CONSUMER GOODS & SERVICES OMBUD
Fairplay between consumer & supplier

ADVISORY NOTE 12: RIGHTS REGARDING CANCELLATIONS[1]

This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act (CPA) with regard to the cancellation of agreements, advance bookings or orders.

Summary

The CGSO receives a significant number of complaints that relate to the cancellation or termination of agreements and the cancellation of advance bookings or orders. In terms of South African common law, a person is bound by an agreement entered into by them unless there is a legal reason that enables them to cancel the agreement. But now, consumers no longer sign documents or enter into agreements at their own peril as the CPA provides them with the right to cancel an agreement under a closed list of circumstances.

There may however be finance consequences that follow the cancellation. The difficulty is that the guidance provided by the CPA as to how to calculate what is a fair charge that may be made for cancelling an order or agreement is in terms of broad principles rather than a set of specific requirements.

This advisory note is an attempt to divine how the Tribunal and the Courts will interpret the CPA when cases come before them, and at the same time provide guidance to suppliers and consumers alike as to how to regulate their dealings in this area. It is hoped that it will spur on the codification of industry practices, to make the lives of all concerned easier.

Guidance may be gained from decided cases when interpreting the CPA. The aim of damages arising from a breach of a contract, which is what a cancellation is, is to put the innocent party (the supplier) in the position that he or she would have been in had the contract been properly performed.

Care has to be taken to ensure that undue hardship is not imposed on the defaulting party and that losses are limited to those that flow from the breach and are not too remote. In deciding what charge is fair, the relevant consideration is whether the charge is out of proportion to the harm suffered by the innocent party, in which case it may be reduced to the extent that it considers fair.

[1] **Warning:** This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors.

This can be assessed in three ways:

- by looking at comparable situations where the desired result was achieved;
- by looking at the size of this penalty and the penalties in general in relation to the income and expenditure of the defendant; and
- by exercising one's sense of fairness and justice.

Where a breach of contract has occurred, the innocent party must take reasonable positive steps to mitigate or prevent the occurrence of losses, failing which his or her claim may be reduced or eliminated.

Any industry guidelines to suppliers as to appropriate cancellation policies should include:

•That the cancellation policy be appropriate to the type of service offered, with regard to the likelihood of being able to, with diligence, rebook the venue/ service;

•That any deposit taken be fair and reasonable and proportionate to the loss that a supplier is likely to suffer if the event/ service is cancelled;

•That provision is made for a stepped scale of forfeiture of a percentage of the deposit in proportion to the length of notice given, subject to the proviso that, in the event of the venue/ service being rebooked, the consumer will only be charged an administrative fee based on actual costs.

Introduction

The CGSO receives a significant number of complaints that relate to the cancellation or termination of agreements and the cancellation of advance bookings or orders by consumers for reasons other than a lack of performance by the supplier of its obligations (breach of contract). Disputes arise particularly in the area of the fairness of suppliers refusing to refund deposits taken in the case of event bookings and advance product orders and in seeking to hold consumers liable for future payments, fees or instalments where the consumer wishes to opt out.

In dealing with disputes, the CGSO may refer to the common law, to the extent it has not been overridden by the CPA.[2] The common law provides the backdrop to understanding and applying the CPA, further, it is rich in precedents provided by decided cases. By contrast, there is as yet a lack of authority on the interpretation of the CPA. It is necessary for the CGSO and other similar bodies to attempt to divine how the Tribunal and the Courts will interpret the CPA when cases come before them. This advisory note is an attempt to do just that, and at the same time provide guidance to suppliers and consumers alike as to how to regulate their dealings in this area. It shall forever be a work in progress as new areas in which cancellations are an issue will be added as the CGSO encounters them. The main part of the note deals with the CPA rules regarding cancellations for reasons other than the supplier's breach of contract. A summarised explanation of the common law principles regarding breach of contract generally and cancellation is included at the end of the note as Annexure "A".

The Law

Common Law

South Africa

The principle of *pacta sunt servanda* (Latin for "agreements must be kept"[3]) is central to the law of contract. If one party to a contract seeks to cancel or be released from the contract without valid legal grounds and in the absence of a clause that permits cancellation, the other party, the innocent party, is entitled to sue the defaulting party either for the fulfilment of the contract or for cancellation and damages arising from the breach. Damages are aimed at putting the innocent party in the position that he or she would have been in had the contract been properly performed.[4]

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[2] That the CPA does not override the common law is implied in s.2 (10): "No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law".

[3] Black's Law Dictionary (8th ed. 2004).

[4] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.

Damages may be calculated according to the loss actually incurred because of the breach or the loss of profits that would, but for the breach, have been made in the future.

When a breach of an agreement of lease gives rise to a valid cancellation thereof the ordinary measure of damages is the difference between the loss of rental income during the unexpired period thereof and the rental that a lessor obtains or can reasonably be expected to obtain from reletting the premises. [5]

A claimant who has lost a bargain in respect of which he has an unlimited supply is entitled to the full loss of profits on the bargain.[6] The situation is different when the supplies are limited. Thus in *Aucamp v Morton* 1949 (3) SA 611 (A), where a tree feller was prevented from accessing a forestry to complete a felling contract, the court held that the feller had not entirely lost the profit which he would have made out of particular contracts but that his making of profits from cutting and selling timber had been deferred for about 22 months owing to his operations in the forest having been stopped.

In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D-688A it was held:

> "To ensure that undue hardship is not imposed on the defaulting party . . . the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach…"

In terms of Roman-Dutch law, a penalty clause included in an agreement was enforceable so long as it was reasonable. This was the position in South Africa until the case of *Pearl Assurance Co. v Union Government* [1934] A.C. 570 (P.C.), in which our law was aligned with the English law approach, namely that penalty clauses were only permissible if they were merely a pre-estimate of damages and not a punishment.

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[5] *Wireless Rentals (Pty) Ltd v Stander* 1965 (4) SA 753 (T) 324.
[6] *Kritzinger v Marchand & Co* 1926 CPD 397.

The Conventional Penalties Act 15 of 1962[7] in effect overruled this decision by permitting contracting parties to agree in advance on the amount of damages that will be payable by the one to the other in the event of a breach of contract by means of a penalty stipulation, so long as the penalty is not out of proportion to the harm suffered by the innocent party. If the penalty is excessive, a court may reduce the penalty to the extent that it considers fair. A party may not claim both damages and a penalty[8], unless the contract expressly allows it.[9] The onus to disprove prejudice was suffered by the creditor rests on the debtor because the penalty clause the creditor seeks to enforce is in the creditor's favour.[10]

In *Van Staden v Central South African Lands and Mines* 1969 (4) SA 349 (W) the Court determined that in interpreting section 3 of the Act:

> "Everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the Act or omission of the debtor, must, if brought to the notice of the Court, be taken into account by the Court in deciding whether the penalty is, in terms of Section 3 of the Conventional Penalties Act, 15 of 1962, out of proportion to the prejudice suffered by the creditor".

The case of *Murcia Lands cc v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) gives guidance as how to decide if a penalty is excessive:

> "It seems to me that the question of whether the penalty was "out of proportion" to the prejudice can be assessed in three ways: by looking at comparable situations where the desired result was achieved; by looking at the size of this penalty and the penalties in general in relation to the income and expenditure of the defendant; and by exercising one's sense of fairness and justice."[11]

In *Smit v Bester* 1977 (4) SA 937 (A), the Appellate Division held that in a case where a court is concerned with a penalty under s 3 of the Conventional Penalties Act, the onus is on the debtor to show that the penalty is disproportionate to the prejudice suffered by the creditor and that it should thus be reduced, and to what extent. When the debtor *prima facie* proves that the penalty should be reduced then there is an onus on the creditor to rebut, so as to refute the *prima facie* case of the debtor.[12]

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[7] See Annexure "B".
[8] Section 2(1) of the Act.
[9] *Custom Credit Corporation (Pty) Ltd v Shembe* (1972) 3 All SA 489(A).
[10] *Steinberg v Lazard* 2006 (5) SA 42 (SCA) par [10].
[11] At paragraph 27.
[12] At 942D-F.

In *Plumbago Financial Services (Pty) Ltd T/A Toshiba Rentals v Janap Joseph T/Project Finance* 2008(3) SA 47 (CPD), the court held that "the best method of determining whether a penalty was excessive was to compare what the plaintiff's position would have been had the defendant not defaulted and what the plaintiff's position would be should it obtain judgment in the full sum sought."[13]

The case concerns a claim for arrear and future rentals and certain ancillary claims by the lessor of photocopier machines arising out of the breach of the lease contract by the lessee. The court accepted that, had there been no defaults on the part of the lessee the lessor would have received the monthly instalments in respects of the equipment month by month over a period of five years.

The court took into consideration the amount of income earned by the lessor from the sale of one of the machines and the leasing out of the other and gave the benefit of this income to the lessee in the form of an abatement of the accelerated rentals as an equitable reduction of the penalty stipulations.

In Australia, the approach taken to penalties is similar to that taken in South Africa:

> "Under the common law a sum payable on breach of a contract will be a penalty where the sum is 'extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach, rather than a genuine pre-estimate of the loss likely to be caused by a breach of the contract'. This is on the ground that a trader should not recover more than its own reasonable costs associated with a breach or default under the contract."[14]

Duty to mitigate loss

Where a breach of contract has occurred, the innocent party must take reasonable positive steps to mitigate or prevent the occurrence of losses, failing which his or her claim may be reduced or eliminated.[15]

This was explained in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* (416/99) [2001] ZASCA 82; [2001] 4 All SA 161 (A):[16]

> "The negligence of a plaintiff could not 'defeat' his claim. The point was made by Watermeyer J in *OK Bazaars (1929) Ltd and Others v Stern and Ekermans* 1976 (2) SA 521 (C) at 528F. If his own negligence was held to be the true or real cause of his loss

[13] At Paragraph 31, page 5.
[14] See: http://www.law.monash.edu.au/about-us/publications/monlr/issues/past/vol-39-3-sims.pdf.
[15] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.
[16] At paragraph 10.

> and he was non-suited on that account it was implicit that there never was a justifiable claim against the defendant. If he negligently failed to 'mitigate' his loss, that too did not 'defeat' his claim. It disabled him from pursuing a valid claim if the entire loss could have been avoided and merely reduced it if part of the loss could have been avoided."

In *Wilson v Spitze* (539/87) [1989] ZASCA 11, the court cited with approval a passage from the Digest[17] in which Ulpian states that if the buyer of wine is in default the seller may hold back the wine or else sell the wine in good faith provided he mitigates the buyer's loss so far as he can without detriment to himself.

Sometimes a consumer may mitigate their loss by bringing in another contractor to finish an abandoned or improperly completed job, as long as the consumer can show that "the repairs effected were necessary and that the cost thereof was fair and reasonable."[18]

A case in which the defendant was held not to have failed to mitigate the loss is *Tremendous Property Investment, 8 CC and Another v Kenntner Wilderness Dune Development (Pty) Ltd* (2433/2007) [2012] ZAWCHC 104 in which the plaintiff claimed the recovery of a deposit of R100 000,00 retained by the defendant under a forfeiture clause in a contract for the sale of land. The sale was not subject to a suspensive condition that a bond be obtained.

The plaintiff paid the amount of R100 000, 00 but failed to provide a guarantee within the specified period and the defendant thereupon cancelled the contract. The plaintiff claimed the defendant failed to mitigate its damages in the light of the fact that:

> 1) the plaintiff after cancellation of the contract, offered to purchase the property at the same price provided for in the cancelled contract of sale, but the defendant refused to accept such an offer; which in turn would have the effect of lessening the damages and
> 2) the defendant withdrew the property from the market.[19]

The court quoted the following passage from *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) *at 391 B-D*:

> "If the penalty is out of proportion to the prejudice, the Court will reduce the penalty to such an extent as it may consider equitable in the circumstances. The words 'out of proportion' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the

[17] D 18.6.1.3, at paragraph 30.
[18] *Heath v Le Grange* 1974 (2) SA 262 at 266.
[19] At paragraph 6.

> Legislature would have said so. What is contemplated, it seems to me, is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be rewarded."

In the *Tremendous Property* case, the court considered the all the wasted costs occasioned by the cancellation, such as work performed in preparation for the transfer of the property and the spent by the defendant assisting the plaintiff's consultants with the rezoning application and concluded that it was not clear or plain that the penalty was out of proportion to the prejudice suffered. Further, it held that the defendant was justified in refusing an offer which differed materially from the cancelled contract as no reasonable person in the circumstances of the defendant would have done anything more than it had. Accordingly, the plaintiff failed to discharge the onus of proving that the defendant failed to mitigate the damages and as such, the plaintiff was not entitled to the reduction of the penalty.

<u>England</u>

While it may be possible to treat a contract as at an end, or reject the goods in the case of sale of goods contract, the primary remedy for breach of contract is damages - to put the victim of breach into the position they would have been in had the contract been performed. The purpose of damages is to compensate for loss caused by the breach.[20]

Damages were awarded for loss of profit in: *Victoria Laundry v Newman Industries Ltd* [1949] 2 KB 528.
It was clear to D, who were to sell and deliver to P a boiler, that it was needed for immediate use, and that profits would be lost if it was not delivered on time.

However, although the claim for the normal profits which the plaintiffs would have earned was allowed, the claim which the plaintiffs made for loss of exceptional profits which would have been earned in special dyeing contracts was disallowed, and profits at the normal rate were awarded for these contracts.

The Duty to Mitigate Loss

The duty is well known. In *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 All ER 225, at 240, Widgery LJ stated:

[20] http://www.insitelawmagazine.com/ch9remedies.htm.

> "In my opinion each case depends upon its own facts, it being remembered, first, that the purpose of the award of damages is to restore the plaintiff to his position before the loss occurred, and secondly, that the plaintiff must act reasonably to mitigate his loss."

The duty to mitigate is only a duty to act reasonably to keep losses from becoming higher than is necessary. Modern interpretation of the rule does not impose a strict duty to take whichever steps are calculated to cause the minimum amount of loss.

Banco De Portugal v Waterlow & Sons Ltd (1932) AC 452,

> "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken".

per Lord Macmillan at 506:

The above was applied in: *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397.

Hire purchase charges for the purchase of a new rotor, to replace a damaged rotor, were high, perhaps, compared to others, but the plaintiff had not acted unreasonably in the circumstances in incurring these charges.

See also *Hayes v Dodd* (1990): plaintiffs had some delay in selling the properties, because they tried unsuccessfully to sell both properties together. Only later did they sell them separately. This meant that the figure for rent was higher than it might have been. However, it was held that all the rent was recoverable as damages by the plaintiffs, as they had acted reasonably.

<u>USA: Wedding venues</u>[21]

The Non-Refundable Deposit

The non-refundable deposit(s) (retainer, instalment, etc) is basically the vendor's way of saying, "These are my damages if you cancel, and I am entitled to them without having to do anything else..."

The law refers to the non-refundable deposit as a Liquidated Damages Clause (the "LDC"). As stated, the LDC must reflect a good faith effort to estimate the damages suffered from a

[21] http://weddingindustrylaw.com/non-refundable-deposits-contract-cancelled/.

breach, or should represent a value amount of the contract that you would be happy with if the bride bailed at a particular point in time prior to the wedding.

Courts typically require the amount to be reasonable and that the harm suffered (your damages if the bride cancels) be difficult to accurately quantify at the time of the breach. For wedding industry professionals, harm at the time of breach is difficult to assess mainly because (1) booking an equivalent wedding on the same date is almost always a difficult proposition and (2) expenses incurred vary depending on how close the breach occurs to the wedding.

To put it another way, the purpose is compensation, not punishment or trying to deter the bride from breaching. Where the purpose is punishment, an LDC becomes a penalty and is no longer enforceable. Often, courts find sums that are too large or unrelated to the loss suffered to be penalties, but the burden will be on the challenging party to prove the unreasonableness.

States differ on how stringently they interpret the terms of a contract. For instance, New York considers an LDC for the entire value of the contract a penalty, and where there is any doubt at all, considers an LDC a penalty.

Morroco v. Limetree Enterprises, Inc., 2008 N.J. Super. Unpub. LEXIS 840 (2008)

In June 2003, Vincent Morrocco, through Barry Herman, hired the Cashmere Thirteen to play his daughter's wedding August 2004. He paid a $3,300 deposit. Less than a month before the date, the wedding was postponed until October 2005. Morrocco signed another contract, and paid a $4,000 deposit. Both contracts contained LDCs. When his daughter canceled again, Morrocco sued to recover the $7,300 he paid in deposits, challenging the clause as a penalty.

Morrocco lost. Not only did he lose in New Jersey superior court, Morocco lost again on appeal.

The LDC in the contract was captioned "NON-REFUNDABLE DEPOSIT: BALANCE DUE." Below the caption, the contract read: "Once you sign the contract the deposits are not refundable for any reason." Another caption explicitly labelled the LDC: "CANCELLATION OF CONTRACT: LIQUIDATED DAMAGES." Below, the contract read:

> "In addition, You understand that the service provided by the Orchestra/Performers is unique and that the Orchestra/Performers makes arrangements to provide music a substantial time before the Date of the Engagement. You understand that the Orchestra/Performers will engage musicians to appear on the Date of Engagement. If you cancel this contract, the Orchestra/Performers will suffer damages because of its obligation to those musicians. These damages are difficult to measure. Therefore, if You cancel this contract at any time up to thirty-one (31) days before the Date of Engagement, the Orchestra/Performers has the right to keep the deposits as

> liquidated damages to compensate the Orchestra/Performers for expenses and losses which result from cancellation of Contract by You."

The court held this LDC was reasonable. Herman could never account for the number of potential clients he turned away while Morrocco had the Cashmere Thirteen booked. Further, Herman immediately utilized part of the deposit to reserve the band and part to pay the salesman who booked the gig. As such, Herman would suffer immediate actual damage if he had to return the deposit.

Indeed, the deposit represented a dollar figure that would leave any already incurred expenses paid, along with an appropriate amount of revenue representing lost profit. Thus, the LDC was enforceable as compensation to Herman in the event of a breach, rather than being a penalty for Morroco to prevent a breach.

While LDCs are immensely useful, they may be potentially damaging for a vendor. Generally, the vendor is only entitled to the value of the LDC in the event of the breach. This means that if a bride cancels, and you retain the LDC amount, you cannot go after the bride for more.

Consumer Protection Act

Consumers no longer sign documents or enter into agreements at their peril as the CPA provides them with the right to cancel an agreement under the following circumstances:

SECTION	CIRCUMSTANCES IN WHICH CANCELLATION PERMITTED	TIME LIMIT	PENALTY
7(2)	Franchise agreement	10 business days of signing	None
14(2)(b)(i)	Fixed-term agreements	20 business days' notice	14(3)(b)(1) Regulations 5(2)&(3)
17(2)	Advance booking/ reservation/ order	No time limit indicated	17(4)
16	Direct Marketing	5 business days of signing	20(4)(a) Return to supplier at the consumer's risk & expense
19(6)(c) & 20(2)&(4)	Goods delivered other than as agreed ITO time/ quality/ type or Not fit for intended purpose communicated to supplier	Per s.21; 10 business days of delivery	20(4)(a) Return to supplier at the supplier's risk & expense 20(6) May charge for use
54(2)(b)	Service of poor quality	Not specified	None
56(2)(b)	Goods defective/not durable or Not reasonably suited for generally intended purpose	6 months from delivery	56(2) None Return to supplier without penalty & at supplier's risk & expense
62(4)	Lay By	Before paying in full or within 60 business days after anticipated date of completion	Regulation 34(1)

Although neither the CPA nor the regulations specifically mention that an open-ended contract must have a cancellation clause giving the consumer the right to cancel, there is a strong argument for such a clause allowing a consumer to cancel upon giving reasonable notice now being an implied term (included by law) of every open-ended consumer

contract.[22] In the recent Supreme Court of Appeal case of *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* (574/13)[2014] ZASCA 73, the court held that in a commercial contract which did not contain a cancellation clause, there was a tacit clause: "The contract may be terminated by either party on reasonable written notice."[23] This follows the position in English law, that even an apparently indefinite contract may normally be terminated on reasonable notice.[24]

An argument in favour of an escape clause being implied by law is that the Tribunal or court, as the case may be, must promote the spirit and purposes of the CPA, and that this includes in Act Part C the consumer's right to choose.[25] Further, an agreement can be declared to be unfair, unreasonable or unjust if… the terms of the transaction or agreement are so adverse to the consumer as to be inequitable.[26] In Australia, the Australian Competition and Consumer Commission has concerns about terms that unfairly restrict the consumer's right to terminate the contract. [27]

In *Sunshine Records (Pty) Ltd v Frohling and Others* (383/84/av) [1986] ZASCA 153 which turned on whether a pop music group was entitled to cancel an agreement in spite of a restraint clause, the court ruled that the was entitled to resile from the contract because as a whole it had many objectionable features and was consequently unenforceable.

A supplier may cancel an agreement under the following circumstances:

SECTION	CIRCUMSTANCES IN WHICH CANCELLATION PERMITTED	TIME LIMIT
14(2)(b)(ii)	Fixed-term agreements	20 business days after giving notice of breach of contract to consumer
64(3)(a)	Prepaid services and access to service facilities	Supplier must provide at least 40 business days written notice before the intended date of closure

The rules relating to cancellation, where it is permitted, are straight forward but the calculation of permissible charges for damages presents a challenge in practice because of the generality of the provisions of section14(3)(b)(1) read with regulations 5(2)and (3)[28] (cancellation of fixed term contract) and section 17(4) (cancellation of advanced order).

[22] The National Consumer Commission (NCC) is of the view that timeshare contracts that last in perpetuity are in breach of the Consumer Protection Act (CPA), and it is preparing cases to take to the National Consumer Tribunal (NCT) (Personal Finance, "Regulator goes after timeshare contracts" September 20 2014)
[23] At pare 27.
[24] See: http://www.edenlegal.com/blog/post.php?s=2014-11-07-how-can-i-terminate-a-contract-with-no-termination-clause.
[25] S.4(2)(b)(i).
[26] S. 48(2)(b).
[27] See: http://www.accc.gov.au/speech/championing-the-rights-of-consumers.
[28] See Annexure "B".

Cancellation of booking/ order (Section 17)

Weddings and conference venue hire/ related services

Approximately 190 000 marriages take place in South Africa every year, of which about a third are religious marriages. The most popular months for marriages are December and November.[29] It is not known how many weddings are cancelled or postponed, but it is safe to assume that the figure is similar to that of the USA, 10-15% per annum.[30]

The cancellation of weddings creates problems for both the wedding venue management and the party that made the booking. It is necessary to find a fair balance between their competing interests: that of the venue to make a profit to enable it to stay in business and that of the booking party to receive back their money for which they perceive they have received little or no value, and the venue not to profit from their misfortune.

For vendors in the wedding business, damages from a cancellation can range from losses on food that spoils, to alteration costs on gowns, to lost opportunities for booking another wedding. It can be particularly difficult for many vendors to prove monetary loss for missed opportunity because a certain weekend was popular or the vendor didn't have time to hire adequate help.[31] By holding a date open, vendor may have to turn down other jobs on that date. Further, by the time a contract is concluded with a couple, the vendor may have spent a considerable amount of time with them in addition to the costs of marketing.
Venue hire is time and date specific. For this reason section 17(4) permits factors such as the length of notice of cancellation provided by the consumer and the reasonable potential for the service provider, acting diligently, to find an alternative consumer and the general practice of the relevant industry to be taken into consideration in deciding whether a cancellation fee is fair.

We deal here with the cancellation termination of the contract by consumers for reasons other than a lack of performance by the supplier of its obligations (breach of contract).

The general practice of the relevant industry

As far as we have been able to establish, no guidelines have been provided by industry bodies as yet.

We conducted a shallow desk bound survey of venues that commendably advertise their cancellation policies on the internet (Annexure "B") and were unable to discern a uniform

[29] See http://www.weddingconnect.co.za/articles/wedding-statistics-in-south-africa.
[30] See http://www.marieclaire.com/sex-love/relationship-issues/brides-call-off-wedding.
[31] See http://weddingindustrylaw.com/non-refundable-deposits-contract-cancelled/.

industry practice. What was evident however was that cancellation policies varied according to the type of venue, depending on whether they cater for weddings only, also cater for other functions also or offer accommodation. The notice for accommodation is less than that for general function venues, while that for wedding dedicated venues is longer than the others. The reason for this is that weddings are generally booked well in advance, as is evident from the survey results below.[32]

Poll: How far out did you book your Reception venue?	
TIME IN ADVANCE	VOTES
0-5 Months	0
6-8 Months	5 votes (6 %)
9-11 Months	18 votes (22 %)
1 year	19 votes (23 %)
1.5 years or Less	36 votes (43 %)
More than 1.5 years	3 votes (4 %)
2 years	2 votes (2 %)
TOTAL	83 votes

Some of the initiatives taken to alleviate the problem are the sale of wedding insurance to cover cancellation costs and expenses for venue hire and other key suppliers and the Charlottesville, Virginia-based website www.BridalBrokerage.com assists venues in reselling cancelled weddings. Apparently some couples are happy to take over pre-planned weddings to avoid the inconvenience of arranging their own weddings.

The approach taken by UK wedding venue Missenden Abbey in a clause in its contract is worthy of consideration:

> We will use reasonable endeavours to "re-sell" the date to another couple. However, you must pay us any losses and costs we suffer because of the cancellation which were reasonably foreseeable to both you and us when the contract was entered into, whether or not we are able to resell the date. Depending on when you cancel, the cancellation charges you must pay shall be determined by reference to the table below [reproduced in Annexure "C"]. We will tell you the exact cancellation charges once we know whether or not we have been able to resell the date, and you must pay the charges within 20 working days of our invoice. Where the final price has yet to be finalised (for example, because you have not yet confirmed catering numbers), we shall base the cancellation charges on any minimum numbers set out in our quotation.[33]

[32] See http://boards.weddingbee.com/topic/book-the-reception-how-far-in-advance/#ixzz317FVH8Pw. It is not known what the practice is in South Africa, but it would be reasonable to expect that it is similar to this.
[33] See http://missendenabbey.co.uk/terms-and-conditions/wedding-venue-hire-terms-and-conditions/.

The taking of a usually non-refundable deposit was common amongst the venues surveyed in Annexure "C". In some instances provision was made for a fixed cancellation or handling fee, presumably to cover costs already incurred and the administration required to cancel the booking. In the instances in which a damage deposit was required, this was refundable in full upon cancellation. One venue specified that the postponement of a function is considered a cancellation. Several of the venues (wisely, in our view) required that the client confirm all changes and cancellations in writing.

A very useful guideline to suppliers is provided by Consumer Affairs Victoria, Australia (attached as Annexure "D").

Vendors must of course mitigate their losses by taking reasonable steps to find other customers willing to use the venue and services on the date that the cancelled event was supposed to take place. An interesting case that tests the boundaries of this concept was brought to our attention. In what might become a trend,[34] a jilted bridegroom who was refused a refund of his share of the deposit due to the shortness of the notice given to the venue, just 3 days. When he asked instead to have a party with his friends, the owner of the venue refused, saying it only permits the use of the venue for weddings.

Ordinarily, there could be no objection to an events venue manager restricting the type of use of the venue, so long as this is not discriminatory in terms of the Constitution or other legislation. Thus a venue is entitled to impose a dress code or standards of behaviour to create an image of exclusivity for which a segment of patrons would be prepared to pay a premium.[35] Not only might the holding of a raucous party dent this image, but there might notionally be a greater danger of a "stag" party getting out of hand and damage being caused.

Against this is the competing but restricted right of the consumer to get a refund or at least value for the money paid and to have his loss mitigated. Legally, the fact that the defaulting party offers the suggested means of mitigation of the loss should not be an impediment.[36] Is it then unreasonable for the venue owner to refuse permission for the venue to be used for a party? We are of the view that it might well be, particularly as this is likely to have been a once off occurrence which would not prevent the owner from continuing to enforce the bookings-for-weddings-only policy. Further, the venue owner could have added stipulations regarding behaviour at the party or even set a reasonable surcharge to provide heightened security measures, if the existing measures were less than those used by venues that cater for all types of events.

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[34] Another instance is reported at: http://www.closeronline.co.uk/2015/01/amazing-video-jilted-bride-goes-ahead-with-wedding-celebrations-turns-heartbreak-to-triumph#.VMtL3WiUdqU.

[35] See: http://www.exhibitoronline.com/corpevent/article.asp?id=813.

[36] ??

Vendors would be wise to keep a “stand by” register of clients that could possibly fill the accommodation in the event of a cancellation to mitigate their losses and in case they ever need to prove that their cancellation charge was justified. For the same reason, they should be able to show what losses or costs were incurred as a direct result of the cancellation, such as time spent with the couple, an apportionment of costs of marketing and administrative costs. They could also consider suggesting that couples take out appropriate cancellation insurance. That is not to say that a supplier can pass its legal liability to the consumer – that is prohibited by section 48(1)(c) – it can however itself obtain insurance cover for any loss it may suffer as a result of the CPA provisions regarding cancellation.

Conclusion

A weddings or conference venue hire/ related services vendor is obliged to accept a cancellation of a booking but may protect itself by taking a deposit and withholding a fair amount from that as a cancellation charge. The case law regarding the Conventional Penalties Act provides a guide as to what a fair charge is, while other court decisions set out how a vendor/ supplier can discharge the obligation upon them to mitigate damages.

It would be advisable for the relevant industry bodies to provide guidelines to suppliers as to appropriate policies to put in place with regard to cancellations as the practice of an industry is one of the things that can be taken into consideration in establishing if a cancellation fee is reasonable. Any such industry practice would of course have to comply with the CPA

We suggest, based on our research, that the guidelines proposed include as a minimum the following:

- That the cancellation policy be appropriate to the type of service offered, with regard to the likelihood of being able to, with diligence, rebook the venue/ service;

- That any deposit taken be fair , reasonable and proportionate to the loss that a supplier is likely to suffer if the event/ service is cancelled;[37]

- That provision is made for a graduated scale of forfeiture of a percentage of the deposit in proportion to the length of notice given, subject to the proviso that, in the event of the venue/ service being rebooked, the consumer will only be charged an administrative fee based on actual costs.

In the spirit of the CPA and in the interest of good customer relations and reputation, the cancellation terms and the provisions of section 17 of CPA should be brought to the attention of the couple before the booking is made.

[37] The wording of section 17 does not appear to prohibit the loss from including loss of profits if the venue is not rebooked.

Cancellation of fixed term agreement (Section 14)

Gyms/ wellness/ health clubs

The rise in chronic diseases, both nationally and internationally, and the identification of the lack of physical activity as a risk factor for many of these diseases leads to the conclusion that it is essential for South Africans to engage in physical activity and take responsibility for their health. One way of doing so if one lives in an urban area is to attend a gym or health club. Gyms and health clubs reported provide services to just less than 2% of the South African population.[38]

While these facilities may provide a useful service, the business practices that some of them use nevertheless give rise to consumer complaints both here and overseas.[39] In our experience, consumers complain mainly about being locked into contracts i.e. not being permitted to cancel or terminate the contract within a fixed period or without having a large penalty imposed. Apart from losing interest in being a member, consumers seek to cancel their contracts because they can no longer afford the expense/ they are retrenched, they become ill or infirm or they move away.

We deal here with the cancellation termination of the contract by consumers for reasons other than a lack of performance by the supplier of its obligations (breach of contract). Thanks to the CPA[40], even if the gym contract is for a fixed period of time, the consumer may cancel it by giving the supplier 20 business days' notice in writing or other recorded form. The consumer remains liable to the gym, however, for any amounts owed in terms of the contract up to the date of the cancellation. Further, the supplier is entitled to impose a reasonable cancellation penalty with respect to any goods or services provided, or discounts granted, to the consumer "in contemplation of the agreement enduring for its intended fixed term".[41]

Some guidance as to how to calculate the "reasonable cancellation penalty" is provided in Regulations 5(2). It lists the factors that must be taken into account:

> (a) the amount which the consumer is still liable for to the supplier up to the date of cancellation;
> (b) the value of the transaction up to cancellation;
> (c) the value of the goods which will remain in the possession of the consumer

[38] See: http://www.ajol.info/index.php/sasma/article/viewFile/31901/5917.
[39] See, for example: http://www.dailymail.co.uk/news/article-2289978/Gyms-forced-end-unfair-exit-clauses-contracts-make-easier-cheaper-members-quit.html; http://barristers.com.au/wp-content/uploads/2012/07/Australian-Consumer-Law-Unfair-Contracts-by-Dr-Philip-Bender.pdf; http://www.athleticbusiness.com/Fitness-Training/a-club-s-termination-fee-is-held-void.html.
[40] S.14(2)(b)(i).
[41] S 14(3)(b)(i)

after cancellation;
(d) the value of the goods that are returned to the supplier;
(e) the duration of the consumer agreement as initially agreed;
(f) losses suffered or benefits accrued by consumer as a result of the consumer entering into the consumer agreement;
(g) the nature of the goods or services that were reserved or booked;
(h) the length of notice of cancellation provided by the consumer;
(i) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
(j) the general practice of the relevant industry.

The wording of these provisions creates difficulties in their interpretation as section 14(3)(b)(i) and regulation 5(2) appear to be at variance with each other. The section states that the cancellation penalty is with regard to "any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any," whereas the regulation appears to be wider than this. This is expanded upon below.

The last part of section 14(3)(b)(i), which refers to the "discounts granted", is easy enough to understand: it means that if any discount was provided on goods or services thanks to the length of the contract, there can be a recalculation based on what the consumer would have paid had a shorter period been agreed upon initially. An example regarding goods is a newspaper subscription that has the effect of reducing the price from R 5.00 per paper if bought daily to R 3.50 per paper over the course of a year. It would work the same way for services: Thus if a once off visit to the gym would have cost R 200 but the bulk rate over 24 months was equivalent to R 100 per visit, the consumer could be held liable for a percentage of the difference in respect of the number of actual visits. The obvious practical problems with this example illustrate the danger of very broad, one-size-fits-all, legislative provisions such as those used in the CPA.

The first part of the sub-section is more difficult to understand: "the supplier may impose a reasonable cancellation penalty with respect to any goods supplied, services provided … to the consumer in contemplation of the agreement enduring for its intended fixed term". With regard to" goods supplied," it seems this would cover say a cell phone provided by a supplier in the belief that its cost would be recovered through subscription fees over a two year period, likewise a kit bag provided by a gym. It is more difficult to imagine a scenario relating to services that is not part and parcel of marketing or delivery of a product or services. Perhaps the sub-section means services such as the induction at the gym where a member of staff takes the measurements of the new member and shows them how to use the various exercise machines.

What seems clearer is that the subsection as a whole does not refer to loss of future profits. If future profits were being referred to, one would expect the CPA to use words such as "services yet to be provided/ which would have been provided in the future", or "future access to services", as is used in two places in section 63(1), and not the words "services provided" that are used.

If future profits are excluded, it is a departure from the common law in respect of a breach of contract, which provides for the assessment of damages for breach in terms of actual as well as prospective losses.[42] In terms of the rules of the interpretation of statutes, there is a presumption that the legislation does not intend to change the existing law more that is necessary (*Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 @823), if it is not clear that it does intend to change it (*Gordon v Standard Merchant Bank* 1983 (3) SA 68 (A)). The wording of section 14(3)(b)(i) is, however, clear and accordingly the so called "golden rule" of interpretation comes into play. That is that the "plain meaning" of words must be given effect to unless that would result in absurd results (*Venter v R* 1907 TS 910 @914), which is not the case here.

Even were it to be found that the exclusion of future profits is not clear and there is a possible meaning that includes future losses, the CPA itself instructs that if any of its provisions, read in their context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the CPA's spirit and purposes, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)(the previously disadvantaged).[43]

Elsewhere the CPA refers to resolving any ambiguity or conflict in favour of the consumer.[44] As it would obviously favour the consumer not to be bound into a long term contract by virtue of a penalty clause relating to the loss of future fees, if there is any ambiguity in section 14(3)(b)(ii), the section must be construed to exclude the possibility of a supplier claiming for lost future earnings upon the consumer cancelling the agreement.

Regulation 5(2) is to an extent in apparent conflict with section 14(3)(b)(i) as its provisions are on the whole more appropriate to the calculation of a penalty in respect of future losses and the mitigation of those losses. Sub-regulations (g)- (j) have in fact been "cut and pasted" from section 17(4) of the CPA, which relates to the consumer's right to cancel an advance reservation, booking or order. As they refer then to future losses, they go beyond the scope of section 14(3)(b)(i) and accordingly a court could rule that they are *ultra vires* (i.e. that they exceed the scope of the power to make regulations and are invalid).

As to the other sub-regulations:

Regulation 5(2)
(a) the amount which the consumer is still liable for to the supplier up to the date of cancellation.

This seems to go further than section 14(3)(a):

> "[T]he consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation."

[42] Visser and Potgieter's *Law of Damages* (3ed) at 77.
[43] S.4(3).
[44] Ss 4(4)(a) and 2(9)(b).

The regulation appears to be ambiguous as it could refer both to liability for goods or services already received by the consumer by the time of the breach but for which they have not yet paid, or to liability flowing from the contractual commitment to purchase future or further goods and services. The section on the other hand seems, as explained above, only to apply to liability already incurred.

Naturally, suppliers prefer an interpretation that permits them to claim for future income in terms of a contract. In the United Kingdom, a court put a stop to this approach in the case of *The Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch).

In that case the Office of Fair Trading (the "OFT") claimed that that Ashbourne had engaged in practices which contravened the Consumer Credit Act 1974 (the "CCA"), the Unfair Terms in Consumer Contracts Regulations 1999 (the "UTCCR") and the Consumer Protection from Unfair Trading Regulations 2008 (the "CPR").

The gym contract in issue provided:

> "You are liable to pay the agreed monthly membership subscriptions for the 'minimum membership period' and may be obliged to do so even if you would prefer to cancel your membership," and
>
> "In the event that this agreement is terminated before the minimum membership period has ended, all sums due to us plus the balance of the monthly subscriptions that would otherwise have fallen due will become payable immediately less 5%."

In its judgment the court stated:

> "In all these circumstances I believe that the defendants' business model is designed and calculated to take advantage of the naivety and inexperience of the average consumer using gym clubs at the lower end of the market. As the many complaints received by the OFT show, the defendants' standard form agreements contain a trap into which the average consumer is likely to fall."[45]

The court concluded that:

> "In accordance with well established principle, if a clause of a membership agreement permits a gym club to terminate in the event of a non repudiatory breach by a member then, upon termination pursuant to that provision, it is entitled to claim sums due and damages for losses suffered up to the date of termination but not beyond."[46]

[45] At para 173.
[46] At para 188.

In a similar vein, in the United States, it was held in *Mau v. L.A. Fitness International* [2010 U.S. Dist. LEXIS 119576] that health clubs must ensure that cancellation clauses are not unfairly punitive.[47] The court determined that a contract clause is unreasonable, and therefore unenforceable against the member, when the amount of the termination fee has no relationship to the injury suffered by the club. Put another way, the court held that the reason most liquidated damages clauses are deemed unenforceable is because they specify the same amount of damages, regardless of the severity of the breach or even who is at fault.

Under the Australian Consumer Law, a term in a standard form contract may be declared unfair if it penalises consumers for terminating memberships.[48]

Returning to the consideration of the interpretation of section 14(3)(a), its plain meaning, that a consumer is liable only for debts already incurred (and by implication not for future obligations or commitments) is consistent with the international approach with respect to fair contractual terms. This means that to the extent that regulation 5(2)(a) goes further than that, it is not only *ultra vires* but also in itself unfair and it is unlikely to be applied by a court or tribunal.

Regulation 5(2)
(b) the value of the transaction up to cancellation;
(c) the value of the goods which will remain in the possession of the consumer after cancellation;
(d) the value of the goods that are returned to the supplier;
(e) the duration of the consumer agreement as initially agreed;

These provisions seem to apply to calculating a penalty for loss of future profits, but they could also be used to calculate the adjustment in respect of discounts provided, so they are valid regulations and should be taken into consideration when calculating a penalty in respect of any goods supplied, services provided, or discounts granted.

Regulation 5(2)
(f) losses suffered or benefits accrued by consumer as a result of the consumer entering into the consumer agreement;

It is not clear what the intention of this sub-regulation is or how "benefits accrued" differs from "the value of the transaction" in sub regulation (a). If the consumer has suffered losses, it would be more appropriate to cancel the contract for breach, in which case there would be no penalty payable by the consumer.

* * *

[47] As reported upon in http://www.athleticbusiness.com/Fitness-Training/a-club-s-termination-fee-is-held-void.html.
[48] See: http://www.consumer.vic.gov.au/businesses/fair-trading/contracts/health-and-fitness-centres.

Calculation of penalty

From the above discussion, it is clear that the scope for recovering a penalty is limited. Further, the guidelines provided in regulation 5(2) imply that a supplier may not merely predetermine a set penalty, say a percentage of the outstanding value of the contract. Rather, the supplier must treat each case on its merits in terms of the variables set out in the regulation.

This does not prevent it from agreeing a sliding scale in respect of permitted penalty charges that relates to the period of the contract and the point at which it is cancelled. So long as, in accordance with the Conventional Penalties Act, the penalty is not out of proportion to the harm suffered by the supplier.[49] To further protect itself, the supplier could indicate in the contract that stipulated goods and services that are provided free in anticipation that the contract will run the full term agreed upon will be charged for if the contract is cancelled without justification within a stated period of time.

Once the penalty is calculated, it must be deducted from any amount paid in advance by the consumer and the balance paid over to the consumer in terms of section 14(3)(b)(ii). Regulation 5(3) prevents the supplier from charging a charge which would have the effect of negating the consumer's CPA right to cancel the agreement. Even where the CPA permits a penalty to be charged, this is subject to the supplier being under an obligation to mitigate its losses.[50] This is elaborated upon by the UK Office of Fair Trading (OFT) in its "Guidance on unfair terms in health and fitness club agreements":

> Mitigation
> 5.3 Such terms are open to challenge because they take no account of the club's duty to mitigate its loss. In law, the club has a legal duty to do so, for example by seeking replacement business. If the club has a closed membership with a waiting list of potential new members, each new member could count as a replacement. This would not necessarily be the case where the club's membership is not full.

* * *

Although it is now easier to escape a gym contract, it does seem harsh, if not a poor approach to customer relations, when the operators of gyms do not release from their contracts without any form of penalty those consumers/ members who move elsewhere, hit hard times or fall ill. [51] We endorse the following view expressed by the OFT in its guidance note referred to above:

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[49] The same approach is taken in Australia: See Dr Philip Bender "Australian Consumer Law: Unfair Contracts and other Litigation" para 41 on http://barristers.com.au/wp-content/uploads/2012/07/Australian-Consumer-Law-Unfair-Contracts-by-Dr-Philip-Bender.pdf.

[50] Section 61(6).

[51] Available on: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284453/oft373.pdf.

> Circumstances beyond a member's control
> 5.5 The fairest terms allow members to transfer their membership or to cancel the contract without penalty if the member, for example, has to relocate, or has suffered redundancy, or has a medical condition that prevents his use of the gym. Such terms take positive account of the interests of the member.

The New Zealand Consumer Commission expressed a similar view in one of its decisions.[52]

Conclusion

From the above discussion, it seems that a consumer may escape a fixed term gym contract with relative ease and without the threat of excessive penalties being imposed, particularly those associated with the loss of profits from the balance of the agreement: Future losses are not provided for in section 14 of the CPA.

All a consumer need do is give the supplier 20 business days' notice in writing or other recorded manner and form. They will still be liable for any outstanding fees up to the date of cancellation and the payment of a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in anticipation of the agreement running for the full period.

In calculating the penalty, the supplier must take into consideration:

> (b) the value of the transaction up to cancellation;
> (c) the value of the goods which will remain in the possession of the consumer after cancellation;
> (d) the value of the goods that are returned to the supplier;
> (e) the duration of the consumer agreement as initially agreed.

It may be permissible for a supplier to agree up front with the consumer a sliding scale in respect of permitted penalty charges that relates to the period of the contract and the point at which it is cancelled, so long as the penalty is not out of proportion to the harm suffered by the supplier.

[52] See: https://www.consumer.org.nz/articles/auckland-gym-cautioned.

Cell phones/ wireless devices

Almost 90% of the country's population is covered by mobile telephone (cell phone) networks. With an estimated 39 million subscribers, South Africa is one of the fastest-growing mobile markets in the world.[53] While pay-as –you-go contracts are becoming increasingly popular, there are still many subscribers tied into fixed- term contracts. This office receives numerous complaints regarding the cancellation of such contracts, particularly that the penalties imposed upon cancellation are so high that they in effect trap the consumers.

The following view is expressed on the website fair contracts.org: [54]

> "However, at any given time, most cell-phone users are in a "cell-phone jail." They are locked into their cell-phone contracts, so they cannot behave like rational consumers in a market economy: they cannot go out and buy a new cell phone when there is a good deal; they cannot switch cell phone carriers if a competitor is offering a better deal. This is because cell-phone service providers usually charge "early termination fees" (ETFs) for cancelling service. The fee, which ranges from $175 to $200, is usually big enough to discourage users from cancelling or switching service providers."

In one matter received by us, the consumer calculated that the amount demanded by the cell phone company actually exceeded what it would cost were he merely to continue to pay the monthly subscription until the end of the contract period.

We deal here with the cancellation termination of the contract by consumers for reasons other than a lack of performance by the supplier of its obligations (breach of contract). As the right of a consumer to cancel a fixed-term contract is dealt with above in the section on gyms, it is not repeated in detail here. To recap, in terms of the CPA,[55] the consumer may cancel the contract by giving the supplier 20 business days' notice in writing or other recorded form. The consumer remains liable to the cell phone company, however, for any amounts owed in terms of the contract up to the date of the cancellation. Further, the supplier is entitled to impose a reasonable cancellation penalty with respect to any goods or services provided, or discounts granted, to the consumer "in contemplation of the agreement enduring for its intended fixed term".[56]

Some guidance as to how to calculate the "reasonable cancellation penalty" is provided in Regulations 5(2).

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[53] See: http://www.lucidliving.co.za/consumer-protection-act/cell-phone-service-providers-attract-attention-of-consumer-commission/.

[54] See: http://www.faircontracts.org/issues/cell-phones.

[55] S.14(2)(b)(i).

[56] S 14(3)(b)(i)

Calculation of penalty

For the reasons previously stated in the section on gyms, the cell phone service providers may not recoup any amount as damages for future losses such as monthly subscriptions and anticipated profits from usage of the service. They may only recover amounts already due and payable (already owing to them) and charge a penalty in respect of three specific type of loss suffered by them:

i) goods provided (cell phone, tablet or other wireless device);
ii) services provided (it is difficult to conceive of any service that is provided in anticipation of the contract running its course but for which there is no up-front charge);
iii) discounts granted (the cheaper rate or price that the consumer benefitted from).

<u>The goods provided</u>

In calculating the penalty, the supplier must in terms of regulation 5(2) consider:

- the value of the transaction up to cancellation;
- the value of the goods which will remain in the possession of the consumer after cancellation;
- the value of the goods that are returned to the supplier; and
- the duration of the consumer agreement as initially agreed.

This is a calculation that is readily capable of being reduced to an online application (app) of the sort available in the USA.[57] In Canada, section 16 of Bill 60, Wireless Services Agreements Act, 2013 very helpfully provides this formula:

> (7) If the consumer cancels a wireless agreement with a fixed term and in respect of which the supplier provided goods to the consumer free of charge or at a discount, the maximum amount that the supplier may charge the consumer as a cancellation fee shall not exceed the amount determined by the following formula:
> $A – (A \times B \div C)$ where,
>
> A = the estimate that the supplier has made in good faith of the value of the economic inducement described in paragraph 10 of subsection 10 (1) and that the supplier is required to disclose under that paragraph,
>
> B = the lesser of 24 and the number of months that have elapsed under the agreement until the cancellation, counting the final part of a month, if any, as a whole month,
>
> C = the lesser of 24 and the number of months in the term of the agreement, counting the final part of a month, if any, as a whole month.[58]

[57] See: http://www.myrateplan.com/contract_termination_fees.

In line with the requirements of CPA regulation 5(2), the following formula is suggested to calculate the penalty (P):

$$P = V - \left(\frac{V-R}{D} \times T\right)$$

Where:
V is the value of the goods (at date of purchase- discussed below) which will remain in the possession of the consumer after cancellation

R is the value of the goods that are returned to the supplier:

D is the duration of the consumer agreement as initially agreed

T is the actual duration up to date of cancellation

EXAMPLE

A consumer takes out a 24 month cell phone contract and is given a handset worth R 2 400. After 18 months, the consumer cancels the contract and keeps the handset.

Summary of Facts:

Value of cell phone: R 2 400 (V)

Value of the goods returned to the supplier: Nothing returned: R 0 (R)

Duration of the consumer agreement as initially agreed: 24 months (D)

Actual duration up to date of cancellation: 18 months (T)

Calculation:

$$P = V - \left(\frac{V-R}{D} \times T\right)$$

$$P = 2400 - \left(\frac{2400-0}{24} \times 18\right)$$

$$P = 2400 - 1800$$

$$P = 600$$

[58] See the explanation on: https://www.ontario.ca/consommateurs/can-i-be-charged-free-or-subsidized-cellphone-came-my-plan-if-i-cancel-my-wireless.

In effect this formula prorates the value over the length of the initial contract period, in line with the approach taken in USA.[59] In that country, in various class action cases, the courts ruled that service providers could not collect millions of dollars of unpaid early termination fees. A similar approach was espoused by the Law Commission in the UK: "An early termination charge in a mobile phone contract, for example, might be quite fair if it simply recouped the cost of the handset supplied."[60]

In the above example, the assumption is made that the value of the goods was the value at time of purchase, rather than the market value at time on cancellation. This gives rise to the question, what is the value based on: the retail price of the cell phone at time of sale or the wholesale value (cost to the supplier)? In the USA, service providers subsidise the cost of cell phones.[61] The Federal Communications Commission has expressed the view that the ETF is meant to recoup the wholesale cost of the phone over the life of the contract.[62]

To avoid the debate whether the value is the cost price, a discounted retail value or full retail value, Vodacom charges 75% on the balance of subscription. In contrast, MTN's early termination fee is based on the remaining retail value of the handset plus one month's subscription fee. Cell C's fee is based on the outstanding value of the handset supplied to the consumer. [63]

This issue is considered further in the next paragraph.

Discounts granted

Here the concept is simpler, but the practical application is not. The words "discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term" would apply to a reduction in the per-minute billing rate in consideration of the "bulk" usage over the agreed period. It might also apply to any discount on the price of the cell phone/ other equipment. For this reason, it would be best to treat V in the proposed formula above as usual retail price to keep it simple.

Calculating the actual number of minutes used over the actual duration of the contract in order to establish the extent of any discount might present technical challenges and costly administrative nightmares. To avoid these difficulties, a supplier could agree up front with consumers a sliding scale in respect of permitted penalty charges that relates to discounts and the period of the contract and the point at which it is cancelled.

Whatever method is used must give a reasonable result that is demonstrably proportional to the actual loss suffered. Although there is at present no specific requirement under the CPA similar to that imposed by the National Credit Act to inform consumers at the start of the contract precisely what their liabilities are and what it will cost to cancel the contract at

[59] See: http://www.fcc.gov/encyclopedia/early-termination-fees; http://www.faircontracts.org/issues/cell-phones: B. Early Termination Fee and the case law quoted therein.
[60] See: http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_issues.pdf
[61] See: http://www.faircontracts.org/issues/cell-phones: B. Early Termination Fee 1. Possible improvements.
[62] See: http://arstechnica.com/tech-policy/2010/05/digging-into-atts-new-325-early-termination-fee/.
[63] See: http://www.itweb.co.za/index.php?option=com_content&view=article&id=62601.

any given time, the spirit of the CPA encompasses suppliers providing consumers with all the necessary facts before they sign the contract. This is to enable them to make informed decisions. The trend internationally is to encourage such disclosure.[64]

Locally, section 43 of the Electronic Communications and Transactions Act 25 of 2002 makes it obligatory to inform a consumer of:

> (n) the return, exchange and refund policy of that supplier;…; and
> (r) the rights of consumers in terms of section 44 [cancellation], where applicable.
> …
> (3) If a supplier fails to comply with the provisions of subsection (1) or (2), the consumer may cancel the transaction within 14 days of receiving the goods or services under the transaction.
> (4) If a transaction is cancelled in terms of subsection (3)—
> (a) the consumer must return the performance of the supplier or, where applicable, cease using the services performed; and
> (b) the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.

As with gym contracts, the supplier may not charge a charge which would have the effect of negating the consumer's CPA right to cancel the agreement. Further, the supplier is under an obligation to mitigate its losses.

[64] E.g. Canada, section 10(7) of Bill 60, Wireless Services Agreements Act, 2013: A supplier must disclose: "The manner of calculating the amounts that the consumer is required to pay to the supplier if the consumer cancels the agreement…" In the USA, the Federal Communications Commission is pushing service providers to provide more information about ETFs (http://www.fcc.gov/encyclopedia/early-termination-fees)

Conclusion

A consumer is no longer tied in to a fixed term cell phone contract but may cancel, subject to the payment of a penalty, but not in respect of the loss of profits from the balance of the agreement: Future losses are not provided for in section 14 of the CPA.

All a consumer need do is give the supplier 20 business days' notice in writing or other recorded manner and form. They will still be liable for any outstanding fees up to the date of cancellation and the payment of a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in anticipation of the agreement running for the full period.

In calculating the penalty, the supplier must take into consideration:

(b) the value of the transaction up to cancellation;
(c) the value of the goods which will remain in the possession of the consumer after cancellation;
(d) the value of the goods that are returned to the supplier;
(e) the duration of the consumer agreement as initially agreed.

It may be permissible for a supplier to agree up front with the consumer a sliding scale in respect of permitted penalty charges that relates to the period of the contract and the point at which it is cancelled, so long as the penalty is not out of proportion to the harm suffered by the supplier.

Annexure "A"

Breach and Cancellation of Contract

This is an attempt to explain for the benefit of non-lawyers the general principles of the law of contract regarding breach of contract and the rights of the contracting parties in that regard.[65] It should be borne in mind that Contract is taught as a subject over a year at universities, so this is no more than a high level view and should not be relied upon. Legal advice should be sought before taking any action.

Breach of contract

A breach of contract occurs, generally, when a party to the contract fails to honour his obligations under the contract. Fault is not a general requirement for the recovery of damages for breach of contract.

Forms of breach:

- Ordinary breach;
- Mora (delay in performance;
- Repudiation;
- Prevention of performance.

Ordinary breach

Ordinary breach relates to how the parties perform. There is a breach if, without lawful excuse, a party fails to do what he has agreed to do (a positive obligation), or does not do what he has agreed not to do (a negative obligation).

The requirement for ordinary breach in the case of a positive obligation is that there was some performance which is incomplete or defective. Where the party is under negative obligation, there is a breach when the party does what it has agreed not to do.

Mora

Mora is a delay in performing or failure to performance of a positive contractual obligation. It relates to the time of the performance, specifically to the failure to meet it. The performance must have been fixed for a particular time, either in the contract or by way of a subsequent demand for performance by a specific date that is reasonable in the circumstances.

The delay must be the party's fault and not out of his control/ made impossible by outside factors, unless the party has guaranteed timeous performance.

[65] Based on: http://en.wikipedia.org/wiki/South_African_contract_law#Remedies_for_breach.

The consequences of delay are threefold. First, supervening impossibility of performance, which is not due to the fault of either party, does not terminate the contract; secondly, as in all cases of breach, the innocent party is entitled to contractual damages for any loss sustained as a result of the *mora*, irrespective of whether he can or does rescind the contract and thirdly, the creditor may cancel the contract if "time was of the essence of the contract," or was made so by a notice of rescission."

Time is of the essence when the parties expressly or impliedly agreed that default of performance by the day fixed would entitle the other party to cancel the contract.

Where time is not of the essence, the creditor may make it so by sending to the debtor a "notice of rescission," informing him that, if he does not perform by the agreed date, or by a date fixed in the notice, the creditor may cancel the contract. The time stipulated for performance must be reasonable, taking into consideration all the circumstances of the case.

The usual remedies apply for breach in the form of *mora*, namely:

- Specific performance
- Cancellation
- Damages.

In consumer contracts, the CPA has overridden the common law rules regarding delay. It is evident from the number of times that delay is mentioned that the CPA considers it to be an important matter:

> 19(2)Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that—
>
> (a) the supplier is responsible to deliver the goods or perform the services—
>
> (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
>
> …
>
> 19(6) (6) If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either—
>
> (a) accept the delivery or performance at that location, date and time;
>
> (b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
>
> (c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21.

21(1)(c) if a supplier delivers goods or performs services at a location, date or time other than as agreed, and the consumer has rejected that delivery or performance of services, as contemplated in section 19(6), those goods or services are unsolicited;

54. (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—

(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;

Repudiation

Repudiation is a party's demonstration, by words or conduct, and without lawful excuse, of an unequivocal intention no longer to be bound by the contract or by any obligation forming part of it. A deliberate breach of a single provision in a contract to which that provision is essential amounts to repudiation of the entire contract. There are two kinds of repudiation:

Ordinary repudiation occurs when the obligation is already owing and anticipatory breach occurs when repudiation is made before the obligation comes due or in anticipation of an obligation to come.

The test to be applied is whether or not that party acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. The breach must be major to constitute repudiation, and the denial must be serious. It must deny a material obligation that goes to the heart of the agreement.

As in all serious cases of breach, the innocent party has a choice of whether to rescind or to affirm the contract, and is relieved of his obligations in terms of the contract.

Prevention of performance

Where performance on either side becomes impossible due to the fault of one of the parties, the contract is not terminated, but the party who rendered performance impossible is guilty of prevention of performance. Fault is an essential element of this breach. The usual remedies, except for specific performance, are available to the creditor.

Remedies for breach

Remedies for breach are aimed either at the fulfilment or at the rescission or cancellation of a contract. Full performance is the natural cause of termination of an agreement. Because breach interferes with proper fulfilment, the primary remedy is accordingly aimed at fulfilment. Cancellation is an extraordinary remedy.

Remedies may be claimed as soon as the breach occurs. This is especially helpful in cases of anticipatory breach, as the claimant does not have to wait for the date when performance falls due.

When breach occurs, the innocent party may generally either:

Uphold the contract and insist on its fulfilment, by claiming either specific performance or its financial equivalent

or

Rescind the contract, tender the return of the other party's performance and claim restitution of any performance already made by himself.

Parties to an agreement may agree on remedies in the event of breach. Such agreement then takes precedence in the application of remedies for breach. Three types of remedy are available:

Remedies aimed at enforcement (which include specific performance)

Cancellation

Remedies aimed at compensation (which include damages and interest)

Enforcement and cancellation are mutually exclusive remedies. Damages and interest are cumulative to other remedies. An innocent party may have alternative or additional claims in delict.

Remedy aimed at keeping the contract alive

Specific performance

A claim for specific performance is the primary and obvious and most basic remedy for breach of contract[66], upholding as it does the expectation interest of the creditor: When one enters into a contract, one expects performance in terms of it. A claim for specific performance may be for the payment of a sum of money, a claim for the performance of some positive act other than payment of money or a claim to enforce a negative obligation.

The courts have exercised an equitable discretion to refuse a claim for specific performance, usually on the grounds of impossibility, undue hardship or in claims for the enforcement of personal services.

[66] François du Bois et al *Wille's Principles of South African Law* 9th ed at 872 refers to it as the natural remedy for breach, since the object of the injured party in making the contract was to gain some specified benefit, and not the extinction of the contract, or pecuniary compensation.

Cancellation

Cancellation is a drastic remedy which negates the original intention of the parties in concluding the agreement.[67] It cannot be claimed in all circumstances. It is an extraordinary remedy, available only if the breach is sufficiently serious or material—unless the parties have provided a cancellation clause (a *lex commissoria*/ forefeiture clause) in the agreement, in which case the agreement takes precedence over common-law rules. If the breach is minor, and there is *no lex commissoria*, the innocent party can always rely on specific performance and claim for damages.

In *Swartz & Son v Wolmaransstad* the test was stated as being whether the breach 'goes to the root of the contract', or affects a 'vital part' of the obligations or means that there is no 'substantial performance'. It amounts to saying that the breach must be so serious that it cannot reasonably be expected of the other party that he should continue with the contract and content himself with an eventual claim for damages.

In *Strachan v Prinsloo*, the court held that an important factor in deciding whether such term was vital was the question whether the defendant would have entered into the agreement in the absence of such term.

The notice of cancellation must be clear and unequivocal, and made within reasonable time. Once the decision is made, it is final. Cancellation takes effect *ex nunc* (from that point onwards) when the other party is informed of it. Cancellation is in this way different from recission, which applies to voidable contracts *ex tunc* (from the beginning of the contract).

Consequences

The effect of cancelling a contract is that the primary and unexecuted obligations of the parties are extinguished. Accrued rights continue to be enforceable. Upon cancellation, each party is obliged reciprocally to restore whatever performance has been received—that is, to make restitution—to the other party. If, for example, a lessor cancelled because the lessee had three months' rent owing, the lessor may still claim the rent outstanding.

Damages

Damages are a primary remedy for breach of contract: a claim to compensate for financial loss suffered as a result of the breach. Damages may be claimed in addition to other remedies. Their purpose, if they are positive-interest or expectation damages, is to place the innocent party in the position he would have occupied had the contract been properly and timeously performed (though the defaulting party is not liable for special consequences he could not have contemplated when he entered into the contract). Negative-interest or reliance damages aim to place the plaintiff in the position he would have occupied had he not entered into the contract at all. Contractual damages may include both expectation and reliance losses.

[67] Wille's Principles (referred to in the previous footnote) at 872.

The requirements for a damages claim are:

A breach of contract by the defendant

Financial or patrimonial loss by the plaintiff, although it must be either *damnum emergens* (loss actually incurred because of the breach) or *lucrum cessans* (prospective damages or loss of profits that would, because of the breach, have been made in the future)

A factual causal link between the breach and the loss; and

Legal causation: The loss must not be too remote a consequence of the breach.

In terms of the difference rule, a plaintiff's financial loss is determined by comparing the patrimonial position occupied after the breach with the hypothetical patrimonial position that would have been occupied had the contract been properly performed. A distinction is made between positive interesse, which applies to contractual damages, and negative i*nteresse*, which applies to delictual ones. As the court put it in *Trotman v Edwick*, the litigant who sues on delict sues to recover a loss sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.

The courts often use a more concrete approach to calculate damages in contractual cases, comparing the value that the specific asset or obligation would have had with its actual value after the breach (rather than on the patrimony as a whole). In terms of the market-value approach (where performance consists of marketable goods), the amount of damages is determined by the difference in the market value of the goods as received and the market value they would have had if the goods had conformed with the requirements of the contract. Wille's Principles[68] gives the example of the case of a seller of an article failing to deliver it; the purchaser is entitled to claim the difference between the purchase price and the much higher price as he is obliged to pay for the article in the market.

In terms of the once-and-for-all-rule, the plaintiff must claim all of his damages in one action. If not all of the loss has been suffered at the time the action is lodged, the plaintiff must include a claim for prospective losses in that action.

Factual causation is established by means of the "but-for" (or *conditio sine qua non*) test. The test for legal causation asks whether the causal connection between the breach and the loss is sufficiently close to justify the imposition of liability. General damages are generally and objectively foreseeable as flowing from the type of breach and are thus not too remote and are recoverable. Special damages would not normally be expected to flow from the type of breach in question and are thus presumed to be too remote unless exceptional circumstances are present. In terms of the convention principle, special damages can be claimed where the parties entered into the contract on

[68] Referred to in previous footnote at 883. See also Visser and Potgieter Law of Damages 3ed at para12.4.

the basis of their knowledge of the special circumstances, and thus can be taken to have agreed that there would be liability for damages arising from such circumstances.

To provide quick and easily provable relief in the event of breach of contract, contracts often include penalty clauses or other similar clauses (pre-estimates of damages and forfeiture clauses). Clauses falling within the scope of the Conventional Penalties Act are enforceable but subject to reduction on equitable grounds. A penalty clause excludes a claim for damages.

Interest that a creditor would have earned on an amount, had it been paid, is a loss that flows naturally from the breach and therefore constitutes damages that can be claimed. At common law, *mora* interest on a debt becomes payable from the date that a liquidated debt falls due. Where no date for payment is agreed, payment becomes due on demand from the creditor. In a claim for unliquidated damages, the debtor cannot be in *mora* until such time as the amount of damages has been fixed by a court. Interest is therefore only payable from the date of judgment.

The Prescribed Rate of Interest Act now governs claims for the payment of interest.

Other remedies

Other remedies available in the case of breach include the interdict and the declaration of rights.

CONVENTIONAL PENALTIES ACT NO. 15 OF 1962

1. Stipulations for penalties in case of breach of contract to be enforceable.

(1) A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.

(2) Any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty.

2. Prohibition on cumulation of remedies and limitation on recovery of penalties in respect of defects or delay.

(1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.

(2) A person who accepts or is obliged to accept defective or non-timeous performance shall not be entitled to recover a penalty in respect of the defect or delay, unless the penalty was expressly stipulated for in respect of that defect or delay.

3. Reduction of excessive penalty.—If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.

4. Provisions as to penalty stipulations also apply in respect of forfeiture stipulations.—A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, remain liable for the performance of anything thereunder, shall have effect to the extent and subject to the conditions prescribed in sections one to three, inclusive, as if it were a penalty stipulation.

CONSUMER PROTECTION ACT

Section 14 (3) Upon cancellation of a consumer agreement as contemplated in subsection (1)(b)—

(a) the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and

(b) the supplier—

(i) may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any;

Regulation 5(2) For purposes of section 14(3), a reasonable credit or charge as contemplated in section 14(4)(c) may not exceed a reasonable amount, taking into account-

(a) the amount which the consumer is still liable for to the supplier up to the date of cancellation;

(b) the value of the transaction up to cancellation;

(c) the value of the goods which will remain in the possession of the consumer after cancellation;

(d) the value of the goods that are returned to the supplier;

(e) the duration of the consumer agreement as initially agreed;

(f) losses suffered or benefits accrued by consumer as a result of the consumer entering into the consumer agreement;

(g) the nature of the goods or services that were reserved or booked;

(h) the length of notice of cancellation provided by the consumer;

(i) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and

j) the general practice of the relevant industry.

(3) Notwithstanding subregulation (2) above, the supplier may not charge a charge which would have the effect of negating the consumer's right to cancel a fixed term consumer agreement as afforded to the consumer by the Act.

Section 17(3) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date may—

(a) require payment of a reasonable deposit in advance; and

(b)impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5).

(4) For the purposes of this section, a charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to—

(a) the nature of the goods or services that were reserved or booked;

(b) the length of notice of cancellation provided by the consumer;
(c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
(d) the general practice of the relevant industry.

Section 49 (1) Any notice to consumers or provision of a consumer agreement that purports to—

(a) limit in any way the risk or liability of the supplier or any other person;
(b) constitute an assumption of risk or liability by the consumer;
(c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
(d) be an acknowledgement of any fact by the consumer,

must be drawn to the attention of the consumer in a manner and form that satisfies the
formal requirements of subsections (3) to (5).

…

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—

(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
(b) before the earlier of the time at which the consumer—
    (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
    (ii) is required or expected to offer consideration for the transaction or agreement.

Section 64. (1) If, in terms of any agreement, a consumer agrees or is required to pay—
(a) a one-time or periodic membership fee or any similar charge; or
(b) any amount in respect of services or access to services to be provided at a date more than 25 business days after the payment is made, other than by way of a prepayment device contemplated in section 63, the amount so paid remains the property of the consumer until the supplier makes a charge against it in accordance with subsection (2).

Regulation 44(3)

A term of a consumer agreement subject to the provisions of subregulation (1) is presumed to be unfair if it has the purpose or effect of-
(h) allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement;
…
(k) allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer;

(I) enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract;
…
(q) allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative);

(r) requiring any consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier.

(s) permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure;

RANDOM SAMPLE OF CANCELLATION POLICIES: WEDDING VENUES 1

VENUE	POLICY
South African National Biodiversity Institute[69]	• 30 Days prior to arrival a 15% cancellation fee will be levied on the full value of the quotation. • 21 Days prior to arrival a 25% cancellation fee will be levied on the full value of the quotation. • 14 Days prior to arrival a 50% cancellation fee will be levied on the full value of the quotation. • 7 Days prior to arrival a 75% cancellation fee will be levied on the full value of the quotation. • 24hours prior to arrival a 100% cancellation fee will be levied on the full value of the quotation.
Nature's Gate Conference & Wedding Venue[70]	• Reservations cancelled less than 48 hours prior to the scheduled check in date will attract a 100% cancellation fee. • Reservations cancelled longer than 48 hours, but less than 7 days prior to the check in date will attract a cancellation fee of 50% of the full value of the reservation. • Reservations cancelled more than 7 days before the scheduled check in date will attract a handling fee of 10% of the full value of the reservation.
Meander Manor Wedding Venue[71]	• The cost of hiring and securing the use of the Meander Manor Wedding Venue for your wedding day is R11,500 venue hire, plus a R2,000 damage deposit. • Payments of the deposits MUST be paid 6 months prior to the date of your wedding to secure the venue and the facilities exclusively for your chosen date, • Please note that upon cancellation, you will forfeit the venue hire deposit according to our cancellation policy… The damage deposit will be refunded to you in full.

[69] http://www.sanbi.org/sites/default/files/documents/documents/tc-weddevents2014.pdf
[70] http://www.naturesgate.co.za/policy.html
[71] http://www.meandermanor.co.za/meander-manor-wedding-venue/venue-hire/

RANDOM SAMPLE OF CANCELLATION POLICIES: WEDDING VENUES 2

VENUE	POLICY
La Louise Venue[72]	• 1. **DEPOSIT** -A deposit of R7500 and this signed document secures your booking of the venue and the date and time of your function. The deposit may be adjusted depending on the amount of guests attending. -R1500 of the deposit is refundable and will be kept for 2 weeks after the wedding/function when all extras and damages are subtracted. (Where Applicable) **2. CANCELLATION FEE:** In the event of a cancellation, fees will be charged as follows: -The deposit (R7500.00) is not refundable in the event of cancellation or requests to change the reserved date. -In case of cancellation less than 5 months before function date, 50% of total quotation must be paid. **3. PAYMENT:** -50% of Invoice is payable 2 months prior to function. - Total outstanding amount is payable 1 month prior to function - Conference booking - 50% deposit is payable with booking and total outstanding 1 month before function date. - Should payments not be received by due dates, the booking will be cancelled
Missenden Abbey[73] (UK)	**Deposit £ 500** **Length of time before your scheduled wedding day** — **Cancellation charge** More than 6 months — Amount of your deposit (ie non-refundable in all cases) Between 3 and 6 months — Up to 50% of total wedding package price Less than 3 months — Up to 75% of total wedding package price Less than 1 month — Up to 90% of total wedding package price

[72] http://www.lalouise.co/index.php/ct-menu-item-23
[73] http://missendenabbey.co.uk/terms-and-conditions/wedding-venue-hire-terms-and-conditions/

RANDOM SAMPLE OF CANCELLATION POLICIES: WEDDING VENUES 3

VENUE	POLICY
Avantio[74]	**Rescheduling of a date** 17.1 The postponement of a function is considered a cancellation. Please refer to cancellation policy. 17.2 The Client must confirm all changes and cancellations in writing. 18. Cancellation Policy 18.1 Should your wedding be cancelled by the Client for any reason once the deposit has been paid any refund will only be made once the date has been rebooked by another function. Any discounts passed onto the new booking for Venue Hire or minimum Guest Amount will be deducted from the potential refund. A R1500.00 handling fee will be deducted from any refunds. Should the venue not be rebooked the full payments received will be forfeited. 18.2 In the event of non-payment of the fees within the time specified, Avianto shall be entitled to cancel a booking, after giving the client written notice giving them seven days to rectify but no later than 48 hours prior to the function 18.3 In the event the wedding is cancelled by Avianto, for any reason other than due to the default of the Client of the terms of this agreement, Avianto will immediately refund all amounts paid to date by the Client. 18.4 The Client must confirm all changes and cancellations in writing.

[74] http://www.avianto.co.za/documents/Avianto-Wedding-Contract.pdf

RANDOM SAMPLE OF CANCELLATION POLICIES: WEDDING VENUES 4

VENUE	POLICY
Hibon Conference[75]	3 months before stay date: 90% of deposit is refundable. 1 month before stay date: 60% of deposit is refundable. 2 weeks before stay date: 30% of deposit is refundable. 1 week before stay date: 0% of deposit is refundable.
Izotsha Creek[76]	Cancellation Three months before your wedding date – the non-refundable deposit initially paid of R3000.00 Cancellation within One month of the wedding date – 50% of your first deposit will be refunded. Cancellation within Two weeks of your wedding day – the entire sum paid, will unfortunately be forfeited.
SA Convention[77]	Should the event be cancelled, the deposit will be forfeited and the following penalties apply: 121 days or more prior to the event 10% of the value of the latest signed Contract will be payable, at the discretion of Management. 90 to 120 days prior to the event 25% of the value of the latest signed Contract will be payable 60 to 89 days prior to the event 50% of the value of the latest signed Contract will be payable 30 to 59 days prior to the event 75% of the value of the latest signed Contract will be payable 01 to 29 days prior to the event 100% of the value of the latest signed Contract will be payable

Note: It is not possible to obtain the cancellation policies of many of the wedding venues from their websites.
Of those venues covered in this survey, some cater for weddings only, some also cater for other functions also and some offer accommodation. This needs to be borne in mind when comparing them as the notice for accommodation is less than that for general function venues, while that for wedding dedicated venues is longer than the others.

[75] http://hibon.co.za/?page_id=53.
[76] http://www.izotshacreek.co.za/wedding/terms-conditions/
[77] http://www.saconvention.co.za/Terms_And_Conditions.asp

When customers cancel – guidance for tourism businesses:

Consumer Affairs Victoria, Australia[78]

Overview

You can avoid many potential problems by including a cancellation policy in a written booking agreement.

Your cancellation policy and the law

When you take a booking from a customer, you enter into a contract which includes terms and conditions. Ensure that these are fair, because the Australian Consumer Law (ACL) prohibits unfair contract terms. For example, if a contract lets you cancel a customer's accommodation booking in any circumstances without notice, it could be regarded as unfair.

Unfair contract terms are void and you cannot enforce them against customers. You may want to include specific terms and conditions about fees, deposits or cancellation charges. If you do include these, make customers aware of them before they book. Failure to disclose these conditions could also be considered unfair, due to a lack of transparency.

Make sure any fees or charges reflect your reasonable costs. If you don't, they may be seen as penalties, which you generally cannot enforce. Deposits greater than 10 per cent of the total cost of a booking may be considered to be prepayments, which your guests may not have to forfeit if they cancel their booking. Consider whether or not you need more than 10 per cent as a deposit (view 'Cancellation fees' below).

Your cancellation policy should spell out what happens if you or the customer cancels a booking.

When the contract cannot be performed

Bad weather

Generally, a guest is not entitled to a refund due to poor weather, as this would be unlikely to frustrate performance of the contract and prevent the booking from going ahead. For example, you cannot be held responsible for external environmental conditions outside your control such as:

- no snow on a ski trip
- rain during a weekend getaway at the beach
- colder weather than expected on a summer camping expedition.

Sometimes, however, weather conditions may be integral to the nature of the service being provided and determine whether a contract can be performed. You may wish to address these situations through a specific contractual term or condition, as previously described. Keep in mind that any rights arising as a result of a potentially frustrated contract should not be limited by this term or condition.

[78] See http://www.consumer.vic.gov.au/businesses/fair-trading/contracts/tourism-businesses.

Other cancellation rights

Your guests also have certain rights in the form of consumer guarantees under the ACL. Essentially, accommodation must be fit for any purpose specified by the customer. If it is not, the guest may be able to cancel the booking and obtain a refund (less any amount for any services already provided), depending on whether the problem with the accommodation is major or cannot be fixed easily or within a reasonable time.

Cancellation fees

Your ability to claim cancellation costs from a customer depends on certain factors. If you charge a cancellation fee, booking fee or administrative charge, it should not be excessive otherwise it may be regarded as an unfair contract term. You should consider limiting the fee to the reasonable costs associated with making the booking and, if relevant, preparing the accommodation for the customer's arrival, or reserving services for their use.

If the guest has paid you a deposit, then cancels the booking without a good reason (for example, if they just change their mind), you will usually be able to keep the deposit depending on the terms of the contract. Generally, a fair deposit would not be more than 10 per cent of the total cost of the accommodation or service booked, unless your potential loss or inconvenience justifies a higher amount. Otherwise, such a higher amount may be seen as a pre-payment.

Pre-payments are refundable, minus any actual or reasonable costs you may have incurred before the booking was cancelled.

Cutting your losses

Before applying your cancellation policy, take into account the likelihood that losses can be limited by re-booking another guest. While the chances of re-booking get smaller closer to the booking date, you should make reasonable efforts. If you re-book the accommodation for the same price, it may be difficult to argue that you have the right to impose a cancellation fee, except for costs already incurred.

If the contract allows you to reclaim losses from a customer, without taking reasonable steps to avoid them, it may be deemed unfair under the ACL. This could include any terms that allow you to claim the total cost of accommodation from a guest regardless of when they cancel the booking.

Deducting cancellation fees from credit cards

If you record credit card details when confirming a booking by phone, advise customers at the time that their card will be charged if they cancel – and ensure they accept that condition. If you don't, it may be considered an unauthorised transaction under the Australian Securities and Investment Commission's ePayments Code. To be safe, give reservations staff a script to follow.

By issuing a written confirmation, you can also prove to the credit card company that you met their conditions.

Credit notes

If the customer is entitled to a refund, you cannot insist that they accept a credit note. For example, this would be where the accommodation does not meet the consumer guarantee of fitness for purpose or any services have not been provided with due care and skill, and the problem with the services is major or cannot be fixed easily or within a reasonable time.