

SOUTH AFRICA / JUDGMENT

Price not binding after consumer informed (2013427507) [2013]

ZACGSO 9 (22 June 2013)

[2013] ZACGSO 9

COURT

Consumer Goods and Services Ombud

BEFORE

N Melville

CASE / FILE NUMBER

2013427507

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Incorrect price displayed

Price not binding after consumer informed

Complaint ref : 2013427507

Adjudicator : N Melville

Date : 22

July 2013

1. Summary of the complaint

The supplier advertised Stella sleeper couches for R199 and when the complainant wanted to buy two of them, the store manager told her that there was an error in the price and the manager refused to sell the second couch to the consumer at the displayed price.

2. Summary of outcome

Suppliers are bound to provide goods at lowest advertised or displayed prices unless they inform the consumer of an error. That is what happened in this case when the first couch was rung up. The supplier was not obliged to sell a second couch at the incorrect price.

3. The response of the supplier

The supplier provided this office with a copy of its response to the NCC:

- This complaint was received by the supplier on Thursday, 16th August 2012.

- The customer visited the store in Rosebank and saw a Stella Sleeper Couch incorrectly priced at R199.99.
- The customer wanted to purchase the couch at the advertised price and in the interest of good customer service, the store management took the decision to sell one Stella Sleeper Couch to the customer at the incorrect price of R199.99 bearing in mind that the selling price of this couch is R1999.99.
- Customer wanted to buy a second couch also at R199.99 which the store refused to do as this was an obvious pricing error.
- The store does apologise for any inconvenience caused with this obvious error, but will not be able to sell the customer a second couch at the obviously incorrect price.

4. Attempts to resolve the complaint

After reviewing the file, I enquired of the supplier at what point was the customer informed of the error. An email was received from H on 27/06/2013, stating that the customer was informed of the error whilst in the store. Following a request for further clarification, I received the following response:

Ms. N visited the store in June 2012 and saw that the Stella Sleeper couch was incorrectly advertised for R199.99, correct price R1999.99.

The salesperson immediately realised that there was an error on the signage and advised Ms. N of the error and also removed the incorrect signage.

The customer requested to speak to the manager and the sales manager, A than attended to Ms. N.

Ms. N advised Mr. G that she wants to purchase a couch at the incorrect price.

Mr. G contacted the store manager, R, who agreed to sell one of the mentioned couches to the customer at the incorrect price, as it was a store error.

Mr. G informed Ms. N of the decision taken by the store management which the customer accepted.

Ms. N then insisted on having a second couch also at the incorrect price.

The regional manager, N N was contacted and informed of the situation and agreed with the store management's decision to sell Ms.N one sleeper couch at the incorrect price, but also agreed that the store cannot sell the customer a second couch at the incorrect price, as the customer initially requested to purchase one couch.

The store assisted Ms. , by selling her one sleeper couch at the incorrect price, taking responsibility for the obvious error committed by the store and also to promote good customer service.

The supplier also provided a copy of the complaint as recorded by NCC.

5. Investigative findings

There is a dispute of fact between the parties regarding whether the consumer attempted to purchase both couches at the same time (consumer's version) or the consumer first bought one couch and then tried to purchase the second couch at the same reduced price (supplier's version). As will become clear later, the sequence of events is material to the outcome. I had considered dealing with the matter by means of mediation but decided that it was preferable to give guidance in this important but unclear area of the Act. Further, the mediator indicated she did not think a resolution was likely when I discussed it with her.

6. Legal considerations/Applicable provisions of the Code of Conduct

Code:

a. The criteria to be used in resolving disputes includes:

8.5.1 the law, especially the Act and the Code (in cases where there is conflict between the interpretation of the Code or the Act, the Act will always prevail);

8.5.2 applicable industry codes or guidelines;

i. Fairness in all the circumstances.

Applicable provisions of the CPA:

Interpretation:

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

(a) appropriate foreign and international law;

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

Price:[1]

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

(a) higher than the displayed price for those goods or services; or

(b) if more than one price is concurrently displayed, higher than the lower or lowest of the prices so displayed...

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

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

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.

Section 30 refers to adverts, which is what this case is about, while section 23 applies to displayed prices. Unlike section 26, section 30 does not provide how errors are to be dealt with nor what the position is if a limit was not placed on the numbers available.

Law:

When the agreement is concluded

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

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.

A shop owner displaying their goods for sale is generally making an invitation to treat: *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB

- 401. They are not obliged to sell the goods to anyone who is willing to pay for them, even if additional signage such as "special

offer" accompanies the display of the goods.

In *Partridge v Crittenden* [1968] 1 WLR 1204, it was held that where the appellant advertised to sell wild birds, it was not offering to sell them. Lord Parker CJ commented that it did not make "business sense" for advertisements to be offers, as the person making the advertisement may find himself in a situation where he would be contractually obliged to sell more goods than he actually owned.

Foreign law and practice

Approach to apportionment of risk

The CPA was drafted by Canadian attorney Phil Knight. According to him, the philosophy underpinning the CPA is the transfer of the risk attaching to doing business from the consumer, who was usually obliged to accept it by the terms of the agreement, to the business, which is best able to distribute the risk through pricing, insurance or taking preventative steps.[2] This philosophy is influenced by American and Australian legal thinking, considered below. Further, the CPA prevents suppliers from forcing consumers to accept risks.

Examples in the CPA where the risk is explicitly stated to be transferred to the supplier are:

s.18: The risk of accidental damage to displayed goods is borne by the supplier and may not be passed to the consumer;

s. 20(4): The risk of goods that may be returned ITO subsection (2)(b) to (d);

s. 20(5): The risk of returning unsolicited goods;

s. 56(2): The risk of goods that may be returned; and

s 62(1)(b): Goods on lay-by

USA

Calabresi

(1970) argued that the efficient/optimal allocation of risk should be the economic and social objective pursued by the courts and governments. This means that risks should be allocated to the party that is best positioned to know about the risks and take precautions designed to avoid the event/accident. It is a search for the “cheapest cost avoider”. [3]

Australia

Government with its access to sophisticated self financing insurance pools and taxes may be in the best position to be a loss distributor compared to a multitude of small and diverse nonprofit service providers, impoverished clients receiving public goods and lack of dedicated private insurance pools serving nonprofit community service enterprise. [4]

South Africa

The principal that a supplier who voluntarily participates in an activity must bear the risks associated with it was already part of South African law:

“A bank which voluntarily decides to participate in a situation which has inherent risk was not entitled to complain and avoid its duty of care arising in that situation by pointing to the cost of safeguarding against the risk of the situation.”[5]

Survey: approach to pricing

UK

The price on display, such as the price on the actual goods, the shelf edge price, the price given in an advertisement or on a website, can form part of what the law terms 'an invitation to treat'. This means that the price given by the trader forms part of an invitation for a prospective buyer to make an offer to buy, which the trader is entitled to either accept or reject. The buyer cannot insist that a trader sells anything at the marked price, whether or not the trader has made a mistake. However, trading standards can take action against a trader for giving a misleading price indication.[6]

If you display or advertise in a catalogue the same good with more than one price, you must sell the good for the lowest displayed (or advertised) price or withdraw the goods from sale until the price is corrected.[7]

Queensland

If an incorrect price is displayed, is the business obliged to sell the product at the lowest displayed price?

No. If a displayed price is incorrect, the business is entitled to withdraw the product from sale, fix the pricing error, and then make the product available for sale again.

In some cases, this may be as simple as fixing a price or label on a shelf. But if the incorrect price has been placed in a newspaper

advertisement or pamphlet, the business would need to publish a correction before returning the item for sale at the correct price.[8]

Canada

Sale Above Advertised Price

Section 74.05 of the Competition Act is a civil provision. It prohibits the sale or rent of a product at a price higher than its advertised price. The provision does not apply if the advertised price was a mistake and the error was immediately corrected.

If a court determines that a person has engaged in conduct contrary to section 74.05, it may order the person not to engage in such conduct, to publish a corrective notice and/or to pay an administrative monetary penalty of up to \$750,000 in the case of a first time occurrence by an individual and \$10,000,000 in the case of a first time occurrence by a corporation. For subsequent orders, the penalties increase to a maximum of \$1,000,000 in the case of an individual and \$15,000,000 in the case of a corporation.[9]

Canadian Code of Practice Scanner Price Accuracy

If the scanned price of a non-price ticketed item is higher than the shelf price or any other displayed price, the customer is entitled to receive the item free, up to a \$10 maximum. When the item has a price tagged, the lowest price applies. When identical items are incorrectly priced, the second one will be sold at the correct price.[10]

New Zealand

What are my rights if a shop advertises something at the wrong price?

Although the shop has probably breached the Fair Trading Act, the only loss or damage you have suffered is a wasted trip to the shop. You can ask them to compensate you for this, but you cannot force the shop to sell you the goods at the advertised price.[11]

Ireland

Traders are required to ensure that prices displayed are accurate and not misleading. Put simply, the price displayed must be the same as the price charged at the till. This also applies to special offers.

If a shop incorrectly labels something with the wrong price, and it is lower than the price charged at the till, you do not have an automatic right to buy the goods at the marked price. As long as the seller tells you before your money is taken that the higher price applies, you can decide not to buy it.[12]

7. Consideration of facts and law

Facts

The parties agree that the supplier advertised Stella sleeper couches for R 199.99 and it does not appear to be disputed that the correct price was R 1999.99. It is also agreed by the parties that the complainant wanted to buy two couches at the lower price but was only permitted to buy one. Where they differ is that the consumer claims that she attempted to purchase both couches at the same time while the supplier claims the consumer first bought one couch and then tried to purchase the second couch at the same reduced price.

Unlike a court or the Tribunal, this office has no power to conduct a hearing or provision for the parties to be cross examined under oath. It must instead do the best it can on the information placed before it or obtained by it. In order for it to be effective, it needs on occasion to take a robust approach.

The versions of the parties on the papers in this case are evenly balanced against each other. It is just as likely that the complainant might have decided to buy a second couch after the first transaction went through, after contemplating what a good bargain was to be had, as it is that the supplier would claim that the second transaction occurred after the complainant was made aware of the error, in order to avoid additional loss. Equally, the recollection of either party could have been mistaken. The supplier has been consistent in asserting that one couch was sold to the consumer before she asked for a second one. It also lists more than one witness to the event. This

dispute of fact, however, cannot be resolved on the papers.

Law

From the comparative survey of legal approaches to price discrepancies, it is evident that there is a spectrum of approaches varying from that the incorrect price is not binding to the item must be sold at no charge below a stated value. An error in the price in South Africa prior to the CPA would not be binding as it would have been considered to be an invitation to treat. CPA section 23(6), which prohibits a supplier from charging more than the lowest price displayed, in effect overrules the common law and makes the displayed price a binding offer that converts to a binding contract once accepted by the consumer tendering payment. This rule is mitigated to the benefit of the supplier in the case where the price as displayed contains an inadvertent and obvious error (section 23(9)) if, upon discovering the error, the supplier:

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

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

On a plain interpretation of section 30, if an advertisement specified a limitation on the number available, a supplier would be bound to provide the item advertised at the advertised price up to the limit advertised, irrespective of any notice subsequently placed in the store. A failure to comply may lead to the imposition of an administrative fine.

Sections 23 and 30 appear to be contradictory with regard to errors unless section 23 is taken only to refer to displayed prices in the store and section 30 is taken to refer to advertisements in the media/ online. This is something only the Tribunal or the Courts can pronounce on.

Applying the law to the facts

The display price of R 199.99 is so much lower than R 1999. 99 that it gives rise to an inference that it is an obvious error. This will not always be the case: there may be instances where the circumstances are such that the error is not obvious, such as where the price is described in the display as “never to be repeated”, “below cost” or “ridiculously low” or words to that effect.

It is evident that the supplier only became aware of the error in the price when the consumer attempted to buy the couches. If the consumer had indeed requested to purchase two couches at that point, the supplier would have been obliged to supply them at the incorrect price as the consumer’s act would have constituted binding acceptance and the two provisos had not yet been complied with. This would hold true even if the consumer had ordered a thousand couches at that price.

If, however, the supplier had informed the consumer of the error and the correct price after the consumer had asked to purchase one couch, the provisos would have been complied with and the supplier would not have been bound by the incorrect price with regards to the second couch.

8.

Conclusion

Based on the information provided by the parties, there was an inadvertent error in the price displayed for a couch and the supplier refused to honour the displayed price in respect of the second couch that the consumer wanted to purchase.

The evidence precludes a firm factual finding from being made in this instance and it cannot be said with certainty that the supplier's version is not true. A hearing might displace this conclusion, but this procedure is not available to this office.

Accepting this, it accordingly follows that the supplier acted correctly in selling the first Couch at the advertised price and was not obliged to sell the second price at the incorrect price.

The following principles that emerge from this case are of broader application:

1] Suppliers are bound to provide goods at lowest advertised or displayed prices i.e. they bear the risk and costs associated with errors;

2] In the case of displayed price errors, the supplier is bound until the consumer is informed. If the consumer acts in a manner consistent with buying the item prior to being informed of the error, the consumer is entitled to pay the error price e.g. the consumer takes the item (or the product details if to be delivered or collected from dispatch) to the till with the intention of paying for it or places the order with the sales assistant and the cashier/ sales assistant then informs the consumer of the error;

3] Suppliers can limit the extent of their risk by stipulating the number of items available at a given price or the period for which the offer is valid in adverts and by correcting the error and taking reasonable steps in the case of displayed prices.

4] Reasonable steps may include:

- In the case of a display error: Withdrawing the product from sale, fixing the pricing error price or label on a shelf, and then making the product available for sale again;

- In the case where the incorrect price has been placed online, in a newspaper advertisement, e mail, sms, catalogue or pamphlet:

- o replacing the advert/ readvertising with a notification alerting consumers to the error and correct price or notifying them via email or sms;

- o putting up notices at the stores affected and keeping suitable proof (including photographs with time/ date indicated) of the form of the notices, who put them up and when;

- o offering to compensate customers for wasted trips by means of cash or vouchers.

5] Suppliers can also:

- ensure that goods and services have one displayed price;
- ensure that tills are capable of ringing up displayed prices and are updated as prices advertised and displayed change;
- appoint a specific employee to be responsible to check for price errors in displays at regular intervals and advertisements before they are approved;
- keep contemporaneous records of incidents of customers claiming goods at advertised prices and conversations that take place.

6] Suppliers need to bear in mind that in addition to allowing consumers to buy at lower prices or compensating them, the suppliers run the risk of having to pay administrative fines for incorrectly advertising prices.

9. Suggested resolution

The supplier need not sell the second couch at the reduced, incorrect price in this instance. It should, however, take heed of the principles set out above and take steps to ensure that it is more careful in future.

[1] See also the commentary in Annexure B.

[2] Department of Trade and Industry: Consumer Protection Law Conference 'Changing the Consumer Protection Landscape in South Africa: The Consumer Protection Act 68 of 2008' Gallagher Estate, 4 to 5 March 2010.

[3] Calabresi G,

(1970) *The Cost of Accidents: A legal and economic analysis*, New Haven: Yale University Press. Similarly, "Liability should be on the best risk avoider, who may or may not be the ... party best suited to distribute costs." (Texas Law Review)

[3] Calabresi G,

(1970) *The Cost of Accidents: A legal and economic analysis*, New Haven: Yale

University Press. Similarly, "Liability should be on the best risk avoider, who may or may not be the ... party best suited to distribute costs." (Texas Law Review)

[4] Who should bear the risk – The party least able to refuse or the party best able to manage the risk? P17 http://eprints.qut.edu.au/5159/1/5159_1.pdf

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[5] *Kwa Mashu Bakery Ltd v Standard Bank of South Africa Ltd* 1994 CLD 160(D) @ 178 (quoted from headnote).

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- [6] http://www.tradingstandards.gov.uk/cgi-bin/brighton-hove/conlitem.cgi?file=*ADV1011-1111.txt
- [7] Australian Competition & Consumer Commission <http://www.accc.gov.au/>
- [8] Office of fair trading: Sales practice (pricing and lay-bys) www.fairtrading.qld.gov.au
- [9] <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home>
- [10] <http://forum.smartcanucks.ca/>
- [11] Fair Trading Act New Zealand <http://www.consumeraffairs.govt.nz/>
- [12] National Consumer Agency Ireland <http://www.nca.ie/nca/pricing-rules#content>
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