The granting of credit is a delicate balancing exercise to enable economic participation of consumers, while being mindful of their financial wellness. Accordingly, consumer credit policy in terms of the NCA ensures that consumers are afforded certain rights to try to manage this balance (Ch 4, Part A of the NCA). For example, the NCA provides consumers with the right to: (i) apply for credit (s 60 of the NCA); (ii) be protected from discrimination regarding credit (s 61 of the NCA); (iii) be provided with reasons when credit is refused (s 62 of the NCA); (iv) have information provided to them in an official language (s 63 of the NCA); (v) be provided with information in plain and understandable language (s 64 of the NCA); receive documents (s 65 of the NCA); and have their consumer credit rights protected (s 66 of the NCA). Furthermore, the NCA actively seeks to guard the financial wellness of consumers by regulating over-indebtedness and reckless credit (Ch 4, Part D of the NCA). Contravention of these rights and regulatory measures would constitute a few examples of prohibited conduct in terms of the NCA.

The CPA, by contrast, applies to all transactions that are concluded in South Africa, subject to certain exceptions (s 5 of the CPA; see also definition of "transaction" in s 1 of the CPA). For instance, the CPA expressly does not apply to credit agreements regulated under the NCA (s 5(2)(*d*) of the CPA). However, goods and services that are a component of the credit agreement are not excluded from the CPA's scope (see also Stoop "The Overlap Between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A Comparison with Australian Law" 2014 77 *THRHR* 135–144).

In contrast to the NCA's specific objective of protecting consumers in the limited context of credit agreements, the CPA seeks to ensure that the socio-economic welfare of consumers as a whole is promoted and advanced through various means (s 3 of the CPA). The CPA further affords consumers an array of rights, which are there to protect broadly consumers entering into transactions to which the CPA applies. These include the consumer's right to equality within the consumer market (Ch 2, Part A of the CPA); privacy (Ch 2, Part B of the CPA); choice (Ch 2, Part C of the CPA); disclosure and information (Ch 2, Part D of the CPA); marketing that is fair and responsible (Ch 2, Part E of the CPA); dealings that are fair and honest (Ch 2, Part F of the CPA); just, reasonable and fair terms and conditions (Ch 2, Part G of the CPA); and "fair value, good quality and safety" (Ch 2, Part H of the CPA). A duty is also placed on the supplier to be accountable to consumers (Ch 2, Part I of the CPA).

The interpretation provisions of both the CPA and the NCA provide that each statute must be interpreted in a manner that gives effect to its purposes (see s 2(1) of both the NCA and CPA). However, there are clear and critical distinguishing factors between the purposes of the two statutes. In this respect, section 3 of the CPA includes the protection of vulnerable consumers within its purposes (s 3(1)(*b*) of the CPA). This refers to consumers who are low-income persons, those who live in remote areas, those who are minors or seniors, and those who have low literacy, visual impairments or limited fluency in a language, to name a few. The protection of vulnerable consumers is an aspect on which the objectives of the NCA are silent. Linked to this, is the unique provision in the CPA that provides for the "realisation of consumer rights" (s 4 of the CPA). In terms of this unique provision, when matters are brought to the Tribunal or courts under the CPA, the common law must be developed as may be required in order to ensure that the realisation of consumer rights is improved, particularly for the benefit of vulnerable consumers (s 4(2)(*a*) of the CPA). Furthermore, in instances where a provision is potentially ambiguous, the Tribunal or court must "prefer a meaning that best promotes the spirit and purposes of [the CPA] and will best improve the realisation and enjoyment of consumer rights generally, and in particular [vulnerable consumers]" (s 4(3) of the CPA).

What is evident from assessing the scope and objectives of the respective statutes is that what will be considered as prohibited conduct under the two statutes is fundamentally different in nature, given that the NCA specifically regulates credit agreements concluded at arm's length, while the regulation of the CPA is broader and expressly excludes credit agreements. This reinforces the *obiter* remark made in *Winter v Kove Empire CC* (*supra*). The significance of distinguishing between the nature of the prohibited conduct that is regulated by each Act respectively is that it illustrates that the contexts of the two statutes are not the same. This is further emphasised by the key differences in the purposes and mandates of the two statutes, as highlighted above. Therefore, since the High Court did not expressly make a finding on section 116(1) of the CPA, the interpretation of section 166(1) of the NCA cannot simply be transplanted to prescription matters under the CPA. While both statutes protect consumers, the scope of application, rights, prohibited conduct and purposes of the two statutes is not identical. This distinction sets the foundation to the differing contexts of the two statutes, which is a tenet of statutory interpretation and is elaborated upon in further detail below (see heading 4 4).

4 2 Establishment and powers of the Tribunal

The Tribunal was established under section 26 of the NCA as a juristic person with jurisdiction over matters throughout South Africa. In terms of this section, it is a tribunal of record, and it is required to exercise its functions in terms of the NCA and any other applicable legislation, which would include the CPA. In terms of section 27 of the NCA, the functions of the Tribunal are to adjudicate any matters, grant cost orders and exercise powers that are conferred on it by law. This is in respect of both the NCA and the CPA. Section 150 of the NCA makes provision for the orders that the Tribunal can make. In this regard, the Tribunal can make an order that is considered to be appropriate in terms of the NCA and the CPA, including: declaring conduct as being prohibited under the NCA; issuing an interdict regarding prohibited conduct; imposing administrative fines; confirming a consent agreement as an order of the Tribunal, in respect of both the NCA or the CPA; cancelling the registration of a registrant; requiring that consumers be refunded any excess amounts charged, including interest; and any other order that might be appropriate to give effect to a right under the NCA and the CPA.

The CPA further elaborates on the role and function of the Tribunal. In terms of section 4 of the CPA, the Tribunal and courts are required to ensure that the spirit and objectives of the CPA are promoted (s 4(2)(*b*)(i) of the CPA). These forums are further required to make the appropriate orders to give practical effect to the right to access redress. This can be in the form of an order that is provided for in terms of the CPA, and – more importantly – innovative orders that give effect to the realisation of consumer rights under the CPA (s 4(2)(*b*)(ii) of the CPA). The term "innovative order" is not defined in the CPA. The ordinary meaning of "innovative" is "to make changes in something already existing, as by introducing new methods, ideas or products" (Pearsall (ed) *The Concise Oxford Dictionary* 10ed (1999) 730). Therefore, an innovative order can be understood to be an order that includes the introduction of a new approach, which might even require a level of creativity on the part of the court or the Tribunal, while maintaining the necessary alignment with the purpose and context of the CPA.

An apt case to consider in this context is *Vousvoukis v Queen Ace cc t/a Ace Motors* (2016 (3) SA 188 (ESG)). In this matter, the court considered the application of the power to make innovative orders in the context of section 56(2) of the CPA, which provides for a six-month limitation period when returning goods under its provisions. The relevance of a case of this nature is that a provision-specific time limit has a similar effect to a prescription clause in the statute as it prevents the applicant concerned from enforcing a right before the relevant forum. Accordingly, in the *Vousvoukis v Queen Ace* matter, the court held that section 56(2) is not ambiguous, and it is thus not possible for the court to extend the period under the guise of making an "innovative order". The court's finding was that

> "[a]ny innovative order made under s 56(2) must be made within the constraints of the legislation and cannot afford a consumer more rights than those specifically provided to them by the Act." (*Vousvoukis v Queen Ace supra* par 110)

Naude and De Stadler rightfully disagree with the court's finding in *Vousvoukis v Queen Ace*. The authors argue that it is not relevant whether or not section 56 is ambiguous. Instead, the issue is primarily that section 55(2)(*c*) of the CPA creates a right without providing a corresponding remedy (Naude and De Stadler "'Innovative Orders' under the South African Consumer Protection Act 68 of 2008" 2019 22 *Potchefstroom Electronic Law Journal* 2 6). In this regard, section 55(2)(*c*) of the Act provides that the consumer has the right to receive goods that "will be useable and durable for a *reasonable period of time*" (own emphasis) considering the ordinary use of the goods and the circumstances surrounding the supply thereof. The authors argue that the court did not properly consider arguments regarding whether certain goods could reasonably be expected to last longer than six months. Accordingly, granting a remedy that goes beyond six months would still be considered as being within the constraints of the CPA, given the lack of a sufficient remedy to enforce section 55(2)(*c*). The authors further support their argument with reference to an advisory note of the Consumer Goods and Services Ombud (CGSO) that rejected the finding in *Vousvoukis v Queen Ace.* In this regard, the CGSO argued that

> "this sub-section is arguably ambiguous by emphasising the words 'at the direction of the consumer' in section 56(2). The [CGSO] 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." (Naude and De Stadler 2019 *PELJ* 7 footnotes omitted)

There is indeed room for an ambiguous meaning to this provision. To further support the above arguments, it is submitted that the authors' approach is validated by sections 2(1) and 4(3) of the CPA. In this regard, section 2(1) provides that the Act must be interpreted in a way that enforces the purposes of the Act as set out in section 3. This includes protecting vulnerable consumers and protecting consumers from trade practices that are "unreasonable, unfair and unjust" (s 3(1)(*b*) and (*d*)(i) of the CPA). In addition, section 4(3) of the Act provides that where there is ambiguity in a provision, as is argued by the CGSO, then the court considering the matter must prefer a meaning that best promotes the objectives of the Act and that protects the rights of vulnerable consumers (see also discussion under heading 4 above).

Sections 55 and 56 of the Act provide for a consumer's right to safe goods of good quality and an implied warranty of quality respectively. These are both provisions that broadly protect vulnerable consumers and also ensure that consumers are not subject to unreasonable or unfair practices. Accordingly, the narrow interpretation adopted in *Vousvoukis v Queen Ace* (*supra*) is not properly aligned with sections 2(1) and 4(3) of the Act.

In the context of section 116 of the Act, Naude and De Stadler argue with merit that providing an innovative order in the context of prescription under section 116 of the CPA would be an instance where "the Act is arguably ambiguous and policy considerations cry out for an innovative order" (see Naude and De Stadler 2019 *PELJ* 10–16). While the NCA provides the Tribunal with the power to make an appropriate order required to give effect to a right under either statute, it is critical to note that the nature of the Tribunal's power in the context of the CPA is more flexible. The Tribunal and court are permitted to exercise this flexibility to ensure that the consumer's right to access redress is achieved. However, the innovative-order remedy is not available under the NCA. The implication is that the running of prescription ought to be suspended using this innovative order for only CPA matters, particularly in instances where matters are in the process of being resolved by ADR agents or the National Consumer Commission (Commission), as the case may be. An exercise of this power by the Tribunal would not be *ultra vires* in the context of the CPA. What follows is a discussion of the enforcement process under the CPA, which often results in delays for the consumer. This is contrasted to the ADR process provided for under the NCA.

4 3 The enforcement processes

The enforcement process provided for in section 69 of the CPA is not particularly clear (see Du Plessis "Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: The Watchdog's Failure to Support an Accredited Industry Ombud – Alternative Suggestions" 2022 33 *Stellenbosch Law Review* 230 231). A consumer seeking to resolve a dispute may refer the matter directly to the Tribunal where a direct referral is permissible (ss 69(*a*) and 75(1) of the CPA, but the latter provision also provides for direct referral to the consumer court). In instances where the supplier falls within the jurisdiction of a statutory ombud, then the matter should be referred to an ombud with jurisdiction (s 69(*b*) of the CPA). Where there is no such ombud with jurisdiction, then there are four options available to the consumer, namely: (i) a referral to the applicable industry ombud; (ii) an application before a consumer court in a province with jurisdiction over the matter; (iii) a referral of the matter to an ADR agent; or (iv) bringing the complaint before the Commission (s 69(c) of the CPA). The ordinary courts may be approached only once all the other remedies that are available under national legislation have been exhausted (s 69(*d*) of the CPA).

As is evident from the examples provided in the Tribunal judgments below, what often happens in the context of the CPA enforcement process is that "the consumer may be sent from pillar to post and may have an interest in eventually getting a ruling from the [Tribunal] or a court" (Naude and De Stadler 2019 *PELJ* 11–12). Another pertinent issue faced by consumers is that they are required to follow this specialised enforcement framework laid out by the CPA; however, "[a]ll 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" (Naude and De Stadler 2019 *PELJ* 12).

In contrast, the NCA sets out its ADR procedure in section 134 of the NCA. This provision applies in instances other than debt-enforcement matters. Insofar as "credit-related disputes" or disputes arising from allegations of reckless-credit agreements are concerned, section 134(1) of the NCA provides that an ombud with jurisdiction, a consumer court or an ADR agent are forums that may be approached as an alternative to the NCR. Matters or disputes regarding reckless-credit matters may be directed towards an ombud with jurisdiction where the credit provider is a financial institution as contemplated in the Financial Sector Regulation Act (9 of 2017) (s 134(1)(*a*) of the NCA). Where the credit provider is not a financial institution in terms of that Act, then the matter can be referred either to the consumer court or an ADR agent (s 134(1)(*b*) of the NCA). However, where the respondent in the referred matter provides a written objection to such referral, then the matter cannot be resolved by the ADR agent (s 134(2)(*a*) of the NCA). In such an instance, the matter is deemed to have been filed as a complaint with either the NCR under section 136 of the NCA or an application to the Tribunal under section 137 of the NCA, if it is considered to be a matter that is within the scope of either forum (s 134(2)(*b*) and (*c*) of the NCA). Where the Tribunal considers a deemed application of this nature and finds that it is a matter that could have been resolved by following a good-faith process of conciliation, mediation or arbitration, then an exceptional costs order can be made against the respondent (s 134(3) of the NCA). Providing for an objection system, along with consequences for an objection made by the respondent in bad faith, is an aspect that is not incorporated into the CPA's ADR provisions. This arguably prolongs the process for consumers lodging claims in terms of the CPA, as respondents often ignore the ADR agent's processes (see Du Plessis 2022 *Stellenbosch Law Review* 231). It is submitted that making provision for similar objection processes under the CPA might circumvent the delays experienced by consumers. It is further submitted that a deemed referral system would be beneficial to the consumer, as a consumer who is subject to a deemed application is able to make a direct application to the Tribunal (rule 9(3) of the Tribunal rules). In the CPA context, if a matter is unresolved by an ADR agent, the consumer would still need to bring the matter before the Commission, whereafter an application to the Tribunal or consumer court can only be made if the

Commission issues a notice of non-referral (ss 70(1) and 75(1)). This is an additional step that the consumer needs to take in the dispute-resolution process under the CPA, taking time and affecting the running of prescription. It is thus another important distinction to highlight between the dispute-resolution processes under the CPA and NCA respectively.

In any dispute between credit providers and consumers, an attempt must be made, by either the credit provider or the consumer, to resolve the matter themselves, prior to approaching the Tribunal (s 134(4)(*a*) of the NCA). If they are not able to resolve the matter themselves, then the matter should be referred either to an ombud with jurisdiction (where the credit provider is a financial institution under the Financial Sector Regulation Act 9 of 2017) (s 134(4)(*b*)(i) of the NCA); or a consumer court or an ADR agent (where the credit provider is not a financial institution in terms of the Financial Sector Regulation Act 9 of 2017) (s 134(4)(*b*)(ii) of the NCA). Should the ADR agent be of the view that either party is not a good-faith participant in the process or that there is no reasonable prospect of resolving the dispute between the parties, then it can issue a certificate stating that the process has not been successful (s 134(5) of the NCA). This opens the door for the consumer or credit provider to approach the Tribunal under the NCA under section 137(3). Again, a consideration of this nature, particularly the *bona fides* of the parties, is not available in terms of the CPA.

Finally, both the CPA and the NCA provide for instances where matters can be referred directly to the Tribunal – in terms of section 141 of the NCA and section 75 of the CPA. The NCA provides that once a notice of non-referral is issued by the NCR, the complainant, with leave, may refer the matter directly to the consumer court or the Tribunal (s 141(1) of the NCA). This is applicable in respect of all matters other than those concerning offences under the Act or complaints under section 61 of the NCA, which deals with protection against discrimination in respect of credit. Similarly, the CPA allows a complainant to refer a matter to the consumer court or the Tribunal once the Commission has issued a notice of non-referral. This applies in all instances other than when section 116 applies (s 75(1) of the CPA). Therefore, it is evident that the prescription provisions under the two statutes are treated differently. While section 166 of the NCA is not an express ground for preventing referral to the Tribunal in credit-agreement matters, section 116 is such a ground under the CPA.

From the ADR process prescribed under Part A of Chapter 7 of the NCA, as referred to above, it is notable that the NCA makes provision for the shortening of the ADR process where there is either an objection to, or bad-faith participation in, the ADR process, and where there is no reasonable prospect of resolving the dispute between the parties. The ADR process under the NCA also makes provision for deemed referrals as discussed above, which is significant as a consumer under the NCA can move an unresolved matter from ADR directly to the Tribunal, whereas a consumer under the CPA must still approach the Commission before referring a matter to the Tribunal or consumer court. The additional step in the CPA dispute-resolution process potentially places the consumer enforcing a matter under the CPA in a more prejudiced position from a prescription perspective, as each of these forums takes time. The NCA also makes provision for an exceptional costs order where the Tribunal finds that a deemed application before it could have been resolved by following a good-faith process of conciliation, mediation or arbitration; such a deterrent is not available under the CPA. Lastly, a consumer under the NCA is not expressly precluded from making a direct referral owing to the prescription provision of the NCA, while the opposite is true for a consumer enforcing a right under the CPA. Therefore, consumers enforcing their rights under the CPA and the NCA respectively are not in exactly the same position.

4 4 Adverse impact of Ludick on CPA prescription matters

Adoption of the *Ludick* interpretation in the context of section 116(1) of the CPA has broadly had an adverse impact on consumers seeking to enforce their rights under the CPA. Post-*Ludick*, consumers have found relief from the restrictive interpretation only "in a case of a course of conduct or continuing practice" as contemplated in section 116(1)(*b*). In such instances, prescription would only begin to run once the conduct or practice has ceased (see *Winter v Kove Empire CC supra* par 74). However, in many cases that reach the Tribunal, consumers have not found themselves on the receiving end of a favourable interpretation of section 116(1) of the CPA, and a strict interpretation has deprived them of their right to access the Tribunal although they followed the dispute-resolution process prescribed by section 69 of the CPA (see, for e.g., *Shabangu v RSM Auto CC* [2022] ZANCT 10 par 15; *National Consumer Commission v Jida Auto Investments (Pty) Ltd t/a Auto Elegance* [2022] ZANCT 12 par 27; *Mthembu v Boundlesstrade 11 (Pty) Ltd t/a Jaguar Land Rover Waterford* [2023] ZANCT 3 par 19; *Kennedy Winmac Service Centre CC* [2022] ZANCT 36 par 20–21).

The matter of *Auto Brokers* pertained to a faulty vehicle that was purchased by the consumer on 19 December 2016. The car had an oil leak and made a crackling sound (*NCC v Auto Brokers supra* par 8). The leak was seemingly repaired by the respondent, but the noise worsened, and the respondent refused to fix the vehicle (*NCC v Auto Brokers supra* par 10). On 13 July 2017, a complaint was lodged with the Motor Industry Ombudsman of South Africa (MIOSA). However, the respondent was not responsive, which led to the file being closed on 6 June 2018 (*NCC v Auto Brokers supra* par 12). The consumer then referred a complaint to the Commission for investigation. As the respondent also did not cooperate with the Commission in that process, the matter was referred to the Tribunal in November 2022 (*NCC v Auto Brokers supra* par 14). The Tribunal asked the consumer to address the issue of prescription as the cause of the complaint arose more than three years before the referral to the Tribunal was made (*NCC v Auto Brokers supra* par 16). The Tribunal, bearing in mind the decision in *Ludick*, was of the view that the matter should have been referred to it by 19 December 2019 (*NCC v Auto Brokers supra* par 19). This is despite the fact that, for at least two of the three years, the matter sat with an accredited industry ombud – namely, MIOSA – and the Commission. The Tribunal was also not convinced that the Commission (being the applicant in this matter) had “vigorously [pursued] its submission that the Tribunal should exercise its discretion by considering the purposes of the CPA and the time the complaint lay with the Ombud.” It was of the view that the Commission’s submissions were just “bald statements” that lacked merit (*NCC v Auto Brokers supra* par 21).

In another matter, the Tribunal in *Mphasane v Afropulse 145 (Pty) Ltd* ([2022] ZANCT 46) dealt with a matter in which the consumer had a very expensive kitchen door installed in June 2016. However, this kitchen door leaked every time it rained from September 2016 (*Mphasane v Afropulse supra* par 4). The respondent had seemingly tried to repair the door, but unsuccessfully (*Mphasane v Afropulse supra* par 4). On 22 June 2018, after lodging a complaint with the Consumer Goods and Services Ombud (CGSO), the consumer received a response that the respondent no longer wished to cooperate. Therefore, the CGSO could not assist (*Mphasane v Afropulse supra* par 5). The consumer lodged a complaint with the Commission on 28 August 2018 (*Mphasane v Afropulse supra* par 5). Only on 6 April 2022 did she receive a notice of non-referral from the Commission, indicating that her claim had lapsed (*Mphasane v Afropulse supra* par 5). This was despite the fact that the consumer had referred her complaint to the Commission within the three-year period. The Commission took almost four years to provide her with a non-referral notice on the basis of the matter having prescribed. The Tribunal nevertheless referred to *Ludick* to support its finding that the Tribunal does not have the power to extend the three-year period (*Mphasane v Afropulse supra* par 20).

It is evident from the above judgments that the strict interpretation of *Ludick* has placed consumers who lodge complaints in terms of the CPA in a very precarious position.

The question arising is whether the interpretation applied to section 116(1) of the CPA following *Ludick* is a reasonable and sensible interpretation. The court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 592 (SCA) par 18) indicated:

> “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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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." (footnotes omitted)

Furthermore, the Constitutional Court in *Cool Ideas 1186 CC v Hubbard* ([2014] ZACC 16 par 28) stated:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)." (footnotes omitted)

Thus, the process to be applied when objectively interpreting a provision involves an analysis of the language used; the context of the provision; its purpose; and an interpretation that preserves constitutional validity. The provision interpreted by the court in *Ludick* was section 166(1) of the NCA. Exactly the same language is used in section 116(1) of the CPA. However, given the nature of the prohibited conduct, the powers of the Tribunal when considering a matter under the CPA, and the structure of the enforcement system under the CPA, the context in which each provision will apply is not the same.

As established above, the court in *Ludick* held that the previous interpretation of section 166(1) of the NCA by the Tribunal that allowed for interruption of prescription was incorrect, considering the wording of the provision (par 28). Without delving deeply into the appropriateness of the interpretation process adopted by the High Court in *Ludick* in the NCA context, it is apparent that a more holistic interpretation of provisions such as section 166(1) of the NCA should have been undertaken. Nonetheless, this note's focus is on the effect of *Ludick* on the Tribunal's subsequent interpretation of section 116(1) of the CPA. In this regard, it is submitted that the interpretation that has been transposed from *Ludick* to section 116(1) of the CPA is not suitable. It focuses on the plain language used in the provision and fails to adopt a more unitary approach that takes into account the broader context and purpose of the provision (*Independent Community Pharmacy Association v Clicks Group Ltd* [2023] ZACC 10 par 238; *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20 par 52).

In the CPA context, the application of the interpretation adopted in *Ludick* regarding prescription has translated into a loss of access to redress for consumers, even in instances where the delay is an aspect that is not within the consumer's control (see, for e.g., *NCC v Auto Brokers supra* and *Mphasane v Afropulse supra* as discussed above). Logic dictates that a consumer should not be prejudiced for following the enforcement process that is prescribed by the CPA itself. Such an interpretation is counter-intuitive, leads to unbusinesslike results and undermines the objectives of the CPA. The purpose of section 116(1) of the CPA is to ensure that there is legal certainty insofar as the period within which a claim can be pursued is concerned (Van Heerden "Chapter 6: Enforcement of Act" in Naude *et al* "Commentary on the Consumer Protection Act" (Revision service 9, 2023) 116–1; see also Scott *Realisation of Rights in Terms of the Consumer Protection Act 68 of 2008* (doctoral thesis, University of South Africa) 2018 108). However, considering the CPA's purpose, the additional powers of the Tribunal and the dispute-resolution process under the CPA as discussed above, a unitary interpretation should have been applied to section 116(1) of the CPA. This would also preserve the constitutional validity of the provision.

4 5 A constitutionally-aligned interpretation of section 116(1) of the CPA

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of South Africa and all laws must be consistent with it (s 2 of the Constitution). Section 39(2) of the Constitution provides that in the interpretation of any legislation, all courts, tribunals and forums must ensure that "the spirit, purport and objects of the Bill of Rights" are promoted. The key provision of the Bill of Rights when considering section 116(1) of the CPA is section 34 of the Constitution, which provides for the right to access courts. In this regard, section 34 provides:

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

While the post-*Ludick* interpretation of section 116(1) of the CPA has led to an undue limitation of the consumer's right to access the Tribunal, the section can be interpreted in a manner that promotes the purpose of the Bill of Rights. As a point of departure, the right to access courts, including the Tribunal, is supported by the CPA's objective to ensure that consumers are provided with "a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions" (s 3(1)(*g*) of the CPA). Insofar as section 116(1) of the CPA is concerned, the two forums that a consumer may be deprived of accessing owing to the effluxion of time are the Tribunal and the consumer court. The Tribunal judgments cited and referred to in this note are examples of how consumers enforcing their rights under the CPA have been deprived of their access to the Tribunal in particular (*NCC v Auto Brokers supra*; *Mphasane v Afropulse supra*; see also *Shabangu v RSM Auto CC supra*; *NCC v Jida Auto Investments supra*; *Mthembu v Boundlesstrade 11 (Pty) Ltd supra*).

It is not disputed that the purpose of the limitation imposed by section 116(1) of the CPA is to ensure legal certainty. This is critical in the context of transactions between suppliers and consumers. The limitation ensures that claims are not brought by consumers against suppliers after prolonged periods when recollection or supporting documents in relation to the transaction might no longer be clear or accessible (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) par 11). However, this necessity must be balanced against the constitutional right of all persons (including consumers) to access courts, which includes tribunals.

The post-*Ludick* interpretation of section 116(1) of the CPA has had the effect of depriving consumers of their right to access the Tribunal, even where they have followed the channels prescribed under the CPA itself (see discussion of *NCC v Auto Brokers supra*; and *Mphasane v Afropulse supra*). The result is preposterous as consumers are essentially prejudiced for following the enforcement framework that is set out in section 69 of the CPA (see also Naude and De Stadler 2019 *PELJ* 11–12). This undermines the specialised ADR interventions provided for under section 69 of the CPA, as well as the rights afforded to consumers under the CPA.

While the Tribunal cannot be expected to act outside of the scope of the CPA, the power of the Tribunal to make innovative orders provides it with the authority to remedy the ambiguous results of the post-*Ludick* interpretation of section 116(1) of the CPA (see Naude and De Stadler 2019 *PELJ* 10–12). This is also a remedy that is only available under the CPA and not the NCA (see discussion under heading 4 2) Provision can be made for the interruption or suspension of prescription, particularly in matters where the consumer has approached the forums contemplated in section 69 of the CPA. Such an approach is aligned with the CPA's purpose and context (see discussion under heading 4 1). As mentioned, this approach was followed by the Tribunal prior to *Ludick.* The Tribunal would also be acting within its powers under the CPA, to the extent that it considers this step to be an innovative order. Such an approach would ensure that the purpose of maintaining legal certainty is achieved, without undermining the objectives of the CPA or the section-34 right to access courts in terms of the Constitution (s 39(2) of the Constitution).

Accordingly, the pre-*Ludick* approach by the Tribunal is preferable and within the scope of the CPA, to the extent that the Tribunal expressly indicates that it is making an innovative order. This would save the provision from potentially being considered unconstitutional.

5 Concluding remarks

The *Ludick* decision has clearly had an adverse impact on the rights of consumers under the CPA. Given the distinction in the nature of the prohibited conduct regulated by the NCA and the CPA respectively, the section-69 dispute-resolution process of the CPA, and the extended powers of the Tribunal in the context of the CPA, it is submitted that superimposing the *Ludick* interpretation of section 166(1) of the NCA, onto section 116(1) of the CPA is a flawed approach that ought to be urgently revisited. This interpretation should also be in alignment with the Constitution to ensure that consumers are not deprived of access to courts (particularly the Tribunal for purposes of this note). The post-*Ludick* interpretation of section 116(1) of the CPA unnecessarily "ties the hands" of the Tribunal and prevents it from protecting the interests of consumers.

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