

INITIAL VIEW

1. Dispute identification

Complainants	: 201503-0232
Nature of dispute	: Misleading advertised price
Adjudicator	: B Hughes
Date	: 11 May 2015

2. Summary of the complaints

On 09 March 2015 the complainant's friend informed him of a promotion the supplier was having on a tool kit at the advertised price of R199.00. The complainant went to the website to see the promotion and also took a screenshot of the advert in the event that a problem might occur.

The complainant then received a call from the same friend stating that he went to the store to purchase the item but incurred problems. After debating the matter the store gave the friend the item at the advertised price.

The complainant was at work and send a family member to purchase the item. The store refused to give the item to the family member at the advertised price. The family member was informed that there was an error with the price and that the item was sold out.

The complainant then decided to phone the supplier. The complainant gave the product ID as well as the branch (Springfield). The store manager advised that there were still 10 of the specific item left in the store. The complainant then informed the manager that his family member was informed that the item was sold out.

The manager advised that she will phone the complainant back. The manager did phone the complainant back and advised him that there was an error and misprint. The manager apologised for the error and advised that after the complainant's friend bought the item they discovered the error and removed the advert and placed the necessary signage up in the store. The manager also confirmed that they only sold one of the items to his friend.

Later during the day another friend of the complainant advised him that he bought a tool set for R199.00 and other people were also allowed to purchase the item at that price.

The complainant again phoned the store and advised that he felt discriminated against as certain people were given the item at the error price but he was refused.

The complainant would like to purchase the tool kit at the advertised price of R199.00.

3. The response of the supplier

The supplier provided this office with its response (without prejudice):

According to the supplier the fact that there was an obvious and inadvertent error is not in dispute. According to the supplier the complainant is disputing the fact that he was not given a fair opportunity to exploit the error.

The set normally sells at R2 299.00 and on promotion it was wrongly captured at R199.00 instead of R1 999.00.

The supplier also advised that a circle of friends which the complainant is part of, made purchases and communicated their till slips with one another. This resulted in the members of the circle, to whom the incorrect price was not advertised to by the supplier but rather informed of by other members of the group, to exploit the error.

The supplier advised that they honored the error price purely as an offer of goodwill to a few customers based on the merits of each case.

The supplier takes note that the consumer feels he was discriminated against and would like to resolve the complaint amicably with the complainant.

4. Legal considerations

CONSUMER PROTECTION ACT

Section 30 is reproduced here in full.

Bait marketing

30. (1) A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price.

(2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits.

(3) It is a defence to an alleged failure to comply with subsection (1) or (2) if—

(a) the supplier offered to supply or procure another person to supply a consumer with the same or equivalent goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; and

(b) the consumer—

(i) unreasonably refused that offer; or

(ii) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

The first question to consider is the ambit of the section. It covers the advertising of goods and services. Advertisement is broadly defined to encompass any direct or indirect visual or oral communication transmitted by any medium that brings to the attention of all or part of the public the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which they are available for supply.¹

Section 23(5) is extended in subsection (c) to include publishing in a catalogue, brochure, circular or similar form of publication available to a consumer, or to the public generally. On the face of it, both section 23(5) and 30 appear to govern the advertisement of goods at a specified price in a catalogue, brochure, circular or similar. Section 30 goes further than section 23(5)(c) as it covers all media of publication.

¹ Section 1 *sv* 'advertisement'.

Is intention required?

The general rule in South African law is that the legislature intended fault to be an element of liability of a statutory offence.² This rule, however, does not apply in respect of the so-called “regulatory” or “public-welfare” offences.³

As to whether the section goes further and creates strict liability, this does seem to be the case, in the absence of express reference to intention or a definition of “deceive” or “mislead” to the contrary.

It is, however, difficult to conceive of a situation in which the supplier was not in some way at fault for not having checked the advertisement. So even if fault was a requirement, it would invariably be present on a *res ipsa loquitur* basis.

The next issue to consider is whether section 30(1) imposes an obligation to sell goods at the advertised price.

Whether or not the supplier is bound by the terms of an advertisement depends on the wording of the advertisement. If a supplier advertises particular goods as being available at a specified price and the advertisement expressly states a limitation in the numbers available, the supplier must honour the advertisement terms, to the extent of the expressed limits.⁴ If, however, no limit is expressed, it follows logically that the supplier is not bound by the advertisement but would nevertheless be liable for contravening the section.

That is not an end to the matter. Section 115 (2) provides in a roundabout way that a person who has suffered loss or damage as a result of prohibited conduct may institute a claim in civil court after obtaining a certificate from the Tribunal to the effect that the conduct complained of was prohibited or required by the CPA. In this regard, “prohibited conduct” means an act or omission in contravention of the CPA.⁵ A contravention of section 30 (1), which is a blanket ban on advertising in a misleading or deceiving way, would constitute prohibited conduct.

Inadvertent error

There is no provision for what to do in the case of an error in section 30. However, the question only arises if the consumer was misled or deceived by the advertisement. In this regard the gross error test is of assistance:⁶ If the mistaken price is more than 20% below the price stated by the seller as the actual selling price at any time during the previous 30 day period, in the case of a large price tag item, the consumer is not

² Burchell E.M. & Hunt P.M.A., *South African Criminal Law and Procedure: General principles of Criminal Law*, Volume 1 (2008 Impression) at 251.

³ Ibid.

⁴ Section 30(2).

⁵ Section 1 sv “prohibited conduct”.

⁶ Retail Advertising Regulations, Massachusetts (940 C.M.R. 3.00.).

deemed to have been misled and accordingly there is no liability on the part of the seller.

6. Applying the law to the facts

The advertisement in question was published on their website by the supplier. I accept that there was no limitation placed in the advertisement on the number of items advertised for sale, bringing the matter within the ambit of section 30(1).

Based on the conclusions reached in the previous sections of this report, it is not necessary to show that the supplier intended to mislead or deceive the consumer, only that the consumer was misled or deceived by the advertisement.

Even if it is accepted that the supplier made a genuine error, as it claims, this in itself would not save it from liability. However, section 30(1) does not *per se* directly create an obligation to sell at the advertised price. It merely creates a prohibition that can lead to the imposition of an administrative fine if breached or that can ground a civil claim for damages.

In this matter, the tool kit usually retails for R2 999 the correct sale price was R1 999 and the advertised price was R199, which is 10% or less than quarter of the correct price. Although there is no provision in the CPA regarding gross error, the definition of this term given above is nevertheless a useful guide as to what the reasonable consumer would realize to be an error.

Accordingly I conclude that the discrepancy between the actual price or the price that a reasonable consumer might expect the price to be and the advertised price was so large that a reasonable consumer would have realised there was an error and not have been misled.

The fact that the complainant was informed by his friends and the fact that the complainant mentioned that he took a screenshot of the advertisement in case that he might incur a problem also indicates that the consumer was well aware that there was an error in the price and could not have been misled.

7. Conclusion and recommendation

Based on the above finding, the supplier is not bound to provide the complainant with the tool kit at the incorrectly advertised price. I am satisfied that the voucher of R250.00 was adequate to compensate the complainant for his time wasted time and transport costs.

Opportunity to comment

This decision is based on the information provided by the parties. If the parties accepts the terms of this assessment, or have any further submissions or comments to make, they must do so before 25 May 2015.

Name: Bonita Hughes

Designation: Complaints Officer

Date: 11 May 2015