

ADVISORY NOTE 16: AUCTIONS¹

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 auctions.

Introduction

Auctions have been used as a means of selling property since the days of the Romans and have gained in popularity in recent years. This has been spurred on by the advent of online auctions. Auctions were not comprehensively legislated for prior to being included in the CPA and CPA regulations. Online auctions are, however, governed by the general rules regarding electronic transactions set out in the Electronic Communications and Transactions Act 25 of 2002 (ECTA), except for the cooling off period provided for in section 44.²

The provisions of both the ECTA and the CPA apply concurrently to online auctions, to the extent that it is possible to apply and comply with one inconsistent provision without contravening the second.³ Auctions of all types are governed by CPA section 45 and CPA regulations 18-33, excluding CPA regulation 30, which applies specifically and exclusively to Internet or electronic auctions.

Consideration of section 45

Section 45 of the CPA (Annexure "A") deals only with the sale of items as individual lots; the completion of a sale by the fall of the hammer and the requirement that advance notice be given that a sale is subject to a reserved price or that the owner or auctioneer will be bidding at the auction. The detailed rules of auctions are contained in regulations 18-33.

Two of the issues that arise in the practical application of the provisions of section 45 and the CPA regulations are considered below:

- 1) Does a consumer have any recourse for defects?
- 2) Does a consumer have any recourse for misstatements?

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.

² Section 42(2)(b) specifically excludes auctions from the application of section 44.

³ CPA s 2(9)(a).

Consideration of issues

1) Does a consumer have any recourse for defects?

Of crucial importance is the fact that CPA section 55(i) specifically excludes goods bought at an auction from the protection provided by the section, which includes the requirements that goods be safe, good quality goods in good working order and free of any defects. A consequence of this is that goods sold at an auction may be sold on a *voetstoots* basis. In effect, the consumer buys the property in the condition it is in and does not enjoy the benefit of any warranty against defects. This merely reflects the common law position regarding auctions.⁴ Sharrock however argues that this does not mean that the common-law principles relating to the quality and condition of goods sold are also excluded.⁵ The seller may, however, be absolved from liability if the conditions of sale applicable to the auction contain a *voetstoots* clause.

That is not an end to the matter. A *voetstoots* clause or indeed any exemption clause can be avoided and a seller held liable for a defect if a seller makes a fraudulent or deliberate misrepresentation. This is what was found to be the case in *Auction Alliance (Pty) Ltd v Netluk Boerdery CC and Another* (2011/10152) [2011] ZAGPJHC 87. In that case, the auction house made representations in its advertising material and verbally that the property was a security estate with a specified number of completed units, only a few of which might have required minor repairs. The Court overturned the sale after having accepted that the representations were in many ways misleading and that they were made deliberately. The Court, however, did not do so lightly. It painstakingly scrutinised numerous aspects of the evidence before doing so.⁶

Where a seller recklessly tells a half-truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance, this may also amount to fraud.⁷

However, a litigant who undertakes the burden to establish fraud must ensure that both his allegations, and the facts on which he relies to underpin them, are clear and specific: *Odendaal v Ferraris* (422/2007) [2008] ZASCA 85 at para 42. In that case, the court upheld a *voetstoots* clause that was under attack based on the buyer of a house's allegations that the seller's failure to obtain statutory approval for building alterations on the property constitutes a latent defect in the property, which along with other defects, were concealed from him. The court held that, at best, his allegation was one of innocent misrepresentation, which must flounder in the face of the *voetstoots* clause. This was in spite of the seller's

⁴ Kerr *The Law of Sale and Lease* (2004) at 135. In *Estate Francis v Land Sales (Pty) Ltd* 1940 NPD 441 at 446, Broome J stated that the modern machinery of execution is hardly compatible with the existence of the *aedilician* remedies.

⁵ In Naudé and Eiselen (eds): *Commentary on the Consumer Protection Act* 45-37 at para 53.

⁶ Paras 38-47

⁷ H Christie *The Law of Contract in South Africa* 5 ed (2006) p 295.

estate agent having given the buyer that the swimming pool and jacuzzi were free from defects and the improvements to the property were in a faultless condition.

Unlike section 55, section 61, which holds a supplier liable for damages caused by defective goods even if the supplier was not negligent, does not expressly exclude goods sold by auction.⁸ This seems to be anomalous as a seller by auction who is not a consumer is exposed to greater liability under section 61 than the seller is excluded from by section 55: this may have been an oversight by the legislature. The auctioneer may however be able to escape liability under section 61(4)(c) if it is unreasonable to expect the auctioneer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers.

In view of the exclusions of goods sold at auction from the section 55 protection, a purchaser at an auction would be well advised to inspect the goods beforehand, if possible with the assistance of an expert. Regulation 28(5) requires an auctioneer to afford consumers a reasonable period of time and opportunity to inspect the goods on offer prior to the commencement of an auction, free of charge, subject to the right to restrict access to such goods on the grounds of the consumer acting unlawful or in contravention of the rules of auction or to require the consumer to adhere to or submit to any reasonable security measures.

2) Does a consumer have any recourse for misstatements?

Section 41(1) prohibits a supplier from directly or indirectly expressing or implying a false, misleading or deceptive representation concerning a material fact to a consumer. Even a failure to correct an apparent misapprehension on the part of a consumer may amount to a false, misleading or deceptive representation. A contravention of the section could lead a court to make an order to money or property to the consumer or to compensate the consumer for losses or expenses suffered or incurred, in terms of section 52(3).

Section 41 is reinforced by regulation 24(m), which prohibits an auctioneer from knowingly misrepresenting the value, composition, structure, character or quality or manufacture of the goods put up for sale at an auction.

Section 115 (2) provides in a roundabout way that a person who has suffered loss or damage as a result of prohibited conduct may institute a claim in civil court after obtaining a certificate from the Tribunal to the effect that the conduct complained of was prohibited or required by the CPA. A supplier may also, in terms of section 112(1), have an administrative fine imposed upon it by the Tribunal in respect of prohibited or required conduct.

⁸ De Stadler in Naudé and Eiselen (eds): *Commentary on the Consumer Protection Act 55-3* para 5.

In the recent case of *Hansa Silver (Pty) Ltd and Others v Obifon (Pty) Ltd t/a The High Street Auction Company* (192/2014) [2015] ZASCA 54 at para 26, van der Merwe AJA stated:

“In my view the enquiry should centre on whether the non-disclosure of a vendor bid in any given case constituted a misrepresentation. That question must of course be decided on the facts and circumstances of each case. If the failure to identify a vendor bid as such does constitute a misrepresentation in the particular circumstances, an auction sale may in terms of general principles of contract be avoided if the misrepresentation was material and induced the sale.”

The auctioneer has the power, as a representative of the seller, to make a representation which binds the seller. The seller would accordingly be liable for any such representations.⁹ The auctioneer’s authority is however always subject to the conditions of sale.¹⁰ If the seller of the property is a business rather than a private individual not trading, regulation 44(3)(d) may prevent it from contractually excluding itself from liability for a statement made by an auctioneer acting on its behalf: The regulation creates the rebuttable presumption that a term that limits the supplier's vicarious liability for its agents is unfair.

Where the seller is private individual not in business, the seller is covered only by the common law and not the CPA, which applies to transactions in the ordinary course of business. In the case of *Doyle v Killeen and Others* (NCT/12984/2014/75(1)(b)CPA, the Tribunal held firstly that the seller had not sold the property in the ordinary course of business and secondly that the fact that an estate agent marketed the property on behalf of the seller did not make the estate agent a representative of the seller. It is difficult to reconcile this finding that an estate agent is not the seller’s representative with the authority cited by Sharrock to the effect that an auctioneer is the seller’s representative, particularly as some estate agents sell by way of auction.¹¹ In *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 (2) SA 881 (A), the court held at para 24 that an estate agent can be vested with the authority to sell a property.

The former finding meant that the seller was not covered by the CPA and the latter that the seller could not be held jointly and severally liable with the estate agent under section 113(1) for any misrepresentation made by the estate agent. The dispute related to a leaking roof of the building sold to the plaintiff by an estate agent on behalf of a private seller. The Applicant claimed that a false, misleading and or deceptive representation was contained in the agreement, namely that “The seller warrants that he is unaware of any latent defects in the property.” The agreement was subject to a voetstoots clause.

Sharrock raises the question whether CPA section 51(1)(g)(i), which prohibits a supplier from making an agreement subject to a term that falsely expresses an acknowledgement by the consumer that before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier, would prevent an auctioneer from exercising the common law right to contract out of liability for non-fraudulent representations made by the auctioneer.¹²

⁹ Sharrock in Naudé and Eiselen (eds): Commentary on the Consumer Protection Act 45-29 at para 25.

¹⁰ *Estate Francis v Land Sales (Pty) Ltd* 1940 NPD 441 at 457.

¹¹ Op cit.

¹² Ibid.

The purchaser may institute the *actio empti* where there is either an express or tacit warranty given in terms of the agreement. Other grounds for institution include the warranty by the seller of the presence of good or the absence of bad characteristics in the thing sold; where the seller concealed the defect.¹³ In *van der Merwe v Meades* 1991 2 SA 1 (A) 3 the court held that the purchaser had to prove that the seller was aware of the existence of a latent defect at time of conclusion of the contract and concealed it *dolo malo* (with the intention to defraud). The purchaser will in these instances be entitled to use the *actio empti* even if a *voetstoots* clause is present.

Where a motor vehicle is auctioned, the auctioneer must attach a notice to the vehicle when it is available for inspection by prospective bidders, which must include information such as:

- whether the auction house, motor vehicle dealer, bank or other financing entity is liable to discharge the duty of repair, or not;
- the name and address of the last owner of the vehicle who was not a dealer, bank or entity;
- the vehicle's year of manufacture, if known;
- the vehicle's year of first registration;
- the vehicle's manufacturer and model designation;
- the vehicle's registration number;
- the vehicle's engine number;
- the vehicle's identification number (VIN); and
- a statement whether or not the reading of the odometer of that vehicle is guaranteed.

Conclusion

In spite of the exclusion of goods sold on auction from the protection of section 55, an auctioneer can be held liable for misrepresentations made, particularly those that are made fraudulently. That liability may range from the sale being cancelled to civil liability under the CPA, to the imposition of an administrative fine.

¹³ J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages' 2012 *De Jure* 455 at 459 See also De Stadler in Naudé and Eiselen (eds): *Commentary on the Consumer Protection Act* 55-4 para 6.

Auctions

45. (1) In this section, “auction” includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction.

(2) When goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.

(3) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made, a bid may be retracted.

(4) Notice must be given in advance that a sale by auction is subject to—

(a) a reserved or upset price; or

(b) a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction.

(5) Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer—

(a) the owner or auctioneer must not bid or employ any person to bid at the sale;

(b) the auctioneer must not knowingly accept any bid from a person contemplated in paragraph (a); and

(c) the consumer may approach a court to declare the transaction fraudulent, if this subsection has been violated.

(6) The Minister may prescribe requirements to be complied with by an auctioneer, or different categories of auctioneer, in respect of—

(a) the conduct of an auction;

(b) the records to be maintained with respect to property placed for auction; and

(c) the sale of any such property by auction.

Regulations

Definitions, interpretation and application: auctions

18 (1) In regulations 19 to 30, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Act has the same meaning, and -

"auction house" means a company or other juristic person which from time to time conducts auctions as part of its business;

"auction without reserve" means an auction at which -

- (a) goods are sold to the highest bidder without reserve;
- (b) the auction does not require a minimum bid;
- (c) the auction does not allow competing bids of any type by the seller or an agent of the seller; and
- (d) the seller of the goods cannot withdraw the goods from auction after the auction is opened and there is public solicitation or calling for bids;

"auctioneer" means the person conducting an auction, irrespective of whether he or she is doing so for his or her own account or as employee of or agent for an auction house or other person;

"bidders' record" means the document contemplated in regulation 26;

"closed auction" means an auction where the auctioneer or the owner, as the case may be, issues an invitation to take part in an auction only to a finite list of consumers;

"game" means game as defined in section 1 of the Game Theft Act, 1991 (Act No. 105 of 1991);

"goods" includes, where appropriate, services;

"livestock" means cattle, sheep, goats, pigs, horses, mules and donkeys;

"lot" means any group of goods sold or offered for sale as a unit and identified as such;

"vendor's roll" means the document contemplated in regulation 28(4); and

"URL" means an operational uniform resource locator, providing access to information on the internet.

(2) Regulations 19 to 30 must be read together with section 45(6) of the Act.

(3) Subject to subregulation (4), these regulations apply to all auctions, irrespective of the nature of the goods offered on auction, the value of the property or the reason for conducting the auction.

(4) These regulations do not apply to -

(a) transactions concluded under the auspices of a registered or licensed stock exchange or similar institution; or

(b) an auction where the goods for sale have been donated for sale at an auction and the proceeds of the auction are paid to a bona fide religious, educational, cultural, welfare, social or sports organisation or body which does not as its primary activity undertake commercial or business operations, but an auction conducted as a sale in execution or ordered by a court of law does not constitute an auction contemplated in paragraph (a).

(5) Any provision in any agreement relating to goods sold or bought at an auction or advertised or offered for sale at an auction, or any agreement providing for conducting the auction itself, in conflict with these regulations, does not from the moment of its conception or conclusion, as the case may be, have any force or effect, but this subregulation must not be interpreted so as to prevent holding a person liable for any relevant contravention.

(6) These regulations do not detract from any law providing for or related to the advertising, sale, purchase, delivery, rendering or financing of goods.

(7) An auctioneer selling immovable property by way of auction must comply with any other applicable law in respect thereof, including legislation regulating the activities of estate agents.

(8) An auctioneer must comply with all general provisions of these regulations as well as those applicable to the category of auction or auctioneer provided for in regulations 32 and 33.

Mandatory advertising of auctions

19 (1) Subject to regulations 33, no goods may under any circumstance whatsoever be sold by auction unless the inclusion of such a particular item or lot or service in that auction has been advertised in compliance with these regulations in such a manner that the general public has had a reasonable opportunity to become aware of the auction, the goods on offer and of the rules governing the auction.

(2) The onus to prove that an auction was advertised as contemplated in subregulation (1) rests on the auctioneer.

(3) An auctioneer must for purposes of subregulation (1) advertise the auction of a particular item or lot at least 24 hours prior to the commencement of the auction, but (a) any goods may be withdrawn at any time prior to the commencement of the auction;

(b) in the event of an auction where goods offered for sale include immovable property, this period must exceed five business days.

(4) If an auction or part thereof relates to goods sold in execution or by order of court, the advertisement must clearly state that fact.

General rules on advertising of auctions

20 (1) Despite the rules and rulings of any advertising standards body, all advertising of auctions must-

(a) be accurate; and

(b) provide sufficient information for a reasonable consumer to -

(i) understand that it relates to an auction; and

(ii) be able to find the place where the auction is to be held.

(2) Advertising relating to an auction must subject to subregulation (3) -

(a) be in a legible format and size;

(b) contain a reference to these regulations, together with the URL of an operational internet site where a copy of these regulations can be obtained;

(c) state the date, place and time of the auction;

(d) state the name of the auctioneer and the auction house, if any, and if registration or licensing of auctioneers or auction houses after the commencement of these regulations becomes mandatory, such registration or licensing number;

(e) state where the rules of auction can be obtained;

(f) state the particulars of the goods offered on auction;

(g) if applicable, state that the auction will be held over a number of days;

(h) state, if applicable as contemplated in section 45(4) of the Act, that a sale by auction is subject to-

(i) a reserved or upset price; or

(ii) a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction; and

(iii) contain a reminder that all prospective bidders must register as such prior to making bids during the auction and that such registration requires proof of identity and of residence as contemplated in regulation 26;

(iv) disclose as accurately as possible the total costs of advertising and conducting the auction.

(3) The requirements of subregulation (2) do not apply to roadside advertising or classified advertising in printed newspapers, but such advertising must -

(a) at the top of the advertising prominently display the word "auction";

(b) indicate where a full advertisement as contemplated in subregulation (2)(b) can be obtained; and

(c) state the date, place and time of the auction.

(4) A consumer may at any time during ordinary business hours request an auctioneer to provide him or her with access to an advertisement contemplated in subregulation (2), and the auctioneer must forthwith without charging any fee whatsoever comply with such a request, but -

(a) a consumer is entitled to only one free copy;

(b) the auctioneer may provide a URL of an operational website which will provide a copy of the full advertisement in a format generally used.

(5) Any material or publication not meeting all of the requirements of this regulation does not constitute advertising for purposes of regulation 19 and this regulation.

(6) An auction may not be advertised as a "sale in execution" or use similar wording implying court action unless -

(a) at least 75 percent of the items or lots in the auction are being offered pursuant to a court order;

(b) the items or lots were clearly not purchased or attained for the purpose of resale at auction; and

(c) the advertising contains an explanation of the court order including identification of the court.

(7) Unless all items or lots being offered at auction are pursuant to a court order, then the advertising must indicate that the auction is "with additions", "supplemented" or use similar wording.

(8) Subregulations (6) and (7) do not prohibit clear, non-misleading advertising of the inclusion of specific goods being offered pursuant to a court order in an auction if such goods are offered pursuant to a court order and were clearly not purchased or attained for the purpose of resale at auction.

(9) An auction may not be advertised as an "insolvency auction" or use similar wording implying insolvency unless -

(a) at least 75 percent of the items or lots in the auction are being offered pursuant to an order of the Master of the High Court;

(b) the items or lots were clearly not purchased or attained for the purpose of resale at auction; and

(c) the advertising contains the order number of the Master of the High Court.

(10) Unless all items or lots being offered at the auction are pursuant to an order of the Master of the High Court, then the advertising must indicate that the auction is "with additions", "supplemented" or use similar wording.

(11) Subregulations (9) and (10) do not prohibit clear, non-misleading advertising of the inclusion of specific goods being offered pursuant to an order of the Master of the High Court in an auction if such goods are offered pursuant to an order of the Master of the High Court and were clearly not purchased or attained for the purpose of resale at auction.

(12) An auction may not be advertised as "deceased auction" or use similar wording implying insolvency unless -

(a) at least 75 percent of the items or lots in the auction are being offered pursuant to an order of the Master of the High Court;

(b) the items or lots were clearly not purchased or attained for the purpose of resale at auction; and

(c) the advertising contains the order number of the Master of the High Court.

(13) Unless all items or lots being offered at the auction are pursuant to an order of the Master of the High Court, then the advertising must indicate that the auction is "with additions", "supplemented" or use similar wording.

(14) Subregulations (12) and (13) do not prohibit clear, non-misleading advertising of the inclusion of specific goods being offered pursuant to an order of the Master of the High Court in an auction if such goods are offered pursuant to an order of the Master of the High Court and were clearly not purchased or attained for the purpose of resale at auction.

(15) An auction shall not be advertised as "divorce auction" or use similar wording implying court action unless-

- (a) at least 75 percent of the items or lots in the auction are being offered pursuant to a court order;
- (b) the items or lots were clearly not purchased or attained for the purpose of resale at auction; and
- (c) the advertising contains an explanation of the court order including identification of the court.

(16) Unless all items or lots being offered at the auction are pursuant to a court order, then the advertising shall clearly indicate that the auction is "with additions", "supplemented" or use similar wording.

(17) Subregulations (15) and (16) do not prohibit clear, non-misleading advertising of the inclusion of specific goods being offered pursuant to a court order in an auction if such goods are offered pursuant to a court order and were clearly not purchased or attained for the purpose of resale at auction.

(18) No auction may be advertised as "absolute" or "without reserve", no advertising may contain the words "auction without reserve", "absolute auction" or "without reserve", or the word "absolute" or words with similar meaning and no auctioneer may offer or sell any goods at auction without reserve unless -

(a) there are no liens or encumbrances on the goods, except property tax obligations, easements, or restrictions on record, in favour of any person other than the seller, or unless each and every holder of each and every lien and encumbrance has in writing agreed to the unqualified acceptance of the highest bid for the property, without regard to the amount of the highest bid or the identity of the high bidder, or that a financially responsible person in writing absolutely guarantees the immediate and complete discharge and satisfaction of any and all liens and encumbrances immediately after the sale or at the closing, without regard to the amount of the highest bid received, or the identity of the high bidder; and

(b) there is the bona fide intention at the time of the advertising and at the time of the auction to transfer ownership of the goods, regardless of the amount of the highest and last bid, to the highest bidder, that intent existing without reliance on any agreement that any particular bid or bid level must be made or be reached, below which level the goods will not be transferred to the highest bidder; and

(c) the rules of auction contain a binding requirement that the auction be conducted without reserve.

(19) Subregulation (18) does not prohibit -

(a) a secured party or other lien holder who is not the seller from bidding at an auction without reserve, but such bidding does not constitute, nor is it tantamount to the direct or indirect establishment or agreement to the establishment of a reserve price on the goods by the seller or by the auctioneer, or by anyone aiding or assisting, or acting upon behalf of, the seller or the auctioneer;

(b) any individual party to the dissolution of any marriage, partnership, or corporation from bidding as an individual entity apart from the selling entity, on goods being sold at auction pursuant to that dissolution;

(c) any individual party or heir of a deceased person's estate from bidding as an individual entity, apart from the selling entity, on goods being offered at auction pursuant to that estate being settled; or

(d) the inclusion of non-misleading advertising of certain goods to be offered at auction with reserve, within the same advertisement, or for sale at the same date and place, but that advertisement must make clear, through appropriate emphasis, which goods are being offered by each method.

Rules of auction

21 (1) An auctioneer must -

(a) in writing compile the rules of auction; and

(b) except in the case of a livestock or game auction or a closed auction, make the document available to the general public at least 24 hours prior to the commencement of the auction.

(2) The rules of auction must, as a minimum -

(a) on the first page of the document in large letters display the words "rules of auction", and immediately beneath that the date, place and time of the auction;

(b) contain the full names, physical address and contact details of the auctioneer, and where applicable, of the auction house;

(c) contain all mandatory information required by these regulations, and if applicable, the information contemplated in section 45(4) or (5) of the Act;

(d) contain a statement to the effect that the rules of auction comply with section 45 of the Act and with these regulations;

(e) contain the text of subsection (2) of section 45 of the Act;

(f) provide that an auction will commence at the published time and that it will not be delayed to enable any specific person or more persons in general to take part in the auction;

(g) provide that a person who attends at the auction to bid on behalf of another person must produce a letter of authority meeting the requirements of regulation 26(3) in order to so bid on behalf of that person;

(h) unless the auctioneer is also the owner or rightful holder (who has the right to sell) of the goods to be auctioned, contain a statement to the effect that the auctioneer has a trust account into which all moneys will be paid for the benefit of the seller, minus the agreed commission;

(i) contain a statement to the effect that the auctioneer will during the auction announce the reason for the auction unless that reason is the normal and voluntary disposal of goods by the owner;

(j) provide that a person who intends to bid at the auction must register prior to the commencement as contemplated in regulation 26(2) together with a description of the requirements for registration;

(k) provide that the bidders' record contemplated in regulation 26 and the vendor roll contemplated in regulation 28(4) are available for inspection during normal hours without the charge of a fee; and

(l) contain a breakdown of the total cost of advertising and conducting an auction and a statement indicating whether additional costs may be added and if so, how such additional costs will be computed.

(3) The rules of auction may not -

(a) exclude liability in respect of inaccurate information provided in the advertising of the auction;

(b) exclude liability in respect of the rules of auction not meeting the requirements of these regulations; or

(c) contain any qualification, reservation or diminution of the requirements of these regulations unless expressly provided for.

(4) In the event that the rules of auction are amended after their initial publication, the auctioneer must expressly indicate that the new version is an amended version.

(5) The rules of auction must be signed by the auctioneer who is going to conduct the auction and he or she must certify that the rules of auction to the best of his or her knowledge meets the requirements of this regulation 21.

(6) If on the day of the auction the auctioneer who signed the rules of auction as contemplated in subregulation (5) is unavailable to conduct the auction, the auctioneer who then conducts the auction will be deemed to have so certified the rules of auction.

(7) An auctioneer is personally accountable and liable for the contents of the rules of auction applicable to a specific auction.

(8) The rules of auction need not be read out at an auction to be valid, but only if -

(a) the rules of auction were, where applicable, available to the general public at least 24 hours prior to the commencement of the auction;

(b) in the case of a livestock or game auction contemplated in regulation 33 are the same as for previous auctions and are generally available on the auction house or the auctioneer's website or at the auction house or the auctioneer's business premises during normal business hours;

(c) in the case of a closed auction, were made available to all persons to whom an invitation to take part in that auction was issued; or

(d) at an auction other than an internet auction, the auctioneer invites any person present to object to the rules of auction not being read upon, and nobody does.

(9) The rules of auction may not exclude the right of inspection as contemplated in regulation 28(5).

Auctioneer and auction house to hold and account for consumer's property

22 (1) An auctioneer and auction house must at all times strictly comply with section 65(2)

of the Act.

(2) Unless the auctioneer is also the owner or rightful holder (who has the right to sell) of the goods to be auctioned, no auctioneer may sell goods on auction until he or she has first entered into a written agreement with the owner or rightful holder (who has the right to sell) of such goods to be sold, whether for a specific auction or auctions on general, which agreement contains the terms and conditions upon which that auctioneer accepts the goods for sale.

(3) An agreement contemplated in subregulation (2) must as a minimum contain –

(a) the name and physical address of owner of the goods to be sold or the owner's agent or the rightful holder (who has the right to sell) thereof;

(b) if the goods are to be sold at a specific auction, the date of the auction or if the goods are to be sold at a number of auctions, a termination date of the agreement;

(c) the address of the premises where the auction is to be held;

(d) the rules of auction;

(e) a description of all of the fees to be charged by the auctioneer or the auction house, which must include commissions, storage, advertising and labour, or a method by which such fees will be determined;

(f) an explanation of the settlement of the auction that includes the disbursement of interest money, if applicable;

(g) a statement indicating whether the auction is an auction without reserve or not;

(h) a brief description of the goods to be sold;

(i) if the sale is of goods at auction without reserve, a statement affirming that the seller of the goods has a bona fide intention to transfer ownership of the property to the highest bidder;

(j) an exact copy of section 65(2) of the Act;

(k) an exact copy of subsections (1) to (5) of section 45 of the Act.

(4) An auctioneer must retain a copy of every agreement contemplated in subregulation (2) signed by the owner or rightful holder of the goods to be auctioned for a period of at least three years from the date of the auction.

(5) In performing the duties of an auctioneer, every auctioneer-

(a) is the agent of the owner or rightful holder (who has the right to sell) of the goods for all aspects of an auction;

(b) must follow all lawful and reasonable requests of the owner or rightful holder of the goods or immovable property sold at auction;

(c) must perform his or her duties so that the highest or most favourable offer made by a bidder is accepted; and

(d) must otherwise perform his or her duties in accordance with the highest standards applicable to auctions.

(6) An auctioneer must keep abreast of current market conditions of goods at all times in order to be in a position to advise and perform services for his or her clients to the best of his or her ability.

(7) An auctioneer

(a) owes a duty of care towards his or her client;

(b) must protect and secure the goods whilst under his or her control or in his or her possession;

(c) must at all times preserve a professional, confidential relationship with his or her client;

(d) must timeously reveal estimated costs and services for conducting the auction; and

(e) if he or she is aware or ought reasonably to be aware of any risks associated with the auction of particular goods, must forthwith disclose such risks to the client.

(8) All unsold property must be returned to the owner or rightful holder immediately upon the completion of an auction unless otherwise agreed.

(9) The owner or rightful holder (who has the right to sell) must be provided with an itemised account of all goods sold immediately upon completion of the auction unless otherwise agreed, which as a minimum must contain -

(a) the item or lot sold,

(b) amount received for the sold item or lot; and

(c) the name of the buyers of every item or lot.

Disqualification to conduct auction

23 A person who -

(a) has been found guilty by a court of law, whether in the Republic or elsewhere, of an offence of which fraud or dishonesty is an element, or of any other offence for which such person has been sentenced to imprisonment exceeding five years without the option of a fine;

(b) is of unsound mind; or

(c) is an unrehabilitated insolvent,

may not conduct an auction or in any other way act as an auctioneer or hold him or herself out as an auctioneer.

Prohibited behaviour

24 An auctioneer may not -

(a) charge or receive any fee or commission in respect of the sale of movable goods unless such goods have been delivered to the purchaser; (b) charge or receive any fee or commission in respect of the sale of immovable property until the purchaser and the seller have signed a written agreement in respect of the sale of such immovable property;

(c) charge or receive any fee or commission from the purchaser if the seller defaults or where such fee or commission has already been paid by the purchaser to the auctioneer, the auctioneer shall immediately refund the purchaser the amount paid, including deposit;

(d) charge or receive any fee or commission from the purchaser, if the purchaser defaults, exceeding ten percent of the purchase price or the total cost of advertising and conducting an auction and such additional costs as may have been reasonably incurred in accordance with regulation 21 (2)(1), whichever is the lesser;

(e) charge or receive any fee or commission from the seller, unless agreed otherwise in writing, if the buyer defaults or where such fee or commission has already been paid by the seller to the auctioneer, the auctioneer shall immediately refund the seller the amount paid;

(f) charge or receive any fee or commission from the seller if the seller defaults, unless agreed otherwise, exceeding ten percent of the purchase price or the total cost of advertising and conducting an auction and such additional costs as may have been reasonably incurred in accordance with regulation 21 (2)(1), whichever is the lesser;

(g) enter into any agreement or arrangement with the seller to sell any goods unless the auctioneer has first provided the seller with an estimate of the total cost of the auction; (h) accept a bid from a person unless he or she is registered in the Bidders' Record as contemplated in regulation 26;

(i) set a minimum or reserve price without the express written permission of the seller;

(j) remove an item or lot from an auction without the express written permission of the seller;

(k) allow bidding on an item or a lot if the auction thereof has not been advertised as contemplated in regulations 19 and 20;

(l) during an auction deviate from the sequence of goods as advertised;

(m) knowingly misrepresent, or cause or permit to be misrepresented the value, composition, structure, character or quality or manufacture of the goods put up for sale at an auction;

(n) hinder the access of any person to any advertisement contemplated in these regulations, rules of auction or vendor's roll; or

(o) pay any other person in order to be appointed as auctioneer, whether in general or for a particular auction or in respect of any specific goods.

False entry in auction record

25 Without detracting from any other applicable law, an auctioneer, including an employee of the auctioneer or the auction house, may not knowingly enter in any record kept or required to be kept by the auctioneer under or in terms of these regulations or any other applicable law, any name or other details other than the real name and details of the actual successful bidder.

Bidder's record

26 (1) An auctioneer must for every auction have a bidders' record to record the identity of all bidders at an auction.

(2) Subject to regulation 30(2), the auctioneer must ensure that every prospective bidder must prior to the commencement of an auction register his or her identity in the bidder's record, and such registration must with the necessary changes meet the requirements of Chapter 1 of the regulations in terms of the Financial Intelligence Centre Act, 2001, published in Notice No. R.1595 in Gazette No. 24176 of 20 December 2002, in respect of establishment and verification of identity, and sign that entry.

(3) The auctioneer must ensure that a person who intends to bid on behalf of another, produces a letter of authority expressly authorising him or her to bid on behalf of that person, and both that person and the person bidding on his or her behalf must meet the requirements of subregulation (2)

(4) The auctioneer must ensure that if a person will be bidding on behalf of a company, the letter of authority contemplated in subregulation (3) must appear on the letterhead of the company and must be accompanied by a certified copy of the resolution authorising him or her to do so.

(5) The bidders' record is available for public inspection in respect of the names of bidders and the bidders numbers referred to in subregulation (6) only, at any time, free of charge -

(a) during an auction, at the premises where the auction is being held; and

(b) before or after an auction, at the auction house or auctioneer's place of business and during normal business hours.

(6) An auctioneer must record the bidder number contemplated in regulation 28(1) in the bidders' record.

Ownership

27 The auctioneer must ensure that a person who wishes to dispose of his or her property by way of an auction signs a declaration stating that he or she is the owner or rightful holder of the goods (who has the right to sell) and submits that declaration to the auctioneer.

Bidding

28 (1) An auctioneer must provide a prospective bidder whose name appears in the bidders' record with a bidder number before he or she may bid, as well as a paddle or other device to which that number is attached in such a way that it is clearly visible to the persons present at the auction.

(2) A bid taken from an unregistered person is invalid.

(3) The place where an auction is held must be open and accessible to any member of the public, subject to the auctioneer's right to refuse a person the right to remain on the auction's premises in the event that that person repeatedly behaves in such a way so as to disrupt the auction.

(4) An auctioneer must have a vendor's roll in which all details of the auction are recorded, which must, as a minimum, include -

(a) the advertising of the auction;

(b) the rules of auction;

(c) the bidders' record;

(d) the declarations contemplated in regulation 21 (2)(h) and 27;

(e) a list of all goods on auction, including goods which were withdrawn from auction;

(f) the names of successful bidders, the goods or lots bought and the prices paid in respect thereof;

(g) the details of any challenges to the validity of the auction or the conduct thereof, and the particulars of the persons making such challenges, if available;

(h) any items or lots not sold;

(i) the details of any reserved price or any matter contemplated in subsections (4) and (5) of section 45 of the Act.

(5) The auctioneer must afford consumers a reasonable period of time and opportunity to inspect the goods on offer prior to the commencement of an auction, and no fee may be charged for such opportunity, but an auctioneer may-

(a) refuse or restrict access to such goods if the consumer after gaining access in any way acts unlawful or in contravention of the applicable rules of auction;

(b) require the consumer to adhere to or submit to any security measures reasonably applicable in the circumstances.

(6) Subject to any reserved price and acceptance of the highest bid by the seller, the highest bidder, when the auctioneer announces the completion of a sale by the fall of the hammer, or in any other customary manner, is the purchaser of the goods or lots on auction.

(7) No fee may be charged for participation in an auction, but this does not apply to refundable deposits.

(8) The auctioneer must upon concluding the proceedings of an auction-

(a) announce that the auction has come to an end;

(b) sign the vendor's roll; and

(c) certify that the proceedings of the auction were to the best of his or her knowledge conducted in accordance with these regulations, any other applicable law and the rules of auction.

Mock auction

29 (1) A mock auction is an auction in which -

(a) goods are sold for less than the highest bid, or part of the purchase price is repaid or credited to the purchaser;

(b) the right to bid for goods is restricted to persons who have bought or have agreed to buy other goods; or

(c) any goods are given away as gifts.

(2) No person may promote, facilitate, conduct or take part in a mock auction.

(3) If it can be proved that the reduction in the purchase price or the repayment credit was due to a defect which the auctioneer only became aware of after the highest bid was made, or because of damage sustained after the highest bid was made, the auction will not be considered to be a mock auction.

(4) No person may promote, organize, participate in or benefit from any kind of conspiracy between an auctioneer, any participants in an auction or any other persons who agree not to bid against each other at an auction or who otherwise conspire to decrease or increase the number or amounts of bids offered at auction.

Internet or electronic auctions

30 (1) An auction may be conducted via the internet or other electronic medium or platform, irrespective of where the server or other electronic medium or platform is situated, only if -

(a) it meets all requirements in respect of an auction provided for in these regulations or other applicable law, but with the necessary changes, if any, to suit an electronic medium or platform;

(b) the relevant internet website or electronic medium or platform is generally available to anyone over the age of 18 years at any time of the day;

(c) the relevant internet website or electronic medium or platform provides high standards of security for electronic transactions;

(d) the relevant internet website or electronic medium or platform provides for easy access to all records prescribed in these regulations in a generally used or accepted medium or format;

(e) the internet auction provider keeps the information contemplated in regulation 28(4).

(2) For purposes of regulation 26(2), a prospective bidder in an auction to be held via the internet or other electronic medium or platform must register by providing -

(a) his or her full names, identification or passport number, age, physical address, internet protocol address, and where applicable, login code or name, and password; and

(b) the details of the means by which payment will be effected.

(3) An auctioneer conducting an auction via the internet or other electronic medium or platform may not exclude liability if any goods purchased by auction are not delivered to the purchaser thereof.

Records

31 (1) Irrespective of any other provision to the contrary in these regulations, all records prescribed in regulations 18 to 33 must be kept for a period of at least three years.

(2) (a) Any person in possession of any record contemplated in regulations 18 to 33 must forthwith upon receipt of a written request at his or her own cost provide the Commission or any forum empowered to administer the Act or an owner or rightful holder (whose goods were on auction at the auction in question) or a registered bidder (at the auction in question) with true copies of the record so requested or which may be relevant to any record so requested, but if the original record is expressly requested, that original record must be made available for inspection.

(b) The Commission may not provide copies of any documents which have come into its possession pursuant to paragraph (a) of this subregulation to anyone, unless by order of court, or where it is the interests of justice to do so.

Motor vehicle auctions

32 In addition to any other requirement in these regulations, an auctioneer may not conduct an auction unless a notice containing the particulars and statements required in this subregulation relating to the vehicle, being a motor vehicle as defined in section 1 of the National Road Traffic Act, 1996 (Act No 93 of 1996), is attached to the vehicle and has been attached to the vehicle at all times when the vehicle was available for inspection by prospective bidders, which must include -

(a) the name and business address of the auctioneer;

(b) if the auctioneer or auction house is conducting the sale on his, her or its own behalf, whether the auctioneer or auction house is liable to discharge the duty of repair, or not;

(c) if the auctioneer or auction house is conducting the sale on behalf of-

(i) a motor vehicle dealer or bank or other financing entity, the name in which that dealer, bank or entity is licensed and the business address of the dealer, bank or entity and whether the dealer, bank or entity is liable to discharge the duty of repair, or not; or

(ii) another person, a statement on whether there is a duty to repair, who is liable to discharge that duty to repair and the details of the repair, and if applicable, the name and address of the last owner of the vehicle who was not a dealer, bank or entity, or alternatively a statement that the last owner's name and address are available on request from the auctioneer or auction house;

(d) if the owner let the vehicle on hire to another person under a vehicle leasing agreement, the name and address of such other person, alternatively a statement that such person's name and address are available on request from the auctioneer;

- (e) the vehicle's year of manufacture, if known;
- (f) the vehicle's year of first registration;
- (g) the vehicle's manufacturer and model designation;
- (h) the vehicle's registration number;
- (i) the vehicle's engine number;
- (j) the vehicle's identification number (VIN);
- (k) a statement whether or not the reading of the odometer of that vehicle is guaranteed; and
- (l) a statement contemplated in regulation 21(2)(i).

Livestock, game and closed auctions

33 The provisions of regulation 19(1) does not apply to -

- (a) a closed auction; or
- (b) a livestock or game auction, if such is conducted regularly on a weekly or monthly basis -
 - (i) at the same time, the same place and by the same auctioneer or auction house;
 - (ii) subject to the same rules of auction; and
 - (iii) nothing but livestock or game is on offer.