

CONSUMER PROTECTION ACT

BEWARE THE FALL OF THE HAMMER

AUTOMOTIVE CODE OF CONDUCT DRIVING US INTO THE FUTURE OF DISPUTE RESOLUTION

CONSUMER GOODS AND SERVICES CODE PUBLISHED FOR PUBLIC COMMENT

BEWARE THE FALL OF THE HAMMER

Public auctions are often favoured as a popular means of achieving optimal selling price for goods or services. It is important that potential sellers and purchasers understand that certain terms and conditions attach to public auctions by virtue of the provisions of the Consumer Protection Act (CPA). In particular, it is important to have regard to the legal effect of the 'fall of the hammer' at a public auction, particularly in circumstances where a bid is received after the fall of the hammer that exceeded a bid immediately prior to it.

All public auctions are required to comply with the provisions of the CPA.

Section 45(3) of the CPA provides that "a sale by auction is completed when the auctioneer announces its completion by the fall of the hammer." This provision justifies the exclusion of any offer received by the auctioneer after the fall of the hammer.

In *Persadh v Wyles NO and Others [2012] ZAKZDHC 46* (10 August 2014), an immovable property was intended to be sold by way of a public auction pursuant to a court order. In terms of the court order, the auctioneer was directed to conduct the auction of the property in accordance with the usual practice of such auctioneer in conducting such auctions as set out in the auctioneer's standard terms and conditions applicable at the date of the sale, including the placement of suitable advertisements and in compliance with the CPA.

The principal issue that arose for determination by the High Court was the proper interpretation of the phrase "conduct a proper auction ... in accordance with the usual practice of the ... auctioneer in conducting such actions, set out in the standard terms and conditions". The background facts to the case were of central importance to the court's interpretation of the phrase.

The court order to sell the property was as a result of acrimonious litigation between co-owners of the property. For purposes of the auction of the property a reserve price was set at an amount of R14 million. The conditions of sale attaching to the auction included a provision that the auction conditions were subject to change without prior notice. In accordance with this provision, the conditions of sale were amended by the auction house to those more suited to a forced sale, in light of the fact that the sale was as a result of a court order. In particular, the default terms relating to further offers after the fall of the hammer and the requirement that the sellers confirm the sale within seven days were removed. Prior to the auction, the conditions of sale were advertised and read out.

At the auction, the property was sold for an amount of R14,5 million, higher than the reserve price which had been set. After the auction, a further higher offer of R15 million was made, but this offer was rejected on the basis that it was made after the auction and therefore not in accordance with the amended terms and conditions applicable to the auction.

The court held that a proper auction is one conducted in terms of the usual practice of an auctioneer set out in the standard terms and conditions prevailing at the time of the auction. In this regard the court confirmed that the terms and conditions applicable were those which applied at the time that the auction was conducted and which complied with the CPA – in particular that the auction was concluded at the fall of the hammer. The purpose was to achieve a fair sale price by public auction, with a reserve price of R14 million. This objective was indeed achieved. Furthermore, the auction complied with the provisions in the CPA relating to auctions, including those relating to advertisement.

Sellers and bidders at public auctions must ensure that they are familiar with the conditions of sale that attach to public auctions and, importantly, need to be aware of the fact that the CPA expressly provides that an auction is completed on the fall of the hammer – meaning that bids that are made after this time are to be disregarded.

Justine Krige

The Consumer Protection Act which came into force in April 2011 was welcomed by consumers across the country. Section 82 of the Act provides for 'industry codes' that are aimed at regulating the interaction between persons concluding business in a certain industry and may even provide an alternative dispute resolution mechanism for consumers. The focus of the remainder of this Alert is the two codes, one regarding the automotive industry and the other regarding goods and services, which are now at the dawn of their implementation.

AUTOMOTIVE CODE OF CONDUCT DRIVING US INTO THE FUTURE OF DISPUTE RESOLUTION

On 17 October 2014 Minister of Trade and Industry, Rob Davies, prescribed the South African Automotive Industry Code of Conduct – accrediting an alternate dispute resolution scheme for the benefit of both consumers and suppliers which will come into force early next year.

On 7 February 2014 a draft code regulating the resolution of disputes in the automotive industry was published for comment. The code applies to the entire automotive industry, including manufacturers, distributors, importers and the like. In line with the objectives of the CPA, the code is geared at consumer protection, supplier guidance and fair business practice.

The code places an obligation on all individuals and business in the automotive industry to promote fair business practices and to protect consumers from conduct which is unconscionable or deceptive, as well as from unfair contractual terms and trade practices.

The code also imposes an obligation on suppliers to establish an internal complaints procedure as a forum for consumer complaints to be dealt with internally as well as in terms of the Motor Industry Ombudsman of South Africa (MIOSA), which established the MIOSA scheme to resolve disputes arising in the industry. Although MIOSA has been in existence since 2001, the code now accredits the scheme and broadens the scope of businesses and individuals who fall within its reach. In terms of MIOSA, any person who stands in the position of a consumer in a consumer-supplier relationship in the motor industry will be entitled to make use of the scheme.

The procedure to be followed where a consumer has a complaint against a supplier is seemingly simple. Firstly, try to resolve the issue with the supplier. If the supplier and the consumer are unable to resolve the dispute or the supplier ignores the complaint for more than five days, the next port of call may be MIOSA. So long as the complaint is no more than three years old and the consumer has given the supplier ten days prior notice that the dispute is on-going, he will be entitled to refer the complaint to MIOSA. Once the complaint has been filed with MIOSA, the supplier will have five days to respond or provide a reasonable response for his failure to do so. MIOSA is entitled to request information before deciding either to refer the complaint to an independent supplier to resolve the complaint or do so itself either by way of mediation or adjudication. If the consumer still isn't happy he can appeal the decision to the National Consumer Commission and Tribunal.

While open for public comment, both the code and the scheme faced criticism, including the apparent unfairness regarding the fact that complaints must be kept confidential until resolved and the fact that any oral hearing or interpreter required is for the expense of the parties themselves. Also, there is a right to legal representation, the concern here being that unrepresented consumers may be intimidated. There are also concerns regarding the procedures envisaged on the basis that these procedures are onerous on consumers.

Nirvana Ajodha

CONSUMER GOODS AND SERVICES CODE PUBLISHED FOR PUBLIC COMMENT

On 3 October 2014, the Consumer Goods and Services Code of Conduct was published for public comment, the aim of which was to enhance the rights of the everyday consumer and offer an increased amount of protection than that offered by the CPA.

Similarly to the Automotive code of conduct (discussed above), the Consumer Goods and Services code of conduct (CGS code) also sets minimum standards to be applied by persons in the industry and creates an alternate dispute resolution mechanism which is industry specific and overseen by various ombuds. The crucial difference however, lies in that the CGS ombud scheme (the alternate dispute resolution component) is only applicable to voluntary 'participants' who pay a fee to register in terms of the CGS ombuds' funding model.

The scope of industries to which the CGS code applies is wide and includes those for food, beverages, tobacco, toys, cosmetics and household tools but excludes certain other industries such as estate agents, banking and insurance. The functions of the CGS ombud are described in the code as being to investigate and evaluate contraventions and to facilitate settlement where a complaint has been lodged.

The procedure for handling a complaint is similar to that of the automotive industry. Firstly, the CGS ombud requires all of its participants to have an internal complaints process which is intended to always be a consumer's first port of call. If this fails, a complaint should be lodged with the GCS ombud who will acknowledge the complaint and either facilitate settlement itself or refer the complaint to another participant to do so. If a settlement cannot be reached, the ombuds will be entitled to conduct an investigation and make a non-binding recommendation. However, the power of the CGS ombud to award damages to a complainant is limited as

the award will have to be confirmed by an appropriate court or tribunal as a consent order anyway. And if after this the dispute is still not resolved then the dispute may be referred to the National Consumer Commission and Tribunal. However, before referring a complaint, it is important to note that a complaint more than a year old cannot be referred to the CGS ombud.

Despite the similarities between codes, the CGS code seems to go a step further by providing specific standards to be applied to certain aspects of marketing and selling goods and services. For example, certain additional standards are applied to the labelling of products whereby a label is defined and suppliers are prohibited from presenting misleading labels. Suppliers are now also required to verbally disclose to a consumer when they are selling 'grey market goods', these being goods which have been imported without the approval or license of the registered owner of a trade-mark. The code also imposes liability on a supplier where a person or property is harmed due to unsafe goods, product failure or inadequate warnings and instructions. Extensive regulations are also outlaid for aerosol products, the display of prices and the recording of sales.

Nirvana Ajodha

The image displays three award certificates. The first certificate is from DealMakers, showing three consecutive years (2011, 2012, 2013) where the firm was ranked 1st in M&A Deal Flow, 1st in M&A Deal Value, and 1st in Unlisted Deals - Deal Flow. The second certificate is from Legal Week, awarding the firm the 'HIGHEST RANKING OF CLIENT SATISFACTION AMONGST AFRICAN FIRMS 2013'. The third certificate is from pmr africa, awarding the firm 'VOTED NO.1 LAW FIRM FOR CLIENT SERVICE EXCELLENCE FOUR YEARS IN A ROW'.

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