

SOUTH AFRICA / JUDGMENT

Refusal by supplier to sell at the displayed price: display price binding (20131118951)

[2014] ZACGSO 14 (1 July 2014)

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COURT
Consumer Goods and Services Ombud

BEFORE
N Melville

CASE / FILE NUMBER
20131118951

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Lowest display price binding

Refusal by supplier to sell at the displayed price: display price binding

Complaint ref : 20131118951

Adjudicator : N

Melville

Date : 1

July 2014

1. Summary of the complaint

The complainant went to the store and saw a Nespresso Latissima Machine priced at R485.00. When the complainant wanted to buy it at the displayed price, the store refused to sell it to her.

2. Summary of outcome

The supplier is bound by that incorrect price as the transaction was concluded by the consumer's conduct of indicating she wished to purchase the goods. The supplier cannot rely upon the protection afforded by section 23(9) as it was too late when the supplier informed the consumer of the error.

3. The response of the supplier

The supplier provided this office with its response:

The supplier informed the consumer that it will not be able to sell her the Nespresso machine at R485. The error on the price tag had a dot before the zero and not after i.e. R485.0

When she informed the supplier that as a consumer she was within her rights to pay the price she sees, the supplier advised her that the CPA also stipulates that where there are obvious errors, the retailer has the opportunity to inform the customer of the error and ensure that before a transaction is concluded that the right price is given to the consumer.

4. Legal considerations

Common 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.

In the case of *Crawley v Rex*[1], a shopkeeper advertised on a placard outside his shop a particular brand of tobacco at a cheap price to attract the public. The court held that the advertisement did not constitute a binding offer that a customer could accept but was merely an announcement of the shopkeeper's intention to sell at the advertised price (this is known as an invitation to treat (do business)). The court was swayed by a concern that if a shopkeeper had sold out of the goods, thousands of customers may nevertheless hold him to the offer.

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 American law, in self-service stores, the store makes an offer to sell for cash at the prices marked on the goods (*Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E. (2d) 305, 163 A.L.R. 235 (1946)). The court held that the offer is accepted when the customer reaches the check-out. The French approach is similar with regard to the offer but holds that the acceptance takes place when the item is taken from the shelf. In practice this is an important distinction as it is necessary to be able to pinpoint the exact point of no return in the transaction in order to determine whether or not the supplier can refuse to sell the goods at a particular price. That point is reached when the agreement is perfecta.

The sale becomes perfecta once there is agreement on the merx (the thing sold) and the pretium (price) and any condition, resolutive or suspensive, has been fulfilled. Once the seller promises to deliver a thing to the buyer and the latter agrees to pay a certain price, agreement is reached and that alone constitutes the sale—neither delivery nor payment is necessary before the sale is concluded.

Where there was a unilateral mistake involved and the mistake was a *iustus* (excusable) error, a party may escape being bound (*Maritz v Pratley* (1894) 11 SC 345). Where the other party is aware of the error, he may not take advantage of it, or “snatch at a bargain” (*Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis* (483/90) [1992] ZASCA 560).

In *Anglo African Shipping (Pty) Ltd. v Slavin's Packaging* (74/85) [1986] ZASCA 110, an employee had mistakenly transposed the prices of two items when offering them for sale. Smalberger JA illustrated just how narrow the defence of unilateral mistake is:

“The fact that Slavin appreciated that he was striking a bargain does not mean that he ‘snatched’ at one in the legal sense. The latter concept denotes an unconscionable act (which the law will not countenance) in deliberately seeking to take advantage of another's known mistake (I refer, of course, to the case where actual knowledge is present); striking a bargain is a legitimate occurrence frequently encountered in the business and commercial world which the law recognises and enforces.”

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:

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...

23(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.

5. Consideration of the law

It is important to bear in mind that *Crawley v Rex* dealt with a placard placed outside a shop, which is more akin to an advertisement (covered by section 30) than a displayed price, and was decided before the advent of self-service stores and there has been no more recent decision by our courts in this area. The *Boots Cash Chemists* decision, which in any event was obiter as it related to criminal charges (the same can be said of *Crawley v Rex*) is not binding on our courts.

Whatever the common law position is, it is necessary to decide to what extent 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.

Hanri du Plessis[2] argues that the supplier is bound by the displayed price by reasoning that this can be inferred from the words 'the seller is not bound' used in the exceptions contained in sections s 23(9)–(10). Bracher reaches the same conclusion but takes a different approach.[3] He reasons that if a supplier is not bound by the provisos to section 23(9), the corollary must be true, namely that the supplier is bound if the displayed price is not inadvertent but deliberate or if it is not an obvious error.

Section 23(6) 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).

It is therefore essential to determine the point in the dealing until which the supplier can take these steps and after which the supplier is bound regardless. In the common law, this would be when the contract is perfecta.

The CPA is silent on when a transaction is concluded. It cannot be the same as the common law position, assuming our courts follow the *Boots Cash Chemists* finding[4] that the sale is concluded when the cashier accepts the price, as this would mean that the concluding act or acceptance would be by the seller. If it is the customer who is accepting the offer, as is suggested in the previous section above, the transaction must be concluded at some time prior to the acceptance of payment.

The possibilities are:

- When the total price has been rung up and the customer tenders payment;
- When the price of the disputed item is rung up at the till;
- When the customer places the goods on the check-out counter;

- When the customer arrives at the check-out counter;
- When the customer takes the goods off the shelf and places them in the basket or trolley.

The first possibility can be excluded on the grounds that payment relates to the performance of the contract rather than when it is concluded or perfecta. It is unlikely in any event that the consumer would tender payment of the disputed amount.

In view of the difficulties associated with treating the placing of the item in one's basket as acceptance that were considered in the Boots Cash Chemists case (such as not being able to change one's mind), the last possibility on the list can also be excluded. To decide which of the other possibilities is the better position, one needs to consider the practicalities of the process.

In practice, the supplier or its servant, the till operator, would only become aware of the error in the price at the point it was rung up at the till. If it was sufficient for the purpose of the first proviso to section 23(9) for the till operator to say "The correct price is R X, I cannot sell the item to you at the incorrectly marked price of R Y, " that would mean that the supplier would never be bound by an obvious error in price, rendering the section redundant. This would be contrary to the presumption that legislation does not contain futile or nugatory provisions.[5]

In order to give effect to the section, it is necessary to hold that the transaction is concluded before the price is rung up on the till. The most logical and workable conclusion is that it happens when, where appropriate, the consumer takes the selected goods out of the trolley or basket and places them on the counter (the third possibility)[6]. By so doing, the consumer is tacitly communicating, "I accept these goods at the prices displayed on or next to them".[7] Unless any of the other of the exceptions exists, the sale becomes binding upon the supplier at that point.

It is then, armed with the knowledge of the error, that the supplier can take steps to correct the displayed price and inform subsequent

customers of the error before they accept the offer at the displayed price.

Steps that might be considered reasonable in informing customers might include: withdrawing the product from sale, fixing the pricing error price or label on a shelf, and then making the product available for sale again; putting up notices at the stores affected or making an announcement over the public address (tannoy) system.

It remains to consider whether, irrespective of the point at which the transaction is perfecta, the supplier may not still claim that it has made an error and the customer is accordingly improperly trying to snatch a bargain.

It is necessary to determine whether the common law defence of snatching a bargain has been displaced by s 23 (9), which states that supplier is not bound by an inadvertent and obvious error in the price provided it correcting the error and takes reasonable steps to inform consumers of the error.

In order to do so, one needs to analyse section 29 as a whole. In summary, Section 29(6) provides a supplier may not charge the higher price unless

- 29(7) the price is determined by regulation;
- 29(8) the original price is wholly obscured by a new price;
- 29(9) there is an inadvertent and obvious error; or
- 29(10) there was an unauthorised alteration of the price.

This is surely a closed list, so section 29(9) is implicitly intended to replace the common law snatching a bargain. It is difficult to see how any other conclusion can be reached, especially that snatching at a bargain can be relied upon instead of section 29(9).

It follows that it is then that once the consumer places the selected goods on the counter^[8] or tells the sales assistant that they want a particular item, it is too late for the sales assistant or till operator to say, "Sorry, that price is incorrect and I cannot sell it to you at that price."

Subsequent customers would also benefit from the incorrect price unless or until such time as the supplier corrected the error in the displayed price and took reasonable steps to inform consumers to whom the erroneous price may have been displayed of the error.

Section 29(9) does not apply in 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 does seem that in practice the only time a supplier would be likely to be able to alert a consumer to the incorrect price before the sale was concluded is if the price was displayed in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally (section 23(5)(c)). This seems to be the probable intention of the legislature because it would only be in that sort of a situation where the seller was exposed to the possibility of being bound to sell non-existent stock to large numbers of potential customers. Where the price is displayed physically on or near the goods, the seller is only bound to sell the actual goods available on display.

6. Applying the law to the facts

The display price of R485.00 is so much lower than R4850.00 that it gives rise to an inference that it was an obvious error. It is evident that the supplier only became aware of the error in the price when the consumer purported to buy the Nespresso Latissima Machine. At that point, the contract of sale was already perfecta, before the two provisos section 23(9) had been complied with i.e. the consumer was informed of the error and the price was changed.

A different conclusion might be reached in the case of an error in a price advertised in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally.

7. Conclusion and recommendation

Based on the information provided by the parties, there was an inadvertent error in the price displayed for a Nespresso Latisima Machine and the supplier refused to honour the displayed price. The supplier is bound by that incorrect price as the transaction was concluded by the consumer's conduct of indicating she wished to purchase the goods. The supplier cannot rely upon the protection afforded by section 23(9) as it was too late when the supplier informed the consumer of the error.

The supplier should accordingly honour the incorrect price.

Postea

The supplier took advantage of the opportunity to comment and responded:

[H]aving read the assessment, we made more specific enquiries with the store staff in question and advise as follows:

1. The Nespresso machine in question was the only one on display but was displayed with other Nespresso machines priced from ±R1699.00 to ±R5000.00.
2. When observing the price displayed, the customer called a staff member over to query the price ie she asked the staff member if that was the price of the item.
3. The customer was then advised that it was in fact not the correct price and it was only then that the customer indicated that she wanted the machine at the price displayed.

In light of the aforementioned, it is clear that at the very least the customer realised that a mistake must have been made, which is why she called someone over to check the price.

While we do not share the view that the CPA has changed the common law with regard to offer and acceptance, even if we did accept the opinion put forward by you and as detailed in the assessment, on these facts there would have been no sale. This consumer did not have the goods in her trolley/basket and place them on the counter indicating that she was accepting the goods at the price displayed.

CGSO gave the complainant the opportunity to respond to this assertion and the complainant admitted that she queried the price with the staff after which they informed her it is a mistake.

She now understands that she will not be able to get the machine at the error price and asked that CGSO close the file.

[1] 1909 TS 1105, analysed in Hanri du Plessis 2014, "Display of Goods for Sale, Advertisements and the Consumer Protection Act 68 of 2008", paper presented at the 14th International Association of Consumer Law Conference, University of Sydney, 1 - 4 July 2013.

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- [2] Hanri du Plessis “Display of Goods for Sale, Advertisements and the Consumer Protection Act 68 of 2008” paper presented at the 14th International Association of Consumer Law Conference, University of Sydney, 1 - 4 July 2013.
- [3] Patrick Bracher, unpublished opinion to CGSO (2014) at 4.
- [4] This is by no means a certainty as the decision was made at the dawn of the electronic age and was in respect of a crime rather than a contract.
- [5] Ex Parte The Minister of Justice: In re R v Jacobson and Levy 1931 AD 466.
- [6] This may be what Somervell L.J. had in mind when he referred to when the customer goes up to the cashier and offers to buy what they have so far chosen (Boots Cash Chemists at 406).
- [7] In the case of bulky goods which are scanned while still in the trolley, wheeling the trolley up to the counter would have the same effect.
- [8] Or takes the trolley up to the counter in the case of large items.

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