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CONSUMER PROTECTION ACT 68 OF 2008

The Consumer Protection Measures Act sets out the minimum requirements to ensure adequate consumer protection.

The President of South Africa signed the Consumer Protection Act on 24 April 2009 and it was published in the government gazette on 29 April 2009 and will operate from 31 March 2011.

The general theme of the Act is to protect the poor and vulnerable, less educated and informed consumer vis-à-vis big business.

1. Application of the Act

- 1.1. The definition of consumer not only includes the person, to whom goods or services are promoted or supplied, but also the actual user of goods or the recipient or beneficiary of services
- 1.2. In terms of section 5 of the Act, certain transactions will be excluded from the application of the Act
 - 1.2.1. goods or services supplied to the State (where the State is the consumer)
 - 1.2.2. goods or services where the consumer is a juristic entity whose asset value or annual turnover at the time of the transaction, equals or exceeds the threshold value determined by the Minister. The Department of Trade and Industry have now set this value at R2 million.
 - 1.2.3. transactions that constituted credit agreements under the National Credit Act
 - 1.2.4. transactions pertaining to services under an employment contract
 - 1.2.5. transactions which gives effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act
- 1.3. The Act also provides a mechanism in terms of which a regulatory authority may apply to the Minister of Trade and Industry for an Industry wide exemption from certain provisions of the Act
- 1.4. In essence, in so far as the operation of an Estate Agency business is concerned, the Act regulates the following;
 - 1.4.1. every transaction between a supplier and a consumer involving the supply of goods and or services in the ordinary course of business within the Republic of SA
 - 1.4.2. the promotion of such goods and services that could lead to a transaction being entered into

2. When is the sale of Immovable property covered by the CPA

- 2.1. In terms of the CPA, the definition of "goods" include -
"a legal interest in land or any other immovable property..."

Therefore the sale of Immovable property falls within the meaning of "goods"

2.2. In terms of the CPA, the definition of a "consumer" is –

"(a) a person to whom goods or services are marketed in the ordinary course of the supplier's business

(b) a person who has entered into a transaction with the supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the CPA by virtue of section 5(2) (see *paragraph 1.2 above*) or in terms of section 5(3) (see *paragraph 1.3 above*) "

As the normal residential purchaser of immovable property (goods) is therefore not a consumer in the ordinary course of the supplier's business, the purchaser can not be considered to be a "consumer"

2.3. In terms of the CPA, the definition of a "transaction" is –

"(a) in respect of a person acting in the ordinary course of business –

(i) an agreement between or among that person and one or more other persons for the supply or potential supply of goods or services in exchange for consideration; or

(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or

(iii) the performance by or at the direction of that person of any services for or at the direction of a consumer for consideration; or

(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a)"

This definition therefore includes any transaction whereby property is sold from a supplier to a consumer, but excludes a once-off sale as it does not occur "in the ordinary course of business"

2.4. In terms of the CPA, the definition of "supply" is –

"(a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or

(b) in relation to services, means to sell the services, or to perform or to cause them to be performed or provided, or to grant access to any premises, event, activity or facility of business in the ordinary course for consideration"

Sale agreements are included under (a) (sell) and also falls under (b) being to grant access to any premises which covers access to the property by giving of occupation in terms of the occupational rent provision in the sale agreement pending transfer.

2.5. Therefore the normal sale by a Seller to a Purchaser of a residential home falls short of the key concept of "in the ordinary course of business"

The Act does not apply to "once-off" sales of immovable property, i.e sales between private persons where the seller is not engaging in a business venture such as investing from time to time in property, or such as a developer.

2.6. Because the freely negotiated agreement between the Seller and the Purchaser in a once-off sale of immovable property (that does not fall within the ambit of the a supply in the ordinary course of business) constitutes the legal basis for their contractual relationship as regulated by the Alienation of Land Act (even to the extent that a pre-printed form provided by an estate agency is usually used as a departure point) it can not be argued that the conclusion of the written agreement falls within the scope of the CPA

2.7. However, where a developer promotes, markets and sells his development to the public or where a property speculator sells a home or where an estate agency as part of it's trading stock sells property, the supply falls within the ambit of "in the ordinary course of business" and therefore the consumers rights as set out in the CPA are protected

2.8. Some of the prominent consumer rights that are protected by the Act are –

- 2.8.1. All agreements must be in plain understandable language
- 2.8.2. All agreements must contain fair, reasonable and just terms
- 2.8.3. A consumer has the right to receive express notice of any term in an agreement which limits the risk of liability of the provider or any terms which constitutes an assumption of risk or liability by the consumer
- 2.8.4. A consumer has a cooling off right which allows him to cancel the agreement within 5 days after contracting
- 2.8.5. A consumer has the right to return defective goods

3. Estate Agency Business and the CPA

- 3.1. In the conventional scenario where a seller/owner instructs an estate agency, the agency will perform its service of marketing and selling or renting the home of the seller/owner "in the ordinary course of its business" and therefore the service that the estate agency renders is covered by the CPA

Therefore the estate agency must ensure that the mandate agreement, which constitutes the basis of the relationship between the supplier (estate agency) and seller/owner (consumer) complies with the list of consumer rights as set out above in paragraph 2.8

- 3.2. The relationship between the purchaser and the estate agency is also covered by the CPA, in that the estate agency markets to the public and the marketing practices will have to comply with the provisions of the CPA. The list of fundamental rights (that not only estate agents, but also attorneys and banks will need to respect) are, the right to –

- 3.2.1. equality in the consumer market
- 3.2.2. privacy
- 3.2.3. choose
- 3.2.4. disclosure and information
- 3.2.5. fair and responsible marketing (*section 29-39, see more below in 3.3)
- 3.2.6. fair and honest dealing (prohibits false, misleading or deceptive misrepresentations, failure to disclose material facts thereby leading to deception, failure to correct an apparent misapprehension by the consumer)
- 3.2.7. just and reasonable terms and conditions
- 3.2.8. fair value, good quality and safety
- 3.2.9. supplier's accountability to consumers

- 3.3. The right to fair and responsible marketing are dealt with under the following sub paragraphs in the Act

- 3.3.1. General standards for marketing of goods and services (provides that you may not to market in a misleading, fraudulent or deceptive way iro the nature, properties, advantages or uses of the goods/services and the manner and price at which the goods may be supplied. Be very accurate in the description of goods you market)
- 3.3.2. Bait marketing
- 3.3.3. Negative option marketing
- 3.3.4. Direct marketing to consumers (see 3.4 below)
- 3.3.5. Catalogue marketing

- 3.3.6. Trade coupons and similar promotions
 - 3.3.7. Customer loyalty programmes
 - 3.3.8. Promotional competitions
 - 3.3.9. Alternative work schemes
 - 3.3.10. Referral selling
 - 3.3.11. Agreements with persons lacking legal capacity
- 3.4. Insofar as direct marketing by the estate agency is concerned, the provisions in the CPA which regulates direct marketing extend to all communications for the purposes of direct marketing which can be directly in person, by mail or electronic communication to promote goods or services

- 3.4.1. A person who directly markets goods or services and who then concludes a transaction with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement

It stands to reason that where an estate agency sends out an email or flyer to a consumer to rent out a property forming part of the stock in trade of a property investor, and the consumer then enters into the lease agreement with the property investor, which qualifies as a transaction in terms of the CPA as it was concluded in the course of ordinary business of the supplier, the consumer must be advised of his right to rescind the agreement, over and above the rights of the consumer in terms of fixed term contracts. (See 5 below)

In further stands to reason of an estate agency sends out a flyer to a consumer promoting their services to sell their property, and the consumer then enters into a mandate with the estate agency, which qualifies as a transaction in terms of the CPA, the consumer must be advised of his right to rescind the agreement

It is our contention that if an estate agency sends out a flyer to a consumer promoting their stock in trade for sale, and the consumer then enters into a sale agreement with the seller who mandated the agency, the resultant sale by the seller as a once-off transaction, is not in the course of the seller's ordinary business, does not constitute a transaction in terms of the CPA, and therefore the consumer does not have a right to rescind the agreement as the transaction contemplated falls outside the ambit of the CPA

- 3.4.2. As far as the right to rescind is concerned, section 16 of the CPA provides that in the event of direct marketing to consumers, the consumer may cancel a transaction entered into as a result of direct marketing on five business days' written notice
- 3.5. In terms of section 11, a consumer may either refuse to accept, pre-emptively block, or require another person to discontinue any communications which may be seen as direct marketing. This may include telephone calls, e-mails, brochures or letters in the mail, etc.
- 3.5.1. The National Consumer Commission will facilitate the establishment of a registry where a consumer may register their particular preferences (for example, that the consumer wishes not to receive any direct marketing [pre-emptive block], or where he previously agreed to receive marketing material, he now wishes to change his mind and requires the marketer to stop marketing to him directly). As at date of publication, no such registry has been established.
 - 3.5.2. Business will have to ensure that they have measures in place to receive and records consumers' specific preferences, and abide by these expressed preferences. In addition, the Minister may prescribe certain times when consumers may not be contacted, for example public holidays and after a certain time at night
- 3.6. The Consumer Tribunal and Courts will hear complaints of aggrieved consumers and anyone convicted of an offence under the Act can be fined or imprisoned for a maximum period of 12 months, or fined and imprisoned

The Tribunal may also impose administrative fines in respect of prohibited conduct and such penalties are limited to an amount not exceeding 10% of the guilty party's annual turnover during the preceding year or R1 000 000.

- 3.7. The nature of these penalties are such, that all business should scrutinise their marketing efforts to ensure that they remain well within the provisions of the CPA
- 3.8. In terms of section 79 onwards of the CPA, you may be required to register your business name with the Registrar of Companies. Therefore if you are currently ABC (Pty) Ltd, trading as XYZ, you will have to register the business name XYZ

4. CPA and the voetstoets clause

- 4.1. Section 5(5) of the CPA provides as follows:

"If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61

- 4.2. Section 61 provides as follows:

"Liability for damage caused by goods

(1) except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for harm, as described in subsection (5), caused wholly or partly as a consequence of –

(a) supplying any unsafe goods;

(b) a product failure, defect or hazards in any goods; or

(2) a supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section"

- 4.3. Section 61(5) provides that "harm" includes economic loss as a result of defects in immovable property as well
- 4.4. Section 61(1)(a) and (b) incorporates latent defects and as such, makes the seller liable to the purchaser for harm caused if the goods are unsafe, has a failure or defect.

Section 61(2) defines supplier wide enough to include estate agents

- 4.5. On a strict interpretation of the words, Section 5(5) appears to deal with transactions which are exempted from the CPA (1.2 above) and not transactions that fall wholly outside the application of the CPA because they were not concluded in the ordinary course of business. Therefore an ordinary once-off seller selling his property, who does not sell property in the ordinary course of business, may continue to rely on the protection of the voetstoets clause on his agreement as such a transaction does not fall within the ambit of the CPA
- 4.6. As regards all transactions which are covered by the CPA, because they are concluded in the ordinary course of the supplier's business, the operation and reliance on the voetstoets clause is excluded by operation of the following sections of the CPA

- 4.6.1. Section 56 Implied warranty of quality

(1) "In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be"

4.6.2. Section 55 deals with the consumer's right to safe, good, quality goods, with the exception of goods bought on auction as contemplated in section 45

Section 55(2) states that the consumer is entitled to receive the goods that

(a) are reasonably suitable for the purposes for which they are generally intended;

(b) are of good quality, in good working order and free of any defects

4.6.3. Section 55(5)(a) states that

"it is irrelevant whether the product failure or defect was latent or patent..."

4.6.4. Section 55(6) states that section 55(2)(a) and 55(2)(b) above do not apply to a transaction if the consumer –

(a) has been expressly informed that particular goods were offered in a specific condition, and

(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting goods in that condition"

4.6.5. Where the goods supplied fails to comply with the standards and requirements contemplated in section 55, section 56(2) provides that –

"within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier without penalty and at the supplier's risk and expense...."

4.6.6. Therefore, developers, speculators and institutional investors with large property portfolios who sell property in the ordinary course of business, cannot exclude liability for defects by way of a voetstoets clause. The CPA effectively does away with a voetstoets clause and any other contractual stipulation such as "no warranties" clause whereby the seller attempts to escape liability for defect

5. The impact on fixed term agreements, in particular on Lease Agreements

The Consumer Protection Act ("CPA") specifically regulates fixed-term agreements (contracts of definite duration) and the expiry and renewal of such agreements. The regulations pertaining to fixed term contracts, also pertains to Lease Agreements, where such agreements qualifies as consumer agreements in terms of the CPA.

The Regulations to the CPA provides that fixed-term consumer agreements must not exceed a period of 24 months. There is no differentiation between various categories of consumer agreements, despite the fact that the CPA empowers the Minister to prescribe different maximum periods for different categories of agreements.

The discussion below will specifically deal with Lease Agreements and the impact that the CPA has on such agreements.

5.1. Renewal and cancellation of Lease Agreements

Lease Agreements in respect of which the fixed-term provisions apply may not be concluded for periods longer than the prescribed maximum period of 24 months. Notwithstanding any contrary provision in a Lease Agreement, a Lessee may cancel such agreement before the expiry of the originally agreed fixed term on 20 business days' written notice (or on notice in other recorded form) to the Lessor. It appears that the Lessee need not provide any reason for the cancellation. The CPA also provides for the Lessor's right to cancel a Lease Agreement on 20 business days' written notice, but this right may only be exercised if the Lessee has failed to remedy a material breach on his part, after having been placed on terms to do so. In all other circumstances the Lessor must adhere to the notice periods provided for in terms of section 14 of the CPA. In terms of that section, the Lessor must notify the Lessee in writing not more than 80 days, but not less than 40 days before expiration of the agreement of its looming expiry. In addition thereto the Lessor must in sufficient detail, specify any changes to be made to the existing Lease Agreement on renewal.

Upon expiry, Lease Agreements will automatically renew on a month-to-month basis, subject only to any material changes in respect of which the Lessor has given notice. This is contrary to the common law position where a lease would terminate finally on the expiry thereof and the tenant would be obliged to immediately vacate the leased premises. The CPA provides that a month-to-month renewal will be effective upon expiry unless the Lessee expressly directs a Lessor to terminate the agreement on the expiry date or agrees to a renewal for a further fixed term. It is accordingly recommended that Lessors incorporate terms in Lease Agreements providing for immediate termination to avoid having to accommodate problematic Lessees for at least a further month after the expiry of the lease.

Regardless of the reason for the cancellation of a Lease Agreement, the Lessee will remain liable to the Lessor for any amounts owed to the Lessor in terms of the relevant agreement up to the date of cancellation, but not up to the end date of the Lease Agreement contemplated under the relevant agreement.

The CPA further provides that the supplier is entitled to impose a reasonable cancellation penalty "in contemplation of the agreement enduring for its intended fixed term." The Regulations provide guidelines in determining a reasonable cancellation amount. It is important to note that the Regulations prohibit the charging of a cancellation amount that will have the effect of negating the consumers (lessee's) right to cancel a fixed term consumer agreement. (Lease Agreement)

It is notable that the provisions relating to fixed term agreements are not applicable to transactions where the supplier and the consumer are juristic persons as defined in the CPA, regardless of the consumer's annual turnover or asset value. This is likely to exclude application of the relevant provisions for most, if not all, commercial lease agreements regardless of size.

5.2. Plain & Ordinary language

In terms of section 22 of the CPA, all agreements, notices, documents or visual representations etc, must be written in plain language so that a consumer of the ordinary class of persons is able to understand it. This provision will extend to anyone including Lessees and Lessors. Factors to consider in determining whether the consumer could understand the contents of the Lease Agreement will include, but is not limited to the following:

- if it can be understood without undue effort,
- the context of the document,
- the organisation involved,
- vocabulary used,
- use of headings and illustrations.

5.3. Prohibition on unfair, unreasonable or unjust terms

A supplier is prohibited from incorporating in agreements, contract terms that are unfair, unreasonable or unjust. In terms of section 48 of the Act a supplier (Lessor) (hereinafter any reference to Lessor will mean a Lessor who is also a supplier) must not require a Lessee to waive any rights, assume any obligation or waive the liability of the landlord on terms that are unfair, unreasonable or unjust. Furthermore, agreements that are generally one sided; or contain a contract term that is so adverse, that it is inequitable; or instances where the Lessor relies on something which is false, misleading or deceptive will automatically constitute an unfair, unreasonable or unjust term or agreement, and will thus be void.

5.4. Voetstoets clauses and disclosure

Although voetstoets clauses are generally only used in contracts of sale, rather than in Lease Agreements, pseudo voetstoets clauses are often found in Lease Agreements. By virtue of these clauses the leased property is let as is, and the Lessor will not bear any obligation to remedy such defects. It is important to note that the incorporation of these pseudo voetstoets clauses does not extinguish, diminish or limit the Lessor's obligation to maintain the leased premises in good order.

6. The impact of the CPA on Estate Agent's Mandates

The definition of a "fixed term consumer agreement" will apply to sole mandates (excluding mandates where both parties are legal entities). In the Regulations pertaining to the Act, the Minister has specified that all fixed term agreement may not exceed 24 months. The consumer has the right to cancel the agreement by giving 20 business days' notice in writing, subject to the payment of a cancellation penalty.

Section 14(2)(c) of the Act states that if a consumer agreement is for a fixed term, the supplier must notify the consumer in writing in not more than 80, nor less than 40 business days before the expiry date of the fixed term of the consumer agreement, 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 in terms of paragraph (d)".

Section 14(2)(d) of the Act deals with the options available to consumers on expiry of the fixed term. It states that on expiry of the agreement, "it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, unless the consumer expressly directs the supplier to terminate the agreement on the expiry date; or agrees to a renewal of the agreement for a further fixed term."

The practical implication for estate agents is that the estate agent must inform the mandator in writing, before the expiry of a sole mandate of:

- (a) the date on which the mandate expires;
- (b) changes (if any) that would apply if the mandate is renewed after the expiry date in the event that the seller does not terminate the mandate on its expiry;
- (c) the fact that if the mandate has not been terminated by the consumer on the expiry date, the mandate will automatically continue on a month-to-month basis unless the consumer agrees to another fixed term, or expressly terminates the agreement.

This written notification must be sent not more than 80 and not less than 40 business days before the expiry date of the mandate.

Therefore, if an estate agent takes a mandate from a client, it is essential to establish whether the client has given a prior sole mandate to another agent, because unless the prior mandate has been terminated in accordance with section 14(2)(d), it is renewed on a month-to-month basis and the subsequent agent will not have the authority to sell the property. In addition the seller may be liable for double commission.

In the event that the Mandate was obtained as a result of direct marketing, the seller may cancel the Mandate within 5 business days of the conclusion of the Mandate. This is known as the "Cooling Off" right. Direct Marketing in terms of the Act means to approach a person, either in person or by mail (electronic or otherwise), for the direct or indirect purpose of promoting or offering to supply goods or services.

Notably, in both cases, the cooling off right and the right of cancellation, the Act does not expect seller's to give reasons for their decision to cancel the mandate.

Therefore Agents would need to consider carefully whether they are going to spend large sums of money on advertising, as it has become a lot easier for sellers to terminate Mandates.

One way of recuperating money spent on advertising should the seller decide to cancel the Mandate before the expiry date, is to charge a reasonable cancellation penalty.

Section 5(3) of the Regulations of the Act determines that the supplier (the Agent in this instance) may not charge a charge which would the effect of negating the consumer's (seller's) right to cancel a fixed term consumer agreement (Mandate) as afforded by the Act.

It is therefore suggested that Agents make sellers aware before hand that should they cancel a Mandate before the expiry date thereof, and the Agency has advertised the property before the

cancellation of the Mandate, the seller will be liable for the actual costs of the advertisements of that property up to the date of cancellation of the Mandate.

It is imperative that each Agency develops their own procedure in this regard, and to notify prospective sellers of the policy.

Although care has been taken to ensure the accuracy of the above information, FN Inc and its members, employees, agents and representatives cannot be held liable for any loss suffered, as a result of the use of this information.

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