# SOME WELCOME GUIDANCE ON THE CPA AND PRIVATE LEASES

***Venter and Another v Els and Another (3639/2024) [2024] ZAWCHC 83 (18 March 2024)***

*The application of the Consumer Protection Act to once-off or other private leases, has caused much confusion for landlords and property practitioners since the former Act was promulgated. This judgment deals with a dispute that arose when a landlord gave notice of early termination of the lease, in terms of a clause in the agreement that made provision therefor. The tenant argued that despite their agreement, this conduct contravened the provisions of section 14 of the CPA. Not so, held the court, and clarified that one must not lose sight of the context in which the CPA finds application and that it does not, without exception, apply to a fixed term lease. It is an important judgment for anyone dealing with lease agreements.*

*The Judgment can be viewed here*

## FACTS

Mr and Mrs Venter, both engineers, moved to Australia in 2018. Whilst there, they rented their property to Mr Els for the period 1 December 2020 to 31 December 2023.

In February 2023, Els advised them that he was keen to renew the lease beyond December 2023. By this time, Mr and Mrs Venter had decided to permanently establish themselves in Australia and was keen to rather sell their home. They advised Els accordingly. The parties entered into some negotiations and in the end agreed to renew the lease, but with a provision recorded in the lease that the Venters were entitled to terminate the lease on three months written notice ('the renewal lease agreement').

In October 2023, the Venters' property was sold. The sale agreement made provision for the Venters to give the purchasers vacant occupation on 1 April 2024. The Venters gave Nel notice to vacate in accordance with the provisions of the renewal lease agreement.

Various communications between the parties followed, Nel indicating that he was keen to arrive at a more convenient solution.

In January 2024, the Venters received a letter from Nel's attorney wherein they were advised that the lease they concluded was a fixed term agreement subject to the Consumer Protection Act 68 of 2008 ('the CPA') and that section 14 thereof prohibits the early termination of the lease agreement by the landlord. The Venters maintained that the termination was valid in terms of the provisions of the renewal lease.

The Venters made various subsequent attempts to reach agreement with Nel to move out from the premises, but to no avail. They then approached the Court for relief

## THE LAW

Section 2(1) of the CPA prescribes that it must be interpreted in a manner that gives effect to the purposes set out in section 3.
Section 3 in turn provides that:

'(1) 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 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.'

Section 4(3) provides that if any provision, read in its context, can reasonably be construed as having more than one meaning then the meaning which best promotes the spirit and purposes of the CPA and which will best improve the realization and enjoyment of consumer rights generally, and in particular by the persons contemplated in section 3(1)(b) is to be preferred.

The CPA defines a '**consumer**' as 'in respect of any particular goods or services, means-
(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3);
(c) ...
(d) …"

A **consumer agreement** is defined as an agreement between a supplier and a consumer other than a franchise agreement and business is defined as the continual marketing of any goods or services. Supplier is defined as a person who markets any goods or services.

**Supply** when used as a verb is defined as 'in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration.'[4]

**Business** is defined as the continual marketing of any goods or services.

## HELD

*Were the provisions of the CPA, more particularly section 14(2)(b), applicable to the lease agreement?*

- As its preamble informs, the CPA was enacted to, amongst other things, promote a fair, accessible, and sustainable marketplace for consumer products and services, to prohibit certain unfair marketing and business practices and to promote responsible consumer behaviour.
- It is also clear from section 3 that the CPA is aims to promote fair business practices, protect consumers against unconscionable, unfair, unreasonable, unjust, and improper business practices, and to establish a legal framework to achieve and maintain a fair consumer market which is efficient, sustainable, and accessible.
- The CPA has to be interpreted purposively, in a way that gives effect to the objectives it strives to achieve, being to prescribe certain standards and norms to promote the fair and responsible treatment of consumers in their business dealings in the marketplace. **It does not seek to destroy, distort or hamper sound business practices.**
- As Delport[i] stated: 'The promotion of fairness does not require that consumers be protected to the extreme, or that consumers be given the right in all instances to escape from the consequences of their business transactions simply because they changed their minds. The Act seeks to protect consumers against exploitation, unfair treatment an unscrupulous business practices, not to empower consumers to act deceitfully or to exploit suppliers.' And that a 'balance must be struck between the legitimate expectations of consumers on the one hand, and that of suppliers on the other. What is required is a sensible interpretation of the Act, not an interpretation skewed towards consumers without properly evaluating the notion of fairness.' Delport further argues, specifically with reference to section 14, that this section '… is not directed at fixed-term agreements where the period of the agreement is open for negotiation between the parties and the consumer enjoys the freedom to determine the duration to suit his needs. The section is aimed at fixed-term agreements offered to consumers on a take-it–or–leave-it basis, where the supplier unilaterally determines the period and customers have no choice but to accept the fixed term offered to them. This is typically the case on health-club contracts and mobile-telephone agreements. It is fair in these situations to allow the consumer to cancel the agreement early, subject to the payment of a reasonable penalty, since the consumer is from the outset locked into the fixed-term dictated by the supplier, without having any bargaining power. This would explain why the fixed-term agreements are limited to two years and why the onus is on the supplier to show a "demonstrable financial benefit" to the consumer if the term is to exceed two years. However, bringing lease agreements and sole mandates under section 14 would not in any way promote the purposes of the Act but would in certain circumstances actually prejudice the consumer.'

*Applied to the facts*

- On the facts of this case, it cannot be said that the bargaining power was skewed in favour of the applicants or that the respondent was forced to agree to the fixed term on a take-it-or-leave-it basis. The undisputed facts show that it was Nel who requested the lease renewal for a period of 3 years and that he was at all material times informed that the Venters intended to sell the property.
- In any event, were section 14 to apply to fixed term lease agreements, it will only apply to the parties' lease agreement if it was concluded in the ordinary course of the Venters' business. (This follows from the definition of the term consumer in the CPA and from the definition of business which requires an element of continuity.)

*'In the course of business'*

- The CPA does not define the term ordinary course of business. In *Amalgamated Banks of South Africa Bpk v De Goede en 'n ander* the court interpreted the phrase as it appeared in the Matrimonial Property Act, and held that it was irrelevant whether the person in question conducted such transactions regularly. Rather the issue was whether the impugned act was conducted in the ordinary course of his business. On this approach, a single, isolated activity could in the proper circumstances constitute an act that was committed in the ordinary court of business.
- Within the context of income tax law, a rental transaction would be in the ordinary course of business if the rental income was the product of a *bona fide* investment with the purpose of earning an income from that investment. Income tax would be payable on the profit made and any rental loss would be deducted from the rental income for the purposes of income tax. Where a lease is concluded by an individual who, aside from

his/her own property has another property which he/she leases to generate an income, the lease would have been concluded in the ordinary course of business and would be subject to the provisions of the CPA, even if this was not the supplier's (lessor's) main or only business.

- The concept of in the ordinary course of business was considered by the National Consumer Tribunal in *Doyle v Killeen and others*. The Tribunal held that the legislature could not have intended for the CPA to apply to persons selling goods in once-off transactions which were distinct from the selling of goods as a continual enterprise. This conclusion was based on section 3, the definition of transaction and the various references in the Act to suppliers, course of business, business and market.
- The Tribunal went on to hold that an objective evaluation is required when considering the concept of ordinary course of business and that all the relevant factors would have to be considered when determining if the transaction was concluded within the ordinary course of business. Relevant factors would include:
  i. whether the person has a registered business;
  ii. the nature of the business the person engages in;
  iii. the nature of the goods normally sold by the person;
  iv. the frequency with which the goods are sold by the person; and
  v. whether the person advertises or markets his goods on an ongoing or frequent basis.
- Lease agreements concluded by lessors who do not let in the ordinary course of their business are not subject to the CPA. A once off lease or sale agreement falls foul of the definition of business. "**It is uncertain at what stage the repeated letting of a home by the homeowner would constitute the continual marketing of the property. In such circumstances, each case would have to be evaluated within its own factual matrix and circumstances**."
- On the undisputed facts of this case, it cannot be said that the lease was entered into during the Venters' ordinary course of business. They do not lease out their property on a continual basis nor to derive an income. They are engineers who leased out their primary residence on a temporary basis while they determined if their move to Australia was permanent or not.

## CONCLUSION

In the circumstances, the CPA does not apply to the lease agreement. Accordingly the court ordered that the 3 months' written notice given to Nel validly cancelled the lease with effect on 31 March 2024 and that Nel should vacate the property on that date.

*The Court mentioned, obiter:*

- "If the CPA were to apply to the lease agreement, section 14(2)(b) should not be read as providing the only circumstances in which the lease may be terminated. Such an interpretation does not necessarily promote the objectives and spirit of the CPA nor is it consistent with a literal interpretation of the provisions of the CPA.
- Section 14(2)(b) should rather be seen as factoring in extra protections for the consumer by nullifying contractual terms which are contrary to the provisions of section 14(2)(b)(i) and which bind a consumer to a fixed term contract without allowing the consumer to terminate the agreement upon the expiry of the fixed date, without penalty or charge or at any other time by giving the supplier 20 business days written notice or in other recorded manner and form.
- If a fixed term agreement could only be cancelled by the consumer and supplier in accordance with the provisions of section 14(2)(b) it would go beyond protecting the consumer against unconscionable, unfair, unjust, or otherwise improper trade practices unfair and would potentially be unfair to the suppliers and could be seen as encouraging irresponsible consumer behaviour. If section 14(2)(b) is interpreted simply as identifying potential contractual clauses which would be no force and effect as it would be nullified by section 14(2)(b) it would achieve the purpose of protecting the consumer while at the same time promoting a sustainable and accessible marketplace for consumer products and services."

[i] The Court made various references to an article by Prof Delport, Henk Delport, titled 'Problematic Aspects of the Consumer Protection Act 28 of 2008 In Relation to Property Transactions: Linked Transactions, Fixed-Term Contracts and Unsigned Sale Agreements', Obiter 2014.