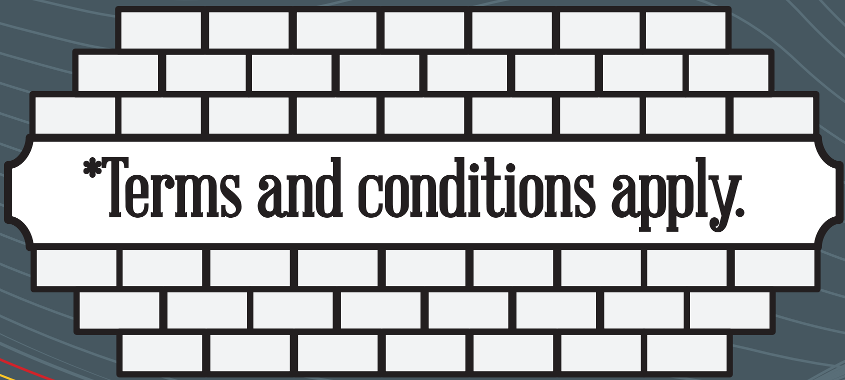

CONSUMER PROTECTION

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WEBBER WENTZEL
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Introduction

Until the enactment of the Consumer Protection Act, No. 68 of 2008 (CPA), South Africa had numerous, fragmented legislative provisions dealing in part, and mostly incidentally, with the regulation of consumer protection. In addition to the CPA, consumer protection measures may be found in a variety of statutes which include the following:

The CPA

The CPA, which was implemented on 31 March 2011, has far-reaching consequences for consumers and for the suppliers of goods and services. It provides a comprehensive framework in which the rights and duties of consumers and suppliers are entrenched. Contracts between consumers and suppliers, the manner in which suppliers interact with consumers, including market-related communications, the liability of suppliers, suppliers' accountability to consumers, and the administration of suppliers and their practices are regulated by the CPA.

The CPA aims to create a fair, accessible and sustainable marketplace by:

- prohibiting unfair market and business practices;
- promoting responsible consumer behaviour; and
- harmonising the laws that govern the protection of consumers.

The CPA aims to establish a culture in which consumer rights and responsibilities are strengthened and business innovation is enhanced.

The CPA applies to all transactions occurring within South Africa that involve the supply of goods or services and to every advertisement transmitted or published in the course of business. It sets out consumer rights, including:

- equality in the consumer market;
- privacy;
- consumer choice;
- disclosure of information;
- fair and responsible marketing;
- honest dealing and fair agreements;
- fair value, good quality and safety; and
- the right of the consumer to hold the supplier accountable for its actions.

For the first time in South African law, the CPA introduces no fault liability for damage caused by certain goods. In limited instances, certain provisions of the CPA have retrospective application and may apply to agreements entered into before the CPA was promulgated.

The aim of this segment is to provide a brief overview of the protected rights and enforcement mechanisms contemplated in the CPA.

The application of the CPA

The CPA, except in limited instances, applies to all transactions for the supply of goods or services in South Africa that are entered into in the ordinary course of business for consideration. It also applies to the supply and promotion of goods and services in South Africa, which generally includes marketing and inducing a consumer to enter into a transaction. The CPA also applies to foreign suppliers and service providers who are engaged in any of the above activities in South Africa.

Who is a consumer?

The CPA aims to protect vulnerable consumers. Its provisions accordingly do not apply to a transaction when the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds ZAR 2 million. An exception does exist in the case of franchises and no-fault liability for harm caused by goods, the provisions relating to which also apply to consumers above the threshold.

The term "consumer" includes natural and juristic persons (subject to the threshold discussed above) to whom goods and services are marketed, actual users of goods or recipients of services (irrespective of whether that person was a party to the transaction or paid for the goods or services), persons who enter into transactions with suppliers in the ordinary course of that supplier's business (when the transaction is not exempt) and franchisees under franchise agreements.

Who is a supplier?

A natural or juristic person who markets, promotes or supplies goods or services in the ordinary course of business for consideration is subject to the CPA's provisions as a "supplier". The supply of goods includes the sale, rent, exchange and hire of goods and the sale or supply of services.

The CPA specifies categories of goods and services to which the provisions of the CPA apply, but these categories are not exhaustive.

Consumer rights

The CPA broadly entrenches consumer rights as follows:

Right to equality

The CPA entrenches the right of the consumer not to be unfairly discriminated against in a range of circumstances, including when a supplier:

- assesses a consumer's ability to meet his or her obligations;
- considers whether or not to enter into a transaction with a consumer; and
- determines the costs of a transaction.

The Equality Court has exclusive jurisdiction over these matters.

Right to privacy

Consumers may refuse or "block" direct marketing, and have the right to register a pre-emptive block to prevent direct marketers from approaching them. Certain dates and times have been prescribed during which a supplier is prohibited from marketing directly to consumers at their homes.

Right to choose

The consumer may:

- select suppliers, and a supplier is prohibited from requiring a consumer, as a prerequisite to concluding a contract, to purchase any other particular goods or services from that supplier, or a designated third party. An exception is granted when the convenience or economic benefit to the consumer outweighs the limitation on the consumer's right to choose;
- reject goods and cancel the contract in certain circumstances, including if the supplier does not perform at the date, time and location agreed by the consumer;
- terminate a fixed-term agreement, unless it is a contract between juristic persons, on a date earlier than the agreed expiry date. Terminations must occur with at least 20 business days' written notice and against payment of a reasonable cancellation penalty. The supplier is also required to give notice, between 40 and 80 days before the expiry date, of the impending expiry of any fixed-term agreement and any material changes that would apply if the agreement is to be renewed beyond the expiry date. On expiry of a fixed-term agreement, the agreement will automatically continue on a month-to-month basis unless the consumer has directed the supplier to terminate the agreement on the expiry date or agrees to renew the agreement for a further fixed-term;

- terminate a contract concluded as a result of direct marketing within five business days after the later of the date of receipt of the goods and the date of conclusion of the transaction; and
- cancel advance reservations or bookings. The CPA entitles a supplier to charge reasonable advance deposits and cancellation penalties.

Right to disclosure and information

The right to disclosure includes the right:

- to receive information in plain, understandable language that the ordinary consumer, with average skills and minimal experience as a consumer of the relevant goods or services, can be expected to understand;
- to the display of the price of goods, which includes the right not to be charged at a higher price than what is displayed or advertised;
- not to be misled by product labeling and the description, packaging and display of goods. This right includes the right to disclosure by a supplier when goods have been genetically modified or contain genetically modified components;
- to the identification of installers and deliverers; and
- to receive a written record of each transaction.

Right to fair and responsible marketing

The CPA prevents a supplier from marketing goods in a manner that is false, misleading, fraudulent or deceptive in any way. Suppliers are therefore prevented from engaging in the following practices:

- bait marketing (ie advertising particular goods as being available at a particular price when they are either not available or are not available at that price); and
- negative option marketing (ie when a supplier provides that an agreement will automatically be concluded unless the consumer declines the offer of goods or services).

The following activities are also specifically regulated under the CPA and may only be performed in a manner that complies with the provisions of the CPA:

- direct marketing to consumers;
- catalogue marketing (ie when an agreement is not concluded in person and the consumer is not afforded the opportunity to inspect the goods in advance);
- trade coupons and similar promotions (ie offer of a prize, gift or award);
- customer loyalty programmes;
- promotional competitions (ie a competition, game or scheme for distributing prizes and rewards, subject to certain conditions);
- alternative work schemes; and
- referral selling (ie offering a benefit to a consumer who provides the supplier with names of or access to the prospective consumers).

Right to fair and honest dealing

Unconscionable conduct, force, coercion, undue influence, pressure or harassment, and unfair tactics or conduct are prohibited in connection with the conclusion of any agreement, any marketing or supply of goods or services, in the enforcement of an agreement and other specified activities. The CPA also prohibits false advertising and representations. Pyramid schemes and auctions are specifically regulated.

It is unconscionable for a supplier to knowingly take advantage of a consumer's inability to protect his or her own interests due to physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

Right to fair, just and reasonable terms and conditions

The CPA provides that a supplier may not:

- offer to supply, or enter into an agreement to supply, goods or services, on terms that are unfair, unreasonable or unjust, or at a price that is unfair, unreasonable or unjust;
- market any goods or services, or negotiate or conclude a transaction or agreement in a manner that is unfair, unreasonable or unjust; or
- require a consumer to surrender any rights, assume any obligation or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust.

There is no exhaustive list of what will constitute an unfair, unreasonable or unjust term, transaction or agreement. The CPA does, however, contain the following examples of unacceptable terms, transactions or agreements:

- if it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- if the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
- if the consumer relied on a false, misleading or deceptive representation or statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- if the transaction is subject to an exclusion or limitation of liability or indemnity that is unfair, unreasonable, unjust or unconscionable or when the fact, nature and effect of that term was not properly drawn to the attention of the consumer in the specified manner.

The CPA regulations contain a list of terms that are rebuttably presumed to be unfair and unreasonable.

When considering whether a term or condition is indeed unfair, unreasonable or unjust, a court must consider, among other things:

- the fair value of the goods or services;
- the nature of the parties to that transaction, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- the extent to which the document was drafted in plain and understandable language; and
- whether the consumer knew or ought reasonably to have known of the existence and extent of the particular provision, having regard to any custom of trade and any previous dealings between the parties.

If an agreement, transaction, term or condition is unfair, unreasonable or unjust, then the supplier risks that such an agreement, transaction, term or condition will be void. In addition, a court may make any order that it considers just and reasonable under the circumstances, including:

- restoring money or property to the consumer;
- awarding compensation to the consumer for losses or expenses relating to the transaction or the proceedings of the court; and/or
- requiring the supplier to cease or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

Importantly, the CPA also contains extensive provisions regulating clauses that limit or exempt a supplier's liability and disclaimers. The CPA requires that any provision, agreement or notice to a consumer which:

- purports to limit in any way the risk or liability of the supplier or any other person;
- constitutes an assumption of risk or liability by the consumer;
- imposes an obligation on the consumer to indemnify the supplier or any other person for any cause;
- constitutes the acknowledgment of any fact by the consumer.
- must be written in plain language and the fact, nature and effect of such provision must be drawn to the attention of the consumer. This must be done in a conspicuous manner and form that is likely to attract the attention of an "ordinarily alert" consumer, having regard to the circumstances. The notice, agreement or provision must be done before the consumer enters into the transaction or agreement, begins to engage in the activity, enters or gains access to the facility or is required or expected to offer consideration for the transaction or agreement (whichever is the earlier).

Consumers cannot be required to waive their rights under the CPA and any provision purporting to do so will be void.

Right to fair value, good quality and safety

The CPA prescribes minimum standards of quality for both goods and services.

The standard expected of a supplier in relation to services, having regard to the circumstances of the supply and the agreement between the supplier and the consumer, includes:

- timely performance and completion of services, and opportune notice of unavoidable delay;
- performance of services in a manner and quality that a consumer would generally be entitled to expect;
- use, delivery and installation of goods free of defects and of a quality that persons are generally entitled to expect; and
- return of property in as good a condition as when the consumer made the property available.

In every agreement or transaction the producer, importer, distributor and retailer each implicitly warrant that the consumer will receive goods that are:

- reasonably suitable for the purposes for which they are generally intended;
- reasonably suitable for the specified purpose of the consumer when the supplier ordinarily offers the goods or acts in a manner that is consistent with being knowledgeable about the use of the goods;
- of good quality and in good working order;
- free of any defects, including free from any material imperfection in the goods that render the goods of a lesser standard than the standard that the consumer would be entitled to expect, or when the goods are less usable or less practicable;
- usable and durable for a reasonable period of time, having regard to the use to which they are normally put; and
- compliant with any applicable standards of the Standards Act, No. 29 of 1993, or any public regulation.

The standard expected will depend on the manner and purpose for which the goods are marketed, packaged and displayed, the range of uses that one might reasonably anticipate for such goods; and the time at which the goods were produced and supplied.

Under the common law, an implied warranty is only applied to manufacturers and those who professed to have skill and knowledge. The CPA therefore extends the common law's implied warranty, applying it to importers, distributors and retailers.

If a supplier fails to honour this warranty, the consumer's rights include the right, within a period of six months after delivery to the consumer, to require the defect to be remedied or the goods to be replaced. The consumer may also request a refund of the price paid.

The supplier of any activity that is of an unusual nature or character or risk must draw the consumer's attention to the potential effect of the risk. Unsafe and hazardous goods must be packaged in accordance with specified standards.

Accountability

The CPA provides that if a consumer agrees or is required to pay any amount in respect of services or access to services that are to be provided at a date more than 25 business days after the payment is made, the amount so paid remains the property of the consumer until the supplier makes a charge against it in accordance with the CPA.

The CPA provides that the supplier:

- must not treat such advance funds as being the property of the supplier;
- must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person while handling, safeguarding and utilising that property; and
- is liable to the consumer for any loss resulting from a failure to comply with these requirements.

The reverse onus: no-fault liability

One of the fundamental changes introduced by the CPA is the imposition of a reverse onus on the producer, importer, distributor and retailer. These individuals or entities will be liable for any harm caused by any unsafe goods and any failure, defect or hazard in any goods as well as inadequate warnings or instructions relating to any hazard associated with any goods, unless such person or entity can successfully prove one of the statutory defenses.

This reverse onus is also imposed on any person who provides access to such goods. Liability will arise irrespective of whether or not the supplier is negligent, and is joint and several among those in the supply chain.

The supplier will be held liable for harm including death, injury, illness, loss of or physical damage to property and any economic loss arising from any of the foregoing.

The only defenses to such a claim are:

- the unsafe characteristic, failure, defect or hazard (defect) is wholly attributable to compliance with regulations;
- the alleged defect did not exist at the time the product was supplied;
- the defect is wholly attributable to the supplier's compliance with instructions from its supplier;
- it is unreasonable to expect the supplier to have discovered the defect, taking into account that person's role in marketing the goods to consumers; or
- the claim is brought more than three years after a specified date, depending on the type of harm suffered.

Registration of business names

The CPA provides that a person may only carry on business under the following names:

- in the case of a natural person, his or her full name as recorded in his or her identity document;
- in the case of a juristic person, its full registered name; or
- a business name registered under the CPA.

This provision effectively abrogates the practice of informal trading names and will require all so-called "trading as" names to be registered in the prescribed manner.

These provisions will, however, only take effect on a date to be published by the Minister and will not be enforced against a business that was actively conducting business under that business name for a period of at least one year before that date.

Enforcement

The CPA is enforced by the National Consumer Commission and the National Consumer Tribunal has jurisdiction to deal with complaints under the CPA.

Contravention of the CPA may in certain instances result in a conviction or the imposition of a fine, or both. The CPA further provides that an administrative penalty may be imposed on a supplier in an amount of up to 10% of the annual turnover of such a supplier during the preceding financial year, or ZAR 1 million, whichever is the greater.

Implementation

The provisions regarding no-fault liability for harm caused by goods apply to goods supplied after 24 April 2010 even if the agreement or transaction relating to such goods or services was concluded before that date.

When an agreement is for a fixed-term, was entered into before 31 March 2011 and expired after 31 March 2013, limited CPA provisions apply to it. The CPA applies to all goods and services supplied after 31 March 2011.

The CPA does not apply to credit agreements which are governed by the National Credit Act.

The NCA

The National Credit Act, No. 34 of 2005 (NCA), published on 15 March 2006, is another statute that gives effect to consumer protection in South Africa. The majority of its administrative provisions came into force on 1 June 2006 and the remainder of its provisions came into effect on 1 June 2007. The National Credit Regulations, which expand and clarify provisions in the NCA, were published on 31 May 2006 and the thresholds in terms of the NCA were published on 1 June 2006.

The NCA regulates the granting of credit in South Africa and repealed both the Usury Act, No. 73 of 1968, and the Credit Agreements Act, No. 75 of 1980.

The NCA is designed to:

- improve transparency;
- prohibit unfair contract terms and practices;
- prohibit anti-competitive practices; and
- promote responsibility in the credit market.

The NCA generally applies to every credit agreement between parties dealing at arm's length and entered into, or having an effect in, South Africa.

In terms of the NCA, a credit agreement is, broadly speaking, an agreement in terms of which:

- there is a deferral of payment of money; and
- interest, fees or charges are levied on the amount deferred.

Transactions in terms of which the payment of money is deferred and a discount is offered if payment is made before a certain date, also qualify as credit agreements for purposes of the NCA.

The following credit agreements are excluded from the operation of the NCA:

- a credit agreement in terms of which the consumer is:
  - a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds ZAR 1 million. A juristic person is related to another juristic person (for purposes of the NCA) if one of them has direct or indirect control over the whole or part of the business of the other, or if a person has direct or indirect control over both of them;
  - the State; or
  - an organ of State;
- a large agreement (as defined in the NCA) in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below ZAR 1 million;
- a credit agreement in terms of which the credit provider is the SARB; or
- a credit agreement in respect of which the credit provider is located outside the Republic, and approved by the Minister on application by the consumer.

The NCA differentiates between small, intermediate and large agreements depending on monetary thresholds stipulated in the National Credit Regulations:

- a small agreement is an agreement in which the credit limit or principal debt is ZAR 15 000 or less;
- an intermediate agreement is a credit facility (as defined) in which the credit limit falls above ZAR 15 000 or a credit transaction (as defined) in which the principal debt falls above ZAR 15 000 but is less than ZAR 250 000; and
- a large agreement is a mortgage agreement or a credit transaction (both as defined) in which the principal debt exceeds ZAR 250 000.

The NCA provides for the registration of credit providers, credit bureau and debt counselors. It contains detailed provisions regarding the permissible fees, charges and interest under credit agreements and advertising practices of credit providers. It also contains provisions regarding consumers' rights to apply for credit, to access certain information, to the protection of confidential information and to obtain reasons for the refusal of credit.

The NCA prohibits:

- certain credit agreements (unlawful credit agreements);
- the inclusion of unlawful provisions in credit agreements;
- the extension of reckless credit; or
- credit that will cause the consumer to become over-indebted.

The NCA prescribes the form and/or information that should to be contained in credit agreements and preliminary documents.

The NCA established the office of a National Credit Regulator, whose functions include promoting a fair, sustainable, accessible credit market and regulating the consumer credit industry. A National Consumer Tribunal, with powers to adjudicate applications under the terms of the NCA and allegations of prohibited conduct, has also been established. The National Consumer Tribunal has jurisdiction to adjudicate matters regarding prohibited conduct under the CPA. The NCA regulates debt enforcement procedures.

Conclusion

Numerous legislative provisions regulate consumer rights in South Africa. The CPA is umbrella legislation, governing the rights of certain consumers and specifying supplier obligations. To ensure compliance with the CPA, standard terms and conditions, sales records and disclaimers should be reviewed. Each supplier should evaluate its position in the supply chain and apportion risk contractually with its own suppliers, to the extent that is legally permissible. Suppliers should also reassess the adequacy of insurance cover.