



NATIONAL CONSUMER COMMISSION

a member of **the dti** group

Keynote address by Commissioner Ebrahim Mohamed
at the occasion of the Discussion Roundtable on the State of Consumer
Protection in South Africa

held at Elangeni Hotel, 63 Snell Parade, North Beach, Durban

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Programme director, Ms Thezi Mabuza

Deputy Director-General of the Department of Economic Development, Tourism and Environmental Affairs, Mr Mduduzi Mfusi;

Head of Business Support, Markets and Tourism Unit of eThekweni Metropolitan Municipality, Mr Thulani Nzama;

Chairperson of the National Consumer Tribunal, Professor Joe Maseko, and tribunal members present;

Chief Executive Officer of the Durban Chamber of Commerce and Industry, Ms Palesa Phili;

Chief Executive Officer of the National Regulator for Compulsory Specifications, Mr Edward Mamadise;

Ombudsman for the Consumer Goods and Services Industry, Ms Magauta Mphahlele;

Government officials present;

Distinguished guests;

Ladies and gentlemen;

Sanibonani, Good afternoon.

Thank you for the opportunity to address this noble gathering on what is probably the most important day on the calendar for the National Consumer Commission, and many of you present here today. World Consumer Rights Day is an important day in the lives of consumers, and is commemorated worldwide on 15 March, to promote the basic rights of consumers.

Programme director;

Allow me thus to wish all delegates and guests present, a happy World Consumer Rights Day! Today is a day of celebration and excitement. It is also a day of reflection and frank discussion to ensure that we commit ourselves to continue advancing consumer protection, and emerge stronger and better than before. I also wish to make use of this opportunity to commend and thank the organisers of this week-long programme and particularly today's event, for their passion, hard work and commitment towards protection of consumers in South Africa. As a soon to-be-retired advocate of consumer and human rights protection, it is comforting to know that we have inspired and created a large pool of dedicated protégé to hand our batons over to.

In giving a broad overview of where we come from as a country in terms of consumer protection, I'd like to quote from the commentary on the Consumer Protection Act where the historic journey of consumer protection in South Africa is captured aptly. It reads as follows:

“When the focus in the world economy moved from a production-orientated viewpoint to a consumer-orientated viewpoint in the second half of the twentieth century, consumer protection law developed in most western economies. This development largely passed South

Africa by, with the result that even at the beginning of the twenty-first century, consumer protection law in South Africa consisted mainly of a patchwork of outdated and ineffective laws, limited to a few small areas, such as credit agreements, usury, price control, insurance agreements, promotional competitions and unfair business practices.”

In further describing the consumer protection landscape that existed then, the authors of the commentary state that:

“Apart from some common-law rules protecting consumers against latent defects in goods, which could be limited or excluded by contract in any event, there was very little protection against poor quality or dangerous goods and services, unfair contract terms, unfair or irresponsible marketing practices, unfair discrimination in the marketplace, the consumer’s right to choose, protection against unfair direct marketing practices, the provision of insufficient information on products and services and actions detrimental to the right to fair and honest dealing.”

That, ladies and gentlemen, sums up where we were.

Bearing in mind that every citizen of the Republic of South Africa is a consumer, it is important to assess the progress made by the South African Government insofar as its obligations relate to the protection of consumer rights.

In terms of Section 41 of the Constitution, read with Schedule 4 thereof, consumer protection is an area of concurrent jurisdiction. Put differently, it is an area that falls within the competencies of both National and Provincial government. In drafting the Consumer Protection Act, research established that there were 70 pieces of legislation that govern various aspects of consumer protection. 23 were mainly administered by **the dti**, and the rest by the Departments of Health, Agriculture, Justice, Transport and Finance. A few were spread between the departments of Environmental Affairs, Minerals and Energy, Water affairs and Communications. Almost 50% of these laws predated 1994 with some going back as far as 1947. The CPA sought to repeal a number of laws and consolidate consumer protection law. Government has done very well in the area of consumer protection. In enacting the CPA, provision was made for the establishment of the National Consumer Commission.

Over and above that, the South African Government has also ensured the existence and or establishment of various consumer protection bodies, these include, amongst others, the nine provincial consumer protection authorities, 5 of which have their own consumer protection courts. Aside from the provincial consumer protection authorities there are various sector regulators. The sector regulators would include, amongst others, the Independent Communications Authority (ICASA); The Estate Agency Affairs Board; The National Home Builders Registration Council; The Private Security Industry Association; National Credit Regulator; Competition Commission; National Regulator for Compulsory Specifications and the POPI regulator. The South African government has also established adjudicators for pension and general consumer related disputes- namely, the Pensions Adjudicator and the National Consumer Tribunal. Most recently, the Financial Sector Regulation Act was signed into law in August 2017. This act aims to establish a new regulatory architecture for the financial sector in SA, moving towards a twin peaks model of regulation.

What is clear, is that whilst consumer protection is less fragmented, it however still remains fragmented, and regrettably this tends to confuse consumers, ordinary sophisticated ones. In order to alleviate the confusion, the dti, the NCT, NCR and the NCC are working together on establishing a national contact centre for consumers, which would serve as one entry point for complaints. Details thereof will be disclosed in the near future.

The NCC as you would know, is charged with the responsibility to enforce and carry out the functions assigned to it in terms of the CPA. The CPA seeks to promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose, to establish national norms and standards relating to consumer protection. It further seeks to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour and to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements. When it comes to redress, in terms of the CPA, which is rights based, the CPA applies to most transactions in the ordinary course of business that involves the promotion of goods and services.

The CPA is intended to provide a general default regime of consumer protection but it does not displace or over-ride more specific schemes of consumer protection established in terms of any industry-specific law. Very importantly, in case of a conflict between CPA and any other law protecting consumers, the laws are to be enforced concurrently, as far as possible, and beyond that, the CPA provides that the greater degree of protection for consumers is to prevail. The CPA expands on and is conceptually linked to both the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act. It protects communities, districts, market segments or populations from being unfairly discriminated against with regards to access to goods or services of different quality or pricing. It contains a general prohibition against unfair discrimination (as defined in the Constitution) when transacting, and recognises long-standing and widely accepted commercial practices that allow differential treatment of consumers of a particular sex, age or gender if the conduct is reasonable. The equality court has exclusive jurisdiction to adjudicate contraventions of this part. With regard to consumers' right to privacy, the CPA includes the right to accept, refuse or block any approach for the purpose of direct marketing, provided that a national Opt-Out register is in place. Minister has prescribed certain days and times during which direct marketing to consumers are prohibited.

Consumers have the right to choose, which is aimed at assisting consumers to select goods or services on the basis of having examined such goods and having compared prices. To this end suppliers are generally prohibited from bundling goods or services.

Consumers now have the right to cancel a fixed-term agreement and the rights of suppliers to impose cancellation charges are limited. Rules governing the expiry of such agreements are stipulated.

Consumers have the Right to disclosure and information. This is to ensure that consumers understand the terms and conditions of the transactions or agreements they enter in to, and

are able to make informed choices about the products and services they want to consume. It is compulsory to display prices and trade descriptions that are not be misleading;

Consumers have the right to fair and responsible marketing. This has been included in the CPA to restrain or correct the worst abuses in the area of marketing of goods or services. Here, the CPA introduces or re-enacts a number of provisions to address standards for fair and responsible marketing and provides a general prohibition against marketing that is misleading, fraudulent or deceptive including bait marketing, negative options and referral selling.

Consumers have the right to an honest and fair dealing. The CPA prohibits unconscionable conduct, force, coercion, undue influence, pressure or harassment, unfair tactics or conduct. A supplier is prohibited from making false, misleading or deceptive representations and certain fraudulent schemes and offers, pyramid and related schemes are prohibited. The CPA tries to ensure fairness in auctions, and deals with issues of overselling and overbooking.

Consumers have the right to fair, just and reasonable terms and conditions. The CPA attempted to codify and improve on the common law by addressing unfair contract terms and provide consumers with remedies in the event of breach. It also attempted to deal with terms and conditions that seek to limit the supplier's liability.

I believe most of you, if not all heard or read last year about the recall of processed meat products from the market place, following the deaths of just under 200 consumers. Likewise you may have heard or read of the recall of a certain make of motor vehicle, which had the propensity to catch fire from time-to-time. Such recalls are now possible as consumers have the right to fair value, good quality and safety. The intention of this right is to promote the safety of consumers and to establish a regime of product liability, irrespective of negligence on the part of anyone in the supply chain. Provision is made for consumers to receive goods that are of good quality and free from defects and that are reasonably suitable for its intended purpose.

Suppliers are now accountable to consumers for any money or other property belonging to the consumer, including advance payments. When a consumer receives defective goods, then the three R's become applicable. That being Refund, Repair or Replacement.

The CPA makes it clear that the NCC must promote the resolution of consumer complaints but that it is not responsible for intervening directly therein. This means that the NCC is not expected to be involved in the conciliation or mediation of disputes between consumers and suppliers unless the parties consent to a settlement of the dispute during the course of an investigation. Ordinarily, disputes amongst consumers and suppliers, if not resolved amongst themselves, should be dealt with by provincial consumer protection authorities and the ombud schemes accredited by Minister. To this end, the NCC resolved to promote the establishment of quick and cost effective redress mechanisms, by agreeing with certain industries and or sectors of industry to establish respective industry ombud schemes to assist in the conciliation and mediation of disputes. Minister has thus far, with the assistance of the NCC, accredited the Motor Industry Ombud of South Africa and the Consumer Goods and Services Ombud. These schemes provide conciliation and mediation services to consumers

and suppliers in line with the provisions of the CPA. These schemes are funded by industries, and their services are provided at no cost to the consumers. Thus, the main function of the NCC insofar as complaints are concerned is to conduct investigations against suppliers allegedly engaging in prohibited conduct and to promote the resolution of disputes between consumers and suppliers.

In line with our existing strategy, the NCC, given its limited resources, has accepted that it will be impossible to investigate every single complaint. Moreover, the NCC has come to learn that the vast majority of consumers in lodging complaints, are seeking quick and cost effective redress for their disputes. The CPA encourages consumers and suppliers to first attempt to resolve disputes among themselves prior to referring complaints to either, alternative dispute resolution agents, industry ombud schemes, provincial consumer protection authorities or to the NCC. The NCC is not an alternative dispute resolution agent, as defined in the CPA.

The vast majority of matters dealt with by accredited ombud schemes are settled. Some may be in favour of the supplier and others in favour of the consumer. Some are rejected for falling outside of the jurisdiction of the respective ombud schemes. As a minority, in some cases certain suppliers refuse to cooperate with the ombuds.

The NCC always try to investigate matters that impact significantly on consumers. This does not mean that we will not investigate a complaint if it relates to a low priced appliance. In such event it depends on how many such complaints we've received and whether the complaint trends warrant an intervention. In other words, the NCC is concerned with the impact and the number of consumers involved. This demonstrably ensures the better utilisation of limited resources.

Over the years, the NCC has noted that a vast majority of business, particularly big business, have been largely compliant with the provisions of the CPA. Business compliance is the first and most important step, as consumers then avoid seeking redress outside of the business premises, and business avoids unnecessary risk to its reputation. A significant number of businesses have revised their marketing policies, including policies relating to returns and refunds, pricing, advertising, contracts and so forth. Many have employed dedicated staff that are responsible for customer care, refunds and returns. Some have gone beyond accepting returns of goods that are not defective, and are willing to effect refunds or exchanges without question. Such actions help business to establish customer loyalty and growth. When disputes are not resolved at shop floor level, they are escalated to provincial consumer protection authorities or ombud schemes where the vast majority are resolved amicably. At this juncture, I call upon all suppliers to, big and small, to take the resolution of consumer complaints seriously. I encourage suppliers to delegate this task to designated employees. If matters are resolved directly with the supplier, the matter will not end up in the Tribunal. The NCC, has among its other priorities begun to prioritise matters of suppliers for hearing at the National Consumer Tribunal.

I note with much concern, that the vast majority of provincial consumer protection authorities, are generally under resourced, including being under funded and not well marketed within their respective provinces. Only 5 Provincial Consumer Courts have been

established. In addition to this we find broadly that provincial consumer protection legislation is not aligned with the CPA.

Provincial consumer protection authorities are the closest point of contact to consumers. These offices may issue compliance notices just like the NCC, and can refer a dispute to a consumer court in its locality, for a ruling. Furthermore, provincial consumer authorities may escalate matters of national concern or impact to the NCC, for investigation. Provinces will have to carefully consider their dealings with consumers going forward. They need to boost their capacity to factor in alternative dispute resolution. Respective MEC's need to better consider consumer protection in their provinces. Improved resource allocation, combined with appropriate legislative review must be prioritised.

Local authorities have been, and largely remain a cause of concern for thousands of consumers. Incorrect billing, unfair billing practices, poor service delivery or lack of service delivery has manifested in a significant number of our local authorities. Commendably, some of our metropolitans have established their own ombud schemes to assist in resolving consumer disputes. These should at least become a compulsory unit for all metropolitans in the country.

Tourism is a priority business area for government, yet no dedicated dispute resolution mechanism exists for tourists, both local and international. President Ramaphosa in his maiden State of the Nation Address stated that: "Tourism is another area which provides our country with incredible opportunities to, quite literally, shine. Tourism currently sustains 700,000 direct jobs and is performing better than most other growth sectors. There is no reason why it can't double in size." The NCC is in advanced discussions with the Department of Tourism on the establishment and funding of a dispute resolution mechanism for tourism related complaints. This can have the effect of lending credibility to an industry that takes deposits as security for bookings and sell holiday points to many consumers that can ill afford to sustain the costs associated with having purchased a product that has to endure in perpetuity. The NCC, the dti and the Department of Tourism, has some urgent work to do in the tourism sector.

Very often consumers' expectations far exceed the remedial action contained in the CPA. For example, a consumer of a second hand motor vehicle with a quarter of a million kilometres on its odometer, expects a brand new engine if the car breaks down within the statutory warranty period of 6 months. Similarly, some consumers expect their 5 month old car which they purchased brand new, to be replaced with a brand new car if an insignificant defect arises. Some even seek emotional damages whereas the CPA only provides for either repair, refund or replacement.

Whilst a key role of the NCC is to ensure that consumer rights are protected, it is mindful that the law does not allow consumers to be unduly enriched, at the expense of business. It is true however that Section 61 of the CPA makes provision for the application of a strict liability regime. Any party in the supply chain of a product can be held liable for damages. However, any harm to consumers that arise from the supply of a harmful product must be directly associated with the use of or consumption of the product in question, for consumers to

qualify for damages. Whilst SA has been slow in instituting class actions lawsuits, recent reports indicate that a class action suit has been filed against Tiger Brands. Arising from this I expect other class actions to follow. The product recall associated with this matter highlighted firstly, the lack of a dedicated food regulator in SA and secondly, the fragmentation of food related legislation, which is spread amongst the national Departments of Health, Agriculture as well as Trade and Industry.

Programme director, ladies and gentlemen;

I think in taking consumer protection to the next level due consideration should be given to addressing the issue of fragmentation.

Consideration should be given to the issue of class action lawsuits. This phenomenon is virtually unheard of in South Africa. Members of the legal fraternity should develop an appetite for taking up such cases on behalf of consumers.

The CPA encourages alternative dispute resolution mechanisms as a way of settling consumer disputes. This approach thrives on the human virtues of compassion and humanity. Although it has largely proven to be effective, some businesses have sadly stonewalled the approach.

In our country, given the varying levels of sophistication, socio-economic divide, our history and various other relevant factors of our context, taking consumer protection to the next level in our view as the NCC, should include a genuine commitment from government to allocate sufficient resources to address consumer disputes, and by extension create a ministerial portfolio for consumer protection where consumer protection bodies are combined under a single umbrella. This should go hand-in-glove with establishment of a national contact centre where calls can be directed and complaints be processed. Local government authorities should play an active role in resolving consumer disputes because of their proximity to citizens. The imposition of major fines or imprisonment for contraveners of consumer protection laws could serve as an effective deterrent measure. Also, consideration should be given to establishment of properly constituted and capacitated SADC continental initiatives, such as the Africa Dialogue, where best practices and information on latest developments can be shared among members, for purposes of development.

If ever there was a time to take consumer protection to the next level then that time is now!

I thank you!