

THE CONSUMER PROTECTION ACT 68 OF 2008

The Consumer Protection Act 68 of 2008 (“the CPA”) consolidates the rights of consumers and sets national standards for consumer protection. It came into effect on 1 April 2011 and provides for nine enforceable consumer rights, being –

1. equality;
2. privacy;
3. choice;
4. disclosure and information
5. fair and responsible marketing;
6. fair and honest dealing;
7. fair, just and reasonable contract terms;
8. fair value, good quality and safety; and
9. supplier’s accountability.

DEFINITIONS

Consumer –

- a person to whom goods or services are marketed;
- a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business;
- a user of those particular goods or the recipient of the services;
- a franchisee in terms of a franchise agreement.

Goods –

- anything marketed for human consumption;
- any tangible object;
- any literature, music, photograph, game, information, data, software or other intangible product written on any medium, or a licence to use any such intangible product.

Service –

- any work or undertaking performed by one person for the direct or indirect benefit of another;
- the provision of any education, information, advice or consultation;
- access to any electronic communication infrastructure;
- the right of access to an event, premises, activity or facility.

Supplier –

- a person who markets and supplies goods or services.

Supply –

- in relation to goods includes to sell, rent, exchange and hire in the ordinary course of business for consideration;
- in relation to services includes to sell the services or to perform the services, grant access to any premises, event, activity or facility in the ordinary course of business.

WHEN DOES THE CPA APPLY?

The CPA applies to the sale of goods or services by a supplier to a consumer. The CPA does not apply –

- to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover is equal to or greater than R2 million;
- to any transaction where the State is the consumer;
- to Credit Agreements in terms of the National Credit Act 2005; or
- to employment contracts and collective agreements.

CONTRACTUAL TERMS AND ISSUES

Agreements concluded prior to 1 April 2011

Certain sections of the CPA will apply to agreements concluded prior to the implementation date (being 1 April 2011). If the agreement would have been subject to the CPA if the CPA had been in effect at the time the agreement was concluded, and if the agreement endures until after 1 April 2013, then that agreement will be subject to, inter alia, the following provisions of the CPA –

- the right to return goods;
- the right to information in plain and understandable language;
- the right to fair value, good quality and safety;
- the supplier's liability for damage caused by the goods supplied. **[Note: this last provision applies to goods that were first supplied on or after 24 April 2010.]**

Fixed Term Contracts

In terms of the CPA, the Minister may prescribe a maximum period for the duration of fixed-term contracts. That period is currently 24 months from date of signature by the consumer. This means that at the end of 24 months from the date of signature, the consumer is entitled to terminate the agreement without cause or penalty, OR to allow the agreement to continue on a month-to-month basis OR to renew the agreement for a further fixed term of 24 months.

In addition, the consumer is entitled to terminate the agreement on 20 business days' notice. In this instance, the supplier may charge a cancellation fee which may not exceed a reasonable amount.

If a consumer agreement is for a fixed terms, not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing of the impending expiry date, including a notice of –

- any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and

- the options available to the consumer.

Unfair and unreasonable terms

The CPA requires that a contract concluded between a consumer and supplier must comply with certain criteria, inter alia, must not contain a term that is unfair or unreasonable. Examples of such unfair or unreasonable terms are –

- excluding or limiting the liability of the supplier;
- excluding the legal right or remedies of the consumer in the event of non-performance by the supplier;
- limiting the supplier's obligation to respect its commitments;
- excluding the supplier's right to take legal action;
- restricting the evidence available to the consumer;
- imposing burdens of proof on the consumer that the law does not provide for;
- allowing the supplier to interpret any term of the contract;
- allowing for the transfer of the supplier's obligations.

IMPLIED WARRANTIES

Quality service

In addition to the right to demand products that are of a certain quality, consumers are entitled to demand quality service. Consumers have the right to demand –

- timeous performance and completion of the service;
- performance of such service in a manner that the consumer is entitled to expect;
- the use and installation of goods that is free from defects.

If a consumer feels that any of the abovementioned standards have not been complied with, he/she is entitled to demand that the supplier remedy the defect or refund a reasonable portion of the purchase price. The difference between the implied warranty of quality and the implied warranty of quality of service is that the latter is subject to the specific terms agreed to between the parties.

Quality products

The CPA ensures that every consumer has the right to safe, good quality products. A consumer who purchases a product will be given an implied warranty against defects – this is true even if the product does not display warranties against defects. This means that consumers will be able to purchase a product on the basis that it is reasonably suited for the purposes for which it was purchased, is of good quality and free from defects.

The implied warranty, however, will not apply if the goods have been altered contrary to the instructions or if they have been altered after leaving the control of the producer, importer, distributor or retailer. In view of the foregoing, suppliers should ensure that trade descriptions and product instructions properly warn and instruct consumers on how to use and maintain the goods.

The CPA requires that manufacturers of goods package such goods in a manner that displays proper instructions for the safe handling and use of such goods.

Remedies

If goods do not comply with the abovementioned standards (ie fit for purpose and free from defects), consumers have the right to return the goods within 6 months of purchase and the supplier must either repair or replace the goods or refund the consumer the price paid for the goods. If the consumer chooses to have the goods repaired and within 3 months of that repair the failure has not been remedied, the supplier will be obliged to replace the goods or refund to the consumer the price paid for such goods.

DIRECT MARKETING

Direct marketing is when you approach people, either in person or by mail or email, for the purposes of offering to supply goods or services to them. Agreements concluded as a result of direct marketing are subject to a 5 day cooling off periods, during which time the consumer may rescind the agreement without penalty.

Consumers have the right to demand that the person responsible for any direct marketing communication desist from sending any further communication and suppliers are obliged to put in place measures to ensure that such demands are met. A consumer may not be charged a fee for making a demand or registering a pre-emptive block against such direct marketing communications.

LEASES

Because the CPA applies to transactions for the supply of goods or services in exchange for consideration, the use of fixed property by way of rental is potentially one of the services to which the CPA relates. Whether or not a lease agreement falls within the scope of the CPA will largely depend on whether the letting of the premises is in the landlord's ordinary course of business.

Contracts of lease must comply with the following requirements –

- they must be in plain and understandable language;
- the tenants attention must be drawn to any provision that limits the risk of the landlord or constitutes an assumption of risk for the tenant;
- it must not contain any provision which limits or exempts the landlord from liability for loss attributable to the gross negligence of the landlord;
- the contract must not be substantially unfair, i.e., it should not be excessively one-sided in favour of the landlord.

Landlords whose agreements fall within the ambit of the CPA should take note that tenants are now able to cancel the lease at any time by giving the landlord 20 business days notice. This right will be available to tenants despite any provision to the contrary. This provision, however, is not applicable to leases involving juristic persons, regardless of their annual turnover or asset value.

Landlords who choose to ignore the CPA run the risk of the entire agreement being declared void and thus unenforceable.

FRANCHISE AGREEMENTS

The definition of a “franchise agreement” in the CPA has been drafted so widely that it may extend not only to the traditional franchise agreements (where a franchisor grants a franchisee the right, for consideration, to carry on business under a system or marketing plan, substantially determined or controlled by the franchisor) but also to license, agency and distribution agreements.

In terms of the CPA, franchise agreements must be in writing and signed by or on behalf of the franchisee and must be stated in plain and understandable language. There is a 10 day cooling off period during which a franchisee may cancel a franchise agreement, without cost or penalty, by simply giving notice to the franchisor.

One provision that is of particular interest to franchisors is section 13 of the CPA which deals with the consumer’s right to choose. This section provides that a supplier (in this case the franchisor) must not require that the consumer -

- purchase any other goods or services from that supplier;
- enter into any additional agreement with the same or another supplier; or
- agree to purchase any goods or services from a designated third party;

unless the supplier can show that –

- the convenience to the consumer in bundling the goods and services outweighs the consumer’s limitation of choice; or
- the bundling of these goods or services appears to result in economic benefit to consumers.

If a franchisor is accused of contravening section 13, it is a defence to say that the goods or services that the franchisee was required to purchase from or at the direction of the franchisor are *reasonably related* to the branded products or services that are the subject of the franchise agreement. It is not entirely clear as to what is meant by *reasonably related*, however, it has been suggested that this means products or services that are the primary or the most important products or services related to the brand or franchise.

Franchisors must ensure that they are competent franchisors providing quality products and services, promptly at reasonable prices and must otherwise deal with the franchisees in a fair, reasonable and equitable manner.

PROCESS FOR COMPLAINTS

Regulatory Bodies

- **Commission or the NCC** - the National Consumer Commission is the body assigned to investigate consumer complaints and was established by the CPA;
- **Consumer Court** - a body established in terms of applicable provincial and which has the power to issue compliance notices on behalf of the NCC, facilitate the mediation or conciliation of a dispute and request the NCC to initiate a complaint;
- **Tribunal** - the National Consumer Tribunal, established by the National Credit Act 43 of 2005, is responsible for the adjudication of violations and transgressions of the CPA.

Process

1. If a consumer believes that his rights in terms of the CPA have been infringed, impaired or threatened, or that prohibited conduct has occurred, the structure of consumer protection system requires the consumer to attempt to resolve his issue firstly with provider of goods and services, ie the supplier.
2. In the event that there is no resolution, parties can either go directly to the NCC (which will in all probability occur more often than not), however, they may attempt to resolve the complaint through alternate dispute resolution (“ADR”). ADR may be facilitated by an Ombud, through the relevant industry self-regulator (for example, the Advertising Standards Authority of South Africa) or one of the Consumer Courts.
3. If the dispute remains unresolved after an attempt at ADR, or should the parties not wish to attempt ADR, the parties may lodge a complaint with the NCC. Once a complaint is referred to the NCC, the NCC investigates the complaint and then may refer the matter to either to –
 - the National Prosecuting Authority for prosecution in the High Court if the NCC believes that a person has committed an offence in terms of the CPA; or
 - the Consumer Court of the province where the supplier has its principal place of business; **[Note: A practical challenge with regard to the Consumer Courts is that as at 1 April 2011, only 3 provinces, Gauteng, Limpopo and the Free State have functional Consumer Courts. How this is going to be addressed is yet to be seen.]**; or
 - the Tribunal. (If a matter is referred to the Consumer Court, any party may apply for the matter to be referred to the Tribunal).

Notwithstanding the above, a consumer has the right, at any stage, to approach the courts for adjudication of the matter.

The Tribunal

The Tribunal as creature of statute may not determine contractual disputes, damages, nor any criminal matters but may only adjudicate on matters specifically provided for in the CPA, being –

- grant interim relief;
- declare conduct to be prohibited;
- issue an interdict for prohibited conduct;
- impose administrative fines;
- confirm consent orders;
- condone non compliance with its rules and procedures.

If a supplier does not comply with an order made by the Tribunal, the consumer concerned would have to approach the court in order to have the order enforced.

The Tribunal makes its finding and if the parties so wish, they make take the decision of the Tribunal on appeal or on review to the High Court.

Burden of proof

The CPA introduces strict liability, which means that a producer, importer, distributor or retailer of a product is liable for harm caused as a result of a defect in the product or as a result of inadequate warnings provided to the consumer re the possible hazards arising from the use of such product.

Consumers will be entitled to approach the court and sue for damages without needing to prove fault on the part of the manufacturer, which removes the current major evidential burden on the part of the consumer.

CONSEQUENCES OF NON-COMPLIANCE

If a supplier finds himself before a court of law in a matter relating to his compliance with the CPA and such court determines that the transaction or agreement in question was, in whole or in part, unjust, unreasonable or unfair, the court may –

- order that the offending section of the agreement/provision/notice be severed; or
- order that the agreement/provision/notice be altered in order to bring it in line with the CPA; or
- declare the entire agreement/provision/ notice void as from the date that it purportedly took effect.

Penalties and administrative fines

If a person is convicted of an offence, he may be liable for –

- a fine; or
- imprisonment for a period not exceeding 12 months; or
- both a fine and imprisonment.

The Tribunal may impose an administrative fine in respect of prohibited or required conduct, however, such fine may not exceed the greater of –

- 10% of the respondent's annual turnover during the preceding financial year; or

- R1 000 000.

CHECKLIST

How does the average man on the street ensure that his business is being run in compliance with the CPA? The following are simple guidelines to assist in ensuring that your business is CPA compliant. Please note that this list is not exhaustive -

- perform all services timeously and professionally;
- ensure all advertising, agreements and communications are in plain language and easily understandable;
- ensure that agreements are not excessively one-sided against the consumer;
- ensure that all contractual terms which limit or exclude the supplier/manufacturer/distributor's liability are highlighted;
- false advertising is prohibited – ie, don't advertise that certain goods are available at a reduced price 'while stocks last' in the hope of luring customers to the store;
- one can no longer agree to exchanges but not refunds – consumers are entitled to refunds in certain circumstances;
- if goods are purchased as a consequence of direct marketing, there is a 5 day cooling off period during which the consumer is entitled to cancel the transaction;
- if the consumer was not given the opportunity to examine the goods beforehand, he/she has 10 days within which to return the goods;
- if there is going to be a delay in delivery, inform the consumer and arrange a new date for delivery (be aware that the consumer is entitled to cancel the deal in such circumstances);
- ensure that the correct goods are delivered to the correct person – if you deliver the wrong goods, or you deliver the goods to the wrong person, you run the risk of the goods being declared 'unsolicited', in which case the person to whom they are delivered is entitled to keep the goods free of charge;
- ensure that you have a procedure for handling complaints and that all staff know who complaints should be escalated to in order for the appropriate communication to be delivered to the consumer;
- as one's staff are often on the front line of customer interaction, it vital to ensure they are trained on the supplier's obligations and the customers' rights arising from the CPA.

In a nutshell, if a business is conducted in an honest and transparent manner with due diligence in every respect, it should not fall foul of the provisions of the CPA. It is slightly more complicated than that, but that's a good place to start!

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