



Consumer protection pertaining to the display of prices on online mediums of advertising

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ABSTRACT

In today's age of digital marketing, online advertising media are used by suppliers as well as by individuals in their private capacity on a more regular basis than previously. Proper, appropriate and unique regulatory methods are indispensable for disputes arising out of electronic transactions, more specifically transactions which are formed and derived from online advertising media. The main issue is whether a consumer that has fallen prey to deceptive marketing as part of an electronic transaction on such an advertising platform is protected from discrepancies in the price quoted in the online advertisement. The common Law, the *Consumer Protection Act* 68 of 2008 and the *Electronic Communications and Transaction Act* 25 of 2002 attempt to achieve appropriate regulation of irregular promotional activities. This study entails an analysis of such regulatory methods, where it seems that online mediums of advertising media are not specifically regulated in South Africa. There is a definite need for certainty regarding advertising online, as there is clear non-compliance in South Africa. It would seem that the *Consumer Protection Act* comes the closest to resolving issues relating to electronic promotional irregularities, but there are certain ways in which a seller or advertiser can circumvent legislation to place the consumer in a position of vulnerability. Consequently, this study concluded that there is a further need for clarity regarding the existing legislation as well as a need for the promulgation of further legislation to regulate online advertising media and so to protect the consumer from the vulnerabilities he or she experiences at present.

Key words:

Acceptance, Addressee, Addressor, Advertising, Binding, Buyer, Certainty, Compliance, Consumer, Contract, Display, Electronic, Goods, Intention, Internet, Invitation, Marketing, Online Media, Merx, Offer, Offeree, Offeror, Online, Price, Product, Seller, Services, Supplier, Transactions, Consumer Vulnerability.

LIST OF ABBREVIATIONS

CPA	Consumer Protection Act
ECTA	Electronic Communications and Transactions Act
JILT	Journal of Information, Law and Technology
PELJ	Potchefstroom Electronic Law Journal
SA	South Africa
SALJ	South African Law Journal
Stell Merc LJ	Stellenbosch Mercantile Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNCITRAL	United Nations Commission on International Trade Law

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1 Introduction

For many years promotional activities within South Africa have been subject to various industry-specific regulatory bodies such as the advertising authority, the Independent Communications Authority of South Africa, the Direct Marketing Association of South Africa and various pieces of legislation, including the *Electronic Communications and Transaction Act*¹ *Consumer Affairs Act*.² as well as the *Consumer Protection Act*.³ It is clear that the *Consumer Protection Act*³ proposes to regulate all forms of promotional activities. The regulation of promotional activities makes up a substantial portion of the Act, which is a commendable step towards a more inclusive manner of regulation. This research documented here, however, goes over and beyond the application of the CPA and focuses instead on consumer protection as a whole, whether it be by common law or legislation. The goal is to provide some sort of solution to consumers who are being improperly lured into contracting via advertisement media, more specifically online mediums of advertising.

The research attempts to investigate a specific issue pertaining to promotional activities within internet law. Cyber Law is implicated in various legal disciplines, which include (to name only a few) contract, marketing, electronic, and consumer protection law.⁴ These disciplines are of the utmost importance for the purposes of this research.⁵

It is necessary to note that the terms and definitions found in this discussion are to be used strictly within the context of this dissertation, as many of them have not yet found local or international recognition. The purpose of the definitions that are given hereafter is to eliminate

¹ Electronic Communications and Transactions Act 25 of 2002 (hereinafter the ECTA).

² *Consumer Affairs Act* 71 of 1988. To clarify possible confusion, it is noted that the name of the Act changed from the *Harmful Business Practices Act* to the *Consumer Affairs (Unfair Business Practices) Act* 1988.

³ *Consumer Protection Act* 68 of 2008 (hereinafter the CPA).

⁴ Anon 2017 <https://www.michalsons.com/focus-areas/internet-law-internet-regulation>.

⁵ See page 4.

ambiguity, thus enabling the reader to understand the terminology used throughout the dissertation. The reason an emphasis is placed on these definitions is that this dissertation is largely terminology bound, and therefore confusion regarding the meaning of a term would be detrimental to the reader.

In today's age of digital marketing, online advertising media are used by suppliers as well as individuals in their private capacity on a more regular basis than previously.⁶ Online advertising is an aspect of a larger practice called digital marketing. Digital marketing is defined as "the promotion of products or brands via one or more forms of electronic media".⁷ Online media, as the name states, focus more on advertising via the internet by using online advertising platforms. Examples of online platforms are Gumtree, Junk Mail and OLX, to name but a few.⁸ For the purposes of this paper Gumtree will be focused on, as it is one of South Africa's largest advertising platforms with more than 600 000 live ads per day being placed on this platform.⁹

It is prudent, at this point, to illustrate the difference between online advertising and online advertising media/platforms. This differentiation is of the utmost importance as it contributes to the uniqueness of the dissertation in respect of display of price. The following example illustrates

⁶ Anon 2017 <http://www.businessdictionary.com/definition/digital-marketing.html>. Digital marketing: "The promotion of products or brands via one or more forms of electronic media. For example, advertising mediums that might be used as part of the digital marketing strategy of a business could include promotional efforts made via the Internet, social media, mobile phones and electronic billboards, as well as via digital and television and radio channels."

⁷ Anon 2016 http://www.sas.com/en_us/insights/marketing/digital-marketing.html.

⁸ When reference is made to "media" it is used as a synonym for mediums as mentioned in the title.

⁹ Anon 2017 https://help.gumtree.co.za/articles/KB_Article/AboutUs?vgroup1=PublicKB&vcategory1=PublicKB%3AGumtree_Basics&vcategory2=About_us. Just to show the popularity of online media of advertising - Gumtree has a large following in South Africa. "Over 600 000 live ads and 30 000 new ads are posted on Gumtree every single day. Gumtree is a great place to sell cars, with well over 3 800 000 unique monthly visits and over 230,000 cars listed on the site. We also have more than double the cars inventory of the next closest competitor."

the difference between online advertising media and online advertisements. Should the famous Makro store advertise in a pamphlet, online or on its shelves, it is bound to a certain extent by the displayed price due to the provisions set out in the CPA and the ECTA. This is a clear example of online advertising in general, where Makro hosts the website. However, what if someone advertises an item for sale on Gumtree? The term applicable here is not online advertisement but the use of an online advertisement medium. Gumtree is such a platform on which people may advertise their items for sale. If Gumtree were a company that advertised items which could be bought directly from itself, as is the case with Makro for example, then the CPA or ECTA would to a certain extent be able to bind Gumtree to its advertised price.¹⁰ The reason being that the legislation refers specifically to such methods of advertising.¹¹ The difference between the two situations is that Makro is the supplier and hosts its own website, whereas Gumtree only hosts its website and makes it available to suppliers who wish to advertise online.

Before the introduction of the CPA, the consumer was said to be in an unfair, disadvantaged position when the supplier would advertise its products for sale. The disadvantage arose from suppliers advertising prices and not being held accountable for the advertised price of their goods. The term for this is bait marketing, which is a form of unfair advertising in general.¹² In such instances the supplier would advertise a product at a ridiculously low price just to obtain the consumer's attention but not be held liable for the said price because of the common law position which

¹⁰ Section 23 of the CPA; s 43 of the ECTA. The reason for the wording may be that issues such as "in adverts" arise, through which the supplier can escape liability. This will be dealt with in more detail in Chapter 4.

¹¹ No South African Act deals specifically with advertising platforms.

¹² Anon 2017 <http://www.investopedia.com/terms/b/bait-switch.asp> Bait Marketing is defined as "A dishonest marketing tactic in which a marketer advertises a very attractive price/rate/term that is really a teaser rate meant to attract customers. Once the customer comes into the store/office to inquire about the advertised price/rate (the "bait"), the advertiser will attempt to sell the customer a more expensive product (the "switch")."

provided that the supplier does not make an offer but rather issues an invitation to treat.¹³ After the promulgation of the CPA, the supplier can now be held liable for its advertised prices by means of the display of price provision as provided for in section 23 of the CPA. This provision sets out clear guidelines which the supplier must heed when goods are advertised under this section. For instance, section 23(6)(a) of the CPA stipulates that the supplier may not require a consumer to pay a higher price than the displayed price. However, section 23 also makes reference to section 43 of the ECTA.¹⁴ Section 23 of CPA states that when a situation, pertaining to the display of price, arises which pertains to electronic transactions, henceforth online media of advertising, section 43 of the ECTA will apply instead.¹⁵ Therefore, the display of price section of the CPA is inexplicably not applicable to online advertising media.

This area of the law needs urgent attention, in particular advertisements by means of online advertisement media such as Gumtree, Junk Mail, and OLX. It is therefore necessary to illustrate the difference between online media of advertising and online advertising, due to the fact that only the latter is dealt with in both the CPA and ECTA. Unfortunately, the South African legislature does not make specific provision regarding online media of advertising. The National Consumer Commissions Annual Report for 2016/17 is proof that the fictional scenario discussed below is relevant as it pertains to complaints revolving around goods.¹⁶ The report shows that complaints revolving goods make up, which is also the largest percentage, 37% of all the complaints received by the commission.¹⁷ It is clear that

¹³ *Crawley v Rex* 1909 TS 1108; *Bird v Summerville* 1960 4 SA 395 (N) 401D; Christie and Bradfield *Law of Contract* 41; Elliott and Quinn *Contract Law* 15.

¹⁴ Naudé and Eiselen *Commentary* 23-9. When referring to s 23 of the CPA "(1) This section does not apply to a transaction if— (b) section 43 of the *Electronic Communications and Transactions Act* applies to that transaction."

¹⁵ Section 23(1)(b) of the CPA "(1) This section does not apply to a transaction if— (b) section 43 of the *Electronic Communications and Transactions Act* applies to that transaction."

¹⁶ National Consumer Commissions Annual Report for 2016/17 26.

¹⁷ National Consumer Commissions Annual Report for 2016/17 26.

there is a general non-compliance regarding goods as opposed to services etc.

Thus the protection of the consumer is unknown in the following factual or sketched situation. Throughout the dissertation reference will be made to the following fictional scenario:¹⁸

A consumer browsing on Gumtree decides that he wants to buy a blue vintage guitar at the advertised price of R10 000. The seller is a known dealer and registered company with an annual turnover exceeding R5 million. The consumer is situated in Cape Town and the supplier is situated in Johannesburg. The consumer decides that he will go to Johannesburg to fetch the product, as the travelling costs are well worth it due to the bargain price of the guitar. When the consumer arrives at the seller's place of business, the seller changes his/her mind and increases the price to R13 000. The seller tries to market the product face-to-face to the consumer, knowing full well that the consumer has already travelled and spent a lot of money to get to Johannesburg. The supplier has baited the consumer into coming to Johannesburg and is therefore able to force the product on the consumer as the consumer would not want to miss out on the guitar. The consumer could walk away, but the issue that arises is that the consumer has already suffered damages in travel expenses as well as time wasted.

In other words, it would seem that there is no specific liability is apportioned to the seller and/or supplier to act in a just and fair manner in respect of online advertising media. The purpose of this discussion is to investigate and to establish how online advertising platforms are dealt with in South Africa. Furthermore, this discussion aims to establish that there are the necessary solutions within South African law, and that foreign jurisdictions need not be investigated.

¹⁸ Reference made to the Consumer and Supplier shall be made interchangeably with Seller and buyer where such interchangeability is possible. In the context of this discussion they are the same parties.

The research question that needs to be answered is to what extent does the common Law, CPA and ECTA protect consumers in the event of display of price when online media advertising is used? A literature study will be done in which the South African common law and legislation will be compared to determine which offers the best possible solution to the specific issues raised above. The South African common law position is derived from English law. To this day common law cases such as *Crawley v Rex* are referred to in our courts regarding offer and acceptance, showing the court's high regard for our common law position pertaining to advertising. There are also various success stories regarding the application of legislation such as the CPA as well as the ECTA. Therefore, South Africa has the tools within its current legislation to provide a solution; which are unfortunately not adequately utilised as it pertains to the interpretation thereof. It will also be shown in Chapter 4 that there is legislation such as the CPA to deal with the issue at hand. However, there is no conformity regarding the interpretation of certain provisions. When there is no conformity regarding a certain section's interpretation it would be overzealous to immediately search for an interpretation and/or solution from a foreign jurisdiction when a declaratory order would have the same effect.¹⁹

In order to investigate and find an appropriate solution to the above scenario, the study will comprise of various chapters. Chapter 1 provides an exposition on the problem statement and research question posed. The investigation will commence with the concept of offer and acceptance, in Chapter 2. In Chapter 3 the common law position pertaining to offer and acceptance will be discussed. Chapters 4 and 5 will deal with the legislation whereby the CPA shall be dealt with in Chapter 4 following the ECTA in Chapter 5. Chapter 6 will compare the remedies dealt with in Chapters 3, 4

¹⁹ A clear concise interpretation of our current legislation from a High Court judge should suffice as to what the legislature truly means as opposed to academic speculation.

and 5. Chapter 7 concludes the study by furnishing recommendations whilst answering the research question – insert your research question here as I don't seem to see it above.

2 Offer and acceptance

2.1 Introduction

The issue regarding the position of the display of price must be dealt with either by the common law, the CPA or the ECTA. This question necessitates an investigation into the principles of contract law pertaining to offer and acceptance. The principles of contract law as set out in this chapter partially convey the common law with the exclusion of certain case law which will be dealt with in specific detail in Chapter 3. The principles of offer and acceptance also state how the display of price with regards to online mediums of advertising would work if the CPA or ECTA did not regulate the position with respect to the display of price in online media.

When two parties commence negotiation in order to initiate contracting, one needs to determine, one needs to determine who is making the offer and who is accepting the offer. Consequently, this will assist in answering the question as to who is liable for the price displayed in an online medium of advertising. The investigation into the principles of offer and acceptance will commence by investigating the requirements of a valid offer, followed by the methods of communication of the offer, and concluding with the termination of the offer. Thereafter the valid requirements of acceptance will be looked into, concluding with the time and place of acceptance.

2.2 Requirements for a valid offer

Before elaborating on the intricacies of an offer, it is necessary to identify the parties to a contract in the normal course of business. In a normal one-on-one transaction (where the parties are in each other's presence) the offeror will be the party who is selling the merx, whereas the offeree will be the party buying the merx. This relationship differs, however, especially in the context of advertising, as will be discussed later.

The court stated in *Jurgens v Volkskas Bank Ltd*²⁰ that an "offer is a manifestation of the offeror's willingness to contract". The court stated further that an offer is "made with the intention that it shall become binding as soon as it is accepted by the offeree".²¹ The offer with regards to the demonstration of intention will be regarded as legally binding only if it meets the prescribed requirements, namely: The offer must be firm, complete, certain, clear, and in a particular form.²²

2.1.1 Offer must be firm²³

The offer made by the offeror should be made with the proper *animus contrahendi*.²⁴ Therefore, the offer should be made with the intention that its acceptance will constitute a binding contract.²⁵ In the *Wasmuth v Jacobs*²⁶ case the court reiterated the above, stating:

It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror.

Proper compliance with this requirement will not be met if one party makes a statement with the purpose of ascertaining whether the other party will enter into negotiations.²⁷ The latter refers to a situation where the offeror is feeling out the situation and has no intention necessarily to contract.

When determining whether or not a party has the intention to contract (has made a firm offer) or has expressed willingness to negotiate, the

²⁰ *Jurgens v Volkskas Bank Ltd* 1993 1 SA 214 (A) 218-219.

²¹ *Jurgens v Volkskas Bank Ltd* 1993 1 SA 214 (A) 218-219.

²² Hutchison et al Law of contract 48;

²³ Hutchison et al Law of contract 48; Scott The influence of the CPA 10.

²⁴ Hutchison *et al* Law of contract 48. *Animus contrahendi* refers to the intention to be legally bound.

²⁵ *Oosthuysen v Oosthuysen* 2007 (1386/2007) [2007] ZAFSHC 66 para 13; *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633 D; Christie and Bradfield *Law of Contract* 31 (Old Christie); Hutchison *et al* Law of contract 48.

²⁶ *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633D.

²⁷ *Efroiken v Simon* 1921 CPD 372; Hutchison et al Law of contract 48.

courts will usually look at all the relevant circumstances in this regard.²⁸ In *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd*²⁹ the court objectively applied the reasonable man test. Bradfield summarizes this attitude towards *animus contrahendi* best by stating the following:³⁰

As the judges frequently remind us, each case depends on its facts, so the nature of the offer, including the words in which it is expressed, the relationship between the parties and the circumstances surrounding the making of the offer must all be examined before it can be decided whether an offer was made with or without *animus contrahendi*.

2.1.2 Offer must be complete³¹

All the material terms of the proposed agreement must be reflected in the offer to meet the "complete" requirement.³² The latter can be explained by *South African Division v GKN Sankey (Pty) Ltd*³³ as follows:

There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force.

It goes without saying that there cannot be any further or outstanding provisions which must still be agreed upon.³⁴ At the very least the offer

²⁸ *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd* 2002 1 SA 886 (C) para 893 "whether an offer was made with the necessary *animus*, a court is entitled to look not only at the words of the offer, but also at the surrounding circumstances – although they cannot usually remedy any defect in the offer itself".

²⁹ *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd* 2002 1 SA 886 (C) para 893 "Gelb knew that the timber identified on the bill of quantities forwarded by him to Cresswell was 'rare and imported wood'. A reasonable man in the position of Gelb ought, in my view, to have realised, in the circumstances, that the 'quote' of respondent was accordingly unreasonably low".

³⁰ Christie and Bradfield *Law of Contract* 39.

³¹ Hutchison et al *Law of contract* 48.

³² *Lambons v BMW* 1997 4 SA 141 (SCA) 334; *South African Division v GKN Sankey (Pty) Ltd* 1987 1 SA 81 (A) 629; Hutchison *et al Law of contract* 48.

³³ *South African Division v GKN Sankey (Pty) Ltd* 1987 1 SA 81 (A) 92A-F.

³⁴ Hutchison *et al Law of contract* 48. The following illustration can be of explanatory use: If the parties agree upon terms A and B they will not be bound to the former terms if terms C and D are yet to be agreed upon and the intention of the parties is to be bound only when the agreement is complete.

must contain the *essentialia* of the contract in order for this requirement to be complied with.³⁵

2.1.3 Offer must be certain and clear³⁶

The offer must contain a satisfactory amount of certainty. If, in such an event, the addressee to whom the offer is made answers "yes" to the offer made, the offer would constitute a binding contract.³⁷ On the contrary, if the offeror makes an unclear offer or it is not what the offeror had in mind then the acceptance thereof shall not constitute a legally binding offer.³⁸ In such an event the addressee shall not be able to determine its obligation due the ambiguous nature of the above offer.³⁹ Therefore, if the offer is infused with vagueness the latter disqualifies the offer from being binding.⁴⁰

However, in the event that the provision of a contract has two different interpretations, the court shall refer to the Parol evidence rule and the rules of interpretation to establish the true meaning of the provision.⁴¹ Courts are reluctant, however, to invalidate agreements where the intentions of the agreement were for it to have legal effect.⁴² The reasons therefore are easily evident: many individuals in the business sphere don't personally have expert drafting knowledge when contracting but this does not

³⁵ Christie and Bradfield *Law of Contract* 44.

³⁶ Hutchison *et al Law of Contract* 48.

³⁷ Christie and Bradfield *Law of Contract* 34; Hutchison *et al Law of contract* 48.

³⁸ Hutchison *et al Law of Contract* 48.

³⁹ Hutchison *et al Law of Contract* 48.

⁴⁰ Hutchison *et al Law of Contract* 49; Du Bois (ed) Wille's principles of South African law 741.

⁴¹ *Affirmative Portfolios CC v Transnet Ltd T/A Metrorail* 2009 1 SA 196 (HHA) para 13 which describes the Parol evidence rule as "when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by Parol evidence"; Hutchison *et al Law of Contract* 49.

⁴² Hutchison *et al Law of Contract* 49. *G4s(SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd And Another* 2017 2 SA 24 (SCA); *Pritchard Properties (Pty) Ltd v Koullis* 1986 2 SA 1 (a)

disentitle them from contracting.⁴³ In such instances there is a predominant reliance on good faith and commercial expediency so as to ensure the contract remains in effect.⁴⁴

*2.1.4 Particular form of the offer*⁴⁵

Generally, the offer is made expressly or implicitly. However, it does not have to be made in a particular form.⁴⁶ There are certain prescribed formalities, however, that are affiliated to certain contracts that need to be adhered to for example contracts for the alienation of land need to be in writing.⁴⁷ In such instances the offer would have to meet the requirements as prescribed.⁴⁸

These requirements for a valid offer as discussed above are fundamental principles within the South African law of contract. However, with the introduction of the CPA there are additional requirements that must be met; namely that the offer must be made in plain and understandable language, that it must state if the goods are grey goods or reconditioned, and so forth.⁴⁹

2.2 Communication of the offer

In general, the offer is addressed to the offeree.⁵⁰ The communication of the offer must be adequate in the sense that the offeree must be aware of the offer in order to have the necessary intention to contract.⁵¹ Offers can

⁴³ Hutchison et al Law of contract 49.

⁴⁴ *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 (A) 567A-C. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 1 SA 256 (CC)

⁴⁵ Van der Merwe *et al Contract: General Principles* 47.

⁴⁶ *Nedcore Bank v Withinshaw Properties* 2002 6 SA 236 (C) para 33; Van der Merwe *et al Contract: General Principles* 48.

⁴⁷ Van der Merwe *et al Contract: General Principles* 48.

⁴⁸ Van der Merwe *et al Contract: General Principles* 48. There is nothing prohibiting the offeror from prescribing certain formalities, however.

⁴⁹ Sections 22 and 25 of the CPA 68 of 2008.

⁵⁰ Christie and Bradfield *Law of Contract* 58.

⁵¹ Christie and Bradfield *Law of Contract* 58.

also be made to the public or a segment of the public.⁵² In such instances a contract will come into effect when a party accepts such an offer.⁵³ With reference to offers to the public, there are many instances that may be investigated, such as advertisements, promises of award, calls for tenders and auctions. For the purposes of this dissertation, the focus will be exclusively on offers made in advertisements. These will be dealt with in chapter 3.

2.3 Termination of the offer

The offer may be terminated in numerous ways. The first method is the rejection of the offer.⁵⁴ In such a case the offer will be terminated whether the rejection is done expressly or is implied.⁵⁵ An implied rejection takes place when the offeree makes a counter offer.⁵⁶ The second manner in which an offer may be terminated is due to the lapsing of a reasonable time period.⁵⁷ This refers to when one of the parties has not prescribed a time period but acceptance does not take place within a reasonable time.⁵⁸ The third instance of termination is in the event of the death of one of the parties.⁵⁹ The offer in this instance does not create rights or liabilities within the deceased estate, and therefore is terminated at death.⁶⁰

⁵² *Hersch v Nel* 1948 3 SA 686 (A) 693; Christie and Bradfield *Law of Contract* 41; Hutchison *et al Law of Contract* 50.

⁵³ *Carlill v Carbolic Smoke Ball Co* [1893] QB 256 (CA); Christie and Bradfield *Law of Contract* 41.

⁵⁴ Hutchison *et al Law of Contract* 54.

⁵⁵ Hutchison *et al Law of Contract* 54; *Gaap Point of Sale (Pty) Ltd v Valjee* [2010] JOL 26353 (KZD) 7; *Hyde v Wrench* 1840 49 ER 132. "The counter-offer amounted to a rejection of the previous offer, which was therefore no longer open for acceptance." Christie and Bradfield *Law of Contract* 52; Van der Merwe *et al Contract: General Principles* 51.

⁵⁶ Hutchison *et al Law of Contract* 54.

⁵⁷ Hutchison *et al Law of Contract* 54.

⁵⁸ Hutchison *et al Law of Contract* 54. Parties can however prescribe a period for the lapsing. In such a case the prescribed period must be adhered to. Van der Merwe *et al Contract: General Principles* 52; Christie and Bradfield *Law of Contract* 51; *Dietrichsen v Dietrichsen* 1911 TPD 487. A reasonable time is imperative as it speaks to good faith between the contracting parties.

⁵⁹ Hutchison *et al Law of Contract* 54.

⁶⁰ Hutchison *et al Law of Contract* 54.

The last method is referred to as the revocation of the offer.⁶¹ An offer may be revoked at any point before contracting.⁶² The revocation may still take place if there is a stipulated time limit wherein the acceptance of the offer must take place.⁶³ However, the revocation of the offer is possible and effective only when it reaches the other party.⁶⁴

Once a valid offer has been made the offeree has the option to accept the offer.

2.4 Acceptance

Acceptance is the express declaration or tacit indication by the person to whom the offer is made that the latter intends to be contractually bound in terms of the offer made.⁶⁵ In the event of silence on the part of the offeree, this shall not be treated as a valid acceptance.⁶⁶ Bradfield is of the opinion that it is:⁶⁷

A very necessary limitation upon the offeror's liberty to indicate the mode of acceptance is that the offeror cannot force a contract on the offeree by saying that the offeree's silence will be taken as acceptance.

The court in the case of *Collen v Rietfontein Engineering Works* stated that⁶⁸:

Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon such other a condition to that effect.

⁶¹ Hutchison et al Law of contract 54.

⁶² Van der Merwe *et al Contract: General Principles* 51; Hutchison et al Law of Contract 54.

⁶³ Van der Merwe *et al Contract: General Principles* 51; Hutchison et al Law of Contract 54.

⁶⁴ *Yates v Dalton* 1938 EDL 178; Christie and Bradfield *Law of Contract* 54.

⁶⁵ Gibson and Visser *Mercantile and Company Law* 34; Du Bois *et al Wille's principles of South African law* 742.

⁶⁶ *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 422; Christie and Bradfield *Law of Contract* 69; Hutchison *et al Law of Contract* 55. Sharrock *Business Transactions Law* 63. Tacit acceptance shall normally be derived from the actions of the addressee (like a nod of the head, indicating yes).

⁶⁷ Christie and Bradfield *Law of Contract* 44.

⁶⁸ *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 422.

The offeror can also not send unsolicited goods by mail and state that if the offer is not rejected it will constitute valid acceptance.⁶⁹ The acceptance shall be seen as valid only if it meets the requirements described below.⁷⁰

*2.4.1 Acceptance must be unqualified*⁷¹

The acceptance must be complete or unambiguous in respect of all elements of the offer.⁷² This means that there can be a valid acceptance only if the offer is accepted in its entirety.⁷³ In the event that an offeree accepts the offer, subject to new conditions or the omission of certain conditions, this shall not be considered a clear acceptance of the offer.⁷⁴ This is a qualified acceptance, in essence a counter offer which may be accepted or rejected by the original offeror.⁷⁵

*2.4.2 Acceptance must be made by the addressee*⁷⁶

As previously mentioned, an offer made to the general public or segment of the public may be accepted by any person in that segment or in the general public.⁷⁷ Where the offer was addressed to one specific person,

⁶⁹ Section 74(1) *National Credit Act* 34 of 2005; Christie and Bradfield *Law of Contract* 69.

⁷⁰ Hutchison et al *Law of Contract* 55.

⁷¹ Hutchison et al *Law of Contract* 55.

⁷² *Roberts v Martin* 2005 4 SA 163 (C); *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 421; Christie and Bradfield *Law of Contract* 64; Hutchison et al *Law of Contract* 55; Van der Merwe et al *Contract: General Principles* 53.

⁷³ Van der Merwe *et al Contract: General Principles* 53; Hutchison *et al Law of Contract* 55. The latter refers to the mirror image rule.

⁷⁴ Hutchison et al *Law of Contract* 55; Van der Merwe et al *Contract: General Principles* 53.

⁷⁵ *Ebrahim v Khan* [1979] 1 All SA 459 (N) 462; *Boerne v Harris* 1949 1 SA 793 (A) 808; Van der Merwe *et al Contract: General Principles* 53. This counter offer can in any event be rejected or accepted by the original offeror. For example: If A offers its Guitar to B at a price of R3 000 and B accepts the offer but qualifies it stating he will pay the R3000 in instalments for 6 months then this constitutes a counter offer. B action in qualifying the acceptance is in essence a rejection of the original offer. In this instance A can either accept or reject the aforesaid counter offer.

⁷⁶ Hutchison et al *Law of Contract* 55.

⁷⁷ *Hersch v Nel* 1948 3 SA 686 (A) 693; Christie and Bradfield *Law of Contract* 41; Hutchison *et al Law of contract* 50.

only that person may accept the offer.⁷⁸ This principle is clearly evident in *Bird v Summerville*.⁷⁹ The appellant wanted to sell his property and was informed by the estate agent that the respondent was interested.⁸⁰ The appellant therefore signed the written offer and named the first respondent as the sole buyer, yet respondent one and two both signed as buyers.⁸¹ It is necessary to note, however, that the applicant when making the offer was unaware of the second respondent. The court found that the appellant was not contractually bound because it was not the appellant's intention to sell the property to the second respondent.⁸² In *Blew v Snoxell*⁸³ this principle was summarised as follows:

Now it is trite law that an offer made by one person to another cannot be accepted by a third . . . for the simple reason that there was no intention on the part of the one person to contract with the other person whatever the subject matter of the contract may be.

Furthermore, the *Oosthuizen v Du Preez*⁸⁴ case serves as an example where the contract is found invalid by reason of the fact that the name of the original purchaser was deleted and replaced by the names of the first and second defendants without the permission of the seller.

*2.4.3 Acceptance must be a mindful response to the offer*⁸⁵

It is clear and logical that a person cannot accept an offer if he is unaware of it.⁸⁶ The principle regarding the unawareness of the offer is enshrined in

⁷⁸ *Levin v Drieprok Properties* 1975 2 SA 397 (A) 676. "It is a cardinal principle of the law of contract that a simple contractual offer made to a specific person can be accepted only by that person; and that, consequently, a purported acceptance by some other person is ineffectual and does not bring about the conclusion of a contract"; Van der Merwe *et al Contract: General Principles* 53; Hutchison *et al Law of Contract* 55.

⁷⁹ *Bird v Summerville* 1961 3 SA 194 (A) 195.

⁸⁰ *Bird v Summerville* 1961 3 SA 194 (A) 195.

⁸¹ *Bird v Summerville* 1961 3 SA 194 (A) 195.

⁸² *Bird v Summerville* 1961 3 SA 194 (A) 204-205.

⁸³ *Blew v Snoxell* 1931 TPD 226 229-230.

⁸⁴ *Oosthuizen v Du Preez* (29116/2006) [2009] ZAGPPHC 138 para 21.

⁸⁵ Hutchison *et al Law of contract* 56; Sharrock *Business Transaction Law* 64-65.

⁸⁶ Hutchison *et al Law of contract* 55; Sharrock *Business Transaction Law* 64-65.

*Bloom v American Swiss Watch Co.*⁸⁷ The respondent was the owner of a jewellery business that was robbed by thieves. The respondent offered a reward for anyone who disclosed information leading to the arrest of the thieves. Mr Bloom took such information to the police while being unaware of the reward, but when he later became aware he tried to claim from the business.⁸⁸ The Court found that he could not claim the reward and explained the decision stating:⁸⁹

Until the plaintiff knew of the offer it seems clear that he could not accept it, and until he accepted it there could be no contract, for a contract requires that there should be a consensus of two minds, and if the one did not know what the other was proposing, the two minds never came together.

A contract therefore requires that the parties must have consensus. In this instance the one party was not aware of the other party's offer and therefore no contract came into effect.⁹⁰

*2.4.4 Acceptance must be in the prescribed form*⁹¹

The offeror, being the initiator of the contractual process, is entitled to determine the process and method of acceptance.⁹² If the offeror prescribes a form, then no other method/formality shall be sufficient for acceptance.⁹³ However, the possibility remains that the offeror prescribes a method without the intention that this is the only acceptable method of acceptance.⁹⁴

⁸⁷ *Bloom v American Swiss Watch Co* 1915 AD 101.

⁸⁸ *Bloom v American Swiss Watch Co* 1915 AD 101.

⁸⁹ *Bloom v American Swiss Watch Co* 1915 AD 107.

⁹⁰ Van der Merwe et al *Contract: General Principles* 56; Hutchison et al *Law of Contract* 56.

⁹¹ Hutchison et al *Law of Contract* 56; Van der Merwe et al *Contract: General Principles* 57.

⁹² *Pillay v Shaik* 2009 4 SA 74 (SCA) 52; Van der Merwe et al *Contract: General Principles* 57; Hutchison et al *Law of Contract* 56.

⁹³ *Pillay v Shaik* 2009 4 SA 74 (SCA) 52; Van der Merwe et al *Contract: General Principles* 57; Hutchison et al *Law of Contract* 56.

⁹⁴ Hutchison et al *Law of Contract* 56; Van der Merwe et al *Contract: General Principles* 57.

2.5 Time and place of acceptance

A distinction must be made between circumstances where the parties contract in each other's presence and in the absence of one another.⁹⁵ Where parties contract in each other's presence there is no time lag between the declaration and determination of acceptance and the situation is therefore unproblematic as acceptance takes place immediately.⁹⁶ More problematic is the situation when parties contract at a distance and a period of time has to elapse between one party's declaration of an offer and the other party's acceptance.⁹⁷ The issue of the time of acceptance needs to be investigated in terms of the fictional scenario sketched in chapter 1. It is clear that the parties are not in each other's immediate presence; therefore the contract is seen to be done *inter absentes*. For this purposes one must establish when acceptance is made via electronic transactions. There are many theories that can be applied. In this instance, however, the most fitting is that described hereunder.

Information theory, which is the general rule in South African Contract Law regarding instantaneous contracts, states that an agreement is concluded when and where the acceptance of the offer is communicated to (as opposed to merely received by) the offeror.⁹⁸ As stated above, this is not a problematic issue when the parties are in each other's presence. However *Van Niekerk* states that the argument can be made that emails (referring to electronic messages) may be instantaneous, therefore the information theory shall apply.⁹⁹ However, Hutchison states that the ECTA governs an

⁹⁵ Hutchison et al Law of Contract 56.

⁹⁶ Hutchison et al Law of Contract 56.

⁹⁷ Van der Merwe et al Contract: General Principles 59; Hutchison et al Law of Contract 56.

⁹⁸ Hutchison *et al Law of Contract* 57. Also see Van Niekerk and Schulze *SA Law of International Trade* 69. Parties can communicate instantaneously both being present at their computers at the same time and responding to each other's messages much in the same way as per telephone.

⁹⁹ Emails may also not be instantaneous. They can be received much later than they were sent, or not during office hours, in which case information theory does not apply (due to the time lag).

electronic contract, as data messages are sent.¹⁰⁰ In this regard section 22(2) of the ECTA states that the contract comes into being at the time and place "where the acceptance of the offer was received by the offeror, thereby adopting the reception theory".¹⁰¹ With regard to the latter theory, the contract comes into being at the addressee's usual place of business and as soon as the message reaches the addressee's information system.¹⁰² Applying this to the fictional scenario would be premature as it is not yet clear who the offeror or the offeree is. This will be dealt with in more detail hereafter in Chapter 3.

The above contract principles set out the manner in which one can determine the obligations of parties when working with offer and acceptance. It is clear that the requirements are that an offer adhere to strict principles, therefore allowing the offeree to be able to make a clear and certain acceptance. Moreover, the communication and form of the offer must convey a sense of clarity to the offeree, thereby sculpting an environment in which clear contractual consensus can be attained. On the other hand the requirements of acceptance place a further obligation on the offeree in as much as the acceptance must be a clear and mindful response to the offer, and the acceptance must be made by the offeree. It further necessitates that the acceptance be in the same form as the offer if a certain form was prescribed in the offer.

The time and place of the acceptance have to be investigated, and they are important to this dissertation as they determine when the contract came into existence. However, doing so is subject to the question of who the offeror and offeree are, which will be clarified in Chapter 3.

¹⁰⁰ Hutchison *et al Law of Contract* 59.

¹⁰¹ Papadopoulos 2010 *Obiter* 189. Hutchison *et al Law of Contract* 57. "The reception theory states that the agreement comes into being when the letter of acceptance reaches the address of the offeror."

¹⁰² Hutchison *et al Law of Contract* 59. The offeror must be regarded as having received the data message when the data message enters the information system designated or used by the addressee and is capable of being retrieved and processed by him.

The above principles should be the point of departure when dealing with the protection of parties with regard to the display of price in online media. The common law position will be investigated in Chapter 3 in accordance with the above contract law principles. The common law position is of the utmost importance in establishing who makes the offer with regard to advertising in online media.

3 The common law position regarding the display of price

3.1 Introduction

The position as it pertains to offer and acceptance is of primary importance when determining the liability and regulation of online media of advertising. As seen in the previous chapter, the position regarding offer and acceptance is entrenched in the contractual principles. Furthermore, the common law plays a contributory role with regards to offer and acceptance within online media of advertising. Its role is investigated below to show what remedies, if any, the vulnerable consumer may have at its disposal. It is important to remember that there are many categories under which an offer and acceptance is made.¹⁰³ When dealing with advertisements, the category of offers to the public is most relevant to this dissertation.¹⁰⁴ The general rule is that offers are directed to an individual, and offers to the public are seen as exceptions to the general rule.¹⁰⁵ The common law position will be investigated in order to ascertain the position the seller is in when he/she ordinarily sells a car on an online medium of advertising such as Gumtree as part of their everyday business. The investigation will also answer the question as to whether it is the seller or the buyer who is making the offer in the fictional scenario. This investigation commences with the general background of offers in advertising and is then developed in terms of the particular case. Thereafter the opinions of various authors are looked at to ascertain if it is the seller or the buyer who in fact makes the offer.

¹⁰³ Christie and Bradfield *Law of Contract* 41; Hutchison *et al Law of Contract* 348.

¹⁰⁴ Christie and Bradfield *Law of Contract* 41; Hutchison *et al Law of Contract* 348; Elliott and Quinn *Contract Law* 13.

¹⁰⁵ Hutchison *et al Law of Contract* 50; Scott *The influence of the CPA* 10; Elliott and Quinn *Contract Law* 13.

3.2 Contributory role of the common law

Generally, advertisements do not amount to binding offers; rather, they constitute invitations to do business.¹⁰⁶ In this instance the party advertising the goods is given the opportunity to decide with whom it wants to do business.¹⁰⁷ This permits the parties to negotiate additional terms to the contract.¹⁰⁸ If one would argue that an advertisement constitutes a binding offer other problems arise.¹⁰⁹ One of the problems is where a supplier or seller has a shortage of stock and the consumer or buyer claims the goods.¹¹⁰ This reasoning is attributed to Smith J in the famous *Crawley v Rex* case.¹¹¹

In this case a shop owner was trading in a specific brand of tobacco.¹¹² The tobacco was advertised at a ridiculously low price to attract a large number of members of the public.¹¹³ A client who had already, on the same day and at the same hour, purchased tobacco came back for more.¹¹⁴ The shop owner then declined to sell any more tobacco to that client and asked the client to leave the store.¹¹⁵ The client refused to leave the store as he felt entitled to accept the shop owner's offer. This led to a disagreement and the question of whether the shop owner's advertisement constituted a valid and binding offer.¹¹⁶ The court in this instance stated that the advertisement was just an announcement of the shop owner's intention to

¹⁰⁶ *Crawley v Rex* 1909 TS 1108; *Bird v Summerville* 1960 4 SA 395 (N) 401D; Christie and Bradfield *Law of Contract* 41; Elliott and Quinn *Contract Law* 15.

¹⁰⁷ *Woker Advertising Law* 52-53; Scott *The influence of the CPA* 10.

¹⁰⁸ *Crawley v Rex* 1909 TS 1107; *Woker Advertising Law* 52-53; Scott *The influence of the CPA* 10.

¹⁰⁹ *Crawley v Rex* 1909 TS 1108; *Woker Advertising Law* 52-53.

¹¹⁰ *Crawley v Rex* 1909 TS 1108; *Woker Advertising Law* 52-53.

¹¹¹ *Crawley v Rex* 1909 TS 1108.

¹¹² *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166.

¹¹³ *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166.

¹¹⁴ *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166-167.

¹¹⁵ *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166-167.

¹¹⁶ *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166-167.

sell at the advertised price.¹¹⁷ The position as it pertains to advertisements was settled by *Smith J*:¹¹⁸

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.

The court in the above-mentioned case referred to no authority for its decision, but it is accepted that this is the current position in the English law.¹¹⁹ The opinion is held as per the common law that the supplier who is advertising a product accepts the offer made by the consumer. The latter statement thus permits the supplier or seller to engage in deceptive advertising and places the consumer in an unfair situation. Hereafter the opinions of various academics will be considered pertaining to the common law position as set by *Crawley v Rex*.¹²⁰

¹¹⁷ *Crawley v Rex* 1909 TS 1108.

¹¹⁸ *Crawley v Rex* 1909 TS 1108. The court stated further: "There is nothing, so far as I know, which obliges a tradesman to sell to any customer who chooses to present himself in his shop; and if he refuses to serve the customer, and demands that he shall leave the shop, in my opinion the customer wrongfully and unlawfully remains in the shop, if he still refuses to leave after so being told to go"; Christie and Bradfield *Law of Contract* 42.

¹¹⁹ *Partridge v Crittenden* [1968] 2 All ER 421 at 424; Du Plessis 2015 *SALJ* 152. Woker *Advertising Law* 52-53. Woker refers to the *Timothy v Simpson* 1834 6 C & P 499 case where the position is identical. The display of goods on the shop's shelves serves only as an invitation to do business and as such does not constitute an offer.

¹²⁰ *Crawley v Rex* 1909 TS 1108.

3.2 Academic opinions regarding the common law position

3.2.1 Vulnerability of consumers

In addition to the above case, the position in *Pharmaceutical Society of Great Britain v Boots Cash Chemists*¹²¹ serves as a further example of the vulnerability of consumers. The court stated that an offer is made by the consumer when he or she takes a product to the cashier, and not when the consumer simply places the product into a trolley.¹²² However, the vulnerability of the consumer is currently regulated by the CPA under section 30.¹²³ This will be dealt with in more detail in Chapter 4.

As it stands in the common law, the consumers are left vulnerable to bait and switch marketing techniques.¹²⁴ The latter is defined as follows:¹²⁵

A fraudulent or deceptive sales practice in which a purchaser is attracted by advertisement of a low-priced item but then is encouraged to purchase a higher-priced one.

This method of advertising has considerable consequences for the consumer. For example, it allows the supplier to advertise a car at a low price in order to attract the consumer, only to raise the price when the consumer shows interest.

As seen above, the position as it pertains to advertisements is that they constitute mere invitations to do business and carry almost no

¹²¹ *Pharmaceutical Society of Great Britain v Boots Cash Chemists* 1953 1 QB 401 (A) 483; Hutchison *et al* *Law of contract* 52; Scott *The influence of the CPA* 11.

¹²² *Pharmaceutical Society of Great Britain v Boots Cash Chemists* 1953 1 QB 401 (A) 483; Scott *The influence of the CPA* 11.

¹²³ Section 30(1) of the CPA.

¹²⁴ Scott *The influence of the CPA* 10-11; Du Plessis 2015 *SALJ* 155; Sharrock *Business Transactions Law* 55. If the seller is not bound to its advertisement than the consumer will fall prey to unfair marketing techniques.

¹²⁵ Anon 2017 <https://www.merriam-webster.com/dictionary/bait%20and%20switch>.

obligation.¹²⁶ There are many different opinions as to the principle of the invitation to do business. These opinions will now be dealt with.

3.2.2 *Invitation to do business*

For more than 100 years the invitation to do business principle has been used in the scope of advertisements. The question to ask is if this principle applies to all advertisements? As stated above, Woker¹²⁷ agrees that advertisements generally do not constitute offers and as such amount to invitations to do business.¹²⁸ She especially refers to the dicta in *Crawley v Rex*.¹²⁹ As mentioned above, the court's main reason for its decision is that the seller can't be bound by an advertisement; otherwise the seller would need unlimited stock.¹³⁰ Furthermore, Unger argues that an advertisement on the shelves of a shop constitutes an invitation to do business for the same reason as that given in the *Crawley* case.¹³¹ Kahn, however, is not convinced by the argument as it pertains to the limitation of stock.¹³² He submits that there is a tacit term in an advert that amounts to a first come, first served principle.¹³³ He goes on further to state that an additional term could be read into it, such as "each customer may only buy a reasonable amount".¹³⁴ It is clear that Kahn is arguing for the vulnerable consumer in as much as he feels that an advertisement should be a binding offer. He suggests that the limited stock issue is one of the few elements keeping the invitation to do business principle alive.

¹²⁶ *Crawley v Rex* 1909 TS 1108.

¹²⁷ Woker *Advertising Law* 52-53.

¹²⁸ Woker *Advertising Law* 52-53.

¹²⁹ *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166-167.

¹³⁰ *Crawley v Rex* 1909 TS 1106; Hayman 1949 *SALJ* 166-167.

¹³¹ *Crawley v Rex* 1909 TS 1108; Du Plessis *Unilateral Determination* 143; Du Plessis 2015 *SALJ* 152 (footnote 27).

¹³² Christie *The law of Contract* op cit 30; Woker *Advertising Law* 53.

¹³³ Christie *The law of Contract* op cit 30; Woker *Advertising Law* 53.

¹³⁴ Christie *The law of Contract* op cit 30; Woker *Advertising Law* 53.

3.2.3 General offer

Gibson and Visser take another stance, arguing that an advertisement can well amount to an offer, but that this would have to be seen as a general offer.¹³⁵ This offer is open to anybody who can perform a specific service.¹³⁶ In this instance the case of *Carlill v Carbolic Smoke Ball*¹³⁷ is most applicable. In this case an advertisement was placed stating that Carbolic Smoke Ball would pay a hundred pounds to any person who uses there product correctly and still contracts influenza.¹³⁸ This is in fact what happened, and the court found that Carlill was entitled to the hundred pounds.¹³⁹ The Court determined that the advertisement amounted to a binding unilateral offer to the whole world, which could be accepted by any person who knew about the offer and therefore contracted influenza despite having used the product as prescribed.¹⁴⁰ Gibson and Visser, therefore, submit the following:¹⁴¹

If an advertiser offers to pay a sum of money to a user of his products who can prove that the products do not have specific qualities, the advertiser makes a valid offer.

It is important to note, however, that the aforementioned case brings about two approaches in respect of a general offer.¹⁴² Woker explains the twofold approach as follow:¹⁴³

First, it showed that an advertisement could constitute a general offer capable of acceptance, and was not always simply an invitation to do business. Secondly, it served as a warning to advertisers and agencies to

¹³⁵ Gibson and Visser *Mercantile and Company Law* 30. The opinion is held that the acceptance would go further than a service.

¹³⁶ Gibson and Visser *Mercantile and Company Law* 30.

¹³⁷ *Carlill v Carbolic Smoke Ball* [1893] QB 256 (CA).

¹³⁸ Gibson and Visser *Mercantile and Company Law* 31.

¹³⁹ Gibson and Visser *Mercantile and Company Law* 31.

¹⁴⁰ Gibson and Visser *Mercantile and Company Law* 31.

¹⁴¹ Gibson and Visser *Mercantile and Company Law* 30-31.

¹⁴² Woker *Advertising Law* 52; *Carlill v Carbolic Smoke Ball* [1893] QB 256 (CA); Scott *The influence of the CPA* 11.

¹⁴³ Woker *Advertising Law* 52; Scott *The influence of the CPA* 11. Chausse *Comparative and critical discussion* 13.

exercise greater care in the writing of copy, not only where financial guarantees were concerned, but also in the wider context of advertising claims generally.

The position is similar in South African law as far as it pertains to the *Bloom v American Swiss Watch Co*¹⁴⁴ case. In this case an offer was made of a reward for information leading to the arrest of thieves who stole jewellery.¹⁴⁵ Solomon JA stated that if the claimant had known about the advertisement and acted upon it (with the intention to be rewarded) a legal obligation would have arisen and therefore the claimant could have legally collected the reward.¹⁴⁶ These two cases clearly exemplify exceptions to the invitation to do business principle by way of a general offer.

3.2.4 Intention

It's clear that the intention as it pertains to the advertisement plays an important role when determining whether an invitation to do business is applicable or a valid offer has occurred.¹⁴⁷ Hutchison¹⁴⁸ takes a subjective stance in the matter as to when the statement constitutes an offer or an invitation to do business. He argues that the intention of the statement must be looked at as well as the impression the statement makes in the mind of the party to whom it was directed.¹⁴⁹ These arguments are persuasive but, as Woker states, there is no hard and fast rule for determining if a statement constitutes an offer or an invitation to do business.¹⁵⁰ She does, however, place a great emphasis on the intention of

¹⁴⁴ *Bloom v American Swiss Watch Co* 1915 AD 100.

¹⁴⁵ *Bloom v American Swiss Watch Co* 1915 AD 100.

¹⁴⁶ Woker Advertising Law 52.

¹⁴⁷ *Carlill v Carbolic Smoke Ball* [1893] QB 256 (CA); Scott *The influence of the CPA* 11.

¹⁴⁸ Hutchison et al *The law of contract* 51.

¹⁴⁹ Hutchison et al *The law of contract* 51; Scott *The influence of the CPA* 11-12.

¹⁵⁰ Woker Advertising Law 52.

the statement.¹⁵¹ Furthermore, she describes the manner in which the intention must be established:¹⁵²

This intention will be established by inference from the declaration and the surrounding circumstances and not simply from denials by advertisers when they find themselves in difficult situations.

She further proposes that if the supplier wants to make its intention clear, it should use qualifications such as "while stocks last" and "the supplier reserves the right to refusal" etcetera.¹⁵³

It is clear that the focus should be on the intention of the seller.¹⁵⁴ Such a focus is necessary as suppliers can easily manipulate the current position as it pertains to the invitation to do business principle.¹⁵⁵ With the focus on the intention of the advertiser the *Fraser v Frank Johnson*¹⁵⁶ case is of importance. The court found that the intention is clearly established if the offer is conveyed in such a simple way that its acceptance would amount to a legally binding contract.¹⁵⁷ However, in the absence of a clear intention, the advert is seen as a mere invitation to do business.¹⁵⁸

3.3 Conclusion

The question remains, however, as to what the position would be for an advertisement on an online advertisement medium such as in the fictional scenario. Would it constitute an offer or an invitation to do business? It is clear that the limitation of stock, as set forth in the *Crawley* case, cannot apply to an advertisement such as the one in the factual scenario. The opinion is that the invitation to do business principle is not applicable due

¹⁵¹ Woker *Advertising Law* 52. She uses the phrase "the real answer is to be found in the intention of the advertiser".

¹⁵² Woker *Advertising Law* 52.

¹⁵³ Woker *Advertising Law* 53.

¹⁵⁴ Sharrock *Business Transactions Law* 55; Scott *The influence of the CPA* 12.

¹⁵⁵ Sharrock *Business Transactions Law* 55; Scott *The influence of the CPA* 12.

¹⁵⁶ *Fraser v Frank Johnson* (1894) 11 SC 66; Du Plessis 2015 *SALJ* 154.

¹⁵⁷ *Fraser v Frank Johnson* (1894) 11 SC 66; Du Plessis 2015 *SALJ* 154.

¹⁵⁸ Christie and Bradfield *Law of Contract* 41; Du Plessis 2015 *SALJ* 152.

to the fact that this offer must be seen as a general offer and as such carries the intention to be bound by the first party who accepts it. Furthermore, applying the *Fraser v Frank Johnson*¹⁵⁹ case, if the advertisement is conveyed in such a simple way then the acceptance would amount to a legally binding contract. Lastly, the remedies in such a case are not too difficult to be established. In the event that the advertisement constitutes an offer, then the acceptance thereof will be a legally binding offer. Therefore, if the offer as it pertains to the prices changes, then this would lead to a basic breach of contract situation, and the normal remedies for breach of contract will apply. Therefore, the advertisement in the fictional scenario does constitute an offer, the reason being that it is conveyed in such simple manner that the simple acceptance thereof constitutes a legally binding contract.

The common law envisages a breach of contract remedy. However, this position can be superseded if the CPA or ECTA can rectify the problem in this scenario in a more efficient manner. Consequently, an investigation into the CPA needs to be done to establish if the consumer might have an alternative remedy.

¹⁵⁹ *Fraser v Frank Johnson* (1894) 11 SC 66; Du Plessis 2015 *SALJ* 154.

4 Analysing the Consumer Protection Act 68 of 2008

As previously mentioned, the common law leaves a considerable amount of doubt and uncertainty in respect of display of price. As such, the CPA was introduced to make up for the shortcomings of the common law. The background and interpretation of the Act are dealt with first, which section is followed by sections dealing specifically with the price of the product in advertisements as it pertains to online media of advertising.

4.1 Introduction and background to the Act

The interpretation of the Act and the relevant provisions plays a major role in the consumer's rights pertaining to advertising, which are encapsulated by sections 23 and 30 of the Act.¹⁶⁰

Traditionally the assumption is that the contracting parties negotiated the terms contained in the specific contract, and that they were on an equal footing during the negotiation process.¹⁶¹ However, this is not the position in practice.¹⁶² Businesses instead use standard contracts which are pre-drafted to the advantage of the business.¹⁶³ These contracts are usually also not open for negotiation.¹⁶⁴ Sharrock illustrates the inequality as follows:¹⁶⁵

The business only has to have one contract drafted for all its transactions with consumers; negotiation time with customers is reduced to a minimum; it is able to use relatively unskilled personnel to conclude its transactions; and its legal liability is restricted and standardised, making it easier for it to discount agreements, obtain financing, insure against liabilities and plan for the future.

¹⁶⁰ Sections 23 and 30 of the CPA.

¹⁶¹ Woker 2010 *Obiter* 227; Du Plessis 2015 *SALJ* 160; Van Eeden *Guide to the CPA* 30.

¹⁶² Du Plessis 2015 *SALJ* 160; Van Eeden *Guide to the CPA* 2.

¹⁶³ *Barkhuizen v Napier* 2007 1 SA 323 (CC) para 175; Sharrock 2010 *SA Merc LJ* 296.

¹⁶⁴ *Barkhuizen v Napier* 2007 1 SA 323 (CC) para 175; Sharrock 2010 *SA Merc LJ* 296.

¹⁶⁵ Sharrock 2010 *SA Merc LJ* 296.

There are recent developments regarding legislation with the objective of protecting the interests of the consumer.¹⁶⁶ The developments point to a shift from the traditional fears regarding contractual autonomy to contractual order instead.¹⁶⁷ One of these legislative developments encompasses the CPA. The CPA made substantial changes to the legal position of purchase and sale in general.¹⁶⁸

The CPA was published and signed on 29 April 2009 and came into being, together with its regulations, on 1 April 2011.¹⁶⁹ The provisions relating to promotional and advertising activities in their various forms came into effect on the 31 March 2011.¹⁷⁰ Furthermore, the preamble to the CPA refers to the historical background of South Africa which partially gave rise to the enactment of the Act,¹⁷¹ as follow:¹⁷²

That apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality; that it is necessary to develop and employ innovative means.

The above should be used to create a culture of informed consumer awareness¹⁷³ and to flatten the so-called unequal playing field between the consumer and supplier.¹⁷⁴ The overall purpose of the CPA is stated in the

¹⁶⁶ Van Vuuren 2009 *Without Prejudice* 38.

¹⁶⁷ Van Vuuren 2009 *Without Prejudice* 38; Sharrock 2010 *SA Merc LJ* 296.

¹⁶⁸ Du Plessis 2015 *SALJ* 160; Van Eeden *Guide to the CPA* 2.

¹⁶⁹ Nagel *et al Commercial Law* 705; Scott *The influence of the CPA* 2; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 1.

¹⁷⁰ Scott *The influence of the CPA* 2.

¹⁷¹ Scott *The influence of the CPA* 2.

¹⁷² Preamble to the CPA.

¹⁷³ Preamble to the CPA; Scott *The influence of the CPA* 2; Melville and Woker 2014 *Obiter* 650.

¹⁷⁴ Preamble to the CPA; Scott *The influence of the CPA* 2; Melville and Woker 2014 *Obiter* 650.

preamble.¹⁷⁵ It is to promote and expand the social and economic welfare of consumers in South Africa through various mechanisms.¹⁷⁶

4.2 Interpretation of the CPA

Section 2 of the CPA states that the Act must be interpreted with the purpose to give effect to the objectives set out in section 3.¹⁷⁷ The main purpose of the CPA is to promote the social and economic welfare of consumers in South Africa.¹⁷⁸ More specifically, the CPA strives to protect the rights of vulnerable people in South Africa.¹⁷⁹ Du Preez¹⁸⁰ confirms the aforementioned and states that the more vulnerable a consumer is, the more protection should be given to him/her.¹⁸¹

Various obligations rest on a court where a matter is brought under the CPA.¹⁸² Firstly, the court must develop the common law to enhance and ensure the rights of consumers.¹⁸³ As such Du Plessis agrees with Woker's argument that the development of the common law will ensure that a supplier will follow the prescribed commercial practice and protect the interests of consumers.¹⁸⁴ Secondly, the court has an obligation to promote

¹⁷⁵ Section 2(1) of the CPA; Scott *The influence of the CPA 2*; Chausse *Comparative and critical discussion 7*.

¹⁷⁶ Section 2(1) of the CPA; Scott *The influence of the CPA 2*; Chausse *Comparative and critical discussion 7*.

¹⁷⁷ Sections 2 and 3 of the CPA; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 1; Christie and Bradfield *Law of Contract 22*.

¹⁷⁸ Section 3(1) of the CPA; Sharrock 2010 *SA Merc LJ* 299.

¹⁷⁹ Section 3(1) of the CPA, focussing on specific consumers such as the following: "(i) who are low-income persons or persons comprising low-income communities; (ii) who live in remote, isolated or low-density population areas or communities; (iii) who are minors, seniors or other similarly vulnerable consumers; or (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented".

¹⁸⁰ Du Preez 2009 *TSAR* 63; Du Plessis 2015 *SALJ* 166.

¹⁸¹ Du Preez 2015 *TSAR* 63; Du Plessis 2015 *SALJ* 166.

¹⁸² Section 4(2) of the CPA.

¹⁸³ Section 4(2)(a) of the CPA; Du Plessis 2015 *SALJ* 167; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 6. The courts are also obliged to develop the Common Law in respect of Section 39 of the Constitution.

¹⁸⁴ Du Plessis 2015 *SALJ* 167.

the spirit and purposes of the CPA.¹⁸⁵ In addition, article 4(3) of the CPA states that if more than one meaning can be attached to a provision, the court must follow the interpretation which best promotes the spirit and purposes of the CPA.¹⁸⁶ It is interesting to note that the aforementioned provisions as imposed by the CPA are almost replicas of those found in Section 39 of the Constitution.¹⁸⁷ This therefore advances the argument that the CPA requires an interpretation that places the interest of a vulnerable consumer above that of a supplier in the event that this interpretation does no or little harm to general trade practices.

4.3 Application of the Act

It is true that the Act does not apply to all consumers and suppliers. As such, to make this Act applicable to the fictional scenario as stated in chapter one, one needs to determine if the fictional scenario in fact falls within the application of the Act. One of the most problematic issues of consumer law prior to the enactment of the CPA was that there was no uniform definition of a consumer.¹⁸⁸ In this regard Jacobs states that in order for a consumer to get a wide range protection he or she must be "defined broadly as an individual who purchases goods and services".¹⁸⁹ Firstly, one must make sure what exactly the Act means when referring to a consumer. A consumer can be defined as follows:¹⁹⁰

A person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business.

¹⁸⁵ Section 4(2) of the CPA.

¹⁸⁶ Section 4(3) of the CPA.

¹⁸⁷ Section 39 (2) of the Constitution of the Republic of South Africa, 1996. "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

¹⁸⁸ Jacobs, Stoop and Van Niekerk 2010 *PELJ*9.

¹⁸⁹ Jacobs, Stoop and Van Niekerk 2010 *PELJ*9.

¹⁹⁰ Section 1 of the CPA.

It's clear with reference to the fictional scenario that the consumer to whom the advert is directed falls within the definition of a consumer. Furthermore, the Act has a broad application and as such applies to every transaction that takes place within South Africa for the following:¹⁹¹

For the supply of goods or services or the promotion of goods or services and the goods or services themselves, unless the transaction is exempted from the application of the Act.

The latter application is subject to certain exceptions, however. The most relevant and important is the section 5(2)(b) exemption.¹⁹² This exempts a consumer with an asset value above or equal to 2 million rand.¹⁹³ The reason for the latter exception is best explained by Jacobs:¹⁹⁴

For example, how will the protection of a sole proprietorship-consumer with a very large annual turnover be justified if a company with the same annual turnover will not be protected in terms of the Consumer Protection Act? And further, does the Consumer Protection Act not aim to protect individual consumers rather than businesses?

It is also clear with reference to section 1 as per the definition of supplier, and section 5(8), that the Act purposefully covers a wide scope of suppliers, including almost anybody selling goods within the normal course of their business.¹⁹⁵ The definition of a supplier is "a person who markets any goods or services".

Lastly it's necessary to mention that the advertising of products falls within the scope and application of the CPA. This application may be found with the definition of the above-mentioned supplier.¹⁹⁶ Focusing on the aforesaid

¹⁹¹ Section 5(1) of the CPA; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 9.

¹⁹² Section 5(2) of the CPA.

¹⁹³ Section 5(2) of the CPA. It's important to state that the asset value must be determined as the time of the transaction.

¹⁹⁴ Jacobs, Stoop and Van Niekerk 2010 *PELJ* footnote 9 at ft 53.

¹⁹⁵ Section 1 of the CPA. "Supplier means a person who markets any goods or services"; s 5(8)(c). "The supplier can be an individual, juristic person, partnership, trust, organ of state, an entity directed or owned by an organ of state or a public-private partnership."

¹⁹⁶ Section 1 of the CPA; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 15.

definition, "to market" means to promote or supply services or goods.¹⁹⁷ Advertisement is contained within the term "promote".¹⁹⁸ According to the CPA, "promote" may be defined as to:¹⁹⁹

- (a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;
- (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or
- (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

It's clear that the fictional scenario falls within the application of the CPA, as it pertains to the definition of the terms "consumers", "supply", "market", "promote" and "advertisements".

Now that the history, interpretation and application of the CPA have been dealt with, three specific sections of it must be investigated to answer the question as to whether it can assist a vulnerable consumer in the fictional scenario. Section 23, which pertains to the display of price, will be dealt with first, followed by section 29, which refers to responsible marketing, and lastly section 30, which pertains to bait marketing.²⁰⁰

4.4 Section 23 - Display of price

Section 23 of the CPA pertains to a price advertised.²⁰¹ Firstly, section 23(3) prohibits the supplier or retailer from displaying a product without a price.²⁰² One needs to determine, however, what constitutes "display" and

¹⁹⁷ Jacobs, Stoop and Van Niekerk 2010 *PELJ* 15.

¹⁹⁸ Section 1 of the CPA.

¹⁹⁹ Section 1 of the CPA.

²⁰⁰ Sections 23 and 30 of the CPA.

²⁰¹ Section 23 of the CPA.

²⁰² Section 23(3) of the CPA.

"price" in accordance with this section. The definition of "display" as per section 1 of the CPA is:²⁰³

Mark, notice or other visual representation, means to place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services.

In short, the display must create an association between the price and the goods.²⁰⁴ As for the term "price", this includes any visual image suggesting a reasonable connection between the goods and the value thereof.²⁰⁵ Furthermore, the price must also refer to the total amount or value of the goods in question (i.e. on display).²⁰⁶ For these reasons section 23(3) compels the retailer to display the full price of the goods, if the goods are displayed with the purpose of being sold.²⁰⁷

In the fictional scenario sketched in Chapter 1 the product is electronically advertised. Section 23(1) states that electronic transactions do not apply to the CPA, and that therefore section 43 of the ECTA shall apply.²⁰⁸ The ECTA provisions shall be elaborated on in detail in Chapter 5. It is clear, however, that section 23 of the CPA is not applicable to the fictional scenario, and it is therefore necessary to investigate sections 29 and 30 to be able to determine whether the CPA can be of assistance to the vulnerable consumer.

²⁰³ Section 1 of the CPA.

²⁰⁴ Section 1 of the CPA; Du Plessis *Unilateral Determination* 103.

²⁰⁵ Section 1 of the CPA. "Price" when used in relation to— (a) a representation required to be displayed by section 23, includes any mark, notice or visual representation that may reasonably be inferred to indicate or express an association between any goods or services and the value of the consideration for which the supplier is willing to sell or supply those goods or services; or (b) the consideration for any transaction, means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation; Du Plessis *Unilateral Determination* 103.

²⁰⁶ Section 1 of the CPA; Plessis 2015 *SALJ* 162.

²⁰⁷ Du Plessis *Unilateral Determination* 106.

²⁰⁸ Naudé and Eiselen *Commentary* 23-9. "(1) This section does not apply to a transaction if— (b) section 43 of the Electronic Communications and Transactions Act applies to that transaction.

4.5 Section 29 of the CPA

Section 29 begins chapter 2 part E of the CPA, which encompasses the right to fair and responsible marketing.²⁰⁹ Firstly, section 29 states that a retailer, producer, distributor, service provider or importer may not market any services or goods in a certain manner.²¹⁰ The latter phrase refers to deceptive, fraudulent or misleading methods of marketing.²¹¹ The section goes beyond that statement and specifies certain elements in respect of the price.²¹² It states that when there is reference made to a price, the term refers to the following:²¹³

The price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services.

From the above section it is clear that the CPA, as per section 29, applies to situations where an advertisement is placed in a misleading or fraudulent manner.²¹⁴ Contrary to section 23, section 29 has no limitation on electronic online transactions. Therefore, the opinion is held that the consumer who is in a vulnerable position due to seeing an incorrect price as a result of misleading advertising can rely on this section. However, one would need to prove that the advertisement was in fact misleading and fraudulent. Section 29 also requires the consumer to refer to Section 41 of the CPA when assessing whether an issue constitutes false and misleading advertising.²¹⁵ For purposes of this study it is not necessary to investigate

²⁰⁹ Chapter 2-part e of the CPA.

²¹⁰ Section 29 of the CPA; Scott *The influence of the CPA* 26.

²¹¹ Section 29 of the CPA; Scott *The influence of the CPA* 26.

²¹² Section 29 of the CPA. A producer, importer, distributor, retailer or service provider must not market any goods or services— (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—(iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services; Scott *The influence of the CPA* 26.

²¹³ Section 29 of the CPA; Scott *The influence of the CPA* 26.

²¹⁴ Section 29 of the CPA; Scott *The influence of the CPA* 26.

²¹⁵ Naudé and Eiselen *Commentary* 29-7.

section 41 as the item sold as per the fictional scenario shall undisputedly fall within the ambit of section 41 and section 29.

The main issue refers to the wording of section 29 "reasonably likely to imply a false or misleading representation".²¹⁶ The question is what actions shall reasonably imply a false or misleading representation. This section together with Section 41 does not differentiate between whether the seller knew or out to have known that the advertisement was false or misleading.²¹⁷ In the commentary of Eiselen and Naude the authors state that section 29 does not imposes a no - fault liability on sellers.²¹⁸ They are also of the opinion that in order for the seller to be held liable, he had to or should have known about the false or misleading fact.²¹⁹

It is the author's submission that there is uncertainty regarding the interpretation of this section and an argument in favour of a no -fault liability could just as easily be applied to this section. There is a need for legislative clarity in the interpretation of this section. The seller could just as well escape liability by pleading that there was a mere mistake in the advertisement and that there was no intention to mislead and/or trade fraudulently. In short, this section presents a solution if the consumer can prove that the advertiser was intentionally acting fraudulently and intentionally misleading, but this is seldom likely to be possible.

4.6 Section 30 of the CPA

Section 30 of the CPA is self-explanatory and as such can be used when an innocent consumer has been baited into expressing interest in a product.²²⁰ Firstly, section 30 states the following:²²¹

²¹⁶ Section 29 (a)

²¹⁷ Naudé and Eiselen *Commentary* 29-10.

²¹⁸ Naudé and Eiselen *Commentary* 29-10.

²¹⁹ Naudé and Eiselen *Commentary* 29-10.

²²⁰ Section 30 of the CPA.

²²¹ Section 30(1) of the CPA; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 35.

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.

This section clearly focuses on advertisements and bait marketing. It must be pointed out that this section does not require the consumer to prove the subjective intent of the seller. The supplier may be found in violation of the provision of the above section if the consumer can prove that the advertisement may lead to consumers being misled or deceived.²²² It is clear that this section comes closer to the crux of the issue at hand.

Furthermore, it is clear that both article 29(b)(iii) and article 30(1) of the CPA are aimed at preventing misleading advertising regarding the price or the availability of goods.²²³ Non-compliance with these provisions would constitute prohibited conduct leading to significant administrative fines or criminal liability.²²⁴

Section 30(2) goes much further in providing a remedy to the consumer in circumstances where a supplier advertises goods and those goods are not available in the store.²²⁵ The section states the following:²²⁶

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.

Lastly the section states in the event the supplier does not have the goods in stock, the supplier must offer the same or equivalent foods or services

²²² Section 30(1) of the CPA.

²²³ Sections 29(b) and 30(1) of the CPA; Du Plessis 2015 *SALJ* 167; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 33.

²²⁴ Du Plessis 2015 *SALJ* 168; Section 23 of the CPA; Horn 2011 *De Rebus* 53; Melville "Incorrect price advertised: price not binding" (Case 1) 2014.

²²⁵ Section 30(2) of the CPA.

²²⁶ Section 30(2) of the CPA.

within a reasonable time.²²⁷ The goods or services must also be offered with a reasonable quantity at the advertised price²²⁸

It seems crystal clear from the above sections, however, that the legislature was adamant that the supplier must be bound to its advertisement.²²⁹ However what the correct interpretation of this section should be still remains a grey area. The latter CPA sections also place certain obligations on a supplier who cannot fulfil its advertised promises.²³⁰ This is in addition to the fact that the supplier can be found guilty of prohibited conduct under the CPA, which in turn could lead to a substantial administrative penalty or criminal liability.²³¹ Du Plessis believes that the above provisions should encourage suppliers to stock sufficient quantity of goods which are advertised.²³² It's clear that this is one of the ways in which the CPA grants additional and improved protection to the consumer, as opposed to the general interpretation and application of the common law.

4.7 Analysis

The question arises, however, as to whether the CPA in fact provides a solution to the problem at hand. Firstly, it is clear that section 23 of the CPA would have been the clear-cut solution if this transaction had not been an electronic transaction.²³³ Secondly, section 29 makes it clear that deceptive marketing will not be tolerated by the CPA. It would seem that

²²⁷ Section 30(3) of the CPA; Scott *The influence of the CPA* 32.

²²⁸ Section 30(3) of the CPA; Scott *The influence of the CPA* 32.

²²⁹ Du Plessis 2015 *SALJ* 169; Sharrock *Business Transactions Law* 2. The advertisement can be an offer if the intention is clear; Melville "Incorrect price advertised: price not binding" (Case 1) 2014 "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." *Crawley v Rex* 1909 TS 1108.

²³⁰ Du Plessis 2015 *SALJ* 169.

²³¹ Du Plessis 2015 *SALJ* 169; Horn 2011 *De Rebus* 53; Melville "Incorrect price advertised: price not binding" (Case 1) 2014.

²³² Du Plessis 2015 *SALJ* 169; Horn 2011 *De Rebus* 53; Melville "Incorrect price advertised: price not binding" (Case 1) 2014.

²³³ Section 23 of the CPA. As stated in subsection 1, electronic transactions must be dealt with under s 43 of the ECTA.

the consumer could rely on section 29 by referring the matter to the national consumer commission or alternatively institute litigation proceedings if there were to be a favourable interpretation of section 29. However, the consumer would have to prove, as per an unfavourable interpretation, that the advert was deceptive and not a mere mistake on the part of the supplier.²³⁴ Yet again the supplier has an opportunity to escape liability. It goes without saying that the unfavourable interpretation is not totally unfair. The seller should be allowed to make a bona fides mistake and not be scrutinized for that. This shall be further dealt with in chapter 6.

The last option for the consumer can be found in section 30 of the CPA. The fact that the consumer need not make a case as to the subjective intent of the supplier allows the consumer a more probable prospect of success as to a damages claim against the supplier. Clarity regarding this will be brought in Chapter 6.

4.8 Conclusion

The above analysis of the CPA shows that the CPA does and does not contribute to a solution to the problem of the vulnerable consumer in the Fictional scenario presented in Chapter 1. The CPA has remedies for the consumer to use in sections 29 and 30, but the possible interpretation posed by section 29 places a nearly impossible burden upon the consumer. Section 30 seems to present a possible remedy, but upon further investigation it would seem this section too contains an escape hatch. This will be dealt with in more detail in Chapter 6.

However, section 23 of the CPA refers to section 43 of the ECTA. The question arises, however, as to whether the ECTA contributes to a solution for the vulnerable consumer in the fictional scenario. The ECTA will

²³⁴ The unfavourable position speaks towards the position from the consumer's perspective.

therefore be investigated next to ascertain whether or not the consumer can in fact rely on legislation at all.

5 Analysing the Electronic Communication and Transactions Act

5.1 Introduction and background of the Act

The ECTA was assented to on 31 July 2002 and came into effect on the 30th of August 2002.²³⁵ This marked the end of a process which the South African government started in 1999 to ascertain a formal structure for e-commerce as well as to develop and regulate e-commerce within South Africa.²³⁶ The Act has been welcomed as it seeks to address certain common law uncertainties in respect of protecting consumers who engage in transactions by electronic means.²³⁷ For the purposes of this study, the focus will be on chapter 7 of the Act, which deals with consumer protection.²³⁸

The objectives of the Act can be found in section 2(1).²³⁹ The most important objectives of the ECTA, as they are relevant for this discussion, are to:²⁴⁰

- c) promote the understanding and, acceptance of and growth in the number of electronic transactions in the Republic remove and prevent barriers to electronic communications and transactions in the Republic;
- e) promote legal certainty and confidence in respect of electronic communications and transactions;
- h) ensure that electronic transactions in the Republic conform to the highest international standards;
- j) develop a safe, secure and effective environment for the consumer, Business and the Government to conduct and use electronic transactions;
- m) ensure compliance with accepted international technical standards in the provision and development of electronic communications and transactions;
- n) promote the stability of electronic transactions in the Republic.

²³⁵ Jacobs Protection and Internet Contracts 556; Eiselen 2014 PELJ 2805.

²³⁶ Michalsons 2008 <https://www.michalsons.com/blog/guide-to-the-ect-act/81>.

²³⁷ Jacobs Protection and Internet Contracts 556.

²³⁸ Chapter 7 of the ECTA; Erasmus *Consumer protection* 13. This particular chapter is largely based on The European Union's Distance Selling Directive.

²³⁹ Section 2 of the ECTA; Thomas *E-Commerce Adoption* 49.

²⁴⁰ Section 2(1) of the ECTA.

Jacobs formulates it best when she refers to the ECTA, stating that the Act is formed "upon principles based on functional equivalence,²⁴¹ [and] technological neutrality",²⁴² whilst being compatible with the best international practices.²⁴³ Eiselen reiterates that he holds the functionality of the Act in high regard when he states that the Act is an enabling piece of legislation.²⁴⁴

The case of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*²⁴⁵, which deals with electronic service, stating that substituted service via Facebook is legally valid, exemplifies the effectiveness of the ECTA as it pertains to sections 23 and 26, A further illustration of the effectiveness of the legislation is *Ketler Investments CC t/a Ketler Presentations v Internet Service Providers' Association*,²⁴⁶ which pertains to section 45 of the ECTA, which deals with spamming.

Despite the aforementioned advancement with the Consumer Protection Act there is still doubt and uncertainty regarding the advertising on online media of advertisements such as Gumtree. The CPA provides solutions, but these so-called solutions have loopholes in them thereby allowing the supplier or advertiser to escape liability. Section 23 of the CPA makes

²⁴¹ Jacobs *Protection and Internet Contracts* 557 cites note 13. "Functional equivalence, or media neutrality, means that the law should treat paper-based and electronic transactions in the same way, without prejudicing either or favouring the one above the other".

²⁴² Jacobs *Protection and Internet Contracts* 557 cites note 14. "Technological neutrality means that the law should not prescribe the use of a certain medium or technology, but should be drafted in wide and general terms".

²⁴³ Jacobs *Protection and Internet Contracts* 557.

²⁴⁴ Eiselen *Fiddling with the ECT Act – Electronic Signatures* 2805. The functionality is substantiated by various case law such as: *Jafta v Ezemvelo KZN Wildlife* 2008 10 BLLR 954 (LC) dealing with offer and acceptance.

²⁴⁵ *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 ZAKZDHC 44. "Whilst the website is initially intended to be a social network service, the present application showed that it has developed to serve more than one purpose. For example it is being used as a tool for tracing individuals and in some instances to bring information to the knowledge of those individuals concerned. In this modern era various connection devices are used to access the website, which renders the site easily accessible to most persons".

²⁴⁶ *Ketler Investments CC t/a Ketler Presentations v Internet Service Providers' Association* 2013 ZAGPJHC 232.

specific reference to section 43 of the ECTA. In the light thereof, an investigation into the intricacies of the ECTA and how the problem at hand could be dealt with is necessary. This section will discuss the background, application and interpretation of the Act, thereafter focusing on the specific provisions which govern the display of price within online media of advertising.

5.2 Key definitions in the ECTA

The definitions, as mentioned in section 1 of the ECTA, that are of relevance are those of "consumer", "supplier", "electronic transaction" and "e-mail".²⁴⁷

"Consumer" is defined as:²⁴⁸

...any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier...

From the above it is clear that the ECTA, as it refers to consumers, deals with natural persons only, which is thought to be too narrow and unaccommodating.²⁴⁹ The definition has been the subject of criticism by various authors who express the need for small and medium enterprises to be able to obtain the protection which the ECTA offers.²⁵⁰ Often these small enterprises are in a similar position to that of a natural person as it relates to bargaining and the general practical standing within a contractual relationship.²⁵¹ It is clear, however, that the legislature was determined to provide protection only to natural persons, as they are mostly more vulnerable to unfair practises than juristic persons.

²⁴⁷ Section 1 of the ECTA; Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁴⁸ Section 1 of the ECTA.

²⁴⁹ Erasmus *Consumer protection* 13.

²⁵⁰ Pistorius 2008 *JILT* 4; Erasmus *Consumer protection* 13.

²⁵¹ Erasmus *Consumer protection* 13.

The definition of "supplier" is set out indirectly in the ECTA. The definition can be deduced from the definition of consumer as follows:²⁵²

A supplier who offers goods or services for sale, hire, or exchange by way of an electronic transaction...

Such an electronic offer must make certain information available to consumers on the website where the goods or services are offered.²⁵³ It is clear from the above that in the ECTA a supplier does not have such a restrictive meaning as in the CPA. Applying the latter definition to the fictional scenario described in Chapter 1, it would be inexpedient to attempt to determine the supplier. There is neither law nor precedent to suggest whether the website owner or advertiser would be considered the supplier in the normal course of business. The submission is made that the advertiser would be the supplier, as this party is physically selling the product to the consumer. The website owner, on the other hand, is merely hosting a website which allows suppliers/sellers to advertise their products on it.

As the fictional scenario sketched in Chapter 1 refers to an electronic transaction, the definition thereof must be dealt with to confer complete understanding.²⁵⁴ The meaning of the term "electronic transaction" is set out indirectly in the ECTA.²⁵⁵ The definition is twofold and consists of the term "electronic communications", which is defined by the Act as "communication by means of data messages".²⁵⁶ Secondly, it includes the term "data messages", which is defined in the Act as meaning:²⁵⁷

²⁵² Section 1 of the ECTA; Jacobs *Protection and Internet Contracts* 558.

²⁵³ Jacobs *Protection and Internet Contracts* 558. Furthermore, "web site" is defined as any location on the Internet containing a home page or web page.

²⁵⁴ Ncube *Introduction to Electronic Transactions Law* 1.

²⁵⁵ Ncube *Introduction to Electronic Transactions Law* 1.

²⁵⁶ Section 1 of the ECTA; Ncube *Introduction to Electronic Transactions Law* 1.

²⁵⁷ Section 1 of the ECTA.

...data generated, sent, received or stored by electronic means and includes- (a) voice, where the voice is used in an automated transaction; and (b) a stored record.

It is clear that an electronic communication embodies information sent by a multiplicity of means, including communication via the internet, fax, telephone and email, to mention only a few.²⁵⁸

Lastly, for the purposes of this study the definition of "email" must be dealt with, as this is the main means by which parties communicate in online advertising. "E-mail" is directly set out in the Act as:²⁵⁹

...a data message used or intended to be used as a mail message between the originator and addressee in an electronic communication.

To fully comprehend the above definition one needs to determine who the originator is and who is the addressee. The addressee as described by the Act is the person who is meant to receive the data message from the originator.²⁶⁰ The originator is described as the person by whom the data message purports to have been sent.²⁶¹ In this instance one would say with reference to the fictional scenario in Chapter 1 that the consumer is the addressee to whom the advertisement is addressed. Consequently, the supplier is the originator by whom the data message purports to have been sent.

²⁵⁸ Section 1 of the ECTA; Ncube *Introduction to Electronic Transactions Law* 1.

²⁵⁹ Section 1 of the ECTA.

²⁶⁰ Section 1 of the ECTA. Addressee "means a person who is intended by the originator to receive the data message, but not a person acting as an intermediary in respect of that data message".

²⁶¹ Section 1 of the ECTA. Originator "means a person by whom, or on whose behalf, a data message purports to have been sent or generated prior to storage, if any, but does not include a person acting as an intermediary with respect to that data message".

5.3 Interpretation and application of the Act

Section 3 of the ECTA deals efficiently and directly with the interpretation of the Act, without excluding the importance of the common law.²⁶² Section 3 enunciates the following:²⁶³

This Act must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions, data messages or any other matter provided for in this Act.

The reference made to the common law is evidence of the fact that the ECTA is wary of upsetting the apple cart when it comes to certain rules that are, so to speak, set in stone.

In section 4 of the ECTA the application of the Act is dealt with.²⁶⁴ This section is utterly straightforward and therefore does not necessitate a substantial discussion. The Act, as encompassed in section 4, applies in respect of any electronic transaction or data message.²⁶⁵

5.4 Consumer protection within the ECTA

The issue that needs to be dealt with is the question as to whether the consumer's position, as described in the scenario given in Chapter 1, can be dealt with within the scope of the ECTA. As mentioned in the previous chapter, the consumer cannot rely on the provision dealing with the display

²⁶² Section 3 of the ECTA.

²⁶³ Section 3 of the ECTA.

²⁶⁴ Section 4 of the ECTA.

²⁶⁵ Section 4 of the ECTA. "Subject to any contrary provision in this section, this Act applies in respect of any electronic transaction or data message.

(2) This Act must not be construed as —

(a) requiring any person to generate, communicate, produce, process, send, receive, record, retain, store or display any information, document or signature by or in electronic form; or

(b) prohibiting a person from establishing requirements in respect of the manner in which that person will accept data messages."

of price as this section, namely section 23, merely refers the consumer to section 43 of the ECTA.²⁶⁶

5.4.1 Information to be supplied

Section 43(1)(a)-(r) of the ECTA requires that certain information be provided to the consumer on the website where the goods or services are offered.²⁶⁷ The information that must be made available by the supplier includes (to list only a few items) the following:²⁶⁸

- (a) its full name and legal status;
- (b) its physical address and telephone number;
- (c) its web site address and e-mail address;
- (d) membership of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
- (e) any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
- (f) in the case of a legal person, its registration number, the names of its office bearers and its place of registration;
- (g) the physical address where that supplier will receive legal service of documents;
- (h) a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
- (i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;
- (j) the manner of payment;
- (k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
- (l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;

²⁶⁶ Section 23(1) of the CPA. "This section does not apply to a transaction if— (a) a supplier has provided an estimate pertaining to that transaction, or the consumer has waived such an estimate, as contemplated in section 15; or (b) section 43 of the Electronic Communications and Transactions Act applies to that transaction."

²⁶⁷ Section 43(1) of the ECTA. There are eighteen pieces of required information under section 43(1); Watney date unknown
http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁶⁸ Section 43(1) of the ECTA.

On the face of it, the information seems to be to be exhaustive, and a supplier advertising on a website must meet the above requirements.²⁶⁹ The importance of this information is crucial, as it allows the consumer to know exactly with whom he is doing business and helps him to track down the supplier if anything goes wrong.²⁷⁰ Erasmus explains the dilemma of insufficient information as follows:²⁷¹

If she had had the contact details, physical address and legal status of the supplier, she would have been able to issue a summons against him, demanding delivery or her money back. This dilemma would not have happened if the supplier had provided A with sufficient information.

The above is clearly applicable to advertising on Gumtree, as most advertisements do not contain the necessary information. Even if the fraudulent supplier is liable, tracing him with limited information becomes the problem. However, Erasmus is of the opinion that this information may be too extensive and that the supplier must at the very least provide the essential information.²⁷² Essentials such as telephone numbers and addresses "enable the consumer to make contact with the supplier or to track them down".²⁷³

The above leads to the question as to whether the information provided by the supplier will be seen as sufficient.²⁷⁴ The Supreme Court of Appeal dealt with this in *Durban's Water Wonderland (Pty) Ltd v Botha*.²⁷⁵ This case was not similar to the above, but the same principle may be used as this is a general principle in South African law. This case had to do with a disclaimer notice and the court found that the test for reasonableness provides a sufficient solution.²⁷⁶ The court stated that:²⁷⁷

²⁶⁹ Section 43(1) of the ECTA.

²⁷⁰ Erasmus *Consumer protection* 20.

²⁷¹ Erasmus *Consumer protection* 20.

²⁷² Erasmus *Consumer protection* 19.

²⁷³ Erasmus *Consumer protection* 19.

²⁷⁴ Erasmus *Consumer protection* 20.

²⁷⁵ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA).

²⁷⁶ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA).

The document itself should be sufficient to gain the attention of a reasonable customer, and the terms and conditions provided for should be visible and readily available to the consumer.

In application of the above dictum the court will therefore determine if the advert (the document) gains the attention of the consumer and whether the information therein is reasonable or not. The submission of the author is that the information required by section 43 should be strictly adhered to, as web sites such as Gumtree are often associated with fraudulent sellers.²⁷⁸ Almost every supplier on Gumtree fails to provide this information, and as a result there is general noncompliance with section 43(1) of the ECTA.

Should the supplier fail to adhere to the section 43 requirements the consumer may then, as per section 43(3), "cancel the transaction within 14 days of receiving the goods or services under the transaction".²⁷⁹ However, the question raised is whether this may be seen as a sufficient remedy for the aggrieved consumer who has been fraudulently baited into a product? Unfortunately, section 43 does little to protect a consumer from bait marketing, as it only offers the consumer the opportunity to cancel the transaction.²⁸⁰

Lastly, it must be noted that section 43 does not differentiate between online media of advertising and online websites. At this stage it would seem that there is only one reason such a differentiation would be necessary. Online websites of companies such as that of Makro who advertise their goods thereon, will mostly comply with obligations set forth in the CPA and ECTA. This may be attributed to the fact that their reputational damage and good will standing with the general public could be severely tarnished if they were found to be associated with

²⁷⁷ Erasmus Consumer protection 20.

²⁷⁸ Nagel 2014 <https://blog.gumtree.co.za/common-online-scams-south-africa-avoid/>.

²⁷⁹ Section 43(3) of the ECTA; Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁸⁰ Section 43(3) of the ECTA.

unfavourable practices. The issue arises with the use of online media such as advertisers who use Gumtree for example, as there is a general noncompliance with regards to the requirements set forth in Section 43 and in light of the fact that there is not such an emphasis by the advertisers on reputational and good will damage.

5.4.2 Binding offers through electronic advertising

From the above it is clear that the ECTA has not yet provided a suitable remedy to a consumer in a position similar to that described in the fictional scenario described in Chapter 1. The buyer of the blue vintage guitar will have the right to cancel the transaction, but there are other costs that have been paid from the buyer's perspective, which include flights and car rental etc. Therefore, cancellation does little to nothing in remedying the buyer's situation. If one could determine that the supplier using on an online medium of advertising is making an offer, one could impose the liability on the supplier by way of the common law. The search for a remedy turns to a different route within the ECTA, which includes section 3, and the literal interpretation of section 43(1) of the ECTA.

As mentioned above, section 3 of the ECTA makes reference to the common law, stating that the Act must not exclude the common law or any other statutory law.²⁸¹ The latter law states that a contract normally comes into effect where there is consensus between the parties involved, which happens when an offer is accepted.²⁸² The common law makes it clear that the supplier advertising is merely inviting offers from the public and is not

²⁸¹ Section 3 of the ECTA. "This Act must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions, data messages or any other matter provided for in this Act"; Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁸² Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

making an offer.²⁸³ According to Van der Merwe and Janse van Vuuren, as stated by Melville :²⁸⁴

The contract will be concluded when such [an internet] order is received and accepted. The acceptance of the order will often be manifested merely by the dispatch of the goods to the purchaser. No legal relationship exists between the parties before the acceptance, and an offer may be revoked at any time before then.

Based on the above, the website owner and advertiser who made a mistake in the advertisement would not be bound by the mistake as the advertiser can merely refuse the offer.²⁸⁵

In the Labour Court case *Jafta v Ezemvelo KZN Wildlife*²⁸⁶ the court stated that when interpreting the ECTA the court has a duty to interpret international and foreign law. In this regard the court held the following:²⁸⁷

The court has a duty to ascertain the international and foreign law applicable to the internet and other electronic communication systems in order to determine whether the international instruments are binding on South Africa, what the best practice is and consequently how the court should interpret and apply provisions of the ECT Act. This duty is reinforced by the very aims of the ECT Act which include ensuring that electronic transactions in the Republic conform to the highest international standards.

The International Law that could be referred to in this instance would be the UNCITRAL Model law. Article 14(2) of the UNCITRAL Model law concedes that the party making a proposal is in fact making an invitation to do business.²⁸⁸

²⁸³ Consumer Goods and Services Ombud Advisory Note 10: E-Commerce 6; *Crawley v Rex* 1909 TS 1108; *Bird v Summerville* 1960 4 SA 395 (N) 401D; Christie and Bradfield *Law of Contract* 41; Elliott and Quinn *Contract Law* 15.

²⁸⁴ Melville "Oops! I clicked it again" 7; Consumer Goods and Services Ombud Advisory Note 10: E-Commerce 7.

²⁸⁵ Melville "Oops! I clicked it again" 7; Consumer Goods and Services Ombud Advisory Note 10: E-Commerce 7.

²⁸⁶ *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84.

²⁸⁷ *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84 para 60.

²⁸⁸ Article 14(2) of the UNCITRAL Model Law. "[A] proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make

This argument is in line with the South African common law position.²⁸⁹ Although this section does not refer to an electronic transaction; it is safe to say that this is the recommended foreign law.²⁹⁰

It is important to specifically look at the wording of the ECTA, however, to ascertain with all certainty the position as to which of the supplier or the consumer makes the offer.²⁹¹ There is a possible argument to be made that the ECTA suggests that the supplier makes the offer and that the consumer accepts the offer. Section 43(1) of the ECTA uses formulations such as the "supplier offering goods".²⁹² There is no definitive answer as to whether the word "offering" is used here in a legal sense or in the ordinary grammatical sense.²⁹³ However, the opinion is held that this wording is meant in a grammatical sense as this would otherwise be one of the only formulations inconsistent with the argument that the supplier makes the acceptance.²⁹⁴

It is thus clear that the ECTA does not assist when determining who makes the offer.²⁹⁵ The common law in this regard takes precedence in that the consumer makes the offer and the supplier accepts the offer.²⁹⁶ The latter, however, is subject to the exclusion of intention, as stated in Chapter 3.²⁹⁷

offers, unless the contrary is clearly indicated by the person making the proposal"; Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁸⁹ Melville "Oops! I clicked it again" 8.

²⁹⁰ Section 39 of the Constitution; Melville "Oops! I clicked it again" 8.

²⁹¹ Melville "Oops! I clicked it again" 8.

²⁹² Section 43(1) of the ECTA. "A supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered".

²⁹³ Melville "Oops! I clicked it again" 8.

²⁹⁴ Melville "Oops! I clicked it again" 8; Melville agrees that this is used in a grammatical sense.

²⁹⁵ Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁹⁶ Watney date unknown http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

²⁹⁷ Sharrock *Business Transactions Law* 55; Scott *The influence of the CPA* 12.

5.5 Conclusion

The background and interpretation of the ECTA provides a solid foundation in the determination of whether the ECTA can in fact provide a remedy to the consumer in an online medium of advertising situation. The ECTA does little to provide a remedy to the particular consumer in the fictional circumstances described in Chapter 1. Firstly, section 23 of the CPA referred the consumer to section 43 of the ECTA.²⁹⁸ This section requires that a supplier must make certain information available.²⁹⁹ It is clear that there is general non-compliance by suppliers pertaining to this section. The remedy the ECTA offers to the consumer is to cancel the transaction.³⁰⁰ The submission here is that this is futile, as the consumer has already suffered substantial loss and the cancellation would only prevent further, future loss. The only other remedy the ECTA offers is that which is available in the common law. The common law remedies described in Chapter 3 therefore apply. The submission is therefore made that the ECTA does not assist the particular consumer in the Chapter 1 scenario effectively, if at all.

²⁹⁸ Sections 23 and 43 of the ECTA.

²⁹⁹ Section 43(1) of the ECTA.

³⁰⁰ Section 43(3) of the ECTA.

6 Analysis of the current South African position in respect of the protection afforded to the vulnerable consumer

It is necessary at this point to articulate the main issues in this study, as various arguments have been made which pertain to various aspects of the issue at hand. In particular, many arguments were made regarding the possible protection the consumer might have in the fictional scenario. Only the most relevant of these will be analysed in this chapter, as it is the writer's opinion that the following aspects have the most likely prospects of being effective as possible remedies for that consumer.

6.1 Offer and acceptance and the common law

In terms of the common law, a contract normally comes into effect where an offer has been made and accepted.³⁰¹ This poses a question as to who makes the offer and who makes the acceptance. This is an important question to ask, as the answer determines when a valid contract has been concluded.

6.1.1 Invitation to treat

Today the position regarding the invitation to treat is still well applied and seen as good law.³⁰² However, it is the writer's opinion that this cannot be the position today as a 1909 case (*Crawley v Rex*) could not and did not make provision for the technological advancement which has occurred in the 21st century, bringing with it various new methods of contracting via technology.

³⁰¹ *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A).

³⁰² *Partridge v Crittenden* [1968] 2 All ER 421 at (424); Du Plessis 2015 *SALJ* 152; Woker *Advertising Law* 52-53. Woker refers to the *Timothy v Simpson* 1834 case where the position is identical. The display of goods on the shop's shelves serves only as an invitation to do business and as such does not constitute an offer.

Generally, advertisements do not amount to binding offers. Rather, they constitute invitations to do business.³⁰³ In this instance the party advertising the goods is given the opportunity to decide with whom it wants to do business.³⁰⁴ Furthermore, this situation permits the aforesaid parties to negotiate additional terms to the contract.³⁰⁵

It is the writer's opinion that there are major issues regarding the above principle. It allows the party placing the advertisements to make uncertain and ambiguous information available to the public.³⁰⁶ Therefore, the consumer will not know the true state of affairs until the offer is made. This therefore leaves the gate open to bait marketing.

The source of the above common law rule as it pertains to the invitation to treat principle can be ascribed to the case of *Crawley v Rex*,³⁰⁷ where the court stated that it is the party making the advertisement who makes the acceptance and not the offer.³⁰⁸ The court in this instance stated that the advertisement was just an announcement of the shop owner's intention to sell at the advertised price.³⁰⁹ The court based this line of reasoning on the possibility that the advertiser might have a limited amount of stock, stating that if an advertisement constitutes an offer then it would place the advertiser in a position where the entire public could accept the offer and

³⁰³ *Crawley v Rex* 1909 TS 1108; *Bird v Summerville* 1960 4 SA 395 (N) 401D; Christie and Bradfield *Law of Contract* 41; Elliott and Quinn *Contract Law* 15.

³⁰⁴ *Woker Advertising Law* 52-53; Scott *The influence of the CPA* 10.

³⁰⁵ *Crawley v Rex* 1909 TS 1107; *Woker Advertising Law* 52-53; Scott *The influence of the CPA* 10.

³⁰⁶ Scott *The influence of the CPA* 10-11; Du Plessis 2015 *SALJ* 155; Sharrock *Business Transactions Law* 55. If the seller is not bound to its advertisement then the consumer will fall prey to unfair marketing techniques.

³⁰⁷ *Crawley v Rex* 1909 TS 1108; *Woker Advertising Law* 52-53.

³⁰⁸ *Crawley v Rex* 1909 TS 1108; *Woker Advertising Law* 52-53.

³⁰⁹ *Crawley v Rex* 1909 TS 1108. "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."

the advertiser would be bound to thousands of people with a limited amount of stock.³¹⁰

It is the writer's opinion that this argument has merit in certain circumstances, but is futile in the event that the supplier/advertiser is selling only one specific item, as in the fictional scenario. The writer is of the opinion that the limitation of stock is the only element keeping the invitation to treat principles alive, as the court in *Crawley v Rex* did not refer to any authority and mentioned the above element as the only reason for the principle.³¹¹

6.1.2 Circumventing the invitation to treat principle

As mentioned in Chapter 3, there is a way around the invitation to treat principle. As Woker submits, the advertiser's intention should be the main deciding factor as to whether the advertisement constitutes an offer or merely an invitation to do business.³¹² She states that intention must be established by inference from the declaration or advertisement as well as taking the surrounding circumstances into account.³¹³

When determining whether a party has the intention to contract (a firm offer) or a willingness to negotiate, the courts mostly look at all the relevant circumstances in this regard.³¹⁴ In *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd*³¹⁵ the court looked objectively at the quote,

³¹⁰ *Crawley v Rex* 1909 TS 1108.

³¹¹ *Partridge v Crittenden* [1968] 2 All ER 421 at (424); Du Plessis 2015 SALJ 152; Woker *Advertising Law* 52-53. Woker refers to the *Timothy v Simpson* 1834 6 C & P 499 case, where the position is identical.

³¹² Woker *Advertising Law* 52. She uses the phrase "the real answer is to be found in the intention of the advertiser".

³¹³ Woker *Advertising Law* 52.

³¹⁴ *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd* 2002 1 SA 886 (C) 893: to ascertain "whether an offer was made with the necessary *animus*, a court is entitled to look not only at the words of the offer, but also at the surrounding circumstances – although they cannot usually remedy any defect in the offer itself".

³¹⁵ *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd* 2002 1 SA 886 (C)

applying the reasonable man test. Bradfield best summarizes the stance towards *animus contrahendi* by stating the following:³¹⁶

As the judges frequently remind us, each case depends on its facts, so the nature of the offer, including the words in which it is expressed, the relationship between the parties and the circumstances surrounding the making of the offer must all be examined before it can be decided whether an offer was made with or without *animus contrahendi*.

Intention as an exception to the invitation to treat principle has merit where it is easy to determine the intention of the advertiser. The court stated in *Fraser v Frank Johnson*³¹⁷ that the intention is clearly established if the offer is conveyed in such a simple way that its acceptance would amount to a legally binding contract. However, in the absence of a clear intention the advert is seen as a mere invitation to do business.³¹⁸ It is clear that it would not be easy to establish the supplier's intention in the fictional scenario. The writer is of the opinion that the determination of intention is bound to a subjective element and that the determination of such intention is therefore a problematic legal notion.

Such a case will be for the consumer to make, and as the consumer would therefore once again be in a difficult position, as taking this path would necessitate large legal fees and there would be only a slim likelihood of this culminating in successful action. The damages and losses the consumer had already faced would not justify his/her embarking on a fully fledged legal case and he/she might decide to drop the case as it is not worth it. One could argue that the consumer would in the first instance place the matter in front of the Consumer Tribunal, but the Tribunal would encounter the same issues as to the determination of the advertiser's intention.

From a common law perspective, it would seem that the consumer does have a remedy against the supplier. However, as mentioned above, the

³¹⁶ Christie and Bradfield *Law of Contract* 39.

³¹⁷ *Fraser v Frank Johnson* (1894) 11 SC 66; Du Plessis 2015 *SALJ* 154.

³¹⁸ Christie and Bradfield *Law of Contract* 41; Du Plessis 2015 *SALJ* 152.

remedy is futile as the consumer would be expected to make a case against the supplier and the consultation fees of the attorney would be greater than the damages the consumer has faced. Legislation is therefore needed to even the playing field by providing once and for all that it is the advertiser that is making the offer and the consumer that is making the acceptance. Such legislation would be an uncontentious solution, as the supplier, knowing that it would be bound by the offer, would respond by forming a well-founded and reasonable offer in advance of placing an advertisement.

It must be acknowledged that there is legislation in the form of the CPA and the ECTA that attempts to regulate various issues regarding advertising, but this legislation fails to properly deal with the issues in the fictional scenario described in Chapter 1.

6.2 Legislation pertaining to the fictional scenario

The position regarding the CPA has been investigated in Chapter 4 of this paper. It is evident that there is ample protection for consumers in section 23 of the CPA regarding the display of price.³¹⁹ The application of this section to normal advertising where goods are not advertised online is a good and solid way of addressing the above common law issues. The legislation regulating the display of price brings in extra protection in various forms of advertising.³²⁰ However, for some reason the legislature chose not to deal with electronic advertisements and transactions as it pertains to price in the CPA, and stated that the ECTA will govern electronic advertisements.³²¹

³¹⁹ Section 23 of the CPA.

³²⁰ Du Plessis 2015 *SALJ* 164. "If two or more prices are displayed concurrently in respect of the same goods, the retailer may not require the consumer to pay the higher or highest price."

³²¹ Section 23(1) of the ECTA.

6.2.1 Contravention of section 30 of the CPA

There are other sections of the CPA, however, that can be used to achieve a remedy for the consumer, such as sections 29 and 30.³²² It is clear that sections 29 and 30 apply to the fictional scenario, as there is no limitation preventing their application to electronic transactions such as section 23 of the CPA.³²³ However, the issue with this application is that the consumer would have to prove that the consumer was in fact misled by the fraudulent actions of the supplier. As stated in Chapter 4, this would have its own challenges.

There is an exception to the latter which was applied by the Consumer tribunal in 2 different cases.³²⁴ The limitations regarding stock have been referred to as the deciding factor as to whether the supplier is in fact bound to the advert or not. Melville states that where there is an expressed limitation of stock, the supplier must honour the terms of the advertisement.³²⁵ The most important element of those terms would be the words: "to the extent of the expressed limits".³²⁶ Melville also makes the following statement in this regard:³²⁷

Clearly, the common law rules regarding offer to treat as expressed in *Crawley v Rex* have been disregarded as far as advertisements in which numbers are limited are concerned.

The writer disagrees with this statement. There is no authority to explain what the legislature meant by "to the extent of the expressed limits". It goes without saying that these words give the supplier a possible way out in the event that the supplier wishes to refuse to sell a product to the consumer, as the supplier can state that the product is out of stock. By only advertising a product in its specificity is a clear and direct expression

³²² Sections 29 and 30 of the CPA.

³²³ Sections 29 and 30 of the CPA.

³²⁴ Melville 2014 *SALII* 1-14; Hughes 2015 *SALII* 1-6.

³²⁵ Melville 2014 *SALII* 1-14; Hughes 2015 *SALII* 1-6.

³²⁶ Melville 2014 *SALII* 1-14; Hughes 2015 *SALII* 1-6.

³²⁷ Melville 2014 *SALII* 1-14.

of limited stock. Applying this to the fictional scenario, the supplier can state to the consumer in person that if the consumer wants the guitar/merx he must pay an extra amount.³²⁸ If the consumer is unhappy and brings this matter to the ombud, the supplier can just state that the guitar had already been sold and therefore out of stock. The consumer would have to prove that the consumer was misled. The supplier can therefore escape liability, as the practicability of proving advertisements to be misleading and deceptive is negligible

The second exception is that where there is no express limitation the supplier will not be bound to the contract, but will be in contravention of the section. The provision would "lead to the imposition of an administrative fine if breached or [a contravention] can ground a civil claim for damages".³²⁹ The latter need not be investigated further, as the fictional scenario specifically states that there is a limited amount of stock, as there is only one guitar.

It is submitted that the main issues in respect of the CPA within the context of this study pertains to the open interpretation of the above mentioned sections which leave escape hatches for a supplier in so far as they apply to the liability of the supplier. It is further submitted that the strictest approach of interpretation would also not be beneficial in that it would require scrutinizing every move of the seller which result in taking it to the extreme. There must still be an element of fair and proper trade between the seller and buyer. An appropriate solution would be to effect a well thought out interpretation that closes the hatches for fraudulent sellers whilst simultaneously equating a bone fide seller's interest to that of the consumer.

³²⁸ This in fact happens in practice where the supplier knows he has the upper hand.

³²⁹ Melville 2014 *SALII* 1-14; Hughes 2015 *SALII* 1-6.

As most CPA disputes end up in the consumer tribunal it negates the effect of setting a well-founded precedent pertaining to the interpretation of the CPA. It is the writer's submission that the best way in obtaining a solution to the research question is not investigating other countries interpretation of this issue. The reason for this is that there is sufficient legislation within South Africa to achieve an acceptable solution. It boils down to a proper interpretation favouring both parties whilst creating a set precedent to apply throughout. This can simply be achieved by obtaining a declaratory order within the High Court of South Africa.

7 Conclusion

7.1 Introduction

In the beginning of this study the research aims were set out in duplicate as there were two different spheres of law that could possibly provide answers to the dilemma a consumer faces as per the position of the consumer in the fictional scenario.³³⁰ The point of departure of this study was to investigate the concept of offer and acceptance within the scope of the common law. Thereafter an investigation was launched into the legislation, as to whether there are any laws to provide relief to the particular consumer.³³¹ Furthermore, it was indicated that the discussion would, by way of a literature study, follow an analytical approach within the scope of the South African law.

From the above discussion it is evident that the situation the consumer finds itself in in the scenario is not specifically catered for in the common law nor in any legislation as yet. Interpretation and an analytical approach were therefore justified and were applied throughout this paper.³³² It is also clear that the consumer's issue lies in the principles of offer and acceptance. These principles and the related theory were dealt with in Chapter 2, to establish a foundation upon which the argument could be based.

The purpose of this concluding chapter is to wrap up the discussion by briefly stating the developments and current legislature that come close to or in any event resolve the issue the consumer finds itself in. Consequently, the writer will address only certain aspects of the discussion, in particular those where the consumer could possibly find proper protection against

³³⁰ Refer to Chapter 1 above.

³³¹ Refer to Chapters 4 and 5 above.

³³² Refer to Chapter 6 above.

unscrupulous advertising on online media, where there is a discrepancy in price.

7.2 Research aims

It is important to state whether the objectives of this paper were achieved and whether the issues raised with the regards to the common law, CPA and the ECTA are of such a nature that the legislative authority needs to step in and make a plan. The research aim and the most problematic issues raised in this paper will consequently be discussed and an analytical commentary made.

7.2.1 Research aims - common law

The first research aim was to investigate the common law as it pertains to offer and acceptance, as well as the effect it has on advertisements in the scope of online media of advertising.³³³ What remained was to establish what the position would be in relation to an advertisement in an online advertisement medium, such as in the fictional scenario. Would it constitute an offer or an invitation to do business? It is clear from this chapter that the limitation of stock, as set forth in the *Crawley* case, cannot apply to an advertisement such as the one in the fictional scenario as it refers to an item sold in its specificity. The opinion is that the invitation to do business principle is not applicable due to this fact, and as previously mentioned, the principle finds its applicability only where there is more than one of the same product available. The writer concluded that the limitation of stock was the only element keeping the invitation to treat principle alive, as the court in *Crawley v Rex* did not refer to any authority and mentioned the above element as its only reason for the principle.³³⁴

³³³ Refer to Chapter 2 above regarding the principles of offer and acceptance.

³³⁴ *Partridge v Crittenden* [1968] 2 All ER 421 at 424; Du Plessis 2015 *SALJ* 152; Woker *Advertising Law* 52-53.

Furthermore, the *Fraser v Frank Johnson* case was applied, stating that if the advertisement is formulated in a very simple way then the acceptance would amount to a legally binding contract.³³⁵ This issue was dealt with in the last analytical chapter, where it was concluded that this could well be a solution, but the consumer would still need to rely on a favourable approach, as determining the intention of the advertiser/supplier would not be easy and would be subject to a number of variables. The conclusion, as shown in Chapter 6, was that the common law remedy would not suffice, as it is not sufficiently concrete to rely on, the consumer would have to make a case against the supplier, and this would have implications in terms of time and money. It was concluded that legislation is necessary to address this problematic situation in a more efficient manner. Consequently, an investigation into the CPA and ECTA was done.

7.2.1 Research aims - legislation

7.2.1.1 Consumer Protection Act

The second research aim was to investigate relevant legislation which could possibly lead to finding a remedy for the consumer in the fictional scenario. Firstly, the CPA was investigated. The principles related to its application and interpretation as well as its history were dealt with. Consequently, the writer concluded that the CPA was in fact applicable to this transaction, and that an investigation into the relevant sections would be justified, as the Act finds its applicability to the fictional scenario.

After the above conclusion was drawn it was apparent that section 23 of the Act was not applicable, as the fictional scenario described an electronic transaction. The relevant section of the Act referred the consumer straight to the ECTA.

³³⁵ *Fraser v Frank Johnson* (1894) 11 SC 66; Du Plessis 2015 *SALJ* 154.

Thereafter sections 29 and 30 of the ECTA were dealt with, and it was found that section 29 applies to situations where an advertisement is placed in a misleading or fraudulent manner.³³⁶ With regard to this section, the author's submission was that it is highly unlikely that the vulnerable consumer would be able to prove the intent of the advertiser in this fictional scenario. The unlikeliness hereof is due to the fact that there is an unfavourable interpretation of this section.³³⁷ With such an interpretation the seller would most likely escape liability by pleading that there had been a mere mistake in the advertisement, and that there had been no intention to mislead or trade fraudulently. This section is in dire need of urgent attention as there are two possible interpretations – one favouring the seller and the other favouring the consumer. By seeking a declaratory order clarity would be obtained as to what the correct interpretation and application of this section is.

Lastly, section 30 of the CPA was dealt with, as the section that was most likely to provide an answer to the consumer. It is clear that this section comes closer to the crux of the issue at hand. It clearly focuses on advertisements and addresses bait marketing. It must be pointed out that this section does not necessitate the consumer proving the subjective intent of the seller. The supplier will be found in contravention of the provisions in the above section if the consumer can prove that the advertisement could lead to the consumer's being misled or deceived. This would be easier for the consumer to prove. but based on the analytical approach followed in Chapter 6, it became apparent that there was, yet again, a way out for the supplier. The limitations regarding stock had been referred to as the deciding factor as to whether the supplier was in fact bound to the advert or not. Chapter 6 focused on a statement by Melville that where there is an expressed limitation of stock the supplier must

³³⁶ Section 29 of the CPA; Scott *The influence of the CPA* 26.

³³⁷ The un-favorableness speaks to the position of the consumer.

honour the terms of the advertisement.³³⁸ The most important element here is the formulation of this section: "to the extent of the expressed limits".³³⁹ It goes without saying these words give the supplier a way out in the event that the supplier can refuse to sell a product to the consumer, stating that the product is out of stock. Applying this to the fictional scenario, the supplier can state to the consumer in person that if the consumer wants the guitar/Merx he must pay an extra amount.³⁴⁰ This is clearly prohibited by the CPA, but it is a "he said she said" situation. The consumer therefore is left in a vulnerable position. This issue could also be circumvented if one obtains a declaratory order regarding the true meaning of the words "to the extent of the expressed limits" within section 30 of the CPA.

Unfortunately, there are still escape routes for the unscrupulous supplier contained in the CPA, and a further qualification in the form of a declaratory order must be given to certain provisions to close these escape routes. It is undisputed that the world moving is more and more towards electronic transactions. Therefore, there needs to be clear and concise legislation regulating these transactions so that the advertiser and the consumer is back on an even playing field. It is also proposed that section 23 regarding the display of price be widened to deal concurrently, together with the ECTA, with the display of price in online media of advertising, as section 23 deals with the display of price ordinarily. This is due to the fact that there is a clear and concise interpretation of section 23

7.2.1.2 The Electronic Communications and Transactions Act

The background and interpretation of the ECTA provides a solid foundation for the determination of whether the ECTA can in fact aid the consumer in an online medium of advertising situation. From the later discussion it was

³³⁸ Melville 2014 *SALII* 1-14; Hughes 2015 *SALII* 1-6.

³³⁹ Melville 2014 *SALII* 1-14; Hughes 2015 *SALII* 1-6.

³⁴⁰ This in fact happens in practice, where the supplier knows he has the upper hand.

clear that the ECTA would also be applicable to the fictional scenario. The issue, however, was whether the ECTA would provide a remedy to this particular consumer. It was established that the ECTA does little to provide a remedy to the particular consumer in the fictional circumstances described in Chapter 1. Firstly, section 23 of the CPA refers the consumer to section 43 of the ECTA.³⁴¹ This section provides that a supplier must make certain information available.³⁴² It is clear that there is general non-compliance by suppliers with this section. The remedy the ECTA offers to the consumer is to cancel the transaction.³⁴³ The submission is that this is futile as the consumer would have already suffered substantial loss, and the cancellation would only prevent further, future loss. The only other remedy the ECTA offers is that which is available in the common law. The common law remedies discussed in Chapter 3 would therefore apply. Therefore, the submission is made that the ECTA does not assist the particular consumer presented in Chapter 1 effectively, if at all.

Although certain of these provisions are applicable to the extent that they have been interpreted, the meaning of many of them is unclear and remains largely debatable. One can only hope that the above analysis will help to shed light on the fact that electronic transactions are alive and well in this day and age. It is therefore necessary for a clear understanding of the CPA as well as a clear interpretation thereof to protect the consumer within the fictional scenario, as this scenario is becoming more and more factual by the day. As mentioned above this can be achieved by obtaining a declaratory order from the high court of South Africa. This needs to be done by the national consumer commission and not by consumers as consumers would advocate for an interpretation that would unjustly favour them. In conclusion an interpretation needs to be established that protects the consumer from bait marketing such as in the fiction scenario as well as

³⁴¹ Sections 23 and 43 of the ECTA.

³⁴² Section 43(1) of the ECTA.

³⁴³ Section 43(3) of the ECTA.

an interpretation that makes provision for the seller to make bone fide mistakes. As such an equilibrium will promote trade relations between buyer and seller.

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