

ADVISORY NOTE 9: CONSUMER OBLIGATIONS: PART 1

This note is provided by the office of the Consumer Goods and Services Ombud (CGSO) to guide consumers as to their obligations and responsibilities under the Consumer Protection Act (CPA).

Introduction

Much has been said about the comprehensive and far reaching set of rights that South African consumers have been granted under the Consumer Protection Act (CPA). What is often overlooked is that the CPA does not completely relieve consumers of the obligation to look out for their own interests, or excuse them for not acting in an honest and responsible fashion.

Unless consumers take the trouble to familiarise themselves with their rights and insist upon them when appropriate, the efforts of government in creating those rights will be in vain. Another problem that arises from a lack of knowledge and understanding of their rights is that consumers who mistakenly believe they have a valid complaint clog up the systems of the complaint handling mechanisms created under the CPA.

One of the central features of the CPA is that it requires suppliers to provide information fully, honestly and in an understandable format in order to enable consumers to make informed choices. So long as the suppliers have done what they are supposed to do, consumers will generally be bound by agreements that they enter into with the suppliers.

This note is an attempt to explain what is expected of consumers under the CPA and the law, to ensure that they gain the maximum benefit from the CPA, pursue their rights effectively and avoid getting into trouble. It does not constitute legal advice.

Summary of main obligations

1] Know your rights and obligations.

2] Make carefully considered and informed decisions after reading all instructions, warnings, agreements, exemption causes, labels and notices/ signs.

3] Ask for information about the product and explain the purpose for which you require it.

4] Use the opportunity to inspect or try on goods at the store wisely.

5] Find out about the supplier's returns/ refunds/ warranty policy before you buy.

6] Keep/ obtain records/ proof.

7] Check goods as soon as they are delivered to ensure they are correct/ undamaged.

8] Do not use, abuse or tamper with anything you intend to return.

9] Follow the correct complaint channels in a constructive fashion.

10] Do not make any unrealistic, dishonest or exaggerated claims or allegations.

Detailed Consideration

1] Know your rights and obligations

It is important for you to know your rights so that you can insist upon them being honoured by suppliers and for you to be able to make decisions or take actions which best protect your interests.

For example, under section 19, it is an implied (automatically included) condition of every transaction for the supply of goods that the supplier is responsible to deliver the goods on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement. If a date and time are agreed upon and the supplier fails to deliver on the agreed date, the consumer is entitled to cancel the agreement without penalty.

Armed with this knowledge, a consumer would ensure that when delivery of an item purchased is discussed with the supplier that a date on which the delivery must take place is agreed upon. Further, the consumer would know that he or she would be entitled to cancel the transaction if the goods were not delivered on the agreed date.

As consumers' rights are not limitless, it is also important for consumers to know what they are not entitled to, to avoid frustration and wasting time. For example, a supplier is not obliged to refund a consumer if the consumer simply changes their mind and decides they do not like what they bought or discovers they can buy the goods more cheaply elsewhere.

There are few obligations in the true legal sense imposed on consumers by the CPA. Those that relate mainly to honesty, such as the obligation not to alter, obscure, falsify or remove a displayed price, which carries a term of imprisonment if breached. Most of the obligations that there are in the CPA are in the sense of expectations that consumers will do certain things, such as the expectation that consumers will examine goods in the store or when delivered to them to ensure the goods are what they want or ordered respectively. If the consumer fails to do as expected of them, they may lose the benefit of the particular right. Thus if a consumer damages the goods by using them in a way that is unreasonable, they will not be entitled to return them for a refund.

2] Make carefully considered and informed decisions after reading all instructions, warnings, agreements, exemption causes, labels and notices/ signs.

One of the central features of the CPA is that it requires suppliers to provide information fully, honestly and in an understandable format in order to enable consumers to make informed choices.¹ Section 3 talks not only of improving consumer awareness and information, but also of encouraging responsible and informed consumer choice and behaviour. This means that the responsibility is on consumers to find out what information is available to them and to be alert to warnings and pitfalls and to apply their minds to the terms and conditions of transactions.

So long as the suppliers have done what they are supposed to do, consumers will generally be bound by transactions that they enter into with the suppliers. Consumers must accordingly be alert. Set out below are the various obligations imposed on suppliers with regards to providing information and the corresponding responsibilities of consumers.

¹ According to the CPA Preamble, one of the purposes of the CPA is to improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs.

SECTION	SUPPLIER OBLIGATION	CONSUMER RESPONSIBILITY
22	Every notice, document or visual representation must be in plain language	Read the notice or document, ask for explanations or get someone to advise you before signing, especially if it is a big price tag item such as a house, car, furniture.
23	Prices must be displayed with goods; the supplier is bound by the lowest price displayed, unless it is an obvious error/ has been tampered with.	Check with a shelf packer if you are unsure of the price, check the till slip to ensure you have not been overcharged.
24 plus Various regulations	Trade descriptions and labels must be applied to goods and not be misleading.	Read the trade descriptions and labels and decide whether the goods are acceptable/ suitable before leaving the shop.
25	Advise customers of reconditioned or grey market (unauthorised import) goods	Decide if you are prepared to accept the risks of defects and no manufacturer's warranty cover.
26	Must provide sales record containing comprehensive list of details.	Check the correctness of the sales record and keep it in a safe place: it is your copy of the agreement and proof of purchase.
28	Marketing/ delivery/ repairs/ installation persons must wear a badge or provide identification.	Be cautious and insist callers at your premises show you their official badge or identification.
33	Must provide comprehensive list of information regarding the terms of catalogue marketing.	Familiarise yourself with the information provided before entering a transaction.
36	Must provide, on request, the rules of a promotional competition.	Request the rules to ensure you are eligible to enter the contest and that you find any conditions acceptable e.g. must collect the prize in Cape Town.
41	May not make false or misleading statements or claims	Familiarise yourself with descriptions of and claims regarding products.
48	Contract terms may not be unfair, unreasonable or unjust.	Read agreement to ensure price/ terms are fair and terms are not one sided/ adverse to you.
49	Any risk of injury or death, adverse term or exclusion of liability consumer in an agreement must be brought to the attention of the consumer in a conspicuous manner before the consumer enters into the transaction.	Be on the alert for warning clauses and read them to find out which risks you will not be covered for before you enter into the agreement. Look out for highlighted terms in contracts.

55(2)	Must provide goods that are suitable for the purposes/ use for which they are generally intended or for which the consumer intends to use them and has specifically informed the supplier of, with regard to the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods.	Read all marketing material, packaging and display information, any trade description or mark, any instructions for, or warnings with respect to the use of the good.
58	Any risk of an unusual nature, injury or death must be brought to the attention of the consumer in a conspicuous manner or on the packaging.	Be on the alert for warning notices & packaging and read them to find out what dangers are associated with the activity/ product before you embark on activity or buy or use the product.
61	A producer or importer, distributor or retailer of any goods is liable for any harm caused as a consequence of inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,	If you are given adequate warnings regarding hazards, you may have no claim for damages caused by the hazard, so ensure you read the instructions or warnings.
14	Must inform you that a fixed term agreement is about to end and will roll over onto a month-to-month basis with/ out new terms.	Read all correspondence and give notice in time if you do not want the contract to continue.

3] Ask for information about the product and explain the purpose for which you require it.

Under section 55(2), every consumer has a right to goods that are:

- reasonably suitable for the purposes for which they are generally intended;
- of good quality, in good working order and free of any defects; and
- will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put

In addition, under subsection 55 (3), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, the supplier may be liable if the goods are not suitable for the purpose for which they are intended, either generally or for the specific purpose communicated to the supplier.

You should therefore ask the salesperson about the product and explain precisely what you want to use it for. For example, if you need an electric drill for your construction business, you should find out from the sales person which drills are suitable for that purpose. If you fail to do so and mistakenly buy a drill that is intended for a home hobbyist, you will have no claim if it burns out from over use at the construction site.

You should keep a record of the conversation and the sales person's name.

If you want to buy an immovable property for a particular purpose, be sure to inform the estate agent of this and get any answer recorded as part of the agreement.

4] Use the opportunity to inspect or try on goods at the store wisely.

The most widely misunderstood aspect of the CPA is the right to return goods or cancel an agreement. Many people mistakenly believe that they have the absolute right to change their minds after buying something and to return it for a refund.

The correct position is that there is only a cooling off period if direct marketing took place. The only other time you can cancel the transaction after the goods are delivered is if the goods were in some way defective within six months after you bought them. This right applies whether or not you could have detected the defect before taking delivery of the goods.

This does not mean that you should not try on or inspect the goods in the store. On the contrary, the CPA gives you the right to choose or examine goods and to select or reject any particular item from displayed stock before completing the transaction (section 18). If you have had the opportunity to examine the goods before they are delivered, you lose the right under section 20(2) to return them to the supplier and receive a full refund after they have been delivered to you.

It is essential that you inspect the goods before delivery because, unless the shop has a refund policy, it is not obliged to take back goods that:

- You change your mind about;
- Your partner does not like;
- Do not match your other clothes/ furniture;
- Do not fit (unless the goods were in a sealed package);
- Are uncomfortable to wear (unless some defect becomes apparent, like a nail protruding through the sole of a shoe);
- Are uncomfortable to sit/ sleep on;
- You realise you cannot afford.

The automatic 6 month warranty of quality provided by section 56 may not apply to a house sold by a private seller and definitely does not apply to goods sold at an auction. This means they may be sold voetstoots (as is, with defects and all). For this reason you are advised to get an expert to inspect a property sold privately or a motor vehicle sold on auction before you sign an offer to purchase or make a bid respectively.

5] Find out about the supplier's returns/ refunds/ warranty policy before you buy.

As was explained in the previous section, unless the goods are defective or the shop has a refund policy, you are not entitled to return goods for a refund. Although most large retailers do have "no questions asked" refund policies in place, these differ from retailer to retailer and they may impose restrictions in terms of by when something must be returned and requirements regarding proof of purchase and return of packaging. Smaller retailers and businesses are less likely to permit change of mind returns or, if they do, give cash refunds.

If you are in any doubt as to a purchase, for instance if it is intended for someone else who may not like it or that it may not fit, find out what the store's exchange policy is. You would be wise to record the answer and get the name of the person that gives you the information.

Here is a checklist of what to ask:²

- Time Limit: How long do you have from the date of purchase to return the goods?
- Shoe Condition: Must you return the goods looking new, in the original box, or can you return them after wearing them?
- Reason for Return: Can you return them for any reason, for no questions asked, or do you need to cite a reason?
- Money Back or Exchange: Does the store refund your money or offer an exchange?
- Procedure: Do you bring the goods into a store?
- Transportation: Does the store foot the bill for return transportation? What is the transportation method for returns?

As the CPA warranty only lasts for 6 months, you should find out if there is a manufacturer's warranty, what the cover is in terms of time period and repairs or replacement, and what the requirements are to initiate it and claim under it.

² From <http://walking.about.com/od/shoechoice/a/Walking-Shoe-Return-Policies.htm>

6] Keep/ obtain records/ proof

The general rule in law is that a party to litigation must prove their version of the facts that they need to establish to make out a valid claim. The CPA goes some way in relieving consumers of having to prove all aspects of the facts by, for instance, not requiring proof that a defect existed in goods at the time of purchase or by not requiring a consumer to prove that the supplier was negligent in a claim for damages arising from a defective product. It would still be necessary however for the consumer to prove in such a case that the defect was the cause of the harm suffered by the consumer.

As a supplier will generally have a good system of record keeping, it raises the bar for a consumer wishing to make a claim in those instances where a dispute arises.

You would be well advised to keep or obtain the following information when you make a purchase or foresee that you will need to bring a claim against a supplier:

- Proof of purchase (invoice, till slip etc) (photostat/ take a digital picture if clear);
- Original box and packaging;
- The barcode (Universal Product Code, or UPC) from product packaging for warranty claims;
- Representations made by or assurances given by sales staff;
- Agreements regarding delivery;
- Notification by you of supplier of incorrect delivery;
- Condition of goods handed over by you to suppliers;
- Contaminated foodstuff (freeze);
- Photos of injuries, product defects/ damaged goods/ contaminants in food
- Medical records and reports where you suffer injury or illness; and
- Contact details (email and cellphone) of the shop/ outlet/ supplier/ service provider.

Never send originals of receipts or cheques to the supplier or any complaint-handling agency- always send copies.

7] Check goods as soon as they are delivered to ensure they are correct/ undamaged.

In terms of section 20 (2):

You may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered—

- (a) goods to you in terms of an agreement arising out of direct marketing, and you have rescinded that agreement during the cooling off period [5 business days]

[n.b. the cancellation of a direct marketing transaction must be in writing (section 16(3))

(b) goods that you did not have an opportunity to examine before delivery, and you have rejected because the goods delivered do not match the description and/ or sample; (section 19(5) and 18(3) & (4));

(c) a mixture of goods were delivered and you refuse delivery of any of those goods...; or

(d) goods intended to satisfy a particular purpose communicated by you to the supplier fail to do so.

You have a right under section 19(5) to a reasonable opportunity to examine the goods to see if they are acceptable and must return them within 10 business days after delivery if they are not. Try out your purchases as soon as they are delivered.

8] Do not use, abuse or tamper with anything you intend to return.

Your right to a full refund under section 20, considered in the section above, depends on whether the goods are returned to the store:

(a) in the original unopened packaging (full refund);

(b) in their original condition and repackaged in their original packaging

(the supplier may charge you a reasonable amount for:

(i) use of the goods during the time they were in your possession; or

(ii) any consumption or depletion of the goods; or

(c) in any other case, the supplier may charge you a reasonable amount for necessary restoration costs to render the goods fit for re-stocking.

You would certainly be disqualified from returning school shoes after your child had worn them to wade through puddles.

You may not return the goods at all if, after delivery, you partially or entirely disassemble, physically alter, permanently install them or affix, attached, join or add them to, blend or combine them with, or embedded them within, other goods or property (section 20(3)).

The section 56 implied warranty against defects does not apply if the goods are altered contrary to the instructions, or after leaving the control of the supplier. This would include things such as cutting off and replacing a two prong plug with a three pronged plug on an electrical appliance.

Likewise, the section 57 warranty on repaired goods is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse.

9] Follow the correct complaint channels in a constructive fashion.

A consumer has an obligation to be assertive so as to ensure that he/she and other customers receive a fair deal.³ The CPA makes it easy and inexpensive to do so by providing a selection of options, ranging from ombuds to the National Consumer Tribunal.

A consumer should start by escalating an unresolved complaint to the supplier's management or central customer care department. If that is unsuccessful, they should then approach the appropriate ombudsman. If the ombudsman cannot resolve it, their office will then give the complainant a letter advising them of the right to refer to the National Consumer Commission.

Hints⁴

- **Complain right away.** Do it while the incident is still clear in your mind, and the people responsible are still on shift. If you wait and do it later, it will be harder to make your case.
- **Find someone who can help.** Don't be that person screaming at a flight attendant about how angry you are that you're going to miss your connecting flight - she can't do anything about it, and all you're doing is making the situation worse. Instead take the time you need to think the situation through and figure out who will actually be able to do something about your issue, or at least connect you with the person who can.
- **State your problem and your desired outcome.** When you find the right person to talk to, be clear about what happened and how you want the situation to be resolved. If you need your money back, be specific about the amount. If it's a service issue and you want some kind of explanation, state that.
- **Don't get emotional.** Don't go on and on about how angry this incident has made you. Don't raise your voice or make angry gestures. The key to actually getting what you want out of the situation is to get the person who can help you on your side. If you're acting threateningly, the person will be far less likely to want to give you what you want.
- **Don't become abusive** as both CGSO and the NCC are entitled to reject frivolous or vexatious⁵ claims.

10] Do not make any unrealistic, exaggerated or dishonest claims or allegations.

³ See <http://www.ucc.co.ug/data/smenu/62/Consumer-Obligations.html>

⁴ From http://www.consumer-action.org/english/articles/how_to_complain#Topic_06

⁵ Vexatious litigation is legal action which is brought, regardless of its merits, solely to harass or subdue an adversary (http://en.wikipedia.org/wiki/Vexatious_litigation)

The CPA requires suppliers to be fair and honest. This is not a one way street: consumers must also be fair and honest. Consumers who are not honest before the Tribunal and the regulator are just as guilty of an offence as are suppliers who do the same (sections 108(3)(b) and 109(2)(d)).

There are various civil and criminal steps that can be taken against consumers who make bogus or fraudulent claims. Anyone making a false claim may actually be prosecuted for fraud or be sued by the supplier for loss of profits and damage to reputation.

Even making an exaggerated claim against a supplier can count against you and can lead to having your claim disallowed as your credibility will be tainted.

Examples of dishonest claims include:

- Returning clothing after wearing it to a function when you had no intention of keeping it;
- Intentionally damaging goods to claim a refund;
- Untruthfully claiming a food product was contaminated in order to make a claim;
- Claiming for far greater damages than you actually suffered.

Certain claims or parts of claims are not permissible. In terms of the general law, a party that suffers a loss as a result of the wrong of another party is obliged to mitigate (lessen) their loss and may not claim for losses they could have avoided by taking steps themselves.

A consumer can generally not claim for the inconvenience of having to complain or the distress associated with it.⁶ Complete emotional tranquility is seldom attainable in the world, and some degree of transient and trivial emotional distress is a part of the price of living among people.⁷

⁶ Christie's *The Law of Contract* 6th Edition at 569.

⁷ Restatement (Second) of Torts, §46, comment j (2003).