

The Consumer Protection Act – a brief overview of the draft General Regulations

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LEGAL BRIEF | JANUARY 2011

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

Draft regulations have been published under the provisions of the Consumer Protection Act No. 68 of 2008 (CPA). The draft regulations (the General Regulations) appeared for comment in the *Government Gazette* as General Notice 1099 on 23 November 2010. The period within which the public has been afforded the opportunity to comment on the General Regulations expires on 31 January 2011. This period is an important part of the exercise of rights by the public pursuant to Section 33 of the Constitution, which guarantees everybody the right to procedurally fair administrative justice.

The General Regulations focus *primarily* on four areas: franchise agreements; certain advertising practices; auctions; and the labelling of products. There are, in addition to the four focus areas, a number of other minor areas that are visited including: the keeping of records; the rights of hawkers; and the notices and languages to be used by the National Consumer Commission.

The approach that has been taken in the General Regulations to franchising agreements is primarily to prescribe the contents of these agreements. Therefore proposed Regulation 2 sets out in great detail the

contents that a franchise agreement must contain in order for it to comply with the CPA. In addition, proposed Regulation 3 concerns disclosures that are to be made to a prospective franchisee by a franchisor, which forms a part of the entire transaction that ultimately may result in a concluded franchise agreement.

Advertising practices are regulated in terms of the CPA. However, without additional detail, which is now contained in the General Regulations, the scope and ambit of the manner in which the CPA deals with these advertising practices have been unknown. Importantly, proposed Regulation 4 finally establishes the content of the means of blocking or controlling direct marketing communications. Therefore proposed Regulation 4(3) establishes the registry pursuant to Section 11(6) of the CPA. This registry will allow consumers to register their details and in so doing block any direct communication. In this regard, proposed Regulation 4(3)(c) provides as follows:

"a consumer may register –

- (i) his or her name, identification number, passport number, telephone number, facsimile number, e-mail address,

postal address, physical address, a website uniform resource locator ('URL');

- (ii) other global address for any website or web application or site on the World Wide Web;
- (iii) any combination of the media or addresses contemplated in paragraphs (i) and (ii);
- (iv) a pre-emptive block for any time of the day or any day of the year; or
- (v) a comprehensive prohibition for any medium of communication, address or time whatsoever,

in his or her sole discretion, as the factor which triggers the pre-emptive block contemplated in Section 11(3) of the Act”.

A great deal of time and attention is paid in proposed Regulation 4 to the establishment of the registry as well as the means by which direct marketing may occur into the future based on the provisions of Section 11 of the CPA read with proposed Regulation 4.

Related to the prohibition on direct marketing are the contents of proposed Regulation 5, which restricts the time for contacting consumers to those specific times stipulated in proposed Regulation 5.

In relation to proposed Regulation 6, the maximum duration for a fixed-term consumer agreement is 24 months from the date of signature by the consumer. Therefore fixed-term agreements, as these agreements are defined in the CPA and provided for in the General Regulations, must be reviewed with reference to the provisions contained in the CPA in order to ensure that they comply with these provisions.

The threshold for pre-authorisation of the repair or the provision of maintenance services is, as stated in proposed Regulation 7, R1.00 excluding value added tax. Therefore for the purposes of Section 15(5) of the CPA, any maintenance work that is required on property owned by a consumer, the value of which exceeds R1.00, must first be authorised by the consumer prior to any such services being rendered.

The detail contained in proposed Regulation 8 read together with proposed Regulation 9 is designed primarily to ensure that consumers are assisted in “making informed decisions” or choices, for the purposes of Section 24(4) of the CPA and is also subject to Subregulation (2). In order for goods to be sold in the Republic, the label that appears on the goods must comply with the provisions of proposed Regulation 8. Proposed Regulation 8(2) does create certain exemptions for goods that must comply with

the provisions of proposed Regulation 8, but the exemptions do not apply to goods that are “imported for marketing purposes” – bearing in mind that the term “market” is defined specifically in Section 1 of the CPA as “to promote or supply any goods or services”. Similar provisions are contained in proposed Regulation 9, which deals primarily with genetically modified organisms and proposed Regulation 10 which deals with the disclosure of reconditioned or grey market goods. The General Regulations, in so far as proposed Regulation 9(2) is concerned, will deal with maize, soya beans and imported canola oil, which are products listed in Annexure B to the General Regulations.

Provisions relating to the hiding of information are contained in proposed Regulations 11 and 12. Proposed Regulation 11 sets out those details that will allow hawkers to be exempt from keeping sales records. Proposed Regulation 12 requires that disclosure of certain information must occur by any intermediary – bearing in mind that an intermediary is defined in Section 1 of the CPA as follows:

“a person who, in the ordinary course of business and for remunerational gain, engages in the business of –

- (a) representing another person with respect to the actual potential supply of any goods or services;
- (b) accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
- (c) offering to sell a consumer, soliciting offers for selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person, but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation.”

Promotional competitions are regulated pursuant to proposed Regulation 14, which requires that information be made available by the organiser of any promotional competition. This proposed regulation includes holding such information, pertaining to the competition, for a period of five years – pursuant to proposed Regulation 14(5).

Other advertising schemes that are dealt with by the General Regulations are alternative work schemes, in proposed Regulation 15, and fraudulent schemes and offers in proposed Regulation 16.

Specific attention is given to “speculative software” in proposed Regulation 17. The proposed regulation defines “speculative software” as “software which claims to

assist consumers to understand securities and exchanges and to trade profitably in securities on exchanges and/or software which claims to predict the outcome of horse race[s], and this software is available on 3 ½-inch floppy disks, compact disks or via the internet.” Proposed Regulation 17 allows for the sale of speculative software provided that certain conditions are met including prescribed disclaimers, which are set out expressly in proposed Regulation 17(2).

Public property syndication schemes are addressed in proposed Regulation 19, including the manner in which such schemes are to be arranged; the information that must be available to the consumer who participates in such schemes; and the prescribed conditions of contract to which schemes must adhere in order to comply with the CPA.

So-called Section 419 schemes are dealt with in proposed Regulation 21. This proposed regulation deals comprehensively with the prohibitions in respect of Section 419 schemes, which echo the provisions of the Consumer Affairs Act No. 71 of 1988. Related to the provisions of proposed Regulation 21 are the provisions of proposed Regulation 22, which contain a prohibition on feasibility studies promising funding.

Proposed Regulation 23 now contains the calculation of interest for multiplication schemes. The prescribed calculation is now a matter of law. Interest may not be calculated in any other manner once proposed Regulation 23 becomes effective.

As stated above auctions receive a great deal of attention in the General Regulations, particularly in proposed Regulations 24 to 40. Proposed Regulation 27 details the rules of an auction.

Proposed Regulation 41 deals with the maximum amount that may be charged as a penalty in respect of a lay-by transaction that is cancelled – as contemplated in Section 62(6) of the CPA.

The balance of the General Regulations, from proposed Regulation 42 to proposed Regulation 55, deal with matters concerning the enforcement of the provisions of the CPA by a consumer. Therefore, these proposed regulations deal with the manner in which complaints may be filed or referred to the National Consumer Commission or to a consumer court, or to be heard by a tribunal. Regulation 49 deals with the standards, procedures and related matters for the purposes of accrediting a consumer protection group in terms of the CPA.

In terms of proposed Regulation 56, a list of contractual terms is provided, which are deemed to be unfair and unreasonable as contemplated in Section 120(d) of the CPA. In terms of Section 120(d) powers are afforded to the Minister of Trade and Industry to make regulations "relating to unfair, unreasonable unjust contract terms". In this regard, proposed Regulation 56 now requires that a contract that is concluded between a consumer and a supplier "wholly or mainly for the purposes related to his or her business or profession" must comply with the criteria that are contained in proposed Regulations 56(1)(a) and (b). Therefore, such agreements must not contain a term listed in Subregulation (3) and must fall outside of the provisions of Subregulation (4). Subregulation (3) contains approximately 30 types of terms and conditions that may not be included in a consumer-related agreement. These provisions are further modified by Subregulation (4). Subregulation (4) contains certain exemptions to the otherwise stringent provisions of Subregulation (3). Unfair or

unreasonable contractual terms include terms:

- ▶ excluding or limiting the liability of the supplier in certain circumstances; or
- ▶ excluding the legal rights or remedies of the consumer in the event of total or partial non-performance or inadequate performance by the supplier; or
- ▶ limiting the supplier's obligation to respect its commitments; or
- ▶ excluding the consumer's rights to take legal action or exercise any other legal remedy; or
- ▶ restricting the evidence available to the consumer; or
- ▶ imposing burdens of proof onto the consumer that the law does not provide for; or
- ▶ allowing the supplier the right to interpret any term of the contract; or
- ▶ allowing for the transfer of the supplier's obligations and generally arranging contractual affairs so as to benefit the supplier over the consumer. Greater detail of the particular terms and conditions shall be provided in a further note.

The General Regulations form an important part of the arrangement of consumer affairs under the CPA. Accordingly, all parties to consumer contracts, being both consumers and suppliers, are well advised to ensure that they are aware of the provisions of the General Regulations and, if necessary, comment on the provisions of the General Regulations to ensure that their rights are protected and exercised properly.

Consumers' rights are becoming as important as social or political rights – receiving as much attention from our legislature as those rights do – in fact, if not more attention based on the degree of detail contained in the General Regulations. Let it not be said that you have not been afforded the opportunity to say your piece – in so far as you do not, then be satisfied with forever holding your peace.

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