

The Role and Mandate of the Motor Industry Ombudsman of South Africa: Addressing Prospects and Challenges to Enhance Consumer Protection

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Abstract

The Motor Industry Ombudsman of South Africa (MIOSA) is an industry ombud recognised under the *Consumer Protection Act* 68 of 2008 (*CPA*). The MIOSA regulates the interaction and provides for alternative dispute resolution in the automotive and related industries in South Africa. Moreover, the MIOSA is an impartial organisation that focusses on the resolution of disputes where a deadlock has been reached between the automotive and related industries and their customers, as well as relationships among participants in the automotive and related industries to the benefit of the parties. The role of the MIOSA is to make recommendations in cases referred to it where parties cannot reach common ground and are unable to arrive at mutually acceptable agreements following a dispute. This analysis explores and proffers possible solutions to address the challenges that impede the MIOSA from discharging its role and mandate under the *CPA* effectively in resolving consumer disputes in the South African automotive industry.

Keywords

MIOSA; automotive industry; consumer protection; ombuds; dispute resolution

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1 Introduction

The Motor Industry Ombudsman of South Africa (MIOSA) was established in the year 2000 as a voluntary scheme and it was later accredited under the *Consumer Protection Act (CPA)* as an industry ombud.¹ The *CPA* emphasises providing an effective, efficient, harmonised, accessible system of redress for consumers; and providing a consistent, accessible, system of consensual resolution of disputes resulting from consumer transactions.² The *CPA* is also aimed at minimising and addressing any disadvantages experienced in accessing the supply of goods or services by vulnerable consumers when seeking redress.³ Notwithstanding, most consumers are still struggling with accessing adequate and efficient redress of their disputes in the automotive industry in South Africa.⁴

The South African Automotive Industry Code (the Code) was proposed by the automotive industry and recommended to the Minister of Trade and Industry by the National Consumer Commission (NCC).⁵ The Code aims to govern how those doing business in the automotive sector engage with one another and with customers.⁶ According to the Code, the MIOSA was established to assist in the resolution of complaints that may occur over any goods or services offered to such consumers by the automotive industry, including suppliers who are in turn consumers in the industry supply chain.⁷ Notwithstanding, the MIOSA is still struggling to effectively discharge its role and mandate of resolving complaints that occur over goods and services

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¹ *Consumer Protection Act 68 of 2008 (CPA)* s 82(6); Van Heerden "Section 69" 69–1, Van Heerden "Section 70" 70–1; also see Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 578; Koekemoer 2014 *Journal of Applied Business Research* 665.

² See s 3 of the *CPA*; also see Van Eeden and Barnard *Consumer Protection Law in South Africa* 41-42.

³ See s 3 of the *CPA*; De Stadler and Du Plessis "Interpretation, Purpose and Application" 3–1.

⁴ See related comments by Woker 2019 *Stell LR* 106-107.

⁵ See s 82(3) of the *CPA*; Gen N 69 in GG 37301 of 7 February 2014 (South African Automotive Industry Code of Conduct) (the Code) 3.

⁶ See s 82(3) of the *CPA*; also see clause 1 of the Code.

⁷ Clause 2.10 of the Code; also see MIOSA date unknown <https://www.miosa.co.za/history.php>; the Constitution of MIOSA in MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf.

provided to consumers in the automotive industry. This problem could be attributed to several challenges hindering the MIOSA from discharging its role and mandate. Such challenges include, among others, the jurisdictional limits of the MIOSA, the lack of accessibility and capacity constraints, the perceived lack of independence, the lack of a binding effect of the recommendations of the MIOSA, as well as the lack of awareness regarding the existence of the MIOSA. While some studies have discussed the enforcement and redress of consumer rights in the past,⁸ they have not fully and comprehensively discussed the role and mandate of the MIOSA against the backdrop of the challenges this ombud is faced with. A recent study by Du Plessis pointed out some but not all of the challenges, pointing to the need to support the MIOSA.⁹ This gap in knowledge affects the prospects of enhancing consumer protection and empowering the MIOSA to discharge its role and mandate optimally. To this end, this paper seeks to provide an analysis of the role and mandate of the MIOSA by discussing the challenges preventing the MIOSA from carrying out its mandate and seeks to recommend possible solutions to remedy such challenges and enhance consumer protection. There cannot be effective consumer protection without effective consumer protection enforcement bodies, including the MIOSA.¹⁰

2 A brief overview of the role and mandate of the MIOSA

In terms of the *CPA*, any persons with *locus standi* may seek to enforce their rights under the *CPA* or a transaction or agreement, or otherwise resolve any dispute with a supplier, by referring the matter to the applicable industry ombud, accredited under the *CPA*, if the supplier is subject to any such ombud.¹¹ The MIOSA is an industry ombud accredited in terms of the *CPA* and it is empowered to provide a role of conciliation, mediation or arbitration services to assist in the resolution of consumer disputes in the motor industry in South Africa.¹² The office began as a voluntary entity in 2000 but was accredited under the *CPA* in 2015.¹³ The MIOSA is mandated to resolve disputes between industry participants and consumers.¹⁴

⁸ See Woker 2019 *Stell LR* 103-108; Van Heerden "Section 69" 69–30; Du Plessis 2022 *Stell LR* 237-240; Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 565-590.

⁹ See Du Plessis 2022 *Stell LR* 237-240.

¹⁰ See related comments by Woker 2019 *Stell LR* 107-108.

¹¹ Section 69 of the *CPA*; MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 4-5; MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 2.

¹² Section 82 of the *CPA*; *Motor Industry Ombudsman of South Africa v Silver Park Motors CC t/a Silverton Motors* (479/2018) [2019] ZASCA 71 (30 May 2019) para 1.

¹³ See Droppa 2021 <https://www.businesslive.co.za/bd/life/motoring/2021-09-23-motor-ombudsman-fees-slammed-for-being-too-expensive/>; also see Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 579.

¹⁴ Section 70 of the *CPA*; Van Heerden "Section 70" 70–3.

Nonetheless, ombud schemes recognised under the *CPA* do not have the authority to make binding decisions or recommendations, although their decisions and recommendations are often accepted by both parties.¹⁵ The MIOSA's jurisdiction covers the relationship between the parties conducting business in the automotive industry and their relations with consumers.¹⁶

The MIOSA's jurisdiction does not extend to any disputes that fall under the sole responsibility of another ombud.¹⁷ In addition to this, the MIOSA does not deal with disputes where any of the parties to a dispute has instituted legal proceedings before a court of law or where there is a *prima facie* basis to believe that any of the parties to a dispute has committed a criminal offence. In the case of *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise v Wentzel*, the Supreme Court of Appeal (SCA) held that section 69(d) of the *CPA* should not be lightly read to exclude and/or prevent a consumer from approaching courts to obtain redress.¹⁸ The SCA also stressed that in line with the purpose of the *CPA*, which is to protect the interests of consumers who are seeking redress, there is no reason to preclude such consumers from immediately pursuing a remedy that may be most effective to them.¹⁹ This view was supported by the court in another recent unreported case of *Steynberg v Tammy Taylor Nails Franchising*.²⁰

The jurisdiction of the MIOSA also excludes any dispute that has prescribed under the *Prescription Act*.²¹ In the case of *Ngoza v Roque Quality Cars* both the Commission and Roque Quality Cars raised the issue that the matter had prescribed.²² The National Consumer Tribunal (NCT or Tribunal) held that the referral to the MIOSA halted prescription because the *CPA* requires a consumer to exhaust all available remedies before proceeding to a civil court.²³ Nonetheless, the requirement that all remedies be exhausted

¹⁵ Section 70 of the *CPA*; Van Heerden "Section 70" 70–3.

¹⁶ The Code 3; Melville and Yeats "Industry Codes of Conduct" 82–9.

¹⁷ Melville and Yeats "Industry Codes of Conduct" 82–9; the Code 10.

¹⁸ *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise v Wentzel* 2021 3 All SA 98 (SCA) (hereafter the *Motus* case) para 26.

¹⁹ See *Motus* case para 27.

²⁰ *Steynberg v Tammy Taylor Nails Franchising No 45 (Pty) Ltd* (Gauteng, Pretoria) (unreported) case number 23655/2021 of 21 June 2022 (hereafter the *Steynberg* case) para 22. In this case the court indicated that the obiter remarks of the SCA were authoritative and carried considerable weight.

²¹ Sections 10(1) and 11(d) of the *Prescription Act* 68 of 1969; see clause 17.2 of the Code 10.

²² *Ngoza v Roque Quality Cars CC* (NCT/79905/2017/73(3)&75(1)(b)) [2018] ZANCT 110 (28 June 2018); s 69 of the *CPA*; Melville and Yeats "Industry Codes of Conduct" 82–9; the Code 10.

²³ Sections 69 and 70 of the *CPA*; *Ngoza v Roque Quality Cars CC* (NCT/79905/2017/73(3)&75(1)(b)) [2018] ZANCT 110 (28 June 2018).

was recently challenged in the *Motus* and *Steynberg* cases.²⁴ The subsequent case of *Takealot Online (RF) (Pty) Ltd v Driveconsortium Hatfield* also adopted the view held in *Motus*.²⁵ Referring the matter to the applicable industry ombud is one of the dispute resolution options open to an aggrieved customer. The MIOSA is the recognised industry ombudsman in charge of resolving consumer concerns in the motor vehicle industry.²⁶ The authors hold the same view as Van Heerden, that the divergent interpretations of section 69 by the courts will only continue to create uncertainty for consumers about which avenue to follow.²⁷ As Van Heerden further posits, the prudent approach would be for consumers to first approach Alternative Dispute Resolution (ADR) agents or consumer courts to resolve their disputes, since they would have more expertise in dealing with cases falling within their jurisdiction.²⁸

In addition to its role and mandate of resolving consumer disputes in the automotive industry, the MIOSA also provides consumer advice and training on the *CPA* to motor-related service providers. Since its accreditation as an industry ombudsman, the MIOSA has remained in compliance with the Codes and the King IV code of corporate governance.²⁹ The governance framework of the MIOSA is built on the ideals of accountability, transparency, ethical management and justice, and upholding the requirements as set out in the preamble of the *CPA*.³⁰ The governing board of the MIOSA recognises that excellent governance may build long-term value and improve equity performance through an ethical culture, competitive performance, effective control, and legitimacy.³¹ Furthermore, the MIOSA also maintains solid connections with automotive trade organisations and consumer groups.³² The provision of consumer advice and training is an important tool that can be effectively used to ensure the

²⁴ *Motus* case para 26; *Steynberg* case para 22. *Takealot Online (RF) (Pty) Ltd v Driveconsortium Hatfield (Pty) Ltd - Application for Leave to Appeal (7348/2021)* [2021] ZAWCHC 280 (11 October 2021) para 15.

²⁵ *Takealot Online (RF) (Pty) Ltd v Driveconsortium Hatfield (Pty) Ltd - Application for Leave to Appeal (7348/2021)* [2021] ZAWCHC 280 (11 October 2021) para 15.

²⁶ See Woker 2019 *Stell LR* 107; also see GN 817 in GG 38107 of 17 October 2014.

²⁷ Van Heerden "Section 69" 69–29.

²⁸ Van Heerden "Section 69" 69–29.

²⁹ MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 3; the Code 7.

³⁰ See Preamble to the *CPA*; also see MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5; MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 2; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 2.

³¹ MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5; MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 10.

³² MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5; MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 2.

realisation of consumer rights in South Africa. As such, this is an important role that the MIOSA has been vested with, since there is little value in consumers having rights unless those rights are realised by those consumers. As Woker correctly asserts, an important factor in consumer protection is to ensure that consumers know their rights, and this will not happen unless consumers are sufficiently educated about their rights and actually claim them.³³

The *CPA* provides that a supplier or a service provider must not violate any applicable industry code in the ordinary course of business.³⁴ The *CPA* furthermore empowers the MIOSA to prevent any party from supplying information if it fails to reply to the MIOSA request within ten business days. The MIOSA is required to report any noncompliance with the Code or the *CPA* by a supplier or service provider to the Automotive Industry Association, of which it is a member, and/or the NCC, so that the noncompliance can be investigated.³⁵ If any supplier, the MIOSA, or its staff becomes aware that a criminal act is being committed or is intended to be committed in the automotive industry, or of a practice that might be considered or alleged to be a criminal offence, they will be required to report the act or behaviour to the appropriate authority.³⁶

3 Dispute resolution procedure of the MIOSA

The dispute resolution procedure of the MIOSA entails that a consumer first approach the supplier's internal complaint handling procedure, and if that fails, then escalate the complaint to the ombud scheme.³⁷ In terms of the *CPA*, if consumers desire to resolve their dispute, they should follow the procedures outlined in the *CPA*.³⁸ As a result, the *CPA* seeks to empower consumers through awareness and education, while also providing consumers with an efficient and accessible means of dispute resolution.³⁹ Aside from outlining several routes for consumers to pursue if they have a

³³ See Woker 2019 *Stell LR* 103.

³⁴ Section 82(8) of the *CPA*; Melville and Yeats "Industry Codes of Conduct" 82–13; the Code 6.

³⁵ The Code 12; Melville and Yeats "Industry Codes of Conduct" 82–13.

³⁶ The Code 12; MIOSA 2017 https://www.miosa.co.za/articles/MIOSA_Annual_Report_2017.pdf: some of the requirements for reporting under the King IV code of corporate governance include *inter alia* accountability, transparency, ethical management and fairness, and the report requires that business be conducted on the basis of fair commercial competitive practices.

³⁷ Sections 69, 70 and 82 of the *CPA*; Van Heerden "Section 69" 69–20; *Nzwana v Dukes Motors t/a Dampier Nissan* (1170/2018) [2019] ZAECGHC 81 (3 September 2019) para 31, where this preferred route of redress was endorsed.

³⁸ Sections 69, 70 and 82 of the *CPA*; Van Heerden "Section 69" 69–20; *Nzwana v Dukes Motors t/a Dampier Nissan* (1170/2018) [2019] ZAECGHC 81 (3 September 2019) para 31, where this preferred route of redress was endorsed.

³⁹ Section 3(f)-(g) of the *CPA*; Reddy 2020 *Obiter* 373; Melville and Yeats "Industry Codes of Conduct" 82–7; the Code 9.

complaint against a supplier, the *CPA* also permits them to exercise their consumer rights using the channels set out in the *CPA*.⁴⁰ According to the MIOSA process, once all essential information regarding a complaint or dispute is obtained, the MIOSA must first seek to mediate the dispute between the parties.⁴¹ Should mediation fail to resolve the dispute, the MIOSA must present the parties with a certificate to that effect. If oral evidence is required to resolve the disagreement, the MIOSA may request that the parties attend a hearing with at least ten days' written notice.⁴² It is furthermore possible to arrange for the hearing to be recorded and to have an interpreter present, and the parties may even be assisted by legal counsel.⁴³ The MIOSA has ten business days following the conclusion of the hearings to present its ruling. If a settlement is reached with the support of the MIOSA, the outcome may be recorded in the form of an order in accordance with the *CPA* and, at the request of a party to a dispute, submitted to the NCT or the High Court to make a consent order.⁴⁴ If consumers are dissatisfied with the outcome of the procedure, they may request that the process be terminated so that they can submit a complaint to **another redress mechanism** in line with the *CPA*.⁴⁵

4 An overview of the challenges hindering the MIOSA from discharging its role and mandate effectively

Despite the recognition of the MIOSA as an ombud under the *CPA* and the important role it has to play in resolving consumer disputes in the automotive industry in South Africa, various challenges continue to hamper the MIOSA from functioning effectively in discharging its role and mandate.⁴⁶ As indicated in the introduction, such challenges include limits to the jurisdiction of the MIOSA, the lack of accessibility and capacity constraints, the lack of independence, and the lack of a binding effect of the recommendations of the MIOSA. These challenges have not received adequate scholarly attention. Hence, an overview of such challenges is

⁴⁰ See ss 69 and 70 of the *CPA*; Van Heerden "Section 69" 69–1; Van Heerden "Section 70" 70–1; also see *Wingfield Motors (Pty) Ltd v National Consumer Commission* (NCT/3882/2012/101(1)(P) CPA) [2012] ZANCT 27 (27 November 2012) para 4.

⁴¹ Section 82 of the *CPA*; the Code 18; Melville and Yeats "Industry Codes of Conduct" 82–1, 82–13.

⁴² The Code Schedule 2, 15; Melville and Yeats "Industry Codes of Conduct" 82–13.

⁴³ The Code Schedule 2, 16; Koekemoer 2014 *Journal of Applied Business Research* 668.

⁴⁴ Section 70(3)(a) and 70(3)(b) of the *CPA*; the Code 12; Melville and Yeats "Industry Codes of Conduct" 82–13.

⁴⁵ Sections 69-71 of the *CPA*; Melville and Yeats "Industry Codes of Conduct" 82–13; Van Heerden "Section 69" 69–1; also see *Wingfield Motors (Pty) Ltd v National Consumer Commission* (NCT/3882/2012/101(1)(P) CPA) [2012] ZANCT 27 (27 November 2012) para 4.

⁴⁶ See s 86(2) of the *CPA*.

necessary since it could be of benefit to policymakers, who may remedy them through policy intervention. A discussion of these challenges is necessary to be able to enhance effective consumer protection in South Africa. Accordingly, these challenges are discussed in more detail below.

4.1 Jurisdictional limits of the MIOSA

It is important to note that the provisions of the *CPA* do not explicitly set forth a clear hierarchy of ADR agents or provide an order in which such agents may be contacted with reference to the order in which the alternative dispute resolution agencies indicated in the *CPA* should be approached.⁴⁷ The consumer may be perplexed about which ombud to contact to resolve an issue because there appears to be a grey area in this regard. In the case of *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs, and Tourism, Free State Government*, the court indicated that it is unclear from the phrasing of the *CPA* whether an express hierarchy of ADR agents has been established.⁴⁸ According to van Heerden, the choice of which ADR agent to contact should be based on the nature of the conflict and whether the consumer resides in a region of the nation where such ADR agents are accessible.⁴⁹ This seems to imply that to resolve a dispute between a supplier and a consumer, the ideal ombud to contact is one to whose jurisdiction the supplier is subject under specific legislation.⁵⁰ However, consumers are not required to approach ombuds with jurisdiction prior to exercising any other remedy provided for in the *CPA*.⁵¹

The *CPA* states that matters should be referred to an industry ombud if the supplier is subject to the jurisdiction of such ombud.⁵² Undoubtedly, this is in line with the judgement of the Constitutional Court in the case of *Chirwa v Transnet Limited and Other*, which indicates that parties must follow the route available to them through a specialised framework.⁵³ Notwithstanding

⁴⁷ Sections 69 and 70 of the *CPA*; Van Heerden "Section 70" 70–1; Van Heerden "Section 69" 69–22.

⁴⁸ *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government* 2016 3 All SA 794 (FB); ss 69 and 70 of the *CPA*.

⁴⁹ Van Heerden "Section 69" 69–23; also see Barnard and Van Heerden "Caveat Emptor" 209.

⁵⁰ Van Heerden "Section 69" 69–23; also see Barnard and Van Heerden "Caveat Emptor" 209.

⁵¹ Section 69(c) of the *CPA*; also see *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico* (1260/2015) [2016] ZANHC 1 (1 April 2016); *Wentzel v Autofit Fitment Centre Renault (Pty) Ltd-Zambezi* (34022/2018) [2019] ZAGPPHC 522 (19 July 2019). In this case the consumer was also accused of approaching the court too soon because MIOSA had not yet decided upon the case she brought up.

⁵² Section 70(1)(b) of the *CPA*; Du Plessis 2022 *Stell LR* 234; also see Van Heerden "Section 70" 70–1; Woker 2016 *SA Merc LJ* 42.

⁵³ *Chirwa v Transnet Limited* [2007] ZACC 23 (28 November 2007) para 77.

the need to provide efficient access to redress and to the courts, it would appear that the recent decisions in *Steynberg* and *Motus* are not in harmony with the *Chirwa* case, which might affect the efficiency of the ADR agents in providing redress under s 69(d) of the CPA.⁵⁴ Providing consumers direct access to courts is not inherently undesirable, but this could render ADR agents redundant and inadvertently frustrate vulnerable consumers in the process.

In *Ngoza v Roque Quality Cars* the NCT confirmed the MIOSA's position as an industry ombud that is authorised to handle consumer issues in the automotive sector.⁵⁵ However, the MIOSA's jurisdiction excludes complaints that require the determination of merits and the quantum of damages and the NCC does not investigate claims where damages are sought.⁵⁶ To secure adequate compensation for consumers, the NCT confirmed its inability to make an order for damages as well as the uncertainty surrounding the calculation and award of interest.⁵⁷ The NCT cannot issue an order for damages unless those damages are agreed upon in a consent order under the CPA.⁵⁸ However, this does not preclude the NCT from ruling on related issues.⁵⁹ The MIOSA is not permitted to rule on product liability, which further restricts its jurisdiction.⁶⁰ According to the CPA, a supplier is responsible for any harm that results from selling unsafe goods, any kind of product failure, or inadequate usage instructions or warnings, even in the absence of evidence of wrongdoing on its part.⁶¹ Any loss or physical damage to any property, any death, disease, or injury to a natural person, as well as any monetary loss brought on by the aforementioned is an example of harm for which a supplier may be held accountable.⁶² However, the MIOSA does not have jurisdiction over the aforementioned.

4.2 Lack of accessibility and capacity constraints

The MIOSA was established in the year 2000. Nonetheless, the MIOSA does not have physical offices across all provinces in South Africa. This

⁵⁴ *Motus* case paras 26-27; *Steynberg* case paras 22 and 24.

⁵⁵ *Ngoza v Roque Quality Cars* (NCT/79905/2017/73(3)&75(1)(b)) [2017] ZANCT 104 (28 September 2017); Koekemoer 2014 *Journal of Applied Business Research* 665, 666.

⁵⁶ The Code 10; Van Heerden "Section 69" 69–32; Du Plessis 2022 *Stell LR* 247.

⁵⁷ Barnard 2020 *SALJ* 232-234; Barnard and Van Heerden "Caveat Emptor" 214.

⁵⁸ Section 74 of the CPA; see *Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes* (NCT /95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018) para 13.

⁵⁹ Barnard and Van Heerden "Caveat Emptor" 214; see *Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes* (NCT /95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018) para 13.

⁶⁰ The Code 10; Melville and Yeats "Industry Codes of Conduct" 82–10.

⁶¹ Section 61(1) of the CPA; Barnard 2012 *De Jure* 478; also see Van Heerden and Barnard 2019 *THRHR* 444.

⁶² Section 61(3) of the CPA; Barnard 2012 *De Jure* 478.

limits the accessibility of the MIOSA to consumers, especially those who reside in remote and rural areas. Moreover, the NCC has stated that it will no longer be handling all individual consumer complaints and will instead refer these to accredited industry ombuds.⁶³ This will free up the NCC to concentrate on systemic issues in specific industries, proactive investigations, endemic harmful business practices and consumer education.⁶⁴ The authors argue that the MIOSA is as a result burdened by cases that exceed its capacity. The head of the case management department oversees three senior case managers each of whom supervises a team of five workers consisting of two case managers and three assistants.⁶⁵ Case managers examine each other's work since each has a co-signatory.⁶⁶ During the years 2022-2023 the MIOSA received 8 123 new applications as opposed to 7 472 during the years 2021-2022.⁶⁷ This demonstrates an increase in the number of cases, and it further indicates that the productivity of the MIOSA will suffer if the trend continues. There is therefore a need to strengthen the capacity of the MIOSA by employing more skilled personnel. This would go a long way toward resolving consumer disputes in the motor industry in South Africa.

4.3 Lack of independence and possibility for conflict of interest

The MIOSA is currently funded by the automotive industry. Given this funding model and approach, there are concerns about the independence of the MIOSA.⁶⁸ The authors argue that this funding model is worrisome for consumers, who could be prejudiced and left more vulnerable if it is perceived that the decisions of the MIOSA might benefit the industry.⁶⁹ Furthermore, it is argued that there is an inherent lack of independence and the possibility of conflict of interest as a result of this funding model. According to the MIOSA, membership in the scheme is now required for all

⁶³ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 567; also see Barnard 2020 *SALJ* 229.

⁶⁴ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 567; also see Barnard 2020 *SALJ* 229; Van Heerden "Section 69" 69–30.

⁶⁵ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 14; MIOSA 2021 <https://www.miosa.co.za/articles/Annual%20Report%202021.pdf> 13.

⁶⁶ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 14; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 12; MIOSA 2021 <https://www.miosa.co.za/articles/Annual%20Report%202021.pdf> 13.

⁶⁷ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 14; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 12.

⁶⁸ MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5; Koekemoer 2014 *Journal of Applied Business Research* 665.

⁶⁹ See related comments by MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5; also see Koekemoer 2014 *Journal of Applied Business Research* 665.

service providers operating in each industry.⁷⁰ One of the ways the MIOSA receives funding is by the collection by the ombud of all due and owing payments from members of the automotive industry.⁷¹ According to the Code, the MIOSA should be supported by retailers as being among the role-players in the motor industry in South Africa. All Original Equipment Manufacturers (OEMs) and importers are required to contribute 20% of the approved budget, and the individual OEM or importer's share is determined by dividing 20% of the approved budget by the total number of organisations that directly import or produce goods.⁷² The retailers are required to contribute 80% of the approved budget, and each retailer's share is determined by dividing 80% of the approved budget by the total number of retail locations from which business is being conducted in the automotive industry.⁷³ In the case of *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd*, the court held that industry participants are required by law to make their contributions to industry ombuds.⁷⁴

The MIOSA has over the years encountered substantial challenges from all sides to uphold its independence.⁷⁵ Most consumers, as well as the motor and related industries, have placed their trust in the MIOSA, recognising that every dispute will be investigated and resolved quickly.⁷⁶ However, the authors argue that some consumers and suppliers continue to doubt the MIOSA's independence as it is supported by the automotive industry, and some suppliers are reluctant to pay the membership fee.⁷⁷ The issue of a

⁷⁰ See s 82 of the CPA; also see *Woker 2016 SA Merc LJ 42*; also see *Motor Industry Ombudsman of South Africa v Silver Park Motors CC t/a Silverton Motors (479/2018)* [2019] ZASCA 71 (30 May 2019) 12.

⁷¹ The Code 8; MIOSA 2010 https://www.miosa.co.za/articles/MIO_ANNUAL_REPORT_2010.pdf 5. The Ombudsman stated that MIOSA derives its income from motor manufacturers, importers, all the major retail groups and a large number of retail outlets and workshops.

⁷² The Code 24; MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 7.

⁷³ The Code 24; MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 7.

⁷⁴ Melville and Yeats "Industry Codes of Conduct" 82–7; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 11; MIOSA 2021 <https://www.miosa.co.za/articles/Annual%20Report%202021.pdf> 12; *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd (18096/2017)* [2021] ZAGPPHC 309 (26 March 2021); *Woker 2016 SA Merc LJ 21*.

⁷⁵ MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 4; the Code 6.

⁷⁶ MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 4; MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 10.

⁷⁷ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 13; also see *Motor Industry Ombudsman of South Africa v Silver Park Motors CC t/a Silverton Motors (479/2018)* [2019] ZASCA 71 (30 May 2019) 12; the Code 23.

perceived lack of independence of the voluntary ombuds is a serious one that affects the efficiency of these dispute resolution bodies.⁷⁸

In this context, the MIOSA is required according to the Codes to adopt a conflict of interest policy that includes identifying conflicts of interest in which the Ombud, any directors or any employees of the MIOSA have an actual or potential interest that could affect their objectivity.⁷⁹ The policy outlines procedures for disclosing any conflicts of interest, rules for the giving and receiving of gifts, vouchers, incentives, hospitality, and other benefits, as well as the establishment and maintenance of a gift register. It also includes provisions for avoiding conflicts of interest and, when this is not possible, justifications for not doing so.⁸⁰ The MIOSA has internal policies and processes in place to ensure that all employees abide by the values of honesty, objectivity, and independence in support of this commitment to prevent conflicts of interest.⁸¹ Nonetheless, the authors argue that since the automotive industry funds the MIOSA through levies and/or membership fees, there is a possibility for a conflict of interest that may influence the MIOSA's ability to accomplish its role and mandate objectively. In this regard it is submitted that the internal policies of the MIOSA regarding objectivity and independence should be consistently and robustly enforced to combat any possibility of conflict of interest.

4.4 Lack of binding effect of the recommendations of the MIOSA

Both industry ombuds and ombuds accredited under the *CPA* do not have the authority to issue legally binding decisions.⁸² However, if consumers are dissatisfied with the outcome of the process, they still have the option of contacting the NCC. In circumstances of threats to the consumer's safety and gross violations, the ombud may also report such issues to the NCC.⁸³ It is alarming to learn that in practice some suppliers fail to adhere to or respond to the "ruling" of industry ombuds, which failure could delay consumer relief.⁸⁴ It is not clear if the *CPA* can be used to "force" suppliers

⁷⁸ Woker 2016 *SA Merc LJ* 40; also see Mupangavanhu 2012 *PELJ* 330; Du Preez 2009 *TSAR* 81; Melville 2010 *SA Merc LJ* 55.

⁷⁹ The Code 9; MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5; MIOSA 2015 https://www.miosa.co.za/articles/MIO_ANNUAL_REPORT_2010.pdf 7.

⁸⁰ The Code 9; MIOSA 2011 https://utasa.co.za/index_htm_files/27%20-%20MIO%20Annual%20Report.pdf 5.

⁸¹ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 6.

⁸² Van Heerden "Section 69" 69–30; also see Melville 2010 *SA Merc LJ* 54; Du Plessis 2022 *Stell LR* 234.

⁸³ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 578; also see Melville 2010 *SA Merc LJ* 54.

⁸⁴ See *Mogotsi v Car Finance Company* (NCT/85798/2017/75(1)) [2018] ZANCT 18 (4 February 2018) para 4; *Perumal v South African Motorcycles (Pty) Ltd t/a Big Boy Scooters* (NCT/86201/2017/75(1)(b)) [2018] ZANCT 4 (21 March 2018) para 3; *Stemmet v Motus Corporation (Pty) Ltd t/a Milnerton Multifranchise*

to comply with "rulings" or "decisions" which are, in reality, recommendations made by industry ombuds.⁸⁵ The *CPA* provides that a supplier is forbidden to disregard an accredited industry code in the normal course of business.⁸⁶ The NCT has made it clear that a non-cooperative attitude on the part of suppliers who are bound by an authorised industry code constitutes non-compliance with the said industry code and is, therefore, prohibited behaviour.⁸⁷ In the year 2022/23 the MIOSA received 8 123 new applications; 912 of which were deemed to fall outside of MIOSA's jurisdiction and were forwarded to other forums. The remaining 6 715 cases were forwarded to the industry for response and of these, 4 750 members of the industry responded to the allegations within the allotted time.⁸⁸ The MIOSA's requests were not acceded to by 1 965 industry participants, leaving them non-compliant. This conduct is regarded as a violation of the *CPA*.⁸⁹

4.5 Cost orders which are not in line with the objectives of the CPA

One of the challenges impeding the effective redress of consumer disputes through industry ombuds is the issue of cost orders. The MIOSA's dispute resolution process entails that once it has resolved a dispute, the MIOSA has to record the resolution of such a dispute as an order in terms of the *CPA*.⁹⁰ After issuing an order, the MIOSA has to give it to the parties to the dispute. At present the *CPA* provides that once the parties in the dispute consent to an order from the MIOSA, the MIOSA may submit it to either the High Court or the NCT for it to be made a consent order.⁹¹ Notwithstanding, most consumers are usually reluctant to request the MIOSA to submit consent orders to the High Court or the NCT.⁹² This is because the Code provides that the costs of consent orders are usually borne by the party

(NCT/83884/2017/75(1)(b)) [2018] ZANCT 21 (25 March 2018) para 5; *Vatsha v Shalom Motors (Pty) Ltd* (NCT/95174/2017/75(1)(b)) [2018] ZANCT 67 (15 May 2018).

⁸⁵ Section 82(8) of the *CPA*; Van Heerden "Section 69" 69–30.

⁸⁶ See s 82(8) of the *CPA*, which requires that all suppliers abide by their applicable industry codes. Failure to abide by an industry code constitutes prohibited conduct, see s 108(1) of the *CPA*; also see Van Heerden "Section 69" 69–30; *James v Noordhoek Motors (Pty) Ltd t/a Hyundai Pinetown* (NCT/103531/2018/75(1)(b)) [2018] ZANCT 96 (11 October 2018) para 8.

⁸⁷ Van Heerden "Section 69" 69–31; Barnard and Van Heerden "Caveat Emptor" 199.

⁸⁸ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 14; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 12; MIOSA 2021 <https://www.miosa.co.za/articles/Annual%20Report%202021.pdf> 13.

⁸⁹ Section 82(8) read with s 108(1) of the *CPA*; MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 14.

⁹⁰ Section 70 (3)(a) of the *CPA*; Van Heerden "Section 70" para 13; also see Du Plessis 2022 *Stell LR* 246.

⁹¹ See s 70(3)(b) of the *CPA*; Du Plessis 2022 *Stell LR* 247.

⁹² Du Plessis 2022 *Stell LR* 246; see related comment by Woker 2019 *Stell LR* 108.

making such a request.⁹³ Du Plessis correctly argues that the provisions of the Code regarding costs are not in line with the spirit and objectives of the *CPA*, which is primarily a piece of legislation designed to protect the interests of vulnerable consumers in South Africa.⁹⁴ The *CPA* was enacted, in the main, to protect the interests of vulnerable consumers, including poor consumers.⁹⁵ In this regard it is argued that the issue of cost orders for consent orders excludes vulnerable consumers who cannot bear the costs of consent orders, thus affecting the efficiency of the MIOSA as a dispute resolution body.

4.6 Lack of awareness of the role and existence of the MIOSA

The MIOSA has been in existence for a long time. However, most consumers in South Africa are not aware of its role and mandate. For instance, the MIOSA's main email account receives emails year after year, with most of the emails consisting of queries about how to file a complaint or seek advice on existing disputes.⁹⁶ The authors argue that this reflects a lack of knowledge and awareness on the part of consumers, which leads to consumer forum shopping or consumers approaching the wrong agency for redress. The authors note that the annual reports of the MIOSA do not provide statistics on consumer awareness apart from different ages and race groups of the complainants.⁹⁷ The 2023 annual report suggests insufficient awareness of the agencies amongst blacks and the difficulties low-income consumers experience in attempting to access enforcement agencies.⁹⁸ The authors recommend that raising awareness should not be solely the responsibility of the MIOSA but also of the MIOSA, the NCC and the suppliers. The MIOSA and the NCC should conduct serious awareness campaigns and visit remote areas to educate consumers about their rights. They should also put additional measures in place to eliminate consumer exploitation by tightening regulations, enforcing compliance, creating awareness, and educating consumers about their rights. Suppliers should also play a role in educating consumers by prominently displaying the MIOSA contact information on the walls of their premises, on their websites, and/or on their receipts. The authors also recommend that suppliers should

⁹³ Clause 23.1.2 of the Code; see Du Plessis 2022 *Stell LR* 232; also see Barnard 2020 *SALJ* 232.

⁹⁴ See the preamble and s 3 of the *CPA*; also see Du Plessis 2022 *Stell LR* 246.

⁹⁵ See s 3 of the *CPA*; Woker 2019 *Stell LR* 115; also see Du Preez 2009 *TSAR* 63.

⁹⁶ MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 11; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 11; MIOSA 2021 <https://www.miosa.co.za/articles/Annual%20Report%202021.pdf> 12; MIOSA 2020 <https://www.miosa.co.za/articles/Annual%20Report%202020.pdf> 13.

⁹⁷ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 569; MIOSA 2022 https://www.miosa.co.za/articles/Annual_Report_2022.pdf 14.

⁹⁸ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 569; MIOSA 2023 https://www.miosa.co.za/articles/Annual_Report_2023.pdf 14.

include information about the role of the MIOSA in contractual agreements they conclude with consumers. An increase in awareness should coincide with increased capacity on the part of MIOSA, to deal with an increased workload.

5 Concluding remarks

One of the purposes of the *CPA* is to provide for an accessible, consistent and efficient system of consensual resolution of disputes emanating from consumer transactions in South Africa.⁹⁹ In line with this purpose the *CPA* has recognised the MIOSA as an industry ombud to address disputes in the automobile industry in South Africa.¹⁰⁰ The recognition of the MIOSA as an industry ombud is crucial for assisting consumers, especially those who are vulnerable, with access to redress and enforcement of their rights. Moreover, the recognition of the MIOSA under the *CPA*, although it was established prior to the enactment of the *CPA*, is a commendable aspect on the part of policymakers in South Africa towards minimising and ameliorating the challenges consumers face in the market place.¹⁰¹ The establishment of the MIOSA is a progressive step towards the realisation of consumer rights in South Africa. Most South African consumers were not given enough recourse under the previous consumer protection regime.¹⁰² Accordingly, the introduction of the MIOSA as empowered by the *CPA* represents an improvement in the provision of avenues of redress available to consumers in the automotive industry.¹⁰³

Notwithstanding the above, it is noted that the MIOSA is faced with a number of challenges. One of the challenges affecting the MIOSA is its limited jurisdiction. Currently, the MIOSA has jurisdiction to the extent that the dispute relates to the automobile industry.¹⁰⁴ Pursuant to the Code, the MIOSA lacks jurisdiction over any dispute that calls for determining the merits and the extent of the damages to be awarded.¹⁰⁵ In this regard, given that the NCT is unable to award damages the NCC should also make an effort to settle these disputes since it may determine that there was a prohibited practice, which the NCT can confirm, which confirmation would

⁹⁹ Section 3(1) (g) of the *CPA*; *Maphutse v Motodeal Park (Pty) Ltd t/a Motor Deal Premium* (40586/2016) [2019] ZAGPJHC 492 (3 December 2019) para 25; Du Preez 2009 *TSAR* 64.

¹⁰⁰ Section 86(2) of the *CPA*.

¹⁰¹ See section 3 of the *CPA*; De Stadler and Du Plessis "Interpretation, Purpose and Application" 3–1.

¹⁰² Koekemoer 2014 *Journal of Applied Business Research* 660; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 307-308.

¹⁰³ Koekemoer 2014 *Journal of Applied Business Research* 660; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 307-308.

¹⁰⁴ See clause 22.3 of the Code 11; Du Plessis 2022 *Stell LR* 245.

¹⁰⁵ Clause 17.2.3 of the Code 10; Barnard and Van Heerden "Caveat Emptor" 214; Melville and Yeats "Industry Codes of Conduct", 82–9.

serve as the foundation of a damages claim in a civil court.¹⁰⁶ The feasibility of this suggestion is dependent on a further recommendation for the NCC to reconsider its decision to not deal with individual disputes. Because the MIOISA and the NCT have limited jurisdiction and were created to help consumers who lack the finances for litigation, this would prevent the consumer from having to approach the civil court in this matter. The authors also argue that the MIOISA's jurisdiction should be expanded to include making determinations about product liability. Moreover, another challenge noted in the foregoing discussion is the MIOISA's lack of accessibility and capacity constraints. To this end, it is recommended that the MIOISA should have an office or a satellite office in each province to improve accessibility. In addition to this, it is recommended that the MIOISA should pool resources, collaborate and work together with provincial consumer offices to offer advice and/or assistance to consumers. This would be beneficial for walk-in consumers, consumers from remote areas with limited access to the internet or email, and customers with inadequate telephone network coverage. Furthermore, it would also address the challenges of a lack of capacity.

The authors have also established that the recommendations of the MIOISA have no binding effect and that there are still certain businesses that do not accept the recommendations of the MIOISA.¹⁰⁷ The lack of a binding effect arises from the fact that the Code does not contain any clauses that require suppliers or service providers to abide by the MIOISA's decisions.¹⁰⁸ However, these rules do contain additional clauses related to managing complaints and resolving disputes, which suppliers must abide by, and in

¹⁰⁶ Du Plessis 2022 *Stell LR* 245; Van Heerden "Section 69" 69–32; Barnard and Van Heerden "Caveat Emptor" 214; Barnard 2020 *SALJ* 243. In *Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes* (NCT/95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018). MIOISA terminated their file after determining that they had "no jurisdiction to pursue matters for compensation and damages" and that "there is a factual dispute between the parties that only a court of law can pronounce on." Notably, the Commission later declined to refer the complaint on identical grounds. However, it is argued that the mere fact that a consumer seeks damages should not preclude attempts by industry ombudsmen to mediate a disagreement, because the parties may agree to a damages award in the course of such dispute resolution. The Commission should not be discouraged from looking into the complaint even if the consumer later files a claim for damages because the investigation could reveal that prohibited behaviour took place, which could then be forwarded to the Tribunal for a finding that could serve as the foundation for further legal action for damages in a civil court.

¹⁰⁷ MIOISA 2015 https://www.miosa.co.za/articles/MIO_ANNUAL_REPORT_2010.pdf 7; MIOISA 2016 https://www.miosa.co.za/articles/170519_MIOSA_Annual_Report_2016.pdf 9.

¹⁰⁸ Van Heerden "Section 69" 69–31; Du Plessis 2022 *Stell LR* 237; Melville 2010 *SA Merc LJ* 54.

violation of which they would engage in forbidden behaviour.¹⁰⁹ The authors suggest that the recommendations of the MIOSA should be legally enforceable and have a binding effect, just as with the ombuds in the South African financial sector, as this inability to make binding recommendations frustrates consumers.¹¹⁰ It follows that ADR systems exist to provide remedies to those who cannot approach the courts to enforce their rights. In this regard, both the *CPA* and the Code need to be amended to give effect to the binding authority of the recommendations of the MIOSA. This approach would go a long way towards enhancing consumer protection by effectively addressing the challenges affecting the MIOSA to ensure that it functions optimally in resolving consumer disputes in the South African automobile industry.

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¹⁰⁹ Van Heerden "Section 70" 69–31; see clause 4.1.4 of the Code 5; Du Plessis 2022 *Stell LR* 237; Melville 2010 *SA Merc LJ* 54.

¹¹⁰ Melville 2010 *SA Merc LJ* 54; Naudé and Barnard "Enforcement and Effectiveness of Consumer Law" 579; see s 27(5)(c) of the *Financial Advisory and Intermediary Services Act* 37 of 2002; Woker 2016 *SA Merc LJ* 41.

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List of Abbreviations

ADR	Alternative Dispute Resolution
CPA	Consumer Protection Act 68 of 2008
MIOSA	Motor Industry Ombudsman of South Africa
NCC	National Consumer Commission
NCT	National Consumer Tribunal
OEMs	Original Equipment Manufacturer
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg