



DYASI M
INCORPORATED
ATTORNEYS

How Does Consumer Protection Law Operate in the Online Space?

NOVEMBER 2021 | PREPARED BY NOMBUSO N. ZULU

CONSUMER PROTECTION



TABLE OF CONTENTS

- 01** Introduction
- 03** What is a consumer in terms of the electronic communications and transaction act
- 04** The duties of the supplier under the electronic communication and transaction act, 2002
- 06** The right of cooling off
- 07** Conclusion



1. INTRODUCTION

Gone are the days where the sole consumer interaction was premised on the customer salesman store relationship. The evolution of consumerism has drastically changed due to the growth of the internet and the eruption of online shopping which has seen a paradigm shift in the way consumers interact with goods. This is more so, due to the increased use of mobile handset technology has made the e-commerce marketplace at a consumer's fingertips. [2] Due to technological landscape changing the consumer protection regulatory regime it is important for consumers to understand the protective measures of the ECTA with specific reference to the duties of the supplier and the cooling off right afforded to consumers.

2. WHAT IS A CONSUMER IN TERMS OF THE ELECTRONIC COMMUNICATIONS AND TRANSACTION ACT?

(a) Scope of Application

The scope Chapter VII of the ECTA has introduced a number of relevant protective measures for online consumers which goes over and above the measure that are normally available to offline consumers.[3] Section 42(1) of the ECTA provides the scope that applies to the consumer protection to electronic transactions.[4] It is pointed out by various authors that in order to understand the chapter, the reader should read Section 42 in context with entire chapter.[5] It is therefore, important to understand the definitions of consumer and electronic transaction for the accurate application.

(b) Definition of Consumer

The definition of a consumer is intrinsic in settling who warrants protection. A consumer is defined as: "any natural person who enters or intends entering into electronic transaction with a supplier as the end-user of the goods or services offered by that supplier.[6]" The definition excludes the following transactions being business-to-business (B2B) transactions this is where goods or services are supplied by juristic persons [7] such as companies and close corporations, and certain business-to-consumer (B2C) transactions. This is usually in instances where the consumer is a natural person not the end-user of the goods or services. An example would be when a sole proprietor or a natural person buys goods for the intention of re-selling it another consumer.[8] The second part of the definition of refers to the word "intends" which means that consumer is also a person intends into entering an electronic transaction. Therefore, if a consumer merely browses on a website with the possibility on entering a transaction they are protected by the provisions of the Chapter VII of the ECTA. [9]

[1] Nombuso Zulu is a Junior Associate in Dyasi M Incorporated Attorneys.

[2] S Papadopoulos 'Online consumer protection' in S Papadopoulos & S Snail (eds) *Cyberlaw @ SA III: The Law of the Internet in South Africa* 3rd ed (2021) 63.

[3] S Papadopoulos supra note 2 64.

[4] Section 42(1) of Electronic Communications and Transaction Act, 2002 reads as follows: "This Chapter applies only to electronic transactions."

[5] S Papadopoulos supra note 2 65

[6] Section of the Electronic Communications and Transactions Act, 2002.

[7] The Companies Act, 2008 defines a juristic person in terms of Section 1 as follows: "juristic person includes – (a) a foreign company; and

(b) a trust, irrespective of whether or not it was established within or outside the Republic."

[8] S Papadopoulos supra note 2 66.

[9] S Papadopoulos Ibid.



(c) Electronic Transaction

In order to effectively apply the definition of a consumer to an electronic transaction, it is important to understand the definition of electronic transaction. It should be noted that the phrase for electronic transaction is not defined in ECTA but the word transaction is defined in terms of Section 1 of ECTA as a "transaction of either a commercial on non-commercial nature, and includes the provision of information and e-government services. The only criticism of the definition was not drafted in a graceful manner. It has been put forward that the definition does not cater for protective mechanisms that may be available when part of the transaction that was concluded electronically and the other part was done by non-electronic means. [10]

3. THE DUTIES OF THE SUPPLIER UNDER THE ELECTRONIC COMMUNICATION AND TRANSACTION ACT, 2002.

The consumer protection provisions of the ECTA place four main duties on the supplier/website owner or electronic trader who offers goods or services for sale, hire or exchange by way of electronic transaction. These duties are to

1. Disclose the listed minimum information to online consumers [11];
2. Provide an opportunity for consumer to review, correct and withdraw from the electronic transaction; [12]
3. Provide a secure payment system; and [13]
4. Execute the order within 30 days of receiving the order unless otherwise agreed. [14]

I will discuss two of the four duties that need to be applied by the supplier which will be related to the minimum information and opportunity to review, correct and withdraw.

[10] This argued by Eiselen 'Information and communications technology law' in D Van der Merwe et al (eds) Papadopoulos (2008) 183.

[11] Section 43(1)(a) –(r) of the Electronic Communications and Transaction Act, 2002.

[12] Section 43(2) of the Electronic Communications and Transaction Act, 2002.

[13] Section 43(5) of the Electronic Communications and Transaction Act, 2002.

[14] Section 46(1) – (3) of the Electronic Communications and Transaction Act, 2002.



(a) Minimum Information

The duty for the supplier must meet a certain amount of information that must be made available to the consumer on the website where goods or services are offered. [15] Failure to make such information available to the consumer gives the consumer the right to cancel the transaction within 14 days of receiving the goods or service. The only charge that may be levied against the consumer would be the direct charge of returning the goods. [16]

(b) Opportunity to review, correct and withdraw

The supplier must provide the consumer with the necessary opportunity to review a summary of the entire electronic transaction, to correct any mistake and withdraw from the transaction from the transaction before agreeing to it. [17] This confirmation process allows for the consumer to give the necessary opportunity to identify the goods they intend to purchase, to identify and correct any noted errors and to make an informed, express consent to the transaction. This similarly applies to transactions that are fulfilled by an automated transaction. [18]

Consumer should be made aware that the “shopping cart” is not the only format that is used by the supplier to fulfil this duty. Therefore, the consumer should be aware of the requirements when making their various electronic transactions, in order to be protected in terms of the ECTA.

[15] It has been pointed out by various authors that goods and services are not defined clearly and the questions that must be asked that whether this includes sale, exchange or hire or whether or not financial services or products should be included, this should be compared to the definitions of goods and services under the Consumer Protection Act, 2008.

[16] Section 43(4) of the Electronic Communications and Transaction Act, 2002.

[17] Section 43(2) of the Electronic Communications and Transaction Act, 2002.

[18] An automated transaction is an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by natural persons in the ordinary course of such a natural person's business or employment. This is captured in terms of Section 1 of the ECTA.



4. THE RIGHT OF COOLING OFF

Consumer protection legislation has the feature of the right of cooling off which has also found its way into e-commerce sphere. [19] This provision allows for the consumer to rescind or withdraw from the agreement without having to supply a reason and without incurring a penalty, provided that the rights is exercised within a reasonably short time. [20] The supplier is required within its informational duties on its website to bring it to the consumer's attention. [21] This right may be exercised within a seven-day period in terms of section 44(1) of ECTA, that allows for the consumer to cancel any electronic transactions and any related credit agreement. However, the calculation of the seven-day period is dependent on whether the consumer purchased goods or services.

When goods are purchased the period is calculated as seven days from the date of receiving of the goods, whilst services are calculated as seven days from the date of the conclusion of the agreement. [22] Should the consumer elect to cancel the electronic transaction the only charge that will be levied will be for the direct cost for the returning the goods.

(a) Transactions that are not subject to the cooling off period

Consumers ought to beware that not even transaction is subject to the right of cooling-off and cannot be afforded protection in terms of the ECTA. The following excludes transactions are:

- Financial Services;
- Online Auctions;
- Services which began with the consumers consent; [23]
- Where the price for the supply of goods or services is dependent on the financial markets and which the supplier cannot control; [24]
- Where goods are made to customer specifications;
- Where audio or video recordings or computer software were unsealed by the customer;
- The sale of newspaper, periodicals, magazines and books; [25]
- The provision of gaming and lottery services; and
- The provisions of accommodation, transport, catering and leisure services.

However, the consumer should not worry if the provisions of the ECTA don't protect these transactions it should be noted that many of these transactions will to some degree be regulated in terms of the CPA and other forms of legislation.

[19] The cooling-off provisions in the ECTA are based on the EU's Distance Selling Directive, Directive (EC) 97/7 on the Protection of Consumers in respect of Distance Contracts [1997] OJ L144/19.

[20] S Papadopoulos supra note 2 78.

[21] Section 43(1)(r) of the Electronic Communications and Transaction Act, 2002.

[22] Section 44 (1)(a) – (b). The days are calculated on the basis of calendar days and not business days.

[23] This applies before the seven-day period referred to in Section 44(1). This exclusion only applies to services if services commenced before the end of the seven-day period or commenced at an agreed time.

[24] In order for a consumer to determine whether the price is actually affected by financial market movements requires a factual investigation as to the source and origin of the goods or services and whether market changes would viewed objectively, affect the prices of the goods and services.

[25] This is regulated by the Consumer Protection Act.



5. CONCLUSION

Consumers transacting within the e-commerce space should be aware that there are rights that provide protection for their electronic transactions. Suppliers are required to provide the necessary duties to protect consumers, failing which the consumer has remedies afforded to them in terms of the ECTA.

Furthermore, the consumer is also afforded the right to cool off as a part of any feature of consumer protection legislation, however, not all transactions are protected in terms of the ECTA and one should be cautious when transacting on the online space.

