

How the Consumer Protection Act will affect property transactions?

By Trudie Broekman

The Consumer Protection Act will only apply to a property transaction when the seller (or in the case of a lease, the landlord) is acting in the ordinary course of business (such as a developer, someone who renovates and sells houses for a living, or a landlord who rents out properties for a living), and the buyer or tenant is an individual or a group of individuals or a body with an annual turnover and asset value of under R3 million.

The act is not clear at all on which aspects of selling or letting property fall within the definition of goods, and which aspects fall within the definition of services. This makes it difficult to apply the provisions of the act to property transactions.

The remedies for consumers differ. When there is a defect in goods, the remedies include getting a full refund of any consideration paid for the goods, whereas if a service is defective the remedy is a refund of a portion of the fees paid for the service. We hope this uncertainty will be resolved by the courts or the National Consumer Tribunal soon after the general effective date of the act on March 31.

When the act applies and the buyer has bought a property as a result of direct marketing, the buyer has a cooling-off period of five business days. Direct marketing is defined as “to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or requesting the person to make a donation of any kind for any reason.

This means the buyer may without penalty, and without giving a reason, cancel the agreement by sending a written notice to the seller within five business days from registration of transfer of the property at the deeds office. This cooling-off right is in addition to the cooling-off period in terms of section 29A of the Alienation of Land Act, which applies where the value of the property is R250 000 or less and the buyer is an individual. This result is particularly concerning for sellers, and may not have been intended by the drafters of the Consumer Protection Act.

When the act applies, a property may not be displayed for sale without displaying the price. It will not be sufficient for a seller to invite offers – an asking price will have to be indicated, either on the property, or on an estate agent’s catalogue (which must be dated) or advertisement, or placed or published in a way that creates an association between the price and the property.

Developers who sell properties ‘off plan’ must ensure that properties delivered to buyers comply in all material aspects to any description, artist’s impression or plan that was provided to buyers. Likewise, if the buyer was persuaded to make the purchase on the basis of a show-house, the developer must deliver a house which complies in all material respects with the show-house. If the consumer saw a description and a show-house, the house must correspond to the description and the show-house.

If a buyer buys a property 'off plan' and the buyer is a consumer to whom the act applies, the buyer may at any time cancel the transaction. This does not apply if the property is 'special-order goods', for instance where the buyer has persuaded the developer to provide a residence that deviates from the standard plans or fittings provided by the developer. The developer is entitled to charge a reasonable deposit and, if the buyer cancels, charge a reasonable cancellation fee.

Unfair contract terms are prohibited in deeds of sale to which the act applies. That will mean, for example, that estate agents will no longer be able to insert a clause that has the effect that the buyer forfeits his deposit if the sale is cancelled for any reason, or a variety of causes that are outside the control of the buyer. Such a clause will be void, and may lead to the entire agreement being void. The fairness of contract terms will have to be evaluated in the light of all the relevant circumstances of each instance.

The CPA provides protection for buyers regarding the time, place and cost of delivery and how risk is allocated, which is the default position that will apply unless the contract between the seller and buyer provide differently. Where the act applies, we recommend that the deed of sale specify that the buyer is liable for the costs of transfer, and that transfer takes place at the buyer's risk. If that is not done, the transfer takes place at the seller's cost and risk. The buyer has the right to cancel the agreement without penalty if the seller's conveyancers tender transfer at a different time (either earlier or later) than specified in the deed of sale.

Where the act applies, a buyer has a right to require a seller to take re-transfer of a property if the property is not of good quality, in good working order, free of any substantial defects, or not fit for its purpose.

The buyer has this right for six months from transfer and may return the property to the seller without penalty and at the seller's expense and risk. The buyer has the choice as to whether the seller must refund the buyer or provide the buyer with a replacement property. Alternatively the buyer can decide to keep the property and require the seller to repair the defect. Practically, this can be very difficult for sellers who may not have the necessary funds or a replacement property available.

Traditional voetstoets clauses which breach the consumer's rights to a property that is of good quality, in good working order, free of any substantial defects, and fit for its purpose are prohibited by the CPA.

Consequently these voetstoets clauses will not be allowed in agreements to which the act applies, but if you sell your home outside of your ordinary business, a voetstoets clause is still in order and valid. Instead, sellers acting in the ordinary course of their business (such as developers) must insert a detailed clause in which they specify the condition of the property, dealing with both patent (visible) defects and latent (unknown) defects. If this clause has been expressly accepted by the buyer, or the buyer has knowingly acted in a way that is consistent with accepting the property in that condition, the seller will not be liable to the buyer for these disclosed defects. We recommend that sellers and their estate agents obtain detailed reports on all patent defects from home inspectors and attach these to deeds of sale.

Where the act applies, and the buyer has a claim against the seller due to defects or any of his other rights under the act, the buyer does not need to approach a court, but can refer the issue to the National Consumer Tribunal, a relevant ombud, consumer court (tribunals which falls

under the provincial governments), alternative dispute resolution agent or the National Consumer Commission.

Where the act applies, estate agents may not market properties, or administer property transactions in an unfair, unreasonable or unjust way. Marketing may not mislead or deceive consumers, nor use exaggeration, innuendo or ambiguity about material facts. Sellers and estate agents will need to reconsider advertising properties with expressions such as 'you will be dazzled by this house', 'immaculate', 'secure', 'great investment property'.

Banks and other financial institutions that provide finance to developers usually look at the developer's 'bankable sales' when evaluating their risk. These financial institutions need to be cautious in relying on these amounts, since buyers who are individuals or juristic persons under the threshold have the right to cancel the sale agreement or return the property to the seller, as set out above.

Some of the provisions of the CPA are already in place, and the balance of the terms come into effect on March 31. Developers, their financiers, estate agents and conveyancers need to prepare now to be fully compliant with the Act.

Trudie Broekman is an associate at Webber Wentzel Attorneys.