



THE CONSUMER PROTECTION ACT – HOW WILL THIS AFFECT YOU & YOUR CLIENTS

Any body who supplies a service or a product and is not excluded from the Act in terms of a specific provision or because of the thresholds of two million turnover or asset value laid down by the Minister will fall within the definition of 'suppliers' in terms of the Act and will thus as of April 2011 will be subject to the provisions of the Consumer Protection Act in terms of which various 'Fundamental Consumer Rights' have been identified. **SUPPLIERS MUST NOT BE LED TO BELIEVE THAT JUST BECAUSE THEY SUPPLY CONSUMERS WHO EXCEED THE THRESHOLD REQUIREMENTS THAT THE ACT DOES NOT APPLY TO THEM. FOR EXAMPLE SECTION 61 DAMAGE CAUSED BY GOOD APPLIES IRRESPECTIVE OF THE THRESHOLDS.**

The Act not only applies to contracting parties, but also other 'users' of the services.

Great care should accordingly be taken by suppliers and a thorough check of their agreements should be undertaken before the Act kicks in.

A failure to adhere to the terms of the Act may even constitute a defence to the payment for services rendered.

Suppliers may also find that sales that they have regarded as concluded, are capable of being set aside by the courts simply on the basis that they contain 'unfair contract terms'.

The following provisions of the Act may have specific application:

1. **PROTECTION AGAINST DISCRIMINATORY MARKETING**

In terms of Section 8 of the Act, a supplier of goods or services must not unfairly exclude any person or category of persons from accessing any goods or services offered by the supplier, or target particular communities, populations or market segments for the exclusive supply of any goods or services, on the basis of one or more grounds of unfair discrimination (e.g. race or gender).

In terms of the Act, there is a presumption that any differential treatment is unfair discrimination, and a contravention of the Act. The onus is thus on the supplier, to prove that this is not the case.

2. **CONSUMER'S RIGHT TO CHOOSE**

2.1 **Section 13: Consumer's right to select suppliers**

A supplier must not require as a condition of supplying or offering to supply goods or services, that the consumer must agree to purchase any particular goods or services from a designated third party.

It is a defence if the supplier can show that:

- the convenience to the consumer of having these goods or services bundled together outweighs the limitation of the consumer's right to choice;
- that the bundling of those goods or services results in economic benefit for consumers;
- or that the supplier offers bundled goods or services separately and at individual prices (i.e. it is not a pre-condition to the sale or supply of services).

2.2 **Section 14: Expiry and renewal of fixed-term agreements**

For example: Should an agent appointed by a developer or a seller obtain a mandate, such mandate would be regarded as a fixed term contract. The seller would be able to terminate such mandate regardless of its duration by giving 20 business days notice of cancellation.

2.3 **Section 16: Consumer's right to cooling-off period after direct marketing**

Any consumer may cancel an agreement within 5 business days of the conclusion of an agreement which resulted from direct marketing. No reason needs to be given for such decision and the contract would then be void ab initio.

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. The 'goods' would include the sale of land or an interest in land.

2.4 **Section 19: Consumer's rights with respect to delivery of goods and the supply of service**

Goods remains at the supplier's risk until the consumer has accepted delivery thereof.

2.5 **Section 20: Consumer's right to return goods**

The consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered goods to the consumer that the purchaser had not had the opportunity to examine before delivery, and the goods were intended to satisfy a particular purpose communicated to the supplier and the goods have been found to be unsuitable for that purpose.

2.6 **Section 21: Consumer's right to information in plain and understandable language**

This is the co-called 'plain language' rule.

If a consumer does not understand a document either because it is not in a language they understand, or is not in plain and understandable language regardless of which language it may be, the agreement may be set aside by the court.

2.7 **Section 40: Right to fair and honest dealing**

Should a supplier or their agent make themselves guilty of unconscionable conduct in relation to the marketing or conclusion of any agreement, or the supply of services, such agreement or conduct can be set aside by the court and the court may even adjust the purchaser price or make an award for damages.

2.8 **Section 41: False, misleading or deceptive representations**

Should a supplier in its marketing or supply of goods or services state that they have characteristics which they don't have, an agreement emanating from such marketing may be void.

2.9 **Section 48: unfair, unreasonable or unjust contract terms**

The court has the power to intervene and adjust a contract term and even the price where such term or price is unfair, unreasonable or unjust.

This will encompass terms that are excessively one sided in favour of any person other than the consumer, or where the consumer relied upon a false, misleading or deceptive representation, to his detriment.

Non- representation clauses that are so common in agreements are also outlawed – the court now has the power to look at the negotiations and representations made leading up to the conclusion of a contract.

2.10 **Section 49: limitation of risk and indemnities**

Any clauses that limit in any way the risk or liability of the supplier or another person, contains an indemnity, or is an acknowledgment of any fact by a consumer must be conspicuous and must be drawn to the attention of the consumer, and the consumer must sign or initial next to such limitation to show that he has assented to such provision. Such indemnity or assumption of risk must also be in clear and simple language.

2.11 **Section 50: Prohibited contract terms - forfeiture provisions, voetstoets clauses and non-representation clauses**

All of the above clauses are common to sale agreements of land. These provisions will be void and the court may even declare the entire agreement void.

PLEASE NOTE THAT THE PROVISIONS OF THE ACT ONLY APPLIES IN RESPECT OF 'SUPPLIER'S AND 'CONSUMERS' IN THE ORDINARY COURSE OF THE SUPPLIER'S BUSINESS.

THE PROVISIONS ALSO DO NOT GENERALLY APPLY TO CORPORATE ENTITIES CONTRACTING WITH EACH OTHER – IE WHERE A SALE OR THE SUPPLY OF A SERVICE TAKES PLACE BETWEEN A SUPPLIER AND A CONSUMER WHOSE ANNUAL TURNOVER OF HIS BUSINESS EXCEEDS A MINIMUM WHICH IS STILL TO BE DETERMINED BY THE MINISTER