

## THE CONSUMER PROTECTION ACT and TYPICAL PROPERTY TRANSACTIONS

### 1. **INTRODUCTION**

Legislation relating to consumer protection in South Africa has for many years been behind that of other jurisdictions. There had been no real review of such laws for a lengthy period of time. As a result of the same it was decided to review all legislation relating to consumers. This involved reviewing approximately 70 different Acts and considering different methods to ensure that the consumer was protected. This resulted in the Consumer Protection Act (the "CPA") being signed into law on the 24<sup>th</sup> of April 2009. Effectively the Act is divided into two portions. The initial portion did not affect estate agents and effectively dealt with the establishment of the National Consumer Protection Institution. The balance of the provisions are meant to come into operation 18 months after the act was signed i.e. on the 24<sup>th</sup> of October 2010 (however this date might be extended at the last minute). These provisions include a "Consumer Bill of Rights" and as a result the CPA will, when the second portion comes into operation, provide consumers in South Africa, with one of the best protections in the world.

### 2. **IN TERMS OF THE ACT, THE MAIN PURPOSES ARE:-**

- a) To promote a fair, accessible and sustainable marketplace, for consumer products and **services** by establishing national norms and standards relating to consumer protection;
- b) To provide for improved standards of consumer information;
- c) To prohibit certain unfair marketing and business practices;
- d) To promote responsible consumer behavior;
- e) To promote a consistent legislative and enforcement framework relating to consumer transactions and agreements; and
- f) To establish a National Consumer Commission.

In the Act it is stated that it was necessary to develop and employ innovative means to:-

- a) fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers;
- b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and

c) to give effect to internationally recognized customer rights.

Accordingly the law was enacted in order to:-

- ☐ promote and protect the economic interests of consumers;
- ☐ improve access to, and the quality of information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
- ☐ protect consumers from hazards to their well being and safety;
- ☐ develop effective means of redress for consumers;
- ☐ promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
- ☐ facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- ☐ promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers

### 3. **SCOPE OF THE CPA**

In essence the Act will regulate:-

- (i) 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 South Africa; and
- (ii) the promotion of such goods and **services** that could lead to a transaction being entered into; and
- (iii) the goods and **services** themselves after the transaction is completed.

Certain juristic persons with turnovers or asset value over a certain threshold will fall outside the protection of CPA. Thus where an estate agent acts on behalf of a large corporation such as Pick 'n Pay, the CPA will not apply.

### 4. **WHO ARE SUPPLIERS AND WHO ARE CONSUMERS?**

A supplier is defined in the CPA as "**a person who markets any goods or services**"

Supply:-

- 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 cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration;

Because the definition relates to goods or services rendered or sold "in the ordinary course of business for consideration" or in relation to services, provided "in the ordinary course of business" for consideration, the CPA applies to those transactions which are of a regular nature and excludes once off transactions.

A consumer is defined in the CPA to include (amongst other things):-

- a) a person to whom goods or services are marketed in the ordinary course of the supplier's businesses;
- b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business.

## 5. PROTECTION OF THE RIGHTS OF CONSUMER'S BILL OF RIGHTS

Chapter 2 of the CPA deals with the various rights which are granted to consumers when dealing with suppliers.

- Part A confers the **right to equality** in the consumer market place. A consumer may not be excluded from access to goods or services and no consumer may be discriminated against or be charged differentiated rates based on any discriminatory grounds.
- Part B confers the **right to privacy**. Marketers may not send advertisements or other communications to consumers if the consumer has informed a marketer of such goods or services that he does not wish to receive such marketing communications. A Central Registry will be established where consumers may indicate their requirements in regard to advertising material.
- Part C confers the **right to choose**. Consumers are allowed to choose their suppliers and bundling is not permitted. In other words, where Bank Z gives finance with which to purchase a vehicle, it may not make it a proviso of the loan that the vehicle must also be insured with Insurer Y, unless specific criteria are met.

- Part D confers the **right to disclosure of information**. All information must be in plain and understandable language and one must be able to determine the price of the goods and services. In addition the supplier must advise whether the goods are new or reconditioned.
  - Part E confers the **right to fair and responsible marketing**. All marketing must be fair and responsible. Rules and regulations will govern promotional competitions and it is interesting to note that there will be separate regulations governing loyalty programmes.
  - Part F confers the **right to fair and honest dealings**. No "unconscionable conduct" is permitted. This means that no supplier may be involved in using any force, coercion or undue influence by a supplier during the promotion, execution or enforcement of a contract. Pyramid schemes and chain letters are also not permitted.
  - Part G confers the **right to fair, just and reasonable terms and conditions**. The Act disallows agreements that:-
    - (i) are too one-sided to be in the consumer's best interest;
    - (ii) adversely impact on the consumer;
    - (iii) involve unfair or unreasonable waiving of rights;
    - (iv) that contains unjust terms or charge unreasonable prices.
- A consumer may not waive any protection which is given to such consumer in terms of the CPA and may not indemnify a supplier against gross negligence.
- Part H confers the **right to fair value, good quality and safety**. The goods and services which are provided must be safe and fit for the purpose for which they were intended.

## 6. DOES THE CPA APPLY TO IMMOVABLE PROPERTY?

From an estate agents point of view, the vital question is whether the CPA applies to immovable property.

The definition of **goods** in the CPA is defined to include:-

" .....

(d) a legal interest in land or any other immovable property....."

It is therefore clear that land falls under the definition of **goods** in the CPA.

It is clear from the definition of a "consumer" referred to above, that a consumer is a person to whom goods or services are marketed in the normal course of the supplier's business or a person who has entered into a transaction with a supplier in the normal course of the supplier's business.

It is therefore clear that a transaction includes any transaction in terms of which property is sold from a supplier to a consumer. If however, the property is not sold by a supplier or is not sold to a consumer, then by definition the CPA will not apply. By virtue of the definition of a supplier set out above, it would therefore appear (although some commentators argue differently) that the CPA will not apply to the once off sale of a property from a seller to a purchaser and will therefore only apply to the sale of properties by speculators and property developers.

#### 7. **HOW DOES THE ACT APPLY TO ESTATE AGENTS?**

It is clear that estate agents fall under the definition of a supplier by virtue of the fact that estate agents are persons who market services. As estate agents do this on a regular basis in the normal course of their business, the provisions of the CPA clearly apply to estate agents. Thus an estate agent must ensure that he or she does not fall foul of the provisions of the CPA. As a general rule if an estate agent, has complied with the code of conduct of the Estate Agency Affairs Board, the estate agent will almost by definition have complied with most of the provisions of the CPA.

Estate agents will however have to ensure that their mandate agreement and their contracts with members of the public do not contravene the provisions of the CPA and in particular do not contravene the various rights referred to in paragraph 5 above. To avoid unnecessary printing, one could initially amend the mandates by way of an addendum to the mandate which will provide that certain clauses are deleted and are to be replaced with other clauses. Estate agents will also have to carefully check to see whether the seller of the immovable property is in fact a person who falls under the CPA or not. If so, a different contract will have to be

utilized for such sales. Accordingly the estate agents will have to ensure that in each of their contracts with the public (not the contracts between a once off seller to a once off purchaser) the following provisions are covered:-

- a) The agreement must be in plain and understandable language;
- b) The agreement must contain fair, reasonable and just terms. A supplier may for example not offer to supply, services or supply goods at a price that is unfair, unreasonable or unjust or on terms that are unfair, unreasonable or unjust. This includes the consequence that should a consumer apply to Court with the allegation that certain terms of his agreement with the supplier are unfair or unjust, the Court may restore the property to the consumer or order compensation to the consumer for losses and expenses relating to the agreement;
- c) The consumer has the right to receive express notice of any term in an agreement which limits the risk or liability of the provider, or of any term which constitutes an assumption of risk or liability by the consumer;
- d) The consumer has a cooling-off right which allows him to cancel the agreement within five business days after contracting;
- e) The consumer has the right to return defective goods, which right does away with the voetstoots clause.

The main contracts which will probably be affected therefore will be the estate agent's mandate, contracts for the sale of properties by speculators, contracts of the sale of properties by property developers and rental agreements.

For the reasons set out above the once off sale (and possibly the once off rental) of a property by a person who is not trading in property or whose business is not the rental of property, will not fall under the CPA and accordingly the estate agents' contracts in this regards will not have to be amended. However, most estate agents' contracts include a commission clause which (strictly speaking is not an agreement between the purchaser and the seller) and this clause will have to no doubt be amended in many cases to ensure that it does not fall foul of the CPA.

#### 8. **THE HOT ISSUE – DOES THE VOETSTOOTS CLAUSE STILL APPLY?**

In terms of Section 55 of the CPA, every consumer has the right to receive goods that are:-

- a) reasonably suitable for the purpose for which they are generally intended;

- b) of good quality, in good working order and free of any defects;
- c) will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply;
- d) comply with the applicable standards set out in the Standard's Act (Act 29 of 1993) or any other public regulation.

In addition to the rights set out above, if the consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods or the use to which the consumer will apply those goods and the supplier offers to supply such goods or acts in a manner consistent with the knowledge about the use of those goods, the consumer has the right to expect that the goods are reasonably suitable for the purpose that the consumer has indicated.

This would imply that the voetstoets clause would be excluded where the CPA applies. As set out above the CPA will not apply to once off transactions between a purchaser and a seller and accordingly, the voetstoets clause will remain in force and effect in such transactions. However property speculators and property developers will no longer be entitled to rely upon the voetstoets clause or other clauses which unfairly limit the rights of consumers to receive goods which are suitable for the purposes for which they are intended, or are of good quality or are in good working order and free of defects.

In terms of Section 56 of the CPA, there is an implied clause in such contract covered by the CPA that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards referred to in Section 55 (the requirements set out above). Accordingly 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, if the goods fail to satisfy the requirements and standards contemplated in Section 55 and the supplier must at the discretion of the consumer either repair or replace the failed, unsafe or defective goods or refund to the consumer the price paid by the consumer for such goods.

## 9. **EXCLUSION**

It is interesting to note that Section 45 specifically states that any sale of immovable property conducted by way of an auction where goods have been put up for sale by

auction, the sale by auction is completed when the auctioneer announces its completion by the fall of the hammer, or any other customary manner, and until that announcement is made, a bid may not be retracted and on the condition that the sale by auction is subject to a reserved or upset price, will be excluded from the CPA.

10. **EFFECT ON AGREEMENTS:-**

The contract between the seller and the purchaser (if it is a once off sale and the seller is not a property developer or speculator) will not fall under the CPA. Although one may argue that the agent is acting on behalf of the seller, the agent is in fact an agent in the true sense and the contract is therefore the contract which is concluded between the principal (the seller) and the purchaser. However any clauses which relate to the commission of an estate agent will have to be carefully scrutinized to ensure that they do not contravene the CPA. If the sale is one from a property developer or a speculator or anybody trading in property, the CPA will apply. Similarly all contracts between the estate agent and the seller of a property or lessor of a property will have to comply with the CPA.

In terms of Section 16 of the CPA, a consumer may rescind a contract resulting from any direct marketing without providing any reasons and without incurring any penalty provided that it gives notice to the supplier within 5 business days after the transaction was concluded. This means that if the mandate was obtained as a result of direct marketing the so called cooling-off clause in terms of the CPA will apply to the transaction.

In addition contracts of the estate agent in regard to the mandate and other agreements which the estate agent has with a seller or lessor must comply with the provisions referred to in paragraph 7.

11. **MARKETING METHODS**

On the basis that an agent will market the seller's house to the general public on instructions of the seller, the agent, will be a "supplier" *vis-à-vis* any potential purchaser and the agent's marketing practices will have to comply with the provisions of the CPA.

The marketing methods will therefore have to comply with the various chapters in the CPA keeping in mind the following:-

- a) The consumer is entitled to equality and privacy;
- b) The right to disclosure of information;
- c) The right to fair and responsible marketing;
- d) The right to honest dealings.

Section 40 of the CPA deals with unconscionable conduct. The CPA clearly states that a supplier or an agent of the supplier may not use:-

- a) physical force against the consumer;
- b) coercion or undue influence;
- c) pressure;
- d) duress or harass;
- e) unfair tactics relating to any of the marketing of the goods or services or the supplier of goods or services whether it is in the negotiation, conclusion or execution stage of an agreement.

Section 41 deals with false, misleading and deceptive representations and states that no supplier or agent of a supplier by words or conduct may:-

- a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
- b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception;
- c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation.

Section 41 further deals with immovable property and it is stated that in relation to any land or other immovable property no statement may be made as to characteristics that the immovable property does not have or that the immovable property may be lawfully used or is capable of being used for a purpose that it is in fact unlawful or impractical or that the immovable has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available property or proximate to it.

## 12. **BAIT MARKETING**

Section 30 specifically states that the supplier may not advertise any particular goods or services as being available at a specific price in a manner that may result in a

consumer being misled or deceived in any respect relating to the actual availability of those goods or services from the supplier at that advertised price.

Section 36 deals with promotional competitions and it must be noted that an agent may not advise a person that he has participated in a competition and won such competition when in fact he has either not won the competition or no competition has in fact been conducted.

13. **WHAT MAY A CONSUMER DO IF HIS/HER RIGHTS ARE VIOLATED?**

A consumer may approach a Court, the Tribunal or the Commission alleging that his/her consumer rights have either been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring. Any Tribunal or Court must promote the spirit and purpose of the CPA, make appropriate orders to give practical effect to the consumer's right of access to redress and promote any orders that better advance, protect, promote and assure the realization by consumers of their rights in terms of the CPA. The penalties for breaching the CPA are very severe. One can be charged an administrative fine of up to 10% of one's annual turnover or an administrative fine of R1-million (which ever is the greater).

14. **CONCLUSION**

What is clear is that the "consumer is king". The CPA although it has a very wide application, is generally aimed at business and individual type transactions between two private individuals will not be covered by the CPA. However, where a seller or purchaser employs the services of an estate agent the agent then falls within the definition of a supplier for the purposes of the CPA because he will be marketing the property and he will be executing his duties as agreed with the seller in terms of the mandate.

We have to point out that with any new Act that comes into effect there are may unanswered questions and grey areas which will have to be decided by a Court. If one thinks of just the National Credit Act and the various litigation that has arisen as a result of such Act to give finality on certain issues we have now doubt that the same will apply to the CPA.