

**UNIVERSITY of the  
WESTERN CAPE**

**FACULTY OF LAW**

**FALSE ADVERTISING AND CONSUMER PROTECTION IN SOUTH AFRICA**

Mini-thesis submitted in partial fulfilment of the requirements for the LLM degree in the  
Department of Private Law

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## DECLARATION

I declare that '**False advertising and consumer protection in South Africa**' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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Date: February 2020



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*‘Praise to You Lord, King of Eternal Glory.’* It is only through His grace and mercy that has brought me here to the completion of my LLM degree. It has been a challenging journey but His love has given me the strength to endure and come out successful.

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## KEY WORDS AND PHRASES

Consumer protection

False Advertisement

Code of Advertising Practice

Puffs

*Animo contrahendi*

Self-regulation

Misrepresentation

Injunction

Class actions

Reasonable consumer



## LIST OF ABBREVIATIONS

CPA	Consumer Protection Act 68 of 2008
CAFCOM	Consumer Affairs Committee
ASA	Advertising Standards Authority
USA	United States of America
ARB	Advertising Regulatory Board
NCC	National Consumer Commission
NCA	National Credit Act
FTC	Federal Trade Commission



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## CHAPTER ONE: INTRODUCTION

### 1.1 BACKGROUND TO THE STUDY

Deceptive advertising, which is also known as false advertising, refers to a manufacturer making use of confusing, misleading, or blatantly untrue statements to promote a particular product or service.<sup>1</sup> The phrase ‘false, misleading or deceptive’ was apparently adopted from North American legislation.<sup>2</sup> It is important to begin by defining these key terms that are frequently used in this thesis. A ‘false’ representation means giving wrongful or incorrect information to someone.<sup>3</sup> A ‘misleading’ representation can be defined as one that leads someone astray, or causes someone to have an incorrect impression or belief.<sup>4</sup> A ‘deceptive’ representation is similar to a misleading representation because it is aimed at deceiving the consumer which ultimately leads to the consumer making an error in judgement.<sup>5</sup> These terms are very similar to each other but there are subtle differences between them. Representations are often misleading or deceptive by virtue of it being false. A representation can, however, also be true yet still be misleading or deceptive.<sup>6</sup>

Advertisements are important as they keep consumers up to date or informed on the latest products and services that are available on the market.<sup>7</sup> More importantly proper advertising ensures that consumers make good and informed consumer choices.<sup>8</sup> Consumers rely on advertisements and deceptive information may therefore be detrimental to the consumer who is bound to make ill-informed consumer choices.<sup>9</sup> False advertising has the effect of inducing the consumer to enter into a contract which she or he would not have entered into or would have probably entered into but on different terms.<sup>10</sup>

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<sup>1</sup>‘Deceptive Advertising Definition’ available at <https://www.consumer.laws.com/deceptive-advertising-definition> (accessed on 15 June 2018).

<sup>2</sup> Section 14 of the Ontario Consumer Protection Act 2002.

<sup>3</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 5.

<sup>4</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 5.

<sup>5</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 5.

<sup>6</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 5.

<sup>7</sup> Arora D ‘Why is advertising so important to business?’ available at <https://www.linkedin.com/pulse/why-advertising-so-important-business-diwakar-arora> (accessed on 18 June 2018).

<sup>8</sup> Arora D ‘Why is advertising so important to business?’ available at <https://www.linkedin.com/pulse/why-advertising-so-important-business-diwakar-arora> (accessed on 18 June 2018).

<sup>9</sup> Stoop PN ‘The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts’ (2015) 18 *PELJ* 1099.

<sup>10</sup> Stoop PN ‘The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts’ (2015) 18 *PELJ* 1099.

Marketing and advertising fall within the ambit of the Consumer Protection Act (CPA).<sup>11</sup> The CPA is a comprehensive piece of legislation which introduced substantial consumer protection measures.<sup>12</sup> Before it came into effect on 1 April 2011, there was no comprehensive and consolidated legislation in place which could specifically deal with the issues that consumers were facing.<sup>13</sup> There were a few industry specific measures which dealt with matters such as finance, the control of the sale and manufacture of foodstuffs,<sup>14</sup> trade descriptions on goods and false and misleading advertising.<sup>15</sup> The Unfair Business Practices Act 71 of 1988(Act) provided for the prohibition or the control of unfair business practices.<sup>16</sup> The Act authorised a Consumer Committee (known as CAFCOM) to investigate business practices and report to the Minister of Trade and Industry.<sup>17</sup> This Act has since been repealed and now the CPA as well as regulatory bodies such as the Advertising Standards Authority (ASA) deal with matters relating to false advertising. The CPA is not a full codification of South African consumer law and legislation dealing with advertisement of pharmaceutical medicines as well as certain foodstuffs are outside the scope of this thesis.

One of the aims contained in the Preamble of the CPA is to ‘*protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace.*’<sup>18</sup> Therefore, it is important that consumers are aware and educated about their rights so that they are able to utilise the remedies available to them in terms of the CPA or the other regulatory bodies. The CPA does not preclude a consumer from making use of a right or remedy that the consumer may have under the common law.<sup>19</sup> It is the hope of the author of this study that the examination of this topic it will enhance the research and awareness of false, misleading and deceptive advertising in the marketplace.

## 1.2 PROBLEM STATEMENT

Advertisements surround us every day. Consumers are constantly bombarded with advertising, whether it be in the form of print media, billboards or more recently on social media. Advertisers spend huge amounts of money erecting billboards, and using other kinds of media to attract sales and

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<sup>11</sup> 68 of 2008.

<sup>12</sup> Woker T ‘Why the need for Consumer Protection Legislation? Act’ (2010) 31 *Obiter* 217.

<sup>13</sup> Woker T ‘Why the need for Consumer Protection Legislation? Act’ (2010) 31 *Obiter* 218.

<sup>14</sup> Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972.

<sup>15</sup> Woker T ‘Why the need for Consumer Protection Legislation? Act’ (2010) 31 *Obiter* 219.

<sup>16</sup> Woker T ‘Why the need for Consumer Protection Legislation? Act’ (2010) 31 *Obiter* 219.

<sup>17</sup> Woker T ‘Why the need for Consumer Protection Legislation? Act’ (2010) 31 *Obiter* 220.

<sup>18</sup> Preamble of the Consumer Protection Act 68 of 2008.

<sup>19</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 444.

customers to inform them of their new products and services.<sup>20</sup> In 2016, an estimated R2.1 billion was spent on ‘out-of-home advertising’ in South Africa.<sup>21</sup> This kind of advertising reaches about 85% of the adult population in South Africa.<sup>22</sup> This means that consumers are bombarded with advertising every day as they journey to and from work, and even when they are in bathrooms at shopping centres. Therefore, it becomes increasingly important that the information that is given to consumers is correct and truthful. False advertisements are problematic since they prejudice consumers who not only make ill-informed decisions but who also in the process lose their hard-earned money.

This study analyses false and misleading advertising and the liability of the parties. The following interrelated secondary questions will be addressed:

1. What is the relevant legal framework that govern false advertising in South Africa?
2. What are the redress mechanisms available under the CPA as well as under the common law?
3. Does the CPA extend liability to a supplier who engages in false advertising as well as third parties whose platforms are used by suppliers?
4. Which experiences from the United States of America (USA) may be useful and applicable within the South African context?

### 1.3 PURPOSE AND OBJECTIVE OF THE STUDY

This thesis seeks to examine the legal position with respect to false, misleading and deceptive advertising.

The purpose of this study is therefore to:

- i. critically analyse false advertising and its various forms.
- ii. analyse the relevant legal instruments that govern false advertising in South Africa.
- iii. examine the extent of the liability of suppliers who engage in false advertising as well as the legal position of the third parties whose platforms are used by the suppliers

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<sup>20</sup> Liebenberg S ‘Chapter 11: Out-of-home Advertising’ available at <https://www.pwc.co.za/en/assets/pdf/enm-20120-chapter11.pdf> (accessed on 13 August 2018).

<sup>21</sup> Liebenberg S ‘Chapter 11: Out-of-home Advertising’ available at <https://www.pwc.co.za/en/assets/pdf/enm-20120-chapter11.pdf> (accessed on 13 August 2018). Out-of-home media consists of billboards, street furniture (advertisements on bus tops, trains etc), sports arena displays and captive ad networks.

<sup>22</sup> Liebenberg S ‘Chapter 11: Out-of-home Advertising’ available at <https://www.pwc.co.za/en/assets/pdf/enm-20120-chapter11.pdf> (accessed on 13 August 2018).

#### 1.4 SIGNIFICANCE OF THE STUDY

Advertising forms part of our everyday lives and we are exposed to it all the time whether we realise it consciously or subconsciously. In this modern age of technology and social media, the regulation of advertisements has become an important issue more than ever. Advertising can be very beneficial because a good advertising campaign can help shape or boost a business' public perception thereby creating a sense of brand loyalty amongst consumers and catering to the needs of the consumers.<sup>23</sup> However, the issue arises when advertising is not factual, is misleading and deceitful. Suppliers and businesses make use of advertising in order to persuade consumers into buying their goods or services. The effects that false advertising has on consumers justifies why there is need for consumers to be adequately protected in South Africa. There is a need to ensure that legislative and institutional framework dealing with false, misleading and deceptive representations protect consumers from abuse and exploitation by unscrupulous dealers.

This thesis will add to the knowledge of consumer welfare by ensuring that consumers are aware of their rights and limit the occurrence of false advertising in the media especially in this mass technology era that we currently live in. The proposed solution will engage contractual and constitutional principles within the South African context. The interpretation and application of the CPA will prove important in the future especially in light of the fact that the Act is still relatively new. This study thus aims to enrich South African jurisprudence. This will be done through an analysis of experiences from other jurisdictions such as the USA.

#### 1.5 RESEARCH METHODOLOGY

The thesis is an analytical study that focuses on false advertising in South Africa and other jurisdictions, a desktop methodology will be appropriate. The methodology will involve an analysis of primary sources such as legislation and case law. The secondary sources of law will include journal articles, text books, thesis and internet sources. An international study is critical to improving the interpretation and understanding of South African law. The CPA makes provision for the consideration of foreign and international law when interpreting the Act.<sup>24</sup> The consideration of foreign and international law is also consistent with the Constitution of the Republic of South Africa, 1996 (the constitution).<sup>25</sup> This study therefore focusses at the USA insofar as the regulation of false advertising is concerned. The USA was selected because of its federal and state protection laws that

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<sup>23</sup> McQuerrey M 'The Positive Effects of Advertising' available at <https://www.smallbusiness.chron.com/positive-effects-advertising-24688.html> (accessed on 22 August 2018).

<sup>24</sup> Section 2 of the Consumer Protection Act 68 of 2008.

<sup>25</sup> Section 39(1)(b) and (c) of the Constitution of the Republic of South Africa, 1996.

generally govern the advertising and marketing of products and services.<sup>26</sup> The backbone of federal consumer law in the USA is the Federal Trade Commission Act (FTC).<sup>27</sup>

## 1.6 LIMITATIONS OF THE STUDY

This study is a critical analysis of various sections in the CPA which is dealt with in Chapter 2, comparable provisions and case law in other jurisdictions such the USA. With regard to the CPA, the study limits itself only to those sections that deal with the right to fair and responsible marketing as well as right to fair and honest dealings, and this is dealt with in terms of Chapter 2 of the Act. There has been few South African scholarly writing on false advertising and the research that has been done in foreign jurisdictions will be an important part of this thesis. This thesis is alive to the fact that specific laws that apply to specific foreign jurisdictions may not always be compatible or suitable in South Africa due to the constitutional dispensation or different socio-economic factors that prevail and are unique to this country.

## 1.7 CHAPTER OUTLINE

The study will be subdivided into five chapters as follows:

### **Chapter one: Introduction**

This chapter will offer an introduction to the study and it gives a general overview of the whole research. It gives a general background to the research problem as well as the problem statement, significance of study, the research methodology and the chapter outline.

### **Chapter two: Legal framework relating to false advertising.**

This chapter focuses on the regulatory framework governing false advertising. It examines the common law position as well as the provisions of the CPA that regulate false and misleading advertising.

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<sup>26</sup> Jordan P *International Advertising Law: A Practical Global Guide* (2014) 479.

<sup>27</sup> Jordan P *International Advertising Law: A Practical Global Guide* (2014) 479. The Lanham Act is also an important federal law which deals with the prohibition of false and misleading representations in advertising and provides sanctions against allegedly offending marketers.

### **Chapter three: Institutional framework and the liability of the supplier**

This chapter examines the consumer redress mechanism and the forums or institutions under the CPA, which is an essential component of the Act. It will also discuss the role of institutions such as the ASA in relation to false advertising and the available relief available for consumers.

### **Chapter four: False advertising law in the United States of America**

This chapter discusses false advertising in the USA as well as the liability of the parties. It also examines whether the liability is extended to third parties in relation to false and misleading advertising in this jurisdiction, and how this is done.

### **Chapter five: Conclusion and recommendations**

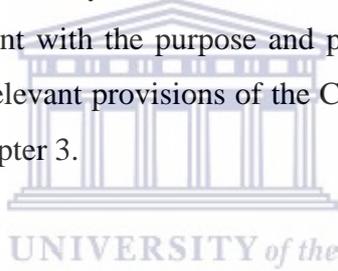
This chapter provides the conclusion of the study and furnishes recommendations.



## CHAPTER TWO: LEGISLATIVE FRAMEWORK OF FALSE ADVERTISING

### 2.1 INTRODUCTION

Chapter one was the introduction to the study and it sets out the purpose of the study as well as what it hopes to achieve. In this chapter, the focus will be on the legal framework dealing with false advertising. The legal framework for the control of advertising content in South Africa is a hybrid system where advertising is partly self-regulated and partly state-regulated.<sup>28</sup> This hybrid system is a mixture of common law and legislation as well as the self-regulatory system which falls under the South African Advertising Code (ASA).<sup>29</sup> The function of self-regulatory bodies is to offer an effective system for the control of advertising content, promote social responsibility and fair competition.<sup>30</sup> All regulatory institutions in South Africa including the ASA are subject to the Constitution of the Republic of South Africa of 1996, and are therefore bound by its provisions.<sup>31</sup> South Africa's advertising regulatory bodies are created or acknowledged by statute.<sup>32</sup> This means that the self-regulatory bodies operate against the backdrop of the relevant legislation. Chapter 4 of the CPA deals with business names and industry codes of conduct. Section 82(4) of the CPA provides that an industry code must be consistent with the purpose and policies of the Act.<sup>33</sup> This chapter focusses on the common law and the relevant provisions of the CPA while self-regulation in South Africa will be discussed in detail in chapter 3.



### 2.2 ADVERTISING AND THE COMMON LAW POSITION

This part discusses what advertisements are and whether they can be construed as a valid offer in terms of the common law. The question that comes to mind is whether an advertisement seen on television, billboards or on social media constitutes an offer to contract? Marketers use captivating advertisements to lure the consumer into buying their products and services, and they often employ marketing strategies, such as puffery to achieve this goal. Therefore, it is important to determine the legal position of advertisements.

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<sup>28</sup> Vos SW *De gustibus non est disputandum: Regulating offensive advertising in a democratic South Africa* (unpublished LLD thesis, University of Pretoria, 2011) 30.

<sup>29</sup> Vos SW *De gustibus non est disputandum: Regulating offensive advertising in a democratic South Africa* (unpublished LLD thesis, University of Pretoria, 2011) 30.

<sup>30</sup> European Advertising Standards Alliance Self-Regulation – A Statement of Common Principles and Operating Standards of Best Practice available at <https://www.easa-alliance.org> (accessed on 9 December 2018).

<sup>31</sup> Schimmel G *Advertising Law: A Guide to the Code of Advertising Practice* (2014) 3.

<sup>32</sup> Vos SW *De gustibus non est disputandum: Regulating offensive advertising in a democratic South Africa* (unpublished LLD thesis, University of Pretoria, 2011) 45.

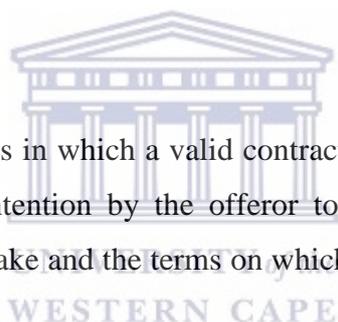
<sup>33</sup> Section 82(4) of the Consumer Protection Act 68 of 2008.

### 2.2.1 WHAT IS ADVERTISING?

Advertising is a marketing tool used by manufacturers or business people to influence consumers to purchase their products or services.<sup>34</sup> The purpose of an advertisement is to promote ideas, goods and services of an identified supplier or manufacturer in order to create sales.<sup>35</sup> Essentially advertisements are messages that are intended to inform or influence the consumer into buying or making use of a particular good or service.<sup>36</sup> Advertising is a pervasive feature of modern society.<sup>37</sup> According to recent statistics South Africans spend a huge amount on advertising.<sup>38</sup> The entire advertising market generated 45.12 billion rand in revenue in 2016.<sup>39</sup> In 2018, the advertising revenue grew at approximately 3.9 percent more than in 2017.<sup>40</sup> This means that consumers are exposed to an array of advertising messages on a continuous basis. It, therefore, becomes necessary for advertising to be regulated in order to protect consumers from deceptive marketing strategies.<sup>41</sup> This has taken place through industry self-regulation, government regulation and self-regulatory bodies such as the Advertising Standards Authority of South Africa (ASSA).<sup>42</sup>

### 2.2.2 OFFER AND ACCEPTANCE

Offer and acceptance is one of the ways in which a valid contract comes into existence.<sup>43</sup> An offer can be defined as a declaration of intention by the offeror to the offeree which indicates the performance she or he is prepared to make and the terms on which she or he will make it.<sup>44</sup> In other



<sup>34</sup> Murthy SN & Bhojanna U *Advertising: An IMC Perspective* 2 ed (2014) 4.

<sup>35</sup> Murthy SN & Bhojanna U *Advertising: An IMC Perspective* 2 ed (2014) 4.

<sup>36</sup> 'Definition of Advertising' available at <https://www.economicstimes.com> (accessed on 2 December 2018).

<sup>37</sup> Cassim S & Langton R 'Current issues in the regulation of deceptive advertising: some consequences for South Africa' (1996) 27 *S.Afr.Bus.Manage* 82.

<sup>38</sup> 'Advertising spending in South Africa from 2016 to 2018, by medium' available at <https://www.statista.com/statistic/3865/advertising-expenditures-by-medium-south-africa/> (accessed on 2 December 2018).

<sup>39</sup> 'Advertising spending in South Africa from 2016 to 2018, by medium' available at <https://www.statista.com/statistic/3865/advertising-expenditures-by-medium-south-africa/> (accessed on 2 December 2018).

<sup>40</sup> 'Advertising spending in South Africa from 2016 to 2018, by medium' available at <https://www.statista.com/statistic/3865/advertising-expenditures-by-medium-south-africa/> (accessed on 2 December 2018).

<sup>41</sup> Petzer DJ 'The attitudes of urban South African consumers residing in Gauteng towards advertising regulations and practices' (2012) 9 *Journal of Contemporary Management* 89.

<sup>42</sup> Petzer DJ 'The attitudes of urban South African consumers residing in Gauteng towards advertising regulations and practices' (2012) 9 *Journal of Contemporary Management* 90.

<sup>43</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 48.

<sup>44</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 49. See also Du Plessis H 'Display of Goods for Sale Advertisements and the Consumer Protection Act' 2015 *SALJ* 151.

words, a contract consists of an invitation to consent to the creation of obligations between two or more parties.<sup>45</sup>

In order to qualify as an offer, there are certain requirements that must be met. Firstly, the offer being made must be firm. This means that the offer must be made with the necessary *animus contrahendi*.<sup>46</sup> A true offer is made with the intention that mere acceptance of the offer by the offeree would create legally binding obligations.<sup>47</sup> *Animus contrahendi* or the 'intention to contract' is a very important element and an offer made in jest cannot be considered as a valid offer because the parties did not have the intention to contract in that particular instance.<sup>48</sup>

The second requirement is that the offer must be complete. This means that the offer must contain all the material terms of the proposed agreement.<sup>49</sup> The offer should thus at the very least set out the material terms of the contract. There is no valid contract that arises if there are outstanding matters that still need to be negotiated unless parties conclude a preliminary agreement.<sup>50</sup>

Thirdly, the offer must be clear and certain. An invitation to create obligations must contain sufficient terms so that an unqualified acceptance will bring about a contract. The content of the agreement must be certain or objectively ascertainable.<sup>51</sup> In other words, the offer must be sufficiently certain as to illicit a clear acceptance from the offeree.<sup>52</sup> Therefore the offer being made must be certain and definite.<sup>53</sup>

An offer can be validly made to a specific addressee, the public at large or a class of people.<sup>54</sup> Offers to the public include offers of reward, advertisements and auction sales. In such cases, an offeror can conclude a contract with specific members of the public who respond to the offer.<sup>55</sup> The case of *Carlill v Carbolic Smoke Ball Co*<sup>56</sup> addresses the issue of offers made to the public. In this particular matter the Carbolic Smoke Ball Company published an advertisement for a 'carbolic smoke ball cure' which they claimed would prevent a person contracting influenza (flu) if it was used as directed. The

<sup>45</sup> Van Huyssteen LF & Lubbe GF & Reinecke MFB et al *Contract: General Principles* 6ed (2020) 60.

<sup>46</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 50.

<sup>47</sup> Van Huyssteen LF & Maxwell CJ *Contract Law in South Africa* 6ed (2019) par 134. Bhana D & Bonthuys E & Nortje M *Student's Guide to the Law of Contract* 3ed (2013) 38.

<sup>48</sup> Van Huyssteen LF & Lubbe GF & Reinecke MFB et al *Contract: General Principles* 6ed (2020) 64.

<sup>49</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 50.

<sup>50</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 50. See also Bhana D & Bonthuys E & Nortje M *Student's Guide to the Law of Contract* 3ed (2013) 40.

<sup>51</sup> Van Huyssteen LF & Maxwell CJ *Contract Law in South Africa* 6ed (2019) par 134.

<sup>52</sup> Van Huyssteen LF & Maxwell CJ *Contract Law in South Africa* 6ed (2019) par 134.

<sup>53</sup> Aronstam P *Consumer Protection: Freedom of Contract and the Law* (1979) 26.

<sup>54</sup> Van Huyssteen LF & Maxwell CJ *Contract Law in South Africa* 6ed (2019) par 135.

<sup>55</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 52.

<sup>56</sup> [1893] 1 QB 256.

advertisement went further to state that the Smoke Ball Company would pay £100 to any person who contracted flu after proper use of the device. Ms Carlill, relying on the advertisement bought and used the product, carefully following all of the instructions but she still contracted influenza. Ms Carlill, then subsequently sued the Smoke Ball Company for the £100 as was stated in their advertisement.<sup>57</sup>

The issue the court had to address was whether a binding contract had been concluded between the parties. The court also in turn had to determine whether the advertisement constituted a valid offer, which was made by the Smoke Ball Company to Ms Carlill which she accepted.<sup>58</sup> The court held that the advertisement did in fact constitute a valid offer which would upon acceptance by a member of the public create a legally binding obligation upon the Smoke Ball Company to pay the money.<sup>59</sup> The court emphasised that the wording of the advertisement which stated that the company had placed £1000 in a designated bank account to cover any payouts from consumers who became ill after using the smoke cure ball. The court also stated that by virtue of the advertisement giving detailed instructions on how to use the particular device and on how to contact the company to claim the money after contracting flu, a method of acceptance had been provided. The court held that in these circumstances it was reasonable to conclude that the company did post the advertisement with the necessary *animus contrahendi*.<sup>60</sup> In this case, the advertisement constituted a valid offer.

When looking at the acceptance of the offer, once the offer has been accepted by the offeree, a contract comes into being.<sup>61</sup> The acceptance is a declaration of will which indicates assent to the proposal contained in the offer and which is communicated to the offeror.<sup>62</sup> The acceptance must be clear and unambiguous.<sup>63</sup> Acceptance will give rise to the formation of a contract between the offeror and the offeree provided that certain requirements are met. The first requirement is that the acceptance must be unqualified. This means that the acceptance must be complete and unequivocal and the offeree must assent to every element of the offer in its entirety.<sup>64</sup> Partial acceptance of an offer does not qualify as valid acceptance.<sup>65</sup>

Second, the acceptance must be made by the person to whom the offer was made. In other words, where an offer was made to a specific person or persons, then only those persons may accept the

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<sup>57</sup> *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

<sup>58</sup> *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

<sup>59</sup> *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

<sup>60</sup> *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

<sup>61</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 57.

<sup>62</sup> Van Huyssteen LF & Lubbe GF & Reinecke MFB et al *Contract: General Principles* 6ed (2020) 68.

<sup>63</sup> Van Huyssteen LF & Lubbe GF & Reinecke MFB et al *Contract: General Principles* 6ed (2020) 69.

<sup>64</sup> Van Huyssteen LF & Lubbe GF & Reinecke MFB et al *Contract: General Principles* 6ed (2020) 73.

<sup>65</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 57.

offer.<sup>66</sup> Any other people cannot accept the offer on behalf of the offeree. In an instance, where offers were made to the public or a class of people, any member of the public or of that class of people may accept the offer.<sup>67</sup> The third requirement is that the acceptance must be a conscious response to the offer. In other words, the offeree must be aware that they are accepting an offer that was made to them.<sup>68</sup> In *Bloom v American Swiss Watch Co*<sup>69</sup> the court held that ‘a contract requires that there should be consensus of two minds, and if one did not know what the other was proposing, the two minds never came together’.<sup>70</sup> The last requirement of a valid acceptance is that the offer must be accepted in the prescribed form. The offeror will prescribe the method of acceptance, and the offeree must ensure that he or she complies with the prescribed method.<sup>71</sup>

South African courts still have not decided who makes an offer in the case where goods and services are displayed or advertised in supermarkets.<sup>72</sup> The case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*<sup>73</sup> seems to address the question regarding who makes an offer where goods and services are displayed or advertisement in supermarkets. The court held in this particular case that where goods are displayed with the price on the article, the customer makes an offer to purchase the item by presenting it for payment. The shopkeeper therefore makes an invitation to do business and the customer makes the offer to purchase.<sup>74</sup> Lord Justice Somervell in the case stated that:

*‘the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy...In this case I decide, first that there is no sale effected merely by the purchaser taking up the article. There is no sale until the buyer’s offer to buy is accepted by the acceptance of the money.’<sup>75</sup>*

Following the view of the court in the *Pharmaceutical v Boots*, it may be concluded that the advertisements or goods displayed in the shops are merely an invitation to do business. A valid contract only comes into existence when the consumer makes an offer to buy the particular goods

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<sup>66</sup> Van Huyssteen LF & Lubbe GF & Reinecke MFB et al *Contract: General Principles* 6ed (2020) 72.

<sup>67</sup> Bhana D & Bonthuys E & Nortje M *Student’s Guide to the Law of Contract* 3ed (2013) 51.

<sup>68</sup> *Bloom v American Swiss Watch Co* 1915 AD 100 at page 105.

<sup>69</sup> *Bloom v American Swiss Watch Co* 1915 AD 100 at page 105.

<sup>70</sup> *Bloom v American Swiss Watch Co* 1915 AD 100 at page 105.

<sup>71</sup> Van Huyssteen LF & Maxwell CJ *Contract Law in South Africa* 6ed (2019) par 135. Bhana D & Bonthuys E & Nortje M *Student’s Guide to the Law of Contract* 3ed (2013) 55.

<sup>72</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 53.

<sup>73</sup> [1953] 1 QB 401 (CA), [1953] 1 ALL ER 482.

<sup>74</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd* [1953] 1 QB 401, [1953] 1 ALL ER 484.

<sup>75</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd* [1953] 1 QB 401, [1953] 1 ALL ER 484.

from the shopkeeper or retailer and the retailer accepts the offer of the consumer by accepting cash in exchange for the goods.

When looking at the definition of advertisement, the difficult question arises whether an advertisement can be construed as an 'offer' in terms of a contract.<sup>76</sup> The very function of an advertisement is to induce the consumer into buying the particular product or make use of a particular service. An advertisement is generally merely an invitation to do business.<sup>77</sup> For an advertisement to become an offer, it either has to contain specific language that commits the advertisers to making an offer that invites a consumer to act without further communication between the parties.<sup>78</sup> This was confirmed in the *Crawley v Rex*,<sup>79</sup> which is the authority for this principle.<sup>80</sup>

In terms of the *Crawley* case, a shopkeeper had placed a placard which advertised the low price of a particular brand of tobacco, outside of his shop.<sup>81</sup> This was done in the hope that the advertisement might attract a large number of customers to his shop. On this particular day, the appellant (Mr Crawley) entered the shop and bought a pound of the tobacco, later on the same day, Mr Crawley returned to buy another pound of tobacco. The shopkeeper declined his request. However, Mr Crawley was adamant that he would not leave the shop without the pound of tobacco. The shopkeeper asked Mr Crawley to leave the premises and when he refused to do so the shopkeeper called a police to escort him off the premises. The appellant argued that he had a *bona fide* right to be in shop by virtue of the contract that had come into existence between him and the shopkeeper. In other words, the appellant had the right to be in shop because by accepting the shopkeepers offer to sell tobacco, a contract was subsequently created and he was entitled to stay in the shop until the contract was carried out.<sup>82</sup>

The court held that on the basis of the facts that had been presented that no contract had come into effect.<sup>83</sup> The court also stated that the mere fact that a tradesman advertises the price at which he sells goods does not constitute an offer to any member of the public nor does a contract come into effect when any member of the public comes in and tenders the price mentioned in the advertisement.<sup>84</sup>

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<sup>76</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 53.

<sup>77</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 53.

<sup>78</sup> Cohen LE 'Choice of a New Generation: Can an Advertisement create a binding contract?' (2000) 65 *Missouri Law Review* 557.

<sup>79</sup> 1909 TS 1105.

<sup>80</sup> *Crawley v Rex* 1909 TS 1105 par 1.

<sup>81</sup> *Crawley v Rex* 1909 TS 1105 par 1.

<sup>82</sup> *Crawley v Rex* 1909 TS 1105 par 2.

<sup>83</sup> *Crawley v Rex* 1909 TS 1105 par 4.

<sup>84</sup> *Crawley v Rex* 1909 TS 1105 par 4.

This would ‘*lead to most extraordinary results*’ if that was the case.<sup>85</sup> Every trader would be compelled in terms of the contract to sell the specific goods even if they had run out of stock.<sup>86</sup> This would result in the shopkeeper having to stock an unlimited amount of cigarettes in order to satisfy every consumers’ needs and that is not a realistic or viable option. In order to avoid this situation, traders need to take care and add ‘while stocks last’ on their advertisements, as to not to create the impression in the mind of the consumers that stock will be readily available for sale.<sup>87</sup> It is important to note that whether a particular statement constitutes an offer depends on the intention of that statement or on the impression that that statement created in the minds of the person to whom it was directed.<sup>88</sup>

### 2.2.3 ADVERTISING AND ‘PUFFS’

Puffery (*simplex commendatio*) is referred to as legal persuasive advertising which entails praise for a product by means of subjective opinions, superlatives, or exaggerations, vaguely and generally stating no specific facts.<sup>89</sup> Puffery or ‘puffs’ is an approach often used by marketers in advertising to enhance their products and boost product awareness among consumers.<sup>90</sup> It is trite law that ‘puffing’ is legally irrelevant in a contractual relationship between persons.<sup>91</sup> This is because generally puffs are just expressions of opinions or it is just an exaggeration by the seller. It does not amount to a misrepresentation.<sup>92</sup> An example of a puff would include a slogans such as ‘Nestle makes the very best chocolate’ and ‘Snapple-made from the best stuff on earth.’<sup>93</sup> From these examples, it is clear that the sellers were praising their wares. A puff should not be taken too seriously and it is therefore not actionable.<sup>94</sup> This position was confirmed by Claassen J in *Small v Smith*:<sup>95</sup> where he stated that *statements of commendation or puffing have no binding effect.*<sup>96</sup>

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<sup>85</sup> *Crawley v Rex* 1909 TS 1105 par 4.

<sup>86</sup> Du Plessis H ‘Display of Goods for Sale Advertisements and the Consumer Protection Act’ 2015 *SALJ* 152.

<sup>87</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 53.

<sup>88</sup> Du Plessis H ‘Display of Goods for Sale Advertisements and the Consumer Protection Act’ 2015 *SALJ* 152.

<sup>89</sup> De Wet HF ‘Should puffery advertising in South Africa be banned: An interdisciplinary analysis’ (2010) 42 *Acta Academica* 117.

<sup>90</sup> De Wet HF ‘Should puffery advertising in South Africa be banned: An interdisciplinary analysis’ (2010) 42 *Acta Academica* 121.

<sup>91</sup> Mullins SF ‘An Analysis of the *Simplex Commendatio* in Modern Society’ (1984) 101 *SALJ* 515.

<sup>92</sup> Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 123.

<sup>93</sup> McQuoid-Mason D *Consumer Law in South Africa* (1997) 275.

<sup>94</sup> McQuoid-Mason D *Consumer Law in South Africa* (1997) 275.

<sup>95</sup> 1954 3 SA 434 (SWA) at page 436.

<sup>96</sup> This was discussed in detail in Chapter 2 Part 2.2.3.

In the *Phame (Pty) Ltd v Paizes*<sup>97</sup> the court dealt with, *inter alia*, the issue of puffery and the commending of wares. With respect to ‘puffing’ the court made an attempt to try and define the concept. It stated that:

*‘[r]elevant considerations could include the following: whether the statement was made in answer to a question from the buyer; its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or of personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been known to do.’*<sup>98</sup>

Whether a statement by the seller goes beyond mere praise or commendation will depend on the nature of the representation.<sup>99</sup> If a reasonable consumer is misled by the representations of praise and commendation made by the seller then it can amount to a *dictum et promissum*.<sup>100</sup>

In the case of *Cockroft v Baxter*<sup>101</sup>, the plaintiff purchased a second-hand motor car from the defendant. The defendant advertised the car for sale in the following terms:

*‘1947/48 Singer Sports. Engine, gear-box, etc. excellent. Good tyres and hood. Body a bit rough. As it is £150.-Phone 47855.’*<sup>102</sup>

The plaintiff responded to the advertisement and subsequently purchased the second-hand vehicle from the defendant. However, after taking delivery of the car, the plaintiff discovered that the engine was defective in several respects. The plaintiff averred in his particulars of claim that ‘*as a consequence of and relying upon the said advertisement*’, he suffered damages in the sum of £172.14.<sup>103</sup> The defendant argued that the plaintiff purchased the car ‘*voetstoots*’.<sup>104</sup>

In this particular case, Ogilvie Thompson J held that the defendant’s advertisement containing the word ‘excellent’ when referring to the car’s engine was merely puffery or an expression of opinion in the circumstances.<sup>105</sup> The court stated that the dividing line between puffery and representation is not always easy to draw. The court also went on to agree with Gardiner J in the case of *Naudé v Harrison*<sup>106</sup> where he stated that to constitute a representation the statement should qualify as an

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<sup>97</sup> (1973) 3 ALL SA 501 (A).

<sup>98</sup> *Phame (Pty) Ltd v Paizes* 1973 3 ALL SA 501 (A) 513.

<sup>99</sup> *Phame (Pty) Ltd v Paizes* 1973 3 ALL SA 501 (A) 513.

<sup>100</sup> Van Huyssteen LF & Maxwell CJ *Contract Law in South Africa* 6ed (2019) par 207.

<sup>101</sup> 1955 (4) SA 93 (C).

<sup>102</sup> *Cockroft v Baxter* 1955 (4) SA 93 (C) 186.

<sup>103</sup> *Cockroft v Baxter* 1955 (4) SA 93 (C) 186.

<sup>104</sup> ‘*Voetstoots*’ means to purchase or accept a particular item ‘as is’.

<sup>105</sup> *Cockroft v Baxter* 1955 (4) SA 93 (C) 189.

<sup>106</sup> 192 C.P.D 84.3.

ascertainable fact. A mere statement as to the degree of quality cannot constitute a misrepresentation if opinions fairly, reasonably and legitimately differ.<sup>107</sup> It is not clear whether the position will remain the same in this modern age of advertising.

Some legal scholars are of the opinion that perhaps the defence of ‘puffing’ should be abolished, as it can be seen as deceptive. Many marketers and sellers may hide behind the fact that they were just using puffery when in fact it was a misleading representation.<sup>108</sup> In essence, the defence or principle of ‘puffery’ allows for some amount of dishonesty.<sup>109</sup> In my view, advertising a car engine as ‘excellent’ and then subsequently finding out that the engine is defective is dishonest. Puffs can have the effect of inducing the consumer into buying a specific product or using a particular service. The product or service is made to look or sound attractive and appealing to the consumer. If the representations made are false, misleading or deceptive, a consumer can rely on misrepresentation in terms of the common law.

#### 2.2.4 MISREPRESENTATION AND *DICTUM ET PROMISSUM*

One of the common law remedies that is available to consumers in terms of false, misleading and deceptive advertising is misrepresentation. Misrepresentation can be defined as an ‘*untrue statement of fact, made by one party to the other in the course of negotiating a contract that induces the other party to enter into the contract.*’<sup>110</sup> It is also important to note that a statement cannot be both a mere puff and misrepresentation since one carries a remedy and the other one does not.<sup>111</sup> Innes CJ stated in *Geldenhuis and Neethling v Beuthin*<sup>112</sup> that ‘*[i]t is often difficult to draw the line between mere puffing which has no effect on the validity of a bargain, and misrepresentation which justifies its repudiation.*’<sup>113</sup>

Misrepresentation prevents the consumer from making a proper comparison between performances.<sup>114</sup> In modern law of contract, all contracts are *bona fidei*, therefore it is not necessary to prove that the misrepresentation was fraudulent in order to invalidate the contract. The innocent

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<sup>107</sup> *Naudé v Harrison* 1925 C.P.D 84 par 91.

<sup>108</sup> De Wet HF ‘Should puffery advertising in South Africa be banned: An interdisciplinary analysis’ (2010) 42 *Acta Academica* 126.

<sup>109</sup> McQuoid-Mason D *Consumer Law in South Africa* (1997) 276.

<sup>110</sup> ‘Misrepresentation’ Law J & Martin EA *Oxford Dictionary of Law* 7ed (2013) 354.

<sup>111</sup> Stoop PN ‘The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts’ (2015) 18 *PELJ* 1100.

<sup>112</sup> 1918 AD 426.

<sup>113</sup> *Geldenhuis and Neethling v Beuthin* 1918 AD 426 page 435.

<sup>114</sup> Kadelbach P *The law affecting comparative advertising in South Africa* (unpublished LLM thesis, University of Cape Town, 2003) 117.

party is equally entitled to rescind whether the misrepresentation was fraudulent, negligent or innocent.<sup>115</sup> If a supplier or retailer falsely advertises a particular product or service and the consumer relies on said advertisement to his or her detriment, the consumer may institute action and claim the remedies available for misrepresentation. The aggrieved party can sue the offending party for any damages incurred as a result of the misrepresentation.<sup>116</sup> Rescission of the contract and restitution is also available to the aggrieved consumer.<sup>117</sup>

An advertisement may qualify as a *dictum et promissum* if it contains statements regarding the quality of the product that go beyond mere praise and commendation.<sup>118</sup> A *dicta et promissa* has the effect of inducing the purchaser to enter into a contract or agree to a much higher price. The purchaser of the defective product may invoke the aedilician remedies.<sup>119</sup> Generally, these remedies are restitutionary in nature and depending on the circumstances, allows the purchaser to claim either a price reduction with the *actio quanti minoris* or cancellation of the contract with the *actio redhibitoria*.<sup>120</sup> It is not a requirement for aedilician relief on the basis of *dicta et promissa* to show that the seller was aware that his statements were false.<sup>121</sup> However, if the seller made false statements knowingly and deliberately in an attempt to induce the purchaser to contract such aggrieved purchaser may claim damages.<sup>122</sup>

It has been correctly argued that the common law principles are inadequate to deal with the sophistication of modern advertising.<sup>123</sup> There are legislative instruments in place such as the CPA that is discussed below. There are also some regulatory bodies that seek to deal with the issue of false advertising in South Africa which are discussed in chapter 3.

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<sup>115</sup> *M v M and Another* (65757/2012) [2020] ZAGPPHC 258 (25 May 2020).

<sup>116</sup> *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 par 24.

<sup>117</sup> *Sim Road Investments CC v Morgan Air Cargo (Pty) Ltd* (024/10) [2010] ZASCA 081 par 22.

<sup>118</sup> See generally Hutchison D and Pretorius C (eds) *The Law of Contract in South Africa* 3ed (2017) 123.

<sup>119</sup> Kriek C *The scope of liability for product defects under the South African Consumer Protection Act 68 of 2008 and common law - A comparative analysis* (unpublished LLD thesis, Stellenbosch University, 2017) 53.

<sup>120</sup> Kriek C *The scope of liability for product defects under the South African Consumer Protection Act 68 of 2008 and common law - A comparative analysis* (unpublished LLD thesis, Stellenbosch University, 2017) 54.

<sup>121</sup> Kriek C *The scope of liability for product defects under the South African Consumer Protection Act 68 of 2008 and common law - A comparative analysis* (unpublished LLD thesis, Stellenbosch University, 2017) 54.

<sup>122</sup> Kriek C *The scope of liability for product defects under the South African Consumer Protection Act 68 of 2008 and common law - A comparative analysis* (unpublished LLD thesis, Stellenbosch University, 2017) 54.

<sup>123</sup> McQuoid-Mason D *Consumer Law in South Africa* (1997) 276.

## 2.3 STATUTORY LAW POSITION

### 2.3.1 THE CONSUMER PROTECTION ACT 68 OF 2008

The recognition of consumer law as a distinct area of law is relatively recent in South Africa. The CPA is the first comprehensive piece of legislation which is solely aimed at the protection of consumers.<sup>124</sup> Section 5 of the CPA deals with the application of the Act. It provides that the Act applies to every transaction occurring within the Republic, which includes an agreement, advertisement, production, distribution, promotion, sale or supply of goods or services.<sup>125</sup> Furthermore, the CPA also applies to the promotion and marketing of any goods or services and to suppliers of goods and services.<sup>126</sup> In terms of advertising, the CPA applies to all advertising, marketing and selling of any goods or services by suppliers who are not excluded from the Act.<sup>127</sup>

The Preamble of the CPA provides that it is necessary to '*fulfil the rights of historically disadvantaged persons and to promote their participation as consumers;*' and to '*protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers.*'<sup>128</sup> South Africa has high levels of illiteracy and people from a lower economic status that are vulnerable to market exploitation and abuse. The necessity of consumer protection is directly related to the educational level of society.<sup>129</sup> When consumers are poorly educated and unaware of their rights, they can be easily induced into buying wares by misleading advertising. The CPA aims to remedy this grave disservice.<sup>130</sup>

The aims of the CPA play an important role in the interpretation of the Act. Section 2 provides that the Act '*must be interpreted in a manner that gives effect to*' its aims.<sup>131</sup> The primary purpose of the CPA is to '*promote and advance the social and economic welfare of consumers*'<sup>132</sup> The Act aims to achieve its objectives by, *inter alia*, establishing a legal framework aimed at achieving and maintaining a consumer market which is fair, accessible and, efficient and sustainable. It also seeks to reduce the disadvantages experienced in accessing goods or services by, firstly, consumers who have low incomes or come from low-income communities Secondly, by those who live in remote,

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<sup>124</sup> De Stader E *Consumer Law Unlocked* (2013) 1.

<sup>125</sup> Section 5 of the Consumer Protection Act 68 of 2008.

<sup>126</sup> Section 5(1)(a) of the Consumer Protection Act 68 of 2008.

<sup>127</sup> Opperman I & Lake R et al *Understanding the Consumer Protection Act* (2012) 1.

<sup>128</sup> Consumer Protection Act 68 of 2008 at part (a) & (b) of Preamble.

<sup>129</sup> Cassim S & Langton R 'Current issues in the regulation of deceptive advertising: some consequences for South Africa' (1996) 27 *S.Afr.Bus.Manage* 82.

<sup>130</sup> Cassim S & Langton R 'Current issues in the regulation of deceptive advertising: some consequences for South Africa' (1996) 27 *S.Afr.Bus.Manage* 83.

<sup>131</sup> Section 2 of the Consumer Protection Act 68 of 2008.

<sup>132</sup> Section 3(1) of the Consumer Protection Act 68 of 2008.

isolated or low-density population areas such as rural areas. Thirdly, it seeks to reduce disadvantages experienced by minors, seniors, or vulnerable consumers. Lastly, its goal is to protect those whose ability to read and comprehend any advertisement is limited as a result of low literacy, vision impairment or limited fluency in the language which is being used.<sup>133</sup>

### 2.3.2 PART E: RIGHT TO FAIR AND RESPONSIBLE MARKETING

The right to fair and responsible marketing is one of the fundamental consumer rights that is aimed at creating fair business practices in respect of advertising and selling.<sup>134</sup> One of the most important business practices is to be truthful in advertising and selling. Therefore, it is considered imperative to create fair business practices in order to ensure real competition between suppliers, which in turn leads to lower prices and better products for the consumers.<sup>135</sup> This will likely lead to greater trust and better relationships between consumers and suppliers.<sup>136</sup>

Part E deals with the right to fair and responsible marketing. It contains an overarching provision which applies to all types of marketing.<sup>137</sup> In general, the marketing of any goods or service by a producer, importer, distributor, retailer or service provider may not be misleading, fraudulent or deceptive, including in respect of the following:<sup>138</sup>

- (a) *‘the nature, properties, advantages or uses of the services or goods;*
- (b) *the conditions or manner in which the services or goods may be supplied;*
- (c) *the price of goods, the existence of a relationship of the price to a previous price or a competitor's price for the same or comparable goods or services;*
- (d) *the sponsoring of an event; or*
- (e) *any other material aspect of the services or goods.’<sup>139</sup>*

The above provision provides the general standards for the marketing of goods or services. In essence, section 29 prohibits marketing which is misleading, fraudulent or deceptive. It should also not be conducted in a manner that is likely to imply a false or misleading representation concerning the

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<sup>133</sup> See section 3(1)(a) to (h) of the Consumer Protection Act 68 of 2008.

<sup>134</sup> Jacobs W ‘Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis’ (2010) 13 *PER* 334.

<sup>135</sup> GN 1957 in GG 26774 of 9 September 2004 par 25. ‘White Paper on Consumer Protection in the Eastern Cape’.

<sup>136</sup> GN 1957 in GG 26774 of 9 September 2004 par 25. ‘White Paper on Consumer Protection in the Eastern Cape’.

<sup>137</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 29-1.

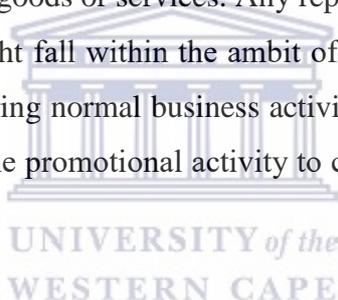
<sup>138</sup> Section 29(b) of the Consumer Protection Act 68 of 2008.

<sup>139</sup> Section 29(b)(i-v) of the Consumer Protection Act 68 of 2008.

goods or services as contemplated in section 41 of the Act.<sup>140</sup> Therefore, section 29 and 41 should be read together. Section 29 of the CPA applies to marketing activities done by a wide category of people namely, a producer, importer, distributor, retailer or service provider. The part below examines the definition of marketing since it is a key concept with respect to advertisements.

### 2.3.3 WHAT IS MARKETING?

Marketing refers to the activities of a company associated with the buying and selling of a product or service.<sup>141</sup> It also includes the advertising, selling and delivering of such products to the consumer.<sup>142</sup> Marketing can also be described as the process or strategy whereby a person creates awareness of a particular product or service amongst members of the public.<sup>143</sup> The CPA uses the word ‘market’ in a wider sense. It defines the word ‘market’ as meaning to ‘promote or supply any goods or services.’<sup>144</sup> The Act also defines the terms ‘promote’ and ‘supply’. The definition of ‘promote’ is wide enough to include the advertisement of the supply of goods or services, the display of goods or services for sale and offering to supply goods or services. Any representation indicating an intention to sell or supply goods or services might fall within the ambit of ‘promote’.<sup>145</sup> The ‘promotion’ of goods or services should take place during normal business activities.<sup>146</sup> Goods or services must be offered for consideration in order for the promotional activity to constitute ‘promotion’ of goods or services for purposes of the CPA.<sup>147</sup>



### 2.3.4 PROHIBITED MARKETING PRACTICES

The CPA has introduced significant restrictions on the way suppliers are permitted to market goods and services to consumers.<sup>148</sup> The CPA deals with marketing practices by suppliers in the following three ways; firstly, by identifying some practices as unlawful such as bait marketing, negative option marketing and referral selling.<sup>149</sup> Bait marketing is prohibited as it deceives or misleads consumers

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<sup>140</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 29-2.

<sup>141</sup> ‘Marketing’ available at <https://www.investopedia.com/terms/m/marketing.asp> (accessed on 13 September 2018).

<sup>142</sup> ‘Marketing’ available at <https://www.investopedia.com/terms/m/marketing.asp> (accessed on 13 September 2018).

<sup>143</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 29-2.

<sup>144</sup> Section 1 of the Consumer Protection Act 68 of 2008.

<sup>145</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 29-2.

<sup>146</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 29-2.

<sup>147</sup> Naudé T & Eiselen S *Commentary of the Consumer Protection Act* (2015).

<sup>148</sup> Lake R ‘Marketing Practices under the CPA’ available at <https://www.nortonrosefulbright.com> (accessed on 9 December 2018).

<sup>149</sup> Opperman I & Lake R et al *Understanding the Consumer Protection Act* (2012) 23.

as to the actual availability of the goods at the advertised price.<sup>150</sup> Negative option requires the consumer to decline the supply of the goods or services. It therefore places an unnecessary burden on the consumer.<sup>151</sup> Furthermore, it induces a consumer to enter into a transaction which he or should would not have entered into. Suppliers are thus prohibited from offering goods on the basis of negative option marketing. Secondly, the CPA restricts certain other marketing practices to ensure fairness, and these practices will only be unlawful if suppliers do not adhere to the rules.<sup>152</sup> Lastly, it introduces general standards for marketing in a fair, responsible and truthful way.<sup>153</sup> The CPA consequently goes a step further in protecting consumers compared to the common law.

### 2.3.5 PART F: RIGHT TO FAIR AND HONEST DEALINGS

The right to fair and honest dealings is one of the fundamental consumer rights contained in the CPA. Part F contains sections dealing with, *inter alia*, unconscionable conduct, false, misleading or deceptive representations.

### 2.3.6 SECTION 40: UNCONSCIONABLE CONDUCT

In Chapter 1 of the CPA ‘unconscionable’ is defined as conduct that is ‘unethical or improper to a degree that would shock the conscience of a reasonable person.’<sup>154</sup> It also elaborates that it is conduct having character as contemplated in section 40 of the Act.<sup>155</sup> Section 40 of the CPA essentially deals with procedural fairness which relates to how the consumer’s consent was obtained.<sup>156</sup> It prohibits suppliers and their agents from using any ‘physical force, coercion, undue influence, pressure or harassment, unfair tactics or any other similar conduct, in connection with any ‘marketing of any goods or services; or supply of goods or services to a consumer.’<sup>157</sup> These seven factors indicate extreme methods which can be used by a supplier against the consumer in order to gain the consumer’s consent, and essentially making the consumer act against their will.<sup>158</sup> Unfair marketing

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<sup>150</sup> Section 30 of the Consumer Protection Act 68 of 2008. See also Hutchison D and Pretorius C (eds) *The Law of Contract in South Africa* 3ed (2017) 53.

<sup>151</sup> Section 31 of the Consumer Protection Act 68 of 2008.

<sup>152</sup> Opperman I & Lake R *et al Understanding the Consumer Protection Act* (2012) 23.

<sup>153</sup> Opperman I & Lake R *et al Understanding the Consumer Protection Act* (2012) 24.

<sup>154</sup> Section 1 of the Consumer Protection Act 68 of 2008.

<sup>155</sup> Rheeders A *The international interpretation of unconscionable conduct and the unconscionability factors contained in section 40 of the Consumer Protection Act 68 of 2008* (unpublished LLM thesis, University of Pretoria, 2015) 35.

<sup>156</sup> Naudé T & Eiselen S *Commentary of the Consumer Protection Act* (2015) 40-1.

<sup>157</sup> Section 40(1)(a) -(e) of the Consumer Protection Act 68 of 2008.

<sup>158</sup> Rheeders A *The international interpretation of unconscionable conduct and the unconscionability factors contained in section 40 of the Consumer Protection Act 68 of 2008* (unpublished LLM thesis, University of Pretoria, 2015) 36.

tactics which are bound to induce consumers into concluding contracts, which they would not ordinarily conclude, are proscribed. This means that repeated calls from service providers might be construed as prohibited within the ambit of section 40(1) of the CPA.

Section 40(2) further provides that it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests, due to physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.<sup>159</sup> This section focuses on the improper ways in which the will of the consumer can be influenced.<sup>160</sup> Suppliers taking advantage of vulnerable consumers creates an unequal power relationship, with the aggrieved consumer being in the weaker position.

Section 40 of the CPA recognises, *inter alia*, unfair tactics in marketing as unconscionable conduct and therefore such conduct is essentially *contra bonos mores*.<sup>161</sup> Providing or disseminating misleading, deceptive or false material information of products or services to consumers, often leads to situations where suppliers are able to take advantage of consumers, especially the vulnerable consumers. This becomes prejudicial to the consumer. Section 41 is also an important provision as it prohibits suppliers from giving false, misleading or deceptive representations regarding goods or services.<sup>162</sup> Both sections 40 and 41 deal with improperly obtained consensus. The consumer is induced to enter into a contract which she or he might not have concluded on the same terms. Thus, it can be seen that section 41 supplements section 40.<sup>163</sup> The underlying aim of these provisions is to ensure that consumers enjoy their right to fair and honest dealings including marketing. Unconscionability is prohibited with the aim to protect the basic human rights of any person who is in a weaker bargaining position.<sup>164</sup> When a party is in a weaker bargaining position it can lead to a contract which is one-sided and in favour of the stronger party. It is important that equality is achieved in the consumer market.<sup>165</sup>

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<sup>159</sup> Section 40(2) of the Consumer Protection Act 68 of 2008.

<sup>160</sup> Naudé T & Eiselen S *Commentary of the Consumer Protection Act* (2015) 40-1.

<sup>161</sup> *Contra bonos mores* to mean against the morals of society or against public policy.

<sup>162</sup> Barnard J 'Consumer rights of the elderly as vulnerable consumers in South Africa: some comparative aspects of the Consumer Protection Act 68 of 2008' (2015) 39 *International Journal of Consumer Studies* 226. See also Hutchison D and Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 148.

<sup>163</sup> Rheeders A *The International Interpretation of unconscionable conduct and the unconscionability factors contained in section 40 of the Consumer Protection Act 68 of 2008* (LLM-thesis, University of Pretoria, 2015) 37.

<sup>164</sup> Rheeders A *The international interpretation of unconscionable conduct and the unconscionability factors contained in section 40 of the Consumer Protection Act 68 of 2008* (unpublished LLM thesis, University of Pretoria, 2015) 37.

<sup>165</sup> Rheeders A *The international interpretation of unconscionable conduct and the unconscionability factors contained in section 40 of the Consumer Protection Act 68 of 2008* (unpublished LLM thesis, University of Pretoria, 2015) 38.

### 2.3.7 SECTION 41: FALSE, MISLEADING OR DECEPTIVE REPRESENTATIONS

Section 41 is an important provision because it deals with false, misleading or deceptive representation. Misrepresentation can be through words or conduct. The CPA refers to a ‘material fact’ as requiring the misrepresentation to be of a serious nature.<sup>166</sup> A representation does not have to take a particular form. It can be made either expressly or tacitly.<sup>167</sup> Naudé opines that in order to ensure proper consumer protection, the requirement that the representation must relate to a fact should presumably, if interpreted broadly, also include an opinion.<sup>168</sup> It is important to note that the scope of this study is limited to false advertising and that it does not cover product labelling.

In essence, what section 41(1) provides, in relation to the marketing (promotion or supply) of any goods or services, is that suppliers cannot by words or conduct, mislead, exaggerate, fail to disclose or correct a wrong representation of a material fact.<sup>169</sup> It also provides that a supplier cannot permit or require any other person to do so on its behalf.<sup>170</sup>

Section 41(2)(a) provides that any person acting on behalf of a supplier of any goods or services must not falsely represent that they have any sponsorship, approval or affiliation.<sup>171</sup> This market practice is similar to the delictual claim of ‘passing off, which is a form of unlawful competition. In the case of ‘passing off’ the applicant is aggrieved because another is exploiting the goodwill and positive association that he has established for his own goods and services with the public.<sup>172</sup> However, the distinction between the two is that, ‘passing off’ infringes on the proprietary rights of the complaining competitor. Whereas, section 41(2) is explicitly aimed at protecting the rights of the consumer.<sup>173</sup> The section further provides that a person acting on behalf of a supplier of any goods or services must not engage in any conduct that the supplier is prohibited from engaging in terms of section 41(1) of the Act.<sup>174</sup> In other words, a person acting on behalf of the supplier cannot engage in the same activity that a supplier is prohibited from under section 41(1). Section 41(3) contains a list of eleven instances where express or implied statements that are prohibited because they constitute false, misleading or

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<sup>166</sup> Tennant SL *Consumer Law Compliance* (2016) 193.

<sup>167</sup> Naudé T & Eiselen S *Commentary of the Consumer Protection Act* (2015) 41-6.

<sup>168</sup> Naudé T & Eiselen S *Commentary of the Consumer Protection Act* (2015) 41-6.

<sup>169</sup> Section 41(1) (a) – (c) of the Consumer Protection Act 68 of 2008.

<sup>170</sup> Section 41(1)(c) of the Consumer Protection Act 68 of 2008.

<sup>171</sup> Section 41(2)(a) of the Consumer Protection Act 68 of 2008.

<sup>172</sup> *Nino's Coffee Bar and Restaurant CC v Nino's Italian Coffee & Sandwich Bar CC* [1998] 3 ALL SA 527 (CC) at page 539.

<sup>173</sup> Van Eeden E & Barnard J *Consumer Protection Law in South Africa* 2ed (2017) 118.

<sup>174</sup> Section 41(2)(b) of the Consumer Protection Act 68 of 2008.

deceptive misrepresentations.<sup>175</sup> Section 52 of the CPA provides remedies for an aggrieved consumer regarding any unconscionable, misleading or unjust contract terms.<sup>176</sup>

### 2.3.8 SECTION 48: UNFAIR, UNREASONABLE OR UNJUST CONTRACT TERMS

Part G deals with the right to fair, just and reasonable terms and condition. Of importance under Part G is section 48(1) (b) which provides that a supplier must not market goods or services in a manner that is unfair, unreasonable or unjust. Section 48(2) gives specific examples of a term or agreement is unfair, unjust or unreasonable, for example, when an agreement is excessively one-sided in favour of any person other than the consumer or where it is 'so adverse to the consumer as to be inequitable'.<sup>177</sup> An advertisement may be construed as unfair, unjust or unreasonable where the consumer relied upon false, misleading or deceptive representation contemplated in section 41.<sup>178</sup>

Also regulation 44 of the CPA provides a list of contract terms which are presumed not to be fair and reasonable. The word 'presumed' indicates that the supplier may insert such terms into consumer contracts as long as they are able to justify why that particular term is necessary and is not unfair in that instance.<sup>179</sup> These terms are also known as 'grey-listed' terms.<sup>180</sup> Then section 51 of the Act prevents a supplier from entering into an agreement with a consumer on prohibited terms. The provision contains a list of prohibited terms and applies to all the contract terms covered by the CPA.<sup>181</sup> Since these terms are prohibited, it means that suppliers should not incorporate such terms in consumer contracts. Such terms fall into the category of "black listed" terms.<sup>182</sup> Any contravention of the provisions of section 48, the court is empowered in terms of section 52 to declare such a contract in part or in whole as unreasonable or unfair. The court may make an order that the offending parts of the contract is void, thereby severing that part or provision from the contract or agreement.

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<sup>175</sup> See section 41(3) (a)-(k) of the Consumer Protection Act 68 of 2008 for the full list.

<sup>176</sup> Van Eeden E & Barnard J *Consumer Protection Law in South Africa* 2ed (2017) 120. Section 52 provides remedies against a supplier who have contravened section 40, 41 or 48.

<sup>177</sup> Section 48(2)(a) of the Consumer Protection Act 68 of 2008. See also Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3ed (2017) 194.

<sup>178</sup> Section 48(2)(c) of the Consumer Protection Act 68 of 2008.

<sup>179</sup> Reg 44(3) of the Consumer Protection Act 68 of 2008 Regulations. De Stadler E 'Explaining the grey listed terms in the Consumer Protection Act (regulation 44)' available at <http://www.esselaar.co.za/legal-articles/explaining-grey-listed-terms-consumer-protection-act-regulation-44> (accessed 24 November 2020).

<sup>180</sup> De Stadler E 'Explaining the grey listed terms in the Consumer Protection Act (regulation 44)' available at <http://www.esselaar.co.za/legal-articles/explaining-grey-listed-terms-consumer-protection-act-regulation-44> (accessed 24 November 2020).

<sup>181</sup> Naudé T 'Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008' (2017) 1 *TSAR* 138.

<sup>182</sup> Naudé T 'Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008' (2017) 1 *TSAR* 139.

The court may also order that the entire agreement or contract is void or may make any further order that is just and reasonable in the circumstances.<sup>183</sup>

## 2.4 CONCLUSION

After considering the common law in relation to advertisements, it is clear that advertisements are generally viewed as an invitation to do business and do not constitute a valid offer. Such advertisements are made without *animo contrahendi*. Until such time the court has clarified or changed the position, an advertisement constitutes an ‘invitation to do business’ in South Africa unless if it has been made with the intention to create legally binding obligations. Puffery and opinions are also not actionable. It has, however, been correctly argued that common law principles are inadequate to deal with the sophistication of modern advertisements since puffs may be used to induce consumers to buy goods or services which they would not have bought. In a country with high levels of consumers who are uneducated and vulnerable to exploitation, common law was deficient and out of step with reality. This resulted in the enactment of the CPA.

The CPA contains detailed provisions that govern advertisements. Part E provides the right to fair and responsible marketing while Part F deals with the right to fair and honest dealings. Section 40 prohibits, among others, the use of harassment, pressure and unfair tactics when marketing goods or services. False, misleading or deceptive representations are prohibited in terms of section 41. Section 48(1)(b) of the CPA requires suppliers to ensure that the marketing of goods or services is fair, just and reasonable. The position regarding advertisements is therefore clearly regulated in terms of the CPA compared to common law. The next chapter will focus on the consumer redress mechanism that are available to the consumer in terms of the CPA.

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<sup>183</sup> Section 52(4) (a-b) of the Consumer Protection Act 68 of 2008.

## CHAPTER THREE: INSTITUTIONAL FRAMEWORK AND THE LIABILITY OF THE SUPPLIER

### 3.1 INTRODUCTION

In chapter 2, the legal framework governing false and misleading advertising was discussed namely, the common law and the Consumer Protection Act 68 of 2008 (CPA). This chapter will highlight the redress mechanisms available to a consumer as well as the liability of the supplier under the CPA. The role of self-regulatory bodies, such as the Advertising Regulatory Board (ARB) will also be analysed and how they aim to achieve consumer redress. In other words, this chapter examines the options available to the consumer seeking consumer redress. The institutional framework is important since it is responsible for providing consumers with access to redress. One of the central aims of the CPA is to ensure that the aggrieved party has access to redress.<sup>184</sup> The numerous rights granted to consumers including the prohibition of false or deceptive advertising would be meaningless if there is no way of enforcing them.

The CPA is not a codification of consumer rights and there are various pieces of legislation that apply in conjunction with it.<sup>185</sup> The CPA provides that in the case of inconsistency or where provisions of both legislation apply concurrently, the one that extends greater protection to the consumer prevails over the alternative provision.<sup>186</sup> Before approaching the various institutions provided under the CPA, a consumer may first approach the supplier concerned to try and resolve the issue. However, if that is deemed unsuccessful then the consumer may make use of the available consumer protection institutions to seek redress.

Generally, false, misleading and deceptive advertising adversely affects all consumers regardless of their background. Consumers from a poorer socio-economic status are, however, more susceptible to fall victim to unscrupulous conduct by marketers and the effect such conduct has on that category of consumer is much more severe. A study conducted by the Human Sciences Research Council looked at how different groups in South Africa are exposed to food advertising in magazines.<sup>187</sup> The study found that more than half of the advertisements in magazines consisted of unhealthy and starchy food and were primarily targeted at poor black people.<sup>188</sup> The research found that some of the

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<sup>184</sup> Preamble of the Consumer Protection Act 68 of 2008.

<sup>185</sup> Naudé T 'Dissemination of Consumer Law and Policy in South Africa' (2018) 41 *Journal of Consumer Policy* 413.

<sup>186</sup> Naudé T 'Dissemination of Consumer Law and Policy in South Africa' (2018) 41 *Journal of Consumer Policy* 413; Section 2(9) of the Consumer Protection Act 68 of 2008.

<sup>187</sup> Abrahams Z & Temple NJ & Mchiza ZJ et al 'A study of food advertising in magazines in South Africa' (2017) 12 *Journal of Hunger and Environmental Nutrition* 1.

<sup>188</sup> Abrahams Z & Temple NJ & Mchiza ZJ et al 'A study of food advertising in magazines in South Africa' (2017) 12 *Journal of Hunger and Environmental Nutrition* 6.

advertisements were misleading and made false claims about the food being healthy.<sup>189</sup> This is very concerning because not only are the advertisers taking advantage of a vulnerable group but also putting those consumers at risk of developing lifestyle diseases or non-communicable diseases such as obesity.<sup>190</sup>

A large part of the consumer population in South Africa comes from disadvantaged communities and were previously excluded from participating in fair business transactions in many sectors.<sup>191</sup> Apartheid had devastating effects on a large group of the population, as there are ‘*unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality*’.<sup>192</sup> This naturally had an effect on post-Apartheid South Africa in terms of people being generally ill-informed about their rights, let alone their consumer rights. The CPA is the kind of legislation that is aimed at promoting economic and social welfare. It acknowledges the vulnerability of consumers within the South African context by recognising the increased levels of illiteracy, poverty and other forms of socio-economic inequality that exists in the country.<sup>193</sup>

### 3.2 NATIONAL CONSUMER PROTECTION INSTITUTIONS

The right to redress for the consumer is probably one of the most important rights under the CPA.<sup>194</sup> Consumer institutions have been put in place with a clear mandate and the appropriate powers to investigate, enforce contraventions against consumers as well as instances of consumer abuse.<sup>195</sup> This is because the key to ensuring proper consumer protection is to have empowered consumers. It is important to have these consumer redress institutions in place so that consumers can have access to fast, efficient and economical redress of disputes.<sup>196</sup> Litigation is often complex, time-consuming and

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<sup>189</sup> Abrahams Z & Temple NJ & Mchiza ZJ et al ‘A study of food advertising in magazines in South Africa’ (2017) 12 *Journal of Hunger and Environmental Nutrition* 7.

<sup>190</sup> Abrahams Z & Temple NJ & Mchiza ZJ et al ‘A study of food advertising in magazines in South Africa’ (2017) 12 *Journal of Hunger and Environmental Nutrition* 9.

<sup>191</sup> Reddy K & Rampersad R ‘Ethical business practices: The Consumer Protection Act and socio-economic transformation in South Africa’ (2012) 6/25 *African Journal of Business Management* 7406.

<sup>192</sup> Reddy K & Rampersad R ‘Ethical business practices: The Consumer Protection Act and socio-economic transformation in South Africa’ (2012) 6/25 *African Journal of Business Management* 7406.

<sup>193</sup> Cassim F & Sibanda OS ‘The Consumer Protection Act and the introduction of collective consumer redress through class actions’ (2012) 75 *THRHR* 598.

<sup>194</sup> Lake R ‘The consumer’s right to redress- is the National Consumer Commission fulfilling its mandate?’ available at <https://www.lexisnexis.co.za> (accessed on 28 January 2019).

<sup>195</sup> ‘Chapter Four: Improving access to redress’ available at <https://www.westerncape.gov.za/text/2004/11/7chapterfour.pdf> (accessed on 28 January 2019).

<sup>196</sup> Preamble of the Consumer Protection Act 68 of 2008.

costly and within the realm of redress in respect of consumer rights, it may impede or frustrate access to justice rather than accommodate it.<sup>197</sup>

### 3.2.1 LOCUS STANDI

*Locus standi* in law means to have the legal standing to bring an action or challenge a decision.<sup>198</sup> In terms of the CPA, it has broad *locus standi* provisions. Section 4(1) of the Act provides that the following persons may in the manner provided for in the Act, approach a court, the National Consumer Tribunal, or the National Consumer Commission.<sup>199</sup> The following persons may allege that a consumers right in terms of the CPA has been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:<sup>200</sup>

- a) a person acting on his or her own behalf ;
- b) an authorised person acting on behalf of another person who cannot act in his or her own name;
- c) a person acting as a member of, or in the interest of, a group of affected persons;
- d) a person acting in the public interest, with leave of the Tribunal or the court as the case may be; and
- e) an association acting in the interests of its members.<sup>201</sup>

From this provision, we can see that it provides for persons with legal standing to act on their own behalf or on behalf of others who cannot act for themselves such as minors. However, this section goes further and also provides for class actions and public interest litigation.<sup>202</sup> Section 4(1) has been phrased very broadly and this allows for many groups or classes of people to have the ability to have access to consumer justice. This provision is in line with one of the CPA's purposes. Section 3(1)(b) provides '*for an accessible consistent, harmonised, effective and efficient system of redress for consumers.*'<sup>203</sup>

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<sup>197</sup> Van Heerden C & Barnard J 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) 6 *Journal of International Commercial Law and Technology* 132.

<sup>198</sup> 'Locus standi' Law J & Martin EA *Oxford Dictionary of Law* 7ed (2013) 333.

<sup>199</sup> Section 4(1) of the Consumer Protection Act 68 of 2008.

<sup>200</sup> Van Heerden C & Barnard J 'Redress for consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) 6 *Journal of International Commercial Law and Technology* 132.

<sup>201</sup> Section 4(1) (a-e) of the Consumer Protection Act 68 of 2008.

<sup>202</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 4-3. Section 4(1)(c) of the Consumer Protection Act.

<sup>203</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 4-3.

### 3.2.2 NATIONAL CONSUMER COMMISSION

The National Consumer Commission (NCC), was established in terms of section 85 of the CPA and serves as a consumer ‘watch dog’. It is a juristic person that has jurisdiction throughout the Republic.<sup>204</sup> The NCC is tasked with the enforcement of the CPA. It is responsible for consumer complaints, investigating those complaints and referring them to an appropriate forum.<sup>205</sup> It is also responsible for monitoring markets, making recommendations for legislative change and interacting with the Minister of Trade and Industry in developing industry codes and allowing exceptions from certain provisions of the Act.<sup>206</sup> The NCC is obliged to exercise its functions in accordance with the values and principles that are enshrined in the Constitution specifically in terms of section 195.<sup>207</sup> Section 195 of the Constitution provides for the basic democratic values and principles governing public administration. The list of principles contained in this section includes, *inter alia*, promoting and maintaining a high standard of professional ethics and ensuring that the services provided are impartial, fair, equitable and without bias.<sup>208</sup>

According to the *National Consumer Commission: Strategic Plan (2018/19 to 2022/23)*, hereinafter ‘NCC: Strategic Plan’, in pursuance of its strategic mandate as enshrined in terms of the CPA, the vision of the NCC is ‘*to be the leading institution in consumer protection that is professional, responsive and effective.*’<sup>209</sup> The NCC: Strategic Plan has identified three strategic outcome orientated goals that the NCC hopes to achieve over the next five years:

- Strategic Outcome Orientated Goal 1: To promote consumer protection and consumer safety;
- Strategic Outcome Orientated Goal 2: To promote reform of consumer policy and compliance with consumer protection legislation;
- Strategic Outcome Orientated Goal 3: To promote public awareness on consumer protection.<sup>210</sup>

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<sup>204</sup> Section 85 of the Consumer Protection Act 68 of 2008.

<sup>205</sup> Lake R ‘The consumer’s right to redress- is the National Consumer Commission fulfilling its mandate?’ available at <https://www.lexisnexis.co.za> (accessed on 28 January 2019).

<sup>206</sup> Lake R ‘The consumer’s right to redress- is the National Consumer Commission fulfilling its mandate?’ available at <https://www.lexisnexis.co.za> (accessed on 28 January 2019).

<sup>207</sup> Mupangavanhu Y ‘An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008’ (2012) 15/5 *PER/PELJ* 323.

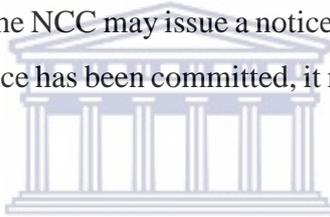
<sup>208</sup> Section 195 of the Constitution of the Republic of South Africa, 1996. See Section 195(1) (a-i) for the complete list of principles.

<sup>209</sup> Ministry of Trade and Industry *National Consumer Commission Revised Strategic Plan 2018/19-2022/23* (2018) 7.

<sup>210</sup> Ministry of Trade and Industry *National Consumer Commission Revised Strategic Plan 2018/19-2022/23* (2018) 21-22.

Each objective is supported by specific key outputs, which are in turn supported by key performance indicator and targets. The targets are contained in the annual performance plan and business plan of the NCC.<sup>211</sup> It is definitely a good thing that the NCC has decided to implement these strategic goals, as consumers face many issues that have a negative impact on them, such as the expiration and forfeiture of unused data and false and misleading advertising.<sup>212</sup> By addressing these major issues, the NCC will be entrenching itself as one of the key mechanisms of consumer redress in South Africa. To achieve these strategic goals will not be easy as the NCC is under-resourced. Collaboration with the necessary key stakeholders and companies will therefore ensure the achievement of these goals.<sup>213</sup>

When a consumer wants to initiate a complaint to the NCC, section 71 of the CPA sets out the criteria that must be followed. It provides that any person may file a complaint with the Commission in the prescribed manner and form alleging that a person has acted in a manner inconsistent with the Act.<sup>214</sup> The NCC may also directly initiate a complaint concerning any alleged prohibited conduct on its own motion, when directed to do so by the Minister or on request of a provincial consumer protection authority, regulatory authority or an accredited consumer protection group.<sup>215</sup> Once an investigation into the complaint has been concluded, the NCC may issue a notice of non-referral to the complainant. If the NCC is of the opinion that an offence has been committed, it may refer the matter to the National Prosecuting Authority (NPA).<sup>216</sup>



The NCC is also able to refer a matter to the equality court if it believes that a person has engaged in prohibited conduct. It may also propose a draft consent order in terms of section 74 of the CPA. The NCC is also able to issue and enforce a compliance notice.<sup>217</sup> A compliance notice is an administrative enforcement. In other words, the notice sets out to the non-compliant person or association, the required steps that need to be taken in order to comply with the Act and the stipulated time period within which the required steps must be done.<sup>218</sup> Failure to comply with the notice may result in the NCC referring the matter to the Tribunal for the imposition of an administrative fine or to the NPA for prosecution of an offence.<sup>219</sup> The NCC does not have the power to either impose an administrative fine or prosecute.

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<sup>211</sup> Ministry of Trade and Industry *National Consumer Commission Revised Strategic Plan 2018/19-2022/23* (2018) 22.

<sup>212</sup> Ministry of Trade and Industry *National Consumer Commission Revised Strategic Plan 2018/19-2022/23* (2018) 4.

<sup>213</sup> Ministry of Trade and Industry *National Consumer Commission Revised Strategic Plan 2018/19-2022/23* (2018) 4.

<sup>214</sup> Section 71(1) of the Consumer Protection Act 68 of 2008.

<sup>215</sup> Section 17 (2)(a) and (b)(i)(ii) and (iii) of the Consumer Protection Act 68 of 2008.

<sup>216</sup> Section 73(1)(c) of the Consumer Protection Act 68 of 2008.

<sup>217</sup> Section 73(1)(c) of the Consumer Protection Act 68 of 2008.

<sup>218</sup> Section 73(1)(c) of the Consumer Protection Act 68 of 2008.

<sup>219</sup> Section 112 of the CPA gives the Tribunal the power to impose an administrative fine. See also 'Moore Stephens: Consumer Protection Act Guide' available at

It is important to note that the Commission does not deal with individual consumer complaints.<sup>220</sup> Section 99 of the CPA provides that the Commission is responsible for the enforcement of the Act by promoting the informal resolution of any dispute arising in terms of the Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute.<sup>221</sup> Therefore, section 99 enables the Commission to refer individual consumer complaints against suppliers to other forums for resolution. The role of the Commission is merely to monitor the performance of these alternative dispute resolution forums.<sup>222</sup> Furthermore, the Commission uses the complaints received from consumers to determine trends in the marketplace and once this is done, a determination is made regarding whether an intervention is necessary or not.<sup>223</sup> By implication, the commission investigates harmful business practices and trends on issues of policy.<sup>224</sup>

### 3.2.3 NATIONAL CONSUMER TRIBUNAL

The National Consumer Tribunal (the 'Tribunal') has been established in terms of the National Credit Act 34 of 2005 (NCA). The Tribunal is a juristic person which has jurisdiction throughout South Africa.<sup>225</sup> It is an independent adjudicative entity deriving its mandate from the National Credit Act.<sup>226</sup> The aim of the Tribunal is to achieve fairness and justice for everyone in the consumer market.<sup>227</sup> The Tribunal can, *inter alia*, grant interim relief, namely: it can declare conduct to be prohibited; issue an interdict for prohibited conduct; confirm consent orders; condone non-compliance with its rules and procedures as well as any other appropriate order required to give effect to a right as contemplated in the Act.<sup>228</sup> The Tribunal, therefore, has extensive powers compared to the NCC. The Tribunal is mandated to promote the spirit and purposes of the CPA in discharging of its duties. Furthermore, it can make appropriate orders which provides a practical effect to the

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<https://southafrica.moorestephens.com/MediaLibsAndFiles/media/southafricaweb.moorestephens.com/Guide2018/MS-Consumer-Protection-Act-Guide.pdf> (accessed on 15 April 2019).

<sup>220</sup> Woker T 'Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress' (2017) 29 SA *MERC LJ* 6.

<sup>221</sup> Section 99 of the Consumer Protection Act 68 of 2008.

<sup>222</sup> Woker T 'Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress' (2017) 29 SA *MERC LJ* 7.

<sup>223</sup> Woker T 'Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress' (2017) 29 SA *MERC LJ* 6.

<sup>224</sup> Woker T 'Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress' (2017) 29 SA *MERC LJ* 6.

<sup>225</sup> Mupangavanhu Y 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) 15 *PER/PELJ* 325.

<sup>226</sup> Section 26 of the National Credit Act 34 of 2005.

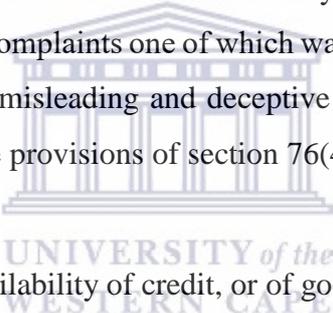
<sup>227</sup> 'National Consumer Tribunal' available at <http://www.thenct.org.za/what-we-do> (accessed on 28 January 2019).

<sup>228</sup> 'National Consumer Tribunal' available at <http://www.thenct.org.za/what-we-do> (accessed on 28 January 2019).

consumer's right of access to redress.<sup>229</sup> It is also empowered to make innovative orders which must be able to advance, protect and ensure the realisation and enjoyment of consumer rights.<sup>230</sup>

In terms of section 150 of the CPA, the tribunal must conduct a hearing in respect of any matter referred to it and also may make any applicable order contemplated,<sup>231</sup> such as declaring a conduct to be prohibited, interdicting prohibited conduct, imposing fees, confirming consent orders or condoning non-compliance with its rules.<sup>232</sup> A consumer may refer a matter directly to the Tribunal.<sup>233</sup>

It is important to note that the Tribunal adjudicates on a wide range of consumer related matters including the ones dealing with the misleading and deceptive representations. A case in point involves, the matter between *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*.<sup>234</sup> The matter related to a so-called 'Satinsky' scheme and the Standard Bank's (Respondent) alleged involvement in the scheme.<sup>235</sup> The Satinsky dealerships involved consumers being promised payment in exchange for carrying advertisements on the cars they purchase subject to an instalment of R699 per month.<sup>236</sup> There were four complaints one of which was that the Respondent's authorised agent ran an advertisement which was misleading and deceptive to consumers.<sup>237</sup> The Tribunal in considering this complaint looked at the provisions of section 76(4) and (5) of the NCA which state that:

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- '(4) An advertisement of the availability of credit, or of goods or services to be purchased on credit—
- (a) must comply with this section;
  - (b) must contain any statement required by regulation;
  - (c) must not-
    - (i) advertise a form of credit that is unlawful;
    - (ii) be misleading, fraudulent or deceptive; or

<sup>229</sup> Mupangavanhu Y 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) 15 *PER/PELJ* 325.

<sup>230</sup> Mupangavanhu Y 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) 15 *PER/PELJ* 326.

<sup>231</sup> This is also provided in terms of section 151 of the NCA.

<sup>232</sup> Van Heerden C & Barnard J 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) 6 *Journal of International Commercial Law and Technology* 134.

<sup>233</sup> Section 69(a) of the Consumer Protection Act 68 of 2008.

<sup>234</sup> NCT/29041/2015/140(1) NCA.

<sup>235</sup> *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*; NCT/29041/2015/140(1) NCA par 4.

<sup>236</sup> *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*; NCT/29041/2015/140(1) NCA par 4.

<sup>237</sup> *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*; NCT/29041/2015/140(1) NCA par 18.

(iii) contain any statement prohibited by regulation...’

The alleged misleading advertisement that was placed before the Tribunal contained the following words:

*‘New car from R699 p!m’, and ‘Drive a new car from R699 pm / A2268 /sms to 35393 / sms cost R3 \*terms and conditions apply \*Costs of Credit Phone [www.justgroup-africa.com/cost.html](http://www.justgroup-africa.com/cost.html)’.*

When the Tribunal was considering the above advertisement, it was unanimously agreed that from the face of the advertisement there is no mention of or reference to Standard Bank. Therefore, the advertisements were not those of the Respondents since there was no reference to it.<sup>238</sup> The reference to cost of credit was worded as follows: *‘\*Costs of Credit Phone [www.justgroup-africa.com/cost.html](http://www.justgroup-africa.com/cost.html)’.* The Tribunal also held that the Standard Bank did not form part of the agreement between Blue Lakes and Satinsky. It was clear to the Tribunal that the consumers essentially entered into two agreements at the Satinsky dealership. One was for the earning of income from the advertising on their vehicles and the second was in respect of the credit agreement should their application be approved.<sup>239</sup> The Tribunal held that the advertisement does contravene section 76 of the NCA but the Tribunal found that the Respondent cannot be held liable for the advertisement.<sup>240</sup> The question whether Satinsky contravened section 76 of the NCA with regards to the advertisement was dealt with in a separate judgment.

In the matter between *The National Credit Regulator (Applicant) v Satinsky 128 (Pty) Ltd t/a Just Group Africa (Respondent)*,<sup>241</sup> a compliance notice was issued against the Satinsky on 14 July 2014 by the NCR which Satinsky did not comply with. The compliance notice resulted from the Respondent’s alleged non-compliance with section 76(4) and (5) of the NCA.<sup>242</sup> Some of the prescribed steps that the compliance notice contained was, *inter alia*, to ensure that advertisements on vehicles comply with section 76 and regulation 21 of the NCA and to implement systems and procedures to ensure compliance with section 76 and regulation 21(7) of the NCA.<sup>243</sup> The Tribunal noted that according to the Respondent; the content of the brand awareness campaign on the motor

<sup>238</sup> *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*; NCT/29041/2015/140(1) NCA par 119.2.

<sup>239</sup> *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*; NCT/29041/2015/140(1) NCA par 118.

<sup>240</sup> *National Credit Regulator (NCR) v Standard Bank of South Africa Limited*; NCT/29041/2015/140(1) NCA par 122.

<sup>241</sup> Case number: NCT/15799/2014/55(6).

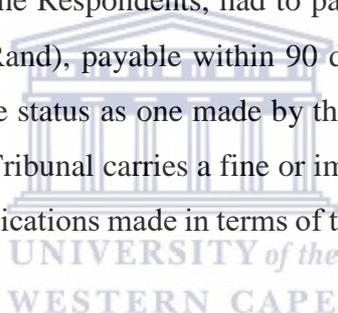
<sup>242</sup> *The National Credit Regulator v Satinsky 128 (Pty) Ltd t/a Just Group Africa*; NCT/15799/2014/55(6) par14.

<sup>243</sup> *The National Credit Regulator v Satinsky 128 (Pty) Ltd t/a Just Group Africa*; NCT/15799/2014/55(6) par15.

vehicle; displayed the address for the website where the interested buyer could read all the terms and conditions as well as the cost of credit for a specific product.<sup>244</sup>

The Tribunal held that the provisions of section 76 and regulation 21 are very specific in that it provides that- '(4) An advertisement of the availability of credit, or of goods or services to be purchased on credit... must ...' A close reading of the introductory part of section 76(4) and (5) of the NCA makes it clear that the section is contravened irrespective of where the information provided to consumer or 'interested buyer' is contained.<sup>245</sup> In other words, even if the prescribed information that is necessary in terms of section 76 and regulation 21, is contained elsewhere, for example on a website. Section 76(4) will still be contravened because that prescribed information is not contained in the advertisement itself.

It was for these reasons that the Tribunal found Satinsky to be in contravention of section 76 read together with regulation 21 of the NCA. Satinsky had therefore committed a prohibited conduct.<sup>246</sup> The Tribunal made an order whereby the Respondents, had to pay an administrative fine of R 150 000 (one hundred and fifty thousand Rand), payable within 90 days of the date of the order. The decisions of the Tribunal have the same status as one made by the High Court of South Africa and failure to comply with an order of the Tribunal carries a fine or imprisonment for up to ten years.<sup>247</sup> The Tribunal's role is to adjudicate applications made in terms of the National Credit Act (NCA) and the CPA.<sup>248</sup>



### 3.2.4 CONSUMER COURTS

A consumer court is established in terms of provincial legislation.<sup>249</sup> A consumer court is available as an alternative to other bodies or functionaries such an ombud or a dispute resolution agent to resolve a dispute between the parties.<sup>250</sup> If a person is involved in any prohibited conduct as contemplated by the CPA, the NCC may refer the matter to a consumer court.<sup>251</sup> The consumer court conducts its proceedings in the same manner as the Tribunal. This means it may make an order in the

<sup>244</sup> *The National Credit Regulator v Satinsky 128 (Pty) Ltd t/a Just Group Africa*; NCT/15799/2014/55(6) par 56.

<sup>245</sup> *The National Credit Regulator v Satinsky 128 (Pty) Ltd t/a Just Group Africa*; NCT/15799/2014/55(6) par 57.

<sup>246</sup> *The National Credit Regulator v Satinsky 128 (Pty) Ltd t/a Just Group Africa*; NCT/15799/2014/55(6) par 58.

<sup>247</sup> 'National Consumer Tribunal' available at <http://www.thenct.org.za/what-we-do> (accessed on 28 January 2019).

<sup>248</sup> 'National Consumer Tribunal' available at <http://www.thenct.org.za/what-we-do> (accessed on 28 January 2019).

<sup>249</sup> Section 1 of the Consumer Protection Act 68 of 2008.

<sup>250</sup> Otto JM *The National Credit Act Explained* (2006) 34.

<sup>251</sup> Du Plessis CH *Does the Consumer Protection Act 68 of 2008 have the effect of reviving the abolished exceptio doli generalis* (unpublished LLM thesis, University of Pretoria, 2012) 19.

same way the Tribunal would have, with the same force and effect.<sup>252</sup> If the NCC issues a notice of non-referral, a consumer may then approach a consumer court with jurisdiction.<sup>253</sup> Once the matter has been brought before the consumer court with evidence of the transgression, the consumer court will make a decision. It will also have the authority to compel the company to refund the consumer, or order it to replace the product.<sup>254</sup> The consumer court could also order the company to pay compensation to the consumer.<sup>255</sup>

The Western Cape has not yet established a consumer court in the province. There is only an Office of the Consumer Protector that is mandated to act as a consumer protection agency within the province by virtue of the powers given to it in terms of national and provincial legislation.<sup>256</sup> The Office of the Consumer Protector acts as a ‘prosecutor’ on behalf of the consumers.<sup>257</sup> This means that whenever a consumer brings a complaint before the Tribunal, the consumer is represented by the Consumer Protector. The errant supplier against whom a complaint is made is allowed to be represented by an attorney.<sup>258</sup> The establishment of consumer courts help level the playing field between consumers and businesses.

### 3.2.5 OMBUDSMANS AND ALTERNATIVE DISPUTE RESOLUTION

An ‘ombudsman’ can be described as an official who receives complaints from the public regarding misuse of power or unacceptable conduct by the State or its organs.<sup>259</sup> The ombudsman acts as a mediator between the industry and the consumer with complaints.<sup>260</sup> The Industry ombud can also act as an Alternative Dispute Resolution (ADR) agent.<sup>261</sup> If the parties are not able to resolve the dispute through the ADR process, the ADR agent must give the notice to the parties terminating the

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<sup>252</sup> Du Plessis CH *Does the Consumer Protection Act 68 of 2008 have the effect of reviving the abolished exceptio doli generalis* (unpublished LLM thesis, University of Pretoria, 2012) 19.

<sup>253</sup> Du Plessis CH *Does the Consumer Protection Act 68 of 2008 have the effect of reviving the abolished exceptio doli generalis* (unpublished LLM thesis, University of Pretoria, 2012) 19.

<sup>254</sup> ‘Consumer court for Cape’ available at [www.iol.co.za/capeargus/consumer-court-for-cape-1209007](http://www.iol.co.za/capeargus/consumer-court-for-cape-1209007) (accessed on 20 April 2019).

<sup>255</sup> ‘Office of the Consumer Protector: Overview’ available at [https://www.westerncape.gov.za/your\\_gov/25](https://www.westerncape.gov.za/your_gov/25) (accessed on 20 April 2019).

<sup>256</sup> Schedule 4, Part A of the Constitution prescribes that the area of consumer protection is a functional area of concurrent national and provincial legislative competence. This entails that at provincial level, provincial governments have the authority to legislate on the arena of consumer protection and also provide associated services within this arena.

<sup>257</sup> ‘Office of the Consumer Protector: Overview’ available at [https://www.westerncape.gov.za/your\\_gov/25](https://www.westerncape.gov.za/your_gov/25) (accessed on 20 April 2019).

<sup>258</sup> ‘Consumer court for Cape’ available at [www.iol.co.za/capeargus/consumer-court-for-cape-1209007](http://www.iol.co.za/capeargus/consumer-court-for-cape-1209007) (accessed on 20 April 2019).

<sup>259</sup> Otto JM *The National Credit Act Explained* (2006) 36.

<sup>260</sup> Otto JM *The National Credit Act Explained* (2006) 36.

<sup>261</sup> Section 70(1) of the Consumer Protection Act 68 of 2008.

process.<sup>262</sup> Afterwards, the aggrieved party may file a complaint with the NCC. If the dispute is ultimately resolved through the ADR process, the agent must record the dispute in the form of an order and if the parties agree to the order as per section 74, it must be given to the tribunal or the High Court to be made a consent order.<sup>263</sup>

The Office of the Goods and Services Ombudsman (CGSO) is one of the consumer goods and services industry's compulsory Ombud scheme established in terms of the CPA.<sup>264</sup> The CGSO enforces the Consumer Goods and Services Industry Code of Conduct. It investigates and deals with consumer complaints free of charge.<sup>265</sup>

The CGSO has ruled on a number of consumer complaints which include misleading advertising. One of the complaints dealt with an advertisement displaying an incorrect price and bait marketing. The facts of the complaint are as follows, the complainant saw the supplier's advert for a Geneva couch selling at R1599.<sup>266</sup> When the complainant went to the store to buy the couch the following day she or he was told that the actual price of the couch was R3700. The store said that the advertised price of R1599 was a printing error and the store refused to sell the couch to the complainant for that price.

The adjudicator came to the conclusion in this instance that the supplier is not bound to provide the consumer with the couch at the advertised price.<sup>267</sup> By using the reasonable consumer test, the advertisement published in a catalogue by the supplier was not misleading because of the large discrepancy with the actual price. The correct price of the couch was R 3700 and the advertised price was R 1599 which is about 43% less than the original correct price. Therefore, when using the reasonable consumer test, the adjudicator was of the opinion that the discrepancy between the actual price or the price that a reasonable consumer might expect to be and the advertised price was large. A reasonable consumer in this instance would have realised there was an error and would not have been misled.<sup>268</sup> Based on this, the supplier could not be held liable for false or misleading advertising and was not bound to provide the consumer with a couch at the incorrect price.

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<sup>262</sup> Section 79(2) of the Consumer Protection Act 68 of 2008.

<sup>263</sup> Lynn ST *The National Credit and Consumer Protection Act: A guide for credit providers and suppliers* (2011) 211 and section 70(1-4) of the Consumer Protection Act 68 of 2008.

<sup>264</sup> Section 82 of the Consumer Protection Act 68 of 2008.

<sup>265</sup> 'Consumer Goods and Services Ombud' available at [www.cgso.org.za/](http://www.cgso.org.za/) (accessed on 20 April 2019).

<sup>266</sup> CGSO Compendium of cases 2014-2017 at 14.

<sup>267</sup> CGSO Compendium of cases 2014-2017 at 14.

<sup>268</sup> CGSO Compendium of cases 2014-2017 at 26.

### 3.2.6 ORDINARY COURTS

The CPA defines a ‘court’ as not including a consumer court.<sup>269</sup> This means that a Magistrates Court or High Court may be approached with regard to consumer matters. Section 52 of the Act deals with the powers of the court to ensure just and fair conduct, terms and conditions. This section must be read with section 76 (powers of court), section 114 (interim relief) and section 115 (civil actions and jurisdiction). Where a person alleges that a supplier has infringed section 41 (false, misleading and deceptive representations) and no remedy is available, the court may make an order that is just and reasonable in the circumstances.<sup>270</sup> The court is obliged to consider those circumstances that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made and the principles, purposes and provisions of the CPA. Section 52(2) of the CPA provides a list of relevant factors which the courts must consider when looking at alleged contraventions of section 40, 41 or 48.<sup>271</sup> The relevant factors are non-exhaustive and the courts may be willing to consider other factors as well which are not listed.<sup>272</sup> A few of the factors listed in section 52(2) of the CPA include the following: the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining positions; the circumstances of the transaction or agreement that existed or were reasonably foreseeable as well as the conduct of the supplier and consumer.<sup>273</sup>

Section 52(3) sets out the list of possible orders that the court can impose if it determines that the marketing of the goods or services including advertisement was wholly or partly unjust, unreasonable or unfair<sup>274</sup>. These orders include, firstly an order that any money or property be restored to the consumer. Secondly, an order that the consumer is compensated for losses or expenses relating to the transaction or the proceedings of the court. Lastly, an order that the supplier ceases any practice, or alters any practice, form or document so as to avoid repetition of the suppliers’ conduct.<sup>275</sup> Consequently, a supplier may be required to stop advertising false information or to alter the advertisement.

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<sup>269</sup> Section 1 of the Consumer Protection Act 68 of 2008.

<sup>270</sup> Lynn ST *The National Credit and Consumer Protection Act: A guide for credit providers and suppliers* (2011) 201.

<sup>271</sup> *NCC v Western Car Sales cc t/a Western Car Sales* NCT/81554/2017/73(2)(b) par 42. On a plain reading of section 48, read with section 52, it would appear that the power to apply the provisions of section 48 remain exclusively reserved for a court of law.

<sup>272</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 52-14.

<sup>273</sup> Section 52(2) of the Consumer Protection Act 68 of 2008. See section 52(2)(a-j) for complete list of factors.

<sup>274</sup> Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 52-25.

<sup>275</sup> Campbell N & Logan S & Bregmann R ‘Consumer Protection Guide for Lawyers’ (2011) *Law Society South Africa* 85 and section 52(4) of the Consumer Protection Act 68 of 2008.

With respect to damages the consumer who has suffered loss due to the prohibited conduct may not institute a claim for the assessment of the amount or awarding of damages if he or she has consented to an award of damages in a consent order or else a certificate must be filed with the civil court.<sup>276</sup> It is important to note that an appeal or review against an order of the Tribunal suspends any right to commence an action in a civil court unless the court says otherwise.<sup>277</sup>

### 3.3 ENFORCEMENT OF RIGHTS

The protection of consumers rights is of utmost importance, section 68(1) of the CPA provides that a supplier must not in response to a consumer exercising a right in the CPA, *inter alia*, discriminate against or penalise a consumer or unilaterally change the terms of the transaction where a consumer will be adversely affected by those changes.<sup>278</sup> Section 68(2) further states that when a court declares an agreement or provision as void or severs a provision as per section 52(4), the supplier<sup>279</sup> may not, *inter alia*, penalise another party to that agreement or alter the terms of the agreement to the detriment of the consumer.<sup>280</sup>

The enforcement of consumer rights is dealt with in terms of section 69 of the CPA. Section 69 is read together with section 4 of the Act which deals with the realisation of consumer rights. Section 4(1) makes provision for an aggrieved consumer to approach a court, tribunal or the NCC.<sup>281</sup> Section 4(3) ensures that when the court is interpreting a provision of the CPA it must be read in such a way that '*best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights generally....*' In other words, the provision, contract or term must be interpreted to ultimately benefit the consumer. Section 69(d) of the CPA provides the aggrieved consumer may approach a court with jurisdiction to hear the dispute if all other remedies have been exhausted. This raises the question as to whether the courts will decline to hear a matter from an aggrieved consumer if they have not approached the consumer protection institutions.

This issue arose in the case of *Joroy 4440 CC v Potgieter and Another NNO*,<sup>282</sup> where the court had to look at the proper interpretation of the section 69(d) provision.<sup>283</sup> The facts briefly state that the

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<sup>276</sup> Section 115(2)(a) – 115(2)(b) of the Consumer Protection Act 68 of 2008.

<sup>277</sup> Section 115(4) of the Consumer Protection Act 68 of 2008.

<sup>278</sup> Lynn ST *The National Credit and Consumer Protection Act: A guide for credit providers and suppliers* (2011) 210.

<sup>279</sup> 'Supplier' means a person who markets any goods or services; section 1 of the Consumer Protection Act 68 of 2008.

<sup>280</sup> Section 68(2) of the Consumer Protection Act 68 of 2008.

<sup>281</sup> Section 4(1) of the Consumer Protection Act 68 of 2008.

<sup>282</sup> 2016 (3) SA 465 (FB).

<sup>283</sup> 2016 (3) SA 465 (FB).

applicant, Joroy, bought a vehicle from a trust which was under the trusteeship of the respondents, Potgieter.<sup>284</sup> The applicant then approached the High Court for a refund of the full purchase price of the vehicle without first utilising the other remedies available in terms of section 69. The court had to first deal with the question whether the court had the jurisdiction to hear the matter in terms of section 69(d).<sup>285</sup> When considering this issue, the court looked at the principle articulated by the Constitutional Court in *Chirwa v Transnet Limited and Others*.<sup>286</sup> It was held by the Constitutional Court that where a specialised framework has been created for the resolution of disputes parties must pursue their claims primarily through such mechanisms.<sup>287</sup> According to this principle, this would mean that if specialised dispute resolution mechanisms are established, the aggrieved person must make use of those mechanisms to resolve their matter.

In addition, the court also looked at the plain language meaning of the word 'if' as it appears in section 69(d). The court held that the wording of the said section is clear and unambiguous. It specifically states that the aggrieved consumer may approach the court 'if' all the available avenues of redress have been exhausted.<sup>288</sup> The legislature was very specific in prescribing the redress that a consumer has in regard to this section. Reinders J stated that '*I fail to see how any other interpretation can be given to the word 'if'*'<sup>289</sup> Therefore, it is clear that the aggrieved consumer needs to ensure that they first utilise all the remedies available to them in terms of the CPA and thereafter approach an ordinary court for relief. The court will then exercise its discretion to hear the matter. In light of this judgment, it is imperative that consumers are aware that approaching an ordinary court should would be the last resort.

### 3.4 SELF REGULATION

Self-regulation entails the regulation or governing of an industry by the role players that are in a particular industry, such as marketing and advertising.<sup>290</sup> In general, self-regulation can take many forms, but one can distinguish between voluntary self-regulation from the one backed up by legislation.<sup>291</sup> In South Africa, the Advertising Standards Authority of South Africa (ASA) is a

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<sup>284</sup> *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) par 2.

<sup>285</sup> *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) par 5.

<sup>286</sup> 2008 (4) SA 367 (CC).

<sup>287</sup> *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC).

<sup>288</sup> *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) par 8.

<sup>289</sup> *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) par 8.

<sup>290</sup> Strachan DP 'An Evaluation of the Self-Regulation of Promotional Competitions in South Africa' (2016) 19 *PER/PELJ* 3.

<sup>291</sup> Strachan DP 'An Evaluation of the Self-Regulation of Promotional Competitions in South Africa' (2016) 19 *PER/PELJ* 3.

system of self-regulation within the advertising industry. It imposes standards, ethics and rules which its members should comply with and it enforces those rules.<sup>292</sup> These ethical rules are usually drawn up in the form of a code, such as the Advertising Standards Authority of South Africa's Code of Advertising Practice (the 'Code').<sup>293</sup>

Since the ASSA is an independent regulatory body which regulates the advertising standards, it works on a system of membership.<sup>294</sup> This means that various industry bodies are members of the ASSA and in turn their individual members are bound by the Code.<sup>295</sup> This principle has been confirmed in case law, such as in the case of *Telematrix (Pty) Ltd v Advertising Standards Authority SA*.<sup>296</sup> The court held in the *Telematrix* case that the ASA is an independent body which has been set up and sponsored by the advertising industry to ensure that the industry's system of self-regulation works in the 'public interest'.<sup>297</sup> It was also stated by the court that advertisers such as Telematrix are 'indirectly bound' to observe the Code because their advertising agents belong to a constituent member of the ASA.<sup>298</sup>

In a more recent judgment, *The Advertising Standards Authority v Herbex (Pty) Ltd*,<sup>299</sup> the central issue in the appeal was whether the appellant (ASA), has jurisdiction over persons who are not its members and who have not consented to its jurisdiction.<sup>300</sup> The respondent (Herbex) was not a member of the ASA.<sup>301</sup> The court held that the ASA has no jurisdiction over any person or entity who is not its member. It may only have jurisdiction where a non-member submits itself to its jurisdiction. This allows non-members to participate in its processes while the ASA is also able to issue any instruction, order or ruling against the non-member or sanction it.<sup>302</sup> Herbex could not be bound to the Code's rules, ethics and rulings since it was not a member of ASA.<sup>303</sup> Undoubtedly, Codes are more flexible than regulation by statute, and they can be readily revised to respond to the issues that arise within the specific industry.<sup>304</sup>

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<sup>292</sup> Schimmel G *Advertising Law: A Guide to the Code of Advertising Practice* (2014) 5.

<sup>293</sup> Schimmel G *Advertising Law: A Guide to the Code of Advertising Practice* (2014) 14.

<sup>294</sup> Schimmel G *Advertising Law: A Guide to the Code of Advertising Practice* (2014) 2.

<sup>295</sup> Schimmel G *Advertising Law: A Guide to the Code of Advertising Practice* (2014) 2.

<sup>296</sup> 2006 (1) 461 (SCA).

<sup>297</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) 461 (SCA) par 4.

<sup>298</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) 461 (SCA) par 4.

<sup>299</sup> (902/16) [2017] ZASCA 132 (29 September 2017).

<sup>300</sup> *The Advertising Standards Authority v Herbex (Pty) Ltd* (902/16) [2017] ZASCA 132 (29 September 2017) par 1.

<sup>301</sup> *The Advertising Standards Authority v Herbex (Pty) Ltd* (902/16) [2017] ZASCA 132 (29 September 2017) par 1.

<sup>302</sup> *The Advertising Standards Authority v Herbex (Pty) Ltd* (902/16) [2017] ZASCA 132 (29 September 2017) par 18.

<sup>303</sup> *The Advertising Standards Authority v Herbex (Pty) Ltd* (902/16) [2017] ZASCA 132 (29 September 2017) par 18.

<sup>304</sup> Boddewyn JJ 'Advertising Self-Regulation: True Purpose and Limits' (1989) 18 *Journal of Advertising* 1989 23.

The ASA used to be responsible for regulating advertisements. ASA's Code of Advertising Practice 2008 placed a number of restrictions on advertising, including statements or visual representations which offend against the prevailing standards of decency. Restrictions were also placed upon advertisements which in their nature had the tendency to abuse the trust of the consumer or exploits his or her lack of experience, knowledge or credulity.<sup>305</sup> The Code was quite comprehensive and it contained specific clauses which relate to the issue of false, misleading and deceptive advertising. Section II made provision for the primary rules governing advertising.<sup>306</sup> For instance, in terms of Section II, clause 4.2.2 deals with puffery. It provides that puffery is permitted provided that it is clear what is being expressed is an opinion and there should not be likelihood of misleading consumers about any aspect of a product or service.<sup>307</sup> ASA no longer exists since it was liquidated in September 2018 due to mismanagement and alleged financial impropriety.<sup>308</sup>

The ARB is a totally new legal entity which has replaced the ASA. The founding members of the ARB consist of member bodies from the marketing and media industries.<sup>309</sup> The ARB administers the widely-accredited Code of Advertising Practice which regulates the content of the South African advertising.<sup>310</sup> The main purpose of the Code is to protect consumers and to ensure fair play amongst the advertisers. The Code consists of four sections, which includes, *inter alia*, Section II which contains the basic rules for advertising.<sup>311</sup> The Code also includes the Procedural Guide which stipulates how the complaint process works.<sup>312</sup> The Code and Procedural Guide binds all the ARB members.

The ARB enables the consumer to lodge a written complaint with them free of charge. If the complaint is successful, the ARB's media members and affiliates will be asked to stop carrying the particular advertisement.<sup>313</sup> It is important to note that the under the ARB an aggrieved consumer is not be able to obtain a refund nor buy the advertised product at the advertised price.<sup>314</sup> The ARB has

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<sup>305</sup> The Code of Advertising Practice 2008.

<sup>306</sup> Advertising Standards of South Africa Code of Advertising Practice 2008. Also available at <https://www.asasa.org.za> (hereinafter "The Code of Advertising Practice 2008").

<sup>307</sup> Clause 4.2.2 of Section II of the Code of Advertising Practice 2008.

<sup>308</sup> Maggs J 'Advertising's new self-regulatory body' available at <https://www.businesslive.co.za/redzone/newsinsights/2018-11-22-come-to-the-new-party/> (accessed on 11 August 2019).

<sup>309</sup> 'Advertising Regulatory Board' available at <http://www.arb.org.za/index.html> (accessed on 15 April 2019).

<sup>310</sup> 'Advertising Regulatory Board' available at <http://www.arb.org.za/index.html> (accessed on 15 April 2019).

<sup>311</sup> 'Advertising Regulatory Board' available at <http://www.arb.org.za/codes.html> (accessed on 15 April 2019).

<sup>312</sup> 'Advertising Regulatory Board' available at <http://www.arb.org.za/codes.html> (accessed on 15 April 2019).

<sup>313</sup> 'Advertising Regulatory Board' available at <http://www.arb.org.za/complaints.html> (accessed on 15 April 2019).

<sup>314</sup> 'Advertising Regulatory Board' available at <http://www.arb.org.za/complaints.html> (accessed on 15 April 2019).

made rulings in terms of misleading claims in advertisements. In *Dave Bennett (complainant) v Shoprite Checkers (Pty) Ltd* (Advertiser), the advertisement in question, concerned a catalogue which featured special deals offered by Checkers.<sup>315</sup> The catalogue contained a deal for Rama ‘Original’ spread, which the catalogue claims was margarine. The complainant, Mr Bennet argued that the product could not have been ‘margarine’ as legally defined. In order for a product to constitute ‘margarine’, the product needs to contain a maximum of 16% water otherwise it is not in fact margarine. The ‘Rama’ product contained a much higher water content than the required 16%.

The Directorate looked at Clause 4.2.1 of Section II of the Code which deals with misleading claims. Clause 4.2.1 provides that:

*‘advertisement(s) should not contain any statement or visual presentation which, directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer.’*<sup>316</sup>

In this matter, Checkers undertook not to use the term ‘margarine’ in its advertising in relation to the ‘Rama’ Original Spread product in the future. The Directorate emphasised that the advertiser should be reminded that they must adhere to the deadlines provided for in terms of Clause 15.3 of the Procedural Guide and that the advert must be withdrawn from every medium in which it appears.<sup>317</sup>

As shown in the case above, the rulings of the ARB can be helpful in curbing the advertising of misleading information. However, it is only members of the ARB that are legally obliged to submit to the jurisdiction of the ARB. The Memorandum of Incorporation (MOI) of the ARB stipulates that a non-member does not have to submit themselves to any process, order or ruling given by the ARB.<sup>318</sup> This means that only members of the ARB are bound by the orders, rulings and decisions. This was confirmed in the *Advertising Standards Authority of South Africa v Herbex (Pty) Ltd* decision.<sup>319</sup> The court stated *‘the ASA has no jurisdiction over non-members and could not require them to participate in its processes.’*<sup>320</sup> This still applies to the ARB.

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<sup>315</sup> *Dave Bennett v Shoprite Checkers (Pty) Ltd* 07-11-18 page 1.

<sup>316</sup> Clause 4.2.1 of the Code of Advertising Practice 2008.

<sup>317</sup> *Dave Bennett v Shoprite Checkers (Pty) Ltd* - 07-11-18 page 3.

<sup>318</sup> *Thando Dube v Taxify South Africa (Pty) Ltd* - 07-01-19 page 3.

<sup>319</sup> (902/16) [2017] ZASCA 132.

<sup>320</sup> *Advertising Standards Authority of South Africa v Herbex (Pty) Ltd* (902/16) [2017] ZASCA 132 par 16.

There are many advantages to self-regulation namely, it is cheaper for a complainant to lodge a claim with the ARB instead of initiating an action in a court of law.<sup>321</sup> Self-regulation can also be seen as more efficient and effective than government regulation because the industry is more aware and privy to the specific problems within the industry.<sup>322</sup> With that being said, self-regulation is also adaptable in the sense that the Code is under constant review. The self-regulatory approach also helps to minimise the frictions between business and consumers as regulation tends to impose rules instead of persuasion and negotiation.<sup>323</sup>

One of the shortcomings of self-regulation is that it is not a complete substitute for other forms of societal control.<sup>324</sup> When it comes to self-regulatory activities, businesses cannot be compelled to participate in the activities, if they are not a members.<sup>325</sup> Self-regulation tends to enforce weak sanctions. In other words, the penalties imposed on advertisers can be relatively mild.<sup>326</sup> Self-regulatory bodies also deal with a number of the same or similar complaints.<sup>327</sup> Such bodies are also not able to discipline all the violators and this could lead to a lack of confidence.<sup>328</sup> One can argue that the work of the regulatory bodies, such as the ARB, is less effective and limited for the reasons discussed above. A mixture of self-regulation and state regulation is thus necessary within the South African context.



### 3.5 CONCLUSION

Consumer have access to various consumer protection institutions as set out in terms of the CPA. However, the CPA was careful not to take away the consumers right to redress in terms of the common law. The fact that consumers can still enjoy their common law rights, together with the other forms of relief that can be obtained in terms of the CPA, is a very valuable development in South African legal system.

The aim of consumer protection institutions is to ensure that consumers have access to fast, efficient and effective means of addressing consumer issue. The National Consumer Commission is

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<sup>321</sup> Boddewyn JJ 'Advertising Self-Regulation: Private Government and Agent of Public Policy' (1985) 4 *Journal of Public Policy and Marketing* 131.

<sup>322</sup> Boddewyn JJ 'Advertising Self-Regulation: Private Government and Agent of Public Policy' (1985) 4 *Journal of Public Policy and Marketing* 131.

<sup>323</sup> Boddewyn JJ 'Advertising Self-Regulation: Private Government and Agent of Public Policy' (1985) 4 *Journal of Public Policy and Marketing* 131.

<sup>324</sup> Boddewyn JJ 'Advertising Self-Regulation: True Purpose and Limits' (1989) 18 *Journal of Advertising* 1989 23.

<sup>325</sup> See discussion on *Telematrix v ASA* and *ASA v Herbex* in 'Self-Regulation'.

<sup>326</sup> Boddewyn JJ 'Advertising Self-Regulation: True Purpose and Limits' (1989) 18 *Journal of Advertising* 1989 23.

<sup>327</sup> Boddewyn JJ 'Advertising Self-Regulation: True Purpose and Limits' (1989) 18 *Journal of Advertising* 1989 23.

<sup>328</sup> Boddewyn JJ 'Advertising Self-Regulation: True Purpose and Limits' (1989) 18 *Journal of Advertising* 1989 23.

considered the ‘watch dog’ of consumer protection. The National Consumer Tribunal has the power to adjudicate on consumer-related matters including the ones dealing with the misleading and deceptive representations. The CPA makes provision for provincial consumer courts which are established in terms of provincial legislation. The Western Cape is yet to establish a provincial consumer courts. Industry ombudsman and ADR forums are also a very useful avenue for consumers since the procedure they use is less formal compared to other forums. Consumers can only approach ordinary courts as a last resort. All other redress mechanisms need to have been first exhausted. The next chapters discuss false advertising in the United States of America.



## CHAPTER FOUR: FALSE ADVERTISING IN THE UNITED STATES OF AMERICA

### 4.1 INTRODUCTION

The previous chapter dealt with the South African consumer legislation and the different consumer redress mechanisms that are available under Consumer Protection Act 68 of 2008. The chapter also looked at the self-regulatory bodies and how they are able to provide redress to consumers who are aggrieved by unscrupulous marketers and companies. In this particular chapter, the focus is on the United States of America (USA) and how it deals with false and misleading advertising, and the redress available to consumers. It also discusses the position of third parties who are involved in misleading advertising. The purpose of the chapter is to draw some lessons (if there are any) from the USA.

The USA was selected as a comparator since it is known for having a culture of consumerism.<sup>329</sup> Consumerism entails the belief that personal well-being and happiness is dependent on, to a large extent, the level of personal consumption of material goods.<sup>330</sup> A consumerist society is one in which people devote a large amount of time, energy and resources consuming goods and the more they consume, the better.<sup>331</sup> Advertising generally plays a major role in promoting this culture of consumerism and in making consumers buy into certain brands and products.<sup>332</sup> In 2009, the average American adult saw over 52 500 advertisements a year on television.<sup>333</sup> This means that they spent about two weeks a year watching television advertisements alone.<sup>334</sup> In 2014, the annual 'Advertising and Audiences' report stated that the average American watches roughly about 5 hours of television per day and that programming consists of 15 minutes of commercials per hour.<sup>335</sup> According to Forbes it is estimated that in 2017 most Americans were exposed to around 4000 to 10 000

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<sup>329</sup> Cohen JN 'The myth of America's "culture of consumerism": Policy may help drive American household's fraying finances' (2014) 16 *Journal of Consumer Culture* 531. Glickman LB *Consumer Society in American History: A Reader* (1999) 1. Brown HS & Vergragt PJ & Maurie JC *Social Change and the coming of Post-Consumer Society: Theoretical advances and policy implications* (2017) 3.

<sup>330</sup> Wright EO & Rogers J "Chapter 7: Consumerism" in *American Society: How it really works* (2009) 1. Tauxe C 'Consumerism' in Zimring CA & Rathje WL (eds) *Encyclopedia of Consumption and Waste* (2012) 150.

<sup>331</sup> Wright EO & Rogers J "Chapter 7: Consumerism" in *American Society: How it really works* (2009) 1. Brown HS & Vergragt PJ & Maurie JC *Social Change and the coming of Post-Consumer Society: Theoretical advances and policy implications* (2017) 4.

<sup>332</sup> Tauxe C 'Consumerism' in Zimring CA & Rathje WL (eds) *Encyclopedia of Consumption and Waste* (2012) 150.

<sup>333</sup> Wright EO & Rogers J "Chapter 7: Consumerism" in *American Society: How it really works* (2009) 1.

<sup>334</sup> Wright EO & Rogers J "Chapter 7: Consumerism" in *American Society: How it really works* (2009) 1.

<sup>335</sup> In other words, for every hour of television, the average American is watching 15 minutes of commercials per hour. Nielsen *Advertising and Audiences: State of the Media Report* (2014) 14.

advertisements each day.<sup>336</sup> Since the USA is an example of a hyper-consumerist society, American consumers are therefore constantly being bombarded with advertisements urging them to buy things.

The growing popularity of the internet over the years has resulted in an increase of advertisements of goods and services online. This is because the internet has become an attractive medium for advertising to a much younger and better-educated audience than traditional media.<sup>337</sup> The internet is borderless and is able to reach consumers on such a massive scale, which makes it a necessary element of any comprehensive integrated marketing communication campaign.<sup>338</sup> As opposed to traditional marketing tactics, such as television commercials or magazines that merely reminds the potential consumer of the product, the internet allows the consumer to move seamlessly from awareness, to temptation which leads to transaction.<sup>339</sup> In other words, the internet can provide instant gratification, where consumers can see an advertisement and then immediately satisfy their need to buy products or services, without much effort at all. Since consumers are exposed to so much advertisements on a daily basis, it is important that consumers are given truthful and accurate information when advertising. This chapter thus focuses on how the USA deals with false and misleading statements.



#### 4.2 LEGAL FRAMEWORK DEALING WITH FALSE AND MISLEADING ADVERTISING

Currently, in the USA there are federal, state and local consumer protection laws, regulations and ordinances that prohibit false or deceptive marking acts and practices.<sup>340</sup> There are various laws that govern advertising and marketing in different areas such as, children, telemarketing and ‘Made in USA’ claims etcetera.<sup>341</sup> In this section, only the federal laws will be discussed as each State has its own specific laws applicable to false advertising. These federal laws generally govern the advertising and marketing of product and services. The laws exist to protect consumers from businesses that want to deceive or take advantage of consumers. The Federal Trade Commission Act of 1914 is the main

<sup>336</sup>Simpson J ‘Finding brand success in the digital world’ available at <http://www.forbes.com/sites/forbesagencycouncil/2017/08/25/finding-brand-success-in-the-digital-world/> (accessed on 28 August 2019).

<sup>337</sup>Keaty A & Roger JJ & Henke LL ‘Can internet service providers and other secondary parties be held liable for online advertising?’ (2009) 58 *The Business Lawyer* 479.

<sup>338</sup>Keaty A & Roger JJ & Henke LL ‘Can internet service providers and other secondary parties be held liable for online advertising?’ (2009) 58 *The Business Lawyer* 479.

<sup>339</sup>Young S ‘Getting the messages how the internet is changing advertising’ available at <https://hbswk.hbs.edu/item/getting-the-message-how-the-internet-is-changing-advertising> (accessed on 16 September 2019).

<sup>340</sup>Jordan P *International Advertising Law: A Practical Global Guide* (2014) 479.

<sup>341</sup>FTC ‘Advertising and Marketing’ available at <https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing> (accessed on 13 November 2019).

piece of legislation that deals with consumer protection. The Lanham Act only has a particular section, which specifically deals with false advertising claims. Therefore, the FTC Act will be focused in more detail than the Lanham Act.

#### 4.2.1 FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission Act ('FTC Act') is a descendant of the Sherman Act of 1890.<sup>342</sup> The original purpose of the FTC Act was to protect businesses and consumers against unscrupulous methods of competition and prevent practices which would lessen competition or tend to create a monopoly.<sup>343</sup> The FTC Act, was not initially intended to deal with the problem of false advertising but rather unfair methods of competition.<sup>344</sup> The FTC Act declared that '*unfair methods of competition in commerce*' were unlawful and, therefore, made provision for the establishment of the Federal Trade Commission (FTC) in order to administer the Act.<sup>345</sup> It was held in *Federal Trade Commission v Winsted Hosiery Co*<sup>346</sup> that false and misleading advertisements are deemed to be an '*unfair method*' within the meaning of the FTC Act.<sup>347</sup> The FTC or ('Commission') has been very active in trying to prevent misrepresentation in advertisements.<sup>348</sup>

The FTC is accordingly responsible for the consumer protection at a federal level.<sup>349</sup> It deals with truth-in advertising laws and it applies the same standards regardless of where an advertisement has appeared, for example internet, magazines, billboards and buses.<sup>350</sup> The FTC stipulates rules for 'truth-in-advertising' which require that advertising must not only be truthful and non-deceptive but should also, be backed up or supported with evidence.<sup>351</sup> Lastly advertisements must not be unfair<sup>352</sup> The FTC looks closely at how the advertising claims affect consumers' welfare.<sup>353</sup>

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<sup>342</sup> Ward CP *Federal Trade Commission: Law Practice and Procedure* (2005) 1-2.

<sup>343</sup> The Federal Trade Commission Act, 1914.

<sup>344</sup> Kintner EW 'The FTC regulation of advertising' (1966) 64 *Michigan Law Review* 1273.

<sup>345</sup> Columbia Law Review Association 'Federal Trade Commission Act of 1938' (1939) 39 *Columbia Law Review* 260.

<sup>346</sup> 258 U.S. 483 (1922).

<sup>347</sup> *Federal Trade Commission v Winsted Hosiery Co* 258 U.S. 483 (1922).

<sup>348</sup> Columbia Law Review Association 'Federal Trade Commission Act of 1938' (1939) 39 *Columbia Law Review* 260.

<sup>349</sup> 'Truth in advertising' available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (accessed on 28 June 2019).

<sup>350</sup> 'Truth in advertising' available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (accessed on 28 June 2019).

<sup>351</sup> 'Truth in advertising' available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (accessed on 28 June 2019).

<sup>352</sup> Section 5 of the Federal Trade Commission Act, 1914.

<sup>353</sup> 'Truth in advertising' available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (accessed on 28 June 2019).

The backbone of the federal consumer protection law is section 5 of the Federal Trade Commission Act, which declares that unfair and/or deceptive acts or practices are unlawful.<sup>354</sup> Section 5 provides, *inter alia*, that:

*'(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful...'*<sup>355</sup>

The Act itself does not provide for any specific unfair practices and decisions as to what constitutes such practices. It leaves it to the FTC to decide what is unfair subject to court review.<sup>356</sup> Terms such as 'unfair or deceptive' are broad and the FTC Act does not define these terms. Therefore, it is left to the Commission and the courts to interpret these terms.<sup>357</sup> The case of *FTC v Colgate Palmolive Co*<sup>358</sup> sets out one of the most authoritative statements relating to the role the courts and the Commission play with regards to construing section 5.

The court in this matter stated that:

*'[t]his statutory scheme necessarily gives the Commission an influential role in interpreting section 5 and in applying it to the facts of particular cases arising out of unprecedented situations.... Nevertheless, while informed judicial interpretation is dependent upon enlightenment gained from administrative experience, in the last analysis, the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction.'*<sup>359</sup>

It is important to reiterate that false and misleading advertising is deemed to be an '*unfair method of competition in commerce*'.<sup>360</sup> This is because such advertisement induces the consumer into buying goods or services and may therefore be prejudicial to the consumer.

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<sup>354</sup> Jordan P *et al International Advertising Law: A Practical Global Guide* (2014) 479.

<sup>355</sup> Section 5 of the Federal Trade Act, 1914. Refer to section 5 to see all the provisions.

<sup>356</sup> Ispahani AS *The role of Federal Trade Commission in regulating false and misleading advertising* (unpublished Master of Arts thesis, University of Southern California, 1962) 13.

<sup>357</sup> Holmes WC 'FTC regulation of unfair or deceptive advertising: Current status of the law' (1981) 30/3 *DePaul Law Review* 556.

<sup>358</sup> 380 US 374 385 (1965).

<sup>359</sup> *FTC v Colgate-Palmolive Co* 380 US 374 385 (1965).

<sup>360</sup> 258 U.S. 483 (1922).

## DEFINITION OF DECEPTIVE ADVERTISING

When trying to determine whether an advertisement is deceptive, the FTC's Policy Statement on Deception [1983], which is attached to the FTC decision in *In re: Cliffdale Associates*,<sup>361</sup> provides for a comprehensive definition as to what would be construed as a deceptive advertisement. The Policy Statement states that ‘

*[a]n advertisement is deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. Although deceptive claims are actionable only if they are material to consumers' decisions to buy or use the product, the Commission need not prove actual injury to consumers.*<sup>362</sup>

The FTC decision of *In re: Cliffdale Associates* explains three defining elements of deception, which are as follows:

First, there must be a representation, omission or practice that is likely to mislead the consumer. Once the Commission has established that a representation, omission or practice has occurred, it will determine whether those claims are expressed or implied.<sup>363</sup> In the case of express claims, the representation itself establishes the meaning of the advertisement. In terms of implied claims, the Commission will often be able to determine the meaning of such claims through an examination of the representation itself and a number other factors. However, in all instances the Commission will carefully consider any extrinsic evidence that is introduced.<sup>364</sup> It is also possible for an advertisement to be misleading if information has been omitted. According to the FTC's Policy Statement on Deception [1983],<sup>365</sup> it can be unlawful to omit information under circumstances where the missing information creates a misleading impression.<sup>366</sup>

Second, the Commission considers the practice from the perspective of a consumer acting reasonably in the circumstances. In determining whether an act or practice is misleading, the consumer's interpretation of or reaction to the representation, omission, or practice must be reasonable under the circumstances.<sup>367</sup> The requirement is included to ensure that deception does not apply to honest

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<sup>361</sup> 103 F.T.C 110, 174 (1984).

<sup>362</sup> Federal Trade Commission *FTC: Advertising Enforcement* (2009) 1. The underlined words are for my emphasis.

<sup>363</sup> *FTC v Cliffdale Associates Inc* 103 F.T.C (1984) 176.

<sup>364</sup> *FTC v Cliffdale Associates Inc* 103 F.T.C (1984) 176.

<sup>365</sup> Federal Trade Commission *FTC Policy Statement on Deception* (1984).

<sup>366</sup> Federal Trade Commission *FTC Policy Statement on Deception* (1984) 2. Howells G & Ramsay I & Wilhelmsson T *et al Handbook of Research on International Consumer Law* (2010) 109.

<sup>367</sup> Federal Trade Commission *Section 5: Unfair and Deceptive Acts or Practices Consumer Compliance Handbook* (2016) 9.

representations that are misunderstood by only a few.<sup>368</sup> The test, in terms of this element is to determine whether the consumer's interpretation or reaction is reasonable.<sup>369</sup> The decision of *FTC v Heinz W Kirchner*<sup>370</sup> stated that an interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is accordingly deceptive.<sup>371</sup> The Commission, however, states that a company cannot be held liable for every interpretation or action by a consumer.<sup>372</sup> The Heinz case has stated this principle quite well and provides that:

*'An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all 'Danish pastry' is made in Denmark. Is it therefore an actionable deception to advertise 'Danish pastry' when it is made in this country? Of course not. A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.'*<sup>373</sup>

This means that just because a certain segment or class of consumers or people unreasonably misunderstands a claim or representation does not necessarily mean that the advertisement is false or deceptive. One always has to take reasonableness into account. Advertisers cannot be held liable for the misunderstandings and unreasonable conclusions drawn by certain consumers. This is only acceptable if the claims are honest and truthful because a blatantly misleading or false claim cannot be justified.

In its analysis the FTC takes into consideration what is known as the 'reasonable consumer'. The FTC looks at what the advertisement says or shows from the perspective of the target audience and not from the perspective of a FTC lawyer.<sup>374</sup> For example, if the advertisement is aimed at teenagers,

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<sup>368</sup> Ward CP *Federal Trade Commission: Law, Practice and Procedure* (2005) 6-22.

<sup>369</sup> *FTC v Cliffdale Associates Inc* 103 F.T.C (1984) 177.

<sup>370</sup> 63 F.T.C 1282 (1963).

<sup>371</sup> *FTC v Heinz W Kirchner* 63 FTC 1282 (1963).

<sup>372</sup> *Heinz W Kirchner* 63 F.T.C 1282, 1290 (1963).

<sup>373</sup> *Heinz W Kirchner* 63 F.T.C 1282, 1290 (1963) 1290. Italicised for my own emphasis.

<sup>374</sup> Federal Trade Commission *FTC Fact Sheet: It's the Law* (2009) 1.

the FTC analyses the advertisement through the lens of a teenager and not that of a parent.<sup>375</sup> In other words, when representations or marketing practices are targeted to a specific audience, such as the elderly or the financially unsophisticated, the standard is based upon the effects of the act or practice on a reasonable member of that group.<sup>376</sup> The reasonable teenager will act differently as opposed to the reasonable university graduate, and therefore the FTC must look at the circumstances in light of this.

Third, the representation, omission, or practice must be a ‘material’ one. The Commission in the decision of *Cliffdale Associates* adopted a traditional approach in establishing whether a representation, omission or practice is deemed to be material or not. The Commission has to determine whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.<sup>377</sup> Express claims that are made with regards to a product are presumed to be material.<sup>378</sup> A similar presumption is made where the advertiser knowingly omits factual information needed by a consumer to make an informed decision regarding the purchase. Also, in terms of implied claims, the materiality may be inferred upon by showing that the advertiser demonstrated an intention to make the claim.<sup>379</sup>

The basic approach to regulating misleading advertising is illustrated by the standard used by the FTC.<sup>380</sup> *In re International Harvester Co*<sup>381</sup> it was stated that an advertisement is considered to be deceptive if it makes a material representation that is likely to mislead consumers who interpret the message reasonably under the circumstances.<sup>382</sup> Therefore, an advertisement is deemed to be deceptive, if the deceptive claim in the advertisement was material and the consumer relied on the deceptive claim in purchasing the product or service. This means that the consumer would not have bought the product or service had it not been for the false or deceptive claim.

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<sup>375</sup> Federal Trade Commission *FTC Fact Sheet: It’s the Law* (2009) 1.

<sup>376</sup> Federal Trade Commission *Section 5: Unfair and Deceptive Acts or Practices Consumer Compliance Handbook* (2016) 9.

<sup>377</sup> Karns JE ‘Redefining “deceptive” advertising under Illinois Consumer Fund and Deceptive Business Practices Act after *Cliffdale Associates*’ (1985) 10 *Southern Illinois University Law Journal* 37.

<sup>378</sup> Karns JE ‘Redefining “deceptive” advertising under Illinois Consumer Fund and Deceptive Business Practices Act after *Cliffdale Associates*’ (1985) 10 *Southern Illinois University Law Journal* 37. Oxendale CL ‘The FTC and deceptive trade practices: A reasonable standard’ (1986) 35/3 *Emory Law Journal* 707.

<sup>379</sup> Karns JE ‘Redefining “deceptive” advertising under Illinois Consumer Fund and Deceptive Business Practices Act after *Cliffdale Associates*’ (1985) 10 *Southern Illinois University Law Journal* 37.

<sup>380</sup> Holmes WC ‘FTC regulation of unfair or deceptive advertising: Current status of the law’ (1981) 30 *DePaul Law Review* 556.

<sup>381</sup> [1984] 104 FTC 949.

<sup>382</sup> *In re International Harvester Co* [1984] 104 F.T.C 949 1056.

#### 4.2.2 THE LANHAM ACT

The Lanham Act (also known as the Trademark Act of 1946) regulates trademarks, service marks and false advertising.<sup>383</sup> One of the purposes of the Lanham Act includes ‘*making actionable the deceptive and misleading use of marks in . . . commerce*’ and ‘*protect[ing] persons engaged in . . . commerce against unfair competition.*’<sup>384</sup> It therefore regulates unfair competition.

Section 43(a) contains two different classes of prohibitions, namely the banning of trademark infringement and prohibiting false advertising.<sup>385</sup> Section 43(a)(1)(B), specifically deals with false advertising and it provides for a cause of action for false advertising.<sup>386</sup> It states that:

*‘(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—*

*(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.’<sup>387</sup>*

Section 43(a) thus provides for a civil action against a party using a false description or representation. This is subject to the aggrieved consumer showing the likelihood of harm or damage that may be suffered.<sup>388</sup>

#### *FALSE AND DECEPTIVE ADVERTISING UNDER THE LANHAM ACT*

In order to succeed with a claim for false, misleading or deceptive advertising, under the Lanham Act, the aggrieved party would have to satisfy the following requirements.

First, they must be able to demonstrate that the offending party’s (defendant) advertisement included a false or misleading statement of fact or representation.<sup>389</sup> Secondly, the misrepresentation must be

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<sup>383</sup> Apgar G ‘Prudential standing limitations on Lanham Act false advertising claims’ (2008) 76 *Fordham Law Review* 2395.

<sup>384</sup> Trademark Act of 1946 see ‘Intent of Act’.

<sup>385</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 45.

<sup>386</sup> Section 43(a)(1)(B) of the Lanham Act 15 U.S. Code § 1125.

<sup>387</sup> Section 43(a) or s1125 of the Lanham Act 15 U.S. Code § 1125: emphasis added.

<sup>388</sup> Section 43(a) of the Lanham Act 15 U.S. Code § 1125.

<sup>389</sup> *Cashmere & Camel Hair Mfrs Inst v Saks Fifth Ave* 284 F.3d 302, 310-11 (1<sup>st</sup> Circuit. 2002) at Part II page 3.

material, in that it is likely to influence the purchasing decision. Thirdly, the misrepresentation must actually deceive the consumer or at least have a tendency to deceive a substantial portion of its intended audience. Fourthly, the offending party must have placed the false or misleading statement in interstate commerce.<sup>390</sup> Lastly, the aggrieved party must have been or is likely to be injured as a result of the false or misleading advertising, either through loss of sales or loss of goodwill.<sup>391</sup> The court will assess the aggrieved party's claims to determine if they have satisfied the requirements.

In *Duty Free Americas Inc v The Estee Lauder Companies Inc*,<sup>392</sup> the court sets out the requirements for bringing a claim for contributory false advertising under section 43 of the Lanham Act. In order to succeed with this claim, the plaintiff must first show that a third party in fact directly engaged in false advertising that injured the plaintiff. Second, the plaintiff must allege that the defendant contributed to that conduct either by knowingly inducing or causing the conduct or by materially participating in it. The court also looked at third party engagement in false advertising. The plaintiff must plead and ultimately prove that an injury to a commercial interest in sales or business reputation was caused by the misrepresentations.<sup>393</sup>

The case of *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC*<sup>394</sup> dealt with the issue of fake online reviews being actionable as false advertising under the Lanham Act. Romeo & Juliette and Assara are competing laser hair-removal companies.<sup>395</sup> The reason for the action against the defendant (Assara) is, there was a series of negative comments being posted on online platforms such as, 'Yelp.com' and 'HairTell.com', about the plaintiff's (Romeo & Juliette) business. In addition, there were also comments that were promoting the services of defendant.<sup>396</sup> These negative comments were being posted anonymously by Assara employees and there was evidence that linked the disparaging comments and reviews to an internet protocol address associated with Assara's place of business.<sup>397</sup> There was no evidence to suggest that the contents of the comments were true.

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<sup>390</sup> 'interstate commerce' refers to the buying, selling, or moving of products, services or money across state borders in the USA.

<sup>391</sup> *Cashmere & Camel Hair Mfrs Inst v Saks Fifth Ave* 284 F.3d 302, 310-11 (1<sup>st</sup> Circuit. 2002) at Part II page 3.

<sup>392</sup> No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015).

<sup>393</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 49.

<sup>394</sup> No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>395</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>396</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>397</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

In order for the comments to be actionable under the Lanham Act, the court had to determine whether the comments made on the internet forums constituted commercial advertising or promotion.<sup>398</sup> The court set out the three requirements for what constitutes commercial advertising or promotion. First, the statement must be commercial speech. Secondly, the statement must be made for the purpose of influencing consumers to buy defendant's goods or services. Thirdly, the statement must be disseminated sufficiently to the relevant purchasing public.<sup>399</sup> The court further stated that the defendant's anonymous comments did constitute commercial advertising or promotion. In order to further the defendant's own commercial interests, they repeatedly posted disparaging comments to a public forum used by consumers to select laser hair removal services. The court held that by anonymously disparaging the plaintiff's business while simultaneously promoting Assara the defendants acted in pursuit of their own economic interests.<sup>400</sup>

The plaintiff successfully brought a claim for false advertising under the Lanham Act by satisfying all four elements.<sup>401</sup> The plaintiff had shown that the Assara who had acted through its employees had made false statements about the plaintiff's business by describing experiences that had not occurred. The statements made by Assara were literally false as a matter of fact since they had described persons who were not Romeo & Juliette customer as well as described experiences that were fictitious and had not occurred.<sup>402</sup> The plaintiff's sought injunctive relief against the defendant and it was granted.<sup>403</sup>

Statements that go beyond puffery may also be actionable under the Lanham Act. In *Tempur Seal Int'l, Inc v WonderGel, LLC*,<sup>404</sup> the defendants (WonderGel) made a video commercial, whereby the Goldilocks character made derogatory statements about the plaintiff's (Tempur) mattress.<sup>405</sup> The commercial referred to the plaintiff's mattress as 'hard', 'a prison bed' and that it may also cause 'arthritis'. The defendants' argued that the commercial was just made in jest and merely constituted puffery.<sup>406</sup> The court rejected the defendant's argument and stated that using humour does not make

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<sup>398</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>399</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>400</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>401</sup> As discussed under 'False and deceptive advertising under the Lanham Act' Part 4.2.2.

<sup>402</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>403</sup> *Romeo & Juliette Laser Hair Removal Inc v Assara I LLC* No 08 CV 442 (DLC) 2016 WL 815205 (S.D.N.Y. Feb.29.2016).

<sup>404</sup> No 1:16-cv-83, 2016 WL 1305155 (E.D. Ky. Apr.1, 2016).

<sup>405</sup> *Tempur Seal Int'l, Inc v WonderGel, LLC* No 1:16-cv-83, 2016 WL 1305155 (E.D. Ky. Apr.1, 2016).

<sup>406</sup> *Tempur Seal Int'l, Inc v WonderGel, LLC* No 1:16-cv-83, 2016 WL 1305155 (E.D. Ky. Apr.1, 2016).

false statements acceptable under the Lanham Act.<sup>407</sup> Referring to the plaintiff's mattress as 'hard' and implying that the mattress causes negative health effects cannot be regarded as puffery and clearly goes beyond the line of permissible advertising.<sup>408</sup> This is same position as in South Africa where statements that go beyond mere puffery are actionable.<sup>409</sup> In this instance, the defendant wanted to hide behind the principle of puffery and jest. The statements, however, crossed the line of a retailer merely commending its own wares and was making false statements about a competitor's product.

### 4.3 LIABILITY OF THE SUPPLIER

#### 4.3.1 LIABILITY OF THE SUPPLIER UNDER THE FTC ACT

The principal advertiser is responsible for all claims, express and implied, that are reasonably conveyed in the advertisement.<sup>410</sup> Proof of intent to convey a deceptive claim nor evidence of the consumer actually having been misled by the advertisement is not required for a finding of liability.<sup>411</sup> This was reiterated in the *Chrysler Corp v FTC*<sup>412</sup> where the court stated that '*[a]n advertiser's good faith does not immunize it from responsibility for its misrepresentations; intent to deceive is not a required element for a section 5 violation.*'<sup>413</sup>

In the FTC decision of *Sears Roebuck & Co*<sup>414</sup> the company better known as 'Sears' was charged with the disseminating of deceptive and unfair advertisements in the course of an advertising campaign for Sears' dishwashing machines.<sup>415</sup> The advertisement made four representations to the public in relation to the 'Lady Kenmore' dishwasher that:

- it could completely remove all residue and dirt from dishes, without prior rinsing or scraping from the dishes and pots used in cooking and baking according to the normal consumer recipes and under other circumstances that consumers could normally be expected to encounter;

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<sup>407</sup> *Tempur Seal Int'l, Inc v WonderGel, LLC* No 1:16-cv-83, 2016 WL 1305155 (E.D. Ky. Apr.1, 2016).

<sup>408</sup> *Tempur Seal Int'l, Inc v WonderGel, LLC* No 1:16-cv-83, 2016 WL 1305155 (E.D. Ky. Apr.1, 2016).

<sup>409</sup> See Chapter 2 Part 2.2.3.

<sup>410</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980).

<sup>411</sup> Federal Trade Commission, *Federal Trade Commission Advertising Enforcement* (2008) 12.

<sup>412</sup> 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977).

<sup>413</sup> *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977) par 5.

<sup>414</sup> 95 F.T.C 406, 511 (1980).

<sup>415</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980).

- it could clean the dishes in the top rack of the dishwasher just as well as the dishes in the bottom rack, without prior rinsing or scraping;
- it has a ‘Sani-Wash’ cycle which gives the dishes a ‘extra-hot 155°’ final rinse thereby destroying all harmful bacteria and microorganisms on the dishes.
- the advertisements of the ‘Lady Kenmore’ dishwasher depicted demonstrations to prove that the dishwasher could remove all dirt and residue from dishes and pans without any prior rinsing and scraping.<sup>416</sup>

Interestingly, the Sears Owner’s Manual which was provided to the purchasers of the dishwasher, instructed the user to ‘*pre-soak or scour firmly cooked or baked-on foods.*’<sup>417</sup> The Commission stated that the advertisement tells the reader that the ‘Sears Lady Kenmore’ does just about everything itself.<sup>418</sup> If the dishwasher was as magnificent as it claimed in the advertisement, then there would be no need for a pre-soak or firm scour as indicated in the owner’s manual.<sup>419</sup>

Sears used the term ‘Sani-Wash’, which means that the dishwasher cleaned everything and was suitable for the cleaning of baby bottles.<sup>420</sup> It was also stated by the Commission that not every member of the public may have derived from the advertisement that the term ‘Sani-Wash’ cycle means that it sterilised the dishes by destroying all the harmful bacteria and microorganisms on them. Some individuals may have perceived a possible difference between ‘hygienically clean’<sup>421</sup> and sterile.<sup>422</sup> Even if the consumer was not sophisticated enough to differentiate between the two, it is only necessary for the advertisement to have the tendency and capacity to convey such representation.<sup>423</sup>

Commissioner Dixon, when considering this matter stated that the Sears advertisement did in fact misrepresent the capabilities of the Lady Kenmore in two significant respects.<sup>424</sup> The Commission held that:

*‘[f]irst, Sears claimed that the Lady Kenmore would eliminate the need for scraping or pre-rinsing all dishes, pots and pans dirtied under circumstances normally encountered in the kitchen, and second, Sears represented that dishes on the top rack of the Lady Kenmore could*

<sup>416</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 412.

<sup>417</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 413.

<sup>418</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 413.

<sup>419</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 406.

<sup>420</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 420. The advertisement referenced ‘especially nice for...baby bottles’.

<sup>421</sup> In terms of microbiology ‘hygienically clean’ means the reduction of bacteria to a safe level and unlikely to cause illness.

<sup>422</sup> In terms of medicine ‘sterile’ means to be totally clean and free from all germs and bacteria.

<sup>423</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 474.

<sup>424</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 512.

*be cleaned as thoroughly as those on the bottom. Both claims were unsubstantiated, and the first is shown by the record in this case to be false.*<sup>425</sup>

Also, Sears lacked a reasonable basis for making those claims. It was on these representations that the Commission found Sears liable for false and misleading advertising and in contravention of section 5 of the FTC Act.<sup>426</sup>

#### 4.3.2 LIABILITY OF THE SUPPLIER UNDER THE LANHAM ACT

When looking at the liability of the supplier under the Lanham Act, it is important to note that it's only competitors who have legal standing under the Lanham Act and not consumers.<sup>427</sup> The wording of section 43(a) states that an '*unfair competitor*' is liable to '*any person who believes that he or she is likely to be damaged.*'<sup>428</sup> Therefore, it will be competitors who will be liable for false and deceptive advertising to any person, which can be construed to mean both consumer and competitor, who believes that they are or is likely to be damaged. This statutory section was designed to protect consumers as well as commercial interests from the effects of false advertising.<sup>429</sup>

#### 4.4 EXTENDING LIABILITY TO THIRD PARTIES

##### 4.4.1 THIRD PARTY LIABILITY UNDER THE FTC ACT

Section 12(a) of the FTC Act provides that '*[i]t shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement....*'<sup>430</sup> This provision imposes a strict liability standard on disseminators of false advertising. The statute does not make mental state an element of violation and creates no exemption from liability for parties not involved in the creation of the false advertising or for unwitting disseminators of false advertising.<sup>431</sup>

Generally speaking, advertisers are responsible for all claims and representations made in terms of an advertisement whether those claims are express or implied. The issue arises when there are other

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<sup>425</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980) 512.

<sup>426</sup> *Sears Roebuck & Co* 95 F.T.C 406, 511 (1980).

<sup>427</sup> Marx GS 'Section 43(a) of the Lanham Act: A statutory cause of action for false advertising' [1983] 40 *Washington and Lee Law Review* 399.

<sup>428</sup> Section 43(a) of the Lanham Act 15 U.S. Code § 1125. Schuman G 'False advertising: A discussion of a competitor's rights and remedies' [1983] 15 *Loyola University of Chicago Law Journal* 12.

<sup>429</sup> Schuman G 'False advertising: A discussion of a competitor's rights and remedies' [1983] 15/1 *Loyola University of Chicago Law Journal* 13.

<sup>430</sup> Section 12(a) of the Federal Trade Act, 1914.

<sup>431</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) at page 12.

parties involved in the creation of the advertisement, for example, a product's spokesperson or product's endorser. The question that springs to mind is: whether these parties will also be held liable for false and misleading advertising claims?<sup>432</sup>

This question seems to have been answered in the case of *Porter & Dietsch Inc. v. Federal Trade Commission*<sup>433</sup> which involved a drug store retailer who was held liable for false claims about a diet pill even though the retailer had no involvement in the creation of the advertisement. Porter & Dietsch Inc, packages 'X-11' tablets and sells them through retail drug stores and the mail.<sup>434</sup> The retail drug store chain involved in this matter, Pay'n Save Corporation, had no active role in the creation of the advertisement in question.<sup>435</sup> The only role Pay'n Save had in connection with the advertising of the X-11 weight loss tablets, was its participation in the Porter & Dietsch co-operative advertising programs. Through these programs, Pay'n Save would receive advertising materials and instructions from Porter & Dietsch and its advertisements would be published bearing the Pay'n Save name. There was nothing in the record to indicate that Pay'n Save had any knowledge that the representation in the advertisements was false or unsubstantiated.<sup>436</sup>

In this matter, Pay'n Save argued that it should be exempted from any liability and prosecution because it had no involvement in the development of the advertisement, nor had any knowledge of its falsity.<sup>437</sup> In deciding the liability of Pay'n Save and as to whether it should have known of the misrepresentations, the Commission<sup>438</sup> concluded that '*if Pay'n Save had critically examined the advertising in light of the package insert, it should have been obvious that the advertising at least did not coincide with the plan.*'<sup>439</sup> The court in this instance agreed with the conclusion of the Commission and also looked at section 12(a) of the FTC Act. Ultimately, the court held Pay'n Save liable for violating section 12(a).<sup>440</sup>

Knowledge may become relevant when the action is not against a manufacturer or the retail advertiser but against an advertising agency that has prepared the advertisement in accordance with the instructions of the actual advertiser.<sup>441</sup> In the case of *Doherty, Clifford, Steers & Shenfield Inc v*

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<sup>432</sup> Third parties include advertising agencies, product endorsers, product inventors and companies that review and approve distributor advertising etcetera.

<sup>433</sup> 605 F.2d 294 (1979).

<sup>434</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) 1.

<sup>435</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) 1.

<sup>436</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) 1.

<sup>437</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) 12.

<sup>438</sup> The matter was first heard at the FTC Commission and thereafter went to court.

<sup>439</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) 12.

<sup>440</sup> *Porter & Dietsch, Inc. v. Federal Trade Commission* 605 F.2d 294 (1979) 16.

<sup>441</sup> Holmes WC 'FTC regulation of unfair or deceptive advertising: Current status of the law' (1981) 30 *DePaul Law Review* 559.

*F.T.C.*<sup>442</sup> the court in the Sixth Circuit, dealt with a section 5 proceeding against an advertising agency as well as a manufacturer for preparing and disseminating advertisements that misrepresented the effectiveness of a throat lozenge in treating sore throats.<sup>443</sup> The advertisements were created by the advertising agency for the manufacturer in accordance with the information provided by the manufacturer. The Sixth Circuit stated that-for the liability to attach in such a situation, the agency must have actively participated in the deception and ‘*must know or have reason to know of the falsity of the advertising.*’<sup>444</sup> The court reasoned that at the very least the agency should have known of the deception involved in the case due to the fact that the advertisements they prepared ‘went far beyond’ the more modest claims appearing in the materials provided by the manufacturer.<sup>445</sup> The Sixth Circuit court upheld the order by the Commission against the advertising agency and manufacturer. Given the standard of ‘active participation’ plus actual or constructive ‘knowledge’ prescribed by the court, the agency presumably would not have been held liable had the advertisements it prepared gone no further than the substantiating materials provided by the manufacturer.<sup>446</sup>

In *Campbell Minthun, L.L.C.*,<sup>447</sup> the Commission found the advertising agency (Campbell Minthun) to be liable for engaging in the making of misleading advertisements.<sup>448</sup> Campbell Minthun made claims about a product called ‘Wonder Bread’ that could improve children’s brain function and help them remember things, due to the calcium in this ‘Wonder Bread’.<sup>449</sup> The advertising agency prepared and disseminated or caused these advertisements containing these misleading claims, to be disseminated. The Commission held that the advertising agency knew or should have known that the representations were false or misleading.<sup>450</sup> The Commission further held that Campbell Minthun did not possess nor did it rely upon a reasonable basis when making these claims.<sup>451</sup> In other words, the advertising agency were making unsubstantiated claims. The Commission in its order prohibited the advertising agency from making any unsubstantiated claims with regards to the ‘Wonder Bread’.<sup>452</sup>

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<sup>442</sup> 392 F.2d 921 (6<sup>th</sup> Cir.1968).

<sup>443</sup> Holmes WC ‘FTC regulation of unfair or deceptive advertising: Current status of the law’ (1981) 30 *DePaul Law Review* 559.

<sup>444</sup> *Doherty Clifford Steers & Shenfield, Inc v FTC* 392 F.2d 921 (6<sup>th</sup> Cir.1968).

<sup>445</sup> *Doherty Clifford Steers & Shenfield, Inc v FTC* 392 F.2d 921 (6<sup>th</sup> Cir.1968).

<sup>446</sup> Holmes WC ‘FTC regulation of unfair or deceptive advertising: Current status of the law’ (1981) 30 *DePaul Law Review* 556.

<sup>447</sup> 133 F.T.C. 702 (2002).

<sup>448</sup> *Campbell Minthun LLC* 133 F.T.C 702 (2002) 704.

<sup>449</sup> *Campbell Minthun LLC* 133 F.T.C 702 (2002) par 4.

<sup>450</sup> *Campbell Minthun LLC* 133 F.T.C 702 (2002) par 8.

<sup>451</sup> *Campbell Minthun LLC* 133 F.T.C 702 (2002) par 7.

<sup>452</sup> *Campbell Minthun LLC* 133 F.T.C 702 (2002) 713.

The order also required the company to have competent and reliable scientific evidence for any claim relating to the bread or bread products that can help improve brain function or memory.<sup>453</sup>

It can be deduced from the cases that an advertising agency may be held liable for a deceptive advertisement if the agency was an active participant in the preparation of the advertisement and if it knew or should have known that the advertisement was deceptive.<sup>454</sup> The advertising agency will be held to know what claims, whether expressed or implied, is being conveyed to the consumers via their advertisements.<sup>455</sup> It is not expected of the advertising agency to independently substantiate the claims or scientifically re-examine the advertiser's substantiation. However, it cannot ignore the obvious shortcomings or facial flaws in an advertiser's substantiation.<sup>456</sup> In other words, the advertising agency does not need to thoroughly check each and every claim made but it has to reasonably check if the claims made are correct.

A recent case regarding the liability of third parties is the *Federal Trade Commission v Partners in Health Care Association Inc et al.*<sup>457</sup> The case concerns a bait-and-switch scheme that sells medical discount cards to consumers under the pretence that they are actually selling health insurance.<sup>458</sup> The company, Partners in Health Care (defendant), enters into marketing agreements with various marketers, such as telemarketers. Partners in Health Care supervises the various marketers who market the Discount Card.<sup>459</sup> The defendants' fraudulent scheme preyed on those consumers, mostly Spanish speaking, who were searching for health insurance. The defendant would use the marketers to pitch the Discount Card to the consumers. The consumers were led to believe that for a one-time enrolment and a monthly payment, they would receive comprehensive medical coverage and affordable health insurance.<sup>460</sup> In essence, what the consumers got was a card for discounts with certain providers and pharmacies. It was hardly the comprehensive cover that was promised to the consumers.<sup>461</sup> The court held that the Partners in Health Care and the various marketers were liable under section 5 of the FTC Act. It was ordered that they be permanently banned from participating

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<sup>453</sup> *Campbell Minthun LLC* 133 F.T.C 702 (2002) 713.

<sup>454</sup> Federal Trade Commission, *Federal Trade Commission Advertising Enforcement* (2008) 13.

<sup>455</sup> Federal Trade Commission, *Federal Trade Commission Advertising Enforcement* (2008) 13.

<sup>456</sup> Federal Trade Commission, *Federal Trade Commission Advertising Enforcement* (2008) 13.

<sup>457</sup> 14:14-cv-23109-RNS (08/25/2014).

<sup>458</sup> *Federal Trade Commission v Partners in Health Care Association Inc et al* 14:14-cv-23109-RNS (08/25/2014) par 2.

<sup>459</sup> *Federal Trade Commission v Partners in Health Care Association Inc et al* 14:14-cv-23109-RNS (08/25/2014) par 8.

<sup>460</sup> *Federal Trade Commission v Partners in Health Care Association Inc et al* 14:14-cv-23109-RNS (08/25/2014) par 24.

<sup>461</sup> Fair L 'Ruling reminds marketers of the risks of discounting FTC legal tenets' available at <https://www.ftc.gov/news-events/blogs/business-blog/2016/07/ruling-reminds-marketers-risks-discounting-ftc-legal-tenets> (accessed on 21 January 2020).

in telemarketing or assisting others engaged in telemarketing, whether acting directly or through an intermediary.<sup>462</sup>

#### 4.4.2 THIRD PARTY LIABILITY UNDER THE LANHAM ACT

The Eleventh Circuit Court of Appeals ruled on the issue of an action for contributory false advertising under section 43(a) of the Lanham Act.<sup>463</sup> In the *Duty Free Americas, Inc v Estee Lauder Companies Inc*,<sup>464</sup> the Duty Free Americas (DFA) was an operator of airport duty-free shops that sold Estee Lauder beauty products until June 2008. In this particular matter, the DFA filed a suit against Estee Lauder after Estee Lauder refused to do business with the DFA.<sup>465</sup> Three claims were alleged against Estee Lauder by the DFA and one of them was false advertising. DFA argued that Estee Lauder made certain statements which amounted to false advertising and that the company should be held liable for these statements based on the theory of contributory negligence, under section 43(a) of the Lanham Act.<sup>466</sup> Estée Lauder responded that the claim must fail because, firstly, the Lanham Act's prohibition on false advertising does not include a derivative claim based on contributory liability. Secondly, even if it did, the DFA has not alleged facts sufficient to support such a claim.<sup>467</sup> The 11<sup>th</sup> Circuit Court agreed with the arguments of the DFA that the prohibition on false advertising in section 43(a) of the Lanham Act may allow a claim based on contributory liability. However, the complaint does not come close to alleging the necessary facts, and the DFA could not prove their claims. Therefore, the court dismissed the claim.<sup>468</sup>

One has to look at case law to determine whether section 43(a) of the Lanham Act includes within its ambit a claim for false advertising based on contributory liability. The DFA in this matter, had only cited one case in which a circuit court recognised the possibility that a defendant could be contributorily liable for a third party's false advertising.<sup>469</sup> The case cited by the DFA was *Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship*.<sup>470</sup> The court in this case stated that although the district courts routinely assume that contributory liability claims are available, neither the

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<sup>462</sup> *Federal Trade Commission v Partners in Health Care Association Inc et al* Final order: 14:14-cv-23109-RNS (08/25/2014) 3.

<sup>463</sup> Lanham Act 15 U.S. Code § 1125.

<sup>464</sup> No 14-11853 (Decided 7 August 2015).

<sup>465</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 6.

<sup>466</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 42.

<sup>467</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 43.

<sup>468</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 43.

<sup>469</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 43.

<sup>470</sup> L.P., 380 F.3d 126, 132-33 (2d Cir. 2004).

Supreme Court nor any Court of Appeals has explicitly considered and resolved this question.<sup>471</sup> It appears that even the courts have not yet been able to come to a definitive answer, as to whether the ambit of section 43(a) of the Lanham Act allows for contributory liability. There is also not enough case law to thoroughly support such a claim.

#### 4.5 PENALTIES FOR FALSE AND MISLEADING ADVERTISEMENTS

##### 4.5.1 PENALTIES UNDER THE FTC ACT

There are several types of penalties that exist for false or misleading advertising. Section 5(1) of the FTC Act authorised the Commission to seek civil penalties for violations of an administrative order. In terms of consumer protection, section 5(m)<sup>472</sup> of the Act also authorises the FTC to file an action to recover civil penalties for violations of cease and desist orders by non-respondents.<sup>473</sup>

Section 5(m)(1)(A) is also an important section in terms of consumer redress. Firstly, it allows the Commission to recover civil penalties in a district court of the US against any person, or corporation for violations of any rule under section 5 in respect of unfair or deceptive acts or practices.<sup>474</sup> Secondly, this is applicable if the person, partnership or corporation had ‘actual knowledge’ or if knowledge is fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In other words, the person or juristic person needed to have actual knowledge or based on the objective circumstances should have known that the certain act would be unfair or deceptive and violates a certain rule. Thirdly, in such action, a person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.<sup>475</sup>

There are other remedies available to the aggrieved consumer such as being able to sue for damages to recover the money paid for a product or service that was falsely advertised.<sup>476</sup> The court can also issue a cease and desist order, requiring the company to stop distributing the false or deceptive advertisement.<sup>477</sup> A cease and desist order is a legally enforceable order from a court or government

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<sup>471</sup> *Duty Free Americas Inc v The Estee Lauder Companies Inc* No 14-11853 (11<sup>th</sup> Cir. Aug. 7, 2015) 43.

<sup>472</sup> Section 5(m) of the Federal Trade Commission Act, 1914 states ‘[c]ivil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices...’

<sup>473</sup> Section 5(m) of the Federal Trade Commission Act, 1914.

<sup>474</sup> Section 5(m)(1)(A) of the Federal Trade Act, 1914. ABA Section of Antitrust Law, *FTC Practice and Procedure Manual* (2007) 166.

<sup>475</sup> Section 5(m)(1)(A) of the Federal Trade Act, 1914.

<sup>476</sup> Section 19(b) of the Federal Trade Act, 1914.

<sup>477</sup> Section 5(b) of the Federal Trade Act, 1914.

agency directing someone to stop engaging in a particular activity.<sup>478</sup> Section 5(b) of the Act empowers the Commission to issue cease and desist orders, and the language of the provision is quite expansive. Novel orders can be made by the court such as; orders requiring the affirmative disclosure of specified product. The court could require the advertiser to make correct disclosure which means it has to inform the consumers of the truth about the product or service.

Section 19(b) of the FTC Act provides that the court may grant relief as it deems necessary to redress injury to consumers or other persons from unfair deceptive acts or practices. Such relief may include, but is not limited to rescission or reformation of contracts; refund of money or return of property; payment of damages, and public notification regarding the rule violation or the unfair and deceptive practice.<sup>479</sup> This section does not allow for exemplary or punitive damages.<sup>480</sup>

The FTC has a very powerful legal remedy to act against deceptive advertising in a timely and effective manner. The nature of the legal remedy is injunctive in nature.<sup>481</sup> Section 13(b) authorises the FTC to bring an action in the federal district court to enjoin acts or practices that violate any provision of law enforced by the FTC.<sup>482</sup> This means that the district court has the power to grant a temporary restraining order (TRO), a preliminary injunction and, ultimately, a permanent injunction with respect to any such unlawful acts or practices.<sup>483</sup> In the South African context, an injunction would be similar to an interdict which can be temporary/interim (rule *nisi*) and the court can make the order final which means it becomes a final interdict.

There is an important FTC case involving injunctive relief which has clarified and reinforced a number of issues. *FTC v Southwest Sunsites Inc*<sup>484</sup> the case looked at the scope of the FTC's statutory authorisation to seek preliminary injunctive relief from the district courts. In its complaint, the FTC had requested an injunction, against the defendants, *Southwest Sunsites Inc*, preventing future misrepresentation and omissions.<sup>485</sup> The district court looked at the plain reading of section 13(b) and concluded that, the Commission may seek only the preliminary relief necessary to restrain alleged unfair practice pending a section 5 administrative proceeding. In the view of the court, the scope of

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<sup>478</sup> 'Cease and Desist' available at <https://www.investopedia.com/terms/c/cease-and-desist.asp> (accessed on 14 November 2019).

<sup>479</sup> Section 19(b) of the Federal Trade Commission Act, 1914. ABA Section of Antitrust Law, *FTC Practice and Procedure Manual* (2007) 174.

<sup>480</sup> ABA Section of Antitrust Law, *FTC Practice and Procedure Manual* (2007) 174.

<sup>481</sup> Becker BW 'Injunction powers of the Federal Trade Commission: Immediate relief from deceptive advertising' (1983) 12/3 *Journal of Advertising* 43.

<sup>482</sup> ABA Section of Antitrust Law, *Consumer Protection Law Developments* (2009) 276.

<sup>483</sup> ABA Section of Antitrust Law, *Consumer Protection Law Developments* (2009) 276.

<sup>484</sup> 665 F.2d 711 (5<sup>th</sup> Cir. 1982).

<sup>485</sup> *FTC v Southwest Sunsites, Inc* 665 F.2d 711 (5<sup>th</sup> Cir. 1982) par n10.

the preliminary relief is limited to the relief which may be ordered by the Commission itself under section 5. Section 13(b) the Commission may obtain consumer redress in federal court actions without having to first obtain relief in an administrative forum.<sup>486</sup> The wording of the provisions in the FTC suggests that both principle suppliers and third parties will be liable for any penalties.<sup>487</sup>

Section 54 of the FTC Act deals with the penalties relating to false advertisements. Under section 54, the party who is in violation of the provisions of section 52(a) of the FTC Act will be guilty of a misdemeanor.<sup>488</sup> Also upon the conviction, the party will be further punished with a fine of not more than \$5000, imprisonment of not more than six months or both.<sup>489</sup> If this is not the party's first conviction, the fine will be not more than \$10 000 or imprisonment of not more than a year or both.<sup>490</sup>

#### 4.5.2 PENALTIES UNDER THE LANHAM ACT

Once the aggrieved party has successfully proven his or her claim under section 43(a) of the Lanham Act, they are entitled to relief. The Lanham Act does not specify any remedy for violations of section 43(a) but merely provides that anyone who violates its proscriptions '*shall be liable to a civil action*'.<sup>491</sup> The nature of the remedies available to the aggrieved party are mostly monetary or compensatory in nature rather than being punitive.<sup>492</sup> This is provided for in terms of section 35 of the Lanham Act which provides for the following remedies, namely, recovery of the defendant's profits; damages and the cost of the action.<sup>493</sup>

In exceptional cases the attorney's fees may also be recovered by the successful plaintiff.<sup>494</sup> There is also a possibility of the plaintiff being awarded 'treble' damages, which means that the plaintiff will receive up to three times the amount of profits made by the defendant.<sup>495</sup> Although section 43(a) does

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<sup>486</sup> ABA Section of Antitrust Law, *FTC Practice and Procedure Manual* (2007) 174.

<sup>487</sup> Section 5(m) of the Federal Trade Commission Act, speaks about 'any person'.

<sup>488</sup> Section 54 of the Federal Trade Commission Act, 1914.

<sup>489</sup> Section 54 of the Federal Trade Commission Act, 1914.

<sup>490</sup> Section 54 of the Federal Trade Commission Act, 1914.

<sup>491</sup> Waltzer GJ 'Monetary relief for false advertising claims arising under section 43(a) of the Lanham Act' (1997) 34 *UCLA Law Review* 961.

<sup>492</sup> Gunn SL 'Lanham Act revision provides relief for misleading comparative advertisements: Does it go too far?' (1990) 68 *Washington University Law Review* 722.

<sup>493</sup> Section 35 of the Lanham Act. Schuman G 'False advertising: A discussion of a competitor's rights and remedies' [1983] 15 *Loyola University of Chicago Law Journal* 23.

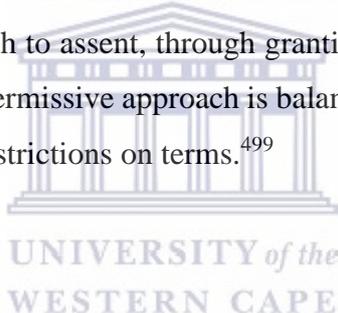
<sup>494</sup> Gunn SL 'Lanham Act revision provides relief for misleading comparative advertisements: Does it go too far?' (1990) 68 *Washington University Law Review* 722.

<sup>495</sup> *Playboy Enters., In. v. P.K. Sorren Export Co.*, 546 F. Supp. 987, 998 (S.D. Fla.1982).

not specifically refer to injunctive relief, it is within the general power of the court to grant appropriate injunctive relief as they deem fit.<sup>496</sup>

#### 4.6 THE USA POSITION ON CONSUMER CONTRACTS

In the context of the law of contract, the *Restatement (Second) of the Law of Contracts*, which was completed in 1979 contained the general principles of the law of contract.<sup>497</sup> It is only in 2012, that the American Law Institute embarked on the drafting of the *Restatement of the Law, Consumer Contracts ('the Draft Restatement')*, a supplementary instrument that applies specifically to transactions by consumers. The Draft Restatement is based on a considerable body of research on consumer contracts and consists of nine sections which deal with the formation of a binding consumer contract.<sup>498</sup> It applies only to 'consumer contracts', in other words contracts between consumers and business. The current status of the *Draft Restatement* is that reporters are to incorporate feedback from the May Annual Meeting 2017 discussion, and that a subsequent Draft will only appear on the agenda for the May 2019 Annual Meeting. At the basis of the Draft Restatement lies the notion that it reflects a 'grand bargain' or trade off in American consumer contract law. The grand bargain follows a lenient or permissive approach to assent, through granting businesses significant freedom to draft contract terms. However, this permissive approach is balanced by greater ex post substantive control through imposing mandatory restrictions on terms.<sup>499</sup>



#### 4.7 CONCLUSION

The USA has a very comprehensive consumer protection framework. Section 5 of the FTC Act is the backbone of consumer protection and the FTC or the Commission is the main body which deals with false and misleading advertising complaints. The Lanham Act is an ancillary piece of legislation which aids in providing protection to consumers in terms of section 43(a). In terms of the liability of the supplier under the FTC, the principal advertiser is responsible for all false or deceptive claims and representations made in the advertisement. The FTC even goes further and extends the liability to third parties who have knowledge or should have had knowledge that the advertisement was misleading. Any third party who is involved in the creation of the misleading advertising is also liable

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<sup>496</sup> Schuman G 'False advertising: A discussion of a competitor's rights and remedies' [1983] 15 *Loyola University of Chicago Law Journal* 21.

<sup>497</sup> Du Plessis J 'Lessons from America? A South African perspective on the Draft Restatement of the law, consumer contracts' (2018) 30 *SA MERC LJ* 190.

<sup>498</sup> Du Plessis J 'Lessons from America? A South African perspective on the Draft Restatement of the law, consumer contracts' (2018) 30 *SA MERC LJ* 194.

<sup>499</sup> Du Plessis J 'Lessons from America? A South African perspective on the Draft Restatement of the law, consumer contracts' (2018) 30 *SA MERC LJ* 189.

for a false advertising claim. The Lanham Act provides that competitors have standing in terms of the Act and can be held liable under section 43(a). It is not entirely certain whether the Lanham Act can extend liability to third parties or if there is a claim for contributory false advertising as there is no case law giving a definite answer on the issue. There is also a number of penalties under the FTC Act and the Lanham Act respectively ranging from an injunctive relief to imprisonment.



## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 INTRODUCTION

False, misleading and deceptive advertising is problematic not only in South Africa but also globally. The rise of mass media and the internet has made it possible for advertisements to reach millions of consumers almost instantly. Therefore, there is a need to ensure that advertisements are truthful and accurately depict what is being marketed to the consumer. The aim of this thesis was to analyse false and misleading advertising in South Africa and the liability of the parties involved. In order to address this overarching issue, a number of interrelated secondary questions were addressed in this thesis. First, what is the relevant legal framework that governs false advertising in South Africa? Secondly, what are the redress mechanisms available under the CPA? Thirdly does the CPA extend liability to the supplier who engages in false advertising as well as third parties whose platforms are used by the suppliers? Lastly, which experiences and lessons can South Africa learn from other jurisdictions such as the United States of America(USA)? In this chapter, conclusions are drawn regarding the various aspects identified within the thesis and recommendations are made regarding the protection of consumers from false and misleading advertising and the liability of those who engage in false and misleading advertising.

Chapter 2 looked at the legislative framework governing false advertising in South Africa. The nature of advertisements was examined in detail.<sup>500</sup> In terms of the common law, advertisements are generally mere invitations to do business. A valid contract only comes into existence once the consumer makes an offer to buy a specific product and the retailer accepts such an offer by accepting the consumer's money in exchange for the goods.<sup>501</sup> Puffery in terms of advertising is allowed and thus not actionable since it is considered to be an acceptable persuasive marketing tactic. Puffs, only become problematic once it goes beyond the retailer merely commending his wares. It can be construed as misleading advertising or as a *dictum et promissum*.<sup>502</sup> In terms of the CPA, the consumer rights in Part E<sup>503</sup> and F<sup>504</sup> generally provides for the prohibition of false, misleading or deceptive representations. Section 41 which specifically deals with false, misleading or deceptive representations was analysed. The CPA ensures that suppliers and retailers adhere to the general

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<sup>500</sup> See Chapter 2 Part 2.2.1.

<sup>501</sup> See Chapter 2 Part 2.2.2.

<sup>502</sup> See Chapter 2 Part 2.2.3.

<sup>503</sup> Right to fair and responsible marketing.

<sup>504</sup> Right to fair and honest dealings.

standards for marketing goods or services.<sup>505</sup> This ensures that goods and services are marketed in a responsible and fair manner to the consumer.

Chapter 3 dealt with the institutional framework and the liability of the supplier. The chapter looked at the various national consumer protection institutions that are established under the CPA. In South Africa, there is a large part of the population that come from a disadvantaged background and are therefore more susceptible to falling victim to false and misleading advertising.<sup>506</sup> Therefore, it was important for the CPA to create consumer redress mechanisms to ensure that vulnerable consumers are able to enforce their rights effectively and efficiently. The National Consumer Commission (NCC) is a juristic person that serves as a consumer watch dog.<sup>507</sup> The NCC allows for consumers to file complaints with them. This institution is able to issue and enforce compliance notices against offending persons.

The National Consumer Tribunal is an independent adjudicative entity which derives its mandate from the National Credit Act 34 of 2005. Case law in relation to how the Tribunal dealt with false and misleading advertising was also discussed in detail.<sup>508</sup> The chapter also examined the various institutions or forums that are available to consumers such as the office of the industry ombuds, provincial consumer courts and alternative dispute resolution. Ultimately, what this chapter showed was that there are various consumer protection institutions available which the consumer first needs to exhaust before attempting to approach a court of law. This was confirmed in *Joroy 4440 CC v Potgieter and another NNO*<sup>509</sup> and was expressly provided for in terms of section 69(d) of the CPA. In my view, it could hinder the process of speedy access to justice if the consumer is required to exhaust all the forums before approaching the court. This is because it might be time consuming for the consumer to have to go through each and every forum before eventually getting to court. Another issue with litigating is that it can be time-consuming and expensive, especially for vulnerable consumers and this may not be a viable option for them. It's also not clear if there is a hierarchy in terms of these forums and whether a consumer should approach, for example, the provincial consumer court before the NCC. Therefore, it gives the impression that consumers are sent from pillar to post before actually getting any redress.

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<sup>505</sup> See Chapter 2 Part 2.3.4.

<sup>506</sup> See Chapter 3.1 Introduction.

<sup>507</sup> See Chapter 3 part 3.2.2.

<sup>508</sup> See Chapter 3 part 3.2.3.

<sup>509</sup> 2016 (3) SA 465 (FB).

Chapter 3 also analysed self- regulation of false advertising in South Africa. False advertising is regulated in terms of the Code of Advertising Practice. Self-regulation of the advertising content is done by the Advertising Standards Authority of South Africa (ASA) which was replaced by Advertising Regulatory Board (ARB). It was established to ensure that consumers are protected through responsible advertising.<sup>510</sup> ARB ensures that its members are held accountable for any unscrupulous conduct that amounts to false and misleading advertising. While there are so many cases that have been referred to the ASA, its decisions are only binding on its members and not on non-members.

Chapter 4 dealt with legal framework of false and misleading advertising in the USA. This chapter analysed how America is a consumerist nation and the major role that advertising plays in promoting the culture of consumerism and the large consumption of goods.<sup>511</sup> The USA has federal laws namely the Federal Trade Commission Act (FTC) of 1914 and the Lanham Act of 1946 which govern false and misleading advertising. The FTC Act is the main instrument that regulates false advertising and it is responsible for consumer protection at a federal level. It has stipulated rules for ‘truth-in-advertising’ which requires advertising to be truthful and non-deceptive.<sup>512</sup> The Federal Trade Commission was established under the FTC Act to serve as the protector of consumer protection. Section 5 of the FTC is a very important provision as it is the backbone of the federal consumer protection law. It provides comprehensive protection for consumers against false or misleading advertising.

The chapter also dealt with the five requirements that an aggrieved party (plaintiff) must prove in order to succeed with a claim for false advertising. Section 43(a) of the Lanham Act prohibits false advertising by providing a cause of action for false advertising claims.<sup>513</sup> It is important to note that under the Lanham Act consumers do not have *locus standi* and that it is only competitors who can rely on its provisions. In terms of the liability of the parties, it was found that the principle advertiser is liable for any claims that are reasonably conveyed in the advertisement. Liability may also be extended to third parties who have contributed and been involved in the creation of the advertisement.

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<sup>510</sup> False advertising is also regulated in terms of the Code of Advertising Practice. Self-regulation is the regulation of advertising content by industry bodies. The Advertising Standards Authority of South Africa (ASA) which was replaced by the Advertising Regulatory Board (ARB), was established to protect consumers through responsible advertising.

<sup>511</sup> See Chapter 4.1 Introduction.

<sup>512</sup> See Chapter 4 Part 4.2.1.

<sup>513</sup> See Chapter 4 Part 4.2.2.

Case law was used to illustrate this point. There are also a number of penalties that these offending parties can incur such as injunctive relief, civil liability claims and penalties.

## 5.2 RECOMMENDATIONS

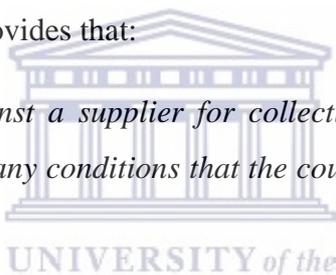
The following is a summary of the recommendations that can assist in the regulation of false misleading advertising in South Africa:

### 5.2.1 CLASS ACTIONS AS CONSUMER REDRESS MECHANISM

Class actions are under-utilised in South Africa even though provision is made for this remedy in terms of consumer legislation. It is submitted that class actions would be an effective redress mechanism for consumers who are adversely affected by false, misleading and deceptive advertising. False, deceptive and misleading advertising does not just affect one individual, it can affect all consumers in general or certain groups or categories of consumers. Section 4(1)(c) of the CPA makes provision for class actions, in terms of the *locus standi* provision.<sup>514</sup>

Section 76(1)(c) of the CPA further provides that:

*‘a court can award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any conditions that the court considers just and equitable to achieve the purpose of the Act.’<sup>515</sup>*



This section clearly makes reference to collective redress measures specific to consumer issues and should be read with section 4(1)(c) of the Act.<sup>516</sup> Although the CPA makes provision for collective redress in terms of class actions, there is no regulatory framework as to how consumers can go about utilising this remedy. Therefore, it is also suggested that the legislature provides specific guidelines for the use of class action proceedings. This will make the process easier as aggrieved consumers will know exactly when and how to go about using class actions as a remedy.

Class actions have the potential of enabling consumers especially indigent consumers to collectively approach the court for enforcement of their rights and damages. This allows for greater access to consumer justice and aligns with the purposes of the CPA insofar as quick and efficient consumer redress is concerned.

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<sup>514</sup> See Chapter 3 Part 3.2.1.

<sup>515</sup> Section 76(1)(c) of the Consumer Protection Act 2008.

<sup>516</sup> Cassim F & Sibanda OS ‘The Consumer Protection Act and the introduction of collective consumer redress through class actions’ (2012) 75 *THRHR* 599.

## 5.2.2 COMPULSORY FUNDING TO SELF-REGULATORY BODIES

The funding model of the ARB relies on donations from the marketers and advertisers.<sup>517</sup> This means that if the marketers and advertisers do not make regular donations the ARB could see itself in a financial crisis. This is what happened, amongst other things, to the previous self-regulatory body, the ASA. It is submitted that members of the self-regulatory bodies such as the ARB should be required to make a compulsory contribution to the ARB. The rationale behind making members pay a contribution to the ARB is to ensure that they are able to continue ensuring that the advertising industry is being regulated and unscrupulous advertisers and marketers are held accountable.<sup>518</sup> Businesses should be encouraged through incentives to join these self-regulatory bodies to ensure that they are bound by the decisions they made.

## 5.2.3 LESSONS FOR SA THAT CAN BE DRAWN FROM THE USA

The USA has a more comprehensive and robust consumer legislation governing false or misleading advertising. The one aspect of false advertising claims that the USA has included in their consumer law is extending liability to third parties something which seems to be missing in the South African consumer law.<sup>519</sup> Although section 41(2)(a-b) of the CPA does provide that suppliers and its agents or employees must not engage in misleading and false prohibited conduct.<sup>520</sup> It does not seem to extend that liability to third party platforms, who post or advertise suppliers' false advertisements. There are many instances where marketers knowingly or sometimes unknowingly distribute or place false and misleading advertisements in newspapers. As mentioned in chapter 3 of this thesis, there is a large part of the South African population that comes from disadvantaged communities.<sup>521</sup> In such circumstances, some newspapers have added disclaimers warning the readers to exercise caution when considering such advertisements and, this has the effect of exempting the newspaper from any liability that may arise from consumers regarding the information they would have published. Where a third party assists in the dissemination of false information to consumers, liability should be extended to the third party.

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<sup>517</sup> 'Advertising Regulatory Board' available at <http://arb.org.za/phone/faq.html> (accessed on 10 October 2019).

<sup>518</sup> See Chapter 3 Part 3.4.

<sup>519</sup> See Chapter 4 Part 4.4.

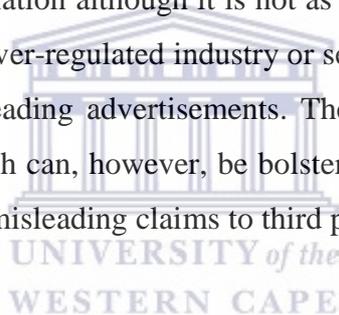
<sup>520</sup> See Chapter 2 Part 2.3.7.

<sup>521</sup> See Chapter 3 Part 3.1 Introduction.

In the US, for example, in the case of *Porter & Dietsch v Federal Trade Commission*<sup>522</sup> a retail drug store was held liable for false claims about a diet pills, even though it did not have an active role in the creation of the advertisement. The retail store argued that it had no knowledge that the representations in the advertisements were false or misleading and therefore should be exempted from any liability. The court held that if the retailer had examined the advertising it would have been obvious the advertising was false or misleading. Ultimately the court also found the retailer liable for the false claims.<sup>523</sup> South Africa can look into the use of third-party platforms and the role they play in disseminating false and misleading advertising and whether they should be held liable as well taking into account the circumstances of the case.

### 5.3 FINAL CONCLUSION

This thesis has shown that false and misleading advertising is problematic in South Africa and worldwide especially with the emergence of the internet and digitisation. The CPA has been enacted to provide protection to consumers against the conduct of unscrupulous suppliers and retailers. The CPA is a comprehensive piece of legislation although it is not as robust as the consumer law in the USA. While it is not ideal to have an over-regulated industry or sector, it is important to adequately protect consumers from false or misleading advertisements. The current consumer legislation in South Africa has good provisions which can, however, be bolstered in certain regards for example by, extending the liability of false and misleading claims to third parties.



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<sup>522</sup> 05 F.2d 294 (1979). See Chapter 4 Part 4.4.1.

<sup>523</sup> See Chapter 4 Part 4.4.1 for the full discussion on the Porter case.

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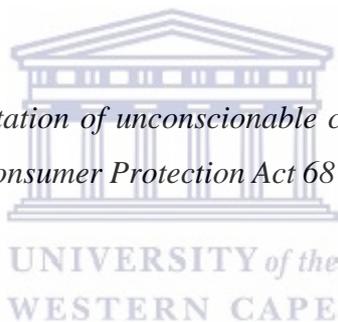
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