

The impact of the Consumer Protection Act on leases: landlords must get their houses in order

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Don't be left in the dark when the new Consumer Protection Act comes into full effect.

Recent media hype regarding the imminent implementation of the Consumer Protection Act, 68 of 2008 ("the CPA") has highlighted its impact on the manufacturing, supply and distribution of goods and services. Little notice has been taken of its effect on leases of immovable property. However, landlords would be well advised to investigate their obligations under the CPA.

Applicability of the CPA

The CPA will apply to:

- ▶ every transaction occurring within South Africa (including agreements between people acting in the ordinary course of business for the supply of goods or services to consumers in exchange for consideration, as well as the supply of goods at the direction of consumers), unless expressly exempted; and
- ▶ the promotion of any goods or services; and
- ▶ the supply of any goods or services, within South Africa (unless exempted and subject to exception); and
- ▶ the actual goods or services that are supplied or performed in terms of a transaction to which the CPA applies.

The provision of access to or use of fixed property by way of rental is one of the services to which the CPA relates. The tenant would, depending on whether or not he or she falls with the thresholds mentioned below, be regarded as a consumer under the CPA. A "consumer", as defined in the CPA, includes not only individuals in respect of residential leases, but also tenants of commercial properties who are individuals or small or medium business enterprises. The regulations to be issued under the CPA have not yet been released to the public. However, the Department of Trade and Industry has indicated that the provisions of the CPA will not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds R3 million.

In this context, the definition of "supply" in relation to services refers to the granting of access to premises "in the ordinary course of business". Whether or not a particular lease agreement falls outside the scope of the CPA as a result of the fact that letting of premises by a particular landlord does not form part of his or her ordinary business, will depend on how widely this aspect is interpreted.

The contract of lease

The contract of lease should now also comply with the provisions of the CPA to ensure that it passes scrutiny and avoids the penalties imposed by the CPA for non-compliant agreements. The following general principles must be adhered to:

- ▶ The contract must be in plain and understandable language that would enable an ordinary person with average literacy skills and minimal experience to understand the content, significance and import. The extent of the impact of this requirement is not clear at this stage, but the landlord should at least ensure that the contract of lease is provided in a language in which the tenant is fluent.
- ▶ The tenant's attention must be conspicuously drawn to any provision in the agreement that limits the risk of the landlord or constitutes an assumption of risk for the tenant, an indemnity by the tenant or an acknowledgement of fact by the tenant. This notice must also be in clear and understandable language. The relevant provisions normally found in standard leases, including those to the effect that the landlord is exempted from any liability arising from the state of repair of the premises and requiring the tenant to indemnify the landlord against any claims arising from the utilisation of the premises, including from third parties accessing the premises, would thus be affected.
- ▶ The contract of lease must not be subject to certain specified provisions which defeat the purpose of the CPA and, more specifically, any provision which purports to limit or exempt the landlord from liability for any loss attributable to the gross negligence of the landlord or requires the tenant to assume liability for this.
- ▶ The contract should not contain a false acknowledgement by the tenant that no representations or warranties were made by the landlord, or on behalf of the landlord (e.g. by the rental agent). This raises a number of questions in respect of clauses normally contained in leases stating that the landlord has not made any such representations or given any warranties. The extent to which such provisions would be allowable depends on the actual circumstances and the factors that would be considered when establishing whether or not the acknowledgement was false when the lease agreement was signed. Common law principles relating to the introduction of extrinsic evidence and the provision normally found in most

written agreements to the effect that the document itself contains the entire agreement between the parties, will also be tested by this provision.

- ▶ Contracts should not be substantively unfair. This means that they should not be excessively one-sided in favour of the landlord or contain provisions so adverse as to be inequitable. Each provision of an agreement and the agreement as a whole should be considered when assessing compliance with this. For instance, the standard provisions normally found in leases dealing with waiver of common law rights or assumption of obligations by tenants could be challenged on the basis of this concept. Unfortunately there is no "tick-box" available to assist draftsmen in this regard and a holistic approach should be followed.

Warranties

The practice of including minimum warranties (and specifically excluding any warranties relating to the purpose for which the premises is intended to be used by the tenant; zoning of the property; or the attainability of any licences or rights in respect of the intended use thereof) will no longer be possible except to the extent that the tenant has been expressly informed that the premises are offered in a specific condition.

For instance, where a tenant intends to use the premises as a restaurant and this is clearly conveyed to the landlord, the tenant will have the right to receive the premises in a condition that is reasonably suitable for this purpose. It could thus be argued that this will include being in a condition to obtain a liquor licence.

Expiry and renewal of leases

The regulations still to be published will prescribe certain maximum periods relating to the term of fixed-term agreements. There is as yet no certainty as to how this will impact the maximum term of leases. It is, however, safe to assume that any limitations on the terms of long-term leases will have far-reaching effects on landlords and tenants alike and will deal a significant blow to the security of tenancy normally created by such leases.

More worryingly, and a principle that all landlords should take notice of, is the fact that the tenant will be 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 in the lease to the contrary. Fortunately for landlords who

let their properties to juristic persons, this provision is not applicable to leases involving juristic persons, regardless of their annual turnover or asset value.

Even though the tenant will remain liable to the landlord for amounts owed in terms of the lease up to the date of cancellation and the landlord will be entitled to impose a reasonable cancellation penalty, the uncertainty caused by this could negatively impact landlords wishing to use rental agreements as security.

Product liability

The CPA introduces a form of modified strict liability for suppliers for all harm resulting from the supply of goods to consumers. However, it is submitted that these provisions will not apply to the supply of access to immovable property as this is regarded as a service and not the provision of goods.

Penalties

Landlords choosing to ignore the CPA and incorporating prohibited provisions into their leases, run the risk of not only the offensive provision, but the entire lease agreement, being declared void and thus unenforceable.

And if that is not enough to scare landlords into compliance, failure to comply with a compliance notice directing that prohibited conduct be rectified, may result in a fine or imprisonment for up to one year, or both a fine and imprisonment. Fines could be substantial and may range up to the greater of 10% of annual turnover or R1 million.

Landlords must also ensure that their agents are well versed on the CPA, as the conduct or failure of, for instance, a rental agent during the process of concluding a lease agreement on the landlord's behalf, may result in the landlord incurring vicarious liability on a joint and several basis.

The way forward

Although the CPA will have only limited application, if any, to agreements concluded prior to the commencement of the CPA, it is clear that landlords should assess how it applies to their business operations without delay. Standard lease contracts should be reviewed and adjusted ahead of the commencement of the CPA on 1 April 2011, as there will be no mercy for any landlord whose house is not in order thereafter.

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Danelle Corbett was appointed as a partner of Jan S. de Villiers in 2008. She became a director of Werksmans Attorneys when the two firms merged in 2009 and is currently a member of the firm's Commercial team, based in Paarl. Danelle specialises in general corporate and commercial transactions, including mergers & acquisitions, both within and beyond South Africa's borders, and corporate re-organisations. Her experience extends to debt securitisation, corporate structuring and financing, black economic empowerment transactions, private equity transactions and project finance transactions. She is also well-versed in corporate governance requirements. Danelle has a BA LLB from Stellenbosch University and a Post Graduate Diploma in Commercial Law from the University of Cape Town.

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