



31 January 2011

Via e-mail: [cparegs@thedti.gov.za](mailto:cparegs@thedti.gov.za)

Mr N Vananda  
Department of Trade and Industry  
Pretoria

Dear Sir

**THE LAW SOCIETY OF SOUTH AFRICA'S COMMENTS ON THE PROPOSED REGULATIONS TO THE CONSUMER PROTECTION ACT 68 OF 2008 PUBLISHED IN THE GOVERNMENT GAZETTE UNDER GENERAL NOTICE 1099 OF 2010 ON 29 NOVEMBER 2010**

**INTRODUCTION**

The following document sets out the Law Society of South Africa ("LSSA") and, more particularly, its members' comments on the proposed regulations, to the Consumer Protection Act 68 of 2008 ("the CPA"), published in draft form in the Government Gazette under General Notice 1099 of 2010 on 29 November 2010 ("the draft regulations").

**GENERAL COMMENTS**

Section 120 of the CPA empowers the Minister of Trade and Industry ("Minister") to -

- make regulations expressly authorized in the CPA in accordance with section 120(2);
- make regulations contemplated elsewhere in the CPA accordance with section 120(2);
- in consultation with the Commission make regulations relating to the functions of the Commission which includes, for example, forms, time periods and information required;
- in consultation with Chairperson of Tribunal the Minister may make regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the Tribunal in terms of the CPA;
- make regulations relating to unfair, unreasonable or unjust contract terms;

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- make regulations regarding any forms required to be used for the purposes of the CPA; and
- make regulations regarding, in general, any ancillary or incidental matter that is necessary for the proper implementation or administration of the CPA.

In the introduction on page 4 of the draft regulations, the Minister has elected to exercise his power to make regulations relying specifically on the provisions of section 120(1)(a) and (e)(ii).

Against this background, any regulation contained in the draft regulations relating to the functions of the Commission, the functions of the Tribunal and rules for the conduct of matters before the Tribunal which relate to unfair, unreasonable or unjust contract terms and any forms required to be used for the purposes of the CPA, should not be contained in the draft regulations. In addition, any regulation not authorized by a particular section in the CPA and not falling within the ambit of the provisions of section 120(1)(a) and (e)(ii) should not be contained in the draft regulations.

It appears that the draft regulations do not contain any regulations which are authorised in terms of the following sections of the CPA -

- 5(1)(a);
- 22;
- 28;
- 32;
- 50(1);
- 50(3);
- 66(1);
- 81(3);
- 82(2)(a);
- 86(a); and
- 93(2).

With regard to the regulations contained in the draft regulations which are applicable to auctioneers, it is submitted that such regulations should not form part of the final regulations until the Minister has consulted with the auctioneering industry. Many of the regulations relating to auctioneers contained in the draft regulations are problematic and do not properly consider how auctions operate.

#### SPECIFIC COMMENTS

REGULATION	APPLICABLE CPA SECTION	COMMENT
4	11(1)	This regulation refers to section 11(1) of the CPA which does not make provision for a regulation. Is this regulation intended to be made in terms of section 120(e)(ii)?
4(3)(b)	11(3) read with 11(6)	The meaning of the last sentence of the regulation is unclear.
4(3)(e)	11(3) read with	The word "may" should be replaced with the word "must" in the last

	11(6)	sentence of the regulation.
4(3)(g)	11(3) read with 11(6)	This regulation does not make sense.
4(3)(m)	11(3) read with 11(6)	If this regulation entitles a consumer to obtain the information referred to in sub-regulation (e) about another consumer, then, it is submitted that this regulation 4(3)(m) conflicts with the right to privacy which right section 11 of the CPA is aimed at protecting. It is submitted that this regulation should read as follows -  <i>"the prohibition contained in subregulation (e) does not apply in respect of information requested by a consumer <u>in respect of himself or herself</u>"</i>
6(1)	14(4)(a)	This regulation refers to a sub-regulation (3) which does not exist.  Section 50(1) of the CPA provides that the Minister may prescribe categories of consumer agreements that are required to be in writing. This regulation implies, by referring to a signature date, that consumer agreements must be in writing but, in accordance with section 50(1) of the CPA, does not stipulate the category of consumer agreements to which this regulation applies.  Furthermore, section 50(2)(a) of the CPA provides that <i>"[i]f a consumer agreement...is in writing, whether required by this Act or voluntarily it applies irrespective of whether or not the consumer signs the agreement..."</i> The reference, therefore, to <i>"the date of signature by the consumer"</i> in the regulation conflicts with this section of the CPA.
7	15(5)	Stipulating a threshold of R1 means that section 15(5) of the CPA applies to <u>all</u> pre-authorisation for repairs and maintenance services and therefore nullifies the need for a prescribed threshold. It is submitted that this threshold should be carefully considered in the context of pre-authorisation for repairs and maintenance services and should be set at a higher amount.
10(1)	25(2)	This regulation refers to the incorrect sub-section (2) in the CPA. It is submitted that this regulation should refer to section 25(1) OR refer to both section 25(1) and (2) and include a sentence at the end of the regulation which states <u>"or imported without the approval or licence of the registered owner of the trade mark."</u>
12(1)(l)	27(3)(a)	It is submitted that this regulation is an invasion of the privacy of an intermediary. In addition, the rationale and necessity for this regulation is unclear.
12(4)	27(3)(a)	In certain instances attorneys will register the transfer of immovable property as well as the bond and also act as the estate agent. In these instances attorneys may act on behalf of both the purchaser and seller of the immovable property. To what extent does this regulation apply to such an instance?

14(3)	36(11)(a)	Stipulating a threshold of R1 means that <u>all</u> competitions fall within the definition of "promotional competition" and therefore nullifies the need for a prescribed threshold. It is submitted that this threshold should be carefully considered and should be set at a higher amount.
18		This regulation does not appear to be authorised by a section in the CPA. It is submitted that this regulation should therefore be deleted.
20		Although no reference to a section in the CPA is made in this regulation, it is submitted that section 51(1)(b) of the CPA deals with the situation envisaged in this regulation. However, section 51(1)(b) of the CPA does not provide for a regulation. Furthermore, the Minister is not empowered by section 120(1)(a) and (e)(ii) of the CPA, to which he refers on page 4 in the introduction to the regulations, to make a regulation such as this regulation 20.
22		This regulation does not appear to be authorised by a section in the CPA. It is submitted that this regulation should therefore be deleted.
24(1)		It is submitted that the definition of livestock in this regulation is too narrow as it leaves out, for example, chickens.
25		<p>This regulation is not practical. It is impossible to advertise all items on large auctions. A well advertised auction will ensure that a sufficient number of buyers are present to purchase all the items on auction.</p> <p>In addition, a private seller may arrive at an auction on the day with something to sell that has not been advertised. This should be allowed provided the seller puts a reserve on the item and/or is personally present at the auction to confirm the highest bid.</p>
25(3)		This section is possibly governed by the right to withdraw any item at any time from an auction. It is not clear as to how this must be dealt with. Surely the seller has the right at any stage to withdraw an item if the price is not to his satisfaction.
26		Having regard to section 45 of the CPA, provision should be made that an asset, being immovable or movable property and being subject to a mortgage bond, suspensive sale agreement or other right reserving ownership on the property, may be sold subject to confirmation by the relevant holder of the right.
26(9), (12)(a) and (14)		The reference to "order of the Master" in these regulations are incorrect on the basis that no order of the Master is required in the case of insolvencies and liquidations.
27(2)(f)		This regulation is not practical. If a buyer or seller is delayed and requests the auctioneer to delay the auction, it is in the interest of the consumer and the seller to do so. Very few auctions start on time and very few buyers are on time.

27(2)(g)		This regulation is not practical as a consumer might decide at the spur of the moment to purchase an item on behalf of someone else. In any event, it is the auctioneer that takes the risk of non-payment.
27(2)(k)		It is first to be established as to whether these records are not private and confidential to the seller on whose behalf they were compiled. Not all sales are held on behalf of executors, liquidators, etc, whose documents ultimately are open for inspection in the offices of the Master of the High Court. Private auctions are often held and it is possible that the owner of the assets does not want to divulge the prices and other information in the documentation to third parties.
27(3)		<p>It is submitted that the bidder or purchaser must satisfy himself as to the condition of the asset which is sold voetstoots. The auctioneer should not be held liable for information which in any event he invariably obtained from a principal who might have incorrect information.</p> <p>It is further submitted that this section will create a number of problems. When a party purchases a property there is usually a liability exclusion clause. Why should the situation be different for property bought on auction?</p>
25 - 40		It is submitted that above regulation 25, it should state that <u>"regulations 25-40, unless otherwise provided for, are in terms of section 45 of the CPA."</u>
28		It will be impossible to comply with this regulation at all times. Very often co-operative societies, banks etc., bring goods to auctions that are to be sold as a matter of urgency. It will not be possible to enter into written agreements under such conditions. It is to be borne in mind that sellers that bring goods to auctions for sale know how auctions work. It is not the normal consumer that puts goods up for sale by auction. It is often the normal consumer that acts as buyer or bidder but definitely not as seller. Auctioneers as a rule do not accept goods from consumers or the public at large for sale. The risk of accepting stolen goods is too great and no auctioneer will run these risks. It is submitted that this regulation is unnecessary.
28(3)(j) and (k)		The reference in these sub-regulations to "an exact copy" should rather read "the exact wording".
30(a)		<p>This regulation should not be included as it does not properly consider, and should not be applicable to, instances of insolvency and liquidations.</p> <p>Furthermore, the auctioneer, as a rule, does not deliver any goods as the buyers make their own arrangements in this regard. Payment must be made before delivery to the buyer. Furthermore, after a sale has taken place and the sale has been confirmed then</p>

		the auctioneer's mandate has been terminated and he is entitled to his commission.
30(c) and (d)		Very often a seller grants the auctioneer a discretion as to the price to be obtained. If the price is too low, the auctioneer must be able to exercise his discretion.  In addition, it is not clear how this regulation would be enforced.
30(e) and (f)		This regulation is not practical. Often goods are bought to an auction just before the auction commences. It is not possible to advertise such goods. In many instances the auctioneer has to deviate from the sequence as advertised. Furthermore, in many instances, buyers request that an item be auctioned earlier so that they can attend to other business.
30(i)		Very often attorneys, liquidators or other auctioneers are involved in multiple auctions. It is not understood who must not be paid by the auctioneer in terms of this regulation.
32		This regulation does not appear to be authorised by a section in the CPA. It is submitted that this regulation should therefore be deleted.
32(2)		This regulation is not practical. It will not be possible to FICA consumers, bidders or buyers prior to the commencement of an auction. It is to be borne in mind that the consumer invariably pays with a cheque and has already done FICA with the bank. In addition, the consumer is required to provide the auctioneer with a cellphone number and has already done FICA with the cellphone company. He must also provide a VAT number.  It is obvious that the auctioneer will obtain such information as to the bidder or buyer's whereabouts as he might require this information for the purpose of obtaining payment for the goods purchased.
32(3)		It is submitted that there is sufficient common law available to cover the difficulties envisaged in this regulation. The fact remains that it will be impossible to properly FICA all intended purchasers.
32(4)		It is practically impossible to comply with this regulation. Very often people attend auctions on short notice and it is not possible to obtain a letter of authority, resolution etc. In any event, it is the auctioneer's problem to obtain monies and he will ensure that he accepts a bid from a properly authorised person.
32(5)		The information is privileged to the auctioneer and the seller, his client. It is submitted that this information should not be available to the public.
34(2)		Very often people do not register as bidders at an auction. They suddenly decide to purchase an item and it is for the auctioneer to accept the bid and obtain payment of the monies. If the auctioneer takes the risk of not having the purchaser or bidder registered,

		surely this is the auctioneer's problem and can not invalidate the sale of that specific item.
34(8)(b)		In many instances the vendor's roll is completed when the auctioneer returns to office. It would not be practicable to sign the vendor's roll immediately after the auction has come to an end.
38		A sub-section should be added compelling any financial institution that might have documents relating to the vehicle in its possession, to hand such documents over to the auctioneer or auction house 48 hours prior to the auction taking place.
42(1)	69(a)	This regulation does not appear to be authorised by a section in the CPA. It is submitted that this regulation should therefore be deleted.
42(2)	69(a)	The word "respondent" should be replaced with the word "applicant".
56	120(d)	On page 4 in the introduction of the draft regulations the Minister refers to section 120(1)(a) and (e)(ii) of the CPA. It is submitted that the Minister should also refer to section 120(d) in the introduction.
56(3)(e)		It is often a clause in an agreement, and is a good practice that has been in place for a number of years, that a certificate signed by the plaintiff is prima facie evidence and conclusive proof of an amount due. In addition, agreements often provide for monthly statements which have not been objected to for a period of, for example, six months, to be prima facie evidence of an amount due. Is it the regulations purpose to outlaw these types of clauses? If so, it is submitted that this regulation should be deleted as such clauses have been long-standing precedents in agreements.
56(3)(h)		It is submitted that this regulation is unnecessary in light of the provisions of the Conventional Penalties Act 15 of 1962.
56(3)(w)		This regulation goes against the decision of the Constitutional Court in <i>Barkhuizen v Napier</i> 2007 (5) SA 323 (CC). It is submitted that this regulation will be detrimental to the insurance industry and should be deleted.

Yours faithfully



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**LAW SOCIETY**  
OF SOUTH AFRICA

14 February 2011

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We refer to our comments dated 31 January 2011 and attach hereto further comments.

<b>REGULATION</b>	<b>APPLICABLE CPA SECTION</b>	<b>COMMENT</b>
2(2)(d)	7	These provisions are vague and would be difficult to apply or interpret in practice
3		This regulation does not appear to be authorised by a section in the CPA. It is submitted that this regulation should therefore be deleted.
5	12(2)	Consideration should be given to the fact that some religious groups observe Saturday as their weekly holy day. It is therefore suggested that Saturdays should also be excluded.
6(2)	14(3)	The reference to section 14(3) is incorrect and should be to section 14(4)(c). In any event, the word "credit" in the context of section 14(3)(ii) does not make any sense and

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		should be removed.`
17(1)		It is not clear why, in the definition of 'speculative software', more modern electronic media like flash disks or memory cards are not also mentioned as well as software predicting the outcome and certain milestones of sports games other than horse races.
56(3)(x)		It is not clear what is meant by the "normal rules regarding the distribution of risk". This provision is inherently vague.
56(3)(bb)		The provision should also refer to the use of fax transmissions.

Yours faithfully



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