



Developing a legal framework for e-commerce in South Africa

by

Mr. JS Phora

Student No. 23513617

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Supervisor: Dr. O Abe

Declaration

I, **Jack Sefako Phora**, student number: **23513617** declare that developing a legal framework for e-commerce in South Africa is my own work and all the sources I have used or quoted herein have been acknowledged by means of references.

I declare that this thesis or any part of it has not been submitted to any other university or institution.

.....
JS Phora

.....
Date

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List of Acronyms

3D	Three Dimension
4IR	Fourth Industrial Revolution
ADR	Alternative Dispute Resolution
B2B	Business-to-Business
B2C	Business-to-Consumers
B2G	Business-to-Government
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer
CPA	Consumer Protection Act
COD	Cash on Delivery
CGSO	Consumer Goods and Services Ombudsman
DSTV	Digital Satellite Television
DTPS	Department of Telecommunication and Postal Services
ECT	Electronic Communication and Transaction Act
EDI	Electronic Data Interchange
EFT	Electronic Funds Transfer
EU	European Union
G2BC	Government-to-Consumer-to-Business-Consumer
GDPR	General Data Protection Regulation
ICT	Information and Communication Technology
IP	Internet Protocol
LCD	Least Developed Countries
MMS	Multimedia Messaging Services
NCA	National Credit Act
NCC	National Consumer Commission
NCT	National Consumer Tribunal
ODR	Online Dispute Mechanism
OECD	Organization for Economic Co-operation
Q1	Quarter One

SADC	Southern African Development Community
SCA	Supreme Court of Appeal
SMS	Short Message Services
SME	Small Medium Enterprises
SARS	South African Revenue Services
TCP	Transmission Control Protocol
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom
USA	United State of America
WAP	Wireless Application Protocol
WTO	World Trade Organization
ZADRR	ZA Domain Name Resolution Regulation

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Abstract

Modern-day consumers procure goods and services using electronic transaction method (e-commerce). E-commerce is growing at a rapid pace throughout the world including South Africa. The whole transaction involves the exchange of commodities and information or data transfer between consumers and businesses. It is a convenient and faster method in comparison to the traditional physical transaction. An extension to e-commerce is the development of Mobile-commerce otherwise known as M-commerce, which entails the use of a mobile phone for everyday transactions. Mobile technology and the use of mobile devices have made the mobile commerce market more orientated due to its easy access. It is evident that e-commerce and M-commerce play an integral part of how business is done domestically and internationally. The use of these technologies comes with number of challenges such as the inaccuracy of information of the goods advertised on the internet, delivered goods inconsistent with consumer's specifications, inability to physically examine the goods before making payment, information of the supplier, loss of data or information are some of the challenges. To address those challenges the Electronic Communications and Transactions Act 25 of 2002 (ECT) was enacted to deal exclusively with issues relating to electronic transactions. The Consumer Protection Act, 68 of 2008 also provides extensive protection to the consumers. This dissertation examines the provision of existing legislation dealing with online consumer protection considering that internet transactions are borderless. It also investigates how effectiveness as well the comparison of Online dispute resolution mechanism in South African with international standards.

Keywords: consumers, electronic transaction, e-commerce, M-commerce, ECT, CPA, PoPIA and dispute resolution.

1 CHAPTER 1

1.1 Introduction

The evolution of information technology (IT) has introduced a better quality of graphics such as three-dimensional (3D) in digital world of the internet. The introduction of 3D on online shopping indicates that the rapid growth of internet usage and technology brought some changes in how consumers conduct businesses through the Information and Communication Technology (ICT) platforms. Electronic commerce (e-commerce) is a transformation that leverages the advancement in digital technology such as high-speed internet, smart-phone, artificial intelligence, 3D printing, Big Data Analysis, Augmented Reality, virtual reality, and diverse and secure digital payment.¹

In these modern days, consumers prefer to trade goods and services through an electronic platform. This method of a transaction referred to as electronic commerce (e-commerce) simply refers to “buying and selling of goods and services through internet platform”. The whole transaction includes money transfer, information and/or data transfer through the internet. This mode of transaction is highly convenient and quicker than the traditional offline or physical transaction. There are four (4) common categories of e-commerce transactions, classified as follows:

- **Business-to-Consumer (B2C):** This type of e-commerce transaction conducted between business and consumer where an online transaction takes place.
- **Consumer-to-Business (C2B):** This is a type of e-commerce transaction where individual consumers utilizes the internet to either sell or render services to the organization.
- **Consumer-to-Consumer (C2C):** This relates to a type of e-commerce transaction that takes place between individuals.

¹ Status, opportunity and challenges of BRICS e-commerce Report 2017

- **Business-to-Business (B2B):** This category relates to the type of e-commerce conducted between business and business e.g. bank to bank or organization to bank interchangeably.

The above categories of e-commerce are mainly utilized for the transfer of goods and services through the internet method.

However, apart from the above common categories of e-commerce, there are other categories also considered for services. Those categories of e-commerce include Business-to-Government (B2G) for services between companies and government and Government-to-Business-Consumer (G2BC) where the government provides services to business and consumers.

Another additional aspect of e-commerce is Mobile-Commerce (M-commerce). The Mobile handset technology and the use of mobile devices by consumers have made M-commerce market more orientated². This has been defined in the Organisation for Economic Co-operation and Development (OECD)³ Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in M-commerce⁴ as follows:

M-commerce refers to the commercial transactions and communication activities conducted through wireless communication service and network by means of short message services (SMS), multimedia messaging services (MMS) or the internet, using small handheld mobile devices that typically are used for telephonic communication.

The above provides a clear guide that electronic transaction is growing rapidly where consumers trade in both in e-commerce as well as an M-commerce platform. This has gone beyond to say that, transaction services are provided easily at high speed where goods and services are delivered to consumers without direct contact with the main suppliers. Now, it is easier, time and costs saving to

² DP van der Merwe and others *Information and Communication Technology Law* (2006); S Papadopoulos *Cyberlaw@SA III The law of the internet in South Africa* (2012) at 5

³ OECD described as a forum where the governments of 34 democracies with market economies work with each other, as well as with more than 70 non-member economies to promote economic growth, prosperity, and sustainable development.

⁴ The Organisation for Economic Co-operation and Development (OECD) M-Commerce Policy Guidance 2009:2; see also Papadopoulos (2012)

trade digitally than physically. Therefore, e-commerce and M-commerce as widely known are subject to both domestic and international markets.⁵ Some countries have already developed and put systems in place to address any emerging challenges that might be arising out of this electronic transaction method.

Notwithstanding rapid development of IT, this poses a challenge in that some existing legislative framework in particular African continent and other developing countries might still be lacking behind for not having a legislative framework dealing adequately with issues of electronic transactions such as infringement of privacy, data protection, defamation, delict and issues relating to frequent interaction between businesses and consumers. African continent predominantly consists of the least developed countries (LCD) and other developing countries.⁶ In South Africa, for example, the Electronic Communications and Transactions Act, 2002 (ECT)⁷ was enacted, to deal with issues relating to electronic communications and transactions. The ECT also deals with issues that are not related to electronic communications and transaction such as cyber inspections,⁸ the liability of service provider⁹ and domain names.¹⁰ The objectives of the ECT indicates government firm intention to govern and provide legal protection on electronic communication and transactions within South Africa.

Having regard to the rapid growth of e-commerce, African countries are obliged to undertake a legislative review to cover areas relating to e-commerce transactions to protect consumers and businesses when transacting with each other. It is important to point out that, the European Union (EU) Commission has already taken steps to deal with online barriers that seem to be preventing people from enjoying full access to all goods and services offered by EU Member States.¹¹ As of January 2020, new rules relating to online consumer protection will enter into force, making it easier for national authorities to protect consumers online.¹² The rules will enable the removal of websites or social media accounts where fraud has been identified. It will also be possible to request

⁵ van der Merwe at 149, refers to Reed and Angel (eds) *Computer law: The law and Regulation of information Technology* (2007)

⁶ <https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/LDCs.aspx> accessed on 17/09/2019

⁷ Electronic Communication and Transactions Act, 25 of 2002

⁸ chapter 12 of the ECT

⁹ chapter 11 of the ECT

¹⁰ chapter 10 of the ECT

¹¹ <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce> (accessed 7 May 2019)

¹² EU Digital Contract rule

information from internet service providers or banks, in order to trace the identity of rogue online traders.

The concept of e-commerce or online transaction covered by various legislations in South Africa that offer similar extensive protection to the consumer. The study will focus on the impact of e-commerce in South Africa, the applicability of the existing legislation and the effectiveness of the dispute resolution mechanism having regard to the various legislation applicable since the internet usage is borderless.

1.2 Background

It can be maintained that the majority of African countries are still lacking behind when it comes to information technology (IT) infrastructure development. In most instances, the laws put in place to address issues pertaining to online transactions are either outdated or have no specific focus in dealing with the current rapid development of e-commerce.

The study will explore the existing legislative framework in South Africa and intervention or measures put in place to protect consumers against cybercrimes, how to adjust the existing legislative framework to cater for e-commerce transaction disputes and analyze the effectiveness of online dispute resolution mechanisms.

Previously in South Africa, online consumer protection previously regulated under the auspices of Usury Act,¹³ Credit Agreement Act,¹⁴ and Consumer Affairs Act.¹⁵ The Usury Act and Credit Agreement Act cease to apply as at 01 June 2007 and Consumer Affairs was repealed by section 121 (2) (f) of Consumer Protection Act (CPA).¹⁶ Since 2002, South Africa enacted legislation called the Electronic Communications and Transaction Act (ECT)¹⁷ to cater to the issues arises out of the electronic transaction. The primary objective of the ECT is to facilitate e-commerce by creating legal certainty, promoting trust and confidence in electronic transactions. The ECT has adopted

¹³ Act 73 of 1968

¹⁴ Act 75 of 1980

¹⁵ Act 89 of 1998

¹⁶ Act 68 of 2008

¹⁷ Act 25 of 2002

principles contained in the United Nations Commission on International Trade Law (UNCITRAL) Model law in response to the legal challenges associated with e-commerce.

Notwithstanding the provisions of the ECT Act, the Consumer Protection Act (CPA)¹⁸ was enacted to govern consumer's electronic transactions activities. The CPA provides extensive protection of the consumer rights, despite the ECT and National Credit Act (NCA)¹⁹ offering in some instances such protection to consumers. The distinction between this legislation is that the CPA does not apply where the consumer protection principle of the ECT applies while NCA applies only on credit transactions. The research will not focus much on NCA as it is dealing with credit transactions in South Africa. In addition, the Protection of Personal Information Act (PoPIA)²⁰ also makes a provision on how to deal with the processing of personal information, which makes it relevant to the processing of information through online transaction. In most instances' information, such as credit card information, names and addresses are required to complete an online transaction and that's where consumers part ways with confidential information for the online transaction.

However, certain provisions of PoPIA are not yet operational and provision of this legislation gives clear guidelines on the protection of personal information. The protection of personal information is another aspect of the law that gives constitutional rights to the privacy of individuals in South Africa.²¹

The ECT, CPA, NCA, and PoPIA offer consumers with legal protection and if there is any inconsistency or misinterpretations on the provision of these legislations then domestic courts or dispute resolution forums play an important role for assisting in resolving such misinterpretation. This infers that when consumers experience challenges that lead to a legal dispute then court or dispute resolution forums adjudicate on the matter as the law prescribes. South Africa as amongst developing country has been marked as a significant e-commerce force, particularly, in the

¹⁸ Act 68 of 2008

¹⁹ Act 38 of 2005

²⁰ Act 04 of 2013

²¹ The Constitution of the Republic of South Africa Chapter 2: Right to Privacy

Southern African Development Community (SADC)²² region and the only sub-Saharan Africa country that shows growth in e-commerce.²³

Flowing from the above, the ZA Domain Name Dispute Resolution Regulation (ZADRR)²⁴ was established to adjudicate on domain name disputes in South Africa. This ZADRR appears to be effective in dealing with such a relevant domain name dispute referred to it for adjudication. However, this limit the scope of this forum as the Regulation established to deal with a domain name rather than other related matters, in particular, e-commerce related disputes.

Apart from ZADRR, there is another dispute resolution mechanism dealing specifically with online transaction disputes. The Online ombudsman such as Consumer Goods and Services Ombudsman (CGSO). This was created in terms of the CPA to adjudicate consumer's related online disputes. However, the question is the effectiveness of this forum considering that online transaction covers various area of laws, which includes the provisions of ECT, CPA, NCA, and PoPIA. The CPA provides that where there is any inconsistency between the CPA itself and another Act, which in this case will be the ECT, both provisions must be applied concurrently to the extent possible without contravening the other Act.²⁵ Having regard to the applicability of various aspects of the law there is a need for some clear guidelines on how the online ombudsman will adjudicate online disputes. The reason is that there is a direct link between the CPA, ECT, and PoPIA which the online ombudsman has to consider when adjudicating online disputes.

The study will also analyze the advantages and disadvantages of e-commerce transactions. This is because modern day's consumers seem to be more reliant on business websites such as takealot and yuppie chef locally and also international websites such as Amazon and eBay amongst other e-commerce platforms. The study will also identify risks and analyze possible mitigations thereof that are associated with e-commerce transactions.

²² The South Africa Development Community established as a development coordinating conference in 1980 and transformed into a development community in 1992. It is an inter-governmental organisation whose goal is to promote sustainable and equitable economic growth and socio-economic development through efficient productive system, deeper co-operation and integration, good governance and durable peace and security among fifteen (15) Southern African member states.

²³ R Cupido *Online Dispute Resolution an African Perspective* at 183

²⁴ <https://domaindisputes.co.za/> (accessed on 13 May 2019)

²⁵ Act 68 of 2008 sec 2(9)

1.3 PROBLEM STATEMENT

The e-commerce transaction, in general, becomes an issue that in some instances information or description of goods displayed or advertised on internet are found to be inaccurate, the delivered goods not in accordance with the consumer's specifications, inability to physical examining the goods before making payment, lack of information of the third party transacting with the consumer. Having regard to such challenges faced by the consumers, what will be the legal remedies to the affected consumers in the event such transaction fails in such instance?

The question that remains is whether the existing legislative framework in South Africa is developed to adequately cater for e-commerce issues and if so, what are measures in place which the consumers can rely on in the event dispute arise out of online transaction or trading.

Consumers in general, more specifically the lower-end consumers, might have no knowledge of what the law provides for the protection of their rights when conducting online transactions. Since e-commerce is now relevant to most consumers, the existing legislation needs to be re-examined, to address imminent problems that might be created by the use of an electronic communication system.

1.4 RESEARCH QUESTION

The increase of online transactions requires a legislative framework that accords more protection to both consumers and businesses. Therefore, the view is having comprehensive legislation that reduces the risk of fraudulent activities, particularly on electronic transaction activities. The overarching question therefore is does the current legislation; the ECT, CPA, and PoPIA, offer the consumers the necessary legal protection to transact without fear of compromising personal information and hard-earned money? It is, therefore, necessary to analyze these applicable legislations to determine whether consumers are provided with an adequate legal protection in South African law.

In that regard, to answer such questions the following questions will have to be answered:

- (a) what is the position of the legislative framework in South Africa dealing with the online transaction and legal recourse available in the event consumer suffered prejudice because of an online transaction?
- (b) what is the legal position on cross border online transactions;
- (c) the effectiveness of the online dispute resolution mechanism in South Africa? and

1.5 AIMS AND OBJECTIVES OF RESEARCH

1.5.1 Research objective

The primary research objective of the study is to examine, evaluate and discuss a legal position on e-commerce in South Africa in order to understand this concept and how does it affect the consumers as well as to determine if the consumers are provided with adequate legal protection to boost the consumer confidence when doing online transactions. Notwithstanding that, ECT was enacted to deal with matters relating to electronic transaction. There is another legislation that provides extensive legal protection to the consumers when it comes to the purchase of goods and services.²⁶ Further, there is other applicable legislation that provides protection to the consumers particularly on matters relating to protecting privacy and processing of information or data in South Africa.²⁷

Further, the research objective of the study is also going to focus on what are the legal remedies or recourse available to the consumers in the event online transaction disputes arise. It is necessary to analyze the effectiveness of the online ombudsman in South Africa since online transactions extended to cross border activities, as such an international intervention mechanism is required rather than relying only on domestic regulation.

²⁶ Act 68 of 2008

²⁷ Act 4 of 2013

1.6 LITERATURE REVIEW

The internet has revolutionized the way in which business is conducted in that it was not foreseeable for some years ago.²⁸ The first South African book on computer law covered contracts for the provision of hardware and software.²⁹ As indicated, the online transaction covers the provisions of various legislation in South Africa such as CPA, ECT, NCA, and PoPIA respectively. These aspects of law trigger issues relating to privacy, consumer protection, data protection amongst other legal rights. Therefore, e-commerce does not have an exclusive area of law as it is extended further to laws relating to banking where payment is made through an online banking system.

It has been emphasized that the development of law usually depends on the reaction to the law challenges or when circumstances changed.³⁰ The ECT adopted the provisions of UNCITRAL Model Law. Although Model law is not a Convention that finds direct application, it does provide international guidance or acceptable solution on national legislation. Chapter III of the ECT is based on Model law as other national legislation from various countries emanating from the UNCITRAL Convention on the Use of Electronic Communication in International Contracts, 2005.³¹ That was in its response to the challenges of e-commerce.³²

Although the CPA provides on the interpretation clause that, where there is an inconsistency between the CPA itself and another Act, which in this case is the ECT, the provision of both legislations must be applied concurrently to the extent possible without contravening the other.³³ Chapter VII (7), section 42 of the ECT Act applies only to electronic transactions and does not apply to electronic transaction stipulated in section 44 (2) (a) to (j) of the same Act. The ECT provides protection to the consumer in an electronic transaction prescribed in section 43 (2) to (5) as follows:

²⁸ van der Merwe and other at 149

²⁹ DP van Der Merwe *Computers and the law* (1986)

³⁰ van der Merwe and others at 152 par 6.1.2

³¹ www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005_Convention.html (accessed 9 May 2019)

³² van der Merwe and others at 156

³³ Act 68 of 2008 chapter 1

- (2) The supplier must provide a consumer with an opportunity, (a) review, correct and withdraw from the transaction.
- (3) If a supplier fails to comply with the provisions of subsection (1) or (2), the consumer may cancel the transaction with 14 days of receiving goods or services under the transaction.
- (4) If a transaction is cancelled in terms of section (3), (a) the consumer must return the goods, (b) supplier must refund all payments and (c) supplier must utilize a payment system that is sufficiently secure with reference to an acceptable technological standard.

From the foregoing, it is evident that the ECT provides sufficient protection to the consumer on issues relating to online disputes. In this regard, it will be unnecessary to apply the provisions of the CPA where the principle of the ECT already providing extensive protection to the consumer. In this research, focus will be on the scope of the ECT in order to address legal questions raised above with a view to understand what is an e-commerce and how does it impact the consumers, the position of legislative framework in South Africa dealing with online transaction, legal recourse and jurisdiction on cross-border online transaction disputes.

Having considered the provisions of ECT and other applicable legislations the online transactions encompass trans-border legal issues such as jurisdiction and applicable laws. It is therefore worth mentioning that, South African laws do not apply beyond its borders. If a contract is concluded by South African individual and Nigerian business, either the South African or the Nigerian law will be applicable. However, the fact that a contract governed by a specific legal system does not necessarily denote that the court of that particular country will have jurisdiction over the parties or adjudicate on the disputes referred.³⁴

The jurisdiction must be firstly determined before the matter can be adjudicated between the parties in dispute (plaintiff and defendant). It is common practice in South Africa that, the jurisdiction of the court might be at the domicile of the defendant. This was substantiated in the case between *IEMAS Financial Services Ltd v F H George*³⁵ where the court pointed out that, it is generally

³⁴ van der Merwe and others at 183; also referred to Forsyth *Private International law* at 169 -172

³⁵ *IEMAS Financial Services (Co-operative) Ltd v Fieland and others* (18726-2016; 93244-15; 96970-15; 75686-15; 40873-16; 96640-15) [2017] ZAGPPHC 575 (8 September 2017) para 9; *Thomas v BMW South Africa (Pty) Ltd* 1996(2). SA 106(C)

accepted based on a rule of law that the cause of action (*ratio rei gestae*): the conclusion of a contract and performance thereof, which occurred within the area of jurisdiction of court, is a ground for founding jurisdiction. However, this varies depending on the superiority of the court as section 21 of the Superior Court Act, 2013³⁶ provides that the high court has jurisdiction in relation to all cases arising within its area of jurisdiction.³⁷

The Dispute Resolution Regulation (ADR)³⁸ promulgated in terms of section 69 read with section 94 of the ECT Act makes a provision for the establishment of a forum to adjudicate on domain name disputes. As highlighted on the background above that, apart from ZADRR as a dispute resolution mechanism dealing with domain name disputes in South Africa, there is Online ombudsman. This forum was established under the CGSO to resolve online consumer disputes in terms of the CPA. However, a question is the effectiveness of this forum considering that the online transaction covers various aspects of laws in South Africa such as CPA, ECT, PoPIA and that online transaction knows no borders.

In evaluating the online transaction, the study will also analyze the ADR mechanisms to assist in resolving disputes arising from online transactions to create a conducive trading environment. The Regulation on Consumers Online Dispute Resolution, which introduced specific ODR processes for dispute between consumers and traders based in the EU came into force in 2016. This EU ODR mechanism focuses on products and services that have been brought online whether they are domestic or EU based transactions.

The rationale for choosing EU members states is that majority of these countries have been using e-commerce, which is now rapidly growing in South African markets. The EU member states are comparable to South Africa because the core characteristics like the online purchase of goods and services, challenges experienced are almost similar. To ensure online protection, the EU has put in place a General Data Protection Regulation in Europe (GDPR)³⁹ that ensures the extraterritorial

³⁶ Superior Courts Act 10 of 2013

³⁷ See above (no 36) para 10

³⁸ GN R116 in *Government Gazette* 29405 of November 2006

³⁹ General Data Protection Regulation in Europe (GDPR) 2016/679 of the European Parliament and of the Council on protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (GDP)

protection of data subjects in the EU from conduct taking place outside the EU.⁴⁰ This GDPR applies to organizations in all EU member states and has implications for businesses and individuals across Europe and beyond. The GDPR is extraterritorial as it imposes controls on personal data outside the EU. This demonstrates that data protection is a fundamental right that requires legal protection. The EU strong rules for data protection could be made futile if information can simply be moved to a “data haven” with fewer or no restrictions. Thus, the GDPR establishes a framework for the international transfer of data or information.⁴¹

1.7 RESEARCH METHODOLOGY

This research will be conducted through a desktop research methodology, library textbooks and other related sources such as published scholar’s articles and journals. The primary sources will be the applicable legislation dealing with electronic transactions in South Africa. Secondary sources will textbooks, journal articles, newspaper articles, Reports websites and Dissertations. The nature of this research will be analytical, explorative and comparative. The analytical research method will be used to define the complex concepts of e-commerce and M-commerce. The explorative methods will be used to explore e-commerce and the comparative method will be used to assess other jurisdictions such as European Union (EU) frameworks against the South African legal position on electronic communications and transactions.

1.8 CHAPTER SYNOPSIS

1.8.1 Chapter 1

This chapter provides an introduction and background on electronic communication and also sets out the rationale for the study, and states the research problem, the research question and the research objectives. The research design and methodology are briefly summarised and the chapter finally provides an overview of the chapter structure of the mini-dissertation.

⁴⁰ See page 7 of White Paper *The Global Governance of Online Consumer Protection and E-Commerce*

⁴¹ C J Hoofnagle *The European Union general data protection regulation: what it is and what it means*

1.8.2 Chapter 2: theoretical framework on e-commerce

In this chapter, deliberation will be on the justification of the concept e-commerce and impact it has on the consumers, the benefits of electronic commerce, challenges, advantages and disadvantages of e-commerce to both consumers and small businesses entering the internet space.

1.8.3 Chapter 3: Analysing the existing legal framework on an electronic transaction in South Africa

This chapter identifies and analyzes the existing legislation that is relevant to the electronic transactions in South Africa.

Further, the study will examine the current dispute resolution mechanism in South Africa and how this mechanism can be enhanced to offer improved protection to the online consumers.

1.8.4 Chapter 4: Comparative analysis of domestic legislation against other international legislation

Chapter 4 gives a detailed comparative analysis from other international chosen jurisdictions. The research will, therefore, look at other jurisdictions with a view of enhancing South African legislation on consumer protection.

1.8.5 Chapter 5: Conclusion

This chapter will conclude the research and summarise the findings and conclusions from the other chapters, explains the contribution and limitations of the present study, and also makes some recommendations for future research.

2 CHAPTER 2

THEORETICAL FRAMEWORK ON E-COMMERCE

2.1 Introduction

This concept e-commerce as briefly defined in chapter 1 refers to “buying and selling of goods and services through online platform”. Various authors described e-commerce as “the buying and selling of goods and services or the transmitting of funds or data over an electronic network primarily the internet”.⁴² Due to the evolution of internet or IT, there are various definitions provided for these methods. However, in 2001 OECD⁴³ came up with definition of electronic commerce and encouraged member countries to consider such guidelines when developing own policies in relation to e-commerce.⁴⁴ In its definition, OECD provided a broad and narrow definition of e-commerce where it defined the method as follows:

Broad definition:

An electronic transaction is the sale or purchase of goods or services, whether between businesses, households, individuals, governments and other public or private organizations concluded over computer-mediated networks.

Narrow definition:

An internet transaction is the sale or purchase of goods and services, whether between business, households, individuals, governments and other public or private organizations concluded over the internet.”

However, in 2009, OECD member countries revised the above definition of e-commerce, which now the definition reads as follows:⁴⁵

“An e-commerce transaction is the sale or purchase of goods and services, conducted over computer networks by methods specifically designed for the purpose of receiving or

⁴² <https://searchcio.techtargget.com/definition/e-commerce>

⁴³ OECD Measuring the information economy 2002 available on <https://www.oecd.org/sti/ieconomy> accessed on 22/7/2019

⁴⁴ Annexure 4 of OECD Measuring the information economy 2002 available on <https://www.oecd.org/sti/ieconomy> accessed on 22/7/2019

⁴⁵ OECD Science, Technology and Industry Scoreboard 2011 available on https://read.oecd-ilibrary.org/science-and-technology/oecd-science-technology-and-industry-scoreboard-2011_sti_scoreboard-2011-en#page155 (accessed on 23/7/2019)

placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organizations. To be included are orders made over the web, extranet or electronic data interchange. The types are defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or mutually typed e-mail.”

The WTO⁴⁶ briefly defined e-commerce as the “production, distribution, marketing, sale or delivery of goods and services by electronic means”. It provides further that, an e-commerce transaction can be between enterprises, households, individuals, governments and other public or private organizations.⁴⁷ Some writes defines e-commerce as:⁴⁸

the use of electronic means and technology to conduct commerce (sale, purchase, transfer or exchange of product, service and/or information) including within business, business to business and business to consumer interactions”

The electronic transaction has developed to incorporate transactions using an electronic handset such as mobile or cellular phones. This mobile electronic transaction method generally referred to as M-commerce, which by definition is “commercial transaction and communication activities through wireless communication service and network by means of SMS, MMS or the internet using handset device”.⁴⁹ The use of wireless technology (WAP) makes it possible for a consumer to access goods and services at any convenient time. With this mobile handset, consumers can be able to purchase or easily access certain services such as:⁵⁰

- (i) music download, ringtones, games or movies;
- (ii) mobile booking and gambling
- (iii) online banking and financial services;
- (iv) purchase of goods and services; and
- (v) interactive mobile television programs (DSTV).

In its initiatives to align policies with international standards on the issue of e-commerce, the South African government through the Department of Telecommunications and Postal Services (DTPS)

⁴⁶ World Trade Organisation (WTO) the global organisation dealing with the rules of trade between nations

⁴⁷ https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm

⁴⁸ Amir Manzoor E-commerce: an introduction 2010 at 2

⁴⁹ S Papadopoulos & S Snail Cyberlaw@SA III The law of the internet in South Africa (2012) at 63

⁵⁰ Papadopoulos at 64

developed a National Integrated Information Communication technology (ICT) Policy white paper⁵¹ to cover issues relating to e-commerce and M-commerce respectively. In this Policy, e-commerce described as “transactions that take place online, where the buyer and seller are remote from each other”. It is further provided that e-commerce includes the use of any ICT, including mobile phones, to buy or sell goods and services.⁵²

From the definitions provided above, it illustrates that there is corresponding definition or interpretation of the methods and it is safe to conclude that there is a concurrent pronouncement about the definition of the concept from various sources since its inception.

It is highlighted that, before the growth of internet usage between 1980s and 1990s the electronic data interchange (EDI) was regarded as the future of the electronic trading method between businesses. The EDI comprised of online communication between existing business partners who had regular dealings with one another, more especially business partners having an economic relationship as suppliers and distributors within a specific industry.⁵³ This method of business is viable for business practice than normal e-commerce transaction between businesses and consumers.

Indeed, e-commerce and M-commerce have changed the way business is being carried out globally and it has a direct impact on consumers and small and medium-sized enterprises (SMEs) business especially in developing countries such as South Africa. The WTO emphasized that there is a growing percentage of users accessing the internet through terminals and mobile technology.⁵⁴ It has been further emphasized that many goods and services are distributed over the internet and thus eliminates the necessity for physical inspection or interaction with business. For example, the sale of software, electronic magazines and newspapers, airline ticket and hotel accommodation bookings and vehicle rentals are some of the instances where e-commerce and M-commerce constantly used on a daily basis hence it is highlighted that it has changed the way business is carried.⁵⁵

⁵¹ National Integrated Information Communication Technology Policy white paper 2016

⁵² Policy (n 5) 172

⁵³ DP van der Merwe and Others Information and Communications Technology Law 2nd Edition at 151

⁵⁴ World Trade Organisation (WTO) *e-commerce in developing countries*

⁵⁵ van der Merve (n 11) 151

2.2 Models of E-Commerce

Apart from the major classification of e-commerce such as B2C, C2B, C2C, and B2B most businesses establish different models considered appropriate for their businesses. All these models of e-commerce connect buyers and sellers where transactions mostly processed electronically. These models can be categorized as follows:⁵⁶

- (1) **drop shipping**
Setting up of a storefront, received money and supplier deliver the goods directly to the consumer.
- (2) **Wholesaling and warehousing**
Manage inventory and stock keep track of customer orders and shipping information.
- (3) **Private labelling and manufacturing**
Manufacturing product offsite for sale and plans or prototypes to a contracted manufacturer who produce to meet customer specifications and ship directly to consumers or third parties.
- (4) **White labelling**
Choose a product that is already on the market, offer white-label options, design its own package, and label and sell the product to the consumer.
- (5) **Subscription e-commerce**
Delivery of goods to the subscribed consumers on regular basis.

In South Africa, there are also similar listed models of e-commerce that tend to be differentiated by factors such as technology platform used, delivery model, payment processing methods, marketing, and customer service.⁵⁷ These models categorized as follows;

- (1) **Online retailers**
Retailers purchase own stock and a mark-up before selling and delivering to consumers. It is an online sale where a consumer cannot physically view the product e.g. takealot, Zando, etc.

⁵⁶ <https://www.ecommerceceo.com/types-of-e-commerce-business-models/#wholesaling-and-warehousing> (accessed on 25/07/2019)

⁵⁷ S Goga, A Paelo & J Nyamwena Online retailing in South Africa: An overview 2019 pg. 13

(2) Omnichannel retailers

This is done using online order and deliver but may include a hybrid option such as “click and collect” where shopping is done online and product can be collected at the business premises, e.g. macro, etc.

(3) Marketplaces

The website provided as infrastructure for other sellers to sell their products online.

(4) Classifieds

Allows consumers to place a small advert for goods and services e.g. Gumtree and OLX etc.

2.3 Benefits and Challenges of e-commerce

Notwithstanding that, the online transaction is convenient and time-saving process than physical transaction it comes with own sets of challenges having a direct impact on the consumers. It is significant to begin evaluating the advantages of electronic transactions as modes of business interaction between consumers and businesses for the procurement of goods and services on a daily basis.

2.3.1 Importance of e-commerce to consumers

Online transaction is faster and easily accessible where millions of consumers access a variety of products from different jurisdictions via an online platform. The statistics indicate that there will be 1.92 billion global digital buyers in 2019.⁵⁸ This number expected to increase and hit a massive 2.14 billion people in 2021. On that note, the importance of e-commerce to the consumers are highlighted as follows:

1. Global market place

Online shopping offers a variety of goods and services from different companies in a different location throughout the world.

2. Accessible for 24 hours

There are no barriers to accessing online goods and services. The platform is open 24 hours a day and 7 days a week regardless of the location. It is more advantageous to the consumers as there no time limit for accessing online products.

⁵⁸ <https://www.oberlo.com/blog/ecommerce-statistics-guide-your-strategy> (accessed on 25/07/2019)

3. **Low cost of purchased products**
In some instances, there are no additional costs of shipment. Goods downloaded from the website, for example, for a subscription the consumer requires only access to the service provider's website.
4. **Easy to compare prices**
The prices of goods can be compared on different websites at the same time. This indicates the competitiveness of goods and services offered by various web trader.
5. **Time-saving**
Unlike physical transactions, no physical visit to the supplier's premises. Purchased is done online and goods are delivered to the consumers at any identified address.

The above advantages show the compelling reasons why e-commerce can become the best model to expand small businesses and be a holy grail for web traders or retailers. On the consumers' side is a purely convenient business transaction that is available 24/7 worldwide without incurred traveling costs for acquiring goods and services.

2.3.2 Disadvantages of e-commerce to the consumers

Though e-commerce could be a convenient method of a business transaction, there are a number of disadvantages associated with the online transaction that has the potential to cause serious damages and financial loss directly to the consumers. It may result in an unfair business practice in the event that consumers were deceived during online transactions. Therefore, consumers may encounter the following disadvantages:

1. **Inability to physically examine the goods**
Online shopping has introduced a 3D to improve the appearance of the goods from a different angle. Besides the quality of 3D pictures, the goods might not be the same when delivered and physically examined. This might be deceiving in some instances where the material, colour or the goods found different and of poor quality.
2. **Specifications of the goods purchased online**
Consumers might find themselves in a very awkward position where the specification does not correlate with what has been ordered online.

3. **Not knowing the identity of the supplier**
In most instance, consumers are dealing directly with the supplier of goods. The website, for example, takealot, acts as an intermediary. The goods are sourced out from the supplier not directly from the website owner.
4. **Delay in receiving the ordered product**
Sometimes a shipment can take several weeks to arrive at the consumer's destination. These delays may be associated with shipment requirements, customs duties, and tax.
5. **Illegitimate online shopping websites**
Not all online shopping websites are legitimate. The consumers might be susceptible to fraudster where after all transaction the website is deactivated and disappear without a trace.
6. **Credit card fraud**
Most online shopping website prefers credit card as a method of payment. The consumer in this regard might experience credit card fraud from the scammers.
7. **Hacking**
Some of the websites not adequately protected against hackers, which the risk also transferred to the consumer who utilizes the website.

Not all business models flourish without unique challenges affecting both consumers and businesses in that specific industry. The main concerns for online transactions such as fraud have direct consequences because fraudsters can take advantage of vulnerable consumers transacting on unsecured websites. It is prudent as business owners intending to expand the business to the e-commerce industry consider investing in cybersecurity features to safeguards against any form of losing revenue due to online fraudsters. Consumers might be sceptical to take a risk of purchasing goods online due to various disadvantages highlighted above.

The M-commerce is also part of the growing sector of online transactions where millions of people transact using the mobile handset in the African continent. This study agrees with the opinion that mobile penetration and the ability to do shopping over mobile devices have increased and although it is still infancy.⁵⁹ The leading African countries participating in this sector are South Africa, Nigeria, and Kenya. Nevertheless, impediments such as lack of infrastructure, costs of data and poor network coverages in these three (3) countries have been benefiting the economy from M-

⁵⁹ S Goga, A Paelo & J Nyamwena Online retailing in South Africa: An overview 2019 at pg. 2

commerce.⁶⁰ Kenya's population have been using M-Pesa (own by Safaricom) to exchange money and it has been considered reliable money exchange while Nigeria's e-commerce platform Jumia still relying on cash of delivery (COD) system as preferred method of payment. Jumia recorded the revenue of \$150 million in 2014 while Konga uses its own payment system called KongaPay.⁶¹ In South Africa, e-commerce businesses still use COD, instant electronic funds transfer (EFT), Snapscan and zapper.

M-commerce also has its own advantages and disadvantages which demonstrates growth in the world of online transactions. The use of mobile handset found to contain the following advantages:⁶²

- (1) it is very convenient and easy to use;
- (2) majority of the population use mobile handset (smartphone etc.);
- (3) business can easily target customers according to their location;
- (4) constant need for optimization;

The mobile transaction is perceived as less complex based on the advantages as indicated above. However, the number of disadvantages still affecting the consumers which relate specifically to; network glitch particularly in developing countries, the cost associated with the setting of an M-commerce technology, costs of data and security concerns relating to data leakages.⁶³ Network connection in certain areas within South Africa is very poor particularly in rural areas where there is no adequate network infrastructure, proper registered addresses and road infrastructure for delivery of goods.

The above-mentioned challenges, advantages/disadvantages of e-commerce and M-commerce demonstrates that regardless of the benefits there are other associated risks that may have substantial financial consequences to both consumers and the business. Therefore, security becomes a major problem when it comes to online transaction activities and it is difficult for ordinary consumers to detect any fraudulent activity while doing online shopping due to the sophistication of cybercrime. According to the Quarter one (Q1) 2018 Cybercrime Report from ThreatMetrix, e-

⁶⁰ M Kaplan Africa: An emerging Ecommerce markets with many challenge available on www.practicalecommerce.com/africa-emerging-ecommerce-market-many-challenges (accessed on 31/07/2019)

⁶¹ See above (no 18)"

⁶² <https://www.toppr.com/guides/business-environment/emerging-trends-in-business/m-commerce/> (accessed on 26/07/2019)

⁶³ See above (no 17)

commerce fraud rates have remained alarmingly high with 150 million attacks seen in 2018.⁶⁴ It has been also indicated in the report that, e-commerce cyberattacks percentage for account logins and new account creations have grown to become amongst the worst in any industry.⁶⁵ The report further indicates that e-commerce attacks are becoming popular for global fraudsters. Many merchants affected are far from developed countries such as the United States of America (USA), Republic of China (China) and Brazil. These cyber-attacks are not only limited to e-commerce, the M-commerce in developed countries as a growing method of an online transaction also affected by cyberattacks. Emerging economies, as they become part of the growing statistics in the world of the internet also become vulnerable. M-commerce is also a leading way of businesses to attract new customers and to continue to drive financial inclusion for customers in less developing countries with almost 60% of new accounts generated on mobile devices.⁶⁶

2.4 SMEs ON E-COMMERCE IN SOUTH AFRICA

Having highlighted above that, e-commerce connects buyer and seller where transactions processed electronically implies that the SMEs also affected by the advancement of IT and the use of e-commerce and M-commerce. There are various dominant online retailers or web traders in South Africa such as Takealot, YuppieChef, OneDayOnly, Loot, Kalahari.com, Zando, Spree and other recognized and biggest retailers participating online business such as Macro, Game, Woolworths, Mr. Price, Checkers, Pick n Pay and etc. Andrew Smith of Yuppiechef emphasizes is that “South African retailers have to realize that there are not just competing against their local competitors but also against the websites that exist globally”.⁶⁷ South Africans online retailers or web traders are positioning themselves by investing on e-commerce infrastructure to expand their business locally and internationally. However, reality is that with high costs of data, poor infrastructure, high delivery costs and supply chain can be contributing factors to generate revenue for SMEs.⁶⁸

There are various compelling reasons for SMEs to take advantage of the growth of information technology and the use of the internet to expand its business. In order to reach a variety of

⁶⁴ <https://www.threatmetrix.com/digital-identity-blog/cybercrime/cybercrime-report-reveals-surge-in-ecommerce-fraud-attacks/> (accessed on 23 July 2019)

⁶⁵ See above (no 12)”

⁶⁶ Q1 2018 Cybercrime Report Global insight from the ThreatMetrix Digital Identity Network at pg. 17

⁶⁷ https://www.investec.com/en_za/focus/growth/stirring-up-ecommerce-in-south-africa.html accessed on 26/07/2019

⁶⁸ <https://www.act-logistics.co.za/blog/e-commerce-in-africa/> accessed on 26/7/2019

consumers and competition both domestically and internationally, SMEs need to invest in e-commerce infrastructure as part of business and revenue growth. In an article published in October 2014,⁶⁹ the emphasizes was that “the test for the internet-based business is not the size or infrastructure surrounding a business but the ability of the business to deliver quality products, quickly and efficiently to the four corners of the world”. This implies that being competitive requires resources and innovations to benefits from IT infrastructure development. As emphasized, small businesses in South Africa should be embracing online sales through their own developed websites, marketplaces and social media despite the lack of funding to enhance their own online business⁷⁰. There were few advantages highlighted on e-commerce for the benefits of the SMEs:⁷¹

- (1) the internet provides a competitive advantage amongst business selling similar product not trading on the internet;
- (2) saving on communication, traditional advertising, and marketing costs;
- (3) creation of a flow of short-term revenue; and
- (4) provides opportunity to operate nationally and internationally reducing limitation of sale imposed on a traditional retail outlet.

The above illustrates the impact of e-commerce where there are possibilities of business growth and increase annual revenue for SMEs. However, this comes with associated costs of participating on the e-commerce platform. Innovation plays a role in order to entice consumers trading online by ensuring that the website is attractive and contains a variety of relevant products for all consumers in this industry.

2.4.1 Challenges faced by SMEs on e-commerce platform

It’s worth mentioning that, consumers have the ability to browse products of their choice from various websites with a trust that the goods legitimate and will be certainly delivered regardless of the destination. The National Report on e-commerce development in South Africa⁷² highlighted some of the problems and distinctive challenges faced by SMEs in South Africa as one of a

⁶⁹ R Govender *Advantages of e-commerce* “<https://www.bizcommunity.com/Article/196/394/120186.htm>” accessed 25/7/2019

⁷⁰ See above (no 17) at 31”

⁷¹ See above (no 15)”

⁷² P Mkhosi *National report on e-commerce development in South Africa 2017*

developing country. The said problems and challenges experienced by the SMEs were highlighted as follows:⁷³

- (1) access to finance and credit;
- (2) poor infrastructure;
- (3) low levels of research and development (R&D)
- (4) onerous labour laws;
- (5) skills shortage a constraint-an inadequately educated workforce;
- (6) inefficient government bureaucracy;
- (7) lack of coordination in government;
- (8) lack of access to markets;
- (9) the majority of SMEs fail in their first year;
- (10) logistics;
- (11) taxation;
- (12) other constraining factors

The most prominent problems in some countries are bureaucratic procedures, unfavourable tax regimes, underdeveloped delivery infrastructure, lack of e-commerce skills in SMEs which hinders their ability to compete with large companies and adequate legal protection mechanisms to ensure privacy and security of personal data or information.⁷⁴ It has to be accepted that, all BRICS countries' challenges are unique and in South Africa cost of data is considered to be high in the world and SMEs lacking access to finances poses a serious setback to the e-commerce environment.⁷⁵

The above are some of the handful of challenges confronting the SME when entering e-commerce space. However, I concur with a view that challenges can be overcome in order to ensure productivity for using e-commerce platform and that may include the following initiatives:⁷⁶

- (1) to ensure that the website that is visually appealing, provides comprehensive information about the product and contain high-quality content;
- (2) increase search engines keywords and phrase;
- (3) constant monitoring of the website and answer queries as quick as possible;
- (4) have a secure payment system that minuses the risks of customers' personal information being obtained by hackers;
- (5) website that provides contact system that enables communication with the browsers; and
- (6) have a website administration and registration of a domain name.

⁷³ See above (no 2) at 54

⁷⁴ See above (no 77) at 8

⁷⁵ See above (no 77) at 8

⁷⁶ See above (no 15)

The relevant authority as referred to in section 9 of the ECT must come to aid of SMEs by establishing or facilitate the establishment of electronic communication centres, as well as, development of web site to transact electronically.

2.5 CURRENT POSITION OF E-COMMERCE IN SOUTH AFRICA

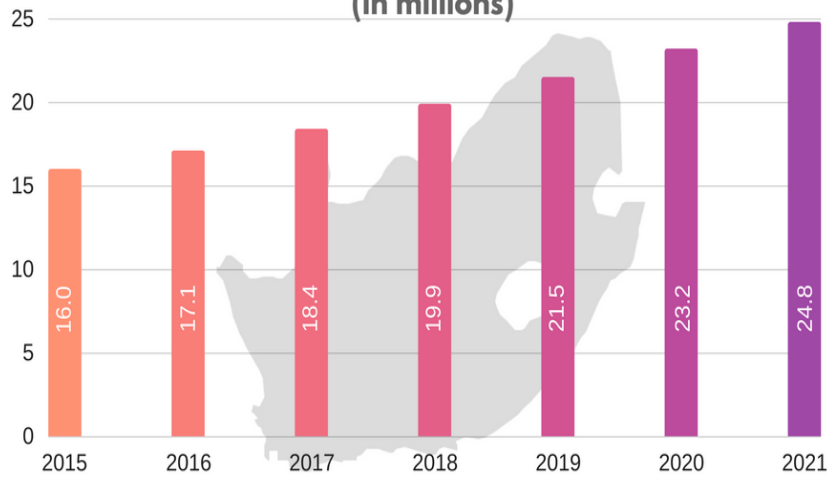
Today in South Africa, e-commerce is making steady progress in the retail environment. Traditional retailers have almost all taken on a web-presence to compete with mail-order companies where many outsource delivery to service providers. It reflects that the online spend forecast projected an annual growth rate of 15% through 2021. Accordingly, user penetration is at 47% and it is expected to reach 60% by 2021 and also mobile penetration is at 65% and continues to grow. Both online methods have become accustomed to performing consumer product research online.⁷⁷ Mobile handset or cell phone is considered to have replaced e-wallets as banks, card operators, retailers, and communications companies provide alternatives to cash as a mean of payment. Therefore, M-commerce, where mobile phones are utilized to pay for goods and services, has advanced to include mobile banking transactions. M-commerce is now attractive in South Africa judging by the number of cell phone users regardless of the limited access to the internet and poor fixed-line infrastructure. This has been a benefit for online retailers or web traders as mobile spending is projected to increase by 2018.⁷⁸ The graphics charts illustrate the number of online shoppers and projected growth in South Africa as follow:⁷⁹

⁷⁷ <https://www.export.gov/article?id=South-Africa-ecommerce> (accessed on 23 July 2019)

⁷⁸ See above (no 21)

⁷⁹ <https://www.eshopworld.com/blog/south-africa-ecommerce-insights-2017/> (accessed on 23 July 2019)

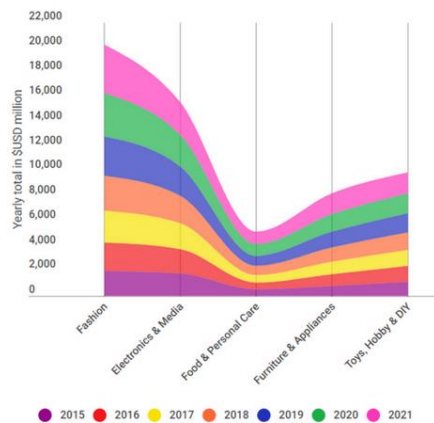
NUMBER OF ONLINE SHOPPERS IN SOUTH AFRICA (in millions)



Source: Statista, e-Commerce South Africa, User in millions

eshopworld

PROJECTED ECOMMERCE REVENUE IN SOUTH AFRICA (in \$USD millions)



Source: Statista, eCommerce South Africa, Revenue in million US\$

eshopworld

The case study indicated that in the year 2016 the retail e-commerce sales in China were at US\$316 billion in China followed by US\$16 billion in both India and Russia, US\$14 billion in Brazil and lastly US\$ 2 billion in South Africa.⁸⁰ In all BRICS countries, China’s e-commerce sale exceeded those of other BRICS countries primarily because of its large markets size, low cost of goods, better

⁸⁰ See above (no 28) at 18”

e-commerce infrastructure with big players such as Alibaba.com⁸¹ invested heavily on this platform. There are certain contributing factors taken into account when assessing the growth of e-commerce in South Africa. The fact that it is still in the nascent stage compared to other developing countries and lack of financial support to build good infrastructure.⁸² Therefore, good IT infrastructure contributes to countries' economic growth and having such will, therefore, boost consumer's moral when transacting online.

2.5.1 Cross-border implications of e-commerce

E-commerce also encourages direct importation of goods and services by consumers from international companies and manufacturers. However, the concern is that it may lead to import that threatens local manufactures in instances in which competitive pricing becomes of uneven competition. Another concern is that where there is a volume of trade in goods and services from abroad domestic tax implication and international trade law will have to apply. Further, under-invoicing may lead to lower taxes payment and South African Revenue Services (SARS) is mandated to monitor any goods within the borders of South African will have to intervene to ensure tax compliance.⁸³ The Value Added Tax (VAT) at the rate of 15% has to be levied on those goods and services, of which as a supplier it is a requirement to be registered as a VAT vendor in terms of the VAT Act 1991.⁸⁴ It was highlighted however that, the requirement for a foreign supplier to be registered in South Africa could be detrimental to cross border e-commerce.⁸⁵

2.5.2 Development of legislative framework in South Africa

The current position in South Africa is that various legislations enacted to offer adequate protection to the consumers in the event of electronic transaction violation. The Electronic Communication and Transaction Act 25 of 2002 (ECT Act), in particular chapter VII dealing with consumer rights, Consumer Protection Act 68 of 2008 (CPA) dealing general with consumer issues and Protection of Personal Information Act, 04 of 2013 (PoPIA) which governs process of accessing to personal

⁸¹ See above (no 32) at 18”

⁸² See above (no 33) at 38”

⁸³ See above (no 12)

⁸⁴ Value Added Tax 89 of 1991 at section 7

⁸⁵ See above (no 35) at 56”

information in South Africa. It can be substantiated that, the aforementioned ECT was informed by an international instrument such as OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999 (OECD Guidelines on Consumer Protection).⁸⁶ The OECD Guidelines on Consumer Protection prescribes various recommendations to consider when formulating a legislative framework for the protection of the online consumers as follows:⁸⁷

- (a) Take the necessary steps to implement the relevant sections of the Guidelines contained in the Annex attached to this Recommendation;
- (b) Widely disseminate the Guidelines to all relevant government departments and agencies, to business sectors involved in electronic commerce, to consumer representatives, to the media, to educational institutions, and to other relevant public interest groups;
- (c) Encourage businesses, consumers and their representatives to take an active role in promoting the implementation of the Guidelines at the international, national and local levels;
- (d) Encourage governments, businesses, consumers and their representatives to participate in and consider the recommendations of ongoing examinations of rules regarding applicable law and jurisdiction;
- (e) Invite non-member countries to take account of the terms of this Recommendation in reviewing their consumer policies, initiatives, and regulations;
- (f) Consult, co-operate and facilitate information sharing among themselves and non-member countries, businesses, consumers and their representatives, at both national and international levels, in providing effective consumer protection in the context of electronic commerce in accordance with the Guidelines;
- (g) Implement the Guidelines in a manner that encourages the development of new business models and technology applications that benefit consumers, and encourage consumers to take advantage of all tools available to strengthen their position as buyers; and
- (h) INSTRUCTS the Committee on Consumer Policy to exchange information on progress and experiences with respect to the implementation of this Recommendation, review that information and report to the Council in 2002, or sooner, and, as appropriate, thereafter.”

OECD through these Guidelines encourages its member’s states to adopt relevant sections of the guidelines as the basic principle in formulating its own legal framework for consumer protection.

⁸⁶ OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999 available on <https://www.oecd.org/sti/consumer/34023811.pdf> (accessed on 22 July 2019)

⁸⁷ See above (no 84)

The Guidelines updated in 2016 provides eight (8) general principles apply only to the consumer and not to B2B transactions stipulate as follows:⁸⁸

- (a) **Transparent and effective protection**
Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.
- (b) **fair business, advertising and marketing practices**
Businesses engaged in electronic commerce should pay due regard to the interests of consumers and act in accordance with fair business, advertising, and marketing practices.
- (c) **Online disclosure**
 - Information about the business;
providing accurate, clear and easily accessible information about themselves.
 - Information about goods and services:
provide accurate and easily accessible information describing the goods or services offered; sufficient to enable consumers to make an informed decision about whether to enter into the transaction.
 - Information about the transaction
provide sufficient information about the terms, conditions, and costs associated with a transaction.
- (d) **Confirmation process**
To avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services he or she wishes to purchase; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and retain a complete and accurate record of the transaction.
- (e) **Payment**
Consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford.
- (f) **Dispute resolution and redress**
Applicable law
Alternative dispute resolution
- (g) **Privacy and security**
Business-to-consumer electronic commerce should be conducted in accordance with the recognized privacy principles set out in the OECD Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data (1980), and taking into account the OECD Ministerial Declaration on the Protection of Privacy on Global Networks (1998), to provide appropriate and effective protection for consumers.

⁸⁸ OECD Guidelines General Principle

(h) **Educational and awareness**

Governments, businesses and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.

It is imperative to point that above OECD principles give clear guidance on important provisions to consider for efficient policies that will boost consumers' confidence when transacting online. Several pieces of legislation in South Africa provide for consumer protection, however, every legislation must be aligned with the provision of the Constitution of the Republic of South Africa as supreme law of the land because any inconsistency might be declared invalid by the competent court and confirmed by Constitutional court.⁸⁹ The next chapter will discuss the extent of legal protection to online consumers in terms of existing enacted legislation in South Africa.

2.6 CONCLUSION

The above analysis on e-commerce and M-commerce addresses the first question posed in this research relating to what is e-commerce and the impact it has to the consumers in the South African market. This is without a doubt that e-commerce changed the way business is being conducted and the traditional way of doing business will be surely overtaken by electronic transaction methods due to the IT development in emerging economies such as South Africa. Nevertheless, geographical limitation consumers can still access goods and services by a simple "click" on the website as is 24/7 accessible. Some of the highlighted external factors (Manzoor) are that the rapid growth of e-commerce worldwide depends on the increased number of people connected to the internet where 62% comes from developed countries and 17% from developing countries population, in 2017.⁹⁰ SMEs in developing countries such as South Africa have not invested much in e-commerce infrastructure and only a handful of e-commerce platforms such as takealot, yuppie chef, Kalahari.com, zando and other participants took advantage of this growing industry to boost its revenues.

⁸⁹ Constitution of the Republic of South Africa Sec 2 and 172 (1) (a)

⁹⁰ Manzoor (no 6) at 16

However, the unsecured and unscrupulous website requires proper monitoring to ensure such discrepancy is resolved before the consumer suffers any form of damages. For that reason, online consumer protection through an adequate legislative framework and policies is required to boost consumer confidence. Therefore, South Africa needs to align its legislation and policies to cater for changes associated with the rapid growth of e-commerce. It is compulsory to ensure that fundamental right of online consumers as enshrined in the Constitution such as the right to privacy are adequately protected.⁹¹ While Chapter VII of the ECT and CPA provides for online consumer statutory right, there is a need for the further regulatory framework as e-commerce brought new challenges that requires legislative enhancement.

There is a compelling reason for the South African businesses to consider investing in e-commerce infrastructure to become competitive with other foreign businesses taking part in this industry. As mentioned that retail e-commerce sales in China were at US\$316 billion followed by US\$16 billion in both India and Russia, and US\$14 in billion in Brazil. South Africa has to improve its infrastructure in order to surpass its US\$ 2 billion marks. The fact that e-commerce in South Africa is still in the nascent stage compared to other developing countries does not suggest the government should not prioritize improving IT infrastructure. Since the South African government is positioning itself to embrace changes that encompass the fourth industrial revolution (4IR) e-commerce also requires advanced and reliable IT infrastructure to able to benefit from this industry. The next chapter will, therefore, focus on the legislative framework in South Africa, more importantly, the provision of e-commerce.

⁹¹ Constitution of Republic of South Africa, 1996 sec 14

3 CHAPTER 3

ANALYSIS OF LEGAL FRAMEWORK ON ELECTRONIC TRANSACTION IN SOUTH AFRICA

3.1 Introduction

It is worth mentioning that, Constitution of the Republic of South Africa is the supreme law of the land and any legislation found to be inconsistent with it will be considered invalid and have no legal effect. The fundamental constitutional rights enshrined in the Constitution such as the right to privacy⁹² and right to access information⁹³ indicates that it is necessary for the government to enact legislation that will adequately provide for such protection to the people.⁹⁴ To balance such constitutional right enshrined in the Constitution, ECT Act was enacted in 2002 to deal exclusively with issues relating to communication and transaction through internet platforms such as a computer, cell phone, and other relevant transaction methods. The objectives of the ECT is to create legal certainty and promote trust and confidence in the electronic transaction for the consumers.⁹⁵ Therefore, to have clear guidance on how the internet operates it is imperative to understand its meaning. The definition of this word “internet” found in section 1 of the ECT Act and defined as:

“the interconnected system of a network that connects computers around the world using TCP/ IP and includes future version thereof. TCP/IP means the Transmission Control Protocol/Internet Protocol used by an information system to connect to the internet”

It is emphasized that the interconnection of the network function was simplified (Buys and Cronje) in order to have a broader understanding of the concept as follows:⁹⁶

“the telecommunication facility provider creates the physical telecommunication connections that allow the various computers (which reside on the interconnected networks) to communicate with each other. In order to enable this, a common language, or protocol, is needed to ensure that the interconnected network of computers communicates with each other clearly. This facilitated by the use of the transmission control protocol/internet protocol (TCP/IP)”.

⁹² Sec 14 of the Constitution of the Republic of South Africa

⁹³ Sec 32 of the Constitution of the Republic of South Africa

⁹⁴ Chapter 2 of the Constitution of the Republic of South Africa

⁹⁵ van der Merwe & others at 424

⁹⁶ Y Burns *Communication Law* (2016) 506

It is my submission that the internet is a technical tool that is not limited only to communicate but also to transact electronically with each other and without it; e-commerce would not have been in existence. It has been emphasized that the internet has revolutionized the way in which business is done in ways that it was difficult to foresee even only ten years ago.⁹⁷ Although the current ECT does not provide a clear definition of the electronic transaction in order to validate reasons for online consumer protection as objectives of the ECT. The ECT only defines a transaction as either a commercial or a non-commercial nature and includes the provision of information and e-government services.⁹⁸ However, it cannot be construed that the ECT is not applicable because Chapter VII of this legislation provides exclusive online consumer protection. However, this seems to be addressed on the proposed Electronic Communication and Transaction Bill (the Bill) where the meaning of “electronic transaction” was inserted to mean, “a transaction conducted using electronic communication.”⁹⁹

The discussion in this chapter will focus mainly on the legislative framework relating to consumer protection in the e-commerce industry. Chapter VII of the ECT deals exclusively with consumer protection, particularly on purchases of goods and services through online or internet methods. Section 43 of the ECT makes it mandatory for suppliers to be transparent about the information published on their websites. This implies that suppliers or online retailers must act transparently and refrain from providing misleading information about their online products or services. Section 43(3) of the ECT offers consumers the legal right to cancel the contract within fourteen (14) days in the event there is none compliance with the provisions subsection (1) and (2) of the same Act. This kind of protection emanates from the provision of the European Distance Selling Directive¹⁰⁰ where suppliers are expected to design own e-commerce websites considering this provision.

As highlighted above, Chapter VII of the ECT offers exclusive protection to online consumers. Therefore, the definition of a consumer is fundamental in determining who warrants protection

⁹⁷ See above (no 6) 509”

⁹⁸ Act 25 of 2002 at sec 1

⁹⁹ Electronic Communication and Transaction Amendment Bill, section 1 (v)

¹⁰⁰ DIRECTIVE 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

under consumer protection legislation.¹⁰¹ In chapter 1 of the ECT, the word “consumer” is defined as follows:

“any natural person who enters or intends to entering into an electronic transaction with the supplier as the end-user of the goods or services offered by the supplier”

The current definition of the word consumer appears to be limited only to an online consumer as a natural person and end-user of goods and services by the suppliers. However, this meaning will only change when Electronic Communication and Transaction Bill (the Bill) becomes law. The proposed definition of the consumer in terms of the Bill will extend the meaning to be aligned with a meaning given in the CPA.¹⁰² This is because the meaning of consumers in CPA appears to be wide enough to cover juristic person.

3.2 GENERAL APPLICATION OF THE ECT

As highlighted above, online consumer protection is found in Chapter VII of the ECT. Therefore, to understand the extent of consumer protection as provided for in the ECT, it is necessary to pay much attention to section 42 as this section lays a foundation on how it applies specifically to the issue relating to internet or online transactions or e-commerce. It should be placed on record that, the provision of section 42 does not apply to business-to-business (B2B) transactions but applies only to business-to-consumer transaction (B2C) category. The fact that it applies to B2C suggests that suppliers or web traders have to comply with the provision of the ECT.¹⁰³

3.2.1 Compliance with the requirements as a supplier (online retailer or web trader)

As a supplier or web traders’ providing goods and services to the consumers it is necessary to take into cognizance the application of certain sections in chapter VII of the ECT. The said sections provide statutory duties on suppliers or web traders to comply with the requirements of section 43(2) to (5) of the ECT mentioned in paragraph 1.6 above.

¹⁰¹ Papadopoulos at 65

¹⁰² Act 68 of 2008

¹⁰³ Sec 48 of the ECT

The above illustrates that as a supplier or a web trader providing goods and services to online consumers must be transparent to the extent that consumer can be able to make an informed decision before entering into such an online contract. This is because the ECT makes the online transaction a valid and acceptable contract. Further, the South African law of contract founded on the principle of freedom of contract where a party is free to negotiate and construct the contract according to their needs and formalities of contract must be complied with if prescribed by the law or parties in contract.¹⁰⁴ It is worth noting that, the primary basis of the contract is a consensus between parties (offeror and offeree) and not offer and acceptance.¹⁰⁵ Offer is a declaration of intention by one party (the offeror) to another (offeree) indicating that he or she is prepared to make and the terms on which he/she will make.¹⁰⁶ I would agree with the scholars' emphasis that, the offer must contain sufficient information to enable the person (consumer) to whom the offer is presented to form a clear idea of what the offeror (supplier or online merchant) has in mind.¹⁰⁷ The common law provision is that a contract comes into effect where there is an offer that is accepted as highlighted in *Estate Breet v Peri-Urban Areas Health Board* case.¹⁰⁸

3.2.2 Acceptance of electronic contract (e-contract)

In order for a contract to be considered valid and binding, there must be acceptance of such an offer presented. The said acceptance of a contract must be a complete and unequivocal assent to every element of the offer that can only be valid acceptance where the whole offer and nothing more or less are acceptable.¹⁰⁹ This means the acceptance must mirror the offer and not contain any additional or conflicting terms and conditions.¹¹⁰ Therefore, acceptance will give rise to the formation of a contract between the offeror and offeree if certain requirements are met.¹¹¹ Reference can be made to a case between *Bird v Sumerville*¹¹² where an estate agent informed the appellant who wishes to sell a property that the first respondent was interested in buying the property and the appellant signed a written offer to sell and name the first respondent as sole purchaser. The first and

¹⁰⁴ Van Der Merwe & others 156

¹⁰⁵ D Hutchison & others *The law of contract in South Africa* (2017) at 48

¹⁰⁶ Hutchison (no 13) at 49

¹⁰⁷ Papadopoulos at 45

¹⁰⁸ *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A)

¹⁰⁹ Hutchison (no 14) at 57

¹¹⁰ Van der Merwe at 157

¹¹¹ Hutchison (no 16) at 57

¹¹² 1961 (3) SA 194 (A); see also Hutchison (no 18) at 57

second respondents both signed the written offer as buyers and the appellant at the time making an offer was unaware that there is the second respondent as a purchaser. The court, in this case, found that both parties buying the property would not have prejudiced the appellant. The appellant was not bound to a contract of sale to both first and second respondents because he never intended that both of them could accept his offer. In this regard, the offer must be unconditional and unequivocal and accepted by a person to whom it was addressed and the acceptance was in response to the offer that complies with required formalities.¹¹³

The ECT as legislation governing the conclusion of the electronic contract (e-contract) recognizes data message as a functional equivalent to messages on paper. Section 11 of ECT, which works together with section 22, provides clear guidance relating to electronic data messages. It has been also highlighted in a landmark case between *Jafta v Ezemvelo KZN Wildlife*¹¹⁴ that, section 22 of the ECT Act acknowledges that agreements formed from data messages have legal effects. Section 11(1) of the ECT provides that, no data message shall be without legal force and effect merely because it is in the form of a data message. Section 1 of the ECT provided a definition of the word “data message” to avoid any misinterpretation. The data message defined as “data generated, sent, received or stored by electronic means and includes: -

- (a) voice, where the voice is used in an automated transaction; and
- (b) a store record.”

The above substantiated in section 11(3) to give legal of data message. Section 11(3) of the ECT provides that: -

- (3) the information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is-
 - (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
 - (b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.”

¹¹³ S Papadopoulos at 46

¹¹⁴ *Jafta v Ezemvelo KZN Wildlife* (2008) ZALC 84 at para 73

Therefore, offer and acceptance may be made by way of an electronic data message unless formalities prescribed. Section 22 strengthen on this provision as it stipulate that no agreement shall be invalid merely because the contract concluded by way of a data message.¹¹⁵ Having regard to such provision it can be concluded that data messages are legally recognized in terms of the law.¹¹⁶ It is not only a data message recognized for the validity of an e-contract. Electronic signature is also recognized for the validity of a contract when is used. Section 13 (1) of the ECT makes a provision for the recognition of electronic signature in the formation a valid e-contract and as it provides that:

-
- (3) where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if: -
 - (a) a method is used to identify the person and to indicate the person's approval of the information communication; and
 - (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

However, having regard to the recognition of the electronic signature in terms of section 13 of the ECT it has to be borne in mind that it does not apply to all electronic transactions. Electronic signature is excluded when concluding an agreement for alienation of immovable property, the conclusion of a long-term agreement for immovable property in excess of twenty (20) years, in the execution of a bill of exchange and in execution, retention, and presentation of a will or codicil.¹¹⁷ In order to understand the application of section 13, reference can be made to a case between Spring Forest Trading 599 cc v Wilberry (Pty) Ltd.¹¹⁸ The parties agreed mutually to terminate the agreement due to Spring Forest's inability to meet its rental obligations. As agreed between the parties to terminate the contract, the terms of cancellation recorded in emails and names of both Spring Forest and Wilberry representatives appeared at the end of each email. However, Wilberry disputed that the agreement was not validly terminated and as a result instituted proceedings in Kwazulu-Natal high court to interdict Spring Forest from continuing its business because it was in breach of the agreement. The high court granted the interdict but was eventually appealed to the Supreme Court of Appeal (SCA). The SCA upheld high court decision on the basis that, an email

¹¹⁵ van Der Merwe & others 157

¹¹⁶ Papadopoulos at 47

¹¹⁷ Papadopoulos at 49

¹¹⁸ *Spring Forest Trading 599 cc v Wilberry (Pty) Ltd t/a Ecowash & Another 2015 (2) SA 118 (SCA)*

exchange between the parties met the requirements for cancellation of an agreement required to be in writing in terms of section 12(a) of the ECT.¹¹⁹ Further, the typewritten names of the parties at the foot of the emails constitute data that logically associated with the data in the body of the emails as envisaged in the definition of electronic signature in terms of the ECT and therefore constitute signature as contemplated in section 13(1) and 13(3) of the ECT. The SCA also held that section 13 (1) and (3) of the ECT can be distinguished in that subsection (1) applies in the instances where a signature is required by law while subsection (3) applies in the instances where a signature is required by the parties and they have not agreed on the type of signature to be used.

It is provided in section 43(1) (a) to (r) of the ECT that, the supplier or web traders providing goods and services to the consumers must comply with the requirements by providing necessary and adequate information on its website. In the event suppliers or web traders failed to do, the ECT provides the consumer with a legal remedy. Section 43(3) provides that, in the event supplier or web traders fail to comply with the provision stipulated in section 43(1) and (2) of the ECT, the consumer has a legal right to either cancel the transaction within fourteen (14) days of receiving the goods and services. If the consumer elected to cancel and return the goods as permissible in terms of the ECT, consumer will only have to bear the costs of returning such goods and the supplier or web traders will therefore refund all payments made by consumer as stipulated in section 43(4) (a) and (b) of the ECT. The cancellation applies also in the instances of the automated transaction in terms of section 20 where “the electronic agent did not provide the consumer with an opportunity to prevent or correct the error”. The consumer will, therefore, have to notify the supplier or web traders timeously after becoming aware of such error and take reasonable steps to return the goods.

Van der Merwe highlighted that “supplier or web traders can avoid negative consequences provided in section 43(3) and 20 by ensuring that that the transactional process makes adequate provision for consumers to review, notice of any mistakes and correct them or withdraw from the transaction.¹²⁰ Providing clear information on the website as a supplier or web traders will definitely ensure accurate compliance with the provision of the ECT. Further, it will enable the consumer to make an

¹¹⁹ Section 12 (a) of the ECT provides that:

A requirement in law that a document or information must be in writing is met if the document or information is:

(a) in the form of a data message; and

(b) accessible in a manner usable for subsequent reference.

¹²⁰ van Der Merwe & others at 204

inform decision when accepting the offer presented by the supplier or web traders. It worth noting that, in certain circumstances, supplier or web trader may not simply accept liability despite the fact the law prescribes, the onus of proof will rest on the consumer to demonstrate that the information not adequately provided and resulted in the detriment of the consumer. In Durban's Water Wonderland Ltd v Botha & Another¹²¹ case, the plaintiffs injured on a ride at an amusement park and subsequently claimed damages against the defendant (owner by the time). The defendant, however, denied liability and relied on a notice that indicated, "We regret that the management must stipulate that they are absolutely unable to accept liability or responsibility for any injury or damages of any nature whatsoever". The court a quo held that any reasonable person would assume correctly that the proprietors are insured. The court reason that the notice was capable of meaning no more than that the management would not accept liability in the sense of admitting liability but would require any claimant to prove his or her claim, in a court of law. The court interpreted the notice not to be an exemption of liability and consequently imposed liability on the defendant. However, the SCA rejected the interpretation by the court a quo and held that the words "unable to accept liability" used in the notice are unambiguous and hence exclude the defendant's liability. The SCA held that the court a quo interpreted the clause as being, at most, a clause that informs users in advance that the owner will always litigate against claims made against the owner. It was further held that the interpretation did not serve the owner's interest nor did it serve the interests of the owner's insurers.

3.2.3 Providing secure payment system

Another strict requirement is found in section 43(5) of the ECT whereas a supplier or web traders, it is required by the law to ensure that the payment system is sufficiently secured according to the acceptable technology at the time of transaction and the type of transaction concerned". This highlights the importance of a payment system that will not compromise consumer personal information in any form. There are certain acceptable general technology security standards considered relevant by various authors that will ensure compliance with requirements of section 45 of the ECT. This requirement includes the follows:¹²²

¹²¹ 1999 (1) SA 982 (SCA)

¹²² See above (no 22) 204; see Papadopoulos at 77

- (a) a digital certificate from a recognized security service provider to authenticate the website;
- (b) encrypted technology that encrypt all data messages between web-traders and consumers;
- (c) the use of username and password to gain access to the web traders after the initial transaction;
- (d) timeout function in login or transaction pages which automatically logs the user off when there is no activity on the page for a certain period;
- (e) offline or offsite site storage payment information;
- (f) use of the latest updated security software and encryption methods;
- (g) regular reviews of the security procedures employed and comparable industry norms.

The above security measures require implementation by the supplier or web traders will definitely confirm that online trading should be carried without fear of compromising personal information. In the event the consumer suffers any form of damages due to insufficient security measures, the supplier or web traders will be liable for damages as prescribed in section 43(6) of the ECT.¹²³ For the consumer to succeed in claiming damages against supplier or web traders must demonstrate that:¹²⁴

- (i) there was a breach of security during and after payment process;
- (ii) the breach was a result of failure or refusal by the supplier to use or maintain a sufficient secured payment system in accordance with the latest available technology or system, and
- (iii) consumer suffered damages because of that failure to act reasonably.

An online transaction might appear easy on the face of it however, in a situation where the confidential information gets accessed by fraudsters consumer suffers a serious financial consequence. It should be mindful that, neither supplier nor web traders can be trusted with personal information due to growing concerns of cybercrime in particular, on account logins and new account creations on the e-commerce industry.¹²⁵

3.2.4 Performance by supplier

Section 46 of the ECT prescribes responsibilities which supplier or an online merchant has to exercise especially in respect of goods and services intended for consumer consumption.

¹²³ Section 43 (6) – the supplier is liable for any damages suffered by a consumer due to a failure by the supplier to comply with subsection (5)

¹²⁴ as above (no 23) at 77

¹²⁵ the Quarter one (Q1) 2018 Cybercrime Report

The provision of the above section 46 is unambiguous in the sense that in the event of none delivery of goods or services by the supplier or we then the consumer has an option to cancel the agreement provided formally notified the supplier or web traders. However, the section suggests that the option for cancellation can only be exercised within 30 days with notice to the supplier. It might be difficult for a consumer to know on which day the notice has to be served to the supplier. Will be it on the exact 30 days or after 30 days lapsed? This poses a challenge more especially on the period to exercise such an option to cancel as a consumer. Although the supplier is required in terms of this section to supply the goods and services to the consumer. If the supplier or merchant fails to execute the order due to the unavailability of the goods then must notify the consumer regarding the unavailability of those goods ordered.¹²⁶

3.2.5 The cooling-off period in terms of ECT

The ECT provides in section 44(1) that the consumer is entitled to cooling-off period without reasons or imposing any penalties against the consumer for any goods and service supplied within seven (7) days after the date of the receipt of the goods or services within 7 days after the date of the conclusion of the agreement. The consumer is therefore entitled to a full refund only if the payment effected and if not yet paid the consumer will only be liable for the costs of returning the goods directly to the supplier or web traders.¹²⁷ Technically, this gives consumer opportunity within a specified period to make a decision about the agreement and to do so without imposing any penalty. Van der Merwe correctly said that this section gives the consumer an opportunity to terminate the agreement lawfully in a reasonable short time after the transaction or having being able to reflect on consequences of the transaction.¹²⁸ It worth noting that, the ECT explicitly stipulates in section 42 (2) that section 44 does not apply to an electronic transaction. It worth noting that, the exclusion of this section emanates from the provisions of the European Distance Selling Directive.¹²⁹ Therefore, it is essential to understand where electronic transaction cooling-off is not applicable as mentioned in section 42(2) of the ECT. The cooling-off will therefore not apply to certain transactions for financial services, online auction, for supply of foodstuff, where price

¹²⁶ van der Merwe at 205

¹²⁷ Papadopoulos at 78; see also van der Merwe at 206

¹²⁸ See above (no 27) 205

¹²⁹ See above (no 10)

depends on fluctuation in the financial market, where goods are clearly personalized, computer software unsealed by consumer, sale of newspaper and magazine, gaming and lotteries services.¹³⁰

3.2.6 Unsolicited goods, services or communications

The ECT further provide in section 45 that “any person who sends unsolicited commercial communication to consumer must also provide the consumer with an option to cancel the subscription to the mailing list of the person and with the identifying particulars of the source from which that person obtained the consumer’s personal information on request of the consumer. The provision of this section deals only with unsolicited sending of commercial communication while seem to be excluding non-commercial communication such as newsletters, opinion surveys, religious messages, political contents, virus warnings, and hoaxes.¹³¹

The current position is that certain provision of the CPA does not apply where the ECT applies. This is constituted by the fact that CPA does not apply to e-commerce transactions if the ECT applies and this is to avoid any form of conflicting provision in these two legislations. Therefore, the broader application of the CPA in respect of consumer protection will be further discussed in details below.

3.2.7 Cross-border electronic transaction

Section 47 of the ECT provides that: “the protection provided to the consumer in this chapter (being chapter VII) applies irrespective of the legal system applicable to the agreement in question”. It can be commended that, the ECT appears to provide extensive protection to consumers beyond the borders of South Africa irrespective of the legal system applicable to the agreement in question. However, this section appears to mean that this legislation is extraterritorial to the extent that consumer protection afforded in this legislation is applicable beyond the borders of South Africa considering that the e-commerce transactions are borderless. Consumers actively transact online regardless of the location because the e-commerce does not differentiate consumers based on country located at the time of transacting. However, the jurisdiction and applicable laws become an

¹³⁰ Papadopoulos at 78-79; see also van der Merwe at 206

¹³¹ van der Merwe at 207

important aspect of the law especially when there is a contractual dispute between parties from different jurisdictions.¹³² Section 90 of the ECT gives recognition to the jurisdiction of the South African courts to adjudicate any matter relating to the provision of the ECT or any other legislation enacted in South Africa.¹³³ However, the provision of section 90 might be interpreted to apply strictly within South Africa borders as it provides that the courts have jurisdiction where the offense was committed in the Republic.¹³⁴

However, the wording of this section 90 slightly differs with the provision of section 28(1) (d) of the Magistrate court Act, 1944.¹³⁵ Section 28(1) (d) of the Magistrate court applicable to a jurisdiction in respect of persons, which stipulates that, “any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division”. Provision of section 90(d) seems to provide for jurisdiction over nationality rather than the offense committed by a person within its territorial borders of South Africa. Another challenge is that South African courts might not have jurisdiction beyond its border unless the perpetrator is extradited to face prosecution in South African courts. However, that will be another extensive process involving cooperation between two countries having an extradition treaty with each other.

3.3 APPLICATION OF THE CONSUMER PROTECTION ACT, 68 OF 2008 (CPA)

The CPA, which came into effect in 2011, comprehensively deals with consumer protection within South Africa’s jurisdiction. Briefly, the purpose of the CPA is to “promote the social and economic welfare of the consumers in South Africa inter alia by establishing a legal framework for a fair, accessible, efficient, sustainable and responsible consumer market that promotes fair business practices, encourages responsible consumer behaviour and provides an efficient system of redress

¹³² van der Merwe at 182

¹³³ Chapter XIV of the ECT

¹³⁴ Section 90 of the ECT provides that: A court in the Republic trying an offence in terms of this Act has jurisdiction where:

- (a) the offence was committed in the Republic;
- (b) any act of preparation towards the offence or any part of the offence was committed in the Republic or where any result of the offence has had an effect in the Republic
- (c) the offence was committed by a South African citizen or a person with permanent residence in the Republic or by a person carrying on business in the Republic; or
- (d) the offence was committed on board any ship or aircraft registered in the Republic or on a voyage or flight to or from the Republic at the time that the offence was committed

¹³⁵ Magistrate Court Act 32 of 1994

for consumers.¹³⁶ Through analyses above, it is demonstrated that chapter VII of the ECT places responsibilities to the supplier or web traders who are providing goods and services for the consumption by the consumer as per the requirements of the Act. The CPA also took a similar approach to ensure adequate consumer protection. The two legislations can be fused together as both provide protection to consumers in relation to the consumption of goods or services offered by the supplier or web trader. The research will now evaluate as to what extent does the CPA offers protection to the consumer in relation to the goods and services provided by the supplier or service providers.

A question might be why not enact one comprehensive legislation that provides extensive protection to the consumer in relation to goods and services. This is because to have two legislation proving similar protection appears to be duplication. However, it is worth noting that, CPA does not apply to electronic transactions where the ECT applies. The specific sections in which the CPA does not apply found in the provisions of the f section16, 19, 23, 26 and 33 of the ECT:

3.3.1 Defined words in CPA

CPA provides several definitions of words such as consumer, supplier, retailer, transaction and exhaustive list that are useful to understand the importance of its application in respect of goods and services supplied to the consumers¹³⁷.

There are also certain arrangements under section 5(6) considered as a transaction between the supplier and consumer, which includes the supply of any goods or services in the ordinary course of the supplier's business to any member of a club, trade union, association or society.¹³⁸

It is observed that section 5(1) of the CPA prescribes that it applies to every transaction occurring within the borders of South Africa unless there is exemption applicable. The transactions it applies to comprise of the promotion of any goods and services, performance or supply of goods and services. However, the provision of the CPA does not apply if such transaction in terms of which

¹³⁶ Papadopoulos at 67

¹³⁷ Act 68 of 2008 at section 1: Definitions

¹³⁸ Papadopoulos at 68

goods and services supplied to the State as provided in terms of subsection 5(2) of the CPA or when the exemption granted by the relevant Minister (Minister of Trade and Industry) as prescribed in section 5(3) and (4) respectively. I concur with Papadopoulos's view that provision of section 5(1) means that for those suppliers or service providers supplying goods and services to consumers in South Africa such transactions will then fall within the ambit of the CPA.¹³⁹

To examine the extent of the CPA application, it is significant to have regard to the provision of section 5(8) of the CPA. This section provides that "the application of subsection (1) - (7) extends to a matter irrespective of whether the supplier: -

- (a) resides or has its principal office within or outside the Republic;
- (b) operates on a profit basis; or
- (c) is an individual, juristic person, contracted or licenced by an organ of state to offer or supply any goods or services; or
- (d) is required or licensed in terms of any public regulation to make the supply of the particular goods and services to the public.

The above-mentioned provision, comprise of similar corresponding implication with that of Chapter XIV, section 90 of the ECT where it says the court will have jurisdiction in trying offenses committed in the Republic. Once again, this brings out the issue of territory or jurisdiction of the South African courts as discussed above.

3.3.2 Consumer protection in respect of the sale of goods

The analysis of this research focused on the application of the ECT towards the procurement of goods and services through the electronic transaction method. The CPA as the enacted legislation specifically for the protection of consumers within South Africa can be read in conjunction with the provision of the ECT particularly chapter VII relating to online transactions. There are various fundamental rights dealing with the consumer rights prescribed in chapter 2 of the CPA.¹⁴⁰

Therefore, those sections in chapter 2 of the CPA demonstrate the extent to which this legislation aim at providing protection to the consumers. Not all sections will be discussed in this research but only sections where the consumer is accorded similar protection as in ECT and PoPIA. Section

¹³⁹ See above (no 33)

¹⁴⁰ Chapter 2 dealing with Fundamental consumer rights

eight (8) of the CPA talks directly to the right to equality in the consumer market. According to this section 8(1) (a)-(g), the suppliers of goods and services must not unfairly exclude any person or category of persons from accessing any goods or services offered by the said supplier. This can be confirmed that the Constitution laid a precise foundation when it comes to the prohibited discriminatory behaviour against any person or persons and therefore the CPA proclaim on the very same provision to ensure that no consumer is directly discriminated without unjustifiable reasons.¹⁴¹ However, the grounds for such discrimination as provided in section 8 might be justified under certain circumstances specified in section 9 of the CPA.

It should be noted that such justification for discrimination in section 9 of the CPA must be read subject to section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Equality Act) to determine fairness or unfairness.¹⁴² In that regard, when the personal information of the consumer is obtained and captured some data collected or requested may depending on the nature of the transaction reflect on one or more of the categories of differentiation listed in section 9 of the Constitution and chapter 2 of the Equality Act. However, nothing in section 9 of the CPA intended to limit the authority of a court to assess the reasonableness of any conduct to the extent contemplated in section 9(1)(b) or (c) or 9(2) and (3). Whether any conduct not reasonably justified and whether any conduct was fair in the circumstances of a particular transaction of goods or service.¹⁴³

3.3.3 Consumer's right to privacy

As discussed above, the Constitution laid a foundation for most of the fundamental rights found in the CPA. Therefore, consumer right to privacy in terms of section 11 of the CPA conforms right to privacy as enshrined in section 14 of the Constitution.¹⁴⁴ This also correlates with the provision of

¹⁴¹ Section 9 of the Constitution state that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or category of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on more ground including race, gender, sex, pregnancy

¹⁴² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

¹⁴³ E van Eeden J Barnard *Consumer Protection Law in South Africa* (2017) at 199

¹⁴⁴ Section 14: Everyone has the right to privacy, which includes the right not to have
d) the privacy of their communications infringed

section 45 of the ECT dealing with unsolicited goods, services or communication. To ensure such protection, this section provide that:

- (1) the right of every person to privacy includes the right to –
 - (a) refuse to accept;
 - (b) require another person to discontinue; or
 - (c) in the case of an approach other than in person, to pre-emptively block any approach or communication to that person, if the approach or communication is primarily for the purposes of direct marketing.

Section 11(2) of the CPA stress it further that, to realize its right to privacy and enable to efficiently protect themselves against the activities mentioned in subsection 1, the consumers may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiating any further communication. Whilst ECT provides in section 45 that the consumer must be provided with an option to cancel the subscription and identify particulars of the source from which that person obtained consumer's personal information, upon request. Further, chapter 3 (which not yet in operation) of PoPIA also makes such provision in section 11(3) (b) for data subject to object processing of personal information.¹⁴⁵

Section 12 makes provision for a time in which suppliers should not engage in direct marketing to a consumer at home for any promotional purposes during the prohibited period prescribed in the CPA unless the consumer has expressly or implicitly requested or agreed to such activities. For the purposes of consumer protection, the Minister may prescribe specific days, dates, public holidays or times of days in which suppliers are prohibited to engage with consumers. The CPA Regulation also provides a mechanism in which the consumer may utilize to ensure that the suppliers desist from such activities.

3.3.4 Right to choose

The right to choose in terms of the CPA means that the consumer has a right to choose the supplier with whom would want to engage for the purposes of providing goods and services. This basic right found in section 13 to 21 of the CPA. This is a kind of autonomy where the consumer has a right to

¹⁴⁵ Section 11(3) provide that: a data subject may object, at any time, to the processing of personal information –
(b) for purposes of direct marketing other than direct marketing by means of unsolicited electronic communications as referred to in section 69

shop around for the quality goods, and services. This signifies that consumer should be in a position to choose from a range of products available on the internet at the competitive price from deferent suppliers. The supplier or web traders cannot insist on the consumer to buy goods from one specific supplier unless that is substantiated by the reasons found in section 13(1) (i) to (iii) of the CPA where it is prescribed that unless the supplier:

- (i) can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer's right to choice;
- (ii) can show that the bundling of those goods and services results in economic benefit for the consumer; or
- (iii) offers bundled goods or services separately and at individual prices.

It is provided further in section 18 of the CPA that, the consumer has a right to choose or examine goods. As provided in this section, the consumer is entitled to goods that are in accordance with the specifications and of good quality. It is worth noting that, a consumer has a right to safe, good quality of goods as required in terms of section 55 and implied warranty of quality in terms of section 56 of the CPA. This applies to the instances where the consumer is in a position to examine goods physically unlike the online transaction where consumer relies on the 3D pictures from supplier or online merchant's website. Section 19 provide that the supplier is responsible to deliver those purchased goods to the consumer provided the parties agreed otherwise between each other. It should be noted however that, the consumer may return the goods to the supplier and receive a full refund of any consideration paid for if the supplier delivered the goods to the consumer as contemplated in section 20(2) of the CPA.¹⁴⁶

Certain provisions of the CPA will not be applicable if the provision of the ECT applies. This has explicitly stipulated in section 16(1) of the CPA (dealing with a cooling-off period) will not apply to a transaction if section 44 of the ECT applies to that transaction. Further, section 19 of the CPA

¹⁴⁶ Section 20 of the CPA provides that, subject to subsection (3) and (6), the consumer may return goods to the supplier and received a full refund of any consideration paid for those goods, if the supplier has delivered: -

- (a) the goods to the consumer in terms of an agreement arising out of direct marketing, and the consumer has received that agreement during cooling-off period in accordance with section 16;
- (b) goods that the consumer did not have an opportunity to examine before delivery and the consumer has rejected delivery of those goods for any of the reasons contemplated in section 19(5);
- (c) a mixture of goods and the consumer has refused delivery of any of those goods as contemplated in section 19(8); or
- (d) goods intended to satisfy a particular purpose communicated to the supplier as contemplated in section 55(3) and within 10 business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose.

does not apply if section 46 of the ECT applies; section 23 of the CPA will not be applicable if section 43 of the ECT applies; section 26 of the CPA does not apply if section 43 of the ECT applies and section 33 of the CPA not applicable if Chapter VII of the ECT applies to the transaction.¹⁴⁷ The number of days in respect of the cooling-off period both legislation differs. In terms of ECT, the period relating to the cancellation of electronic transactions in section 44(1) is calculated as seven days from the date of receipt of the goods. Whilst in terms of the CPA number of days for cancelation is calculated within five days after the later of the date on which the transaction or agreement was concluded or the goods that were subject of the transaction were delivered to the consumer.¹⁴⁸ It might have stated in the interpretation clause that, where there is an inconsistency between CPA and another legislation the provision of both legislation must be applied concurrently to the extent possible without contravening the other. This seems to address the challenge on a reasonable number of days as both legislations applicable to consumer rights.

3.3.5 Consumer right to disclosure and information

The drafters took into account the importance of using a language that would be comprehended by consumers of all literacy levels to ensure that the consumers are able to familiarise themselves with the terms and conditions that comes with entering into an agreement. Section 22 to 28 of the CPA provide such right to consumers. The consumers have a right to information that is in plain language to be able to understand the consequence of tying themselves to such a contract. Section 22(3) of the CPA gives the Commission a mandate to publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1) (b). Section 22(1) (b) provides that, a notice or document must produce or display in a plain language if no form has been prescribed for that notice, document or visual representation. In assessing whether the notice is reasonably in plain language, the Commission will regard the following:¹⁴⁹

- (a) the context, comprehensiveness, and consistency of the notice, document or visual representation;
- (b) the organization, form, and style of the notice, document or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

¹⁴⁷ Papadopoulos at 82

¹⁴⁸ Section 16 (3) (a) to (b) of the CPA

¹⁴⁹ Section 22 (2) (a) to (d) of the CPA

(d) the use of any illustrations examples, heading or other aids to reading and understanding.

The above provision of section 22(2) can be utilized to assess or monitor the supplier's website meant for the supply of goods and services to the consumers. This is in consideration of the consumers with average literacy skill and minimal experience trading online not to be indirectly discriminated against or taken advantaged of based on the language.

3.3.6 Direct marketing as per the CPA

In terms of the CPA, direct marketing means, "to approach a person, either in person or by email or electronic communication, for the direct or indirect purpose of promoting or offering to supply in the ordinary course of business, any goods or services to the person or requesting the person to make a donation of any kind for any reason.¹⁵⁰ This has been also defined in PoPIA¹⁵¹ of which application of this legislation will be discussed below. This provides consumers with a legal right to restrict unwanted direct marketing against any person with a person offering to supply goods and services in the ordinary course of business as stated in section 11(1)(c) of the CPA. Papadopoulos maintains that this provides consumers with a legal right to refuse to accept or block any approach or communication if it's in the drive of direct marketing.¹⁵² The suppliers must be aware of the fact that this kind of activity does not continue to the extent that it constitutes a violation of consumer right. Section 32(2) of the CPA provides that, if a person who has marketed any goods as contemplated in subsection (1) left any goods with the consumer without requiring or arranging payment for them, those goods will be considered as unsolicited goods to which section 21 of the CPA applies. Section 21(1)(e) specifically stipulates that; if any goods have been delivered to, or any services performed for, a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that delivery or performance, the goods or service, as the case may be, are unsolicited goods. However, the consumers have to take note of subsequent section 21(2) (b) which indicates that if those goods are clearly addressed to another person and delivered at incorrect address or having regard to the circumstances of the delivery, it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to another person. Therefore, the

¹⁵⁰ Section 1 of the CPA

¹⁵¹ Protection of Personal Information Act, 2013 not operational.

¹⁵² Papadopoulos at 88

consumer is required to assist the supplier by making goods available to be returned to the supplier to avoid being liable in terms of section 21(4) of the CPA.¹⁵³

In one of the adjudicated complaints,¹⁵⁴ relating to unsolicited goods where the consumer placed an order of Smart UHD LED TV with the supplier through its official trading website. On 31/11/2015 prior to delivery of the order, the complainant partner called the supplier to cancel the order. The complainant partner was informed that the order has been cancelled and appears something will be refunded. However, the supplier delivered the order on 1/12/2015 on the day of delivery the complainant partner signed for acceptance. Realizing that it is the same order that was cancelled the complainant dispose of the TV as she regarded as unsolicited goods as per section 21 of the CPA. In resolving that complaint, the OGSO highlighted that CPA does not explicitly provide for a situation where a supplier delivers goods in error but delivering them to the wrong person. Therefore, mischief section 21 seeks to prevent is the unfair business practice of intentionally delivering goods that were not ordered. In that regard, the section that provides for the passing of ownership of unsolicited goods to a consumer as stated in section 21(6) (a) may be itself unconstitutional. It was concluded that the goods in question (TV set) was not unsolicited for the purposes of section 21 and ownership had not passed which the consumer have to make payment of the disputed sum to the supplier.

In terms of section 45(4) of the ECT dealing with unsolicited goods, services or communication it's an offense for a person who sends such unsolicited communication to consumers and that person will be liable in terms of section 89(1)¹⁵⁵ of the ECT. The CPA, Regulation 4 also provides a mechanism for consumers in respect of direct marketing for the purposes of section 11(1) and (11(2) of the CPA.

¹⁵³ Section 21(4) stipulate that: - A person who fails to comply with subsection (3)(a) is liable to the supplier or deliverer, as the case may be, for any additional costs for recovery of, or damage to, the goods arising as a result of anything done to frustrate or impede the lawful recovery of the goods.

¹⁵⁴ CGSO Decisions 2016 – Unsolicited goods -complaint no 201604-0006803 May 2016

¹⁵⁵ Section 89 (1) provides that; a person convicted of an offence referred to in section 37(3), 40(2), 58(2),80(5), 82(2) or 86(1), (2) or (3) is liable to a fine or imprisonment for a period not exceeding 12 months

3.3.7 Online auction in terms of the CPA

Section 45 of the CPA and its Regulation makes a provision for online auction. This becomes relevant as research focuses mainly on an electronic transaction where goods and services are supplied to the consumers. This section in the CPA is amongst the important section providing extensive protection to the consumer through either the internet or electronic communication platform. The auction includes the sale in execution of pursuant to a court order, to extent that the order contemplated that the sale is to be conducted by an action.¹⁵⁶ There are specific rules to internet or electronic auctions found in Regulation 30, which provides that:

- (1) any auction may be conducted via the internet or other electronic medium or platform, irrespective of where the server or other electronic medium or platform is situated, only if:
 -
 - (a) it meets all the requirements in respect of an auction provided for in these regulations or other applicable law, but with the necessary changes, in any, to suit an electronic medium or platform;
 - (b) the relevant internet website or electronic medium or platform is generally available to anyone over the age of 18 years at any time of the day;
 - (c) the relevant internet website or electronic medium or platform provides high standards of security for electronic transactions;
 - (d) the relevant internet website or electronic medium or platform provides for easy access to all records prescribed in these regulations in a generally used or accepted medium or format;
 - (e) the internet auction provider keeps the information contemplated in regulation 28 (4).
- (2) For purposes of regulation 26(2), a prospective bidder in an auction to be held via the internet or other electronic medium or platform must register by providing:
 - (a) his or her full names, identification or passport number, age, physical address, internet protocol address, and where applicable, login code or name, and password; and
 - (b) the details of the means by which payment will be effected.
- (3) An auctioneer conducting an auction via the internet or other electronic medium or platform may not exclude liability if any goods purchased by auction are not delivered to the purchaser thereof.

However, there are exceptions in which this rule of auctions may not be applicable. For instance, the rule will not apply as provided in Regulation 18(4) to transactions if the goods auctioned the proceeds go to a bona fide religious, educational, cultural, welfare, social or sports organization, which does not undertake commercial, or business operations or transactions concluded under the auspices of a registered or licensed stock exchange.¹⁵⁷ It worth noting that, Regulation 30 of the

¹⁵⁶ Section 45(1) of the CPA

¹⁵⁷ Papadopoulos at 83

CPA gives rise to the provision of section 42(2) (b) of the ECT which does not apply to an electronic transaction. Section 45 of the CPA, as well as, Regulation 18-33 governs all type of auctions and Regulation 30 dealing with internet or electronic auctions can applied in terms of the ECT as it has been explicitly stated that both legislation apply concurrently to the extent that it is possible to and comply with one without contravening the other.¹⁵⁸

3.4 GENERAL APPLICATION OF THE PROTECTION OF PERSONAL INFORMATION ACT (POPIA)

The main purpose of PoPIA is to promote the protection of personal information by public and private bodies giving effect to the constitutional right of privacy.¹⁵⁹ Although PoPIA was signed into law by the President of the Republic of South Africa, certain provisions are not yet in operation and will, therefore, be effective at later date to be determined by the Minister. There are sections that have come into effect since 11 April 2014 such as-

- (1) Section 1 dealing with the definitions;
- (2) Part A of Chapter 5 dealing with the establishment of the Information Regulator;
- (3) Section 112 dealing with powers of the relevant Minister to make Regulations relating to the establishment of the Regulator; and
- (4) Sections 113 dealing with the procedures for making Regulations by the Minister and Regulator.

As provided in section 1, PoPIA applies to all public and private bodies that process personal information entered into a record, by or on behalf of a responsible party.¹⁶⁰ It has been highlighted that personal information as per the definition in section 1 of PoPIA is limited to information about an identifiable, living natural person or existing juristic person and not the deceased person.¹⁶¹ Further, anonymous information is excluded in terms of the PoPIA. There are certain important conditions for lawful processing of personal information that includes accountability, processing limitation, purpose specification, further processing limitation, information quality, openness,

¹⁵⁸ Section 2(9)(a) of the CPA

¹⁵⁹ Section 2 of PoPIA

¹⁶⁰ Papadopoulos at 299-300

¹⁶¹ As above (no 148) 300; see chapter 1 of PoPIA

safeguards, data subject participation, processing special information, and trans-border data transfer.¹⁶²

3.4.1 Spam and direct marketing

For the purpose of this research, the focus is mainly on PoPIA's application to the electronic transaction in terms of Chapter 8 as this chapter specifically deals with rights of data subjects regarding direct marketing by means of unsolicited electronic communications (spam), directories and automated decision-making. Section 45 of the ECT deals with unsolicited goods, services or communications, which its provisions are similar to that of chapter 8 of PoPIA. In that regard, section 45 of the ECT might be repealed by the provision of chapter 8 of the PoPIA when comes into effect at the later date.

PoPIA provides a specific requirement in which the personal information of a data subject is processed which failure to observe such requirements and comply with its provision will constitute a criminal offense. This is to uphold individual privacy as one of the fundamental rights in the terms of the Constitution.¹⁶³ Section 69(1) of PoPIA provides that:-

- (1) The processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automated calling machines, facsimile machine, SMA or e-mail is prohibited unless the data subject-
 - (a) has given him, her or its consent to the procession; or
 - (b) is, subject to subsection (3), a customer of the responsible party.

From this section, it is evident that PoPIA attempts to prohibits the processing of personal information for the purposes of direct marketing. This provides legal recourse to consumers from the supplier who without proper consent, process or share consumer's personal information and must provide consumer with an option to opt-out in terms of section 11(3) (b) of PoPIA. The responsible party may only process the personal information of the consumer who is his, her or its customer subject to section 69(3), which provides that:

¹⁶² van der Merwe at 442 to 453; see also van Eeden at 572 to 580

¹⁶³ As above (no 134)

- (3) A responsible party may only process the personal information of a data subject who is a customer of the responsible party in terms of subsection (1) (b) -
 - (a) if the responsible party has obtained the contact details of the data subject in the context of the sale of a product or service;
 - (b) for the purpose of direct marketing of the responsible party's own similar products or services; and
 - (c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details-
 - (i) at the time when the information was collected; and
 - (ii) on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use.

Regardless of the manner in which the personal information is processed, this section explicitly prohibits the processing of personal information by means of automatic calling machines, facsimile machines, SMS or electronic mail. Therefore, the responsible party might not escape liability in terms of this PoPIA merely because personal information was processed by an automated calling machine. This is because Automated Calling Machine in this regard means a machine that is automatically programmed to answer calls without human intervention.¹⁶⁴

3.4.2 Directories

PoPIA further makes it mandatory in terms of section 70 for the consumer or data subject to be informed without any costs or charge before an information is included in the directory the purpose of such directory and any further uses to which the directory may possibly be put, based on search functions embedded in electronic version of the directory. The data subject must also be given a reasonable opportunity to object to such use of his, her or its personal information or to request verification, confirmation or withdrawal of such information if the data subject has not initially refused such usage.¹⁶⁵

3.4.3 Automated decision-making

It should be noted that electronic transaction is usually by means of automated communication machine, therefore, a person must have a full understanding of the legal consequences of his or her

¹⁶⁴ Sec 69 (5) of the PoPIA

¹⁶⁵ Sec 70 (1) (a) –(b) & (2); see also Papadopoulos at 90

decision before a contract have binding effects. The processing of information does not automatically constitute a valid contract. Section 71(1) clearly stipulates that:

“a person may not be subjected to a decision which results in legal consequences for him, her or it, or which affect him, her, or it to a substantial degree, which is based solely on the basis of the automated processing of personal information intended to provide a profile of such person including his or her performance at work, or his, her or its creditworthiness, reliability, location, health, personal preference or conduct”. However, section 71 (1) will not apply if a decision was taken when concluding a contract and measures have been taken to protect data subject interest.¹⁶⁶

In that regard, as provided in section 71(3) appropriate measures referred to provide an opportunity for a data subject to make representations about a decision in section 71(1) and require a responsible party to provide a data subject with sufficient information about the underlining logic of the automated processing of the information relating to him or her to be able to make appropriate representations. This suggests that consent is necessary particularly for direct marketing by electronic communications. However, such consent is not necessary for physical direct marketing.

3.4.4 Security safeguards

In terms of section 19(1) of PoPIA, a holder of information is required to ensure that personal information at their disposal is not compromised. Therefore, to give effect to this provision section 19(2) of PoPIA provides that a responsible party must take reasonable measures to-

- (a) identify all reasonably foreseeable internal and external risks to personal information in their possession or under their control;
- (b) establishes and maintain appropriate safeguards against the risks identified
- (c) regularly verify that the safeguards are effectively implemented, and
- (d) ensure that the safeguards are continually updated in the response of new risks or deficiencies in previously implemented safeguards.

It has been highlighted that appropriate security means that the measures taken should warrant a level of security that is commensurate with the risks inherent in the type of processing and

¹⁶⁶ Sec 71 (2) of the PoPIA

information involved.¹⁶⁷ If such security is compromised, then the responsible party is required in terms of section 22 of PoPIA to send a notification to the Regulator and data subject affected unless they cannot be identified.¹⁶⁸

3.4.5 Trans border information flows

The online transaction encompasses data procession in which information flows from one person to another (being a consumer to supplier domestically and internationally) for the purposes of goods and services supply. The word “processing” as defined in section 1 PoPIA means;

- Any operation or activity or any or any set of operations, whether or not by automatic means, concerning personal information, including –
- (a) the collection, receipt, recording, organization, collation, storage, updating or modification, retrieval, alteration, consultation or use;
 - (b) dissemination by means of transmission, distribution or making available in any other form; or
 - (c) merging linking, as well as restriction, degradation, erasure or destruction of information.

The above definition covers a wide range of activities relating to personal information which electronic transaction would cover in the process. Therefore, transfer or flow of information across borders involves the processing of personal information through electronic transactions. PoPIA provides protection of personal information, which specifically relate to an identifiable, living natural person and where it is applicable, to an identifiable, existing juristic person.¹⁶⁹ Since e-commerce is border-less, PoPIA provides forms of restrictions to suppliers or web traders to ensure the protection of personal information in this instance. It provides in section 72 that, any party in the Republic may not transfer personal information to third-party in a foreign country unless the third is subject to a law binding corporate rules providing an adequate level of protection. Further, the data subject consented to the transfer and transfer is necessary for the performance of the contract with the responsible party and is in the interest of data subject and responsible party.

Notwithstanding that, PoPIA makes a provision for the protection of personal information as the consumer might not be aware when transacting online that the supplier’s country has no adequate

¹⁶⁷ van Eeden at 577; see also van der Merwe at 451

¹⁶⁸ See above (no 156) 577

¹⁶⁹ Section 1 of PoPIA

law that protects information. This poses challenges to electronic commerce, in general, considering that supplier or web trader's website may not reveal such to the consumer fearing losing interest from consumers. However, businesses within South Africa must ensure compliance with the stringent requirements of the PoPIA or run the risk of being penalized.¹⁷⁰

3.5 THE EFFECTIVENESS OF THE ALTERNATIVE DISPUTE RESOLUTION MECHANISM

The Alternative Disputes Resolution (ADR) promulgated in terms of section 69 read with section 94 of the ECT intended to resolve disputes over domain name registered under the 'co.za' sub-domain.¹⁷¹ It worth noting that, this ADR in the ECT context established specifically to adjudicate matters concerning domain name registration. However, the focus in this research is mainly on addressing legal questions concerning the effectiveness of ADR as established to resolve consumers related disputes since both legislations applied concurrently in terms of section 2(9).¹⁷²

In realization of consumer rights, the affected consumer may approach the Commission, Tribunal or the Court in the event where there is infringement, impaired or threatened of rights.¹⁷³ The purpose of approaching such forums is to enforce consumer right as stated in section 69 of the CPA. The ADR established in terms of section 70 of the CPA, which stipulate that:

- (1) A consumer may seek to resolve any dispute in respect of s transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who maybe –
 - (a) an ombud with jurisdiction;
 - (b) an industry ombud accredited in terms of section 82(6)
 - (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes; or
 - (d) applying to the consumer court of the province with jurisdiction over the matter.

Consumers are authorized to approach the above-mentioned forums in the event dispute arises having regard to the processes outlined in section 71 to 78 of the CPA. Further, the above forums may impose statutory punishment as provided in section 111 to 113 ranging from penalties to fine

¹⁷⁰ Van Eeden at 581

¹⁷¹ van der Merwe at 254

¹⁷² See above (no 147)

¹⁷³ Section 41 of the CPA

or imprisonment for a period not exceeding 10 years; 10% of annual turnover. Consumers may only approach courts having jurisdiction when all remedies as stated in section 69(d) of the CPA exhausted.¹⁷⁴ This was confirmed in *Joroy 4440 cc t/a Ubuntu Procurement v Potgieter N.O & Another*¹⁷⁵ where it was highlighted that the Constitutional Court held that where a specialized framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms. Another aspect is that National Consumer Tribunal (NCT) decisions are subject to appeal or review by the High Court. Then the High Court will make appropriate orders to give effect to the consumer's right of access to redress including any order provided for in the Act and any innovative order that better advances, protects, promotes and assures the consumers' realization of their rights in terms of the CPA.¹⁷⁶ In addition to an ombudsman or industry ombudsman, an alternative dispute resolution agent¹⁷⁷ is also authorized to assist in resolving consumer disputes. The outcome of the dispute, if the consumer consented to, may be recorded and submitted to either NCT or the High Court to be made a consent order as stated in section 70(3)(b) or 74(3). This consent order, if it has been referred to ADR by the National Consumer Commission (NCC)¹⁷⁸ may with the consent of the complainant include an award of damages to the complaint.¹⁷⁹

Another important point to consider is that consumers should not delay instituting a complaint as it might be affected by prescription as stated in section 116 of the CPA.¹⁸⁰ Filing a complaint is therefore limited to a number of three years.¹⁸¹ To drive this point, in *Lazarus v RDB Project*

¹⁷⁴ Section 69 (d): A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement; or otherwise resolve any dispute with a supplier, by
(d) approach a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted

¹⁷⁵ *Joroy 4440 cc t/a Ubuntu Procurement v Portgieter N.O & Another* (2016) ZAFSHC SA 465 at 10;

¹⁷⁶ *E van Eeden* (no 135) at 33

¹⁷⁷ Alternative Dispute Resolution Agent means: -

- (a) an ombud with jurisdiction;
- (b) an industry ombud accredited in term of section 82(6); or
- (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction or an accredited industry ombud

¹⁷⁸ National Consumer Commission established in terms of section 85 of the CPA

¹⁷⁹ See above (no 159) at 33

¹⁸⁰ Section 116 (1) of the CPA states that: a complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after-

- (a) the act or omission that is the cause of the complaint; or
- (b) in the case of a course of conduct or commission practice, the date that the conduct or practice ceased.

¹⁸¹

Management CC trading as Solid¹⁸² the applicant had purchased a kitchen-top, which was installed on 3 May 2012 at his house. However, an apparent malfunctioning of the kitchen top occurred on 19 October 2012 (five months after being installed). The applicant lodged a complaint with the Western Cape Office of the Consumer Protector in December 2012. An attempt at mediation between the parties under the auspices of Consumer Protector failed in September 2013 and the matter was referred to the NCC, which in turn referred it to the Consumer Goods and Services Ombudsman in 2014. The matter was re-referred to the NCC in March 2014 when the respondent failed to respond to the complaint. The NCC eventually issued a letter of non-referral during November 2015. The applicant lodged its application with the NCT during January 2016. Based on requirements of section 116(1) the NCT held that, as supply of the goods had occurred on 3 May 2012, the defect had occurred on 19 October 2012 and the application had been lodged with the NCT in January 2016, a period of more than 3 years had elapsed since the applicant became aware of the defect. The NCT noted that it superficially appeared as if the applicant's claim had prescribed or lapsed. The applicant had, however, lodged the matter with the Office of the Consumer Protector in the Western Cape in compliance with section 69(c) (ii) of the CPA. The NCT accordingly found that prescription had been interrupted during the period commencing December 2012 when the matter lodged with the office of the Consumer Protector, the interruption continuing for a period of 11 months until October 2013, when the matter was referred to the NCC. It was submitted that it is doubtful whether the lodging of a complaint with the NCC or any consumer protection authority or consumer court has the effect of interrupting the prescription provided for in section 116(1) of the Act.

On its 2018/2019 Annual Report,¹⁸³ the OGSO indicated to have received a record number of complaints up 47% year on year from 5 593 to 8 261. It further highlighted in its annual report¹⁸⁴ that, despite the increase of cases to 47% it has closed 7 717 cases in which 63% were in favour of the complainants. The number of complaints relating to goods and services procured online rose from 2% to 6% representing an increase of 200%.

¹⁸² *Lazarus v RDB Project Management CC trading as Solid* (2016) JOL 36058 (NCT); see also van Eeden (no 160) at 420

¹⁸³ CGSO Annual Report 2018/2019

¹⁸⁴ See above (no 159)

Online ombudsman might have been established and operating however the number shows that there is more need to be done, in particular, where the complaints relate to the application of the CPA and ECT for the online procurement of goods and services.

3.6 CONCLUSION

The aim of this chapter was to evaluate the legislative framework in South Africa dealing with e-commerce. The emphasis has been made that, the right to privacy remain critical and the Constitution laid an important foundation, which the ECT, CPA, and PoPIA as discussed above in this chapter, affirms to such provision of section 14. Chapter VII of the ECT provides the necessary consumer protection specifically on electronic transactions.¹⁸⁵ Nevertheless, the scope of its application in terms of section 42(3), CPA provides extensive protection to consumers. PoPIA if fully implemented will also validate and provide the necessary consumer protection. There are various sections in all legislations discussed above that consumers can rely on for interim relief and injustice. It is mandatory for suppliers or web traders to comply with relevant provisions of this legislation and failure to do so there will be statutory penalties and sanctions. The analysis in this chapter aimed at addressing a question about the legislative framework in South Africa dealing with the online transactions and legal recourse available to consumers in the event of prejudice suffered while transacting through the internet. However, there are certain sections that are problematic such as section 47 and 90 of the ECT, as well as section 5(8) of the CPA on the issue of jurisdiction. It worth noting that, the Superior Court Act and Magistrate Court Act makes a provision on the issue of jurisdiction particularly over a person residing or present in that area of its jurisdiction. The court in certain circumstances may exercise extra-territorial jurisdiction to try terrorist acts committed abroad in terms of section 15(1) of Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.¹⁸⁶ However, the section confers to extra-territorial jurisdiction only in respect of a specific offense such as an act of terrorism.¹⁸⁷

¹⁸⁵ Section 42(1) of the ECT

¹⁸⁶ Act No 33 of 2004

¹⁸⁷ See above (no 179) at para 13

4 CHAPTER 4

INTERNATIONAL LEGAL FRAMEWORK: OVERVIEW OF ELECTRONIC COMMERCE IN THE EUROPEAN UNION

4.1 Introduction

As mentioned at the beginning, the European Union (EU) Commission introduced new rules that will take effect in January 2020 for the protection of online consumers in its member states. The main aim of this initiative is to make it easier for national authorities of member states to protect online consumers by removing sites or social media accounts where fraud identified. Further, the GDPR¹⁸⁸ is extraterritorial as it imposes controls on the processing of personal data even outside the EU.¹⁸⁹ This demonstrates that protection of data is also a fundamental right that requires adequate legal protection as is in South Africa. Article 12 stipulates clearly that, the controller must take appropriate measures referred to in Article 13 and 14 and any communication under Article 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form using clear and plain language.

Comparable to South Africa, United Kingdom (UK) enacted various legislations dealing specifically with consumer-related matters. The said legislation includes the Consumer Rights Act 2015, Data Protection Act, 2018, Consumer Contracts Regulations 2013, 524/2013 as well as, Electronic Commerce Regulations 2002. Further, there is an Alternative Dispute Resolution and ODR mechanism established under EU Regulations,¹⁹⁰ which will be discussed below. It is therefore prudent to explore the legal framework regulating specifically electronic transactions with the purpose of determining how can South Africa improve the current form of its legislation so as to keep it aligned with the international standards to accommodate the rapid growth of e-commerce globally. For the purpose of this research consideration, the focus will be on the application of the relevant legislation dealing specifically with electronic commerce in the EU.

¹⁸⁸ See above (no 40)

¹⁸⁹ Article 3 of the GDPR provides that the Regulation applies to the processing of a personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not

¹⁹⁰ Council Directive 2013/11/EU of 21 May 2013 on Alternative Dispute Resolution for Consumer Dispute (2013) OJL 165/63 and Council Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer's dispute and amending Regulation 2006/2004 and Directive 2009/22/EC (2013) OJL 165/1

4.2 Electronic Commerce (EC Directive) Regulation 2002¹⁹¹

In terms of the European Community Act, 1972¹⁹² it stipulates that Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force without being adopted into national law. This conforms with the provision of section 2(1) of the same Act.¹⁹³ EC Directive establishes legal rules that online retailers must comply with when dealing with the consumer in 27 member states of the EU. More importantly, the EC Directive applies only to online activities that are of a commercial nature. In that regard, it applies to online trade and advertising through the internet, by email or by mobile phone. Notwithstanding the implementation of GDPR in 2020, the EC Regulation will still be applicable particularly on the processing of personal data protection by the Union institution as provided in Article 2(3) of the GDPR.¹⁹⁴

4.2.1 Application of the EC Regulations

4.2.2.1 General information to be provided

To begin with, for the purposes of transparency to the consumer or online traders Regulation 6(1) provides stringent requirements that certain information is made available to comply with the EC Regulation. It provides that, any person providing information society services¹⁹⁵ shall make available to the recipient of the service and any relevant authority, in a form and manner that is easily, directly and permanently accessible the following information:

¹⁹¹ <http://www.legislation.gov.uk/ukxi/2002/2013/regulation> (accessed on 20/07/19)

¹⁹² European Communities Act 1972 – Revised updated to 1 December 2014

¹⁹³ Section 2(1) of the European Community Act 1972: The following shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the treaties governing the European Union:

- (a) the treaties governing the European Union;
- (b) acts adopted by the institutions of the European Union;
- (c) acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty;
- (d) acts adopted by bodies competent under those treaties

¹⁹⁴ Article 2(3) of the GDPR state that; For the processing of data personal data by the Union institutions, bodies, office and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98

¹⁹⁵ Information Society Services has the meaning set out in Article 2(a) of the E Commerce Directive(which refers to Article 1(2) of the Technical Standards Directive 98/34/EC, as amended by Directive 98/48/EC, and is summarised in recital 17 to the E-Commerce Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service)

- (a) the name of the service provider;
- (b) geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar register available to the public, details of the register in which the service provider is entered and his registration number or equivalent means of identification in that register;
- (e) where the provision of the service is subject to an authorization scheme, the particulars of the relevant supervisory authority;
- (f) where the service provider exercises a regulated profession-
 - (i) the details of any professional body or similar institution with which the service provider is registered;
 - (ii) his professional title and the Member State where that title has been granted;
 - (iii) a reference to the professional rules applicable to the service provider in the Member State of establishment and the means to access them; and
- (g) where the service provider undertakes an activity that is subject to value-added tax, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to a turnover Taxes-Common system of a value-added tax: uniform basis of assessment.

It goes further and provides in Regulation 6(2) that, where service provider providing information service refers to prices, must clearly and unambiguously, indicate whether they are tax and delivery costs included. This obviously means that the price of the product must be provided in detail rather than mislead the consumer particularly on the exact price of the final product. Regulation 9(1) also makes a provision for the information to be provided to the consumer when conducting business through electronic means, which prior to an order being placed by the consumer, the service provider must provide the following information:

- (a) the different technical steps to follow to conclude the contract;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors to the placing of the order; and
- (d) the language offered for the conclusion of the contract.

Regulation 9(2) requires the service provider to be more transparent by indicating the codes of conduct are subscribed to and detail information on how the code can be accessed electronically. Further provides the terms and conditions under which a contract is made and make them in a way

that consumer to store and reproduce them.¹⁹⁶ This provides a strict requirement to the service provider and therefore failure to adhere to this provision will result in a breach of the statutory obligation for not providing adequate information to the consumers.¹⁹⁷

4.2.2.2 Commercial communications¹⁹⁸

As provided in the definition, this concept refers to commercial information in any form designed to promote, directly or indirectly, the goods or services for the purposes of pursuing a commercial activity, in doing so, it must be clearly: -

- (a) identifiable as a commercial communication;
- (b) identifies the person on whose behalf the commercial communication is made;
- (c) identify as such any promotional offer
- (d) identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

4.2.2.3 Unsolicited commercial communications

Regulation 8 requires the service provider to ensure that unsolicited commercial communication sent to the consumer through electronic mail is clear and unambiguously identifiable, as soon as, is received. I submit that nothing varies from the provision of section 69(4) of the PoPIA on electronic communication as it also requires the service provider to provide the consumer with clear information when providing goods and services.

4.2.2.4 Placing an order through internet

Regulation 12 provides that, except in relation to Regulation 9(1) (c) and 11(1) (b) where the order shall be the contractual offer, the order may not be the contractual offer for the purposes of regulation 9 and 11. Regulation 11(1) provide that, when consumer place an order through electronic means, it is mandatory for service provider to acknowledge receipt of the order without

¹⁹⁶ Regulation 9(3)

¹⁹⁷ Regulation 13: Liability of the service provider: - the duties imposed by regulation 6, 7, 8, 9(1) and 11(1) (a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty.

¹⁹⁸ Regulation 7

undue delay and by electronic means and also make available to the consumer appropriate, effective and accessible technical means allowing the consumer to identify and correct input errors prior to the placing of the order. In doing so, for the purpose of paragraph 11(a), it will be deemed to be received when the parties to whom they are addressed be able to access them. Further, the acknowledgment of receipt may take the form of the provision of service paid for where that service is an information society service.

4.2.2.5 Right to rescind the contract

As stated above in Regulation 11(1) (b) to make available to consumers appropriately, effectively and accessible technical means that will allow the consumer to identify and correct inputs error prior to placing an order. The consumer is entitled to rescind the contract due to failure to provide such an opportunity to rectify errors made unless any court having jurisdiction in relation to that contract order otherwise on the application of the service provider.¹⁹⁹

4.2.2.6 Liability of the service provider

Regulation 13 indicates that the duties imposed by Regulation 6, 7, 8, 9(1) and 11(a) will be enforceable at suit by an action against the service provider for damages sustained due to the violation of statutory duties. It provides further in Regulation 14 that, failure to provide terms and conditions applicable to the contract, data subject seek an order from any court having jurisdiction to comply with the requirements.

4.3 ALTERNATIVE DISPUTE RESOLUTION (ADR) AND ONLINE DISPUTE RESOLUTION (ODR)

In order to provide the consumer with effective legal recourse more especially on disputes originated from on e-commerce, EU issued Directive 2013/11 and Regulation 524/2013,²⁰⁰ which has been in place since 2015 and 2016. The aim is to offer consumers confronted with e-commerce issues an out of court proceedings as a first remedy to promote the effectiveness of consumer law in

¹⁹⁹ Regulation 15

²⁰⁰ See above (no 172)

the EU.²⁰¹ Considering the cost, time and complex court process it was deemed necessary to establish a dispute resolution mechanism to complement the provision of the above-mentioned Directive and Regulation in the EU.

4.3.1 ADR in terms of Directive 2013/11/EU

The scope of the Directive 2013/11, apply to procedures for the out of court settlement of domestic and cross-border disputes concerning contractual obligations originating from sales goods or services contract between a trader²⁰² and resident consumer²⁰³ in EU through the intervention of an ADR entity which proposes or impose a solution with an aim of facilitating an amicable solution.²⁰⁴ It provides that, in the event of a conflict with another EU legal act relating to out of court redress procedures initiated by a consumer against a trader, the provision of the Directive 2013/11 shall prevail.²⁰⁵ On its interpretation of the Directive 2013/11/EU, the court in case C-75/16 *Livio Menini & Maria Antonia Rampanelli v Banco Popolare Societa Cooperativa*²⁰⁶ ruled that, the directive must not be interpreted as precluding national legislation, which prescribes a recourse to mediation procedures in a dispute referred to in Article 2(1) of that directive, as a condition for the admissibility of legal proceedings relating to those disputes to the extent that such requirement does not prevent the parties from exercising their right of access to the judicial system. All 28-member states of the EU required to implement the Directive 2013/11 to bolster consumer law through ADR mechanism under the registered bodies. Whilst it is not mandatory for traders to use ADR Directive in respect of individual consumer complaint, online traders are under obligation to include a “link” to the ODR platform on their website.²⁰⁷ The EU Commission²⁰⁸ is mandated to monitor the ADR bodies to ensure compliance with the Directive 2013/11.

²⁰¹ M Beek, M D’Aubrey, J Garzaniti Consumer Dispute in a cross border e-commerce context article 2016 at par 24

²⁰² Article 4 defines Trader as any natural person or any legal person irrespective of whether privately or publicly owned, who is acting including through any person acting in his name or on his behalf for purposes relating to his trade, business, craft or profession

²⁰³ Article 4 defines Consumer as any natural person who is acting for purposes which are outside his trade, business, craft or profession

²⁰⁴ Article 2 of the Directive 2013/11/EU

²⁰⁵ Article 3 of the Directive 2013/11/EU

²⁰⁶ *Livio Menini & Maria Antonia Rampelli v Banco Popolare Societa Cooperativa* ECLI: EU: 2017:457

²⁰⁷ See above (no 172) at Article 7(2) - Council Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22/EC, [2013] OJ L 165/1.

²⁰⁸ EU Commission responsible for the development, operation and maintenance of the ODR platform and provide all technical facilities necessary for the functioning of the platform in terms of Article 5

4.3.2 Online Dispute Resolution (ODR)²⁰⁹

Council Regulation 524/2013, which entered into force in 2016, introduces processes for dispute resolution between consumers and online traders based in the EU²¹⁰. This ODR is an online platform established to channel complaints to ADR bodies or entities in respect of any problem or dispute with traders over the purchase of goods or services (online or offline) in retail sectors both domestically and across borders.²¹¹ The purpose is to make it easier for consumer who is not satisfied with an online transaction to file a complaint as to avoid initiation of a long and expensive court process.²¹² It worth mentioning that, it intends to address the online dispute between consumers and traders and not between traders (B2B) nor (C2C). The ODR considered quick, flexible and low-cost tools for resolving certain types of disputes, particularly, online retail disputes.²¹³ I will agree with the emphasis that, traditional dispute resolution mechanisms such as litigations before the court are sometimes not suitable options to deal with an increasing number of low-value cross-border claims.²¹⁴ This is because the courts, for example in South Africa, deals with matters as per court process whereby the matter has to put on roll to be heard on a specified date and which might take even longer for the matter to be heard and adjudicated.

The outlined processes of dealing with a dispute in term of the ODR platform is in accordance with Article 8, 9 and 10 of the Regulation.²¹⁵ The process consist of the following:

- (a) the consumer filling online complaint form;
- (b) trader processing and transmitting a complaint; and
- (c) Resolution of the dispute by ADR entity

From its inception to this date, the ODR considered being effective in all EU member states and useful tools by consumers. The platform received an average of over 160 000 unique visitors per

²⁰⁹ Council Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer's dispute and amending Regulation 2006/2004 and Directive 2009/22/EC (2013) OJL 165/1

²¹⁰ World Economic Forum *The Global Governance of online Consumer Protection and e-commerce*, 2019 at 20

²¹¹ See above (no 189) at Article 5

²¹² See above (no 190) at Article 8

²¹³ E van Gelder, A Biard *The Online Dispute Resolution Platform after one year of operation: A work in progress with promising potential*

²¹⁴ See above (no 195) at 3

²¹⁵ See above 191

month and over 2000 complaints per month on average.²¹⁶ Further, about 40% of the overall number of complaints were successfully resolved through bilateral negotiations between traders and consumers.²¹⁷

In terms of Article 13,²¹⁸ the data confidentiality and security has to be maintained as per the legislation of member states and the EU have to take appropriate technical and organizational measures to ensure compliance with the Regulations and Article 22 of Regulation (EC) NO 45/2001.²¹⁹ The traders are required to provide on their websites an electronic link to the ODR platform.²²⁰ In this regard, the traders must ensure to make consumers aware of the ODR platform and the possibility of using the ODR platform in case of issues or disputes arising out of trading on that particular trader's website.²²¹

4.4 CONCLUSION

Domestic or national laws of the EU member states mainly derive from the EU Regulations and Directives. The main reason for the harmonization of national laws is to promote the establishment and function of the EU as a unified trading space. This is because variation between national laws has been viewed as an impediment to market integration prompting a need for harmonization at the EU level.²²² As highlighted above that, the European Community Act, 1972 stipulates that Regulations are legal acts that apply automatically and uniformly apply to all EU countries as soon as they enter into force without being adopted into national law.²²³

²¹⁶ See above (no 226) at 8

²¹⁷ See above (no 226) at 9

²¹⁸ Article 13 provides that ODR contact points shall be subject to rules of professional secrecy or other equivalent duties of confidentiality laid down in the legislation of the Member State concerned.

²¹⁹ (EC) No 45/2001 Article 22: Security of processing state that-

(1) having regard to the state of the art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and to prevent all other unlawful forms of processing.

²²⁰ See above (190) at Article 14 – Consumer information

²²¹ See Article 3 of Commission Implementing Regulation (EU) 2015/1051 of July 2015

²²² S Weatherill *EU Consumer law and Policy* 2013 at 11

²²³ See above (no 187)

The EC Directive has applied only to online activities of a commercial nature become an important piece of a legislative framework for the protection of online trade and advertising through the internet, by email or by mobile phone. The EC Directive further applies to the processing of personal data protection by the Union institution as provided in Article 2(3) of the GDPR.²²⁴ This is to ensure consumers in all member states are protected from any kind of harm emanating from online trading. It is mandatory for the supplier or web trader to ensure through their websites that, consumers are provided with adequate information to exercise their rights. Failure to do so will be inconsistent with the EU Directive 2013/11 and Regulation 524/2013 that offers consumers confronted with e-commerce issues an out of court proceedings as a first remedy to promote the effectiveness of consumer law in the EU. Regulation 6(1) as mention above strictly requires certain information to be made available as a compliance requirement to enhance transparency and boost the confidence of the online consumers. Further, the right to information where contracts are concluded by electronic means must be comprehensive and unambiguously demonstrate that language should not be the bearer to trading activities. Consumers need to comprehend the information before committing to the obligation. The consumer will, therefore, have a right to rescind the contract as provided in Regulation 15 unless the court orders otherwise.

²²⁴ See above (no 188)

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5.1 CONCLUSION

It is worth mentioning that, the growth of e-commerce in developing countries such as South Africa requires an adequate legal framework for the protection of online trading consumers. This requires urgent attention considering the rapid growth of online shopping globally. The e-commerce activities involve flows of personal information that can be easily compromised regardless of the right to privacy as enshrined in the Constitution.²²⁵ The ECT, which most of its provision appears to be originating from the EU Distance Selling Directive, provides for consumer protection only on the electronic transaction to a certain extent. Then it complemented by the provision of the CPA which provides protection mainly on consumer affairs in South Africa. As mentioned above, PoPIA deals with data protection, however, it is not yet operational.

The research concludes that the application of the ECT seems to be limited to consumers residing within the borders of South Africa, notwithstanding, the provision of section 47 of the ECT which stipulates that the protection provided in chapter VII applies to the agreement irrespective of the legal system applicable. It is not clear whether legislators intended to complement the provision of section 5(8) of the CPA given to the fact that e-commerce is borderless and the need for adequate online protection regardless of the jurisdiction. The provision of section 47 and section 90 of the ECT conflict with each other. Section 90 of ECT gives recognition to the jurisdiction of the South Africa courts to adjudicate any matter relating to the provision of the ECT or any other legislation enacted in South Africa. Therefore, with section 47, a challenge in the Superior Court Act, 2013 indicates that it has jurisdiction in relation to all cases arising within its area of jurisdiction.²²⁶ Further, the Magistrate Court Act also have a similar provision on the jurisdiction in respect of persons, whether or not he or she resides, carries on business or is employed within the district or regional division if the cause of action arose wholly within the district or regional division.²²⁷ If section 90 of ECT appreciates the jurisdiction of the court then section 47 creates a conflicting provision. Section 47 might be useful only if the majority of countries have similar legislative

²²⁵ See above (no 22)

²²⁶ See above (no 38)

²²⁷ See above (no 129)

provisions on jurisdiction for the e-commerce industry or if the order of the court on e-commerce can be enforced outside South Africa.

Without a doubt, CPA is a piece of legislation that provides adequate protection to consumers in South Africa. As mentioned that section 5(8) (a) applies whether the supplier resides or has its principal office within or outside the Republic of South Africa. Unlike the ECT, CPA indicates that suppliers will be held accountable and issued with a statutory penalty and appropriate administrative fine as a remedy to consumer rights violation in terms of section 111²²⁸, 112²²⁹ and 113²³⁰. The ECT only provides in section 49 that, a consumer may lodge a complaint with the Consumer Affairs Committee for any non-compliance with the provisions of chapter VII by the supplier without explicitly providing forms of statutory fines and penalties to be enforced. With this loophole, it remains a challenge and the suppliers might continue with infringement of the consumer rights if not reported knowing that there are no prescribed penalties on the electronic transaction in terms of the ECT.

The ECT Regulation promulgated in terms of section 69 read with section 94 of the ECT makes a provision for ADR. However, the ADR applies only to domain name disputes resolution registered under the co.za sub-domain. That ADR does not deal with cases for the infringement of consumer rights resulting from electronic transactions. Further, there are no proper guidelines on how the online ombudsman will be able to deal with electronic transaction dispute and this might raise a challenge, as the ECT does not provide an adequate penalty for such violation.

EU Regulations 2002 are pillars of consumer laws in the EU and provide adequate protection to consumers in all member states. Since the growth of e-commerce EU has ready itself by revising its law to cover such changes relating to e-commerce. South Africa is delaying the implementation of PoPIA and this result in supplier taking advantage of the lack of adequate protection on data protection.

²²⁸ Section 111 prescribes Penalties for breach of confidence to a fine or imprisonment for a period not exceeding 10 years or both; or in any case, to a fine or imprisonment for a period not exceeding 12 months or both

²²⁹ Section 112 prescribes Administrative fines of 10 percent of the respondent annual turnover

²³⁰ Section 113 prescribes for Vicarious liability if an employee or agent of a person is liable for anything done or omitted in the course of employment or activities on behalf of their principal

5.2 RECOMMENDATIONS

Notwithstanding that, chapter VII of the ECT provides protection to online consumers, it is recommended to expand on the regulations to provide for more adequate consumer protection. There is no specific monitoring agency established to ensure proper monitoring and reporting on suppliers or web traders' websites.

Further, it is evident that only a few matters have been referred to the online ombudsman in particular on electronic transaction-related matters. This illustrates the lack of awareness of consumer about the legal protection accorded in terms of CPA and ECT. This view is based on the number of adjudicated matters on e-commerce and online shopping is growing which consumers become vulnerable to fraudulent online activities.

E-commerce transaction encompasses personal information sharing which requires adequate legal protection as is borderless. Therefore, the full implementation of PoPIA and the establishment of the Regulator as envisaged in the Act should not be delayed. This recommendation is primarily based on the view that PoPIA seems to offer adequate protection to consumers, in particular, on the processing of data or personal information. Having, a Regulator established specifically for such purpose will ensure the security of personal information in South Africa.

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