Availability at advertised price

Incorrect price advertised: price not binding (Case 1)

Complaint ref : 20145261021
Adjudicator : N Melville
Date : 2 July 2014

1. Summary of the complaint

On 25 May 2014, the complainant saw the supplier's advert for a Geneva couch, selling at R1 599. On the following day, the complainant went to the store to buy the couch and was told that the actual price was R3 700. The store said the advertised price of R1 599 was a printing error and the store refused to sell it at that price.

2. Summary of outcome

The supplier is not bound to provide the consumer with a couch at the incorrectly advertised price. Using the reasonable consumer test, the advertisement published in a catalogue by the supplier was not misleading because of the large discrepancy with the actual price.

3. The response of the supplier

The supplier provided this office with its response:

> We apologise for the error that occurred in our latest catalogue. Whilst every care is taken to ensure that this type of error does not occur, through a process of detail checking, sometimes a mistake is not picked up.
>
> As a reputable Company, we can assure you that there is absolutely no intention on our part to mislead our customers in any way. This is a genuine error.
>
> It cannot be considered false advertising as there is an "Errors and omissions" warning in the terms and conditions printed on all our catalogue, and there was fair warning when you arrived at the store in the form of a notice stating "Oops, we spotted a mistake."

4. Legal considerations

Common Law:

I will briefly set out the common law principles as they relate to the advertising of goods and services and associated contracts of sale.

When a supplier advertises goods or services to the public by some method of mass communication such as the media, circulars or catalogues, this is generally considered to be an invitation to treat or do business, or a mere puff.[1] It may, however, depending on the particular wording of the advertisement and the surrounding circumstances, amount to a binding offer made to all the world which will ripen into a contract with anyone who accepts it.[2] This is best illustrated by reference to actual cases.

The publication of an advertisement offering goods for sale at a stated price is not an offer to all who may read the advertisement but merely an invitation to make offers: *Bird v Summerville* 1960 4 SA 395(N) 401D. This is referred to as an invitation to treat.

In the case of *Crawley v Rex*[3], a shopkeeper advertised on a placard outside his shop a particular brand of tobacco at a cheap price to attract the public. A customer who refused to leave the premises when the shopkeeper declined to sell more of the tobacco to him on a second occasion was charged with trespass. In his defence, the customer claimed he was entitled to be in the shop as he was accepting the shopkeeper's offer. The court held that no contract had arisen because the advertisement did not constitute a binding offer that the customer could accept but was merely an announcement of the shopkeeper's intention to sell at the advertised price. In arriving at this conclusion, Smith J made the following observation[4]:

> "The mere fact that a tradesman advertises the price at which he sells goods does not appear to me to be an offer to any member of the public to enter into the shop and purchase goods, nor do I think that a contract is constituted when any member of the public comes in and tenders the price mentioned in the advertisement. It would lead to extraordinary results if that were the correct view of the case. Because then, supposing a shopkeeper were sold out of a particular class of goods, thousands of members of the public might crowd into the shop and demand to be served, and each one would have a right of action against the proprietor for not performing his contract".

In the English case of *Carlill v Carbolic Smoke Ball Co. Ltd*[5] the defendants published an advertisement that claimed that they would pay £ 100 to any person who had correctly used their product and nevertheless contracted influenza. This was held to be a binding unilateral offer to all the world which would be accepted by any person who

[1] R.H. Christie and G.B. Bradfield Christie's Law of Contract in South Africa 6th ed (2011) at 35 and 41
[2] *Carlill v Carbolic Smokeball Co Ltd* [1893] 1 QB 256 at 268.
[3] 1909 TS 1105, analysed in Hanri du Plessis "Display of Goods for Sale, Advertisements and the Consumer Protection Act 68 of 2008" (2014) unpublished article.
[4] At 1108.
[5] Op cit fn 3: According to Christie (op cit at 420), this case influenced Crawley v Rex op cit fn 4.

knew of it and who contracted influenza after using the product as directed. A telling consideration in the decision was that the advertisement also stated that £ 1000 had been deposited in a bank account to show the sincerity of the defendants in their offer.

In *Bloom v American Swiss Watch Co* 1915 AD 100 the defendants advertised a reward for any person who gave information to the police regarding to a jewellery robbery that took place on their premises. The court held that the offer had not been accepted by the first person who supplied information to the police because he had at the time been unaware of the offer.

A case relating specifically to the advertisement of goods for sale is the American case of *Lefkowitz v. Great Minneapolis Surplus Store, Inc*[6]. The facts briefly were that the defendants published this advertisement".

> "Saturday 9 A.M. Sharp 3 Brand New Fur Coats Worth to $100.00. First Come First Served $1 Each."

The first person to attempt to take up the offer was the plaintiff. The defendants refused to sell to him, relying on a "house rule" that the offer was for women only. The court held that the advertisement constituted an offer and the plaintiff's conduct constituted an acceptance thereof.

In arriving at this conclusion, the court stated the test of whether a binding obligation may originate in advertisements addressed to the general public to be "whether the facts show that some performance was promised in positive terms in return for something requested".[7]

Even if an advertisement does amount to an offer, the supplier may nevertheless escape being bound by it if the supplier is able to prove there was some error or mistake in the advertisement (a not uncommon occurrence) and that the customer is trying to snatch a bargain.

Where a party to a contract realises the other party is making a mistake, that party has a duty to speak and to enquire. If he does not do so but decides to snatch the bargain, there is no consensus between the parties, actual or imputed.[8] This does not preclude a buyer who is not deliberately seeking to take advantage of another's known mistake from striking a bargain.[9]

The case law in this area deals mostly with situations in which individuals or businesses represented by individuals are involved in protracted negotiations and not with advertisements in a retail environment, where it is not uncommon for genuine bargains to be advertised as a business strategy. This creates some doubt as to whether

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[6] 86 NW 2d 689 (Minn, 1957) available on http://law.justia.com/cases/minnesota/supreme-court/1957/37-220.html

[7] Ibid, quoting 1 Williston, *Contracts* § 27 (Rev. ed. 1936).

[8] *Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis* (483/90) [1992] ZASCA 56 at para 25.

[9] *Anglo African Shipping (Pty) Ltd. v Slavin's Packaging* (74/85) [1986] ZASCA 110 at para 37.

the defence of snatching a bargain has a place in this environment in the common law, let alone the CPA, which is considered next.

It is not clear to what extent the CPA has overridden the common law, particularly with regard to contracts. There is no room for doubt, however, that the CPA requires that its provisions are construed in a way that favours the consumer.[10] I will now consider the import of section 30, which is reproduced here in full.

> **Bait marketing**
>
> 30. (1) A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price.
>
> (2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits.
>
> (3) It is a defence to an alleged failure to comply with subsection (1) or (2) if—
>
> > (a) the supplier offered to supply or procure another person to supply a consumer with the same or equivalent goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; and
> >
> > (b) the consumer—
> >
> > > (i) unreasonably refused that offer; or
> > >
> > > (ii) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

On a first reading, this section is deceptively simple. It is only when its practical implications are considered that the difficulties it poses become apparent.

The first question to consider is the ambit of the section. It covers the advertising of goods and services. Advertisement is broadly defined to encompass any direct or indirect visual or oral communication transmitted by any medium that brings to the attention of all or part of the public the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which they are available for supply.[11]

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[10] Section 2(9)(b) and 4(3).
[11] Section 1 *sv* 'advertisement'.

The next consideration is how section 30 relates to section 23 as the display of a price in section 23(5) is extended in subsection (c) to include publishing in a catalogue, brochure, circular or similar form of publication available to a consumer, or to the public generally. On the face of it, both section 23(5) and 30 appear to govern the advertisement of goods at a specified price in a catalogue, brochure, circular or similar. Section 30 goes further than section 23(5)(c) as it covers all media of publication. The only way to give effect to both sections is to hold that section 23 generally governs the prices charged for displayed goods and that section 30 applies to the availability of goods advertised other than by means of display. Then section 23(5)(c) merely sets out the specific requirements for advertising[12] the price in a catalogue or the like but does not address the availability of the goods or the price that they must be sold at.

A more important issue with regard to section 30 is whether it indeed addresses the practice of bait marketing or whether it goes beyond that. Specifically, is it requirement that the supplier actually intends to mislead the consumer or is section 30 broad enough to apply to any price advertised that may result in consumers being misled or deceived? In other words, does it impose strict liability?

As bait marketing is a new concept to our law, it is useful to consider the legislative provisions that deal it in other countries in order to gain a better understanding of what is intended in section 30.

England

The Consumer Protection from Unfair Trading Regulations 2008

2008 No. 1277 SCHEDULE 1

Commercial practices which are in all circumstances considered unfair:

> 5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are reasonable, having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
>
> 6. Making an invitation to purchase products at a specified price and then—
>
> (a)refusing to show the advertised item to consumers,
>
> (b)refusing to take orders for it or deliver it within a reasonable time, or
>
> (c)demonstrating a defective sample of it,

[12] This word gives better clarity than "display" that is unfortunately used in the subsection. It would have been preferable to have moved the content of s. 23(5)(c) to s. 30 to avoid confusion.

with the intention of promoting a different product (bait and switch).

Although also somewhat convoluted, these regulations are clearer in their meaning than section 30. It would seem that section 30 (1) encompasses elements of both the scenarios dealt with by of these regulations. As to whether intention is required, reference to reasonableness in regulation 5 brings in negligence, while intention is expressly required by regulation 6.

Australia

The Australian Consumer Law[13]

35 Bait advertising

(1) A person must not, in trade or commerce, advertise goods or services for supply at a specified price if:

(a) there are reasonable grounds for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable, having regard to:

(i) the nature of the market in which the person carries on business; and

(ii) the nature of the advertisement; and

(b) the person is aware or ought reasonably to be aware of those grounds.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) A person who, in trade or commerce, advertises goods or services for supply at a specified price must offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to:

(a) the nature of the market in which the person carries on business; and

(b) the nature of the advertisement.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

Consumer Affairs, Victoria, gives this example:[14]

An electronics retailer runs a major national campaign advertising 50-inch televisions at a low price of $799 for a week-long sale. The retailer usually sells about 30 televisions of this type

[13] The full text of the Australian Consumer Law (ACL) is set out in Schedule 2 of the Competition and Consumer Act 2010 which is the new name of the Trade Practices Act 1974 (TPA). See also: http://www.consumerlaw.gov.au/content/the_acl/downloads/A_guide_to_provisions_Nov_2010.pdf

[14] See http://www.consumer.vic.gov.au/shopping/advertising-and-promotions/bait-advertising.

every week. The retailer only stocks two televisions at the advertised price and refuses to take customer orders.

When customers attempt to buy the television at the advertised price, they are told it is out of stock and offered a more expensive unit for $999. This is likely to be bait advertising as the retailer does not have a reasonable supply of the advertised television.

Section 35(1) of the Competition and Consumer Act equates to the UK regulation 5, although the former is more clearly worded than the latter. Both have in common the requirement of reasonableness.

United States

Retail Advertising Regulations, Massachusetts

Owing to their length, these detailed regulations are not reproduced here. They are available on the internet.[15]

The first thing to note about the Regulations is that they list a number of practices that are considered unfair and deceptive. Another noteworthy aspect is that Regulation 6.13 (3) requires a supplier to honour an advertisement that contains a material error unless it is a gross error[16]. It is permissible under regulation 6.06 (2) for a supplier to advertise goods when it does not have the goods in stock or readily available for sale in sufficient quantities to meet reasonably anticipated demand if the supplier states the minimum quantity of the product available in each store; or that the quantity is limited.

Throughout the regulations it is a defence if the seller has acted in good faith. This fact coupled with the absence of mention of the requirement intention lead to the conclusion that the regulations operate on the basis that culpability is deemed, on a sort of res ipse loquitur basis, unless the supplier disproves it. Actual intention is thus not required: the focus is rather on the conduct, in contrast to the approach taken in England and Australia. The South African approach in section 30, albeit less detailed, appears to follow that taken in the Massachusetts Regulations rather than the English and Australian approach of specifically spelling out the specific intended deception. The heading “Bait Marketing” to section 30 is thus ironically in itself misleading.

Is intention required?

[15] See http://www.mass.gov/ago/government-resources/ags-regulations/940-cmr-600.html#6.13:%20Corrections940 CMR 6.00

[16] A "gross error" is a price which was never intended as the selling price at any time during the previous 30 day period, and which, for an item with an actual selling price of not more than $20.00, is less than half the price stated by the seller as the actual selling price, or which, for an item with an actual selling price of more than $20.00, is more than 20% below the price stated by the seller as the actual selling price.

The conclusion reached in the previous paragraph that intention is not required seems to fly in the face of the general rule in South African law that the legislature intended fault to be an element of liability of a statutory offence.[17] This rule, however, does not apply in respect of the so-called "regulatory" or "public-welfare" offences.[18] The case of *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of the City of Durban*[19] related to the contravention of a by- law governing food safety. In spite of this, the majority held that *mens rea* in the form of *culpa* was required. The rule set out in *S v Arenstein* 1964(1) SA 361 (A) at 365 C-D was applied at paras 5-6:

> "The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. (*R. v. H.*, 1944 A.D. 121 at pp. 125, 126; *R. v. Wallendorf and Others*, 1920 A.D. 383 at p. 394). Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of *mens rea*. (*R. v. H.*, supra, at p. 126.)."

In considering the scope and object of the legislation, the majority considered that the object may generally be attained if *mens rea* in the form of culpa were to be an essential ingredient of the offence, and moreover that members of the affected class will not necessarily escape liability for the acts and omissions of their employees. A further consideration was that the prescribed penalty was not a heavy one.[20]

In his dissenting judgment, Botha JA said as follows:

> "My view is that strict liability should only be found in cases where there are compelling reasons to do so, but that the circumstances of this case proclaim the need to recognize that rare exceptions to the general rule of *mens rea* must be allowed, for the sake of the proper, practical administration of criminal justice."

These principles are now applied to section 30 in order to establish whether intention is a requirement. Starting with the scope and object of the legislation, it is clear that the CPA is public-welfare legislation. It is to be construed in the manner that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally.[21]

As to the nature and extent of the penalty, as section 30 deals with prohibited conduct, an administrative fine, rather than imprisonment, is the prescribed penalty.[22] Looking next to the indications of the wording itself, the words intention or intentional have

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[17] Burchell E.M. & Hunt P.M.A., *South African Criminal Law and Procedure: General principles of Criminal Law*, Volume 1 (2008 Impression) at 251.
[18] Ibid.
[19] (675/92) [1994] ZASCA 2; 1994 (3) SA 170 (AD); [1994] 2 All SA 222 (A).
[20] At para 26.
[21] Section 4(3).
[22] Section 112.

not been used to indicate the requirement of *mens rea*,[23] nor has strict liability been signalled.[24] The reference in section 30(1) of "manner that may result in consumers being misled or deceived" refers to the effect of the conduct and not the intention behind it. In the explanation of misleading or deceptive conduct given by the Australian Department of Industry, it suggests [25]:

> Conduct will be misleading or deceptive if it induces error, or is capable of inducing error, in an ordinary reasonable person…
>
> Conduct can give rise to liability even if …the person making the representation acted honestly and reasonably. All that is necessary for liability to arise is that the conduct did, in fact, mislead or deceive.

The Hobart Community Legal Service takes a different view regarding deceptive conduct, namely that it requires an intention to deceive (fraud) and so is of little relevance because proving fraud is difficult. As far as 'misleading' is concerned, however, it is of the view that this requires no intention or particular state of mind. In fact the prohibition of misleading conduct imposes a strict liability not to lead another into error in commercial and consumer dealings. Case law has established that an innocent (non-fraudulent and non-negligent) statement may generate liability.[26]

The American approach differs from the Australian approach in that the definition of the term "misleading conduct" in 18 U.S. Code § 1515 includes the word "knowingly". In contrast, "mislead" and "misleading conduct" are not defined in the CPA, but in section 24(2)(b), the use of the phrase "calculated to mislead" signals the requirement of intention, while the use of "its general purpose or effect is to—… (ii) mislead or deceive" in section 51(1)(a) covers both the result and intention separately. In comparison, the wording of section 30(1) gives no clear indication one way or the other.

Finally, the all important consideration of the ease with which liability, or liability for the acts and omissions of employees, could be evaded if *mens rea* is not required. In practice, there is likely to be a chain of service providers involved in getting an advertisement from conception by the supplier or its advertising agency to publication in the media, on the internet or as a flier, catalogue or similar. An error could occur at any stage of the process.

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[23] C.f. s. 23(3)(c) and s. 42(3)(a).
[24] C.f. s. 61(1).
[25] See: http://www.industry.gov.au/smallbusiness/LegalHelp/LegalTopics/FairTrading/Pages/Whatismisleadingordeceptiveconduct.aspx. The general misleading conduct provisions can be found under s 18 of the Australian Consumer Law and give rise to civil liabilities. Additionally, under Part 3-1 of the ACL prohibits numerous business practices that are false or misleading, and gives rise to both criminal and civil liabilities… While s 18 imposes a strict liability in the regulation of misleading conduct in trade or commerce… See http://www.findlaw.com.au/articles/4512/a-general-introduction-to-misleading-or-deceptive-.aspx
[26] The Hobart Community Legal Service, *Tasmanian Law Handbook* See: http://www.hobartlegal.org.au/tasmanian-law-handbook/consumers-money-and-debts/australian-consumer-law/misleading-or-deceptive

To some extent section 113(1) covers this possibility as it provides that if an employee or agent of a person is liable in terms of the CPA for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person. Whether this encompasses the entire supply chain of advertising agent, designer, compositor, printer, newspaper/ magazine/ catalogue and distributor/newsagent involved in getting the advertisement to the consumer is doubtful.[27] The CPA definition of supply chain extends only to suppliers involved in supplying goods and services.[28] Consequently, it would be very easy for a supplier to escape liability by blaming someone else in the supply chain for an error in the price.

Taking all these factors into consideration, it can be concluded that section 30 applies not only to the practice known as bait marketing but also to any situation where the consumer may be misled. This means that it is not necessary to show a specific intention to deceive. As to whether the section goes further and creates strict liability, this does seem to be the case, in the absence of express reference to intention or a definition of "deceive" or "mislead" to the contrary.

Other considerations that favour this conclusion are that the CPA is public welfare legislation; the penalties are not severe in that they do not include a criminal conviction or imprisonment and it would be easy to escape liability by blaming someone else in the supply chain. It would be illogical to treat "deceive" and "mislead" differently in this regard as it is the manner in which goods are advertised that causes the misleading or the deception and not the intention behind it.

The intention or lack thereof on the part of the supplier would be a factor that would be taken into consideration in determining an appropriate administrative fine for contravening the section. It is, however, difficult to conceive of a situation in which the supplier was not in some way at fault for not having checked the advertisement. So even if fault was a requirement, it would invariably be present on *a res ipsa loquitur basis*.

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

Advertisement binding

[27] In Australia, Google was found not to be liable for misleading or deceptive statements made by advertisers. See: http://www.mondaq.com/australia/x/225812/Consumer+Trading+Unfair+Trading/Google+succeeds+in+High+Court+appeal+misleading+and+deceptive+conduct.

[28] Section 1 sv "supply chain".

Whether or not the supplier is bound by the terms of an advertisement depends on the wording of the advertisement. If a supplier advertises particular goods as being available at a specified price and the advertisement expressly states a limitation in the numbers available, the supplier must honour the advertisement terms, to the extent of the expressed limits.[29] Clearly, the common law rules regarding offer to treat as expressed in *Crawley v Rex* has been disregarded as far as advertisements in which numbers are limited are concerned.

If, however, no limit is expressed, it follows logically that the supplier is not bound by the advertisement but would nevertheless be liable for contravening the section. This seems to take into consideration the concern raised in *Crawley v Rex* regarding large numbers of would-be buyers insisting upon being sold goods of which the supplier had no stock. Such an approach of course flies in the face of the consumer centric intentions of the CPA as it disregards the cost and inconvenience suffered by the consumers who especially travel to the store to take advantage of the bargain which turns out to be an illusion.

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

This leads to the rather bizarre and probably unintended consequence that if no limit on numbers is expressed in an advertisement, the supplier is not obliged to fulfil the terms of the advertisement but is liable of contravening the CPA and open to a civil claim for damages resulting from the contravention. In the favour of this state of affairs, at least it prevents an anomalous situation from arising by a supplier being able to escape liability for a misleading or deceptive advertisement merely by not indicating a limitation on the goods available.

What if there is an inadvertent error in the advertisement in either of the above scenarios? This is dealt with next.

Inadvertent error

There is no provision for what to do in the case of an error in section 30. The defence of snatching a bargain would not be applicable because that relates to the doctrine of quasi mutual assent, which does not apply here because the transaction comes about *ex lege* and not as a result of the meeting of the minds of the parties.

[29] Section 30(2).
[30] Section 1 sv "prohibited conduct''.

The wording of section 23(5)(c) read with section 23(9), however, permits the conclusion that if a price is published in relation to the goods in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, and it is an inadvertent and obvious error, the supplier is not bound by it after correcting the error and taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.

Any other medium of advertisement is by implication not covered by section 23(9). This seems to have the potential to lead to anomalous and harsh consequences. Imagine for instance a car dealer intending to advertise a car for R 500 000 and a zero being omitted from the advertisement, creating the bargain price of R 50 000.

The solution to this dilemma is to follow the Australian approach and to apply a reasonable person test when making an assessment of whether the advertisement did or may mislead or deceive a consumer or consumers.[31]

Applying this approach, consumers would not have been misled by such a massive error as that in the above example, so the error would not have been binding. Conversely, if the car was mistakenly advertised at the price of " R 490 000", this would mislead the reasonable person and be binding, especially if accompanied by the customary words "only.." or "bargain". As to the difficulty in deciding where to draw the line between these two extremes, that is the type of challenge that the courts constantly face and are equipped to deal with on a case by case basis.

5. Applying the law to the facts

The advertisement in question was published in a catalogue by the supplier. This brings it within the provisions of section 30 read with sections 23(5) and 23(9). As both parties were silent in this regard, I shall accept that there was no limitation placed in the advertisement on the number of items advertised for sale, bringing the matter within the ambit of section 30(1).

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

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[31] Find LawAustralia "Deceptive and misleading conduct by corporations: the provisions" on http://www.findlaw.com.au/articles/4433/deceptive-and-misleading-conduct-by-corporations-t.aspx.
Similarly, the European Court of Justice, when considering the misleading of consumers, has held that, "...in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect" (Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, para 31.) The Court of Appeal, California, also applies a reasonable customer test (*Zion Lavie V Procter & Gamble Co.* A093393 available on http://caselaw.findlaw.com/ca-court-of-appeal/1040791.html)

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

Further, being an advertisement in a brochure, section 23(9) applies, meaning that if the advertised price is an inadvertent and obvious error, the supplier is not bound by it after—

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

I cannot agree with the supplier's contention that it cannot be considered false advertising as there is an "Errors and omissions" warning in the terms and conditions printed on all its catalogue, as a supplier cannot contract out of its legal obligations under the CPA (section 48(1)(c)).

If, as alleged by the supplier, when you arrived at the store there was a warning in the form of a notice stating "Oops, we spotted a mistake," this might have been sufficient, depending upon the circumstances.

It is not, however necessary to decide on that because this case turns on whether or not the advertised price was misleading or deceptive. In order to arrive at this answer, I deem it appropriate to use the reasonable customer test.

In this matter, the correct price was R3 700 and the advertised price was R1 599, which is 43 % or less than half of the correct price. Although there is no provision in the CPA regarding gross error, the definition of this term given in footnote 16 hereof is nevertheless a useful guide as to what the reasonable consumer would realize to be an error. It must be borne in mind that price is relative to the nature of the goods.

I unfortunately do not have the benefit of perusing the brochure in question, but I did manage to locate a Geneva 2.5 Division Couch Velvet Mink on the supplier's website, priced at R4,499.00. I do not know if this is the exact same model, but it serves sufficiently to show that the couch is a substantial piece of furniture of apparent quality. I researched various other websites but could not find a couch similar in appearance selling for less than R 2 900.

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

6. Conclusion and recommendation

Based on the above finding, the supplier is not bound to provide the consumer with a couch at the incorrectly advertised price. I recommend, however, that in the interests of good customer relations, the supplier provides the complainant with a nominal token of apology for the customer's wasted time and transport costs.