DLA CLIFFE DEKKER HOFMEYR

CONSUMER PROTECTION ACT

ALERT

11 JUNE 2014

IN THIS ISSUE

MEAT LABELLING: THE CHAOS AFTER THE STORM

Trade Description Requirements effective as of 25 April 2014

Over a year has passed since the infamous meat labelling scandal that revealed gross misrepresentations in respect of the content of meat products and the incorrect labelling of meat products not only in South Africa, but globally. One may recall that a prominent South African university released a report stating that meat products labelled as beef had been found to contain traces of donkey, water buffalo and goat meat, as well as soya.

During October 2013 the Minister of Trade and Industry, Dr Rob Davies, published a notice, in terms of s24 of the Consumer Protection Act, No 68 of 2008 (CPA) prescribing that processed and packaged meat products and dried and packaged meat products must contain certain prescribed information. Suppliers of these products will be required to comply with this notice and ensure that the requisite information appears in the trade description of the products as of 25 April 2014.

A trade description is widely defined in terms of the CPA and includes any description, statement or other direct or indirect indication as well as any figure, word or mark (although trademarks are specifically excluded) which is understood to be an indication of:

(i) the number, quantity, measure, weight or gauge of any goods;

(ii) the name of the producer of any goods;

(iii) the ingredients of which any goods consist or the material of which any good is made;

(iv) the country of origin of the goods;

(v) the methods of manufacturing or producing the goods; or

(vi) whether the goods are subject to patent, privilege or copyright.

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Trade descriptions need not be directly applied to goods but can also be attached to the goods, displayed with or in the proximity of the goods or contained in a sign, advertisement, catalogue, invoice, business letter or other similar document.

As of 25 April 2014, the trade description of processed and packaged meat products and dried and packaged meat products must state:

1. the number, quantity, measure, weight or gauge of the goods;

2. the name of the producer of the goods;

3. the ingredients of which the goods consist, or material of which the goods are made, including a plain language description of the animal from which any particles, portions or constituents of meat were derived (notably the notice specifically states as examples, water buffalo, horse and donkey); and

4. the mode of manufacturing or producing the goods.

In addition to these specific disclosures in terms of the notice, s24 of the CPA requires that producers and importers of these goods (being goods that are required to have a trade description applied to them) must also ensure that the country of origin of the goods is contained in the trade description.

One would anticipate that the bulk of the effort to ensure compliance with s24 of the CPA would fall on the producer or importer of the goods, but this is not the case. The producers and importers are obliged to ensure that the information appears in the trade description of the goods. Retailers, on the other hand, have the wider obligation to ensure that they do not offer for supply, display or supply any goods that contain an incorrect or misleading trade description or contain a trade description which the retailer could reasonably determine, or has reason to suspect, is incorrect or misleading.

Although this regulatory intervention is not particularly far-reaching (since other legislation and regulations and general principles regarding marketing already prohibit misleading statements made to the consumer, whether in trade descriptions or otherwise) it is indicative of the commitment of the South African Government to consumer welfare.

Leana Engelbrecht

THE RIGHT OF A FRANCHISEE TO CANCEL A FRANCHISE AGREEMENT

Section 7 of the Consumer Protection Act, No 68 of 2008 (CPA) sets out certain formalities that all franchise agreements must comply with:

- Firstly, all franchise agreements must be concluded in writing and signed by or on behalf of the franchisee.

- Franchise agreements must include prescribed information or prescribed categories of information including, but not limited to, the obligations of the franchisor, a description of the applicable franchise business system and the name and description of the types of goods or services which the franchisee is entitled to provide. Prescribed information may also be determined by the Minister of Trade and Industry.

- In addition, the franchise agreement must be written in plain and understandable language.

- Perhaps the most significant provision from the franchisor's perspective is the cooling off period set out in s7(2) of the CPA.

The cooling off provision in the CPA allows the franchisee to cancel the franchise agreement without cost or penalty within 10 business days after signing the franchise agreement. Accordingly, where a franchisee elects to exercise this cooling off right, it may do so without incurring any costs or penalties.

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Regulation 2 of the CPA stipulates that the exact text of this cooling-off provision must be included at the top of the first page of the franchise agreement. This means that page one of every franchise agreement must include the following wording "*In terms of section 7(2) of the Consumer Protection Act No 68 of 2008, the franchisee may cancel this franchise agreement without cost or penalty within 10 business days after signing this agreement, by giving written notice to the franchisor*".

This provision poses a significant risk to franchisors which incur expenses in anticipation of the franchise arrangement. By way of example, where the franchisor incurs shop fitting expenses or costs through modifications to the franchised business in accordance with the terms agreed to with the franchisee, or where the franchisor incurred legal expenses in preparation of the agreement, it would not be able to recover these expenses from the franchisee. This provision serves as a warning to franchisors to enter into franchise agreements with circumspection. Franchisors should rather err on the side of caution and where possible, should wait for this cooling off period to lapse before incurring additional costs in relation to the franchise agreement.

Kayley Keylock and Christelle Wood

OF COMPLAINTS, A COMMISSION AND COMMUNICATION

Looking back to March 2011, the media were positively giddy with excitement about the Consumer Protection Act, No. 68 of 2008 (CPA) and the whip cracking that was to be done by the National Consumer Commission (Commission) on behalf of consumers who felt hard done by after poor treatment from goods suppliers or service providers. Complain, the media urged, if a supplier wants to charge you for a quote. Complain if they won't let you return something within six months of purchase. Complain, they wrote, because now you will be heard by the Commission, the consumer protection watchdog.

Three years later and recent judgements by the National Consumer Tribunal (Tribunal) reveal that, in certain instances, these complaints were heard by a statutory body whose bark was louder than its bite. Of the 11 judgements reflected on the Southern African Legal Information Institute's website at the time of writing, five of the judgements were applications to the Tribunal to review and set aside compliance notices granted by the Commission.

Club Leisure Group v National Consumer Commission 2014 ZANCT 5

The Commission issued a compliance order and the applicant applied to have it reviewed and cancelled by the Tribunal. The Commission did not file an answering affidavit and did not appear at the hearing. The Tribunal held that the CPA was not applicable to the matter because the contract was concluded prior to the effective date of the CPA and the compliance notice was therefore cancelled.

Quality Vacation Club v National Consumer Commission 2014 ZANCT 6

A compliance notice was issued by the Commission and the applicant applied to have it reviewed and cancelled by the Tribunal. The Commission did not file an answering affidavit and did not appear at the hearing. Not applicable, the Tribunal responded, because the agreement was entered into prior to the CPA effective date. The compliance notice was cancelled.

Hyundai Automotive SA (Pty) Ltd v t/a Kia Motors Roodepoort 2014 ZANCT 8

A compliance notice was issued and the applicant applied to have it set aside. No answering affidavit was filed and there was no appearance at the hearing on behalf of the Commission. The applicant's allegations, which were consequently all deemed to be admitted by the Commission, was that no investigation was ever conducted, the complaint was never received, nor any conciliation hearing attended. The Tribunal noted that the compliance notice contained no evidence of any prohibited conduct. The compliance notice was cancelled.

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Inks Media and Digital Machine Supplies CC t/a IMDM v National Consumer Commission 2014 ZANCT 4

A compliance notice was issued and the applicant duly applied to have the notice set aside. Once again, the Commission never filed an answering affidavit and was not represented at the hearing so all allegations were deemed to be admitted. The Tribunal held that the CPA was not applicable because the purchase and delivery of the machine occurred before the effective date, but for some reason the Tribunal elected, never the less, to deal with the application of the CPA to the facts. It found that the complainant had only raised concerns regarding the machine approximately eight months after purchase, well outside of the six months provided for by the CPA. The notice was cancelled.

Byleveld v Execor Twelve (Pty) Ltd t/a Motor City and Another 2014 ZANCT 2

This time, the Commission incorrectly informed the complainant that the transaction had been concluded prior to the effective date of the CPA and that it therefore did not have jurisdiction to deal with the complaint. At the hearing, the Tribunal noted that it was common cause that the transaction occurred more than two months after the effective date. The Tribunal found that the supplier had sold the complainant a defective car and failed to complete the repairs that it had agreed to complete. It was held that the purchaser was entitled to a full refund of the amount for the repairs necessary to render the vehicle usable by the applicant.

A recurring theme through all of the cases is that the Commission failed to correctly assess its jurisdiction over the matter. Moreover, in not one of these cases did the Commission appear at the hearing to argue its point or support the compliance notice it had issued. In only one of these cases was an answering affidavit even filed by the Commission. In not one of these cases was an investigation conducted, as is required under the CPA.

When the Commission has appeared at hearings to oppose an application to set aside a compliance notice, it has not necessarily fared any better. In the City of Johannesburg case in 2012, the Tribunal found that the Commission had not followed the processes and procedures which govern the investigation of complaints prior to the issuing of compliance notices. In addition, the compliance notices issued had been defective. Communication by the Commission appears to have been very poor, with parties purportedly either not receiving information from the Commission or receiving it deplorably late. In two separate cases in 2012, concerning complaints lodged against Vodacom and MTN respectively, the compliance notices issued by the Commission were set aside because the Commission had failed to consult with the Independent Communications Authority of South Africa (ICASA), as required by the CPA when complaints are lodged against regulated entities.

It must be noted that it is unclear how many complaints have been resolved informally by the Commission. It is likely doing itself a disservice by not publicising complaints resolved informally. The Commission will need to address these issues urgently in order to fulfil its consumer protection mandate and align its bark with its bite.

Megan Badenhorst

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UNCONSCIONABLE CONDUCT

Unconscionable conduct, defined in the Consumer Protection Act, No 68 of 2008 (CPA) to include unethical or improper conduct that will shock the conscience of a reasonable person, is outlawed in terms of s40 of the CPA and falls under the broader consumer right to fair and honest dealings. Specific forms of unconscionable conduct include the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, against a consumer. This may occur in the context of marketing any goods or services; in the supply of goods or services to a consumer; during the negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; at demand, collection or payment for goods or services by a consumer; or during the recovery of goods from a consumer. The CPA prohibits unconscionable conduct in various phases of a transaction involving a consumer. Suppliers must constantly ensure that even their promotional activities are free of unconscionable conduct.

Although s40 only refers to suppliers, it must be kept in mind that a supplier is involved in the marketing of goods and services, which is, by definition, both the supply and the promotion of goods and services. However, where a business outsources its marketing to a marketing consultancy firm, for example, in order to create and implement marketing strategies for the business, then both the firm and the business to which it provides marketing services will incur liability insofar as unconscionable conduct is concerned. It is unclear from the provision whether the two entities are jointly and severally liable in this regard.

Furthermore, unconscionable conduct would be present where a supplier knowingly takes advantage of the fact that a consumer was substantially unable to protect its own interests because of a disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor. This provision is in keeping with the purpose of the CPA which essentially includes reducing and improving any disadvantages experienced by consumers who are in a vulnerable position.

A failure to adhere to this provision may result in the issuance of a compliance notice. Where a person fails to act in accordance with a compliance notice the National Consumer Commission may apply to the National Consumer Tribunal for the imposition of an administrative fine, which may be up to 10% of a company's annual turnover or R1 million.

Tshepiso Scott

THE APPLICATION OF THE CONSUMER PROTECTION ACT TO MUNICIPALITIES

Included among the objects of the Consumer Protection Act, No. 68 of 2008 (CPA) are the imperatives to strengthen a culture of consumer rights as well as consumer-focused service delivery. It may, however, take some time before those rights are realised, particularly for those in South Africa who need its protection most.

Schedule 2 to the CPA (which provides for transitional arrangements) envisages the incremental implementation of the CPA. In other words, the legislature envisages a gradual process of the implementation of the rights of consumers under the CPA – including where consumers seek to exercise their rights against municipalities.

S2(3)(b) of Schedule 2 of the CPA which deals with transitional provisions states as follows:

"*The Minister* [which is a reference to the Minister of Trade and Industry], *by notice published in the Gazette at least 20 business days before the date contemplated in sub-item (2), may –*

(a) defer the effective date of any provision contemplated in that sub-item for a period of not more than six additional months, on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure the efficient and effective implementation of that provision; or

(b) on request from the member of the Cabinet responsible for local government matters, defer until further notice the application of this Act to –

(i) any particular municipality other than a high capacity municipality as defined in terms of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

(ii) …

in its capacity as a supplier of any goods or services to consumers, on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure that the municipality or organ of state can meet its obligations in terms of this Act efficiently and effectively." (underlining our emphasis)

Thus, these provisions enable the Minister (of his or her own volition or on request by a member of Cabinet) to defer the application of the CPA to any municipality other than a 'high capacity municipality' – which is a reference to a list of municipalities in or near areas of high economic growth.

These deferment provisions must be contrasted with obligations set out in s54 of the CPA:

"*(1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to –*

(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;

(b) the performance of the services in a manner and quality that persons are generally entitled to expect;

(c) …; and

(d) …,

having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services. (underlining our emphasis)

(2) If a supplier fails to perform a service to the standards contemplated in sub-section (1), the consumer may require the supplier to either –

(a) remedy any defect in the quality of the services performed or goods supplied; or

(b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure." (underlining our emphasis)

In other words, where the Minister exercises his or her power in terms of s2(3)(b) of Schedule 2 to the CPA, the effect of this would be to bar residents of so-called lower-capacity municipalities from seeking redress under the CPA for unsatisfactory municipal services or non-delivery thereof.

The issue of deferment and the Minister's powers in terms of Schedule 2 to the CPA arose in the matter of *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP) (Afriforum). In that case, Afriforum challenged two notices published by the Minister in terms of which the Minister exempted so-called 'medium' and 'low' capacity municipalities from certain provisions of the CPA.

The Court ultimately found that the Minister had failed to conduct a proper assessment of lower and medium capacity municipalities in respect of which he sought to defer the application of the CPA to determine whether any of those municipalities were in fact administratively prepared for the application of the CPA. Although the Court was cautious to recognise the complexity of the municipal structures in South Africa, and the principle of deference to the policy decisions of the executive, it found that the Minister's failure to expressly set out in the two notices precisely which municipalities fell to be exempted (as opposed to the Minister's blanket listing of low and medium capacity municipalities) was irrational, thus rendering the notices unlawful.

In reaching its decision the Court held that municipal services are at the centre of quality of life for all citizens, and their rights as consumers against municipalities cannot be deferred in perpetuity in absence of an express legislative provision allowing it, and that the Minister could not defer basic human rights without being precise. The Court went on to note that the Minister would, with the information at his disposal, have been able to determine which services were lacking and which municipalities were incapable of complying with the CPA. The Court noted that in light of this, the Minister's failure to list each municipality requiring deferment instead of exempting an entire category of municipalities was inexplicable, irrational and unlawful.

The Court, accordingly, directed the Minister to publish a fresh notice listing every municipality requiring deferment.

The case highlights the disjuncture which often exists between legislation and the practical implementation thereof. Often the legislature's noble intentions do not fit with practical reality, and can create problems when it comes time for the objects of legislation to be implemented. This is a complex problem which the legislature, executive and the Courts routinely confront in South Africa – particularly in relation to socio-economic rights. It is no different in the context of the CPA. It will be some time before consumers are able to hold low and medium capacity municipalities to the lofty standards set in the CPA.

Justine Krige

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Consumer Protection services, please contact:

Nick Altini
National Practice Head
Director
T +27 (0)11 562 1079
E nick.altini@dlacdh.com

Chris Charter
Director
T +27 (0)11 562 1053
E chris.charter@dlacdh.com

Allan Hannie
Director
T +27 (0)21 405 6010
E allan.hannie@dlacdh.com

Anita Moolman
Director
T +27 (0)21 405 6122
E anita.moolman@dlacdh.com

Albert Aukema
Senior Associate
T +27 (0)11 562 1205
E albert.aukema@dlacdh.com

Leana Engelbrecht
Senior Associate
T +27 (0)11 562 1239
E leana.engelbrecht@dlacdh.com

Kendall Keanly
Senior Associate
T +27 (0)21 481 6411
E kendall.keanly@dlacdh.com

Kayley Keylock
Senior Associate
T +27 (0)11 562 1217
E kayley.keylock@dlacdh.com

Justine Krige
Senior Associate
T +27 (0)21 481 6379
E justine.krige@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com