

INITIAL VIEW

1. Dispute identification

CGSO ref. no	:	201504-0174
Nature of dispute	:	Misleading display price
Adjudicator	:	B Hughes
Date	:	05 May 2015

2. Summary of the complaint

On 20 March 2015 the complainant went to the supplier to purchase a sleeper couch. The sleeper couch was priced at R2 199.99.

The complainant paid for the couch and gave the invoice to the stock manager. The manager refused to give the couch to the complainant and advised that the wrong price was placed on the couch and the complainant would have to pay an additional R800.00 in order to get the couch.

The complainant would like the goods at the price he paid for it.

3. The response of the supplier

The supplier provided this office with its response:

The supplier advised that the manager of the store is responsible and accountable for daily movement of stock and the day to day of the business ethos. The manager identified that the item was going to receive is not equal to the value of what it was supposed to be.

According to the supplier it is highly impossible to check every item that is displayed on the floor.

Kids also walk in on a daily basis and they run amuck by playing with the pricing holders that are displayed with the stock.

The manager duly performed his duties in a professional conduct and explained to the customer that the item was incorrectly priced as the price was moved around.

As a business they have a right to check that what is been dispatched and making sure the price is correct.

Section 23 also states that if there is an obvious error a supplier will not be bound by the price if the supplier corrected the error and or has taken steps to inform consumers that the wrong price has been displayed as result of an unauthorized person tampering with price in some way.

4. Legal considerations

Common Law:

When the agreement is concluded

Under the common law, a contract normally comes into effect where there is an offer that is accepted: *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A). An offer occurs when someone puts forward a proposal with the intention that if it is accepted, a contract will come into existence.

In the case of *Crawley v Rex*¹, a shopkeeper advertised on a placard outside his shop a particular brand of tobacco at a cheap price to attract the public. The court held that the advertisement did not constitute a binding offer that a customer could accept but was merely an announcement of the shopkeeper's intention to sell at the advertised price (this is known as an invitation to treat (do business)). The court was swayed by a concern that if a shopkeeper had sold out of the goods, thousands of customers may nevertheless hold him to the offer.

A shop owner displaying their goods for sale is generally making an invitation to treat: *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401. They are not obliged to sell the goods to anyone who is willing to pay for them, even if additional signage such as "special offer" accompanies the display of the goods.

In American law, in self-service stores, the store makes an offer to sell for cash at the prices marked on the goods (*Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E. (2d) 305, 163 A.L.R. 235 (1946)). The court held that the offer is accepted when the customer reaches the check-out. The French approach is similar with regard to the offer but holds that the acceptance takes place when the item is taken from the shelf. In practice this is an important distinction as it is necessary to be able to pinpoint the exact point of no return in the transaction in order to determine whether or not the

¹ 1909 TS 1105, analysed in Hanri du Plessis 2014, "Display of Goods for Sale, Advertisements and the Consumer Protection Act 68 of 2008", paper presented at the 14th International Association of Consumer Law Conference, University of Sydney, 1 - 4 July 2013.

supplier can refuse to sell the goods at a particular price. That point is reached when the agreement is perfecta.

The sale becomes perfecta once there is agreement on the merx (the thing sold) and the pretium (price) and any condition, resolutive or suspensive, has been fulfilled. Once the seller promises to deliver a thing to the buyer and the latter agrees to pay a certain price, agreement is reached and that alone constitutes the sale—neither delivery nor payment is necessary before the sale is concluded.

Where there was a unilateral mistake involved and the mistake was a iustus (excusable) error, a party may escape being bound (*Maritz v Pratley* (1894) 11 SC 345). Where the other party is aware of the error, he may not take advantage of it, or “snatch at a bargain” (*Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis* (483/90) [1992] ZASCA 560).

In *Anglo African Shipping (Pty) Ltd. v Slavin's Packaging* (74/85) [1986] ZASCA 110, an employee had mistakenly transposed the prices of two items when offering them for sale. Smalberger JA illustrated just how narrow the defence of unilateral mistake is:

“The fact that Slavin appreciated that he was striking a bargain does not mean that he ‘snatched’ at one in the legal sense. The latter concept denotes an unconscionable act (which the law will not countenance) in deliberately seeking to take advantage of another's known mistake (I refer, of course, to the case where actual knowledge is present); striking a bargain is a legitimate occurrence frequently encountered in the business and commercial world which the law recognises and enforces.”

Applicable provisions of the CPA:

Interpretation:

2(2) When interpreting or applying this Act, a person, court or Tribunal or the Commission may consider—

- (a) appropriate foreign and international law;

4(3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).

Price:

23(6) Subject to subsections (7) to (10), a supplier must not require a consumer to pay a price for any goods or services—

- (a) higher than the displayed price for those goods or services; or
- (b) if more than one price is concurrently displayed, higher than the lower or lowest of the prices so displayed...

(9) If a price as displayed contains an inadvertent and obvious error, the supplier is not bound by it after—

- (a) correcting the error in the displayed price; and
- (b) taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.

5. Consideration of the law

It is important to bear in mind that *Crawley v Rex* dealt with a placard placed outside a shop, which is more akin to an advertisement (covered by section 30) than a displayed price, and was decided before the advent of self-service stores and there has been no more recent decision by our courts in this area. The *Boots Cash Chemists* decision, which in any event was obiter as it related to criminal charges (the same can be said of *Crawley v Rex*) is not binding on our courts.

Whatever the common law position is, it is necessary to decide to what extent section 23(6) of the CPA, which prohibits a supplier from charging more than the lowest price displayed, in effect overrules the common law and makes the displayed price a binding offer that converts to a binding contract once accepted by the consumer tendering payment.

Hanri du Plessis² argues that the supplier is bound by the displayed price by reasoning that this can be inferred from the words ‘the seller is not bound’ used in the exceptions contained in sections s 23(9)–(10). Bracher reaches the same conclusion but takes a different approach.³ He reasons that if a supplier is not bound by the provisos to section 23(9), the corollary must be true, namely that the supplier is bound if the displayed price is not inadvertent but deliberate or if it is not an obvious error.

Section 23(6) is mitigated to the benefit of the supplier in the case where the price as displayed contains an inadvertent and obvious error (section 23(9)) if, upon discovering the error, the supplier:

- corrects the error; and
- takes reasonable steps in the circumstances to inform consumers of the error and the correct price

² Hanri du Plessis “*Display of Goods for Sale, Advertisements and the Consumer Protection Act 68 of 2008*” paper presented at the 14th International Association of Consumer Law Conference, University of Sydney, 1 - 4 July 2013.

³ Patrick Bracher, unpublished opinion to CGSO (2014) at 4.

(the requirements of these bullet points are hereafter referred to as the provisos) .

It is therefore essential to determine the point in the dealing until which the supplier can take these steps and after which the supplier is bound regardless. In the common law, this would be when the contract is *perfecta*.

The CPA is silent on when a transaction is concluded. It cannot be the same as the common law position, assuming our courts follow the *Boots Cash Chemists* finding⁴ that the sale is concluded when the cashier accepts the price, as this would mean that the concluding act or acceptance would be by the seller. If it is the customer who is accepting the offer, as is suggested in the previous section above, the transaction must be concluded at some time prior to the acceptance of payment.

The possibilities are:

- When the total price has been rung up and the customer tenders payment;
- When the price of the disputed item is rung up at the till;
- When the customer places the goods on the check-out counter;
- When the customer arrives at the check-out counter;
- When the customer takes the goods off the shelf and places them in the basket or trolley.

The first possibility can be excluded on the grounds that payment relates to the performance of the contract rather than when it is concluded or *perfecta*. It is unlikely in any event that the consumer would tender payment of the disputed amount.

In view of the difficulties associated with treating, the placing of the item in one's basket as acceptance that were considered in the *Boots Cash Chemists* case (such as not being able to change one's mind), the last possibility on the list can also be excluded. To decide which one of the other possibilities is the better position, one needs to consider the practicalities of the process.

In practice, the supplier or its servant, the till operator, would only become aware of the error in the price at the point it was rung up at the till. If it was sufficient for the purpose of the first proviso to section 23(9) for the till operator to say "The correct price is R X, I cannot sell the item to you at the incorrectly marked price of R Y, " that would mean that the supplier would never be bound by an obvious error in price, rendering the section redundant. This would be contrary to the presumption that legislation does not contain futile or nugatory provisions.⁵

In order to give effect to the section, it is necessary to hold that the transaction is concluded before the price is rung up on the till. The most logical and workable conclusion is that it happens when, where appropriate, the consumer takes the selected

⁴ This is by no means a certainty as the decision was made at the dawn of the electronic age and was in respect of a crime rather than a contract.

⁵ *Ex Parte The Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466.

goods out of the trolley or basket and places them on the counter (the third possibility)⁶. By so doing, the consumer is tacitly communicating, “I accept these goods at the prices displayed on or next to them”.⁷ Unless any of the other exceptions exists, the sale becomes binding upon the supplier at that point.

It is then, armed with the knowledge of the error, that the supplier can take steps to correct the displayed price and inform subsequent customers of the error before they accept the offer at the displayed price.

Steps that might be considered reasonable in informing customers might include: withdrawing the product from sale, fixing the pricing error price or label on a shelf, and then making the product available for sale again; putting up notices at the stores affected or making an announcement over the public address (tannoy) system.

It remains to consider whether, irrespective of the point at which the transaction is perfecta, the supplier may not still claim that it has made an error and the customer is accordingly improperly trying to snatch a bargain.

It is necessary to determine whether the common law defence of snatching a bargain has been displaced by s 23 (9), which states that the supplier is not bound by an inadvertent and obvious error in the price provided it corrected the error and took reasonable steps to inform consumers of the error.

In order to do so, one needs to analyse section as a whole. In summary,

Section 29(6) provides a supplier may not charge the higher price unless

29(7) the price is determined by regulation;

29(8) the original price is wholly obscured by a new price;

29(9) there is an inadvertent and obvious error; or

29(10) there was an unauthorised alteration of the price.

This is surely a closed list, so section 29(9) is implicitly intended to replace the common law snatching a bargain. It is difficult to see how any other conclusion can be reached, especially that snatching at a bargain can be relied upon instead of section 29(9).

It follows that it is then that once the consumer places the selected goods on the counter⁸ or tells the sales assistant that they want a particular item, it is too late for the sales assistant or till operator to say, “Sorry, that price is incorrect and I cannot sell it to you at that price.”

⁶ This may be what Somervell L.J. had in mind when he referred to when the customer goes up to the cashier and offers to buy what they have so far chosen (*Boots Cash Chemists* at 406).

⁷ In the case of bulky goods which are scanned while still in the trolley, wheeling the trolley up to the counter would have the same effect.

⁸ Or takes the trolley up to the counter in the case of large items.

Subsequent customers would also benefit from the incorrect price unless or until such time as the supplier corrected the error in the displayed price and took reasonable steps to inform consumers, to whom the erroneous price may have been displayed, of the error.

Section 29(9) does not apply in instances where the circumstances are such that the error is not obvious, such as where the price is described in the display as “never to be repeated”, “below cost” or “ridiculously low” or words to that effect.

It does seem that in practice the only time a supplier would be likely to be able to alert a consumer to the incorrect price before the sale was concluded is if the price was displayed in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally (section 23(5)(c)). This to be the probable intention of the legislature because it would only be in that sort of a situation where the seller was exposed to the possibility of being bound to sell non-existent stock to large numbers of potential customers. Where the price is displayed physically on or near the goods, the seller is only bound to sell the actual goods available on display.

6. Applying the law to the facts

The display price of R2199.99 is not that much lower than R2 999.99 that it gives rise to an inference that it was not an obvious error. It is evident that the supplier only became aware of the error in the price after the consumer already paid for the item and was waiting to take delivery of it. At that point, the contract of sale was already perfecta, before the two provisions of section 23(9) had been complied with i.e. the consumer was informed of the error and the price was changed.

A different conclusion might be reached in the case of an error in a price advertised in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally.

7. Conclusion and recommendation

Based on the information provided by the parties, there was an inadvertent error in the price for the couch and the supplier refused to honour the displayed price. The supplier is bound by that incorrect price as the transaction was concluded by the consumer indicating that he wishes to purchase the goods and subsequently paying for it. The supplier cannot rely upon the protection afforded by section 23(9) as it was too late when the supplier informed the consumer of the error.

The supplier should accordingly honour the incorrect price.

Opportunity to comment

If the parties accepts the terms of this assessment, or have any further submissions or comments to make, they must do so before **19 May 2015**.

Name: Bonita Hughes

Designation: Complaints Officer

Date: 05 May 2015