

The Consumer Protection Act

Up until now our market laws have been based on the principle of Roman Dutch law that the "buyer must beware". The Consumer Protection Act (the Act) turns this principle on its head and effectively says "**seller beware**".

The principles which will serve to guide us in the **interpretation** of this Act are to be gleaned from Section 3 (1) of the Act. What this means is that whenever we are uncertain about the meaning and extent of any portion of the Act we must assume that the legislature intended it to be understood to be achieving one of the **purposes** set out in Section 3. That Section provides that;

The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

(a) 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;

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—

(i) who are low-income persons or persons comprising low-income communities;

(ii) who live in remote, isolated or low-density population areas or communities;

(iii) who are minors, seniors or other similarly vulnerable consumers; or

(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;

(c) promoting fair business practices;

(d) protecting consumers from—

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

(ii) deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;

(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

(g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and

(h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

The Act creates a regulating authority for the implementation and ongoing control of the Act and the entire field of consumer protection to be known as the National Consumer Commission. It is given quite impressive powers of investigation and it is clear that it will extend its tentacles into all areas of commercial endeavour in our country in the years to come. The Act also acknowledges and incorporates the functions of an adjudicating body catered for in the National Credit Act known as the National Consumer Tribunal.

The Tribunal is a kind of informal court to which consumers will be entitled to refer disputes for adjudication. The Act also acknowledges the participation in the system of any special consumer courts which might already have been established in terms of provincial legislation dealing with consumer matters. These courts and the Tribunal will have concurrent jurisdiction. The existing regular courts are of course not excluded from the process and they will also have jurisdiction to adjudicate on matters catered for in the Act and to generally apply the law as they have always done.

These structures between them will administer and police the Act and ensure that the rights of consumers are upheld. Besides catering for the right of a wronged individual to seek redress the Act provides for what effectively amounts to class action procedures. This will enable a group of consumers who have all been similarly wronged to bring a group action against the supplier who has acted unlawfully. The Act also caters for the right of a person or group of persons to approach the Tribunal or the courts on matters of public interest. This will enable action groups to identify malpractice and ensure that the courts bring it to a stop.

The Act applies to all transactions unless specifically exempted in terms of the Act and also to the action of **promoting** the sale of goods and services. The word "transaction" is defined as including the supply of goods and the supply of services in exchange for payment. To "promote" means to advertise, display or offer to supply goods and services. The Act exempts the following transactions from most (see the commentary below dealing with defect liability for certain provisos) of its jurisdiction namely;

- Where the consumer is the state
- Where the consumer is a juristic person whose assets or annual turnover exceeds a certain threshold. We do not at this point know what that threshold will be but if the National Credit Act is anything to go by it will probably be between R500,000 and R1 million. A juristic person is deemed to include not only companies, close corporations and the like but also trusts and partnerships
- Services supplied under an employment contract.

- Any other transaction which the minister might in future exempt.

The Act then proceeds to lay out a list of what it describes as *fundamental consumer rights*. The other side of the coin is of course that these "consumer rights" become "supplier obligations"! It will not be possible within the context of this commentary to describe each and every one of these rights and I will therefore be limiting myself to mentioning them by category and highlighting only aspects which I think are particularly noteworthy. For those who are really interested in matters of this nature I will refer to the relevant section of the Act to enable you to read the full text. These fundamental consumer rights are the following;

- **Protection against discriminatory marketing (Section 8)**. Most of the aspects catered for have already largely been catered for in other legislation and there is nothing terribly surprising. It is interesting to see that it will not be deemed to be discriminatory marketing to designate particular facilities or services exclusively for those who are older than 60 years. Special deals for pensioners will therefore still be lawful. Unisex toilets have fortunately not been made compulsory!
- **Right to restrict unwanted direct marketing (Section 11)**. The Act caters for the creation of a national register in which consumers may register what is described as a pre-emptive block, the purpose of which is to record that the consumer does not wish to receive unsolicited marketing. Suppliers will therefore now be obliged to check the register for such pre-emptive block before sending unsolicited marketing material to consumers or making any marketing approach to the consumer. It is also contemplated that the minister will by regulation specify certain times and days on which unsolicited direct marketing may not occur.
- **Consumer's right to choose (Section 13)**. It will not be permissible for a supplier to impose a condition requiring a consumer to enter into an additional agreement with that supplier or with a designated third party unless the supplier can show that it is to the advantage of the consumer. This might prove to be quite a headache for the property development community when selling "plot and plan". Developers will probably have to set one price if the consumer buys the plot alone and a lower price if the consumer buys the plot and the house.
- **Expiry and renewal of fixed term agreements (Section 14)**. This entire section does not apply to transactions between juristic persons regardless of their turnover or asset value. It is interesting to see that this section speaks of a transaction "between juristic persons" which would imply that both the supplier and the consumer must be juristic persons. This does not really make sense and I presume it will be understood to mean that the consumer being a juristic person will be the only relevant issues. This section contemplates that if any consumer agreement is for a fixed term that term may not exceed the maximum period which will be prescribed in terms of regulations. The consumer will furthermore (and notwithstanding the fact that the contract is for a fixed term) be permitted at any time during that period to give the supplier 20 business days notice to terminate the agreement. Should the consumer do so he will be liable to the supplier for what the Act describes as a "reasonable cancellation penalty". The supplier will only be permitted to cancel the agreement after giving the consumer 20 business

days written notice of any breach. As immovable property leases are not excluded from the operation of the Act I must conclude that this provision applies to such leases also. It therefore now appears that from the point of view of the landlord a fixed term lease cannot be relied on. His tenant can give him notice and leave at any time. Although the concept of a "reasonable cancellation penalty" is not defined it is my assumption that the landlord will be permitted to claim from the tenant the damages which the landlord suffers until he has found a new tenant. How this will be interpreted by the Consumer Tribunal remains to be seen. This section also stipulates that the supplier has a duty within certain periods before expiry of the fixed term of the agreement to notify the consumer in writing of the material changes to be applied on the renewal of the agreement and the consumer's rights in terms of this section. This section furthermore stipulates that on expiry of the fixed term period the contract will automatically be renewed on a month-to-month basis unless the consumer directs the supplier to terminate the agreement or unless the consumer accepts the supplier's new terms. This last provision is quite important and has certain repercussions especially in the field of leases as if the matter is not properly dealt with the lease might not terminate on the last day of the initial period. The act does not make it clear how the landlord is expected to deal with a lease which he does not want to renew for any particular reason. It seems to me that if the landlord does not want to extend the lease he would be best advised to inform the tenant of quite a "healthy" (but not ridiculous) increase in the rental. If the consumer/tenant is silly enough to accept the new "healthily increased" rental then the landlord is simply going to have to accept that he will not be able to lawfully terminate the lease and expect the consumer to vacate until at least two months have elapsed from the date of expiry of the initial period. Leases will have to be carefully rewritten to deal with these changes.

- **Preauthorisation of repair or maintenance service. (Section 15)** This section has specific relevance to the motor vehicle repair industry but obviously applies to all other service providers. It will apply to transactions above a certain threshold which will be stated by regulation. The bottom line is that the supplier will not be allowed to charge the consumer anything for repair or maintenance service unless he has provided the consumer with a quotation for the work. It seems to me that the section might also affect the rights of service providers who do maintenance work on immovable properties .
- **Right to cooling off period after direct marketing. (Section 16)** Any transaction resulting from any direct marketing may be terminated by the consumer without consequence within five business days of the conclusion of the agreement or delivery of the goods. This topic is touched on again in Section 32 of the Act where it is required that any consumer who concludes an agreement as a result of direct marketing must be informed of this cooling off right. The question of whether a transaction "results from any direct marketing" is of course debatable and suppliers would be well advised to include as a standard clause of contracts a confirmation by the consumer that he has not elected to deal with the supplier as a result of direct marketing.
- **Right to cancel advance reservations, bookings or order. (Section 17)**. This Section will not apply to special order goods. In respect of all other goods and services the supplier

has the right to impose a reasonable cancellation charge if the consumer exercises his right to cancel. What this means in practice is that the supplier cannot enforce specific performance of the contract by suing the consumer for the contract amount and will be obliged to only sue for reasonable damages after mitigating his damages. This could apply to agreements between property developers and consumers where the consumer has purchased a standard product of the property developer "off plan".

- **Consumer's right to choose or examine the goods. (Section 18).** It is interesting to see that this section exempts the consumer from any damage which he might cause to the goods in the process of examining the goods unless the consumer's actions can be said to be grossly negligent, reckless or malicious. The traditional notices on the lines of "nice to see, nice to hold but if you break it consider it sold" will no longer apply.
- **Rights with respect to delivery of goods or supply of service (Section 19).** Much of this section simply repeats our common law which requires the supplier in circumstances where a specific performance time has not been agreed to perform the agreement within a reasonable period of time. Novel aspects include the right of the consumer to be given a reasonable period of time to inspect the goods once they have been delivered. This Section also seems to override the common law by stipulating that if the supplier delivers the goods or the performance of the service on a date other than that as agreed the consumer has a choice to stick to the deal or without penalty to cancel the agreement and to treat the delivered goods or performed services as unsolicited goods. (See discussion about unsolicited goods and services later in this article). A supplier who has therefore exceeded the promised supply date would be well advised to ask the consumer in advance before delivering the goods or services whether the consumer wishes to cancel the agreement. If he does not and if he then proceeds to do the delivery he is at risk. In terms of Section 32 of the Act any goods left with the consumer in the process of direct marketing will be deemed to be unsolicited goods. How this will be applied to building contracts which are running late and sales by developers in developments which are running late remains to be seen.
- **Consumer's right to return goods (Section 20).** This section entitles the consumer to return goods and receive a refund in certain circumstances. These include transactions cancelled in terms of the cooling off right mentioned above; goods which the consumer did not have an opportunity to properly inspect on delivery and goods which have not satisfied the particular purpose communicated to the supplier by the consumer when ordering the goods. Suppliers would be well advised to include as a specific term of the agreement a confirmation by the consumer that he has not indicated to the supplier a particular purpose when ordering the goods.
- **Unsolicited goods or services (Section 21).** This is a novel section which substantially changes our common law. All suppliers of goods would be well advised to become very well acquainted with this section. The essence of this section is that if a supplier delivers goods to a consumer which the consumer has not asked for, the supplier might lose the right to reclaim those goods in certain circumstances. Certain goods although not really "unsolicited" are deemed to be unsolicited and it is accordingly important to note these as well. They include goods which were supplied late; goods which were supplied in

error and goods which were supplied in excess of the amount ordered. Although this section is a little confusing it is my understanding of this section (however unfair this might seem) that the consumer can keep the goods and not pay for them unless the supplier can show that the goods were clearly addressed to another person and have obviously been misdirected or unless the supplier notifies the consumer within 10 business days after delivery and then collects the goods within 20 days after so advising him. It is not entirely clear what the position is if the supplier is not aware that he has delivered goods in excess of the amount ordered. One interpretation is that the consumer has no obligation to inform the supplier of such facts and can quietly wait for the supplier's 10 business day notice right to lapse and thereafter enjoy the goods for free! This really does seem extraordinarily unfair and I hope that the other interpretation will apply namely that the consumer has a duty to at least inform the supplier that there has been a misdelivery of goods. We will have to wait and see. In the interim suppliers would be well advised to check with the consumer within 10 business days of delivery that there has been no excess supply and to include as a term of supply that the consumer has a duty to inform the supplier within 10 business days of excess supply.

- **Right to information in plain and understandable language. (Section 22).** It appears that the form of notices, documents and visual representation might be regulated. In the interim they should be in language commensurate to that which an ordinary consumer with average literacy skills and minimal experience as a consumer of the relevant goods or services could be expected to understand. All sale agreements and leases used by estate agents for the sale of immovable property will have to be rewritten to ensure that the language is clear and simple and perhaps illustrated by examples and clarified with additional explanations.
- **Disclosure of price of goods and services (Section 23).** It is interesting to see that this Section has not seen fit to tamper with our law insofar as errors in the advertising of prices are concerned. If a price is advertised in error the supplier is not obliged to sell the product or service at that price.
- **Product labelling and trade description (Section 24).** It is interesting to see that all products must now disclose the presence of any genetically modified ingredients.
- **Disclosure of reconditioned or grey market goods (Section 25).** Suppliers of goods which are not supported locally by the manufacturer of the goods are required to disclose this fact.
- **Disclosure by intermediaries (Section 27).** Agents representing that the supplier or the consumer will be required to disclose certain information which will be prescribed by regulation. This will probably apply to estate agents also.
- **Identification of deliverers, installers and others (Section 28).** Any supplier or employee of a supplier who visits the premises of a consumer shall be required to visibly display a badge or similar identification device and to be able to identify himself to the consumer. This will apply to estate agents also.

- **General standards for marketing of goods and services (Section 29).** No goods and services should be marketed in such a way as to reasonably imply a false or misleading representation regarding the goods or services.
- **Bait marketing (Section 30).** If suppliers are going to advertise "specials" to attract consumers to their shops then they are required to ensure that they have enough product of the special to reasonably meet the anticipated demand.
- **Negative option marketing (Section 31).** No contract for goods or services will be enforceable if it is entered into on the basis that unless the consumer declines the offer he will be deemed to have concluded it.
- **Customer loyalty programmes (Section 34).** For those of us who have experienced frustration in exercising or using our air miles with our preferred airline this section will be most welcome. The section effectively stipulates that save for a maximum period of 90 days in any one year the sponsor of a loyalty programme is obliged to treat the consumer who wishes to pay for the goods or services of the sponsor with his loyalty award credits in exactly the same way as a consumer who wishes to pay in cash. The sponsor is obliged to ensure that there are sufficient amounts of goods and services to meet the needs of the consumers who wish to pay with loyalty credits. Airlines will accordingly no longer be permitted to allocate a limited number of seats on their flights for those who wish to pay with loyalty credits.
- **Alternative work schemes (Section 37).** Those entrepreneurs amongst us who regularly advertise in the newspaper the opportunity to make a vast fortune whilst "working from home" will have their wings trimmed by this section. The Act now makes it an offence for anyone to make false representations as to the availability and the profitability of such ventures. Proper disclosure will have been made of the risks involved. The entrepreneur's ability to charge a fee to the consumer who is drawn to these opportunities is also curtailed.
- **Referral selling . (Section 38).** Although this section is not a model of clarity it is clear that a limitation and control is placed upon the right of a supplier to persuade a consumer to purchase his goods or services by promising the consumer a discount or other benefit for referring the new customers to the supplier.
- **Unconscionable conduct (Section 40).** Any supplier who acts unconscionably could be prosecuted or fined. Amongst other things the section stipulates that it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was unable to protect his own interests because of physical or mental disability including illiteracy, ignorance and language.
- **False and misleading or deceptive representations (Section 41).** No supplier or anyone else on behalf of the supplier is permitted in the process of marketing any goods to make a false, misleading or deceptive representation concerning a material fact to the consumer. The use of exaggeration, innuendo or ambiguity or the failure to disclose a material fact is deemed to be a deception. Suppliers are expressly obliged to correct any

misapprehension on the part of a consumer and the failure to so do is also deemed to be a deception. The Act cites a number of examples including with regard to immovable property the fact that it will be deemed to be a deception if the consumer is led to believe or allowed to continue to believe that any immovable property has characteristics which it does not have, may lawfully be used for a purpose that is in fact unlawful or impracticable or is close to facilities and amenities which are in fact not close or has natural features which it does not have. As estate agents will probably for purposes of this section be deemed to be "marketing on behalf" of the seller of the property the representations of the estate agent to the consumer could be visited upon the seller and the seller would be well advised to determine whether any representations were made at all.

- **Pyramid and related schemes (Section 43)**. The Act makes it a crime to initiate or participate in any Pyramid or related schemes. Any scheme which is designed to give the participating party returns of at least 20% above the repo rate is deemed to be an unlawful scheme.
- **Consumer's right to assume the supplier is entitled to sell the goods (Section 44)**. The supplier of any goods is deemed to warrant that he is able to transfer legal ownership of the goods unless the supplier makes full disclosure in writing of the fact that he is not the owner before the sale is concluded. The Act renders the supplier not only liable to the consumer but also liable to the owner of the goods. This does not mean that the owner of goods may not recover the goods.
- **Auctions (Section 45)**. This section applies to auctions including those done pursuant to a court order. The section stipulates that any bidder is permitted to withdraw his bid at any time before the auctioneer announces the completion of the auction. If the auction is to be subject to a reserve price then notice of this fact must be given in advance of the auction. Auctioneers and owners of goods on auction or persons on their behalf are not allowed to bid at auction unless this is also notified in advance. The Act does not indicate what "in advance" means and auctioneers would be well advised to include these disclosures in all advertisements of the auction.
- **Overselling and overbooking (Section 47)**. If a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and then is not able to do so due to insufficient stock or capacity, the supplier must refund to the consumer any monies which the consumer has paid plus interest thereon and compensate the consumer for costs incurred by the consumer directly incidental to the supplier's breach of the terms of the agreement. The supplier is however permitted to supply alternative goods or services as long as they are comparable or better than those already nearly promised. The supplier is also released from any obligation if his failure to supply is due to circumstances beyond the supplier's control and if the supplier took reasonable steps to inform the consumer of the shortage as soon as it was practical so to do in the circumstances. This section will no doubt bring an end to the pesky business of airlines overbooking their flights.

- **Unfair, unreasonable or unjust contract terms (Section 48).** This section substantially changes our common law and is a very important section which will play a dominant role. In terms of common law the right to contract on the basis agreed by the parties is respected and no court is permitted to interfere unless the agreement can in some way be couched as unlawful. This section now gives courts and of course the Consumer Tribunal the right to review the terms of the agreement concluded between the parties. This review extends not only to the terms of the agreement but also to the price! This section provides that a supplier is prohibited from entering into an agreement to supply goods or services at a price which is unfair, unreasonable or unjust or on terms which are unfair, unreasonable or unjust. This section also provides that the supplier is not permitted to require a consumer to waive any rights or assume any obligations on terms which are unfair, unreasonable or unjust. This section provides that terms will be deemed to offend this section if they are excessively one-sided or inequitable (not fair). This section is also offended if the consumer relied on a false, misleading or deceptive representation made by the supplier. It is difficult to predict how far this section will extend and I have assumed that the courts and the tribunal will only interfere where the consumer has clearly been "ripped off". What is however clear is that contracts are going to have to be carefully scrutinised to ensure that they are reasonably balanced and not designed only to protect the supplier.
- **Notice required for certain terms and conditions (Section 49).** Any notice to a consumer or a provision in a consumer agreement that purports to limit in any way the risk or liability of the supplier or any other person; constitutes an assumption of risk or liability by the consumer; imposes an obligation on the consumer to indemnify the supplier or any other person or amounts to an acknowledgement of any fact by the consumer must be drawn to the attention of the consumer in a conspicuous fashion; in plain language and before the consumer enters into the agreement or pays, whichever occurs first. From the point of view of the sale of immovable property the traditional clauses dealing with the passing of risk would be an example of a clause which would need to be properly dealt with. The same would apply to clauses in leases dealing with the tenant or the tenant's invitees suffering harm or damage upon the property.
- **Written consumer agreements (Section 50).** It is contemplated that the Minister may prescribe categories of consumer agreements that must be in writing.
- **Prohibited transactions, agreements, terms or conditions (Section 51).** This is also a rather important section which covers a number of aspects. At the outset it stipulates clearly that it is not permissible for any agreement to contain any clauses which serves to waive or deprive the consumer of a right given to him in terms of the Act. The agreement may also not falsely contain 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 or a person on behalf of the supplier. Forfeiture clauses are also restricted.
- **Powers of court to ensure fair and just contract terms and conditions (Section 52).** As I have already mentioned the Act intrudes upon the right of parties to the contract to agree as they choose and empowers the courts to interfere and to rewrite portions of

the contract if they do not meet the standards set by this Act. This section sets out guidelines for the Court/Tribunal in the exercise of the discretion given to them. The section is quite a lengthy one and I can obviously not summarise everything. The general principle is that the court should take into account; the relative balance of power which existed between the parties when the contract was negotiated; the simplicity of the language used, trade custom; previous dealings between the parties; the real market value of the goods or services and the general conduct of both parties. The bottom line is that the adjudicating authority has a broad discretion to either import into the contract provisions of fairness which do not exist; delete from the contract provisions which offend the Act or set the entire contract inside.

The next area which the Act tackles is the entire area of defects in goods and services; hazardous goods and services and unsafe goods and services (Section 54). In so doing it rewrites our common law almost completely. A defect is defined as an imperfection in the goods or services that renders them less acceptable than persons generally would be reasonably entitled to expect or which renders them less useful, practical or safe than persons generally would reasonably be entitled to expect in the circumstances. In terms of our common law a defect was defined as a condition in the goods which renders them unfit for the purpose for which they are intended. The new definition accordingly is wider. The fact that a product "does the job" is no longer good enough. It must do the job as well as a reasonable person would expect of the product. This probably means that the product must be measured against other similar products. A hazard is defined as a characteristic in the goods or services which presents a significant risk of personal injury or damage to property and the term unsafe is defined as a condition which presents extreme risk of injury or damage. It is not yet clear what the difference is between a significant risk as opposed to an extreme risk! The topic is dealt with under a number of headings including;

- **The consumer's right to safe and good quality goods.** Save for goods bought at auction (which are excluded) it is recorded that the consumer has a right to receive goods that are reasonably suitable for the purpose for which they are generally intended (this effectively repeats the common law definition of defects); are of good quality, in good working order and free of defects; will be usable and durable for a reasonable period of time and comply with any national standard prescribed in terms of law. If the consumer has indicated to the supplier how he intends to use the goods then if the supplier stays silent and supplies the goods the goods will be deemed to be defective if they do not serve the consumers indicated purpose. The distinction between patent and latent defects is abolished. It accordingly no longer matters whether the defect can be seen on ordinary careful inspection or whether it is hidden. It is permissible for the supplier to supply goods which are not necessarily suitable for the purpose for which they are generally intended or which are not of good quality, not in good working order and not free of defects if the supplier informs the consumer that the goods are being supplied without such promise. The traditional "voetstoets" clause much relied upon in sale of immovable property agreements is accordingly still permitted. Such goods must nevertheless (and this is difficult to understand) still be usable and durable for a reasonable period of time and comply with national standards. It is not clear to me how something which is clearly stated to not be in good working order can nevertheless be usable and durable for a reasonable period of time! What is clear to me is that sellers of

immovable property will be inescapably deemed to be promising that the buildings on the property have been lawfully built.

- **Implied warranty of quality.** In every contract (even if it is not expressly stated) the supplier is deemed to have promised the consumer that the product meets the standards set out in the preceding paragraph. The concept of supplier applies to the producer of the goods; the importer of the goods; the distributor of the goods and the retailer of the goods all of whom are deemed to make this promise to the consumer. The Act gives the consumer the right to return any goods which do not meet the standards set out in the preceding paragraph to the supplier without penalty and at the supplier's risk and costs at any time within six months of the date of receiving the goods and the consumer may elect to either receive a refund or force the supplier to repair or replace the goods at the supplier's costs.
- **Warranty on repaired goods.** All service providers are deemed to warrant all new and reconditioned parts installed during any repair or maintenance work including the labour component thereof for a period of three months from the date of installation.
- **Warning concerning facts and nature of risks.** The supplier of any activity or facility which is subject to any risk of an unusual character or one which the consumer could not reasonably be expected to be aware of which could result in serious injury or death must draw these risks to the attention of the consumer in a prominent fashion. Any person who packages (not necessarily the producer) any hazardous unsafe goods must display on the packaging a notice providing the consumer with adequate instructions on the use and handling of the goods.
- **Liability for damage caused by goods.** This particular section turns our common law on its head! In terms of our common law before one can successfully sue another party for loss or damage to our person or property one must prove that the other party acted negligently. If this can't be proved one cannot claim. The Act does away with the requirement of proving negligence. All that now need be proved is that the consumer suffered harm due to the goods being unsafe or hazardous. The liability extends not only to the manufacturer of the goods but also the importer; the distributor and the retailer unless the distributor and retailer can prove that it is unreasonable to expect of them to have discovered the problem in the goods. The consumer's action for damages must be brought within three years from the date of injury or loss. The liability extends not only to physical loss but also economic loss.

The next portion of the Act (commencing at Section 62) is presented under the heading of the Supplier's accountability to consumers. It deals with the following aspects;

- **Lay-bys .** The Act interferes with the common law provisions of the contract of sale by providing that the supplier is obliged to refund to the consumer the money paid by the consumer if the consumer fails to pay the full amount within 60 days of the due date for payment and may only in certain circumstances retain a fair termination penalty.

- **Pre-Paid certificates, credits and vouchers.** This section deals with any transaction whereby a supplier receives money from the consumer in exchange for a certificate, card, credit, voucher or similar device and promises to provide goods or services to the consumer on presentation of the device. The Act stipulates that such devices may not expire sooner than three years from the date of issue.
- **Prepaid services and access the service facilities.** This section applies to consumers who pay a one-time or periodic membership fee or similar charge in respect of services or access to services to be provided at a date more than 25 days after the payment is made. (Example golf clubs and gyms). Even though the consumer might be required to pay a considerable number of months if not a year in advance the supplier is only permitted to use a pro rata portion of the consumer's money per month.
- **Supplier to hold an account for consumer's property.** All money received by a supplier in the three categories mentioned immediately above must be held separately from the supplier's own money and the supplier may not treat that money as being his money until the supplier becomes entitled to the money. How this will be dealt with on the insolvency of the supplier is not clear. It is obviously an effort on the part of the legislation to create a kind of "trust account" relationship between the supplier and the consumer and is very similar to that which exists between an attorney and his client. This will no doubt prove to be somewhat of a nightmare to suppliers to administer.
- **Deposits in respect of containers, pallets or similar objects.** The Act permits the Minister to prescribe the minimum or maximum deposits which the supplier must or may require a consumer to pay in respect of the return of bottles, containers, reels or similar objects and the supplier of such goods (irrespective of whether the particular returns were sold by that supplier) must refund the deposit to the bearer.
- **Return of parts and materials.** A supplier is required to retain and deliver to the consumer all parts which were replaced in the process of repair and maintenance work

The next portion of the Act deals with business names and industry codes of conduct. (Section 80) The Act stipulates that no supplier may carry on business under any name unless it is his own name or a name registered for use by that person in terms of the Act. All trade catalogues, business documents and the like must contain a reference to the name of the business, physical address and the name of the party in whose name the business name is registered. All suppliers who wish to carry on business in a name other than their own will be required to register their business name with a registrar appointed for such purposes. If the name is not used for a continuous period of at least six months the right to use the name can be lost. The registrar may refuse to register a name if it is confusingly similar to the name of an existing company or close corporation or a registered trademark. The business name cannot falsely imply that the business has qualities or qualifications which it does not in fact have.

In ending this article I should mention that **Franchise Agreements** (Section 7) receive particular attention in this Act .Some of the more noteworthy provisions are that :

- Franchise agreements must be in writing.

- The agreements must contain certain information which will be prescribed by regulation.
- Consumers who have signed franchise agreements will have a 10 day cooling off period during which they may without consequence cancel the agreement.
- The right of a franchisor to force franchisees to acquire goods and services from them or their nominated supplier is restricted.

I have no doubt that as time passes and as I become more acquainted with this Act and of course its regulations [when they are made] further consequences for the marketplace and the traditional terms of contract will be revealed.

Milton Koumbatis
Miltons Matsemela Inc.
1 July 2009