

College of Law and Management Studies

School of Law

**The regulation of the sale of skin lightening
creams in South Africa**

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DECLARATION

I, Nabeela Seedat, do hereby declare that this dissertation, unless indicated otherwise, is an original piece of work.

I further declare that this dissertation has not been submitted for any degree or examination at any other university.

Signed at Durban on this 26th February 2019.



Signature

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ABSTRACT

And her skin was as white as milk, her hair was as smooth as silk and her eyes were as blue as the deep blue sea...

It is a common misconception that many people equate fairness with beauty however, little do they know of the harm that is associated with attaining such beauty. Consumers who purchase skin lightening creams that contain banned and/or illegal substances such as mercury and hydroquinone suffer from permanent skin damage and impairment as a result of the use of such creams. These skin lightening creams constitute defective goods and are not allowed to be sold as cosmetics.

The common law remedies available to consumers for the sale of defective goods are limited and consumers are usually not entitled to claim consequential damages. Often consumers are only entitled to repayment of the purchase price which is not ideal as the damages suffered as a result of defective skin lightening creams is exorbitant in comparison to the price paid. There are certain statutes which are applicable however the penalties are criminal in nature and are insufficient to deter unscrupulous suppliers from continuing to supply consumers with these skin lightening creams. Lack of effective monitoring also appears to be a major concern. The introduction of the Consumer Protection Act 68 of 2008 (CPA), has improved the rights of consumers considerably as the CPA contains a host of consumer rights, as well as mechanisms providing access to redress for affected consumers. Consumers are now entitled to hold anyone in the supply chain liable for the supply of defective goods and there are administrative penalties available against a supplier who is found to have supplied defective goods. In the light of the introduction of the CPA, this dissertation focusses on the legal responsibilities of suppliers in relation to the sale of defective goods as well as the rights of recourse available to consumers who suffer damages as a result of using such defective products.

CHAPTER 1

INTRODUCTION

1.1 Background

*Mirror, mirror on the wall, who is the fairest of them all*¹

Professor Ncoza Dlova of the University of KwaZulu-Natal has reported that the use of skin lightening creams has increased in South Africa and elsewhere in the world since 2000.² This has resulted in millions of dark-skinned women suffering from devastating side effects such as skin thinning, bacterial and fungal infections and permanent stretch marks or skin cancer.³ This is a matter of grave concern as the legislature during the 1970s banned the use of certain active ingredients that formed part of the composition of skin lightening creams⁴ and so the practice died down.⁵ However, in recent times, Professor Ncoza Dlova reports that the practice has re-emerged and grown substantially.⁶

The use of skin lightening creams amongst individuals globally and especially in South Africa has escalated because it appears that many people are dissatisfied with the condition and/or colour of their skin. They appear to experiment with skin lightening creams in order to alter their physical appearance and to become more appealing in the eyes of others.⁷ The practice of lightening one's skin has also resulted in many dark-skinned individuals becoming self-conscious about the colour of their skin, such that they risk their

¹ This is a famous statement from the children's storybook *Snow White* originally written by Jacob and Wilhelm Grimm and was also the title of an article by M Ntambwe which is available at <http://www.scienceinafrica.com/old/index/2004/march/skinlightening.htm>, accessed on 30 October 2018.

² C Dardagan 'Illegal bleaching is blooming' *The Mercury* 1 June 2016 1.

³ *Ibid.*

⁴ Regulations to the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 prohibiting the use of hydroquinone, any active or potentially active depigmenting ingredient, lead and its salts, mercury and its salts and the cosmetic category skin bleacher, skin lightener or skin whitener – Amendment published in the GN Notice 864 of GG 12427 on 20 April 1990.

⁵ C Dardagan 'Illegal bleaching is blooming' *The Mercury* 1 June 2016 1.

⁶ *Ibid.*

⁷ Z Teke 'Skin-lightening product warning' *IOL* 28 January 2016, available at <http://www.iol.co.za/dailynews/lifestyle/skin-lightening-product-warning-1976845>, accessed on 18 July 2016.

health and their lives to become “the fairest of them all.”⁸ A recent study stated that at some point in time, 35 per cent of women in South Africa, have used skin lightening products.⁹

According to Professor Ncoza Dlova, the colonial and historical roots of skin whitening can be traced back to Victorian times and the practice first began with white people and was linked to ideas surrounding class and money.¹⁰ Professor Dlova further states that during the South African apartheid era, black women who had lighter skins appeared to be given more and better opportunities.¹¹ According to research conducted by Professor Dlova, there are a number of reasons why skin lightening creams were used.¹² These include, for example, the treatment of skin problems, such as post inflammatory hyperpigmentation, melasma and acne as well as for the purpose of lightening the skin.¹³ Consumers also use skin lightening creams in an attempt to improve their self-esteem, to acquire better jobs and to ensure that they have better marriage prospects.¹⁴ Consumers are often introduced to skin lightening creams by friends who use these products.¹⁵ The use of skin lightening creams is not limited to women as there are men who are unhappy with their physical appearance and have resorted to using skin lightening creams in an attempt to enhance their physical appearance.¹⁶

The media and advertising have also played a role when it comes to influencing people’s decisions to use skin lightening creams as the media frequently

⁸ Z Mapumulo ‘Dying to be white’ *City Press* 26 February 2016, available at <http://citypress.news24.com/News/dying-to-be-white-20160220>, accessed on 16 April 2016.

⁹ L Davids ‘It’s time for Africa to take a stand on skin lightening creams’ *UCT News* 14 January 2016 available at <https://www.news.uct.ac.za/article/-2016-01-14-its-time-for-africa-to-take-a-stand-on-skin-lightening-creams>, accessed on 18 July 2016.

¹⁰ C Dardagan ‘Illegal bleaching is blooming’ *The Mercury* 1 June 2016 1.

¹¹ Ibid.

¹² NC Dlova, SH Hamed, J Tsoka-Gwegweni & A Grobler ‘Skin lightening practices: an epidemiological study of South African women of African and Indian ancestries’ (2015) Vol 173 Issue S2 *British Journal of Dermatology* 6.

¹³ Ibid 6.

¹⁴ Z Teke ‘Skin-lightening product warning’ *IOL* 28 January 2016, available at <http://www.iol.co.za/dailynews/lifestyle/skin-lightening-product-warning-1976845>, accessed on 18 July 2016.

¹⁵ Z Mapumulo ‘Skin-lightening: Case studies’ *City Press* 26 February 2016, available at <https://citypress.news24.com/News/skin-lightening-case-studies-20160220>, accessed on 30 June 2018.

¹⁶ I Skosana ‘When lightening strikes, it brings pale ailments’ *Bhekisisa Centre for Health Journalism* 31 October 2014, available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

portray lighter-skinned people as being more physically appealing.¹⁷ Celebrities such as Khanyi Mbau are also in search of a lightened skin tone and use skin lightening products such as glutathione injections to alter their skin tone.¹⁸ Unfortunately this encourages their fans to follow suit.¹⁹ Electronic applications such as Snapchat contribute to the popularity of skin lightening because they create a platform for users to place their image onto the application and then select options that lighten skin tone in the image, cover all blemishes and create an even and lighter skin tone.²⁰ Users then want to emulate this in real life and so they turn to skin lightening creams.

The recent problem that emanates with the use of skin lightening creams is that certain skin lightening creams contain harmful and/or banned ingredients such as mercury, hydroquinone²¹, resorcinol and topical steroids.²² Active ingredients such as mercury and hydroquinone are banned from cosmetics, and hydroquinone is only allowed at a maximum of two percent for medicinal use.²³ Skin lightening creams that contain banned and/or restricted substances that are not prescribed by medical practitioners have the potential of causing disastrous effects on consumers²⁴ and, it is submitted, constitute defective goods in terms of the Consumer Protection Act 68 of 2008 (CPA).

The long-term effects of the harmful and/or banned substances contained in skin lightening creams are extremely detrimental to users and they are reported to suffer with side effects such as irreversible skin damage and ochronosis, skin

¹⁷ NC Dlova, SH Hamed, J Tsoka-Gwegweni, A Grobler & R Hift 'Women's perceptions of the benefits and risks of skin-lightening creams in two South African communities' (2014) Vol 13 Issue 3 *Journal of Cosmetic Dermatology* 239, also see L Chikhi 'Miss Algeria faces racist backlash after winning title' IOL 10 January 2019 available at <https://www.iol.co.za/news/africa/miss-algeria-faces-racist-backlash-after-winning-title-18769334>, accessed on 18 February 2019 where the winner of the Algerian beauty pageant was targeted due to her skin colour.

¹⁸ F Parker 'How safe is the skin-lightening drip Khanyi Mbau is using? Doctors don't actually know' *Huffington Post* 25 January 2017 available at http://www.huffingtonpost.co.za/2017/01/25/the-skin-lightening-iv-drip-khanyi-mbau-uses-is-not-all-its-cra_a_21662508/, accessed on 10 March 2018.

¹⁹ Ibid.

²⁰ More information regarding snapchat is available at <https://www.snapchat.com>.

²¹ Hydroquinone is a chemical used in photo processing and rubber production according to N Singh in 'The dark side of skin lightening' IOL 21 July 2011 and which is available at <http://www.iol.co.za/lifestyle/style/beauty/the-dark-side-of-skin-lightening-1103381>, accessed on 7 April 2016.

²² NC Dlova, NE Hendricks & BS Martincgh 'Skin-lightening creams used in Durban, South Africa' (2012) Vol 51 *The International Journal of Dermatology* 52.

²³ Regulations to the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 as per footnote 4.

²⁴ Dlova et al 'Skin-lightening creams used in Durban' 52.

cancer, severe stretch marks, rapid aging, skin infections, permanent dark marks and steroid induced acne.²⁵ It has been reported that when mercury is used in cosmetics, it is absorbed through the skin and could result in ailments in the kidneys, nervous system and gastrointestinal tract.²⁶ It is further reported that nine out of ten users of skin lightening creams are unaware of the dangerous side effects of the products.²⁷ While safe skin lightening products will contain an insert with the list of ingredients and the instructions for proper use,²⁸ these products are just too expensive for most consumers.²⁹ Due to the demand for such skin lightening creams, the situation has arisen where it is possible to find “unsolicited” and “untested” products on the market³⁰ which usually do not have a list of ingredients and instructions for use.³¹ These cheaper products are available at roadside stalls and train stations³² for as little as R10.³³

A recent study entitled *Skin-lightening creams used in Durban, South Africa*³⁴ was conducted by Professor Dlova, Nicole Hendricks and Bice Martincgh. In this study, ten top-selling skin lightening creams in Durban were examined.³⁵ Of the top-selling brands, 90 per cent were found to contain banned or illegal compounds. Of the skin lightening creams that were examined, 60 per cent were manufactured in South Africa and the balance were illegally imported from

²⁵ Z Mapumulo 'Dying to be white' *City Press* 26 February 2016 available at <http://citypress.news24.com/News/dying-to-be-white-20160220>, accessed on 16 April 2016.

²⁶ MH Maneli, L Wiesner, C Tinguely, L.M Davids, Z Spengane, P Smith, J.C van Wyk, A Jardine & N.P Khumalo 'Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study' (2016) Vol 41 Issue 2 *Clinical and Experimental Dermatology* 200.

²⁷ V Zulu 'Calls for Mzansi to ban skin lightening creams because they cause cancer and other terrible diseases' available at <http://imzansi.co.za/ban-skin-lightening-creams/>, accessed on 18 July 2016.

²⁸ Dlova et al 'Skin-lightening creams used in Durban' 52, also see I Skosana 'When lightening strikes, it brings pale ailments' *Bhekisisa Centre for Health Journalism* 31 October 2014 available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

²⁹ I Skosana 'When lightening strikes, it brings pale ailments' *Bhekisisa Centre for Health Journalism* 31 October 2014 available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

³⁰ Ibid.

³¹ Ibid.

³² F Parker 'How safe is the skin-lightening drip Khanyi Mbau is using? Doctors don't actually know' *Huffington Post* 25 January 2017 available at https://www.huffingtonpost.co.za/2017/01/25/the-skin-lightening-iv-drip-khanyi-mbau-uses-is-not-all-its-cra_a_21662508/, accessed on 10 March 2018.

³³ Dlova et al 'Skin-lightening creams used in Durban' 52.

³⁴ NC Dlova, NE Hendricks & BS Martincgh 'Skin-lightening creams used in Durban, South Africa' (2012) Vol 51 *The International Journal of Dermatology* 51.

³⁵ Ibid 52.

Taiwan (10%), Italy (10%) and the United Kingdom (10%).³⁶ Furthermore, 40 per cent contained mercury as an active ingredient, 20 per cent contained corticosteroids, 20 per cent resorcinol and 10 per cent a derivative of hydroquinone.³⁷ Furthermore 30 per cent of the products declared the active ingredient on the labelling of the product whilst 20 per cent were incorrectly labelled as they were found to contain mercury instead of the natural albumen placenta as stated on the packaging.³⁸ It was noted that none of the products had any warnings on the packaging advising consumers to stop using the product if side effects were experienced and there was no advice regarding how to use the product.³⁹

The outcome of this study is alarming as there are many consumers who use these products on a daily basis with no knowledge of the danger that the products actually pose. Thus, consumers are unaware that although they may have received temporary satisfaction when they used the product⁴⁰, they will probably be left with permanent impairment of their skin as the creams strip the skin of its melanin.⁴¹ Moreover, according to Professor Dlova, the cost implications are very serious for the South African economy as it costs the state five times more to treat steroid induced acne than ordinary acne.⁴²

A further study conducted by the University of Cape Town entitled *Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study* examined 29 products that are available in Cape Town.⁴³ The aim of the study was to examine the active ingredients as well as the originating countries of skin lightening products available in Cape Town.⁴⁴ Two products were purchased from a pharmacy whilst 27 products were purchased

³⁶ Ibid 52.

³⁷ Dlova et al 'Skin-lightening creams used in Durban' 52.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ I Skosana 'When lightening strikes, it brings pale ailments' *Bhekisisa Centre for Health Journalism* 31 October 2014 available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

⁴¹ C Dardagan 'Illegal bleaching is blooming' *The Mercury* 1 June 2016 1.

⁴² Ibid.

⁴³ Maneli et al 'Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study' 196.

⁴⁴ Ibid.

from informal vendors.⁴⁵ The skin lightening products that were tested included 23 creams, two solid soaps, three lotions and one ointment.⁴⁶ Out of the 29 products tested, 22 products contained illegal or banned skin lightening active ingredients in that 13 contained steroids, 12 contained mercury, 11 contained hydroquinone and two contained a combination of hydroquinone, mercury and steroids.⁴⁷

The tested products came from Italy, India, the Democratic Republic of Congo, Cote d'Ivoire, the United States of America, the United Kingdom, and France.⁴⁸ Again, according to this study the ingredients found in the products were not listed as ingredients on the product packaging with mercury being one such example.⁴⁹ The study further found that although the hydroquinone concentration levels were lower than the legal limit,⁵⁰ the effect of a low concentration of hydroquinone combined with potent and ultrapotent steroids and/or mercury was unknown and the subject of ongoing study.⁵¹ Furthermore it was unclear whether the adverse effects associated with hydroquinone were due to high concentration levels or whether the prolonged use of products containing low concentration levels of hydroquinone was also a factor.⁵² These are serious issues that need to be addressed.

1.2 The purpose of this study

This study was prompted as a result of the recent influx of articles relating to consumers who have suffered permanent skin damage as a result of the harmful ingredients contained in skin lightening creams. These products are not allowed to be sold as cosmetics and constitute defective goods in terms of South African law. When skin lightening products are being sold by

⁴⁵ Ibid.

⁴⁶ Ibid 197.

⁴⁷ Maneli et al 'Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study' 196.

⁴⁸ Ibid 199.

⁴⁹ Ibid 199.

⁵⁰ The recommended limit is two percent.

⁵¹ Maneli et al 'Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study' 200.

⁵² Ibid 200.

manufacturers and retailers directly to consumers and are not prescribed by medical practitioners, there is no control over what is being sold or to whom. No consideration is given to the consumer's skin condition nor is any consideration given to the harmful ingredients that such skin lightening creams may contain.⁵³ Nevertheless there are serious legal consequences for those who supply products that cause harm to consumers through their use.

The purpose of this study is to consider the legal consequences for those who manufacture and/or supply skin lightening creams that do not comply with the law and the penalties that such suppliers or manufacturers may face. This dissertation provides an overview of the applicable laws surrounding the sale of skin lightening creams in the form of the common law of sale, the law of delict, the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, and certain relevant regulations. The dissertation also considers self-regulation of the cosmetic and advertising industry in the form of the Cosmetic, Toiletry and Fragrance Association of South Africa (CTFA) and the Advertising Standards Authority (ASASA) as well as the Consumer Protection Act 68 of 2008.

This paper will further highlight that despite the presence of strict laws surrounding the sale of skin lightening products and the possible implications suppliers may face should they sell defective products in terms of the Consumer Protection Act 68 of 2008 (CPA) and other relevant statutes, suppliers and retailers continue to sell these products to consumers without any apparent fear of repercussion. There is therefore a need to focus on proper law enforcement.

This dissertation further aims at addressing the urgent need for proper law enforcement as there appears to be no rigid monitoring by law enforcement officials regarding the sale of skin lightening creams. It is my submission that the law only holds its intended value when it is upheld, and this can only be done when proper law enforcement mechanisms are in place. Manufacturers

⁵³ L Davids 'It's time for Africa to take a stand on skin lightening creams' *UCT News* 14 January 2016 available at <https://www.news.uct.ac.za/article/-2016-01-14-its-time-for-africa-to-take-a-stand-on-skin-lightening-creams>, accessed on 18 July 2016.

and suppliers will only refrain from supplying such products to consumers when they see that these products are being confiscated and destroyed and that there are serious consequences attached to the sale thereof.

There is further a need to educate consumers about the dangers of skin lightening creams that do not comply with the law and the adverse effects that these products may cause. It is only through consumer education and government intervention that potential consumers will be deterred from purchasing these harmful products.

1.3 The rationale for this study

Many products are promoted as having some kind of fast-acting or miracle cure. Examples of such products include weight loss products, wrinkle removing products, hair growth and skin lightening products. At best, many of these so-called miracle cures will not achieve their lofty aims but in many cases they will actually harm consumers. In some instances, there are products which have the potential to be seriously harmful and it is in this category that skin lightening creams fall.

The rationale for this study arises from the harmful consequences suffered by consumers as a result of using defective skin lightening creams which are so readily available despite the laws prohibiting their sale.

In terms of the regulations to the FCDA, the legislature has banned or curtailed the use of certain active ingredients contained in skin lightening creams however these products continue to be sold due to popular consumer demand. With the introduction of the CPA, however, there is potential for suppliers to face serious penalties if they are found to be selling such defective products. This paper seeks to establish what those penalties are and what remedies consumers will have if they suffer damages as a result of using such products.

1.4 The research questions to be determined by this paper

This dissertation seeks to answer the following research questions:

- 1.4.1 What is the current legal position applicable to the sale of skin lightening creams?
- 1.4.2 What are the legal responsibilities of manufacturers, importers, distributors and retailers when it comes to ensuring that they know and understand the content of the products they sell and that they take steps to inform the consumer of the harm that may be caused as a result of consuming or using such products?
- 1.4.3 What redress is available to consumers who have suffer harm as a result of using prohibited products supplied by a manufacturer, importer, distributor or retailer?
- 1.4.4 What alternatives are available to curtail the sale of skin lightening creams in South Africa?

1.5 Research methodology

The methodology used in this dissertation is desktop research. Research on various articles on the harm caused to consumers as a result of the defective skin lightening creams containing banned and/or illegal substances in South Africa is conducted via online journal and newspaper articles.

This dissertation will also provide an overview of the relevant laws which are (or were) applicable to the cosmetic industry such as the common law of sale, the law of delict, the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 as amended by Act 39 of 2007 (FCDA), the regulations to the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 governing the sale of skin lightening creams containing active ingredients, the regulations to the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 governing the sale of

cosmetics containing hydroquinone, mercury and lead, the regulations to the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 relating to the labelling, advertising and composition of cosmetics published on 22 December 2017, the Medicines and Related Substance Act 101 of 1965 as amended as well as the Consumer Protection Act 68 of 2008.

Self-regulatory bodies in the form of the Cosmetic, Toiletry and Fragrance Association of South Africa (CTFA) and the Advertising Standards Authority (ASASA) in the cosmetic and advertising sector shall also be discussed.

This paper will also use the facilities of online databases such as the Southern African Legal Information Institute (Saflii) and Sabinet online to obtain case law and other research.

The information as obtained above is used to demonstrate that despite the prohibitions in the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 as amended by Act 39 of 2007, the Medicines and Related Substances Act 101 of 1965 as amended Act 14 of 2015 and the Consumer Protection Act 68 of 2008, certain suppliers continue to engage in prohibited conduct by supplying consumers with defective skin lightening creams that cause harm to consumers. This dissertation describes the legal responsibilities of the suppliers as well as the consumer's right of recourse under the applicable legislation when faced with the situation where they are harmed by the product.

1.6 Structure of the dissertation

Chapter one sets out the introduction to the issue surrounding the sale of skin lightening creams that contain banned and/or illegal substances and the harmful consequences suffered by consumers by the use thereof. This chapter contains studies in support of the problem and outlines the purpose and rationale of the dissertation as well as the research questions to be addressed in this dissertation.

Chapter two provides an explanation of the applicable common law provisions under the law of sale and the law of delict. Under the law of sale, the issue surrounding the sale of defective goods is discussed together with the applicable consequences that suppliers may face should they sell defective goods to consumers. Under the law of delict, the issue surrounding product liability is discussed together with the necessary elements that are required in order to successfully prove a delict against a supplier. This chapter further highlights the shortcomings under the common law of sale and the law of delict and the need for further regulation.

Chapter three focuses on self-regulation of the cosmetics and advertising sector in the form of the Cosmetic, Toiletry and Fragrance Association of South Africa (CTFA) and the Advertising Standards Authority (ASASA). This chapter outlines the developments of the advertising sector and a brief overview of the advantages and disadvantages of self-regulation.

Chapter four outlines the applicable statutory law in the form of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, as amended by Act 39 of 2007, together with regulations and the Medicines and Related Substances Act 101 of 1965, as amended by Act 14 of 2015. This chapter identifies the statutory provisions surrounding the sale of skin lightening creams as well as the possible contraventions of the statutes.

Chapter five provides an introduction to the Consumer Protection Act 68 of 2008 together with an explanation of the relevant consumer rights and product liability. This chapter further outlines the supplier's liability for the supply of defective goods and the consequences that suppliers may face should they sell defective goods to consumers.

Chapter six outlines access to redress for a consumer. This chapter entails access to redress in terms of the CPA as well the possible consequences that a supplier may face should it be in breach of any of the provisions of the CPA.

Chapter seven provides a conclusion to this dissertation as well as some recommendations.

CHAPTER 2

THE COMMON LAW

2.1 Introduction

In order to understand the common law that is applicable to the sale of skin lightening creams, it is necessary to commence by first considering the supply chain of the product from the manufacturer to the consumer. According to the Consumer Protection Act,⁵⁴ a “supply chain” refers to the collectivity of all suppliers who directly or indirectly contribute towards the ultimate supply of goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods.⁵⁵ Thus the supply chain ultimately consists of the manufacturer, the importer (if the product is not manufactured in South Africa), perhaps wholesale distributors (which may also be importers) and retailers. It is also possible that retailers may import the product directly from the manufacturer, but it is not likely that retailers are also responsible for manufacturing the product. So, at the very least the supply chain will consist of the manufacturer and the retailer.

The consumer usually buys the product from a retailer so the common law that applies in such a case is the law of sale.⁵⁶ If the consumer seeks to hold another entity liable for his or her damages, he or she cannot sue in terms of the law of contract because there is no contractual nexus between the parties, so he or she will have to rely on the law of delict. It is therefore necessary to consider the general principles of the law of sale and the general principles of the law of delict.

⁵⁴ The Consumer Protection Act 68 of 2008 (CPA).

⁵⁵ Definition section of the CPA.

⁵⁶ G Bradfield & K Lehmann *Principles of the Law of Sale and Lease* 3rd Ed (2013) Juta 4.

2.2 The law of sale

In order for a contract of sale to be valid, the buyer and seller must be in agreement about the sale of the goods and the price of the goods.⁵⁷ In the event that any one of these requirements is not present, then the contract is not one of sale.⁵⁸ Once the seller agrees to sell skin lightening creams to a buyer for a specific price, there is a binding contract of sale. The seller then owes certain duties to the buyer, one of the most important for the purpose of this paper is the seller's duty not to sell defective goods.⁵⁹ It is therefore essential to consider firstly, when goods are regarded as being latently defective and secondly, the remedies which a consumer has when he or she has suffered damages as a result of purchasing defective goods.

2.2.1 Latently defective goods

A latent defect is regarded as a defect that cannot be detected upon careful external examination of the item sold by a conventionally intelligent individual.⁶⁰ In the case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*,⁶¹ a defect was defined as an abnormal quality or characteristic that destroys or significantly impairs the use or effectiveness of the goods for the purpose for which they have been sold.⁶² An objective test is applied and the defect must destroy or impair the goods for everyone and not just for a particular purchaser.⁶³ Finally, the defect must attach to the thing sold.⁶⁴

Consumers purchasing skin lightening creams do so with the intention of altering their physical appearance and obtaining a lighter skin tone.⁶⁵

⁵⁷ Ibid 24.

⁵⁸ Ibid 24.

⁵⁹ G Glover & AJ Kerr *Kerr's Principles of Sale and Lease* 4th Ed (2014) Lexis Nexis 185.

⁶⁰ Bradfield & Lehmann *Sale and Lease* 77.

⁶¹ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

⁶² Ibid.

⁶³ *Dibley v Furter* 1951 (4) SA 73 (C) 73.

⁶⁴ Ibid.

⁶⁵ Z Maphumulo 'Dying to be white' *City Press* 26 February 2016, available at <http://citypress.news24.com/News/dying-to-be-white-20160220>, accessed on 16 April 2016.

Consumers do not expect these creams to cause harm to them⁶⁶ nor do they expect the creams to contain any banned and/or illegal substances such as mercury and hydroquinone which is in any event prohibited by law. Skin lightening creams that contain active ingredients such as mercury and hydroquinone are clearly latently defective goods, and consumers are then entitled to certain remedies.

2.2.2 The consumer's remedies

The consumer's rights and remedies in relation to latently defective goods are determined according to the seriousness of the defect⁶⁷ and the conduct of the seller.⁶⁸ The general remedy available for latently defective goods is the *aedilician* action in the form of the *actio redhibitoria* and *actio quanti minoris*.⁶⁹ The *actio redhibitoria* is used when the defect is so serious that the buyer would not have purchased the goods⁷⁰ so the buyer is entitled to cancel the sale with a return of the purchase price,⁷¹ whereas the *actio quanti minoris* refers to a reduction in the purchase price.⁷² These remedies are limited as they provide for restitutionary relief and do not include a claim for consequential loss.⁷³

If the consumer purchases defective skin lightening creams from a street vendor or a supermarket which is selling skin lightening creams in addition to many other goods, the consumer's remedies are limited to the *aedilician* action. The consumer may not claim consequential loss and may either cancel the contract and obtain a refund or claim a reduction in the price. This is meaningless for the consumer as the cost of the skin lightening creams can be

⁶⁶ I Skosana 'When lightening strikes, it brings pale ailments' *Bhekisisa Centre for Health Journalism* 31 October 2014 available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

⁶⁷ Bradfield & Lehmann *Sale and Lease* 78.

⁶⁸ Glover & Kerr *Sale and Lease* 193.

⁶⁹ *Ibid* 193.

⁷⁰ *De Vries v Wholesale Cars en 'n Ander* 1986 (2) SA 22 (O).

⁷¹ Glover & Kerr *Sale and Lease* 211.

⁷² *Ibid* 217.

⁷³ Bradfield & Lehmann *Sale and Lease* 80.

as little as R10⁷⁴ whereas the damage suffered by the consumer as a result of the defective cream can be exorbitant.⁷⁵

2.2.3 The consumer's right to claim consequential loss

There are however three instances in which a consumer may claim consequential loss from the supplier and this is known as the *actio empti*.⁷⁶ This is firstly, where the seller fraudulently concealed a defect and sold the goods; secondly, where the seller gave an express or tacit warranty that the goods would be fit for a particular purpose, yet they are defective; and thirdly, where the seller is regarded as an expert seller.⁷⁷

If the seller fraudulently concealed a defect and sold the skin lightening creams to the consumer, the consumer is entitled to claim consequential loss from the seller however the onus is on the consumer to prove the conduct of the seller.⁷⁸ This may be difficult to prove as many transactions for the sale of skin lightening creams are conducted informally or at the roadside and it is possible that the consumer may not be able to find the vendor again.

If the seller warranted, expressly or tacitly, that the skin lightening cream would not be defective, and it is defective, there are two situations which may be considered.⁷⁹ The first is where the seller warrants that the skin lightening creams will be fit for a particular purpose and the second is where the seller warrants that the skin lightening creams are of a reasonable merchantable quality.⁸⁰ In the context of skin lightening creams, the pertinent issue appears is that the skin lightening creams containing banned and/or illegal substances result in impairment and damage to consumer's skin instead of lightening their

⁷⁴ Dlova et al 'Skin-lightening creams used in Durban' 52.

⁷⁵ T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) Vol 31 Issue 2 *Orbiter* 229.

⁷⁶ Glover & Kerr *Sale and Lease* 193.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid* 195.

⁸⁰ *Ibid.*

skin, and hence the skin lightening creams that have been sold clearly do not fulfil their purpose. Further, if the seller has warranted to the consumer that the skin lightening creams are of a reasonable merchantable quality and they are subsequently defective, then the consumer is entitled to claim consequential loss.

In the case where the seller is an expert seller or has “warranted the skill of his art” and sells latently defective skin lightening creams to the consumer, the consumer is entitled to claim consequential loss from the seller.⁸¹ A case that outlines the liability of an expert seller is the case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*.⁸² In that case, the respondent contracted to purchase bricks from the appellant which was a manufacturer and seller of bricks.⁸³ The bricks were subsequently defective and the structures containing the defective bricks had to be demolished and new bricks ordered.⁸⁴ The court held that a merchant who manufactures goods or publicly professes to have skill and expertise in relation to any goods is liable for any consequential damages caused if the goods are latently defective.⁸⁵ The court further held that the seller cannot rely on ignorance of the defect and, once it is understood that the seller falls into one of the abovementioned categories, the law irrevocably attaches this liability to him unless he expressly or impliedly contracted out of such liability.⁸⁶

In the context of skin lightening creams, it appears that some consumers purchase skin lightening creams from cosmetic and beauty shops professing to have certain expertise. If this is the case where the seller has publicly professed to have certain knowledge regarding the skin lightening creams and those products are subsequently found to be defective, the consumer may bring a claim against the seller for consequential loss suffered. The seller cannot use the defence that he or she was unaware of the ingredients contained in the skin

⁸¹ Glover & Kerr *Sale and Lease* 202.

⁸² *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

lightening creams as he is regarded as an expert and will be liable to compensate the consumer for damages suffered.

A case that outlines the position of defective goods containing banned and/or illegal substances is *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*.⁸⁷ In that case, the respondent contracted with the appellant who was a manufacturer of spices for the supply of spices to be used locally as well as internationally.⁸⁸ The appellant supplied the respondent with spices that contained Sudan 1 dye, which is an ingredient banned by the World Health Organisation and deemed unfit for human consumption resulting in the respondent having to withdraw all its products.⁸⁹ Despite the presence of a contract excluding the seller from liability for any defects, the court found that the indemnity clause did not cover the situation where the defect was different to that for which the goods were bargained.⁹⁰ The court dismissed the appeal and the respondent was able to claim damages for consequential loss suffered.⁹¹ In the context of skin lightening creams, those creams containing banned and/or restricted ingredients such as mercury and hydroquinone are prohibited for cosmetic use⁹² and sellers who sell skin lightening creams containing these ingredients are highly unlikely to succeed even if there is a contract excluding liability for defective goods on the part of the seller.

It is clear from this discussion that the consumer's remedies are limited under the *aedilitian* action as the consumer cannot claim consequential loss unless one of the three instances mentioned above are present, the most applicable being that the seller is an expert. Consumers appear to purchase skin lightening creams from just about anywhere, including street vendors, supermarkets and cosmetic stores. If a consumer purchases skin lightening cream from a supermarket then the consumer's claim will fall under the *aedilitian* action with limited remedies to the consumer.

⁸⁷ *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² See footnote 4 above.

2.3 The Law of Delict

If the consumer cannot succeed with a claim for product liability under the law of sale, the consumer may bring a claim against the manufacturer or producer of a defective product under the law of delict.⁹³

According to Van der Walt and Midgley:⁹⁴

“The essential requirements for delictual liability is as follows: harm sustained by the plaintiff; conduct on the part of the defendant which is wrongful; a causal connection between the conduct and the plaintiff’s harm; and fault or blame-worthiness on the part of the defendant.”⁹⁵

It can therefore be said that in order to be successful for Aquillian liability for harm caused by defective products, it is necessary for one to prove wrongfulness and fault (this is either the subjective intention of the manufacturer or the negligence of the manufacturer), as well as evidence of conduct, causation and harm.⁹⁶ The consumer is therefore required to prove that the harm that was caused was caused wrongfully, due to the fault of the producer and that the producer was at the very least negligent in causing such harm.⁹⁷

The requirement of fault is a difficult element to prove as this means that the consumer must prove intention.⁹⁸ It is difficult to prove the subjective intention of a particular person however it may be easier for the consumer to prove negligence. Negligence is determined by evaluating a person’s conduct against a standard which is reasonably acceptable in society and is based on the reasonable person test as reflected in the case of *Kruger v Coetzee*.⁹⁹

⁹³ M Loubser & E Reid *Product Liability in South Africa* 1st Ed (2012) Juta 38.

⁹⁴ M Loubser, R Midgley et al *The Law of Delict in South Africa* 1st Ed (2010) Oxford University Press 21.

⁹⁵ Ibid.

⁹⁶ Loubser & Reid *Product Liability in South Africa* 39.

⁹⁷ Ibid.

⁹⁸ Loubser et al *The Law of Delict in South Africa* 105.

⁹⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A).

Wrongfulness however is judged against an objective standard and involves a value judgment evaluated through an open process of reasoning using principles of the law, legislation and public considerations.¹⁰⁰

In the context of skin lightening creams, if the consumer were to rely on the law of delict as a result of the use of defective skin lightening creams, he or she would have to be able to prove that the harm caused was wrongfully caused and that the manufacturer was negligent in causing this harm. This means that the consumer must be able to prove that the skin lightening cream that was used contained illegal or banned substances. Although this may seem easier as the consumer will be able to argue that the manufacturer ought not to have contained banned and/or illegal substances in the skin lightening creams, it is possible that the consumer may have already used the product for a few months before realising the adverse effects of the products or that the skin lightening cream does not contain the address of the manufacturer or it may have been decanted into small containers with no proper labelling hence it is impossible to actually find the manufacturer. In these cases, it may be difficult for the consumer to succeed in a delictual action against the supplier or manufacturer.

A case that recognises the supplier's liability for defective goods is the case of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*.¹⁰¹ In this case, the court held that where a manufacturer produces and markets a product without having performed conclusive tests, and where a consumer uses the goods in the manner recommended and the goods are found to be potentially hazardous to the consumer, such negligence by the manufacturer may expose him to delictual liability.¹⁰² The court further stated that where the consumer does not obtain the product directly from the manufacturer, and the manufacturer is a third party, then it is known as "product liability" and a contractual nexus between the manufacturer and the consumer is not required.¹⁰³

¹⁰⁰ Loubser & Reid *Product Liability in South Africa* 41.

¹⁰¹ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA).

¹⁰² *Ibid* 450.

¹⁰³ *Ibid*.

A further case that examined the manufacturer's liability for defective goods is the case of *Wagener v Pharmacare Ltd*.¹⁰⁴ In this case, the court had to decide the extent to which a manufacturer could be held strictly liable in delict for unintended harm caused by the defective manufacture of a product where there was no contractual privity between the manufacturer and the injured persons.¹⁰⁵ In this case, the appellant underwent a shoulder surgery at a private hospital and had utilised a local anaesthetic that was manufactured by the Respondent.¹⁰⁶ The anaesthetic was subsequently found to be defective and resulted in the necrosis and paralysis of the appellant's right arm.¹⁰⁷ Although the court accepted that the anaesthetic manufactured by the respondent was defective when it left the respondent's control and was used according to its instructions and thus that it had legal duty to avoid reasonable foreseeable harm, it was difficult to prove fault on the part of the respondent.¹⁰⁸ It was argued by the appellant that it was difficult for a plaintiff to prove fault in relation to pharmaceutical products as the plaintiff had no knowledge or access to the manufacturing process or its workings in order to determine negligence on the part of the manufacturer.¹⁰⁹ Furthermore the plaintiff had the burden of proving that the product was defective when it left the manufacturer.¹¹⁰ Although the appeal was dismissed, the court recognised the need to develop the common law on strict liability and noted that, whilst it could not do so, it was something the legislature should consider.¹¹¹

It is evident from the cases mentioned that although a manufacturer may be held liable under the Aquillian action in the law of delict, all the elements of a delict must be proved by the plaintiff, which is an onerous burden. Fault or negligence is one of the most difficult elements to prove as seen in the *Wagener* case and without the presence of that element, the court will not impose strict liability. In the context of skin lightening creams, the consumer may be able to prove fault on the part of the manufacturer on the basis that the banned

¹⁰⁴ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

ingredients ought not to have been present in terms of the law, however the difficulty lies in the fact that some of the skin lightening creams are imported from overseas and allowed into the country without proper procedures having been followed and the manufacturer cannot be traced.

Furthermore, some of the skin lightening creams do not even list all the ingredients¹¹² and it is only after the consumer has used the product for a while that he or she may notice damage to his or her skin and at that point it may be difficult to go back and trace which product contained the banned and/or restricted ingredients that caused the harm. Even if the consumer used only one product, he or she would have to bear the cost of proving that illegal substances were contained in the skin lightening cream which caused the harm, something ordinary consumers cannot afford.

2.4 Conclusion

Skin lightening creams containing banned and/or illegal ingredients constitute defective goods which have the potential to cause severe harm and damage to consumers. Despite the existence of remedies under the common law, these remedies are limited as no provision is made for consequential loss unless there was an express warranty given, a misrepresentation was made or the goods were purchased directly from the manufacturer or someone professing to be an expert.

If the consumer purchased the skin lightening cream from a shop professing to be an expert such as the foreign (often Indian) shops specialising in “beauty” and “fairness creams”,¹¹³ a claim may be brought against such a shop on the basis that it professes to be an expert. These shops may also be responsible for importing the skin lightening creams and as such the consumer may pursue a claim for damages as well as consequential loss if he or she can prove that

¹¹² Dlova et al ‘Skin-lightening creams used in Durban’ 52.

¹¹³ N Singh ‘The dark side of skin lightening’ *IOL* 21 July 2011 available at <http://www.iol.co.za/lifestyle/style/beauty/the-dark-side-of-skin-lightening-1103381>, accessed on 7 April 2016.

such a supplier is in fact an expert. If, however, the retailer is based alongside the train station or at the roadside selling a number of goods in addition to skin lightening creams, it may be difficult to argue that that person is an expert and one may not succeed in pursuing the *actio empti*. Instead one may be left with the general *aedilitian* remedy which does not include consequential loss.

If the seller provides an express warranty or a misrepresentation to the consumer, the consumer may be able to claim for damages and consequential loss from the seller however the consumer has to prove such express warranty or misrepresentation. If however the seller's conduct does not constitute grounds upon which to institute the *actio empti*, the consumer's remedies are limited to the general *aedilitian* remedies which do not include a claim for consequential loss.

Under the law of delict, it was discussed that all the elements of a delict need to be proven to succeed with a claim for consequential loss. As previously mentioned, fault or negligence is one of the most difficult elements to prove by the consumer. Consumers are not always aware of the dangers of skin lightening creams and therefore cannot act timeously. Furthermore they do not expect harmful ingredients to be contained in skin lightening creams and therefore do not expect or suspect that anything is wrong with the product.¹¹⁴ Since skin lightening creams containing banned and/or restricted substances provide for temporary satisfaction and subsequently cause permanent damage, it will be difficult to prove which product actually caused the harm as some consumers use a variety of skin lightening creams which contain a variety of ingredients.¹¹⁵

As can be seen from this discussion, the provisions of the common law are inadequate to protect consumers when it comes to the supply of skin lightening creams and therefore legislation is required to regulate the supply of such

¹¹⁴ I Skosana 'When lightening strikes, it brings pale ailments' 31 October 2014, available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

¹¹⁵ Z Mapumulo 'Skin-lightening: Case studies' *City Press* 26 February 2016, available at <https://citypress.news24.com/News/skin-lightening-case-studies-20160220>, accessed on 30 June 2018.

products and to ensure that suppliers comply with the law. In addition, as stated above, such products are often supplied by those in the beauty industry which is subject to self-regulation. Therefore before discussing relevant legislation, the next chapter will consider the issue of self-regulation.

CHAPTER 3

SELF-REGULATION

3.1 Introduction

Self-regulation refers to a form of monitoring and supervision over the *modus operandi* of a particular industry by the members of the industry who form a body and create a set of rules and accepted conduct in order to regulate compliance in the marketplace.¹¹⁶ Self-regulation has been further described as “a system of autonomously generated and enforced norms.”¹¹⁷ Self-regulation is a vital component of the cosmetic industry and works in conjunction with government to provide insight into the industry’s *modus operandi* when drafting laws.¹¹⁸ According to Woker, in order for self-regulation to be effective, there must be an industry body that has the capacity to monitor the industry and deal with offenders, together with a sanction that deters members from breaching the code.¹¹⁹

Woker argues further that in many instances, membership is voluntary and a number of businesses do not form part of the self-regulatory body and therefore are unaware that there is an industry code regulating the industry.¹²⁰ In other instances, businesses which are part of the self-regulatory body conveniently remove themselves when they are found to be under investigation which leaves the self-regulatory body incapable of pursuing the matter any further.¹²¹

¹¹⁶ T Woker ‘Consumer protection and alternative dispute resolution’ (2016) Vol 28 Issue 1 *South African Mercantile Law Journal* 31.

¹¹⁷ ‘Investigation by the business practices committee’ GN Notice 444 published in GG 13988, 18 May 1992 39.

¹¹⁸ CTFA ‘Policy and Legislation’ available at <https://ctfa.co.za>, accessed on 11 February 2019.

¹¹⁹ T Woker ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ (2010) Vol 31 Issue 2 *Orbiter* 222.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

There are two applicable self-regulatory bodies in the skin lightening industry, namely the Cosmetics, Toiletry and Fragrance Association of South Africa (CTFA) and the Advertising Standards Authority of South Africa (ASASA).

3.2 The CTFA

The CTFA was formed to regulate the cosmetic industry and to allow members of the cosmetic industry to come together to form a single body.¹²² The CTFA is the primary self-regulatory body and guides its members on the regulatory codes of practice and standards in the cosmetic industry.¹²³ The CTFA further represents the industry by negotiating with government officials in relation to law-making and provides a forum where all members of the industry can work together to create a progressive industry.¹²⁴ The CTFA has taken a proactive stance towards educating its members on matters that affect the cosmetic industry such as compliance of cosmetics¹²⁵ and ensuring that cosmetic products are compliant before reaching the consumer.¹²⁶

The CTFA has created the South African Cosmetic Guidelines (Compendium)¹²⁷ and Codes of Practice in order to regulate the industry.¹²⁸ Attempts were made by the writer to access this compendium when this research was first being conducted and it was discovered that this was at a cost of R2850. Further attempts were made to purchase the compendium however the writer was informed that the compendium was only available to members of the CTFA.¹²⁹ It is unfortunate that consumers are unable to gain easy access of the compendium that regulates the industry as consumers are unaware of

¹²² Information about the CTFA is available at <https://ctfa.co.za>.

¹²³ CTFA "about us" available at <https://ctfa.co.za>, accessed 14 February 2019.

¹²⁴ CTFA "Key roles and Responsibilities" available at <https://ctfa.co.za>, accessed 14 July 2018.

¹²⁵ One such example being that the CTFA held a seminar to educate its members on the labelling of cosmetics to ensure that the products are compliant with the applicable regulations. This information was extracted from an article titled 'How compliant is your product labelling?' (2014) Vol 41 Issue 3 *South African Pharmaceutical and Cosmetic Review* 50.

¹²⁶ Ibid.

¹²⁷ This information is available at <https://ctfa.co.za/ctfa-cosmetic-guidelines/>, accessed on 22 February 2019. It must be mentioned that this paper did not have access to the Code but simply makes mention of it.

¹²⁸ Information about the CTFA is available at <https://ctfa.co.za>.

¹²⁹ The writer hereof telephoned the CTFA on the 20 February 2019 in order to purchase the compendium but was advised by one, Samantha that the compendium is only available to members of the CTFA.

the type of standards required and when a member is in breach of the compendium. This further results in consumers not knowing who to complain to when they are dissatisfied with a service and seems to defeat the whole purpose of self-regulation as self-regulation is a mechanism aimed at protecting consumers.¹³⁰ This is one of the reasons why there is a need for legislation so that everyone is aware of the standards expected and the manner of redress in the event of breach. It is submitted that those who argue that self-regulation is insufficient to ensure consumer protection often argue that the self-regulatory body appears to protect its members rather than holding them accountable and unfortunately the approach of the CTFA in this matter appears to provide ammunition to those who argue in favour of government regulation rather than self-regulation.¹³¹

Although the CTFA has measures in place to regulate the industry, not all suppliers form part of the CTFA and hence do not adhere to the compendium.¹³² The CTFA only comprises of those members who choose to be a part of it and, since it is not mandatory for all suppliers to join the CTFA, some suppliers simply do not do so. This has a major impact on the progression of the industry.

3.3 The Advertising Standards Authority of South Africa (ASASA)¹³³

The Advertising Standards Authority of South Africa (ASASA) is a self-regulatory body which is established and paid for by the marketing communications industry.¹³⁴ It has established a code of advertising practice based on the International Code of Advertising Practice which is prepared by the International Chamber of Commerce and is accepted worldwide in order to

¹³⁰ 'Investigation by the business practices committee' GN Notice 444 published in GG 13988, 18 May 1992 41.

¹³¹ Strachan DP "An Evaluation of the Self-Regulation of Promotional Competitions in South Africa" PER / PELJ 2016(19) 5.

¹³² This information has been inferred from the CTFA and which is available at <https://ctfa.co.za/membership/>, accessed on 17 February 2019.

¹³³ Although ASASA is the main regulatory body in the advertising sector, recent articles online advise that ASASA is currently in liquidation and the advertising industry now appears to be regulated by the Advertising Regulatory Board. This information is available at <http://arb.org.za/index.html>, accessed on 11 February 2019. This dissertation however retains ASASA as the main self-regulatory body.

¹³⁴ Information about ASASA is available at <http://www.asasa.org.za/about>, accessed 29 June 2018.

self-regulate the industry.¹³⁵ ASASA is responsible for self-regulating the marketing and advertising sector.¹³⁶ According to Woker there are two reasons why it is successful: firstly, the main participants in the advertising industry such as the print and the broadcast media are part of the organization and secondly, the key sanction of refusing advertising time and space is a very powerful sanction.¹³⁷

One of the aspects of the ASASA that is significant to the regulation of the sale of skin lightening creams is the Advertising and Marketing Industry Code of Practice¹³⁸ that was published in the Government Gazette on 26 July 2016 by the National Consumer Commission in terms of s 82(3)(a) of the Consumer Protection Act. It must be noted that although this code has been published, it is not yet in operation however this still remains a good indication of what is acceptable regarding the advertising of skin lightening creams.

3.3.1 Introduction of the code

The Advertising and Marketing Industry Code of Practice (the code) has been created in terms of s 82 (3)(a) of the CPA and specifically deals with resolving issues such as prohibited conduct and the failure to comply with the required conduct for advertising and marketing goods to consumers as entailed in the Act.¹³⁹ The code further aims at regulating the relationship between participants in the advertising and marketing industry and consumers¹⁴⁰, and provides for alternative dispute resolution between industry participants and the consumers.¹⁴¹ It is further intended to protect consumers from unconscionable, unfair, unreasonable or improper trade practices and deceptive or fraudulent conduct.¹⁴²

¹³⁵ Information about ASASA is available at <http://www.asasa.org.za/about>, accessed 29 June 2018.

¹³⁶ Ibid.

¹³⁷ T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) Vol 31 Issue 2 *Orbiter* 222.

¹³⁸ The Advertising and Marketing Industry Code of Practice published under GN Notice 449 of GG No 40159 on 26 July 2016.

¹³⁹ Provision 1.4 GN Notice 449.

¹⁴⁰ Provision 4.2.1 GN Notice 449.

¹⁴¹ Provision 4.2.2 GN Notice 449.

¹⁴² Provision 4.3.1 GN Notice 449.

3.3.2 The members

The code is applicable to all advertising and marketing industry participants unless they are regulated elsewhere or where the complaint is under the jurisdiction of an Ombudsman.¹⁴³ The Code makes it obligatory for all advertising and marketing industry participants to comply with the provisions thereof and to register with ASASA.¹⁴⁴ Members are also obliged to contribute towards the funding of ASASA which funding model is set out in the Code.¹⁴⁵ Perhaps once the Code comes into operation and members are obliged to contribute to the ASASA, this may resolve the financial difficulties that the ASASA presently finds itself in.

3.3.3 The main provisions of the code

Provision 6 of the Code sets out the powers of ASASA and provision 7 sets out the obligations of the participants to the code. In terms of provision 7.1 A, the participants must ensure that their advertising and marketing contents are honest and are in compliance with the laws of South Africa.¹⁴⁶

Provision 8 of the code deals with consumer and industry awareness and participants are obliged to create internal complaints handling processes that will be understood by all consumers.¹⁴⁷

Provision 9 sets out the jurisdiction and operating procedures for the ASASA whereas provision 11 sets out its role and functions.¹⁴⁸ Provision 12 of code explains the procedure for lodging a complaint¹⁴⁹ and provision 13 identifies the process for the lodging of complaints with ASASA.¹⁵⁰

¹⁴³ Provision 5.1 GN Notice 449.

¹⁴⁴ Provision 5.3 GN Notice 449.

¹⁴⁵ Ibid.

¹⁴⁶ Provision 7.1 A GN Notice 449.

¹⁴⁷ Provision 8 GN Notice 449.

¹⁴⁸ Provision 11 GN Notice 449.

¹⁴⁹ Provision 12 GN Notice 449.

¹⁵⁰ Provision 13 GN Notice 449.

3.3.4. Enforcement of the code

3.3.4.1 Enforcement of complaints

According to provision 9 of the code, the Directorate¹⁵¹ shall have the primary obligation of guaranteeing compliance with the code.¹⁵² The Directorate shall decide whether the complaint is vexatious¹⁵³ or without merit and may call upon the party against whom the complaint has been made to respond thereto.¹⁵⁴ Upon receipt of the written representations of the parties, the Directorate shall either make a ruling or refer the matter to the appropriate committee for consideration.¹⁵⁵ The parties may also appeal the decision of the Directorate¹⁵⁶ to the Advertising Standards Committee if they are dissatisfied.¹⁵⁷

3.3.4.2 Sanctions

According to provision 14 of the code, the Advertising Committee, the Advertising Industry Tribunal and the final Appeal Committee may require that the advertiser withdraw or amend the offending advertisement.¹⁵⁸ Advertisers may then be obliged to submit the proposed amendment, the original advertisement and the ASASA ruling to the ASA Advisory Service for pre-publication assistance.¹⁵⁹ If the advertiser does not agree to comply with ASASA's requirements then such advertiser shall be referred to the Commission.¹⁶⁰

¹⁵¹ The Directorate is referred to as the investigating and adjudicating committee within the ASASA that deals with consumer complaints. This definition has been extracted from the definition section of the Advertising and Marketing Industry Code of Practice published in GN Notice 449 of GG No 40159 on 26 July 2016.

¹⁵² Provision 9.1.1 GN Notice 449.

¹⁵³ Provision 9.1.2.1 GN Notice 449.

¹⁵⁴ Provision 9.1.2.2 GN Notice 449.

¹⁵⁵ Provision 9.1.2.2 GN Notice 449.

¹⁵⁶ Within ten days after being informed of the decision.

¹⁵⁷ Provision 9.1.10 GN Notice 449.

¹⁵⁸ Provision 14.1.1 GN Notice 449.

¹⁵⁹ Provision 14.1.2 GN Notice 449.

¹⁶⁰ Provision 14.3 GN Notice 449.

3.3.5 Regulations published on 26 July 2016 in Government Gazette No. 40159.

In addition to the publication of the code on 26 July 2016, sectoral advertising regulations relating to cosmetics were also published. The applicable provisions of these regulations will be discussed.

3.3.5.1 Applicable provisions of the sectoral advertising regulations

This regulation provides further guidelines about the advertisement of cosmetic products. The regulations illustrate the purpose of a cosmetic and a product is regarded as a cosmetic if it is used to clean¹⁶¹, perfume¹⁶², change the appearance¹⁶³, correct body odours¹⁶⁴, protect¹⁶⁵ and to keep in good condition.¹⁶⁶ The regulations prohibit the use of medical symbols on cosmetic products¹⁶⁷ and any claims suggesting that the cosmetic will have permanent effects on consumers is prohibited.¹⁶⁸ This is a significant provision in the context of skin lightening creams as it prohibits the advertising of cosmetics which state that the cosmetic will cause permanent changes to consumers, something which skin lightening creams intend to do.

Regulation 9 prohibits any advertisement or label on a skin lightening product from claiming that the skin lightening product does not contain an ingredient which is not usually allowed in cosmetics such as “hydroquinone-free” or “steroid-free.”¹⁶⁹ These are prohibited ingredients in cosmetics and are not allowed at all. Furthermore, for a product to claim skin lightening without clinical trials, such product must contain a broad-spectrum sunscreen which must

¹⁶¹ Regulation 3.2.1 GN Notice 449 42.

¹⁶² Regulation 3.2.2 GN Notice 449 42.

¹⁶³ Regulation 3.2.3 GN Notice 449 42.

¹⁶⁴ Regulation 3.2.4 GN Notice 449 42.

¹⁶⁵ Regulation 3.2.5 GN Notice 449 42.

¹⁶⁶ Regulation 3.2.6 GN Notice 449 42.

¹⁶⁷ Regulation 4.3 GN Notice 449 43.

¹⁶⁸ Regulation 5.3 GN Notice 449 43.

¹⁶⁹ Regulation 9.1 GN Notice 449 45.

contain an SPF of at least 15 and the SPF must appear on the label and in the advertisements.¹⁷⁰

In terms of regulation 9.3, any products claiming skin lightening that do not incorporate UV filters to meet the requirements mentioned in clause 9.2 of the regulations must carry a warning in the following terms:

“Sun Alert: Because this product may make your skin more sensitive to the sun, be certain that you apply a broad-spectrum sunscreen of at least SPF 15 while using this product, and for a week after you discontinue use.”¹⁷¹

The product must also have an acceptable scientific substantiation for its safe and effective use.¹⁷²

In terms of regulation 9.4 of the code, a skin lightening product may not claim to make the skin “any shade lighter than its normal constitutive pigmentation.”¹⁷³ This is a noteworthy provision as it reiterates the fact that the advertising of skin lightening products may not induce consumers to believe that it will permanently make their skin lighter, a major misconception that many consumers believe.

3.4 Conclusion

The recently published Advertising and Marketing Industry Code contains important provisions regulating the content of the marketing and advertising of skin lightening products. This is a substantial improvement towards regulating the marketing and advertising of cosmetics and once the code comes into effect, it will be a further form of regulation towards the sale of skin lightening products.

As mentioned previously, although the CTFA has published a Compendium for its members to follow to ensure compliance of the industry however not all

¹⁷⁰ Regulation 9.2 GN Notice 449 45.

¹⁷¹ Regulation 9.3 GN Notice 449 45.

¹⁷² Ibid.

¹⁷³ Regulation 9.4 GN Notice 449 45.

suppliers form part of the CTFA and are therefore unaware of applicable standards. Furthermore and as discussed, since the Compendium is only available to members of the CTFA, consumers are unable to gain access to view the Compendium so consumers are unaware of the provisions contained therein which seems to defeat the purpose of self-regulation hence the need for legislation.

CHAPTER 4

STATUTORY LAW

4.1 Introduction

As previously discussed, in order for a consumer to successfully claim damages including consequential loss against a seller for supplying defective goods under the law of sale, the consumer must be able to prove that the seller acted fraudulently, or that the seller misrepresented the product to the consumer, or that the seller was a manufacturer or professed to have certain knowledge of the product. If the consumer institutes action against the seller under the law of delict, the consumer bears the onus of proving all the elements of a delict including fault or negligence on the part of the manufacturer which can prove to be an onerous burden on the consumer.

As mentioned in the previous chapter, despite the presence of self-regulatory bodies such as the CTFA and ASASA, there are shortcomings in that membership of the self-regulatory bodies is not always obligatory and hence the need for legislation.

The most important legislation which needs to be discussed is the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972, as amended by Act 39 of 2007, as well as its regulations, and the Medicines and Related Substances Act 101 of 1965, as amended by Act 14 of 2015.

4.2 The Foodstuff, Cosmetics and Disinfectants Act 54 of 1972, as amended by Act 39 of 2007

4.2.1 Introduction

The Foodstuff, Cosmetics and Disinfectants Act (FCDA) is the overarching legislation governing the sale of foodstuff, cosmetics and disinfectants in South Africa. This Act provides an overview of the type of products that can be sold

as cosmetics, as well as the types of ingredients and composition requirements that are acceptable. This Act forms the basis of the regulation of the cosmetic industry in South Africa and has developed recent regulations to ensure compliance in the cosmetic industry which will be discussed herein.

4.2.2. The purpose of the FCDA

One of the purposes of the FCDA is to control the manner in which cosmetics can be sold to consumers, manufactured and imported.¹⁷⁴ The FCDA further focuses on ensuring that cosmetics contain the proper ingredients¹⁷⁵ as well as prescribing the manner in which cosmetics may be advertised to consumers.¹⁷⁶

4.2.3. Main sections of the FCDA

In terms of the definition section of the FCDA, a cosmetic is regarded as:

(A)ny article, preparation or substance (except a (drug) medicine as defined in the Medicines and Related Substances Act, 1965 (Act No.101 of 1965)) intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body, including the epidermis, hair, teeth, mucous membranes of the oral cavity, lips and external genital organs, for purposes of cleansing, perfuming, correcting body odours, conditioning, beautifying, protecting, promoting attractiveness or improving or altering the appearance, and includes any part or ingredient of any such article or substance.¹⁷⁷

According to this definition, skin lightening creams are regarded as cosmetics which can be rubbed or applied to one's skin and therefore these laws apply to such products.

In terms of s 2(1)(a) of the FCDA, it is an offence for any person to sell, manufacture or import any cosmetic which contains or has been treated with a

¹⁷⁴ Preamble to the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972, as amended by Act 39 of 2007.

¹⁷⁵ Section 2 of the FCDA.

¹⁷⁶ Section 5 of the FCDA.

¹⁷⁷ Definition section of the FCDA, as amended by s 1 of Act 39 of 2007.

prohibited substance;¹⁷⁸ which contains or has been treated with a substance greater than that permitted by regulation;¹⁷⁹ which does not comply with the standards in respect of composition, strength, quality or any other attribute as per regulations;¹⁸⁰ or where the sale of the cosmetic is totally prohibited by regulation.¹⁸¹

In terms of s 2(1)(b) of the FCDA, it is an offence for a person to sell, manufacture or import any cosmetic which is contaminated, impure or decayed, or is deemed to be harmful or injurious to human health in terms of any regulation¹⁸² or which contains or has been treated with a contaminated or impure substance or a substance which is, or is deemed to be, harmful or injurious to human health in terms of any regulation.¹⁸³

The FCDA further regulates the advertising of cosmetics and it is considered an offence to publish a false or misleading advertisement about any cosmetic¹⁸⁴ or to describe any cosmetic in a false or misleading manner in terms of its origin, nature, substance, composition, quality or other properties¹⁸⁵ or to sell or import such cosmetic.¹⁸⁶

The FCDA makes provision for special defences in that a person shall not be convicted if he had no reason to suspect the article in question was a prohibited article¹⁸⁷ and had sold it in the condition that he acquired it, and had no reason to suspect that the article was in any other condition other than that in which it was acquired or imported.¹⁸⁸ Although the FCDA makes provision for this as a potential defence for suppliers, the dangers surrounding the sale of banned and/or restricted ingredients contained in skin lightening creams are well within the public domain and will not suffice as a defence.

¹⁷⁸ Section 2(1)(a)(i) of the FCDA.

¹⁷⁹ Section 2(1)(a) (ii) of the FCDA.

¹⁸⁰ Section 2(1)(a)(iii) of the FCDA.

¹⁸¹ Section 2(1)(a)(iv) of the FCDA.

¹⁸² Section 2(1)(b)(i) of the FCDA.

¹⁸³ Section 2(1)(b)(ii) of the FCDA.

¹⁸⁴ Section 5(1)(a) of the FCDA.

¹⁸⁵ Section 5(1)(b) of the FCDA.

¹⁸⁶ Section 5(1)(c) of the FCDA.

¹⁸⁷ Section 6(b)(ii) of the FCDA.

¹⁸⁸ Section 6(b)(iii) of the FCDA.

The FCDA further states that any importer, manufacturer or packer who sells any cosmetic in a sealed package, the label of which does not comply with the provisions of the FCDA, is presumed to have imported, manufactured or packed such product and may be convicted and sentenced accordingly¹⁸⁹ unless such person can prove that he did not import, manufacture or pack such article¹⁹⁰ or that the non-compliance with the FCDA occurred due to deterioration or some other change which occurred after the article left his possession and over which he had no control.¹⁹¹

4.2.4 Enforcement of the FCDA

The FCDA has made provision for the recognition of inspectors who have been vested with certain powers, duties and functions¹⁹² in relation to enforcement therewith. An inspector has the power, within reasonable times, to enter premises where a cosmetic is or is suspected to be manufactured, treated, marked, labelled, stored, sold, served or where any other operation or activity relating to the cosmetic is or is suspected to be carried out, and may perform the following:¹⁹³

1. Inspect or search the premises and examine and remove samples of any cosmetic or substance that is suspected to be being used in connection with the manufacture or treatment of any cosmetic or in connection with any operation or activity relating such cosmetic;¹⁹⁴
2. To demand any information regarding any cosmetic from any person who is in charge of the premises;¹⁹⁵

¹⁸⁹Section 9(1) of the FCDA.

¹⁹⁰ Section 9(1)(a) of the FCDA.

¹⁹¹ Section 9(1)(b) of the FCDA.

¹⁹² Section 10 of the FCDA.

¹⁹³ Section 11(1) of the FCDA.

¹⁹⁴ Section 11(1)(a) of the FCDA.

¹⁹⁵ Section 11(1)(b) of the FCDA.

3. To weigh, count, measure, mark or seal any cosmetic or its package or container;¹⁹⁶
4. To examine, make copies of or extract any statement or other document found in or upon such premises which refers to or is suspected of referring to such cosmetic;¹⁹⁷
5. To inspect any operation or process carried out upon such premises in connection with any activity as aforementioned;¹⁹⁸ and
6. To seize any cosmetic or substance which appears to provide proof of a contravention of any of the provisions of the Act.¹⁹⁹

In terms of the FCDA, if any cosmetic is found to be a prohibited item by the Commissioner for Customs and Excise,²⁰⁰ the Director-General may direct that such cosmetic be confiscated and destroyed,²⁰¹ returned to the port of shipment,²⁰² may be imported upon specific compliance including any condition for the substitution of a label approved by the Director-General for any existing label,²⁰³ or shall be dealt with in any manner as may be specified by the Director-General.²⁰⁴

4.2.5. Offences and penalties for contravening the FCDA

The FCDA considers it an offence for a person to:

1. Obstruct or prevent an inspector from performing his obligations;²⁰⁵
2. Refuse or fail to disclose information to the inspector when so demanded;²⁰⁶

¹⁹⁶ Section 11(1)(c) of the FCDA.

¹⁹⁷ Section 11(1)(d) of the FCDA.

¹⁹⁸ Section 11(1)(f) of the FCDA.

¹⁹⁹ Section 11(1)(h) of the FCDA.

²⁰⁰ Section 14(3) of the FCDA.

²⁰¹ Section 14(3)(a) of the FCDA.

²⁰² Section 14(3)(b) of the FCDA.

²⁰³ Section 14(3)(c) of the FCDA.

²⁰⁴ Section 14(3)(d) of the FCDA.

²⁰⁵ Section 17(a) of the FCDA.

²⁰⁶ Section 17(b) of the FCDA.

3. Alter any seal on any cosmetic that is placed by an inspector;²⁰⁷
4. Falsely portray himself to be an inspector;²⁰⁸
5. Retake any samples obtained or seized or hinder any samples from being taken;²⁰⁹ or
6. Falsely make use of any warranty or certificate relating to a cosmetic.²¹⁰

If a person contravenes the FCDA for the first time, then he or she shall be liable to a fine or imprisonment for a period not exceeding six months or to both a fine and such imprisonment.²¹¹ If a person is found to have committed a second contravention of the FCDA, then he or she shall be liable to pay a fine or to imprisonment for a period not exceeding twelve months or to both such a fine and such imprisonment.²¹² If a person is found guilty of a third contravention of the FCDA then he or she shall be liable to pay a fine or to imprisonment for a period not exceeding twenty-four months or to both a fine and imprisonment.²¹³ The FCDA further states that where a penalty is specifically prescribed for a contravention of the FCDA, the person convicted of any contravention shall be liable only to the penalty prescribed.²¹⁴

4.3 Regulations to the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 governing the sale of skin lightening creams containing active ingredients.

During the 1970's, the Minister made regulations under the FCDA prohibiting the sale of any cosmetic which contains mercury or its salts, lead or its salts or hydroquinone monobenzyl ether,²¹⁵ however subsequent regulations were made and repealed leading up to the regulations published on 23 September 1983. This regulation contained a direct prohibition on the sale of certain

²⁰⁷ Section 17(c) of the FCDA.

²⁰⁸ Section 17(d) of the FCDA.

²⁰⁹ Section 17(e) of the FCDA.

²¹⁰ Section 17(f) of the FCDA.

²¹¹ Section 7 of the FCDA Amendment Act 39 of 2007.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Section 18 of the FCDA.

²¹⁵ GN Notice 740 of GG No 4668 published on 18 April 1975.

cosmetics. There are three sets of applicable regulations, all of which are explained below.

4.3.1 **Regulations governing the sale of cosmetics containing hydroquinone, mercury and lead made under the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972**²¹⁶

4.3.1.1 Purpose of the regulation

The purpose of this regulation was to prevent the sale of cosmetics containing lead, hydroquinone or mercury²¹⁷ and to prevent cosmetics containing any other active ingredient other than hydroquinone (which was only permitted at levels of two percent) posing as a skin lightening agent or a skin whitener.²¹⁸ The regulation further aimed at ensuring that skin lightening agents or skin whiteners contained proper labelling which reflected warning signs to consumers before use thereof²¹⁹ and prohibited the use of certain wording on skin lightening agents or skin whiteners.²²⁰

4.3.1.2 Main provisions of the regulations

In terms of sub-regulation (2), it is prohibited for any person to sell any cosmetic which contains lead or its salts, hydroquinone monobenzyl ether, or mercury or its salts.²²¹ Furthermore if a cosmetic is sold as a skin lightening agent or skin whitener, it may not contain any other active or potentially active depigmenting ingredient other than hydroquinone²²² which is only allowed in a maximum of two percent in volume or mass²²³ and it cannot be sold without a sun screen with a protection factor (SPF) 5 or equivalent sun blocking agent.²²⁴

²¹⁶ GN 2083 of GG No 8900 published on 23 September 1983 7.

²¹⁷ Regulation 2(1)(a) GN Notice 2083.

²¹⁸ Regulation 2(b)(ii) GN Notice 2083.

²¹⁹ Regulation 3(1) GN Notice 2083.

²²⁰ Regulation 3(2) GN Notice 2083.

²²¹ Regulation 2(1)(a) GN Notice 2083.

²²² Regulation 2(b)(i) GN Notice 2083.

²²³ Regulation 2(b)(ii) GN Notice 2083.

²²⁴ Regulation 2(b)(iv) GN Notice 2083.

Regulation 3 further discusses the labelling of skin lightening agents or skin whiteners.²²⁵ If a cosmetic is sold as a skin lightening agent or skin whitener, such product must contain a label under the heading “warning”²²⁶ which is aimed at advising consumers that the product contains hydroquinone;²²⁷ that should skin irritation develop, the consumer should discontinue using the product or consult a physician;²²⁸ that if no lightening is seen after two months of treatment, use of the product should be discontinued;²²⁹ that depigmentation may not be noticeable when used on very dark skin;²³⁰ that the product is intended to lighten skin and not to prevent sunburn;²³¹ and that the consumer should avoid prolonged exposure to sun in order to prevent darkening reoccurring.²³²

Regulation 3(2) further prohibits any wording or similar wording on the label of any skin lightening agent or skin whitener which states that the use of the product will result in healthier, younger or rejuvenated skin;²³³ that the product will help brighten or clear the skin;²³⁴ that the product fades spots on the skin;²³⁵ or that the product will result in an even, wholesome complexion.²³⁶

These regulations were subsequently withdrawn, and the Minister then implemented further regulations on 24 June 1988 titled “Regulations prohibiting the use of hydroquinone, any active or potentially active depigmenting ingredient, lead and its salts, mercury and its salts and the cosmetic category skin bleacher, skin lightener or skin whitener.”²³⁷

²²⁵ Regulation 3(1) GN Notice 2083.

²²⁶ *Ibid.*

²²⁷ Regulation 3(1)(a) GN Notice 2083.

²²⁸ Regulation 3(1)(e) GN Notice 2083.

²²⁹ Regulation 3(1)(g) GN Notice 2083.

²³⁰ Regulation 3(1)(h) GN Notice 2083.

²³¹ Regulation 3(1)(i) GN Notice 2083.

²³² Regulation 3(1)(j) GN Notice 2083.

²³³ Regulation 3(2)(a) GN Notice 2083.

²³⁴ Regulation 3(2)(b) GN Notice 2083.

²³⁵ Regulation 3(2)(c) GN Notice 2083.

²³⁶ Regulation 3(2)(d) GN Notice 2083.

²³⁷ GN Notice 1227 of GG No 11360 published on 24 June 1988 38.

According to this regulation, it was prohibited for any cosmetics to contain lead and its salts²³⁸, mercury and its salts,²³⁹ hydroquinone monobenzyl ether,²⁴⁰ hydroquinone²⁴¹ and any other active or potentially active depigmenting ingredient.²⁴² Furthermore, in terms of regulation 2(2)(b), it was prohibited for any person to sell any cosmetic purporting to be a skin bleacher, skin lightener or skin whitener.²⁴³ This is significant as it clearly prohibits the sale of any cosmetic posing as a skin lightening product.

These regulations were subsequently amended on 20 April 1990 by the “Regulations prohibiting the use of hydroquinone, any active or potentially active depigmenting ingredient, lead and its salts, mercury and its salts and the cosmetic category skin bleacher, skin lightener or skin whitener – Amendment.”²⁴⁴

4.3.2 “Regulations prohibiting the use of hydroquinone, any active or potentially active depigmenting ingredient, lead and its salts, mercury and its salts and the cosmetic category skin bleacher, skin lightener or skin whitener – Amendment.”

4.3.2.1 Main provisions

The regulation aimed at deleting the word “hydroquinone”²⁴⁵ from cosmetics where it appeared in regulation 2(1)(b) of Regulation 1227 published on 24 June 1988.

The reason for the removal of “hydroquinone” was because the legislature intended to control preparations and mixtures of hydroquinone, with a maximum limit of two percent, when the product was intended to be applied to

²³⁸ Regulation 2(1)(a) GN Notice 1227.

²³⁹ Ibid.

²⁴⁰ Regulation 2(1)(b) GN Notice 1227.

²⁴¹ Ibid.

²⁴² Regulation 2(1)(b) GN Notice 1227.

²⁴³ Regulation 2(2)(b) GN Notice 1227.

²⁴⁴ GN Notice 864 of GG No 12427 published on 20 April 1990.

²⁴⁵ Regulation 2 GN Notice 864.

the skin as a medicine in terms of the Medicines and Related Substances Act of 1965.²⁴⁶

This means that hydroquinone cannot under any circumstances be used as a cosmetic in terms of the Foodstuff, Cosmetics and Disinfectants Act of 1972.²⁴⁷ The amendment subsequently came into effect on 10 August 1990.²⁴⁸

4.4 Subsequent regulations relating to the labelling, advertising and composition of cosmetics

On 19 August 2016, the Minister of Health introduced regulations to the Foodstuff, Cosmetics and Disinfectants Act 1972²⁴⁹ however these regulations were amended and the Minister of Health published a further regulation to the Foodstuff, Cosmetics and Disinfectants Act 1972 on 22 December 2017.²⁵⁰ This regulation is not yet in effect however once it comes into effect, it is anticipated that it will be an initiative by the Minister of Health to address some of the pertinent problems regarding the labelling of cosmetics and to ensure effective quality control measures.

4.4.1 Regulations relating to the labelling, advertising and composition of cosmetics published on 22 December 2017

4.4.1.1 The purpose of the regulations

The purpose of the regulations is to regulate the cosmetics industry by categorising cosmetics,²⁵¹ identifying product composition requirements,²⁵² ensuring effective quality control measures,²⁵³ and ensuring proper labelling²⁵⁴

²⁴⁶ GN Notice 864 of GG No 12427 published on 20 April 1990 15.

²⁴⁷ Ibid.

²⁴⁸ GN Notice 1861 of GG No 12700 published on 10 August 1990.

²⁴⁹ The Regulation was titled 'Regulations relating to the labelling, advertising, and composition of cosmetics' and published in GN 921 of GG No 40216 and published on the 19 August 2016.

²⁵⁰ The Regulation is titled 'Regulations relating to the labelling, advertising and composition of cosmetics' published in GN Notice 1469 of GG No 41351.

²⁵¹ Regulation 2 GN Notice 1469.

²⁵² Regulation 7 GN Notice 1469.

²⁵³ Regulation 3, 4 and 5 GN Notice 1469.

²⁵⁴ Regulation 8 GN Notice 1469.

on cosmetics before making same available to consumers. The regulation further intends to prohibit the use of certain words and phrases on cosmetic products²⁵⁵ and imposes penalties on those contravening the regulations.²⁵⁶

4.4.1.2 The main provisions of the regulations

Regulation 2 recognises a cosmetic to be in the form of a cream, emulsion, lotion, and gel. If any substance is injected or implanted into the body then it is not regarded as a cosmetic.²⁵⁷ Most skin lightening products are found in the form of creams²⁵⁸ however the recent trend of skin lightening products is believed to be in the form of pills and injections²⁵⁹ such as glutathione injections.²⁶⁰ This raises the question of whether a glutathione injection purporting to lighten skin²⁶¹ would constitute a cosmetic, as it is clearly excluded from the definition in the regulations.

In terms of regulation 3, the legislature has introduced the concept of the “responsible person” to ensure compliance of the regulations.²⁶² The “responsible person” is a natural or juristic person such as the manufacturer, importer or distributor who is responsible for introducing the cosmetic into the market.²⁶³ This “responsible person” bears the onus of ensuring that the cosmetic complies with this regulation when making same available to consumers.²⁶⁴ This is a significant move towards compliance as it imposes a

²⁵⁵ Regulation 9 GN Notice 1469.

²⁵⁶ Regulation 12 GN Notice 1469.

²⁵⁷ Regulation 2 GN Notice 1469.

²⁵⁸ G Khan ‘Skin bleaching in Africa: An ‘addiction’ with risks’ 9 August 2018, available at <https://www.enca.com/analysis/skin-bleaching-africa-addiction-risks>, accessed on 24 September 2018.

²⁵⁹ *Ibid.*

²⁶⁰ P Dayimani & M Crous ‘Skin lightening in 2017 - what are people using and how dangerous is it really?’ available at <https://www.w24.co.za/Beauty/Skin/skin-lightening-in-2017-what-are-people-using-and-how-dangerous-is-it-really-20170320> accessed on 10 March 2018, also see LM Davids, JC Van Wyk & NP Khumalo ‘Intravenous glutathione for skin lightening: Inadequate safety data’ (2016) Vol 106 No 8 *SA Medical Journal* 782.

²⁶¹ P Dayimani & M Crous ‘Skin lightening in 2017 - what are people using and how dangerous is it really?’ available at <https://www.w24.co.za/Beauty/Skin/skin-lightening-in-2017-what-are-people-using-and-how-dangerous-is-it-really-20170320> accessed on 10 March 2018.

²⁶² Regulation 3(1) GN Notice 1469.

²⁶³ Definition section in regulations.

²⁶⁴ Regulation 3(1) GN Notice 1469.

duty on the manufacturer, importer or distributor to ensure compliance with the regulations.

Regulation 4(1) prohibits any person from selling, manufacturing or importing any cosmetic that may be detrimental to human health when used under normal or reasonably foreseeable conditions²⁶⁵ taking into account the product presentation,²⁶⁶ product composition,²⁶⁷ labelling,²⁶⁸ instructions for use²⁶⁹ and any other information provided by the responsible person.²⁷⁰

Regulation 4(2) further imposes a duty on the responsible person to ensure that the cosmetic has undergone a safety assessment of the finished product as well as its ingredients.²⁷¹ This is a significant provision as many skin lightening creams are brought illegally into South Africa and do not comply with the requirements set out in the FCDA²⁷² or are incorrectly labelled.²⁷³ Some skin lightening products do not contain any warnings²⁷⁴ and consumers do not know how to use the product or what it contains.

In terms of regulation 5, the cosmetic must be in compliance with “Good Manufacturing Practice”.²⁷⁵ This is noteworthy as it suggests that the legislature intends to establish a set of recognisable manufacturing practices to regulate the quality of cosmetics that are available to consumers and to ensure that the cosmetics comply with the necessary standards before being made available to consumers.

²⁶⁵ Regulation 4(1) GN Notice 1469.

²⁶⁶ Regulation 4(1)(a) GN Notice 1469.

²⁶⁷ Regulation 4(1)(b) GN Notice 1469.

²⁶⁸ Regulation 4(1)(c) GN Notice 1469.

²⁶⁹ Regulation 4(1)(d) GN Notice 1469.

²⁷⁰ Regulation 4(1)(e) GN Notice 1469.

²⁷¹ Regulation 4(2) of GN Notice 1469.

²⁷² 'Dangerous skin lightening products on sale on our streets' *UCT Newsroom* 31 August 2015, available at <https://www.news.uct.ac.za/article/-2015-08-31-dangerous-skin-lightening-products-on-sale-on-our-streets>, accessed on 16 April 2016.

²⁷³ Maneli et al 'Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study' 197.

²⁷⁴ Dlova et al 'Skin-lightening creams used in Durban' 52.

²⁷⁵ Regulation 5(1) GN Notice 1469.

According to regulation 7, it is prohibited for any person to manufacture, import or distribute a cosmetic containing a prohibited substance²⁷⁶ or a restricted substance²⁷⁷ however in the case of a restricted substance, the restrictions, conditions of use and warnings must be printed on label of the cosmetic.²⁷⁸ In the context of skin lightening creams, mercury and its compounds are regarded as a prohibited substance as listed in Annex I²⁷⁹ and hydroquinone is regarded as a restricted substance in terms of Annex II and is scheduled to be used, for example, for artificial nails by professionals only at maximum use of two percent.²⁸⁰ In any event, the use of hydroquinone in cosmetics under the FCDA is prohibited.

Regulation 7(2) further imposes an obligation that all cosmetics for sale must contain warning statements as listed in the annexes to the regulations.

The regulations further address the labelling of cosmetics in that the primary and secondary container of every cosmetic must have a label attached wherein it portrays the name of the cosmetic,²⁸¹ the name and business address of the responsible person,²⁸² the country of origin for imported cosmetics,²⁸³ the list of ingredients,²⁸⁴ the function of the cosmetic,²⁸⁵ and any precautions and warning statements for the consumer to observe.²⁸⁶

Regulation 8(9) further ensures that the names used to describe ingredients on the label of the cosmetic must correspond with those identified in the annexes to the regulation or the INCI nomenclature (International Nomenclature for Cosmetics Ingredients)²⁸⁷ and all information that is required to appear on the label of the cosmetic must be at least in English.²⁸⁸

²⁷⁶ Annex I to the Regulations in GN Notice 1469.

²⁷⁷ Annex II to the Regulations in GN Notice 1469.

²⁷⁸ Regulation 7(1)(b) GN in GN Notice 1469.

²⁷⁹ Annex I of GN Notice 1469.

²⁸⁰ Annex II of GN Notice 1469.

²⁸¹ Regulation 8(a) GN Notice 1469.

²⁸² Regulation 8(b) GN Notice 1469.

²⁸³ Regulation 8(c) GN Notice 1469.

²⁸⁴ Regulation 8(h) GN Notice 1469.

²⁸⁵ Regulation 8(i) GN Notice 1469.

²⁸⁶ Regulation 8(f) GN Notice 1469.

²⁸⁷ Regulation 8(9) GN Notice 1469.

²⁸⁸ Regulation 8(14) GN Notice 1469.

The regulation recognises certain prohibited product claims which are not allowed to appear on the label of cosmetics.²⁸⁹ These include claims such as “clinically proven” unless scientifically substantiated;²⁹⁰ claims that convey the impression that the cosmetic possesses medicinal properties;²⁹¹ phrases such as “recommended by doctors” or any other words or symbols implying that medical practitioners have recommended its use unless scientifically substantiated;²⁹² phrases such as “skin bleacher”, “skin lightener” or “skin whitener” or claims of a similar nature implying that the cosmetic performs any skin bleaching, skin lightening or skin whitening.²⁹³

This provision, in particular, is significant as it prohibits the sale of any cosmetic intending to act as a skin lightener, skin whitener or skin bleacher. These regulations can be seen as supplementing the regulations enacted on the 24 June 1988 under the FCDA.

Regulation 10 further initiates a process of redress for consumers should a consumer suffer from undesirable or seriously undesirable events as the responsible person ought to have a process in place to handle and investigate such events.²⁹⁴

In terms of regulation 11, it is prohibited for any person to advertise a cosmetic in an advertisement which contains any information that is prohibited from being on the label of a cosmetic in terms of the regulations.²⁹⁵

4.4.1.3 Penalties for contravening the regulations

If a person is convicted of an offence under the regulations or fails to comply with the regulations for the first time, he or she is liable to a fine or imprisonment

²⁸⁹ Regulation 8(16) GN Notice 1469.

²⁹⁰ Regulation 9(1)(c) GN Notice 1469.

²⁹¹ Regulation 9(1)(d) GN Notice 1469.

²⁹² Regulation 9(1)(e) GN Notice 1469.

²⁹³ Regulation 9(1)(f) GN Notice 1469.

²⁹⁴ Regulation 10(2) GN Notice 1469.

²⁹⁵ Regulation 11 GN Notice 1469.

for a period not exceeding six months or to both a fine and imprisonment.²⁹⁶ If the person is found to have committed a second contravention, he or she is liable to a fine or imprisonment for a period not exceeding twelve months or to both a fine and such imprisonment.²⁹⁷ If the person is found to have committed a third or subsequent contravention, he or she is liable to a fine or to imprisonment for a period not exceeding twenty-four months or to both a fine and such imprisonment.²⁹⁸ Furthermore any person convicted of an offence for failure to comply with the regulations is liable for the cost of destruction of the non-compliant products.²⁹⁹

It is worth mentioning that although these regulations are not yet in effect, once they come into effect, they will provide for proper procedures and guidelines for retailers and suppliers so as to ensure compliance with the Act, especially through the concept of the responsible person. These regulations clearly set out the processes for the responsible person to follow before making the cosmetic available to consumers, and therefore there cannot be any misunderstanding regarding compliance. Since the regulations re-iterate the prohibition of any cosmetic to act as a “skin bleacher”, “skin lightener” or “skin whitener”, it is submitted that the sale of skin lightening creams ought to be banned in totality.

4.5 The Medicines and Related Substances Act 101 of 1965, as amended by Act 14 of 2015

4.5.1 Introduction

The Medicines and Related Substances Act 101 of 1965, as amended by Act 14 of 2015, (the MRSA) is the overarching legislation governing the medicines and related substances sector. This dissertation is however limited to a discussion of the applicable provisions on the use of hydroquinone in relation to the sale of skin lightening creams.

²⁹⁶ Regulation 12(a) GN Notice 1469.

²⁹⁷ Regulation 12(b) GN Notice 1469.

²⁹⁸ Regulation 12(c) GN Notice 1469.

²⁹⁹ Regulation 12(2) GN Notice 1469.

4.5.2 The main provisions

Section 22A of the MRSA divides certain medicines and substances into specific schedules and lists the manner in which these medicines and substances may be sold. Hydroquinone has been listed as a scheduled substance in terms of schedule 2 and schedule 3 of the Act.³⁰⁰

Section 22A(5) of the MRSA prohibits the sale of any schedule 2 or 3 substance by any person other than a pharmacist or his intern or assistant acting under supervision of the pharmacist, who may sell only schedule 2 substances without a prescription. Since hydroquinone is listed in both schedule 2 and 3, the sale of hydroquinone requires a prescription under schedule 3 and if it is sold under schedule 2, it must be sold by a pharmacist. These provisions are clearly being breached because the research discussed in chapter one indicates that consumers are able to purchase skin lightening creams containing hydroquinone from vendors at the roadside without any difficulty whatsoever.

Section 22A(5)(b) prohibits the pharmacist or his intern or an assistant acting under the supervision of the pharmacist from selling any schedule 3 substance without a written prescription or verbal instructions issued by an authorised prescriber³⁰¹ who is known to the pharmacist.³⁰²

Section 22A(7)(a) notably prohibits any person, other than a pharmacist, from selling or exporting a schedule 2 or 3 substance for cosmetics purposes unless he has a permit from the Director-General for such purpose.³⁰³

The MRSA further prohibits the sale or administration of any scheduled substance for any other purpose than medicinal purposes.³⁰⁴ In the case of skin

³⁰⁰ Schedule 2 and 3 of the Medicines and Related Substances Act 101 of 1965, as amended by Act 14 of 2015.

³⁰¹ An 'authorised prescriber' is defined as a medical practitioner, dentist, veterinarian, practitioner, nurse or other person registered under the Health Professions Act, 1974 and has been extracted from s 22A(17)(a) of the MRSA.

³⁰² Section 22A(5)(b) of the MRSA.

³⁰³ Section 22A(7)(a) of the MRSA.

³⁰⁴ Section 22A(10) of the MRSA.

lightening creams containing hydroquinone, these creams are not being sold for medicinal purposes and are actually being sold for cosmetic purposes.

4.5.3 Penalties for contravening the MRSA

In terms of the MRSA, any person who contravenes any of the provisions of s 22A of the MRSA is guilty of an offence³⁰⁵ and shall be liable to a fine or imprisonment for a period not exceeding 10 years.³⁰⁶ Furthermore, the court has the power to declare that the scheduled substance under which the offence has been committed can be forfeited to the state.³⁰⁷

4.6 Conclusion

As previously discussed, the regulations to the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 clearly prohibit the sale of skin lightening creams containing active ingredients such as mercury and hydroquinone when used for cosmetic purposes. Furthermore, the recently published regulations to the Foodstuff, Cosmetics and Disinfectants Act (which are yet to come into effect) further prohibit words such as “skin bleacher”, “skin lightener” or “skin whitener” or any claims which convey the impression of skin bleaching, skin lightening or skin whitening which in my view prohibits the sale of any kind of whitening or bleaching creams as a cosmetic in totality.

The difficulty is that despite the strict laws surrounding the sale of skin lightening creams, the sanctions for offenders are criminal in nature resulting in a fine or imprisonment or both which may not always solve the problem as suppliers will still continue to sell the product. Enforcement of the law is also a major concern as law enforcement authorities need to step in to stop the sale of defective skin lightening creams and customs officers need to be alert and ensure that only compliant products are allowed into the Republic of South Africa. Any form of non-compliance needs to be addressed immediately, before the product

³⁰⁵ Section 29 of the MRSA.

³⁰⁶ Section 30 of the MRSA.

³⁰⁷ Section 30 of the MRSA.

reaches the market. Perhaps one of the major problems with enforcement in this regard is that this is a consumer protection issue; it is extremely difficult to get the criminal authorities to take action when the issue involves consumer protection.³⁰⁸ The South African Police services more often deal with major criminal issues and so consumers who complain about defective products are usually advised to consult their attorneys.³⁰⁹ Something which most consumers who purchase such products will not be able to do.

From the above discussion it can be seen that criminal sanctions for offenders in terms of the FCDA are not sufficient to prevent the sale of defective skin lightening creams. This is a general problem when it comes to the supply of defective products in South Africa and is one of the main reasons for the introduction of the Consumer Protection Act which is discussed in the next chapter.

³⁰⁸ T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) Vol 31 Issue 2 *Orbiter* 220.

³⁰⁹ *Ibid* 221.

CHAPTER 5

THE CONSUMER PROTECTION ACT

5.1 Introduction

In the preceding chapters, an overview of the common law as well as the statutory law applicable to the sale of skin lightening creams was considered. The shortfalls identified in chapter two were that under the common law of sale, the consumer was only able to claim consequential loss against a seller if the consumer was able to prove that the seller acted fraudulently, the seller made certain misrepresentations to the consumer, or that the seller was a manufacturer or professed to have certain knowledge regarding the product. Under the law of delict, the consumer had to prove all the elements of a delict and proving fault imposed an onerous burden on the consumer. The shortcomings identified in chapter three were that although there are self-regulatory bodies, membership of those bodies is voluntary and, without every supplier subscribing to these bodies, it is difficult to ensure compliance within the industry. Access of the applicable self-regulatory standards by consumers also appeared to be a major downfall. Chapter four considered applicable legislation surrounding the sale of skin lightening creams together with the applicable regulations which has significantly improved the situation. However, as discussed, the penalties for contravening the law are criminal in nature with a fine being imposed on offenders. Criminal penalties for the supply of defective goods has not served as a sufficient deterrent which is one of the major reasons why the legislature deemed it necessary to introduce the Consumer Protection Act 68 of 2008 (CPA).

The CPA came into operation on 1 April 2011³¹⁰ and was the long-awaited legislation aimed at creating significant consumer protection measures in the

³¹⁰ PN Stoop & C Chürr 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' (2013) Vol 16 No 5 *Potchefstroom Electronic Law Journal* 514.

marketplace.³¹¹ With the introduction of the CPA, consumers have now been afforded certain rights and expectations, especially in the case of defective goods. According to Van Eeden,³¹² whilst South Africa previously had elements of consumer protection, the introduction of the CPA is a major progression in the scope and focus of the legal framework that it replaces.³¹³ Van Eeden further states that the CPA reformulates and develops consumer rights and new regulatory structures are created for the realisation and enforcement of consumer rights.³¹⁴

One of the major changes advanced by the CPA and paramount to this dissertation is the implementation of strict liability against the producer, importer, distributor or retailer in respect of the supply of defective goods.³¹⁵ This strict liability principle appears to follow that of the European Directive and ensures that South Africa is in line with many other jurisdictions.³¹⁶ This chapter will outline the purpose as well as the main sections of the CPA.

5.2 The purpose of the CPA

The CPA has been designed to create national norms and standards that enhance consumer protection legislation.³¹⁷ It is aimed at promoting a fair and sustainable marketplace for consumer services and prohibits certain unfair marketing and business practices.³¹⁸ The CPA recognizes the need to improve the quality of information available to consumers so that they are in a position to make informed choices as well as to protect consumers from hazards to their well-being and safety.³¹⁹ It further intends to establish certain measures towards redress for consumers.³²⁰

³¹¹ T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) Vol 31 Issue 2 *Orbiter* 217.

³¹² E Van Eeden *A guide to the Consumer Protection Act* 1st Ed (2009) Lexis Nexis 2.

³¹³ *Ibid.*

³¹⁴ Van Eeden *A guide to the Consumer Protection Act* 255.

³¹⁵ Section 61 of the CPA.

³¹⁶ M Loubser & E Reid 'Liability for products in the Consumer Protection Bill 2006: A comparative critique' 2006 *Stellenbosch Law Review* 413.

³¹⁷ Preamble to the CPA.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

This is a significant development in the field of consumer protection legislation as consumers are now protected and governed by the CPA which encompasses a standard of expected rules and principles which were not available to consumers in the past.

5.3 The main provisions of the CPA

5.3.1 Fundamental consumer rights

The CPA introduces significant consumer rights. In chapter 2, consumers have the right to equality in the consumer market,³²¹ the right to privacy,³²² the right to choose,³²³ the right to disclosure and information,³²⁴ the right to fair and responsible marketing,³²⁵ the right to fair and honest dealing,³²⁶ the right to fair, just and reasonable terms and conditions,³²⁷ and the right to fair value, good quality and safety.³²⁸ Consumers are also provided with the procedures for redress³²⁹ if they have encountered any breach of the provisions of the CPA. The CPA further recognises industry codes of conduct³³⁰ and establishes the National Consumer Commission (discussed below). It is not within this paper to discuss all the relevant provisions of the CPA and this paper will discuss only the relevant provisions surrounding the sale of defective goods.

5.3.2 The consumer's right to information in plain and understandable language

In terms of Chapter 2, Part D of the CPA, the consumer has a right to information in plain and understandable language. In terms of s 22, the producer of a notice, document or visual representation must use the form

³²¹ Chapter 2, Part A of the CPA.

³²² Chapter 2, Part B of the CPA.

³²³ Chapter 2, Part C of the CPA.

³²⁴ Chapter 2, Part D of the CPA.

³²⁵ Chapter 2, Part E of the CPA.

³²⁶ Chapter 2, Part F of the CPA.

³²⁷ Chapter 2, Part G of the CPA.

³²⁸ Chapter 2, Part H of the CPA.

³²⁹ Chapter 3, part A of the CPA.

³³⁰ Chapter 4 of the CPA.

prescribed by the CPA³³¹ provided that there is a prescribed form or plain language.³³² In order to determine whether a notice is in plain language, it must be reasonable to conclude that an ordinary consumer with average literacy skills and minimal experience could be expected to understand the notice without undue effort.³³³ This section compels suppliers and manufacturers to ensure that consumers understand the information that they make available so that consumers are in a position to make informed decisions.

In the context of skin lightening creams, a problem may arise when skin lightening creams are imported from a foreign countries and are labelled in different languages hence South African consumers may not understand the text of the product and the ingredients contained therein but may see an image of an individual with fair skin which may prompt them to purchase the product. In the light of section 22, it can be seen that a supplier may not supply products unless understandable information is supplied to consumers regarding the product they are purchasing. Therefore, on this basis alone, the supplier will be acting in contravention of the CPA and the enforcement authorities should be able to take action against such suppliers.

5.3.3 Product labelling and trade descriptions

Section 24 of the CPA recognises certain instances when goods are applied with a trade description. These are instances when the trade description is applied to the goods or to a label on the goods,³³⁴ when the trade description is displayed close to the goods,³³⁵ or when it is contained in any advertisement of the goods.³³⁶ It is prohibited for a person to alter³³⁷ or deliberately apply a trade description that has the possibility of misleading consumers.³³⁸ Section 24(3) prevents a retailer from displaying or supplying goods to a consumer if

³³¹ Section 22(1)(a) of the CPA.

³³² Section 22(1)(b) of the CPA.

³³³ Section 22(2) of the CPA.

³³⁴ Section 24(1)(a) of the CPA.

³³⁵ Section 24(1)(b) of the CPA.

³³⁶ Section 24(1)(c) of the CPA.

³³⁷ Section 24(2)(b) of the CPA.

³³⁸ Section 24(2)(a) of the CPA.

he is aware or could reasonably be aware or has reason to suspect³³⁹ that the goods are likely to mislead the consumer³⁴⁰ or that the trade description has been altered.³⁴¹ Section 24(4) also requires a producer or importer of any goods to apply a trade description if same is prescribed by the Minister,³⁴² and such trade description must disclose the country of origin of such goods and any other prescribed information.³⁴³ Similarly to the discussion of section 22 above, suppliers of skin lightening creams must ensure that they comply with this section and if they do not, they will be engaging in prohibited conduct, thus enabling the enforcement authorities to take action.

5.3.4 The consumer's right to fair and responsible marketing

Section 29 of the CPA prohibits any producer, importer, distributor or retailer from marketing any goods that may reasonably create a false or misleading demonstration of the goods³⁴⁴ or marketing in a manner that is misleading, fraudulent or deceptive regarding the nature, properties or uses of the goods.³⁴⁵ This provision is particularly important in the context of skin lightening creams as many skin lightening creams have been marketed as having produced remarkable results in whitening consumer's skin when in actual fact these creams contain banned and/or illegal substances that severely damage and darken consumer's skin. The manufacturer or retailer does not reflect the true nature of the skin lightening cream and the potential harm that may be caused by the ingredients contained therein and consumers who are driven by a need to lighten their skin are lured into purchasing these harmful creams as a result of the marketing and advertising tactics contained on the box.

³³⁹ Ibid.

³⁴⁰ Section 24(3)(a)(i) and (ii) of the CPA.

³⁴¹ Section 24(3)(a)(ii) of the CPA.

³⁴² Section 24(4) of the CPA.

³⁴³ Section 24(5) of the CPA.

³⁴⁴ Section 29(a) of the CPA.

³⁴⁵ Section 29(b)(i) of the CPA.

5.3.5 The consumer's right to fair and honest dealing

According to s 40 of the CPA, a supplier is prohibited from using any unfair tactics in connection with the marketing,³⁴⁶ negotiation,³⁴⁷ or supply of any goods to the consumer.³⁴⁸ This section further prevents the supplier from intentionally taking undue advantage of the consumer as a result of the consumer not being able to safeguard themselves due to illiteracy, ignorance or inability to understand the language. In the context of skin lightening creams, consumers purchasing skin lightening creams originate from different social backgrounds and statuses. Consumers do not expect banned and/or illegal substances to be contained in skin lightening creams and may therefore be ignorant to the fact that the cream contains such ingredients.³⁴⁹ In most cases, it appears that the supplier or retailer who markets the product to the consumer illustrates to the consumer the extraordinary results of the product and this tempts the consumer to purchase the product, especially when the consumer is of a low education background.

In terms of s 41 of the CPA, a supplier³⁵⁰ must not indicate any false, misleading or deceptive representation of any material fact of the product to the consumer,³⁵¹ neither must the supplier use any exaggeration, innuendo or ambiguity regarding a material fact or fail to disclose a material fact if such a failure amounts to a deception.³⁵² A supplier is also prohibited from failing to correct an alleged misapprehension in the mind of the consumer constituting a false, misleading or deceptive representation.³⁵³ The CPA further regards it as a false, misleading or deceptive representation for any supplier to falsely state or fail to correct an alleged misapprehension on the part of the consumer³⁵⁴

³⁴⁶ Section 40(1)(a) of the CPA.

³⁴⁷ Section 40(1)(c) of the CPA.

³⁴⁸ Section 40(1)(b) of the CPA.

³⁴⁹ I Skosana 'When lightening strikes, it brings pale ailments' *Bhekisisa Centre for Health Journalism* 31 October 2014, available at <http://mg.co.za/article/2014-10-31-00-when-lightening-strikes-it-brings-pale-ailments/>, accessed on 12 April 2016.

³⁵⁰ This is also to include any other person acting on behalf of the supplier in terms of s 41(2) of the Act.

³⁵¹ Section 41(1)(a) of the CPA.

³⁵² Section 41(1)(b) of the CPA.

³⁵³ Section 41(1)(c) of the CPA.

³⁵⁴ Section 41(3) of the CPA.

regarding any ingredients or performance characteristics which are false,³⁵⁵ or that the goods are of a particular standard or quality.³⁵⁶

5.3.6 The consumer's right to fair, reasonable and just contract terms

According to Chapter 2, Part G of the CPA, the consumer has a right to fair, just and reasonable terms and conditions.³⁵⁷ The discussion relating to fair, just and unreasonable terms in the light of the CPA requires a comprehensive discussion which is not possible in the context of this mini-dissertation. What is important to note is that suppliers may not contract out of their responsibilities under the CPA by adding terms and conditions to their contracts.³⁵⁸ This is particularly important when it comes to beauty salons, for example, because if they supply defective products to their clients they will not be able to absolve themselves from responsibility for any problems that arise by adding exemption clauses to their contracts.

5.3.7 The consumer's right to fair value, good quality and safety

In the context of this mini-dissertation this is perhaps one of the most important rights which consumers have. According to s 53 of the CPA, a "defect" is regarded as a material imperfection in the manufacture or performance of any goods which renders it less acceptable to the consumer's reasonable expectations³⁵⁹ or any characteristic of the goods that renders it less useful or safe than the consumer would generally expect.³⁶⁰

The CPA defines a "failure" as the inability of the goods to perform in the manner intended or to reach the intended effect.³⁶¹

³⁵⁵ Section 41(3)(b)(i) of the CPA.

³⁵⁶ Section 41(3)(b)(ii) of the CPA.

³⁵⁷ Part G of the CPA.

³⁵⁸ Y Mupangavanhu 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) *De Jure* 131.

³⁵⁹ Section 53(1)(a)(i) of the CPA.

³⁶⁰ Section 53(1)(a)(ii) of the CPA.

³⁶¹ Section 53(1)(b) of the CPA.

The CPA defines a “hazard” as any characteristic that is recognised to be a hazard in terms of any other law or any characteristic that poses a significant risk of personal injury to a person when the goods are utilised.³⁶²

The CPA defines the word “unsafe” as any characteristic, failure, defect or hazard in the goods resulting in the goods posing an extreme risk of personal injury to the consumer.³⁶³

In terms of s 54 of the CPA, if a supplier agrees to perform any services for or on behalf of a consumer, the consumer has a right to such performance in a manner and quality that is generally expected by the consumer³⁶⁴ and the use, of goods are free from defects and of quality that is generally expected by the consumer.³⁶⁵ If a supplier fails to provide consumers with goods as abovementioned, the consumer may require the supplier either to remedy any defect in the quality of the services performed or goods supplied,³⁶⁶ or refund the consumer a reasonable portion of the price the consumer paid for the services performed or goods taking into consideration the extent of the failure.³⁶⁷

Section 55 of the CPA provides that the consumer has a right to receive goods that are reasonably suited for the purpose that they were intended,³⁶⁸ that are of good quality and without any defects,³⁶⁹ and that are in compliance with applicable public regulation.³⁷⁰ If the consumer has explicitly informed the supplier of the reason why the consumer requires the goods and the supplier offered to supply such goods or acted in a manner that is consistent with possessing knowledge relating to the use of the goods, then the consumer has the right to expect that such goods are reasonably suited for the purpose intended by the consumer.³⁷¹ In determining whether or not any particular

³⁶² Section 53(1)(c) of the CPA.

³⁶³ Section 53(1)(d) of the CPA.

³⁶⁴ Section 54(1)(b) of the CPA.

³⁶⁵ Section 54 (1)(c) of the CPA.

³⁶⁶ Section 54(2)(a) of the CPA.

³⁶⁷ Section 54(2)(b) of the CPA.

³⁶⁸ Section 55(2)(a) of the CPA.

³⁶⁹ Section 55(2)(b) of the CPA.

³⁷⁰ Section 55(2)(d) of the CPA.

³⁷¹ Section 55(3)(b) of the CPA.

goods satisfy the abovementioned requirements, all the relevant circumstances surrounding the sale of the goods are considered, such as the manner in which and the purpose for which the goods were marketed, packaged or displayed and any instructions or warnings relating to the use of the goods.³⁷² Furthermore it is immaterial whether a product failure or defect was latent or patent or whether same could have been detected by the consumer before the consumer took delivery of the goods.³⁷³

In the context of skin lightening creams, if a consumer advises a supplier that the consumer requires a product which will lighten the consumer's skin and the supplier provides the consumer with a box of a skin lightening cream, which box depicts a trail of images of an individual from dark skin to light skin representing the effectiveness of the cream, and confirmation by the supplier which induces the consumer to purchase such skin lightening cream, the consumer will expect that his or her skin will become lighter. The consumer does not expect the skin lightening cream to be defective neither that the skin lightening cream will cause any damage to the consumer's skin whatsoever as the box clearly illustrated that the consumer will attain lighter skin with the use of the product and the supplier confirmed same. This is the unfortunate scenario that most consumers are likely to encounter when purchasing skin lightening creams which prove to be defective.

A significant provision that has been included into the CPA is the provision relating to an implied warranty on the quality of goods on behalf of the producer, importer, distributor or retailer who warrant that the goods comply with the requirements and standards as mentioned in s 55 of the CPA.³⁷⁴ If the consumer finds that the product is defective or fails to comply with the provisions of s 55 of the CPA, the consumer can return the goods to the supplier, without any penalty, and at the supplier's expense.³⁷⁵ The supplier is then obliged to either repair or replace the unsafe or defective goods³⁷⁶ or to refund

³⁷² Section 55(4)(a) of the CPA.

³⁷³ Section 55(5)(a) of the CPA.

³⁷⁴ Section 56(1) of the CPA.

³⁷⁵ Section 56(2) of the CPA.

³⁷⁶ Section 56(2)(a) of the CPA.

the consumer the purchase price of the goods.³⁷⁷ In the context of skin lightening creams, if the consumer suffers from harm or damages as a result of the use of a skin lightening cream which contained banned and/or restricted substances, the consumer can take the skin lightening cream back to the supplier in exchange for the purchase price. As previously discussed, this is meaningless for the consumer as the cost of the skin lightening cream is trifling compared to the damages suffered. This leads to the implementation of the strict liability principle.

5.3.8 Product liability

One of the most important provisions that has been introduced in the CPA is s 61 which relates to the liability for damage caused by defective or unsafe goods.³⁷⁸ This statutory provision is a complete transformation of the common law position relating to damage caused as a result of defective goods.³⁷⁹ In terms of s 61 of the CPA, the producer, importer, distributor or retailer of any goods can now be held liable for any harm,³⁸⁰ whether wholly or in part as a result of supplying unsafe goods to a consumer,³⁸¹ a product failure, defect or hazard in any goods,³⁸² or inadequate instructions or warnings provided to the consumer regarding any hazard arising from or related to the use of such goods,³⁸³ irrespective of whether the harm was caused due to negligence on the part of the producer, importer, distributor or retailer.³⁸⁴ In the event that more than one person in the supply chain is liable, such liability will be joint and several.³⁸⁵ This is a major development in the law relating to product liability as the CPA now allows all the parties in the supply chain to be held liable for harm caused to consumers as a result of supplying harmful or defective goods. The consumer no longer bears the onus of proving fault and all the consumer

³⁷⁷ Section 56(2)(b) of the CPA.

³⁷⁸ Section 61 of the CPA.

³⁷⁹ E Van Eeden & J Barnard *Consumer Protection Law in South Africa* 2nd Ed (2017) Lexis Nexis 66.

³⁸⁰ According to s 61(5) of the CPA, harm includes any illness of any natural person.

³⁸¹ Section 61(1)(a) of the CPA.

³⁸² Section 61(1)(b) of the CPA.

³⁸³ Section 61(1)(c) of the CPA.

³⁸⁴ Section 61(1) of the CPA.

³⁸⁵ Section 61(3) of the CPA.

must be able to prove is that the defective goods caused the harm.³⁸⁶ According to Naudé and Eiselen³⁸⁷ strict liability is not limited to traders trading at a commercial level and also extends to suppliers who have been trading and may have required a licence to provide such goods to consumers.³⁸⁸ According to Van Eeden, since the product liability regime has the potential of implicating companies towards huge costs, this in turn has a substantial impact on consumer prices of the products that are associated with such regime.³⁸⁹ There are however certain defences that the supplier may raise to avoid the liability in question.³⁹⁰ These are described as follows:

1. That the unsafe product, characteristic, failure, defect or hazard is due to compliance with public regulation;³⁹¹
2. That the alleged unsafe product, characteristic, failure, defect or hazard did not exist at the time that it was supplied by that person to the other person alleged to be liable³⁹² or the alleged unsafe product, characteristic, failure, defect or hazard was “wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person”;³⁹³
3. It is unreasonable to expect the distributor or retailer to have known about the unsafe product characteristic, failure, defect or hazard having regard to that person’s role in the marketing of the goods to consumers;³⁹⁴ or

³⁸⁶ M Nöthling Slabbert, B Maister, M Botes & MS Pepper ‘The application of the consumer Protection Act in the South African health care context: concerns and recommendations’ (2011) XLIV *Comparative and International Law Journal of South Africa* 172.

³⁸⁷ T Naudé and S Eiselen *Commentary on the Consumer Protection Act* (Original service, 2014) Juta 61-3 – This is significant in the case of skin lightening creams as street vendors selling defective skin lightening creams and which require prescriptions may be held liable to consumers against the strict liability principle for supplying defective goods.

³⁸⁸ Ibid.

³⁸⁹ E Van Eeden & Barnard *Consumer Protection Law in South Africa* 384.

³⁹⁰ Section 61(4) of the CPA.

³⁹¹ Section 61(4)(a) of the CPA.

³⁹² Section 61(4)(b)(i) of the CPA.

³⁹³ Section 61(4)(b)(ii) of the CPA.

³⁹⁴ Section 61(4)(c) of the CPA.

4. The claim for damages is brought more than three years after the death or injury of the person³⁹⁵, or the earliest time which the person had knowledge of his or her illness.³⁹⁶

According to s 61(5) of the CPA, liability for harm caused includes the death, injury or illness of any natural person.³⁹⁷

The position is therefore as follows: if a retailer were to sell skin lightening creams for cosmetic use which is subsequently found to be defective and which results in harm to the consumer, the consumer may claim liability for damages in terms of s 61 of the CPA against the producer, importer, distributor or retailer. This is irrespective of whether the skin lightening cream contained a list of the ingredients or conditions of use - the mere presence of the banned and/or illegal substances in the skin lightening cream renders the skin lightening cream defective in terms of the CPA.

It is submitted that the producer, importer, distributor or retailer will not be able to rely on any of the defences available in terms of s 61(4) as the unsafe product, defect or hazard that caused the harm cannot be as a result of compliance with any regulation and is in fact a breach of the law. Furthermore, the banned active ingredients such as mercury and hydroquinone contained in the skin lightening cream are present from manufacture and one cannot use the defence that the defect or hazard resulting in the harm was inexistent at the time that it was supplied from one person to the next and without the presence of any warning signs, one cannot rely on the observance of any instructions on the product which in any event will not suffice as a defence. The distributor or retailer cannot rely on s 61(4)(c) and allege that he could not be expected to have known about the defect taking into account his role in the marketing of goods as the presence of mercury and hydroquinone in skin lightening creams for cosmetic use is prohibited by law. This is not negotiable. Further, there is sufficient evidence available on various platforms alerting individuals of the harms of the banned

³⁹⁵ Section 61(4)(d)(i) of the CPA.

³⁹⁶ Section 61(4)(d)(ii) of the CPA.

³⁹⁷ Section 61(5)(b) of the CPA.

and/or illegal substances such as mercury and hydroquinone contained in skin lightening creams and such information has been available since the introduction of the regulations to the FCDA in the 1970's. There are also ongoing articles identifying the risks of defective skin lightening creams which can easily be accessed online. There is just too much information available advising individuals of the dangers of defective skin lightening creams and therefore it is submitted that it would be extremely difficult for a supplier to argue that he could not have known about the defect especially of the sale of a product containing the illegal ingredients.

A recent case dealing with s61 of the CPA is the case of *Eskom Holdings Limited v Derek Anthony Halstead-Cleak*.³⁹⁸ In this matter, the Respondent came into contact with a low hanging live power line whilst cycling and sustained severe electrical burns.³⁹⁹ The Respondent instituted action against the Appellant alleging firstly that the Appellant was the sole supplier or producer of electricity on the national grid and its control of all power lines not falling under the control of any local authority or municipality; secondly that the Appellant is liable in terms of section 61 of CPA as the producer or supplier of electricity and in the alternative, that the Appellant negligently and wrongfully caused the damages to the Respondent.⁴⁰⁰ Whilst the court *a quo* found that the Appellant was 100 per cent liable to the Respondent in terms of s61 of the CPA⁴⁰¹, the SCA did not find the presence of a supplier and consumer relationship between the Appellant and Respondent.⁴⁰² In examining s61(1)(c), the Court held that where there is a situation for liability of goods relating to inadequate instructions of any potential hazard to the goods, such liability is only limited to instances where a consumer has entered into a transaction with the Appellant.⁴⁰³ The Court found that the Respondent was not a consumer and the Respondent had not entered into transaction with the Appellant as a supplier or producer of electricity in the ordinary course of the Appellant's

³⁹⁸ *Eskom Holdings Limited v Derek Anthony Halstead-Cleak* 2017 (1) SA 333 (SCA).

³⁹⁹ *Eskom v Halstead-Cleak* para 2.

⁴⁰⁰ *Eskom v Halstead-Cleak* para 3.

⁴⁰¹ *Eskom v Halstead-Cleak* para 5.

⁴⁰² *Eskom v Halstead-Cleak* para 23.

⁴⁰³ *Ibid.*

business⁴⁰⁴ and this case fell outside of the ambit of a consumer-supplier relationship to which the CPA applies.⁴⁰⁵ It is therefore clear that in order for a supplier to be held accountable in terms of s61 of the CPA, there must be a consumer and supplier relationship between the parties.

5.4 Conclusion

As previously discussed, the CPA contains various fundamental rights for consumers so as to ensure that consumers are protected from unscrupulous suppliers in the marketplace. For the purposes of this dissertation, the main provision applicable to the sale of defective goods is that the CPA now entitles a consumer to hold any party in the supply chain liable for the sale of defective goods to the consumer. This is a major development of the common law as in the past the consumer's remedies were limited to certain factors surrounding the sale of the products which determined whether the consumer was entitled to consequential damages. With the recent implementation of the strict liability principle, an ordinary retailer may be held liable and this could even mean a retailer at the roadside or train station. Suppliers cannot raise the defence that they were unaware of what they were selling to consumers as there is just too much evidence available warning individuals about the sale of skin lightening creams containing banned and/or illegal substances. If the consumer is found a victim of defective skin lightening creams, the consumer is entitled to redress. The access to redress to consumers as well as the penalties available to suppliers are discussed in the next chapter.

⁴⁰⁴ *Eskom v Halstead-Cleak* para 22.

⁴⁰⁵ *Eskom v Halstead-Cleak* para 25.

CHAPTER 6

ACCESS TO REDRESS

6.1 Introduction

Access to redress is a vital component towards the implementation of consumer rights; without effective means of redress, the realisation of consumer rights is virtually impossible. With the introduction of the CPA, certain provisions have been made available to consumers in order to obtain redress in the case of a supplier breaching any provision of the CPA. According to Van Heerden,⁴⁰⁶ a significant aspect of access to redress in terms of the CPA is to create the motion for a less litigious environment for consumers by virtue of the presence of various dispute resolution mechanisms available to consumers instead of consumers approaching a court.⁴⁰⁷ The applicable provisions of access to redress will be discussed throughout this chapter.

In terms of s 69 of the CPA, there are various dispute resolution mechanisms available in order for consumers to obtain redress.⁴⁰⁸ A consumer may enforce their rights contained in the CPA by referring the matter to the tribunal (if permitted),⁴⁰⁹ to the relevant industry Ombud,⁴¹⁰ to a consumer court,⁴¹¹ to an alternative dispute resolution agent,⁴¹² via a complaint with a commission,⁴¹³ or to the court with jurisdiction if all the other remedies have been exhausted.⁴¹⁴ This means that before a consumer approaches a civil court for relief, the consumer is obliged to exhaust all other means of redress.⁴¹⁵ In the case of

⁴⁰⁶ T Naudé and S Eiselen *Commentary on the Consumer Protection Act* (Original service, 2014) Juta 68-4.

⁴⁰⁷ Ibid.

⁴⁰⁸ T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' (2017) Vol 29 Issue 1 *South African Mercantile Law Journal* 4.

⁴⁰⁹ Section 69(a) of the CPA.

⁴¹⁰ Section 69(c)(i) of the CPA.

⁴¹¹ Section 69(c)(ii) of the CPA.

⁴¹² Section 69(c)(iii) of the CPA.

⁴¹³ Section 69(c)(iv) of the CPA.

⁴¹⁴ Section 69(d) of the CPA.

⁴¹⁵ *Joyroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O and Another* (4161/2015) [2016] ZAFSHC 10; 2016(3) SA (FB) at para 8.

Joyroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O and Another, the court refused to hear an application for the refund of the full purchase price of a motor vehicle on the basis that the Applicant had not exhausted all other available remedies before having approached the civil court.⁴¹⁶ According to Woker, if the consumer's complaint cannot be directed to the Tribunal or there is no Ombud with jurisdiction, the consumer then has a choice of which forum to refer their complaint to however this process is not entirely clear for the consumer.⁴¹⁷ The consumer is then left with a variety of options and this may lead to forum shopping.⁴¹⁸ This has huge implications for consumers who are trying to claim damages from a supplier as they are required to follow the processes as set down in section 69 before having to approach a court for assistance.⁴¹⁹

In terms of s 70 of the CPA, an alternative dispute resolution agent may be an ombud with jurisdiction,⁴²⁰ an industry ombud,⁴²¹ an individual providing conciliation, mediation, or arbitration in order to resolve disputes,⁴²² or a consumer court.⁴²³ In the context of skin lightening creams, the applicable industry ombud will be the Consumer Goods and Services Ombud who is responsible for dealing with consumer complaints free of charge and responsible for investigating alleged contraventions.⁴²⁴ In addition, any self-regulatory body would qualify as an alternative dispute resolution body.⁴²⁵ Consumers could therefore refer complaints to self-regulatory bodies provided the supplier concerned was a member of that self-regulatory body.⁴²⁶

⁴¹⁶ *Joyroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O and Another* (4161/2015) [2016] ZAFSHC 10; 2016(3) SA (FB).

⁴¹⁷ T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' (2017) Vol 29 Issue 1 *South African Mercantile Law Journal* 5.

⁴¹⁸ Y Mupangavanhu 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) Vol 15 No 5 *Potchefstroom Electronic Law Journal* 325; T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' (2017) Vol 29 Issue 1 *South African Mercantile Law Journal* 5.

⁴¹⁹ According to Woker, some consumers have to wait a number of years before having received any compensation from suppliers for contraventions of the CPA and this process ends up being costly for the consumer. See T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' (2017) Vol 29 Issue 1 *South African Mercantile Law Journal* 3.

⁴²⁰ Section 70(a) of the CPA.

⁴²¹ Section 70(b) of the CPA.

⁴²² Section 70(c) of the CPA.

⁴²³ Section 70(d) of the CPA.

⁴²⁴ Information about the CGSO is available at <http://www.cgso.org.za/>, accessed on 14 July 2018.

⁴²⁵ T Woker, 'Consumer protection and alternative dispute resolution' (2016) Vol 28 Issue 1 *South African Mercantile Law Journal* 31.

⁴²⁶ *Ibid.*

6.2 The National Consumer Commission

If the parties are unable to resolve their disputes via alternative dispute resolution,⁴²⁷ the referring party may then file a complaint with the National Consumer Commission⁴²⁸ in terms of s 71 of the CPA. Section 71 of the CPA provides that any person may initiate a complaint with the National Consumer Commission however the commission is at liberty to directly initiate any complaint concerning alleged prohibited conduct⁴²⁹ either when requested to do so by the Minister⁴³⁰ or by a regulatory authority⁴³¹ or accredited consumer protection group.⁴³²

6.2.1 Duties of the National Consumer Commission

The commission is responsible for receiving complaints regarding alleged prohibited conduct or offences,⁴³³ for investigating such complaints,⁴³⁴ and for issuing compliance notices.⁴³⁵ The commission may also refer the matter to the National Consumer Tribunal for a hearing into prohibited conduct.⁴³⁶

Once the complaint is initiated or received by the commission, it may issue a notice of non-referral to the complaint if it emerges that the complaint is frivolous or vexatious⁴³⁷ or does not allege any facts, or if same were true but did not form a remedy.⁴³⁸ The commission may also refer the matter to an alternative dispute resolution agent or a consumer court to assist the parties⁴³⁹ or direct

⁴²⁷ According to Y Mupangavanhu, s 72(1)(b) and (d) suggest that the commission will not investigate the matter unless the parties have attempted settlement and are unsuccessful. This information is obtained from Y Mupangavanhu 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) Vol 15 No 5 *Potchefstroom Electronic Law Journal* 325.

⁴²⁸ The National Consumer Commission was established in terms of s 85 of the CPA and has jurisdiction throughout the Republic of South Africa.

⁴²⁹ Section 71(2) of the CPA.

⁴³⁰ Section 71(2)(a) of the CPA.

⁴³¹ Section 71(2)(b)(ii) of the CPA.

⁴³² Section 71(2)(b)(iii) of the CPA.

⁴³³ Section 99(b) of the CPA.

⁴³⁴ Section 99(d) of the CPA.

⁴³⁵ Section 99(e) of the CPA.

⁴³⁶ Section 99(h) of the CPA.

⁴³⁷ Section 72(1)(a)(i) of the CPA.

⁴³⁸ Section 72(1)(a)(ii) of the CPA.

⁴³⁹ Section 72(1)(b) of the CPA.

an inspector to investigate the complaint.⁴⁴⁰ Once the commission has investigated the complaint, it may either issue a notice of non-referral to the complaint⁴⁴¹ or refer the matter to the National Prosecuting Authority.⁴⁴² If the commission has found that the supplier has engaged in prohibited conduct, it may draft a consent order⁴⁴³ or issue compliance notices.⁴⁴⁴

If the commission has issued a compliance notice in terms of s 100 of the CPA and a person fails to comply therewith, then the commission may apply to the National Consumer Tribunal⁴⁴⁵ (the tribunal) for the imposition of an administrative fine.⁴⁴⁶ It is therefore clear that the commission is limited to investigating alleged complaints relating to prohibited conduct and imposing compliance notices however it may not prosecute⁴⁴⁷ and if an administrative penalty ought to be imposed, it is for the tribunal to do so.

In terms of s 112 of the CPA, the tribunal may impose administrative penalties in respect of prohibited or mandatory conduct. The administrative penalty imposed by the tribunal must not exceed the greater of ten percent of the respondent's annual turnover during the preceding financial year⁴⁴⁸ or a million Rand.⁴⁴⁹ The determining factors that the tribunal takes into account when calculating the administrative penalty are the nature and extent of the contravention,⁴⁵⁰ the loss or damage suffered,⁴⁵¹ and the behaviour of the respondent.⁴⁵² Any decision taken by the tribunal is of the same force and effect as if it were an order of the High Court.⁴⁵³ This administrative penalty is a major deterrent for suppliers to ensure that they comply with the provisions of the CPA as the administrative penalty that suppliers may face if found in contravention

⁴⁴⁰ Section 72(1)(d) of the CPA.

⁴⁴¹ Section 73(1)(a) of the CPA.

⁴⁴² Section 73(1)(b) of the CPA.

⁴⁴³ Section 73(1)(c)(ii) of the CPA.

⁴⁴⁴ Section 73(1)(c)(iv) of the CPA.

⁴⁴⁵ The National Consumer Tribunal was created in terms of s 26 of the National Credit Act 34 of 2005.

⁴⁴⁶ Section 100(6) of the CPA.

⁴⁴⁷ Y Mupangavanhu 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) Vol 15 No 5 *Potchefstroom Electronic Law Journal* 323.

⁴⁴⁸ Section 112(2)(a) of the CPA.

⁴⁴⁹ Section 112(2)(b) of the CPA.

⁴⁵⁰ Section 112(3)(a) of the CPA.

⁴⁵¹ Section 112(3)(b) of the CPA.

⁴⁵² Section 112(3)(c) of the CPA.

⁴⁵³ Section 152 of the National Credit Act 34 of 2005.

of the provisions of the CPA is substantial to the supplier's business as the supplier is obliged to pay ten percent of his annual turnover during the preceding financial year or a million Rand which is a costly exercise.

6.3 Conclusion

From the above discussion it can be seen that consumers have a number of options available to them when they have suffered damages as a result of using defective products. This process is probably most relevant in circumstances where the consumer has suffered harm after using products which were supplied to him or her by a legitimate supplier such as a chemist or other retailer or beauty salon. Trying to deal with a street vendor in these circumstances will probably be fruitless. In the light of s 69 the consumer must first attempt to resolve the dispute with the applicable industry Ombud or an alternative dispute resolution agent (which in this case would be the self-regulatory body in provided the supplier was a member of this self-regulatory body) or consumer court. If settlement has been reached, then the matter ends there. If however the consumer is not satisfied, he or she may lodge a complaint with the National Consumer Commission which will investigate the complaint and issue compliance notices, if applicable. If the supplier does not comply with the compliance notices, the commission may then refer the matter to the National Consumer Tribunal in order to impose an administrative fine which can have huge implications against the supplier.

In the context of the sale of skin lightening creams, suppliers who sell skin lightening creams at the roadside are most likely sole traders selling on a day-to-day basis with a minimal profit margin and no proper financials as opposed to registered companies. If such a supplier were found to have engaged in prohibited conduct by selling defective to consumers, it is questionable how much of an administrative penalty would be implemented. This is distinguishable from those suppliers who have registered companies with proper financial statements. Accordingly, at least when it comes to commercial business such as beauty salons, supermarkets, chemists and even doctors who specialise in cosmetic surgery and dermatology, the penalties in the CPA

are a powerful incentive for them to ensure that the products which they supply to consumers comply with the law. These penalties are far more substantial than the criminal penalties contained in the legislation discussed in chapter four.

CHAPTER 7

CONCLUSION

In conclusion, this dissertation has illustrated that although there is a demand for skin lightening creams, many of these skin lightening creams are defective in that they contain banned and/or illegal ingredients resulting in harm to consumers. This constitutes defective goods and there are legal consequences for suppliers who are found to be selling such defective products.

The first chapter in this dissertation examined the demand for skin lightening creams, the reasons for use of skin lightening products and the stereotype that fairness and lighter skin tone is more beautiful. Recent studies identifying the banned and/or restricted active ingredients contained in the skin lightening products available to consumers were examined. The prevalent issue found in the studies was that despite the presence of banned and/or restricted substances in skin lightening creams, labelling was incorrect and there was a lack of warning to the consumer about the risk of using the product.

In the second chapter, the common law relating to the law of sale and the law of delict was examined. It was noted that under the law of sale, only if the seller had fraudulently misrepresented the goods, an express warranty was given, or the seller was a manufacturer or expert, could a consumer claim consequential damages. In the absence of those circumstances, the consumer was left with general *aedilitian* remedies which did not include consequential loss resulting in a limitation of the common law of sale. Under the common law of delict, it was noted that all the requirements of a delict must be proven by the consumer with the element of fault being extremely difficult to prove.

In the third chapter, self-regulation in the form of the CTFA and ASASA was examined. The CTFA was seen as the main self-regulatory body of the cosmetics sector whilst ASASA is the self-regulatory body in the advertising sector. With the CTFA, it was stated that only those that are members of the CTFA are bound by the industry Compendium however those who do not form

part of the CTFA cannot be identified and regulated. Furthermore consumers are not able to gain access to the industry Compendium as it is only available CTFA members. The Advertising and Marketing Industry Code was further discussed, which code will be a further advancement towards the regulation of the advertising of skin lightening creams once it is in effect.

In the fourth chapter, the relevant laws were examined. It was noted that the regulations to the FCDA prohibit cosmetics purporting to be skin bleachers, skin lighteners or skin whiteners as well as the presence of active ingredients such as mercury and hydroquinone in skin lightening cosmetics. The recent regulations to the FCDA were examined and once these regulations come into effect, it will be a further form of regulation. A brief overview of the applicable provisions of the MRSA was conducted and it was concluded that products containing hydroquinone may only be sold by a pharmacist. Skin lightening creams not complying with the law thus cannot be sold by street vendors and beauty stores as they contain harmful ingredients when not administered under medical supervision.

In the fifth chapter, the applicable provisions of the CPA was examined. One of the main provisions that was introduced was the implementation of strict liability against the producer, importer, distributor or retailer of unsafe goods. The producer, importer, distributor or retailer will not be able to rely on the defences provided for in the CPA as there is far too much evidence surrounding the sale of skin lightening creams and the types of substances contained therein and such evidence is widely available. Every producer, importer, distributor or retailer ought to make himself aware of the nature of the products that he puts on the market and cannot rely on ignorance as defective skin lightening creams have the potential to cause harmful consequences to consumers.

In the sixth chapter, an overview of access to redress was examined. It was noted that a consumer has first to resolve the dispute with the supplier either through the industry Ombud or through alternative dispute resolution agents before referring the matter to the National Consumer Commission. Furthermore, the consumer is only obliged to approach a court after having exhausted all

other remedies as mentioned in section 69 of the CPA. If the supplier is found guilty of prohibited conduct, there are severe administrative penalties that may be imposed on him but the difficulty in the context of skin lightening creams lies with the street vendors who may not even be found after selling the product to the consumer. If this is the case, the consumer will then have to hold the other parties in the supply chain liable which may also be a challenging exercise as it may be difficult for the consumer to trace the manufacturer.

In conclusion, in order to prevent the situation of the sale of skin lightening creams, consumer education is a priority. Consumers need to eradicate the stereotype that fair skin is more beautiful as this stereotype is within the minds of individuals themselves and it is up to individuals to embrace their natural skin. Professor Ncoza Dlova recently promoted a march held on the 26 August 2016, aimed at educating consumers about the dangers of skin bleaching and advising them that “black is beautiful”.⁴⁵⁴ Furthermore, a documentary titled “A Gentle Magic”⁴⁵⁵ was recently released which focused on the use of skin lightening creams and the dangers associated therewith.⁴⁵⁶ More action is however required by regulating authorities to ensure that consumers are educated about the risk of using skin lightening creams.

Furthermore, law enforcement officials need to take a rigorous stand to enforce monitoring of skin lightening creams and confiscating those products in contravention of the law so that other suppliers may be deterred from selling such products. Customs officers must be able to identify products that are being imported into the Republic to ensure that such products comply with the laws of the Republic and contain proper labelling.

⁴⁵⁴ Statement by Professor Ncoza Dlova and those involved in the skin lightening march on 26 August 2016.

⁴⁵⁵ S Germaner 'Watch: Dark side of skin lightening products' *IOL* 11 November 2017, available at <https://www.iol.co.za/saturday-star/news/watch-dark-side-of-skin-lightening-products-11960680>, accessed on 10 March 2018.

⁴⁵⁶ *Ibid.*

Skin lightening products that have been banned elsewhere such as the EU cannot be imported into the Republic of South Africa⁴⁵⁷ and the question has been aptly raised by academics is whether South Africa has become a dumping ground for illegal cosmetics.⁴⁵⁸

It is submitted that although there are acceptable skin lightening creams when used for medicinal purposes, there is just too much scope for illegal products to come into the market therefore the sale of skin lightening creams ought to be banned in totality as there is an apparent misuse of the product. It is the defective skin lightening creams that are sold at the roadside or at supermarkets that have the worst effects on consumers. There cannot be the situation where there are such stringent laws surrounding the sale of skin lightening creams but, due to ineffective monitoring, these laws have no force. The Ivory Coast recently banned the sale of skin whitening creams due to long-term health problems⁴⁵⁹ and South Africa ought to follow suit. Skin lightening creams containing banned ingredients are dangerous and so the final recommendation of this dissertation is that the sale of skin lightening creams ought to be prohibited in totality. The vast majority of South African consumers are unable to distinguish between creams that comply with the law and those that do not. Therefore it is submitted that the most effective way in which to deal with the problem is to ban the sale of these products altogether.

⁴⁵⁷ Maneli et al 'Combinations of potent topical steroids, mercury and hydroquinone are common in internationally manufactured skin-lightening products: A spectroscopic study' 200.

⁴⁵⁸ 'Dangerous skin lightening products on sale on our streets' *UCT Newsroom* 31 August 2015, available at <https://www.news.uct.ac.za/article/-2015-08-31-dangerous-skin-lightening-products-on-sale-on-our-streets>, accessed on 16 April 2018.

⁴⁵⁹ P Thacker 'Another African nation bans popular skin-whitening creams' *Women in the World* 5 December 2015, available at <http://womenintheworld.com>, accessed on 16 April 2016.

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05 June 2016

Ms Nabeela Seedat (210517156)
School of Law
Howard College Campus

Dear Ms Seedat,

Protocol reference number: HSS/0753/016M

Project title: The regulation of the sale of skin lightening creams in South Africa

Full Approval – No Risk / Exempt Application

In response to your application received on 01 June 2016, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Professor Tanya Woker
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak / Ms Robynne Louw

Humanities & Social Sciences Research Ethics Committee

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