



Schreuder
Attorneys

news

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Newsletter, Articles and Matters of Interest

1. ADMINISTRATION ADJUDICATION OF ROAD TRAFFIC OFFENCES ACT

The Administrative Adjudication of Road Traffic Offences Act, No. 46 of 1998 ("AARTO") classifies road traffic violation in terms of the National Road Traffic Act, No 93 of 1996 as a traffic offence; or a minor infringement; or a major infringement. In 2008 the Department of Transport announced that they would be implementing the AARTO system in the near future. According to the department, motorists would have a demerit system, which depending on the type of traffic violation, would mean that a demerit was placed on your traffic record. Kind of like at school, collect enough demerits and eventually you are spending all your lunch time and after school hours in detention. In this scenario, it would mean at worst, your license would be revoked.

According to the Act, its objectives are to, encourage compliance with the national and provincial laws relating to road traffic and promote road traffic safety; encourage the payment of penalties imposed for infringements and to allow alleged minor infringers to make representations; establish a procedure for

effective and expeditious adjudication of infringements; to alleviate the burden on the courts of trying offenders for infringements; to penalize drivers and operators who are guilty of infringement or offences through the imposition of demerit points leading to suspension and cancellation of driving licences, professional driving permits or operator cards; reward law-abiding behavior by reducing demerit points imposed if infringements or offences are not committed over specified periods; establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process; and to strengthen co-operation between the prosecuting and law enforcement authorities by establishing a board to govern the agency.

When a motorist commits a traffic infringement (and is caught) depending on the infringement, a number of points will be allocated to the offence and will be recorded on his driver's licence. Once the motorist has reached and exceeded 12 points, they will automatically be banned from driving for a period of months equal to

the number of points by which 12 is exceeded, e.g. 15 points, means a ban from driving for a period of 9 months(3x3). In the event that the motorist is disqualified for a third time, their drivers licence will be revoked. One demerit point will be reduced for every three months a motorist does not incur any demerit points.

With the Easter holidays long gone, our roads witnessed an alarming rate of fatalities, whether from reckless driving, driving unroadworthy vehicles, driver fatigue or any other number of reasons given for the road carnage, the Act aims to decrease the rate of fatalities and make roads safer for all users.

Written by: V Miya, Associate Attorney, Schreuder Attorneys April 2012

2. CONSUMER PROTECTION ACT – STANDARDS FOR MARKETING OF GOODS OR SERVICES



Currently two of our banking giants have hauled each other to court for amongst other things, false advertising. Their actions bring to mind, the ancient Kikuyu proverb, 'When elephants fight, it is the grass that suffers'.

It has been a year since the establishment of the National Consumer Commission (the "Commission") which was established in terms of section 85 of the Consumer Protection Act 2008 (the "Act"). According to the Act, the Commission is an organ of state within the public administration, but an institution outside the public service. The Commission has jurisdiction throughout the Republic and is a juristic person. The Commission must exercise the functions assigned to it in terms of the Act or any other law, or by the Minister, in the most cost effective and effective manner, and in accordance with the values and principles mentioned in section 195 of the Constitution.

The purposes and policies of the Act are to promote and advance the social and economic welfare of consumers in South Africa by, establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; promoting fair business practices; protecting consumers unconscionable, unfair, unreasonable, unjust or otherwise improper trade practice and deceptive, misleading, unfair or fraudulent conduct. The Act applies to every transaction occurring within the Republic, unless it is exempt; the promotion of any goods or services, or of the supplier of any goods or services, within the Republic;

Section 29 of the Act sets out the general standards for marketing of goods or services. It states specifically that, a producer, importer, distributor, retailer or service provider must not market any goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or in a manner that is misleading, fraudulent or deceptive in any way, including in respect of -

- i. The nature, properties, advantages or uses of the goods or services;
- ii. The manner in or conditions on which those goods or services may be supplied;
- iii. The price at which goods may be supplied or the existence of or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;
- iv. The sponsoring of an event;
- v. Any other material aspect of the goods or services;

While section 41 gives instances where representations may be seen as false or misleading. In relation to the marketing of any goods or services, the supplier must not, by words or conduct;

- 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; or
- c. Fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation;

Or permit any other person to do so on behalf of the supplier

A person may initiate a complaint in terms of section 71 with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with the Act. Alternatively the Commission may directly initiate a complaint concerning the any alleged prohibited conduct on its own motion, or, when directed to do so by the Minister, or on the request of a provincial consumer protection authority; another regulatory authority, or an accredited consumer protection group.

The Commission is tasked with enforcing the provisions of the Act by, promoting informal resolution of any dispute arising in terms of the Act, between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute. It may receive

complaints concerning alleged prohibited conduct or offences and dealing with those complaints in accordance with the Act. The Commission is further responsible to monitor the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted and monitor the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery by organs of state, and any other regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector. Should a supplier be investigated for alleged prohibited conduct, and be found to not be complying, the Commission may issue enforcing compliance notices.

When the Commission receives a complaint, it may issue a notice of non-referral in terms of rule 72(1) to the complainant in the prescribed form, if the complaint appears frivolous or vexatious, or does not allege any facts which, if true, would constitute grounds for a remedy under the Act, or if the complaint falls outside

3. CONSUMER PROTECTION ACT (“CPA”) AND LEASE AGREEMENT

The CPA aims to promote a fair, accessible and sustainable marketplace for consumer services and prohibit certain unfair marketing and business practices.

One of the key provisions of the CPA, applicable to lease agreements is section 14. This section deals with the expiry and Renewal of Fixed agreements pertaining to landlords, a consumer’s right to cancel an agreement by giving the supplier 20 business days’ notice, the supplier is then entitled to impose a reasonable cancellation penalty; the supplier is obliged between 40 and 80 days

the ambit of the Act. The Commission may alternatively refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for purposes of assisting the parties to attempt to resolve the dispute, or refer the complaint to another regulatory authority with jurisdiction over the matter for investigation; or, direct an inspector to investigate the complaint as quickly as practicable;

After investigations are completed, the Commission may issue a compliance notice to a person, or association of persons whom the Commission, on reasonable grounds believes have engaged in prohibited conduct. The compliance notice must set out the person, or association to whom the notice applies; the provisions of the Act not complied with, details and extent of non-compliance; any steps that are required to be taken and the period within which those steps must be taken and the penalty that may be imposed in terms of the Act if those steps are not taken.

before the termination of the agreement to notify the consumer of the impending expiry of the agreement and any material changes that will apply if the agreement is renewed, furthermore on the expiry of the fixed term agreements the agreement continues on a month to month basis.

Application

Section 14 applies to agreements, which fall within the ambit of the CPA which were concluded after the

The Commissioner of the National Consumer Commission Mamodupi Mohlala was recently interviewed by the Sunday Times Newspaper (Money & Careers, April 1 2012). In brief, the Commissioner gave a summary of the worst offenders of the Act, being the motor, retail, cellphone, and City of Johannesburg, while the most commonly violated rights were returns and refunds, and cancellation of contracts. MTN, City of Johannesburg and MultiChoice have been before the consumer tribunal, while BMW, Vodacom, Cell C, Eskom and Dynabidz are due to be heard by the tribunal in the next few months. The Commission is also conducting an investigation into the terms and conditions of e-tags.



Written by: V Miya, Associate Attorney, Schreuder Attorneys April 2012

commencement of the CPA (1 April 2011). If an agreement was concluded before 1 April 2011 then certain parts of Section 14 are applicable to the agreement but only if the agreement provides for a fixed term which will expire on or after 1 April 2013 (2 years after the commencement of the CPA). If the agreement provides for a fixed term which will expire on or after 1 April 2013 then the designated sections of Section 14 of the CPA will be applicable to such agreement. This appears in section 3 of the Transitional Provisions of the

CPA. This section does not apply to transactions between juristic persons.

Plain language

Section 22 of the CPA prescribes that a document must be in plain language. This means that the class of person for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant service could be expected to understand the content, significance and import of the document without due effort. Subsection (a) – (b) provides for a list of factors that must be taken into regard. Therefore the full contents of lease agreements must appear in plain language.

Unfair, unreasonable or unjust contract terms

In terms of section 48 of the CPA a supplier may not enter into an agreement in respect of any services at a price that is unfair, unreasonable or unjust or on terms that are unfair, unreasonable or unjust.

The Section further states that - a supplier may not require a consumer to whom services are supplied to

- Waive any rights
- Assume any obligation
- Waive any liability of the supplier

on terms that are unfair, unreasonable or unjust. The supplier may also not impose such terms as a condition of entering into a transaction.

The section goes further and states that an agreement or a term of an agreement is unfair, unreasonable or unjust if

- It is excessively one sided in favour of any person other than the consumer or
- The terms of the agreement are so adverse to the consumer as to be inequitable.

Prohibited agreements, terms and conditions

Section 51 of The Consumer Protection Act (CPA) states that a supplier cannot make an agreement subject to any terms which directly or indirectly:

- Waive or deprive a consumer of a right in terms of the CPA
- Avoid a suppliers obligation or duty in terms of the CPA
- Set aside or override the effect of any provision of the CPA

Furthermore Section 51 states that an agreement cannot be subject to a term which

- Limits or exempts the supplier from liability for any loss attributable to his gross negligence
- Constitutes an assumption of risk or liability by the consumer for such loss
- Imposes an obligation on the consumer to pay for damages

In addition, in terms of Section 51 a supplier may not make an agreement that falsely expresses an acknowledgement by the consumer that before the agreement was made, no representations or warranties

were made in connection with the agreement by the supplier.

Notice required for certain terms and conditions

Section 49 of the Consumer Protection Act (CPA) is an important section for Landlords. Section 49 of the CPA provides that a provision of an agreement that

- Limits in any way the risk or liability of the supplier
- Constitutes the consumer assuming risk or liability
- Imposes an obligation on the consumer to indemnify the supplier
- Constitutes an acknowledgement of any fact by the consumer

must be drawn to the attention of the consumer and must be

- Written in plain language
- Drawn to the attention of the consumer in a conspicuous manner that is likely to attract his attention
- Be brought to his attention at an early stage as set out in the section
- The consumer must be given an adequate opportunity to receive and comprehend the provision of the agreement

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