



**MYBURGH
ATTORNEYS**
INCORPORATED

CONSUMER PROTECTION ACT KNOW YOUR RIGHTS

WHO IS AFFECTED BY THE CONSUMER PROTECTION ACT (“CPA”)?

- Suppliers of Products
- Suppliers of Services
- Dual Suppliers of Services and Products
- Consumers

WHEN IS THE CPA APPLICABLE?

It is applicable to every transaction (as defined in the Act) occurring in RSA also, to the promotion of any goods or services within RSA.

The transaction must be in the ordinary course of the business of the Supplier. The Supplier must be transacting with a Consumer.

WHAT DOES PRODUCT LIABILITY MEAN UNDER THE CPA?

Section 61: Liability for Damage Caused by Goods

The supply chain is jointly and severally liable for any harm, death, injury, illness, loss, physical damage, economic loss caused wholly or partly by:

- Supplying unsafe goods
- Product failure, defects, hazards in goods
- Inadequate instructions, warnings about the product

The supplier is liable regardless of whether there was any negligence present on behalf of the supplier. The Act has brought about strict liability.

WHAT ARE THE ADVANTAGES OF THE CPA?

A Consumer may lodge a complaint with the Commission who will investigate the complaint. In the event of a legitimate complaint, the matter will be referred to the Tribunal for prosecution.

In the event that a supplier is found guilty of being in violation of a provision of the Act, the Tribunal may level an administrative fee of up to R1,000,000 or 10% of annual turnover, whichever is the greater. This can have a crippling effect on most businesses.



ESSENTIAL DEFINITIONS FROM THE ACT:

Goods: Anything for human consumption, any tangible object, any literature, music, photograph, game, information, data, software, other tangible product written on any medium, a legal interest in land, gas, water and electricity.

Services: Any work or undertaking, provision of education or information, advice or consultation, any banking services or financial services, transportation of individual goods, provision of accommodation, entertainment or access to entertainment, access to any electronic communication infrastructure, access to any event, premises, activity or facility, access to premises in terms of rental and right of occupation.

Transaction: An agreement for the supply (or potential supply) of any goods or services in the suppliers ordinary course of business.

Consumer:

- A person (including small “companies”) to whom goods or services are marketed or who has entered into a transaction with a supplier in the suppliers ordinary course of business;
- A user of the goods or recipient or beneficiary of the services irrespective of whether the user is a party to the transaction;
- A franchisee.

Government and large businesses are not Consumers. The Regulations for the Act (which are still to be promulgated) will provide the threshold for the annual turn-over (and asset base) for companies, above which, companies will be deemed not to be consumers.

VOETSTOOTS CLAUSE:

- a) A sells his (only) primary residence to B: voetstoots is still applicable
- b) A sells his (only) beach house to B: voetstoots is still applicable
- c) A sells his primary residence to B: but the seller used the services of a real estate agent who was the effective cause of the deal. The Act is applicable to the mandate that the estate agent takes from the seller. The Act is accordingly applicable to all of the services provided by the agent to the parties. While it is currently a huge point of discussion and controversy, the agent’s involvement should not elevate the agreement between the seller and the purchaser (which is not an ordinary course transaction) to a transaction to which the Act is applicable. The voetstoots clause should therefore still be allowed in these agreements.
- d) A sells one of his units in his developments to B: the Act is applicable to these transactions because this is an ordinary course transaction. The supply chain is also jointly and severally liable for the product (the unit). The agent would be included in the supply chain.

The voetstoots clause (a product of common law) will still be in use and applicable to transactions which are not ordinary course transactions.

IMPORTANT PROVISIONS:

Section 14: Expiry and Renewal of Fixed-term Agreements:

A consumer may terminate a long-term contract on 20 business days notice. (Section 14 is however not applicable to companies or CCs regardless of turn-over). The supplier is only entitled to a reasonable

cancellation fee in such an event. In the current draft Regulations the cancellation fee is currently set as a maximum of 10% of the value of the remainder of the contract.

Section 16: Right to Cooling-off Period after Direct Marketing:

A consumer is entitled to cancel an agreement which resulted from direct marketing, without reason or penalty. The cool-off period is 5 business days from the time of the transaction. The supplier must refund the consumer within 15 days from return of the goods or notice of termination.

Section 19: Consumer's Rights regarding Delivery of Goods or Supply of Services:

It is an implied term of every transaction for the supply of goods and services that:

- The supplier is responsible to deliver the goods or services on the agreed place, time and date – at the cost of the supplier.
- If the supplier tenders delivery of the goods or services on a date or time other than that agreed to, the consumer may:
 - Accept the delivery as tendered; or
 - Insist that delivery occurs on the agreed date (if delivery has not yet occurred); or
 - Cancel the agreement without penalty, treating the delivered goods as unsolicited goods / services (section 21).
- If the supplier delivers a quantity larger than what was agreed, the consumer may:
 - Reject all the goods; or
 - Accept the delivery and treat the excess quantity of goods as unsolicited goods (section 21).

The implications of late delivery of goods and services are harsh. Suppliers should be careful when they commit to a time and date for delivery.

Section 20: Consumers Right to Return Goods:

The consumer may return goods for a full refund if:

- the goods were returned as a result of termination during the cool-off period;
- the consumer was not given an opportunity to examine the goods prior to delivery;
- the supplier sent a mixture of good (not only what was ordered);
- the goods were ordered for a particular purpose and the consumer found that (within 10 business days) the goods were not suitable for the intended purpose.

Section 21: Unsolicited Goods or Services:

Goods or services are unsolicited if:

- the goods were left with the consumer after direct marketing;
- the goods delivered are materially different to what was ordered;
- delivery was rejected as a result of delivery on incorrect date, time or location;
- the supplier delivered a larger quantity of goods than what was ordered, the excess is unsolicited.

It is important to note that the consumer becomes the owner of unsolicited goods.

Section 22: Plain Language:

Any document, notice or contract must be in plain language so that an ordinary consumer with average-literacy skills and minimal experience as a consumer of the relevant goods or services could be expected to understand the content.

Section 30: Bait Marketing:

A supplier may not mislead the consumer in any advertisement about the availability of goods or services at a specific price when the supplier is unable or does not intend to supply the goods or services at those prices.

Section 31: Negative Option Marketing:

A supplier may not promote any goods or services on the basis that an agreement will automatically come into existence, unless the consumer (actively) declines the offer.

Section 41: False, Misleading or Deceptive Representations:

The supplier of goods or services may not, directly or indirectly, express or imply a false, misleading or deceptive representation concerning a material fact, or use exaggerated, innuendo or ambiguity as to a material fact, or fail to correct an apparent misapprehension on the part of the consumer.

Section 47: Over-selling and Over-booking:

If the supplier accepts a reservation but fails to deliver because of insufficient stock or capacity, the supplier must:

- Refund the consumer with interest;
- Compensate the consumer for costs directly incidental to the supplier's breach.

Section 48: unfair, Unreasonable or Unjust Contract Terms:

A supplier may no longer inset contract terms which are excessively one-sided, which require the consumer to waive his / her rights or which force the consumer to assume certain obligations or indemnify the supplier. It is important to revise contracts to bring them in line with the Act.

Section 54: Consumer's Right to demand Quality Services:

The consumer has the right to the timely performance and completion of services, and the timely notice of any unavoidable delays – the performance of the service is to be in a manner and quality that persons are generally entitled to expect.

Section 55: Consumer's rights to safe, good quality goods:

“goods must be reasonably suitable for the purpose for which they are generally intended”

“it is irrelevant whether product failure or defect is latent or patent or whether it could have been detected by the consumer”

UNFAIR, UNREASONABLE OR UNJUST CONTRACT TERMS:

A supplier must not:

- offer to supply, supply or enter into an agreement to supply, any goods or services:-
 - at a price that is unfair, unreasonable or unjust; or
 - on terms that are unfair, unreasonable or unjust.
- market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer:-
 - to waive any rights;
 - assume any obligation; or
 - waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust 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;
- the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
- the consumer relied upon a false, misleading or deceptive representation, as contemplated in Section 42 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in Section 49(1), and:-
 - the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of Section 49.

It is always better to consult with an experience attorney and ensure that your attorney explains everything to you in detail until you understand.

*This information is only meant to be used as a guideline.
Consult your attorney.*