

ADVISORY NOTE 7: CPA CONSENT ORDERS

This note is provided by the office of the Consumer Goods and Services Ombud (CGSO) to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act (CPA).

Introduction

One of the possible remedies available to the CPA redress mechanisms (including an industry ombud¹ such as CGSO and the National Consumer Commission (NCC)) to which a consumer refers a complaint for resolution is a **consent order**. Although the end result may be similar whether the consent order emanates from the NCC or an ombud, the intent and process behind each respective type of consent order is slightly different. In the case of an NCC issued consent order, the intention is to predominantly to ensure compliance with the CPA and the agreement is reached between the NCC and the supplier (unless an award for damages is involved, in which case the consumer is involved also), while with an ombud issued consent order, the intention is the resolution of a dispute between the supplier and a customer and the agreement is between both of these parties, facilitated by the ombud. It is true that the NCC also engages in the conciliation of complaints, but this procedure is not expressly provided for in the CPA.

The Law

CPA: The NCC

74. (1) If a matter has been investigated by the Commission, and the Commission and the respondent [supplier under investigation] agree to the proposed terms of an appropriate order, the Tribunal or a court, without hearing any evidence, may **confirm that agreement as a consent order**.

(2) After hearing a motion for a consent order, the Tribunal or a court must—

(a) make an order as agreed to and proposed by the Commission and the respondent;

(b) indicate any changes that must be made in the draft order before it will make the order; or

(c) refuse to make the order.

(3) With the consent of a complainant, a consent order confirmed in terms of subsection (1) may include an award of damages to the complainant.

¹ **70. (1)** A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be—

...

(b) an industry ombud accredited in terms of section 82(6), if the supplier is subject to the jurisdiction of any such ombud;

An Ombud

- 70 (3)** If an alternative dispute resolution agent [including an ombud] has resolved, or assisted parties in resolving their dispute, the agent may—
- (a) **record the resolution of that dispute in the form of an order**, and
 - (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.
- (4) With the consent of a complainant, a consent order confirmed in terms of subsection (3)(b) may include an award of damages to that complainant.

The Industry Code of Conduct:

9. FUNCTIONS OF THE OFFICE OF THE CONSUMER GOODS AND SERVICES OMBUD

- 9.1 Included in the CGSO's functions is the obligation to enforce the Code by:
- 9.1.1 upon receipt of a Complaint, investigating and evaluating alleged contraventions of the Code;
 - 9.1.2 attempting to facilitate a settlement between the Parties;
 - 9.1.3 making a recommendation as to how the Dispute should be settled by the Parties;
 - 9.1.4 at the request of a Party to a Dispute, recording the resolution of a Dispute in the form of an order in terms of section 70 (3)(a) of the CPA;

Discussion

It is important to note that no matter whether a matter is dealt with by Ombud or the NCC, the initial result is an agreement between the parties. Neither the ombud nor the NCC can actually order the supplier or consumer to comply- only a court or the Tribunal can do that. The reason that an agreement is recorded **in the form of an order** is so that either of the parties can approach a court or the Tribunal to enforce it. A party approaching a court is obliged to at the end of their pleadings (claim) say what it is that they want the court to order if they are successful. So it is only when a court or the Tribunal confirms the agreement or settlement that it becomes an **order**.



In practice, there would seldom be a need to have a settlement that was reached through the facilitation of an ADR agent/ ombud made an order of court, so long as the ADR agent got both parties to sign a document indicating that they consented to the order. It would only be necessary for a party to approach a court if the other party did not adhere to the terms of the order. Fortunately, the CGSO has not yet had a problem in getting suppliers to comply so there has been no need to have an agreement turned into an order.

A dissatisfied party to an agreement can always approach a court to request it to enforce the agreement against the other party. All the CPA does is make the process for doing so easier and, accordingly, cheaper. A claimant would only need to lodge the agreement recorded in the form of an order and not need to prove the original claim or explain the settlement agreement as would otherwise be the case. The matter would be dealt with as a motion and not a trial.

Clause 11.7.7 of the Code states that if a party wants to approach the Tribunal to have a settlement made an order of Court, that party must do so at its own expense.

The provisions relating to making a settlement agreement an order is to the benefit of both the consumer **and the supplier**.

Once a person has consented to an award of damages in a consent order, that person may not institute a claim in a civil court for the damages (CPA Section 115 (2)). This means that after agreeing to a compromise, a consumer cannot at a later stage turn around and demand something else.

The CGSO does not at present record settlement agreements in the form of an order except if the agreement is reached following mediation by Equillore on its behalf. The reason the practise was introduced with mediations was to prevent the repetition of an instance in which a consumer who agreed to a settlement during the course of mediation subsequently changed her mind and made additional demands. The CGSO does, however, intend to, to the extent possible, formally record all settlement agreements in 2014, to ensure that they are indeed "in full and final settlement".

Summary

The CGSO cannot order a supplier or consumer to do anything, but it can record a settlement reached between the parties in the form of an order so that the parties can enforce the agreement at the Tribunal or in court, at their own cost, should they so wish. When an agreement is recorded it protects both parties as neither of them can go back on what they agreed.