

4. CONSUMER PROTECTION

RELEVANT LEGISLATION

There are several pieces of legislation that contain consumer protection provisions that are applicable to electronic contracts. However, the main sources are the Electronic Communications and Transactions Act (ECTA) and the Consumer Protection Act (CPA).

APPLICABILITY OF ECTA AND CPA

ECTA only applies to electronic transactions (section 42(1)) and only protects natural persons (section 1 definition of consumer). Its application extends to foreign vendors/suppliers (section 47) and any contractual provisions which seek to exclude any rights provided for in chapter 8 of ECTA are null and void (section 48). Any complaints must be lodged with the National Consumer Commission (section 49). Chapter 8 of ECTA provides for supplier duties, the regulation of certain marketing activities and consumer rights. The CPA applies to all transactions, including electronic transactions, unless there is an express exclusion to its applicability to electronic transactions (see table below). Unlike ECTA, it extends consumer protection to legal persons with an annual turnover of less than R2 million (section 1 definition of consumer). It applies only to transactions occurring in South Africa (section 5). Like ECTA, the CPA provides that any contractual provisions which seek to exclude any rights it provides for are null and void (section 48(1) (c)). Consumer rights may be enforced by referring a matter to the Tribunal, an applicable ombud with jurisdiction, lodging a complaint with the National Consumer Commission or after the exhaustion of all remedies provided by applicable legislation, seeking recourse from a court with jurisdiction (section 69). Like ECTA, the CPA provides for supplier prohibitions and obligations as well as consumer rights. The aim of these provisions is to protect consumer rights.

The CPA does not apply to electronic transactions where ECTA already provides for equivalent or superior protection as depicted in the table below:

	Applicable ECTA provision (if this section applies)	Inapplicable CPA provision (this section does not)
Cooling off	s44	s16
Delivery	s46	s19
Disclosure of price	s43	s23



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Sales records	s43	s26
Catalogue marketing	s42- 49	s33

The key provisions of both pieces of legislation are summarised below.

ECTA

Duties of the supplier

- Section 43(1): Disclose prescribed minimum information on a website (what about other electronic platforms?)
- Section 43(2): Allow the consumer a chance to review, correct or withdraw from the transaction
- Section 43(3)- (4): Breach of s43(1) – (2) by a supplier entitles the consumer to cancel the transaction within 14 days and to seek a refund
- Section 43(5) –(6) : Provide a secure payment system or be liable for losses sustained by consumer due to insecure payment system
- Section 44: to refund a consumer who exercises their right to cancel within the statutory cooling-off period
- Section 46: Execute order within 30 days of receipt of order
- Section 44 of ECTA provides for consumers' cooling off rights as follows:

“A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply-

(a) of goods within seven days after the date of the receipt of the goods; or

(b) of services within seven days after the date of the conclusion of the agreement.

(2) The only charge that may be levied on the consumer is the direct cost of returning the goods.

(3) If payment for the goods or services has been effected prior to a consumer exercising a right referred to in subsection (1), the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.

(4) This section must not be construed as prejudicing the rights of a consumer provided for in any other law”.

This right is not applicable to the following transactions (section 42(2)):

(a) for financial services;

(b) auctions;

(c) supply of foodstuffs, beverages or other goods intended for everyday consumption



- (d) for services which began with the consumer's consent before the end of the seven-day period referred to in s44 (1);
- (e) where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which cannot be controlled by the supplier;
- (f) where the goods are made to the consumer's specifications; are clearly personalised; by reason of their nature cannot be returned; or are likely to deteriorate or expire rapidly;
- (g) where audio or video recordings or computer software were unsealed by the consumer;
- (h) for the sale of newspapers, periodicals, magazines and books;
- (i) for the provision of gaming and lottery services; or
- (j) for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

Section 44(3) of ECTA provides that chapter 8 of ECTA “does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions”.

CPA

The CPA provides for the following consumer rights:

- Right to equality
- Right to privacy
- Right to choose
- Right to disclosure and information
- Right to fair and responsible marketing
- Right to fair and honest dealing
- Right to fair, just and reasonable terms and conditions
- Right to fair value, good quality and safety.

These rights are protected through supplier duties and prohibitions. Before providing an overview of these duties and prohibition it is important to address the applicability of the CPA to electronic transactions.

The provisions of the CPA which are applicable to electronic transactions are summarised below.

The CPA provides for the following supplier prohibitions:

- Making false or misleading representations section 4(5)(b) –(c), section 29, section 41, section 30(1), section 37(1)



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- Engaging in unfair discrimination section 8-9
- Unwanted direct marketing section 11
- Exceeding the regulated duration of fixed term contracts or denying a consumer's early termination section 14(1)
- Repairing or maintaining goods without consumer pre-authorisation section 15(1)
- Arbitrary bundling of goods & services section 21(1)
- Provision of unsolicited goods or services section 21(1)
- Misleading trade descriptions section 24(4)
- Fraudulent or pyramid schemes or offers section 42(1), section 43(1)
- concluding unfair, unreasonable or unjust agreements (price, marketing or negotiation) section 48(1) –(2)
- Negative option marketing section 31(1)
- Making promotional or loyalty programme offers without an intention to fulfil them s34(3), section 35(2), section 63
- Pretending a person has won a competition section 36(2)
- Promotion, offering or supplying goods or services upon the condition that the consumer will refer others section 38(1)
- Contracting with, or knowingly taking advantage of, persons without legal capacity section 39(1), section 40(2)
- Overbooking or overselling section 47(1)
- Requiring consumers to waive their rights, assume obligations or waive supplier liability section 48(1)
- Supplying unsafe, hazardous or defective goods

The CPA provides for the following **supplier duties**:

Suppliers must-

- Permit consumers to cancel non-specialised advance bookings, reservations or orders section 17
- Use prescribed notice or document formats or use plain understandable language section 22(1) –(2)
- Disclose that goods are reconditioned or grey market section 25(1)
- Provide written records of transactions section 26(2), section 50(1)
- Provision of prescribed information by intermediaries section 27(1)
- Inform consumers of the right to cancel direct marketing agreements section 32(1)



ONLINE AUCTIONS

The Consumer Protection Act extensively regulates auctions in section 45. This section does not provide a comprehensive definition of auction. It merely provides that an auction “includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction” (section 45(1)).

Section 45(2) provides that when goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.

Section 45 (3) provides that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made, a bid may be retracted.

Section 45 (4) provides that notice must be given in advance that a sale by auction is subject to—

- (a) a reserved or upset price; or
- (b) a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction.

Section 45 (5) provides that if notice is not given in advance that the owner or auctioneer has a right to bid, they are not allowed to bid at that auction, either in person or by employing someone else to bid on their behalf. If they do, a consumer may approach a court to declare the transaction fraudulent.

Section 45 (6) provides that the Minister may prescribe requirements to be complied with by an auctioneer, or different categories of auctioneer, in respect of—

- (a) the conduct of an auction;
- (b) the records to be maintained with respect to property placed for auction; and
- (c) the sale of any such property by auction.

Regulation 30(1) provides that auctions may be conducted via the internet or other electronic medium or platform, irrespective of where the server or other electronic medium or platform is situated, only if—

- (a) it meets all requirements in respect of an auction provided for in these regulations or other applicable law, but with the necessary changes, if any, to suit an electronic medium or platform;



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- (b) the relevant internet website or electronic medium or platform is generally available to anyone over the age of 18 years at any time of the day;
- (c) the relevant internet website or electronic medium or platform provides high standards of security for electronic transactions;
- (d) the relevant internet website or electronic medium or platform provides for easy access to all records prescribed in these regulations in a generally used or accepted medium or format;
- (e) the internet auction provider keeps the information contemplated in regulation 28 (4).

Regulation 28 (4) requires an auctioneer to create a vendor's roll in which all details of the auction are recorded, which must, as a minimum, include—

- (a) the advertising of the auction;
- (b) the rules of auction;
- (c) the bidders' record;
- (d) the declarations contemplated in regulation 21 (2) (h) and 27;
- (e) a list of all goods on auction, including goods which were withdrawn from auction;
- (f) the names of the successful bidders, the goods or lots bought and the prices paid in respect thereof;
- (g) the details of any challenges to the validity of the auction or the conduct thereof, and the particulars of the persons making such challenges, if available;
- (h) any items or lots not sold;
- (i) the details of any reserved price or any matter contemplated in subsections (4) and (5) of section 45 of the Act.

Regulation 30(2) provides that to create the bidder's record required by Regulation 26(2) a prospective bidder in an auction to be held via the internet or other electronic medium or platform must register by providing—

- (a) his or her full names, identification or passport number, age, physical address, internet protocol address, and where applicable, login code or name, and password; and
- (b) the details of the means by which payment will be effected.

Regulation 30(3) provides that an auctioneer conducting an auction via the internet or other electronic medium or platform may not exclude liability if any goods purchased by auction are not delivered to the purchaser thereof.



SOME RELEVANT INTERNATIONAL STANDARDS

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce, 1999

Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce, 2002

OECD Policy Guidance for addressing emerging consumer protection and empowerment issues in mobile commerce, 2008

Recommended Reading

T Naude 'The Consumer's 'Right to Fair, Reasonable and Just Terms' Under the New Consumer Protection Act in Comparative Perspective'(2011) 23(3) *South African Law Journal* 505

S Papadopoulos 'Online Consumer Protection' *Cyberlaw@SA III* pp 53 – 91



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