

# A Consumer's Calamity

**The Consumer Protection Act: Cancellations of Bookings and Reservations in the context of COVID-19**

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As a result of the current COVID-19 pandemic and the consequential countrywide lock down in South Africa, many consumers may be forced to cancel their upcoming holidays or even worse, their weddings, which may include the cancellation of flights, accommodation, venues and other services.

This article serves as an insight to the possible rights and/or recourse consumers may have against suppliers, in relation to claims of refunds keeping in mind the possible ramifications on consumers and suppliers as well as the economy. It is due to the travel bans and restrictions on various types of gatherings that, in most cases, none of the parties are at fault. Consumer Goods and Services Ombudsman (CGSO), Magauta Mphahlele, therefore, urges suppliers to ensure that their cancellation policies are in line with the Consumer Protection Act (CPA).

It is difficult, from a CPA point of view, to conclude whether the consumer is entitled to a full refund as neither of the parties are actually at fault due to the fact that both parties' obligations have become impossible to perform. Mphahlele says that interpreting the CPA, in the context of the current pandemic, is still "uncharted territory" and that the CPA, as it currently reads, does not provide a straight forward solution for situations such as this one.

When one contemplates the current COVID-19 pandemic and the abovementioned consequences, sections 17 and 47 of the CPA come to mind, due to the fact that they deal with situations where a consumer voluntarily cancels a certain booking, as well as where a supplier is forced to cancel because of an inability to provide a service either due to their own fault or circumstances beyond their control.

Section 17 stipulates that a supplier may charge a reservation fee as well as a reasonable cancellation fee, should the consumer wish to cancel prematurely. However, section 17(5) gives us exceptions and states as follows:

*"A supplier may not impose any cancellation fee in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made".*

This section clearly states that a consumer will not be penalised for a cancellation due to illness or death. Since the President's address to the nation on 23 March 2020, Mphahlele points out that the imposed restrictions by the President and the health department may result in everyone being treated as "ill". It is, therefore, the CGSO's interpretation that section 17(5) of the CPA, together with the imposed restrictions, implies that consumers are entitled to a full refund

when cancelling their respective bookings and/or reservations. This is, however, the CGSO's interpretation of 17(5) of the CPA and not necessarily grounds for a full refund.

Mphahlele, however, also states that cancellation fees might be a possibility, but only in cases where the supplier is in a position to prove that costs have already been incurred.

Section 47 of the CPA alludes to instances where only the supplier is unable to perform and gives some respite to suppliers where cancellations arise through no fault of the supplier. Sections 47(3) and 47(5) state as follows:

***“47(3) If a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must—***

*(a) refund to the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and*

*(b) in addition, compensate the consumer for costs directly incidental to the supplier's breach of the contract, except to the extent that subsection (5) provides otherwise”.*

***“47(5) Subsection (3)(b) does not apply if— (a) the shortage of stock or capacity is due to circumstances beyond the supplier's control, subject to subsection (6); and (b) the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances”.***

It is clear from the above sections that the consumer is entitled to two remedies, when the supplier is unable to perform, namely:

1. A full refund with interest plus compensation for direct incidental costs;
2. Where the supplier has taken reasonable steps to inform the consumer of its shortage of stock or capacity, which came about due to circumstances beyond the supplier's control, the consumer is only entitled to a refund and interest and not directly incidental costs.

Mphahlele states that the second remedy will be the applicable remedy available in the context of the COVID-19 pandemic. This, at least, serves as a respite for suppliers. However, it is important to keep in mind that the applicability of this section might still come in to question as it is only an interpretation by the CGSO in the context of the COVID-19 pandemic and may be open for debate.

Although suppliers are entitled to make alternative offers, Mphahlele stresses the fact that such offers may not be made without the option of a refund. Alternative options may include postponing the booking to another date and/or vouchers. However, consumers are under no obligation to accept the alternative offer, but must at least have sensible reasons for not accepting such offer.

Section 47(4), however, serves as a defence where a consumer is being unreasonable should the supplier have made an alternative offer to the consumer in order to satisfy the promise to deliver.

In most cases that will arise during the pandemic both parties will most likely not be at fault, but one must still keep in mind other scenarios. For example, where a consumer has already paid in full for a flight and the supplier is unable to perform as a consequence of the national lockdown which halted their operations. Arguably, in such an instance, the supplier is the one who is unable to perform, as the consumer has already performed by making an advance payment, in order to secure the flight booking for the specified date.

In the premise, section 47 is applicable but gives the supplier some respite because its non-performance was due to events beyond its control. A strict interpretation of the CPA, without regard to everyone being treated as “ill”, still entitles the consumer to a refund, but without consequential damages since neither the consumer nor the supplier is at fault.

It is important to note that each case should be judged and settled on its own merits with due regard to the facts and circumstances, including: the date of cancellation, during which stage of the lockdown cancellation occurs; which party was unable to perform (be it only one or both parties) and the reason for non-performance. Examination of these factors,

in the context of each specific case, will alight as to the applicable remedies which may be available to suppliers and consumers, alike.

Even though the above sections of the CPA are clearly in favour of consumers, it is important to note that suppliers also keep the economy afloat. Should all consumers decide that they want a full refund, to which they may indeed be entitled, many suppliers may face closure prospects which may negatively affect our economy.

It is vital that both consumer and supplier keep each other's needs in mind, in order to obtain a balance and maintain the principles of equity and good faith in their negotiations. Consumers must, therefore, consider alternative offers from suppliers and suppliers likewise must understand that they cannot impose blanket policies without proposing alternatives.

#### **Sources referenced in this article**

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