

The duties of an estate agent in the sale of residential  
property and the influence of the Consumer Protection  
Act 68 of 2008

by

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# SUMMARY

The main purpose of this dissertation is to critically analyse the duties of an estate agent in the sale of residential property under the Consumer Protection Act 68 of 2008 (CPA). To present a comprehensive analysis of the research, one has to look further than the CPA, to also include the consumer protection measures which existed prior to the CPA in terms of the Estate Agency Affairs Act 112 of 1976 (EAAA) and the common law, as it is clear that the CPA aims to include the rights of consumers as provided for in industry-specific legislation (section 2(9) of the CPA) and the common law (section 2(10) of the CPA) within the ambit of the CPA.

A structured *modus operandi* includes an analysis of the provisions of section 5 of the CPA which clarifies the circumstances under which the CPA will apply, an investigative summary of the statutory duties imposed on the estate agent under the EAAA, an analysis of the common law duties imposed on the estate agent, a critical analysis of the duties imposed on an estate agent under section 19 and section 54 of the CPA and a conclusion of the research to critically answer the question: What are the duties of the estate agent in the sale of residential property under the CPA?

The research clearly illustrates that the intervention of the CPA brought about an important amendment of the common law, with the provisions of section 19(2)(a) and section 54(1) of the CPA importing terms to the agreement between the seller and the estate agent for the sale of the seller's residential property that impose duties on the estate agent in the sale of residential property, which are not otherwise provided for under common law.

In order to present a logical conclusion and recommendations, the problematic application of the seller's remedies under section 19(6) and section 54(2) of the CPA are disseminated in the research. A critical discussion on this aspect, supports and emphasises the importance of developing the common law as provided for under section 4(2)(a) of the CPA, to include terms to the specific type of agreement between the seller and the estate agent for the sale of the seller's residential property, which impose duties on the estate agent as provided for in the CPA. Not only will this bring certainty in respect of the duties imposed on the estate agent in the sale of residential property, but will ultimately also guarantee the seller's common law rights, to cancel the agreement with the estate agent and to institute a claim for damages suffered as a result of the estate agent who sells the seller's residential property in breach of the duties imposed on the estate agent under the CPA, which are preserved under section 2(10) of the CPA.

It is also important to acknowledge that the Property Practitioners Act 22 of 2019 (PPA), which was signed into law by the President of the Republic of South Africa on 2 October 2019 replaces the EAAA. Although a comprehensive analysis of the duties imposed on the property practitioner under the PPA falls outside the scope of this research, mention must be made of the implications of including statutory regulation of property practitioners from a consumer protection perspective, outside the scope of the CPA.

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## **Chapter 1: INTRODUCTION**

### **1 1 Introduction**

Consumer protection measures in South Africa are not new.<sup>1</sup>

“What distinguishes the CPA<sup>2</sup> from previous developments in this field is that it comprises a comprehensive and coherent treatment of a wide range of consumer protection issues set within an overall legal framework of international standard.”<sup>3</sup>

The CPA provides for fundamental consumer rights,<sup>4</sup> as well as a regulatory framework for the protection and enforcement of a consumer’s fundamental consumer rights<sup>5</sup> and routes of redress available to a consumer.<sup>6</sup>

Chapter 2 of the CPA introduces eight<sup>7</sup> fundamental consumer rights. Specifically in relation to services, section 19, included in Part C of Chapter 2 of the CPA, provides for a consumer’s fundamental rights in respect of the supply of services and section 54, included in Part H of Chapter 2 of the CPA, provides for a consumer’s right to demand quality services.

An estate agent supplies a service to his client<sup>8</sup> and in the context of the sale of residential property by an estate agent in terms of an agreement with the seller to sell his residential property,<sup>9</sup> this research aims to determine and critically analyse the

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<sup>1</sup> Van Eeden E & Barnard J *Consumer Protection Law in South Africa* 2<sup>nd</sup> Ed. (2017) LexisNexis (hereinafter “Van Eeden & Barnard”) 24.

<sup>2</sup> The Consumer Protection Act 68 of 2008 (hereinafter the “CPA”).

<sup>3</sup> Van Eeden & Barnard 25.

<sup>4</sup> Ch 2 of the CPA.

<sup>5</sup> Ch 3 of the CPA.

<sup>6</sup> Ch 6 of the CPA.

<sup>7</sup> The right of equality in the consumer market (Part A), the right to privacy (Part B), the right to choose (Part C), the right to disclosure and information (Part D), the right to fair and responsible marketing (Part E), the right to fair and honest dealings (Part F), the right to fair, just and reasonable terms and conditions (Part G), the right to fair value, good quality and safety (Part H) and right to demand a supplier’s accountability to consumers (Part I).

<sup>8</sup> Reg 1(c) of the Estate Agency Affairs Board Code of Conduct (hereinafter the “Code of Conduct”) defines a “client” as the person who has given an estate agent a mandate and reg 1(h) of the Code of Conduct defines a “mandate” as an instruction or authority given to and accepted by an estate agent to render estate agency services.

<sup>9</sup> Hereinafter an “estate agent’s mandate”.

duties of an estate agent in the sale of residential property under the CPA.

At this point, it is necessary to clarify the estate agent's common law mandate for the sale of the seller's residential property and the service provided by an estate agent in the sale of residential property. The express terms of the estate agent's mandate for the sale of the seller's residential property must always be the point of departure to determine what was agreed between them.<sup>10</sup> The estate agent's common law mandate for the sale of the seller's residential property provides for an instruction by the seller to the estate agent to sell his residential property, which instruction the estate agent accepts,<sup>11</sup> together with an undertaking by the seller to compensate the estate agent. Such compensation is usually in the form of a commission calculated as a percentage of the purchase price of the seller's residential property for the sale of the seller's residential property to a willing and able buyer.<sup>12</sup>

Firstly, it is important to point out that unless the specific agreement between the seller and the estate agent includes a written<sup>13</sup> power of attorney which specifically authorises the estate agent to sell his residential property, an estate agent is not clothed with authority to perform a juristic act on behalf of the seller and is therefore not authorised to sell the seller's residential property.<sup>14</sup> Secondly, if the estate agent is not authorised to sell the seller's residential property, it follows that the services expected of the estate agent in the sale of the seller's residential property, are limited to those services necessary to put the seller in a position to sell his residential property to a willing and able buyer.

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<sup>10</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>11</sup> Reg 1(h) of the Code of Conduct defines a "mandate" as "an instruction or an authority given to, and accepted by, an estate agent to render an estate agency service".

<sup>12</sup> *Tekenpraktik CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>13</sup> S 2(1) of the Alienation of Land Act 81 of 1981 (hereinafter the "ALA"); Reg 3 5 of the Code of Conduct.

<sup>14</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

Nugent AJA in *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>15</sup> explained the estate agent's mandate for the sale of the seller's residential property without a power of attorney which authorises an estate agent to perform a juristic act on behalf of the seller, as follows:

“When parties agree, as in this case, that the agent will “sell” the property they envisage no more than that the estate agent will bring about a sale between principals.”

For purposes of this research, reference to the estate agent's mandate must be understood as an agreement between a seller and an estate agent for the sale of the seller's residential property and the terms “sale” or “sell” indicating the collective of services required to bring about a sale of the seller's residential property to a willing and able buyer.

To answer the question: what are the duties of an estate agent in the sale of residential property, one has to look further than the CPA to also include the statutory duties imposed on an estate agent under the Estate Agency Affairs Act<sup>16</sup> and the duties imposed on an estate agent under common law rules of the estate agent's mandate for the sale of the seller's residential property.

Woker<sup>17</sup> points out that consumer protection measures in South Africa existed prior to the CPA for many years in industry-specific legislation<sup>18</sup> and the common law.<sup>19</sup> It is clear that the CPA aims to also include the rights of consumers as provided for in industry-specific legislation and common law within the ambit of the CPA. Section 2(9) of the CPA provides for a concurrent application of the provisions of the CPA and any

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<sup>15</sup> [2001] 3 All SA 295 (A) at para 1.

<sup>16</sup> Act 112 of 1976 (hereinafter the “EAAA”).

<sup>17</sup> Woker T “Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 *Obiter* 217 – 231 (hereinafter “Woker 2010 *Obiter*”) 218.

<sup>18</sup> Woker 2010 *Obiter* 218.

<sup>19</sup> Woker 2010 *Obiter* 223.

other Act<sup>20</sup> as provided for under section 2(9)(a) and section 2(9)(b) of the CPA. Section 2(10) of the CPA preserves the consumer's common law rights providing that no provision of the CPA must be interpreted in a manner which precludes a consumer from exercising any rights afforded to him under common law.

A structured *modus operandi* will be followed to include:

- a an analysis of the provisions of section 5 of the CPA which clarifies the circumstances under which the CPA will apply;<sup>21</sup>
- b an investigative summary of the statutory duties imposed on the estate agent under the EAAA and the Code of Conduct;<sup>22</sup>
- c an analysis of the common law duties imposed on the estate agent;<sup>23</sup> and
- d a critical analysis of the duties imposed on an estate agent under section 19 and section 54 of the CPA.<sup>24</sup>

In order to present a logical conclusion and recommendations, the problematic application of the seller's remedies under section 19(6) and section 54(2) of the CPA will also be disseminated in the research. A critical discussion on this aspect will support and emphasise the importance of developing the common law as provided for under section 4(2)(a) of the CPA to include the mandatory implied terms of section 19(2)(a) to the estate agent's common law mandate for the sale of residential property, which impose contractual duties on the estate agent as provided for in the CPA.

It is also important to acknowledge the Property Practitioners Act<sup>25</sup> which was signed

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<sup>20</sup> Excluding the Public Finance Management Act 1 of 1999 (hereinafter the "Public Finance Management Act") and the Public Service Act Proclamation 103 of 1994 (hereinafter the Public Services Act") which are dealt with under s 2(8) of the CPA.

<sup>21</sup> Ch 2 of this research.

<sup>22</sup> Ch 3 of this research.

<sup>23</sup> Ch 4 of this research.

<sup>24</sup> Ch 5 of this research.

<sup>25</sup> Act 22 of 2019 (hereinafter the "PPA").

into law by the President of the Republic of South Africa<sup>26</sup> on 2 October 2019. The PPA will only come into operation on a date fixed by the President by proclamation in the *Gazette* and will then replace the EAAA. Chapter 10 of the PPA introduces an additional industry-specific regulation of property practitioners under the banner of “Consumer Protection”, but it only deals with aspects relating to mandatory disclosure forms,<sup>27</sup> the language of agreements<sup>28</sup> and aspects of consumer education and information.<sup>29</sup>

Although a comprehensive analysis of the duties imposed on the property practitioner<sup>30</sup> under the PPA falls outside the scope of this research, mention will be made of the implications of including statutory regulation of property practitioners from a consumer protection perspective outside the scope of the CPA. This aspect will be absorbed and discussed in chapter 3 of this research.

## **1 2 Interpretation of the CPA**

Madjiedt AJ in *Cool Ideas 1186 CC v Hubbard and Another*<sup>31</sup> referring to *SATAWU and Another v Garvas and Others*,<sup>32</sup> *S v Zuma and Others*<sup>33</sup> and *Dadoo Ltd and Others v Krugersdorp Municipal Council*<sup>34</sup> confirmed that a “fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity”.<sup>35</sup> The court identified three crucial, interrelated riders to the general principle, namely that:

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<sup>26</sup> Hereinafter the “President”.

<sup>27</sup> S 66 of the PPA.

<sup>28</sup> S 67 of the PPA.

<sup>29</sup> S 68 of the PPA.

<sup>30</sup> Previously an estate agent.

<sup>31</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 8 BCLR 869 (CC).

<sup>32</sup> *SATAWU and Another v Garvas and Others* 2013 1 SA 83 (CC) at para 37.

<sup>33</sup> *S v Zuma and Others* 1995 4 BCLR 401 (CC) at para 13.

<sup>34</sup> *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 543.

<sup>35</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 8 BCLR 869 (CC) at para 28.



- a a statutory provision should always be interpreted in a manner which gives effect to the purposes of the Act in question;
- b the relevant statutory provision must be properly contextualised; and
- c all statutes must be construed in a manner which is consistent with the Constitution.<sup>36</sup>

The CPA includes specific instructions on the interpretation of the CPA and confirms the interrelated riders to the general principle to be applied to the interpretation of statutes as identified in *Cool Ideas 1186 CC v Hubbard and Another*.<sup>37</sup> Section 2(1) of the CPA provides that the CPA must be interpreted in a manner which gives effect to the purposes of the CPA.<sup>38</sup> Section 2(1) of the CPA must be read together with section 4(2)(b) of the CPA, which instructs the court<sup>39</sup> to promote the spirit and purposes of the CPA in any matter brought before the Tribunal<sup>40</sup> or the court.<sup>41</sup> Section 4(3) of the CPA provides that if any provision of the CPA, read in context, can be construed to have more than one meaning, the Tribunal or court<sup>42</sup> must prefer the meaning that best promotes the spirit and purposes of the CPA.

Section 3 of the CPA states the purpose of the CPA. The CPA aims to “promote and advance the social and economic welfare of consumers in South Africa” by those means listed in subparagraphs (1)(a) to (h). The phrase “spirit and purposes”<sup>43</sup> of the CPA is not explained in the CPA. Van Eeden & Barnard<sup>44</sup> argue that:

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<sup>36</sup> Constitution of the Republic of South Africa 2006 (hereinafter the “Constitution”).

<sup>37</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 8 BCLR 869 (CC).

<sup>38</sup> S 3 of the CPA states the purposes of the CPA.

<sup>39</sup> Excluding a consumer court.

<sup>40</sup> The National Consumer Tribunal established under s 26 of the National Credit Act 35 of 2005 (hereinafter the “Tribunal” or “NCT”).

<sup>41</sup> S 4(2)(b)(i) of the CPA.

<sup>42</sup> Excluding a consumer court.

<sup>43</sup> See s 4(2)(b)(i) and s 4(3) of the CPA.

<sup>44</sup> Van Eeden & Barnard 40.

“It may be inferred that the word “spirit” was employed to indicate a policy that the Act should not be interpreted overly literally, and that the interpretation of the Act should facilitate the realisation and enjoyment of consumer rights.”

The Supreme Court of Appeal in the matter of *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*<sup>45</sup> explained that in interpreting an Act, the words used must be considered in light of all the relevant and admissible context, including the circumstances under which the legislation came into being. In this regard, the Preamble to the CPA acknowledges the historical background of South Africa which resulted in a social and economic inequality of society, that recent and emerging technological developments and changes will bring new opportunities, benefits and challenges to the consumer market, and that the economic environment should promote a culture which supports and strengthens consumer rights and responsibilities, business innovation and enhanced performance.

It is against this background that the CPA was enacted in order to:

- a* promote and protect the economic interest of consumers;
  - b* improve access to and the quality of information that is necessary to enable consumers to make informed choices according to their own individual needs and wishes;
  - c* to protect consumers from any hazards which might threaten their well-being and safety;
  - d* to develop an effective system of redress for consumers;
  - e* to promote and provide for consumer education, including education concerning the social and economic effects of a consumer’s particular choice;
- and

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<sup>45</sup> *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 1 (SCA) 518 at para 27.

*f* to facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests and to promote consumer participation in decision-making processes concerning the marketplace and the interest of consumers.<sup>46</sup>

The interpretational discretion provided for under sections 4(2)(*b*) and 4(3) to promote the spirit and purposes of the CPA must be exercised having regard to the circumstances in which the CPA came into being as set out in the Preamble to the CPA, with the intention to give effect to the objective of the CPA as set out in section 3(1) of the CPA.

Bauling and Nagtegaal argue that “[t]he CPA, as social justice legislation, has as aim the transformative constitutional aspiration to kindle and drive social-economic change in the impoverished South African society”.<sup>47</sup> Van Eeden and Barnard however point out that although the CPA is regarded as a remedial law, the purpose of the CPA<sup>48</sup> prescribes balancing the rights and remedies of consumers provided for in the CPA in a manner that is fair to both consumers and suppliers and promotes an efficient market place for the regulation of all transactions occurring in the Republic.<sup>49</sup>

Primarily, the CPA is purposed to protect consumers and “the Act must therefore be interpreted keeping in mind that its focus is the protection of consumers”.<sup>50</sup> It is against this background that the provisions of the CPA relating to the supply or performance of services in general and specifically in relation to the sale of residential property by

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<sup>46</sup> See the Preamble to the CPA.

<sup>47</sup> Bauling A & Nagtegaal A “Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008” 2015 *De Jure* 149 - 171 (hereinafter “Bauling & Nagtegaal 2015 *De Jure*”) 151.

<sup>48</sup> S 3 of the CPA provides for a purpose to promote and advance the social and economic welfare of consumers in South Africa. See s 3(1)(*a*) of the CPA.

<sup>49</sup> S 5(1)(*a*) of the CPA.

<sup>50</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 16.

an estate agent in terms of the estate agent's common law mandate for the sale of the seller's residential property, will be analysed.

### **1 3 Research statement and objective**

The primary purpose of this research is to determine and critically analyse the duties of an estate agent in the sale of residential property under the CPA. The *modus operandi* to be followed is:

- a* an analysis of the provisions of section 5 of the CPA read together with the definition of "transaction" which clarifies the circumstances under which the CPA will apply and determines the requirements which must be met to establish an application of the CPA in the sale of residential property;
- b* an investigation and summary of the statutory duties imposed on the estate agent in the supply or performance of services in the sale of residential property under the EAAA and the Code of Conduct;
- c* an analysis of the common law duties imported as *naturalia* to the common law estate agent's mandate for the sale of the seller's residential property;
- d* an extensive evaluation and critical analysis of the duties imposed on an estate agent under section 19 and section 54 of the CPA, which regulate the seller's rights in respect of the supply of services<sup>51</sup> and the seller's right to demand quality services in the sale of residential property under the CPA; and
- e* a conclusion of the duties of the estate agent in the sale of residential property under the CPA to answer the critical question: what are the duties of the estate agent in the sale of residential property under the CPA?

In order to arrive at a logical conclusion and meaningful recommendations, the problematic application of the seller's remedies under section 19(6) and section 54(2)

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<sup>51</sup> S 19 of the CPA.

of the CPA will also be disseminated in the research. A critical discussion on this aspect will support and emphasise the importance of developing the common law as provided for under section 4(2)(a) of the CPA to include the mandatory implied terms of section 19(2)(a) to the estate agent's common law mandate for the sale of residential property, which impose contractual duties on the estate agent as provided for in the CPA. Not only will this bring certainty in respect of the duties imposed on the estate agent in the sale of residential property, but it will ultimately also guarantee the seller's common law rights, including the right to cancel the agreement with the estate agent and to institute a claim for damages suffered as a result of the estate agent who sells the seller's residential property in breach of the duties imposed on the estate agent under the CPA, which are preserved under section 2(10) of the CPA.

#### **1 4 Delineations and limitations on the scope of the research**

“[T]he Consumer Protection Act is a formidable statute, comprising 122 main sections grouped into seven chapters, countless sections, two schedules, and all the regulations and notices published under the Act. It repeals five other statutes, a number of sections of a sixth, and introduces amendments to three existing Acts.”<sup>52</sup>

The main purpose of this research is to determine and analyse the application of the CPA to duties of an estate agent in the sale of residential property. It is important to be reminded that an estate agent is not, unless specifically authorised by the seller in writing,<sup>53</sup> clothed with the authority to perform a juristic act on behalf of the seller which will bind the seller and a third party in a legal relationship and is therefore not authorised to sell the seller's residential property to a willing and able buyer.<sup>54</sup> The

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<sup>52</sup> Delport H “Problematic aspects of the Consumer Protection Act 68 of 2008 in relation to property transactions: linked transactions, fixed-term transactions and unsigned sale agreements” 2014 *Obiter* 60 - 80 (hereinafter “Delport 2014 *Obiter*”).

<sup>53</sup> S 2(1) of the ALA; Reg 3 5 of the Code of Conduct; *National Board Pretoria (Pty) Ltd v Estate Swanepoel* 1975 3 SA 6 (A); *Roodia Beleggings (Flora) (Edms) Bpk v Marais* 1979 4 SA 488 (T).

<sup>54</sup> *Bird v Summerville and another* 1961 3 SA 194 (A); *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N); *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Basil Elk Estates (Pty) Ltd v Curzon* 1990 2 SA 1 (TPD); *Wynland Properties CC v Potgieter and Another* [1999] 3 All SA 576 (C); *Nach*

service expected of an estate agent in the sale of residential property is to supply or perform a collective of services to bring about a sale of the seller's residential property to a willing and able buyer.<sup>55</sup>

The main purpose of this research to determine and analyse the application of the CPA to duties of an estate agent in the sale of residential property, must therefore be understood as an analysis of the duties imposed on an estate agent in the supply or performance of the collective services to bring about a sale of the seller's residential property to a willing and able buyer. Although it is acknowledged that the CPA impose a number of duties on the estate agent in the sale of residential property, this research is therefore limited to and focusses on the duties imposed on the estate agent the supply or performance of the collective services to bring about a sale of the seller's residential property to a willing and able buyer under section 19 of the CPA which regulates the seller's rights respect to the supply of services and section 54 of the CPA which regulates the seller's right to demand quality services.

Estate agents are regulated by the Estate Agency Affairs Board<sup>56</sup> in terms of the EAAA and the scope of this research is limited by specifically excluding the following transactions, defined as "estate agency services" in section 1 of the EAAA, from the scope of this research:

- a the purchase or hire of any property, including residential property, commercial property and any business undertaking;
- b the sale of any property, other than residential property;
- c the lease of any property, including residential property, commercial property and any business undertaking; and

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*Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A); *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP).

<sup>55</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>56</sup> Hereinafter the "EAAB".

- d* the supply or performance of any estate agency services by an estate agent, acting as a broker between the seller or lessor and the purchaser or lessee for the sale or purchase or the lease or hire of any property, including residential property, commercial property or any business undertaking.

The EAAB formulated and published<sup>57</sup> regulations<sup>58</sup> in the form of a Code of Conduct, which impose specific duties on estate agents in regulating their dealings with the public. Many of the duties imposed on an estate agent under the EAAA and the Code of Conduct correspond with specific provisions of the CPA. A critical analysis of many of the relevant corresponding provisions of the CPA falls outside the scope of this research, and this research is limited by specifically excluding a critical analysis of the following provisions of the CPA:

- a* section 14 of the CPA which applies to fixed-term agreements such as sole mandates. Section 14 of the CPA provides for a consumer's rights in respect of the expiry and renewal of fixed-term contracts and corresponds with an estate agent's duties in respect of mandates as provided for in regulation 3 of the Code of Conduct;
- b* section 22 of the CPA regulates the consumer's right to information in plain and understandable language and impose additional duties on the estate agent in the preparation and presentation of a sole mandate to his client;
- c* section 27 of the CPA which regulates the duty imposed on an intermediary to disclose information and to keep accounting records of all relationships and transactions contemplated in section 27 of the CPA. The duties imposed on an intermediary under section 27 of the CPA corresponds with the duty to disclose,

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<sup>57</sup> S 8(1)(b) of the EAAA empowers the EAAB to frame and publish regulations with the approval of the Minister.

<sup>58</sup> S 33(1)(a) of the EAAA.

- imposed on an estate agent under regulation 4 of the Code of Conduct;
- d* Part E of the CPA which deals with a consumer's right to fair and responsible marketing and corresponds with regulation 5 of the Code of Conduct which imposes a duty on the estate agent not to make misrepresentations or false statements or to use harmful marketing techniques;
  - e* section 40 of the CPA which regulates a consumer's rights in respect of unsociable conduct and impose specific duties on a supplier in respect of using undue influence. The provisions of section 40 of the CPA corresponds with regulation 7 of the Code of Conduct which prohibits against undue influence; and
  - f* section 65 of the CPA which impose a duty on the supplier to hold and account for the consumer's property and corresponds with the provisions of regulation 9 of the Code of Conduct which regulates the estate agent's duties in respect of trust monies and interest.

Delpont argues that the regulatory nature of the Code of Conduct may support an argument that the duties imposed on an estate agent under the Code of Conduct must be included as tacit terms to the agreement between the estate agent and his client as provided for under the "common bystander test".<sup>59</sup> A critical analysis of the incorporation of the duties imposed on an estate agent as tacit terms to an agreement between an estate agent and the seller for the sale of the seller's residential property falls outside the scope of this research. A brief overview of Delpont's argument and the principles set out in the "common bystander test" are included in this research to provide a comprehensive overview of the industry-specific regulatory duties imposed

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<sup>59</sup> Delpont H "An estate agent's duty to list and market a property at market value" 2009 *Obiter* 131 – 143 (hereinafter "Delpont 2009 *Obiter* (131)") 139.



on an estate agent in the sale of residential property.

Aspects of the PPA which regulate the duties of a property practitioner from a consumer protection perspective and the implications of including statutory regulation of property practitioners outside the scope of the application of the CPA, will be discussed, but a comprehensive analysis of the PPA falls outside the scope of this research.

Common law forms the basis of the estate agent's mandate for the sale of residential property and the scope of this research is further limited by excluding the supply or performance of services by an estate agent, duly authorised by the seller in terms of a written power of attorney in terms of a unilateral act or otherwise to act on behalf of the seller in the sale of his residential property.

An overview of the duties of an estate agent under the EAAA, the PPA and the common law is provided, but an in-depth critical analysis is not intentional and is limited to aspects in support of the process of formulating arguments within the scope of this research.

The scope of the application of the CPA in this research is limited specifically to the performance of services to bring about a sale of the seller's residential property to a willing and able buyer, by or at the direction of an estate agent, acting in the ordinary course of business, to or at the direction of the seller of the residential property, for consideration, as provided for under section 1(a)(iii) of the definition of "transaction" in the CPA.

From a consumer protection perspective under the CPA, this research is further limited to a critical analysis of the provisions of section 19 of the CPA and section 54 of the CPA. Sections of the CPA relevant to the supply or performance of services by an estate agent in the sale of residential property may be referred to in the critical analysis

of the application of section 19 and section 54 of the CPA to the duties imposed on a estate agent in the sale of residential property, but it is pointed out that any reference to any other sections in the CPA are dealt with, where applicable, briefly and without critical analysis, only to ensure a comprehensive overview in achieving the main aim of this research.

It is specifically pointed out that although reference to the provisions of section 4(2) and section 69 of the CPA and section 173 of the Constitution are included in this research, a comprehensive analysis of section 4(2) and 69 of the CPA and section 173 of the Constitution falls outside the scope of this research. A discussion on the application of section 4(2) and section 69 of the CPA, as well as section 173 of the Constitution, is included in this research in support of developing a logical conclusion in chapter 6 of this research.

A discussion of the additional duties imposed on an estate agent under the Protection of Personal Information Act<sup>60</sup> and the Electronic Communications and Transactions Act<sup>61</sup> in the sale of residential property, are specifically excluded from the scope of this research.

Chapter 6 of this research provides conclusions and recommendations on the research and answers the question: what are the duties of an estate agent in the sale of residential property under the CPA? To arrive at a logical conclusion and meaningful recommendations, aspects relating to the remedies available to a consumer under section 19(6) and section 54(2) of the CPA read together with the provisions of section 4(2) and section 69(d) of the CPA as well as section 173 of the Constitution are disseminated in chapter 6 of this research, but is however not presented as a critical

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<sup>60</sup> Act 4 of 2013 (hereinafter the “POPI Act”).

<sup>61</sup> Act 25 of 2005 (hereinafter the “ECTA”).

analysis of the any of the aforementioned provisions.

## **1 5 Methodology**

In following a critical approach to determine the application of the CPA to the supply or performance of estate agency services in the sale of residential property and a critical analysis of the duties imposed on the estate agent under the CPA, a literature study of the primary sources (legislation, regulations and judicial precedent) and secondary sources (journal articles, textbooks and chapters in textbooks, draft bills, bills and consultation papers) are undertaken and are referenced and discussed in support of the formulation of the author's arguments to achieve the research aim of this dissertation.

For ease of reference, the following reference techniques are applied in this research:

- a* an abbreviated mode of citation is used as referencing method to refer to primary and secondary sources, with the exception of case law which is cited in full. The full titles of all sources are provided in the bibliography;
- b* a gender-neutral language dictates the exclusive use of the masculine form of expression, and includes a reference to all other genders as natural persons;

The law, as stated in this research, reflects the position as at 30 October 2019.

## **1 6 Overview of chapters**

### **1 6 1 Chapter 1: Introduction**

Chapter 1 will provide a general introduction to the aims, purposes and relevance of this research, stating the research objective, explaining the methodology to be adopted in the manner in which the research is undertaken, proposing the delineation and limitations of the research and reasons therefore and, providing a brief overview of each chapter included in the research.

## **1 6 2 Chapter 2: The application of the CPA**

In chapter 2 of this research, the application of the CPA to the supply or performance of estate agency services by an estate agent in the context of the sale of residential property on behalf of the seller of the residential property, will be established.

Section 5 of the CPA which regulates the application of the CPA, will be discussed in relation to the supply or performance of services with reference to the key concepts and definitions which determine the scope of the application of the CPA under section 5. The point of departure will be that the CPA applies to every transaction occurring in the Republic unless it is exempted under section 5(2),<sup>62</sup> 5(3)<sup>63</sup> or 5(4)<sup>64</sup> of the CPA. A “transaction” is defined in section 1 of the CPA to include the performance of any services by or at the direction of a person acting in the ordinary course of business for or at the direction of a consumer for consideration.

An estate agent performs estate agency services for or at the direction of his client in terms of an instruction given to and accepted by the estate agent<sup>65</sup> and the application of the CPA under section 1(a)(iii) of the definition of “transaction” will be established in chapter 2 of this research.

## **1 6 3 Chapter 3: The duties of an estate agent in the sale of residential property under the EAAA and the Code of Conduct**

Estate agents perform estate agency services in terms of a mandate which provides

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<sup>62</sup> S 5(2) of the CPA excludes specific transactions as provided for under sections (a) – (g) from the application of the CPA.

<sup>63</sup> S 5(3) of the CPA provides for a regulatory authority to apply to the Minister for an industrywide exemption from one or more provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation or any treaty, international law, convention or protocol.

<sup>64</sup> Under s 5(4) of the CPA, the Minister may, by notice in the *Gazette* after receiving the advice of the Commission, grant an exemption contemplated in s 5(3) of the CPA to the extent that the relevant regulatory scheme ensures the achievement of the purposes and the provisions of the CPA and subject to any limits or conditions necessary to ensure the achievement of the purposes of the CPA.

<sup>65</sup> Reg 1(h) of the Code of Conduct.

for an instruction or authority given to and accepted by an estate agent to render estate agency services.<sup>66</sup> Estate agents are regulated by the Estate Agency Affairs Board<sup>67</sup> under the EAAA, which aims to regulate the activities of estate agents in the public interest. To this extent, the EAAB published<sup>68</sup> a Code of Conduct with the approval of the Minister of Trade and Industry which imposes duties on the estate agent in dealing with the public.<sup>69</sup>

A discussion of the duties imposed on an estate agent in the EAAA will be included in the analysis of the duties imposed on an estate agent in the sale of residential property under the CPA as provided for under section 2(9) of the CPA. If there are any inconsistencies between any of the provisions of the CPA and the provision of the EAAA,<sup>70</sup> the provisions of both the CPA and the EAAA will be applied concurrently, to the extent that it is possible to apply and comply with the one without contravention of the other.<sup>71</sup> To the extent that a concurrent application is not possible, the provisions of either the CPA or the EAAA that extend the greater protection to a consumer will prevail over the alternative provision.<sup>72</sup>

Section 5(3) and 5(4) of the CPA provide for a regulatory authority to apply to the Minister for an industry-wide exemption to one or more of the provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by the regulatory authority in terms of other national legislation.<sup>73</sup> To date, no application has been granted in favour of the EAAB, and the provisions of the

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<sup>66</sup> See the definition of “mandate” in reg 1(h) of the Code of Conduct.

<sup>67</sup> Hereinafter the “EAAB”.

<sup>68</sup> S 8(1)(b) of the EAAA.

<sup>69</sup> S 33 of the EAAA.

<sup>70</sup> The provisions of s 2(9) do not apply to any inconsistencies between ch 5 of the CPA and the Public Finance Management Act or the Public Services Act, which are dealt with separately in s 2(8) of the CPA.

<sup>71</sup> S 2(9)(a) of the CPA.

<sup>72</sup> S 2(9)(b) of the CPA.

<sup>73</sup> S 5(3)(a) of the CPA.

EAAA and the CPA must therefore be applied as provided for in section 2(9) of the CPA.

Aspects of the PPA will be included in the summary of the statutory duties imposed on an estate agent in the sale of residential property.

#### **1 6 4 Chapter 4: The duties of an estate agent in the sale of residential property under the common law**

A consumer's common law rights are acknowledged and protected in section 2(10) of the CPA which provides that "no provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law."

Common law acknowledges the mandate as an agreement or transaction type for the supply or performance of services<sup>74</sup> and compares the duties of an estate agent to the duties of an agent acting on behalf of his principal and to the duties of a mandatory in performing the instruction received from the mandatory.<sup>75</sup> The duties of an agent and a mandatory are implied terms to the classes of the specific contracts of agency and mandate and will be discussed in chapter 4 of this research.

The agreement between the estate agent and the seller for the sale of residential property on instructions received from the seller to sell his residential property<sup>76</sup> exhibits many of the characteristics of agency and mandate. However, the specific agreement has been held as being *sui generis*,<sup>77</sup> in that the common law does not import terms *ex lege* to the estate agent's mandate for the sale of the seller's residential property, which imposes any contractual duties on the estate agent in the sale of residential property.

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<sup>74</sup> Van Eeden & Barnard 309.

<sup>75</sup> *Bird v Summerville and another* 1961 3 SA 194 (A) 202; *John H. Pritchard & Associates v Thorney Park Estates* 1967 2 SA 511 (D) 517; *Aida Real Estate Ltd v Lipschitz* 1971 3 SA 871 (W) 873; *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986.

<sup>76</sup> Hereinafter the "estate agent's mandate".

<sup>77</sup> Sharrock R *Business Transactions Law* 8<sup>th</sup> Ed. (2011) Juta (hereinafter "Sharrock") 2.

The common law rules regulating the estate agent's mandate for the sale of the seller's residential property will be discussed in chapter 4 of this research.

### **1 6 5 Chapter 5: The duties of an estate agent in the sale of residential property under the CPA**

Chapter 2 of the CPA introduces fundamental consumer rights<sup>78</sup> which regulate the relationship between a consumer and a supplier. In the context of the supply or performance of services by a supplier to a consumer in terms of an agreement between them, section 19 of the CPA,<sup>79</sup> included in Part C of Chapter 2 the CPA which deals with the consumer's right to choose provides for a consumer's rights with respect to the supply of services and section 54 of the CPA,<sup>80</sup> included Part H of Chapter 2 of the CPA which regulates the consumer's right to fair value, good quality and safety, provides for a consumer's rights to demand quality services.

#### **1 6 5 1 The consumer's remedies under section 19(6) and section 54(2) of the CPA**

The application of the provisions of section 19(2) and section 54 of the CPA to the supply or performance of the services by an estate agent in the sale of residential property will be critically analysed in chapter 5 of this research. In order to arrive at a logical conclusion and recommendations, the problematic application of the seller's remedies under section 19(6) and section 54(2) of the CPA will be disseminated in chapter 5 of the research and included in chapter 6, which concludes the research.

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<sup>78</sup> The right of equality in the consumer market (Part A), the right to privacy (Part B), the right to choose (Part C), the right to disclosure and information (Part D), the right to fair and responsible marketing (Part E), the right to fair and honest dealings (Part F), the right to fair, just and reasonable terms and conditions (Part G), the right to fair value, good quality and safety (Part H) and the right to demand a supplier's accountability to consumers (Part I).

<sup>79</sup> S 19 of the CPA deals with a consumer's rights in respect of the delivery of goods and the supply of services.

<sup>80</sup> S 54 of the CPA deals with the consumer's right to demand quality service.

## **1 6 6 Chapter 6: Conclusion and recommendations**

Chapter 6 of this research concludes this dissertation by summarising the findings of this research, with reference to the research statement and objective. The question: what are the duties of an estate agent in the sale of residential property under the CPA, will be answered in chapter 6 of this research.

The problematic application of the seller's remedies under section 19(6) and section 54(2) of the CPA which are disseminated in chapter 5 of the research, and read together with the provisions of section 4(2) and section 69(d) of the CPA as well as section 173 of the Constitution, will support and emphasise the importance of developing the common law to include terms to the estate agent's common law mandate for the sale of the seller's residential property, which impose contractual duties on the estate agent as provided for in the CPA. This aspect will be absorbed and addressed in the recommendation included in chapter 6 of this research.



## **Chapter 2: THE APPLICATION OF THE CPA**

### **2 1 Introduction**

Consumer protection law in South Africa before 2000 consisted, apart from ancillary protection afforded to consumers under common law, mainly of incidental legislative control measures in industry-specific legislation.<sup>81</sup>

The CPA came into operation on 1 April 2011 and is “an ambitious and comprehensive piece of legislation aiming to regulate the consumer market as widely as possible.”<sup>82</sup>

The primary purposes<sup>83</sup> of the CPA include the promotion and advancement of the social and economic welfare of consumers in South Africa by *inter alia*:

- a* establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;<sup>84</sup>
- b* protects consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices<sup>85</sup> and deceptive, misleading, unfair or fraudulent conduct;<sup>86</sup> and
- c* provides an accessible, consistent, harmonised, effective and efficient system of redress for consumers.<sup>87</sup>

The scope and application of the CPA are provided for in section 5 of the CPA. Primarily, the CPA regulates transactions between consumers and persons acting in the ordinary course of business, and the marketing of goods and services. Section 5 of the CPA must be read together with the definitions which define the application of

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<sup>81</sup> Naudé T & Eiselen S (Eds) *Commentary on the Consumer Protection Act* Juta Cape Town Original Service (2014) (hereinafter “Naudé & Eiselen Original Service (2014)”) 1.

<sup>82</sup> Naudé & Eiselen Original Service (2014) 2.

<sup>83</sup> S 3 of the CPA regulates the purposes of the CPA.

<sup>84</sup> S 3(1)(a) of the CPA.

<sup>85</sup> S 3(1)(d)(i) of the CPA.

<sup>86</sup> S 3(1)(d)(ii) of the CPA.

<sup>87</sup> S 3(1)(h) of the CPA.

the CPA under section 5 thereof.

Estate agents are regulated by the EAAB in terms of the EAAA which came into operation on 1 August 1977. The purposes of the EAAA are set out in the Preamble to the EAAA and provide for the regulation and control of certain activities in the public interest. To this extent, the EAAB framed and published regulations, with the approval of the Minister of Trade and Industry, in the format of a Code of Conduct as provided for in section 8(1)(b) of the EAAA to regulate, control or prohibit any practice followed by estate agents.<sup>88</sup>

The EAAA and the Code of Conduct provide lists of defined<sup>89</sup> industry-specific terms and phrases which guide the application of the EAAA and the Code of Conduct to the activities of estate agents.<sup>90</sup> The definitions provided in the EAAA<sup>91</sup> and the Code of Conduct<sup>92</sup> must be used as additional interpretational tools in determining an application of the CPA<sup>93</sup> specifically in the sale of residential property by an estate agent on instruction received from the seller to sell his residential property.

Although the main purpose of this research aims to answer the question: what are the duties of an estate agent in the sale of residential property under the CPA, it is important, first, to establish an application of the CPA to the performance of services by an estate agent in the sale of residential property.

## **2 2 The scope and application of the CPA in the performance of services by an estate agent in the sale of residential property**

### **2 2 1 Introduction**

Section 5 of the CPA regulates the scope and application of the CPA. In principle, the

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<sup>88</sup> S 33(1)(a) of the EAAA.

<sup>89</sup> See s 1 of the EAAA and reg 1 of the Code of Conduct.

<sup>90</sup> The EAAA *inter alia* aims to regulate the activities of estate agents in the public interest.

<sup>91</sup> See s 1 of the EAAA.

<sup>92</sup> See reg 1 of the Code of Conduct.

<sup>93</sup> S 5 of the CPA regulates the application of the CPA.

CPA applies to every relationship, agreement and transaction between a supplier and a consumer occurring within the Republic,<sup>94</sup> to the marketing of any goods or services<sup>95</sup> and to the goods or services that are supplied or performed in terms of the transaction to which the CPA applies.<sup>96</sup>

A transaction refers<sup>97</sup> to an agreement between a supplier, acting in the ordinary course of business and one or more consumers for the supply or potential supply of goods or services for consideration.<sup>98</sup> In relation to the supply of goods, a transaction also refers to the supply by a supplier acting in the ordinary course of business to or at the direction of the consumer for consideration.<sup>99</sup> In the context of the performance of services a “transaction” is defined<sup>100</sup> to mean –

- “(a) in respect of a person acting in the ordinary course of business –
- (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.”

The comprehensive list of definitions of terms and phrases in section 1 of the CPA which make up section 5 of the CPA, must be used as interpretational tools aimed at providing greater clarity in attributing meaning to the words used in section 5 of the CPA.<sup>101</sup> The defined<sup>102</sup> industry-specific term and phrases which guide the regulation of estate agents under the EAAA and the Code of Conduct, are used as additional interpretational tools to determine the specific scope and application of the CPA to the

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<sup>94</sup> S 5(1)(a) of the CPA. The CPA does not apply to transactions which are specifically exempted in terms of sections 5(2), 5(3) or 5(4) of the CPA.

<sup>95</sup> The CPA does not apply to the promotion of goods or services if those goods or services could not reasonably be the subject of a transaction in terms of the CPA or if the promotion of the goods or services are exempted in terms of sections 5(3) or 5(4) of the CPA.

<sup>96</sup> S 5(1)(c) of the CPA. The CPA applies irrespective of whether the goods or services are offered or supplied in conjunction with or separate from any other goods or services. See also Van Eeden & Barnard 35.

<sup>97</sup> S 1 of the CPA. The CPA applies to every transaction occurring in the Republic, unless that transaction is exempted as provided for in s 5(2), 5(3) and 5(4) of the CPA.

<sup>98</sup> See (a)(i) of the definition of “transaction” in s 1 of the CPA.

<sup>99</sup> See (a)(ii) of the definition of “transaction” in s 1 of the CPA.

<sup>100</sup> See (a)(iii) of the definition of “transaction” in s 1 of the CPA.

<sup>101</sup> Naudé T & Eiselen S (Eds) *Commentary on the Consumer Protection Act* Juta Cape Town Revision Service (2016) (hereinafter “Naudé & Eiselen Revision Service 1 (2016)”) 1-1.

<sup>102</sup> See s 1 of the EAAA and reg 1 of the Code of Conduct.

sale of residential property by an estate agent on instruction received from the seller to sell his residential property.

From the outset, the instruction given by the seller and accepted by the estate agent to sell the seller's residential property<sup>103</sup> must be clarified. An estate agent is not, unless specifically authorised by the seller in writing,<sup>104</sup> clothed with the authority to perform a juristic act on behalf of the seller which will bind the seller and a third party in a legal relationship.<sup>105</sup> The terms of the agreement between the seller and the estate agent determine what was agreed between them.<sup>106</sup> Without a specific written authorisation by the seller to the estate agent, an instruction by the seller to the estate agent to sell his residential property must be understood as an instruction by the seller to the estate agent to do all that is necessary to bring about a sale of the seller's residential property to a willing and able buyer.<sup>107</sup>

Section 5 of the CPA must be interpreted in a manner which gives effect to, and best promotes the spirit and purposes of the CPA.<sup>108</sup> This means that "where the Act or its application in a particular factual situation is unclear the interpretation which favours the extension of the Act's application should be favoured."<sup>109</sup>

In the context of the performance of services as provided for under section 1(a)(iii) of the definition of "transaction", the definitions of the terms and phrases "performance" of a "service", "person acting in the ordinary course of business", "consumer" and

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<sup>103</sup> Reg 1(h) of the Code of Conduct defines a "mandate" as an instruction given to and accepted by an estate agent to render estate agency services.

<sup>104</sup> S 2(1) of the ALA; Reg 3 of the Code of Conduct; *National Board Pretoria (Pty) Ltd v Estate Swanepoel* 1975 3 SA 6 (A); *Roadia Beleggings (Flora) (Edms) Bpk v Marais* 1979 4 SA 488 (T).

<sup>105</sup> *Bird v Summerville and another* 1961 3 SA 194 (A); *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N); *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Basil Elk Estates (Pty) Ltd v Curzon* 1990 2 SA 1 (TPD); *Wynland Properties CC v Potgieter and Another* [1999] 3 All SA 576 (C); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A); *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 167 (GNP).

<sup>106</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>107</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>108</sup> S 2(1) of the CPA read together with s 4(3) of the CPA.

<sup>109</sup> Naudé & Eiselen Revision Service 1 (2016) 5-3.

“consideration” are fundamental to establishing an application of the CPA as provided for in section 5 of the CPA to the supply or performance of a service in general, and specifically to the supply or performance of a service by an estate agent to bring about a sale of the seller’s residential property.

## **2 2 2            The performance of a service under the CPA**

### **2 2 2 1        A performance under the CPA**

In the context of the performance of a service, section 5(1)(a) of the CPA, read together section 1(a)(iii) of the definition of “transaction”, provides for an application of the CPA to the performance of services by or at the direction of a supplier, acting in the ordinary course of business for or at the direction of a consumer for consideration. The term “performance” is not defined in the CPA. It is however suggested<sup>110</sup> that “performance” should bear the same meaning as “supply” in section 1 of the CPA, as “supply” in relation to services specifically includes “to perform or cause them [services] to be performed”.

The term “supply” is defined<sup>111</sup> in relation to services as a verb to mean to sell or perform or cause services to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.<sup>112</sup>

The term “performance” is used to describe the effort or action by or at the direction of the person acting in the ordinary course of business, as well as in relation to or at the direction of the consumer and must be read together with the definition of “service” in section 1 of the CPA.

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<sup>110</sup> Naudé & Eiselen Revisions Service 1 (2016) 5-21.

<sup>111</sup> S 1 of the CPA.

<sup>112</sup> See (b) of the definition of “supply” in s 1 of the CPA.

## **2 2 2 2      Services under the CPA**

A “service” is defined<sup>113</sup> to include:

- a* any work or undertaking performed by a person for the direct or indirect benefit of another;<sup>114</sup>
- b* the provision of any education, information, advice or consultation;<sup>115</sup>
- c* any banking services or related financial services, or the undertaking, underwriting or assumption of risk by one person on behalf of another person;<sup>116</sup>
- d* the transportation of an individual or any goods;<sup>117</sup> and
- e* the provision of any accommodation, sustenance or any access to any entertainment or similar intangible product, access to any electronic communication infrastructure, access to any such access or the right of access to any event or premises, activity or facility and access to or the use of any premises or other property in terms of a rental.<sup>118</sup>

A “service” also includes a right to occupancy of, or power or privilege over or in connection with any land or immovable property, other than in terms of a rental<sup>119</sup> and the rights of a franchisee in terms of a franchise agreement, as provided for in section 5(6)(b) to (e) of the CPA.<sup>120</sup>

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<sup>113</sup> S 1 of the CPA.

<sup>114</sup> See (a) of the definition of “service” in s 1 of the CPA.

<sup>115</sup> See (b) of the definition of “service” in s 1 of the CPA. Advice is limited to advice which is not subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (hereinafter the “FAIS Act”).

<sup>116</sup> See (c) of the definition of “service” in s 1 of the CPA. Any such service which constitutes advice or intermediary services which is subject to regulation in terms of the FAIS Act or is regulated in terms of the Long-term Insurance Act 52 of 1998 (hereinafter the “Long Term Insurance Act”) or the Short-term Insurance Act 53 of 1998 (hereinafter the “Short Term Insurance Act”) is excluded from the definition of “service”. (See (c)(i) and (c)(ii) of the definition of “service” in s 1 of the CPA.

<sup>117</sup> See (d) of the definition of “service” in s 1 of the CPA.

<sup>118</sup> See (e) of the definition of “service” in s 1 of the CPA.

<sup>119</sup> See (f) of the definition of “service” in s 1 of the CPA.

<sup>120</sup> See (g) of the definition of “service” in s 1 of the CPA.

The list of activities, provided for in parts (a) to (g) of the definition<sup>121</sup> of “service” is not a *numerus clausus* with the definition<sup>122</sup> of “service” providing that the activities listed are included, but not limited to a “service” under the CPA.

Part (a) of the definition<sup>123</sup> of “service” provides a general, broad, inclusive, catch-all definition of “service” to include any work or undertaking performed by one person for the direct or indirect benefit<sup>124</sup> of another person and list specific activities in parts (b) to (g) of the definition of “service” in section 1 of the CPA.<sup>125</sup>

A service is also not limited to the person who actually supplies or performs the service, with the definition<sup>126</sup> concluding with a *proviso* that an activity will be regarded as a service, irrespective of whether the person promoting, offering or providing the service directly or indirectly, participates or engages in the service, or supervises the service. This is consistent with section 1(a)(iii) of the definition<sup>127</sup> of “transaction” which includes services performed “by or at the direction” of the person acting in the ordinary course of business and section 1(b) of the definition<sup>128</sup> of “supply” which includes, with reference to a “service”, “to cause them to be performed or provided” thereby providing the consumer with access to any person in the chain of the supply of services, irrespective of whether the person directly supplied the service to the consumer or not.<sup>129</sup> This is also consistent with section 1(c) of the definition<sup>130</sup> of “consumer” which

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<sup>121</sup> S 1 of the CPA.

<sup>122</sup> S 1 of the CPA.

<sup>123</sup> S 1 of the CPA.

<sup>124</sup> It may be argued that the marketing of the seller’s property to the public, as a direct service to the seller, is also an indirect service to the purchaser, guiding and assisting him in determining his choice of property to purchase, thereby establishing a legal relationship between the estate agent and the purchaser and subjecting the marketing practices of the estate agent to the provisions of the CPA. A discussion on this aspect falls outside the scope of this research.

<sup>125</sup> S 1 of the CPA.

<sup>126</sup> S 1 of the CPA.

<sup>127</sup> See (a)(iii) of the definition of “transaction” in s 1 of the CPA..

<sup>128</sup> S 1 of the CPA.

<sup>129</sup> Naudé & Eiselen Revision Service 1 (2016) 5-9.

<sup>130</sup> S 1 of the CPA.

includes a recipient or beneficiary of services, irrespective of whether the recipient or beneficiary was a party to the transaction for the supply of the services.

An estate agent performs services in terms of an instruction or authority received from his client and accepted by him.<sup>131</sup> An “estate agency service” is defined<sup>132</sup> in regulation 1(d) of the Code of Conduct to mean any of the services referred to in section 1(a)(i) – (iv) of the definition of “estate agent” in the EAAA. In the context of the sale of residential property, estate agency services means to “sell ... publicly exhibits for sale immovable property ... or negotiate in connection therewith or canvasses or undertakes or offers to canvass a ... purchaser therefor”<sup>133</sup> or “... any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette”.<sup>134</sup>

It is important to clarify the instruction by the seller to the estate agent to sell the seller’s residential property. In the absence of a specific written agreement<sup>135</sup> which authorises the estate agent to perform a juristic act on behalf of the seller, binding the seller and the third party, in this instance the willing and able buyer, in a legal relationship and causing the seller to acquire all the rights and duties flowing from that act,<sup>136</sup> the estate agent is not clothed with the authority to sell the seller’s residential property.<sup>137</sup> Nugent, AJA in the matter between *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>138</sup> held that the instruction by the seller to the estate agent to sell his

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<sup>131</sup> Reg 1(h) of the Code of Conduct defines a “mandate” as an instruction or authority given to and accepted by an estate agent to render estate agency services.

<sup>132</sup> Reg 1(d) of the Code of Conduct.

<sup>133</sup> See (a)(i) of the definition of “estate agent” in s 1 of the EAAA.

<sup>134</sup> See (a)(iv) of the definition of “estate agent” in s 1 of the EAAA.

<sup>135</sup> S 2(1) of the ALA.

<sup>136</sup> *United Plant Hire v Hills* 1976 1 SA 717 (A); *Strydom v Protea Eiendomme* 1979 2 SA 206 (T); *Putco Ltd v TV & Radio Guarantee Company (Pty) Ltd* [1985] 2 All SA 533 (A); *Totalisator Agency Board OFS v Livanos* 1987 3 SA 283 (W).

<sup>137</sup> *Bird v Summerville and Another* 1961 3 SA 194 (A); *Van Zyl & Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N); *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26; *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>138</sup> [2001] 3 All SA 295 (A).



residential property must be understood to mean that the parties “envisage no more than that the agent will bring about a sale between principals.”<sup>139</sup> The service expected of the estate agent in performing the instruction to sell is to do all that is necessary to bring about a sale of the seller’s residential property to a willing and able buyer. This means that the estate agent must take all reasonable steps to ensure a sale of the seller’s residential property to a willing and able buyer and the services performed by an estate agent is therefore not limited to the actual sale of the seller’s residential property to a willing and able buyer. The services expected of the estate agent includes the collective of services required to be performed by the estate agent, from acceptance of the instruction to sell the seller’s residential property to the actual sale of the seller’s residential property to a willing and able buyer.<sup>140</sup>

The definition<sup>141</sup> of an “estate agency service” in relation to the sale of residential property, is limited to the services listed in section 1(a)(i) of the definition of “estate agent” in the EAAA and may exclude some of the services performed by the estate agent to bring about a sale of the seller’s residential property to a willing and able buyer. Section 1(a) of the definition of “service” in the CPA, however, includes “any work or undertaking performed by one person for the direct or indirect benefit of another person” and provides a sufficiently wide enough definition to include all other services provided by an estate agent to bring about a sale of the seller’s residential property to a willing and able buyer, in the application<sup>142</sup> of the CPA.

The services provided by an estate agent may include a property evaluation to

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<sup>139</sup> At para 8.

<sup>140</sup> The services includes, but is not limited to the listing and valuation of the seller’s property, the marketing of the seller’s property (which includes the advertising of the seller’s property for sale in the media and on online platforms, conducting a show house of the seller’s property and direct marketing of the seller’s property to prospective buyers), introducing the seller’s property to prospective buyers and conducting negotiations with prospective buyers.

<sup>141</sup> Reg 1(h) of the Code of Conduct read together with (a)(i) of the definition of “estate agent” in s 1 of the EAAA.

<sup>142</sup> S 5 of the CPA regulates the application of the CPA.

determine the most accurate and market-related value of the property, specific repairs and general maintenance of the property and staging of the property to its best advantage for marketing purposes, utilising online and printed media marketing strategies, skilled negotiation strategies and advice on legal and financial matters<sup>143</sup> and the CPA applies<sup>144</sup> to the performance of any service by an estate agent as defined in section 1 of the EAAA.<sup>145</sup> If, for example, an estate agent offers<sup>146</sup> to arrange for a valuator to do a valuation of the seller's residential property as a service to the seller, or, offers to arrange for the repairs and maintenance or staging of the seller's residential property, or any other services, whether or not he participates in, or supervises or engages directly or indirectly in the performance of the service, the estate agent will be liable as a service provider<sup>147</sup> under the CPA.<sup>148</sup>

The activities listed in the definition<sup>149</sup> of "service" are regarded as services for purposes of the CPA, "irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in

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<sup>143</sup> <https://www.privateproperty.co.za/advice/property/articles/what-do-estate-agents-actually-do/6588> accessed on 14 August 2019.

<sup>144</sup> Subject to the fulfillment of all the criteria listed in s 5 of the CPA.

<sup>145</sup> An "estate agent" is defined in s 1 of the EAAA and includes an estate agent who, for the acquisition of gain, "on his own account or in a partnership" holds himself out as a person who advertises that he, on the instruction or on behalf of another person, performs the services listed in (a)(i) – (iv) thereof (s 1(a) of the definition of "estate agent"), any director of a company or a member of a close corporation who is competent and entitled to take part in the running and management of the business and who is an "estate agent" and any person who is employed by an estate agent and performs any services listed in (a)(i) – (ii) of the definition of an "estate agent", (section (b) and (c) of the definition of "estate agent") and any person who is employed by an attorney or a professional company as defined in section 1 of the Attorneys Act 53 of 1979 (hereinafter the "Attorneys Act")) other than as an attorney or article clerk and whose duties primarily include the performance of any estate agency services listed in (a)(i) – (ii) of the definition of "estate agent" on behalf of such attorney or professional company (part (cA) of the definition of "estate agent").

<sup>146</sup> The *proviso* included in the definition of "service" in s 1 of the CPA provides that a service shall be regarded as a "service" for purposes of the CPA, irrespective of whether the person "promoting, offering or providing the services" participates directly in, supervises or engages directly or indirectly in the services. To "promote" includes to offer to supply any services in the ordinary course of business to all or part of the public for consideration (see the definition of "promote" in s 1 of the CPA).

<sup>147</sup> A "service provider" is a person who promotes, supplies or offers to supply any services (see the definition of "service provider" s 1 of the CPA).

<sup>148</sup> See also Naudé & Eiselen Revision Service 1 (2016) 5-9.

<sup>149</sup> S 1 of the CPA.

the service.”<sup>150</sup> This is consistent with the definition<sup>151</sup> of “supply” which includes, in relation to services, “to cause them to be performed or provided”<sup>152</sup> and has far reaching implications, specifically for an estate agent in the sale of residential property on instruction received from the seller to sell his residential property.

## **2 2 3 A person acting in the ordinary course of business under the CPA**

### **2 2 3 1 A person under the CPA**

A “person” is not defined in the CPA other than to state that a “person” includes a juristic person. Van Eeden & Barnard<sup>153</sup> argue that although the emphasis of the CPA seemingly relates to the protection of individual persons as consumers, it is not unusual for consumer protection legislation to apply to juristic persons too:

“[T]here is no doctrinal necessity for restricting consumer legislation exclusively to individual consumers in a personal, family or household context – the specific area of application of consumer protection legislation will depend on particular policy imperatives.”<sup>154</sup>

A person who markets any goods or services is a supplier for purposes of the CPA. The term “market”, when used as a verb in relation to the performance of services, means to promote or supply any services and “supply” means<sup>155</sup> to sell services or to perform or cause the services to be performed, in the ordinary course of business for consideration.

A “service provider” is defined<sup>156</sup> as a person who promotes, supplies or offers to supply any services and forms part of the “supply chain”<sup>157</sup> which also includes

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<sup>150</sup> See the definition of “service” in s 1 of the CPA.

<sup>151</sup> S 1 of the CPA.

<sup>152</sup> See (b) of the definition of “supply” in s 1 of the CPA. This is also consistent with the definition of “transaction” in s 1 of the CPA which provides for, specifically in relation to the performance of services in (a)(iii) thereof, the “performance by, or at the direction of, that person.”

<sup>153</sup> Van Eeden & Barnard 42.

<sup>154</sup> Van Eeden & Barnard 43.

<sup>155</sup> See the definition of “supply” in s 1 of the CPA.

<sup>156</sup> S 1 of the CPA.

<sup>157</sup> The “supply chain” is defined in s 1 of the CPA to mean, with respect to any goods or services, the collectivity

producers, distributors, importers, retailers and intermediaries as a collectivity of all suppliers who directly or indirectly contribute to the supply of services.<sup>158</sup>

Under section 5(8) of the CPA, the CPA applies to suppliers:

- a* irrespective of whether the supplier resides or has its principal office within or outside South Africa;<sup>159</sup>
- b* operates on a for-profit basis or not;<sup>160</sup>
- c* is an individual, juristic person, partnership, trust, organ of state or an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any services, or a public-private partnership;<sup>161</sup> or
- d* is a person required or licensed in terms of any public regulation to make the supply of the particular services available to all or part of the public.<sup>162</sup>

De Stadler argues<sup>163</sup> that the provisions of section 5(8) unnecessarily clarify the application of the CPA by listing specific factors which should not be taken into account when determining an application of the CPA to the supplier of any goods and services.<sup>164</sup> In principle, the application of the CPA is limited to every transaction occurring in the Republic<sup>165</sup> and not to the supplier having its principal office in South

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of all suppliers who directly or indirectly contribute to the ultimate supply of those goods or services to a consumer.

<sup>158</sup> S 1 of the CPA.

<sup>159</sup> S 5(8)(a) of the CPA.

<sup>160</sup> S 5(8)(b) of the CPA.

<sup>161</sup> S 5(8)(c) of the CPA.

<sup>162</sup> S 5(8)(d) of the CPA. S 1 of the CPA. S 5(8) of the CPA includes any person irrespective of whether that person resides or has its principal office inside or outside South Africa, operates on a for-profit or non-profit basis, is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership or is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public as a "supplier" for purposes of the application of the CPA.

<sup>163</sup> Naudé & Eiselen Original Service (2014) 5-43.

<sup>164</sup> See s 5(1)(b) of the CPA.

<sup>165</sup> S 5(1)(a) of the CPA.

Africa. A supplier is a person who markets any goods or services<sup>166</sup> and a person includes a juristic person.<sup>167</sup> An individual person, juristic person, partnership, trust, organ of state or a supplier owned, directed, contracted or licenced by an organ of state and a public-private partnership are therefore included in the application of the CPA as a result of the definitions of “supplier” and “person” as provided for in section 1 of the CPA.

The specific inclusion of a supplier, whether the supplier operates on a profit or non-profit basis<sup>168</sup> or is required or licenced in terms of any public regulations to make the supply of goods or services available to all or part of the public<sup>169</sup> are irrelevant<sup>170</sup> considering the definitions<sup>171</sup> of “supplier”, “person” and the provisions of section 5(1)(a) of the CPA.

An “estate agent” is defined in section 1 of the EAAA. Section 1(a) thereof provides a general definition of an estate agent to mean any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person” performs estate agency services<sup>172</sup> listed under section 1(a)(i) – (iv) of the EAAA.

A “person” is defined in section 1 of the CPA to include a juristic person. A juristic person can generally be defined as an artificial entity upon which the law confers a legal personality and also includes, for purposes of the CPA,<sup>173</sup> a body corporate,<sup>174</sup> a

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<sup>166</sup> See the definition of “supplier” in s 1 of the CPA.

<sup>167</sup> See the definition of “person” in s 1 of the CPA.

<sup>168</sup> S 5(8)(b) of the CPA.

<sup>169</sup> S 5(8)(d) of the CPA.

<sup>170</sup> Naudé & Eiselen Original Service (2014) 5-44.

<sup>171</sup> S 1 of the CPA.

<sup>172</sup> The term “estate agency services” is defined in reg 1(e) of the Code of Conduct with reference to (a)(i) – (iv) of the definition of “estate agent” in s 1 of the EAAA.

<sup>173</sup> S 1 of the CPA.

<sup>174</sup> See (a) of the definition of “juristic person” in s 1 of the CPA.

partnership or association<sup>175</sup> or a trust<sup>176</sup> as defined in the Trust Property Act<sup>177</sup>. This is consistent with the definition of “estate agent” in section 1 of the EAAA which includes persons acting in for their own account or in partnership with other persons. The definition of “juristic person” in section 1 of the CPA broadens the application of the CPA to include estate agents operating as a body corporate, a partnership or association or as trust as defined in the Trust Property Act.

For purposes of the application of the CPA under section 1(a)(iii) of the definition of “transaction”, the estate agent is a “person” as defined in section 1 of the CPA and performs services as a “supplier”<sup>178</sup> of services or a “service provider” as defined<sup>179</sup> in the CPA.

## **2 2 3 2      A person acting in the ordinary course of business under the CPA**

In as much as the CPA aims to regulate the consumer market as widely as possible,<sup>180</sup> the scope of the application<sup>181</sup> of the CPA, in relation to the supply or performance of services, is limited to the performance of services by a person, acting in the ordinary course of business for a consumer and for consideration.<sup>182</sup> Under section 1(a)(iii) of

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<sup>175</sup> See (b) of the definition of “*juristic person*” in s 1 of the CPA.

<sup>176</sup> See (c) of the definition of “*juristic person*” in s 1 of the CPA.

<sup>177</sup> Act 57 of 1988 (hereinafter the “Trust Property Act”).

<sup>178</sup> S 1 of the CPA. The CPA applies to suppliers, irrespective of whether the supplier resides or has its principal office within or outside South Africa, operates on a for-profit basis or not, is an individual, juristic person, partnership, trust, organ of state or an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any services, or a public-private partnership, is a person required or licensed in terms of any public regulation to make the supply of the particular services available to all or part of the public (see s 5(8) of the CPA).

<sup>179</sup> A person who promotes, supplies or offers to supply any services and forms part of the “*supply chain*” (the “*supply chain*” is defined in s 1 of the CPA means, with respect to any goods or services, the collectivity of all suppliers who directly or indirectly contribute to the ultimate supply of those goods or services to a consumer) which also includes producers, distributors, importers, retailers and intermediaries as a collectivity of all suppliers who directly or indirectly contribute to the supply of services.

<sup>180</sup> Naudé & Eiselen “Introduction” Original Service (2014) at para 2.

<sup>181</sup> S 5 of the CPA.

<sup>182</sup> See the definition of “transaction” in s 1 of the CPA.

the definition<sup>183</sup> of “transaction”, the performance by or at the direction of a person “acting in the ordinary course of business” of any services for or at the direction of a consumer for consideration, is a transaction as provided for in section 5 of the CPA. The phrase “in the ordinary course of business” is not defined in the CPA. The definition<sup>184</sup> of “business” to mean the “continual marketing of any goods or services” indicates a requirement of some regularity of the promotion or supply of goods or services to be regarded to be in the ordinary course of business and supports an argument that the CPA does not apply to once-off transactions.<sup>185</sup> Naudé & Eiselen<sup>186</sup> agree, pointing out that the definition<sup>187</sup> of “ordinary” to mean “what is commonplace or standard” indicates that the performance of services in the ordinary course of business also means that it must be commonplace, but caution against such a narrow interpretation of the phrase, if it limits such application of the CPA.<sup>188</sup>

In the matter of *Eskom Holdings Ltd v Halstead-Cleak*<sup>189</sup> on appeal from the Gauteng Division of the High Court of South Africa<sup>190</sup> the court considered whether the appellant, Eskom Holdings Ltd, could be held strictly liable in terms of section 61 of the CPA for the harm caused to the respondent, Mr Halstead-Cleak, by a low hanging power line.<sup>191</sup>

Schoeman AJA, delivering the judgement in the Supreme Court of Appeal, employed the principles applied in the interpretation of statutes as articulated in *Natal Joint*

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<sup>183</sup> S 1 of the CPA.

<sup>184</sup> S 1 of the CPA.

<sup>185</sup> Jacobs W, Stoop PN & Van Niekerk R “Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis” 2010 *PELJ* 302 – 508 (hereinafter “Jacobs, Stoop & Van Niekerk”) 312, Barnard J “The Influence of the Consumer Protection Act 68 of 2008 in the warranty against latent defects, voetstoots clauses and liability for damages” 2012 *De Jure* 455 - 484 (hereinafter “Barnard 2012 *De Jure*”) 464 and Delport 2014 *De Jure* 64.

<sup>186</sup> Naudé & Eiselen Revision Service 1 (2016) 5-16.

<sup>187</sup> <http://oxford.dictionaries.com> accessed on 17 August 2019.

<sup>188</sup> Naudé & Eiselen Original Service (2014) 5-17.

<sup>189</sup> 2017 1 SA 333 (SCA).

<sup>190</sup> *Halstead-Cleak v Eskom Holdings Ltd* 2016 2 SA 141 (GP).

<sup>191</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 1.

*Municipal Pension Fund v Endumeni Municipality*<sup>192</sup> and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*<sup>193</sup> together with the provisions of section 2 of the CPA, which provide specific rules for the interpretation of the CPA and the definitions of terms and phrases used throughout the CPA, as provided for in section 1 of the CPA, as interpretational tools to determine the application of the CPA and specifically the provisions of section 61 of the CPA.

“Taking into account all the definitions and the wording of s 62, the respondent had to establish that, first, in respect of that incident, the respondent came to harm and secondly that Eskom was a producer of electricity. Furthermore, that the harm was caused wholly or partly as a consequence of Eskom selling unsafe electricity in the ordinary course of business, for consideration, or there was a product failure, defect or hazard in the electricity.”<sup>194</sup>

Referring to the judgment by Brand J in *Van Zyl & others NNO v Turner & another NNO*<sup>195</sup> the court confirmed that the question whether a person acted in the ordinary course of business must be determined objectively, having regard to all the circumstances, including the actions of both parties.<sup>196</sup>

Section 2(1) of the CPA provides that the CPA must be interpreted in a manner that gives effect to the purposes<sup>197</sup> of the CPA. Section 2(1) of the CPA must be read together with section 4(3) of the CPA which provides that if any provision of the CPA, which read in context can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights in general, but more specifically by vulnerable consumers.<sup>198</sup>

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<sup>192</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) at para 18.

<sup>193</sup> *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 1 SA 518 (SCA) at para 27.

<sup>194</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 21.

<sup>195</sup> 1998 2 SA 236 (C).

<sup>196</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 21. See also *Van Zyl and others NNO v Turner & another NNO* 1998 2 SA 236 (C) at para 34 and *Griffiths v Janse van Rensburg NO* 2016 3 SA 389 (SCA) at para 11.

<sup>197</sup> S 3 of the CPA defines the purposes of the CPA.

<sup>198</sup> Those persons listed in s 3(1)(b) of the CPA.



A purposive interpretation of the phrase “in the ordinary course of business” must be followed to give the phrase a wide meaning. The phrase “in the ordinary course of business” was considered in the matter between *AA Mutual Insurance Ltd v Biddulph and Another*<sup>199</sup> where the court held that the phrase “in the ordinary course of business” should be given a wide meaning to include “even a single, isolated activity, enterprise, or pursuit”.<sup>200</sup>

Any transaction, objectively determined, having regard to all the circumstances and the actions of both parties,<sup>201</sup> must be regarded to be in the ordinary course of business, irrespective of whether the transaction occurred only once-off.<sup>202</sup> It is therefore submitted that the term “once-off transaction” should be used cautiously in summarily excluding an application of the CPA. The CPA does not apply to transactions which are not in the ordinary course of business of a supplier, producer, importer, distributor and retailer, irrespective of whether the transaction occurs once-off or not. Every supply or performance must be objectively evaluated, having regard to all the circumstances to determine whether a person acted in the ordinary course of business<sup>203</sup> and should be given a wide meaning to include once-off transactions.<sup>204</sup> The EAAA came into operation on 1 August 1977 with the aim<sup>205</sup> to transform the estate agency industry into a profession. From this date, estate agents were compelled to register with the EAAB and apply for a Fidelity Fund Certificate.<sup>206</sup> No estate agent may perform any services as an estate agent unless a valid FFC has been issued to

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<sup>199</sup> 1976 1 SA 725 (A).

<sup>200</sup> *AA Mutual Insurance Ltd v Biddulph and Another* 1975 1 SA 725 (A) 239.

<sup>201</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) 21.

<sup>202</sup> *AA Mutual Insurance Ltd v Biddulph and Another* 1975 1 SA 725 (A) 239.

<sup>203</sup> *Van Zyl and others NNO v Turner & another NNO* 1998 2 SA 236 (C) at para 34; *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 21.

<sup>204</sup> *AA Mutual Insurance Ltd v Biddulph and Another* 1975 1 SA 725 (A) 739.

<sup>205</sup> The purposes of the EAAA is set out in the Preamble to the EAAA.

<sup>206</sup> Hereinafter an “FFC”.

him and to every person employed by him as an estate agent.<sup>207</sup> The FFC serves as evidence of the estate agent's registration with the EAAB and that that person is legally entitled to carry out the activities of an estate agent.

The EAAB must<sup>208</sup> also maintain and promote the standards of conduct of estate agents<sup>209</sup> and in this regard published<sup>210</sup> "*The Standard of Training of Estate Agents Regulations, 2008*",<sup>211</sup> which regulates the prescribed training and experience of estate agents and introduced a new standard "primarily intended to support and advance the functioning and professionalism"<sup>212</sup> of estate agents.

Section 2 of the CPA guides the interpretation of the CPA and provides<sup>213</sup> that "any decision of a consumer court, ombud or arbitrator in terms of this Act, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court" may be considered by a person, the court, Tribunal or Commission<sup>214</sup> as a tool to interpret or apply the CPA.

The NCT in the matter of *Doyle v Killeen and others*<sup>215</sup> considered the meaning of the phrase "in the ordinary course of business" with reference to *Gazit Properties v Botha*<sup>216</sup> and *Al-Kharafi and Son's and Another v Pema and Others NNO*<sup>217</sup> in the context of insolvency law and concluded that an objective determination of all the relevant facts, including the actions of the estate agent and the seller, are required to make a determination on whether or not a person is acting in the ordinary course of

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<sup>207</sup> S 26(1) of the EAAA. If the estate agent is a company, a valid FFC must be issued to every director of the company (s 26(1)(a) of the EAAA).

<sup>208</sup> S 7 of the EAAA sets the objectives of the EAAB.

<sup>209</sup> S 7(1)(a) of the EAAA.

<sup>210</sup> GN R.633 published in GG 31125 of 4 June 2008 in terms of s 33(1) of the EAAA.

<sup>211</sup> Hereinafter the "Training Regulations".

<sup>212</sup> See the Foreword by the then Chairperson of the EAAB, Thami Bolani, to the Study Guide for the Professional Practitioner in Real Estate NQF Level 5.

<sup>213</sup> S 2(2)(c) of the CPA.

<sup>214</sup> National Consumer Commission (hereinafter the "Commission" or the "NCC").

<sup>215</sup> NCT/12984/2014/75(1)(b) at para 57.

<sup>216</sup> *Gazit Properties v Botha NNO* (873/10) [2011] ZASCA 199.

<sup>217</sup> *Al-Kharafi and Sons's and Another v Pema and Others NNO* (2008/12359) [2008] ZAGPHC 273.

business.<sup>218</sup>

Factors such as whether the person has a registered business, the nature of the business the person engages in, the nature of the services usually performed by that person, the frequency within which the services are performed and whether that person frequently advertises or markets the services, may be considered in determining whether a person is acting in the ordinary course of business.<sup>219</sup>

Objectively determined, it must be argued that any services performed by an estate agent who is registered with the EAAB, has been issued with a valid FFC and has complied with the Training Regulations, must be accepted to be performed in the ordinary course of the estate agent's business. A fully certified and industry recognised estate agent, who performs any services to the public, is doing so in the ordinary course of his business.

Section 26 of the EAAA prohibits any person from performing any act as an estate agent, unless a valid FFC has been issued to him<sup>220</sup> and imposes specific sanctions<sup>221</sup> on an estate agent who acts in contravention of the provisions of the EAAA.<sup>222</sup> This, by implication, means that an estate agent who performs estate agency services without a valid FFC having been issued to him, does not perform those services as an estate agent in the ordinary course of his business<sup>223</sup> and challenges the application of the CPA to the performance of services by a person under these circumstances.

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<sup>218</sup> At para 59.

<sup>219</sup> *Doyle v Killeen and Others* NCT/12984/2014/75(1)(b) 17. It is pointed out that the NCT considered the requirement of "acting in the ordinary course of business" in relation to the sale of residential property by the seller and therefore determined factors to be considered in an objective determination of "in the ordinary course of business" having regard to the sale of goods.

<sup>220</sup> S 26(1) of the EAAA.

<sup>221</sup> S 30(3) of the EAAA.

<sup>222</sup> S 30 of the EAAA.

<sup>223</sup> An estate agent who performs any services without a valid FFC having been issued to him is also not entitled to claim any payment for the services rendered. See *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* 2017 4 SA 610 (SCA).

The provisions of section 26 of the EAAA are inconsistent with the provisions of section 5 of the CPA. Any inconsistency between any of the provisions of the CPA and any other Act are dealt with under section 2(9) of the CPA. If the provisions of both section 26 of the EAAA and section 5 of the CPA cannot be applied and complied with without contravention as provided for in section 2(9)(a) of the CPA, the provision which extends the greater protection to the consumer must prevail over the other provision. From a consumer protection perspective in the context of the sale of residential property by an estate agent in terms of an agreement with the seller to sell his residential property, the provisions of section 26 of the EAAA which limit the application of the CPA to the performance of services in the ordinary course of business of a person who has not been issued with a valid FFC, must be disregarded in favour of the provisions of section 5 of the CPA to ensure an application of the CPA to the performance of services under those circumstances and, a greater protection to the seller of the residential property.

A purposive interpretation of the phrase “in the ordinary course of business” must also be followed to give the phrase a wide meaning. Any transaction between an estate agent and the seller for the sale of the seller’s residential property which, objectively determined, having regard to all the circumstances and the actions of both parties,<sup>224</sup> must be regarded to be in the ordinary course of business, irrespective of whether the transaction occurred only once-off.<sup>225</sup>

#### **2 2 4 A consumer under the CPA**

The absence of a uniform definition of a “consumer” was identified as one of the greatest stumbling blocks of consumer protection legislation in South Africa before the

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<sup>224</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) 21.

<sup>225</sup> *AA Mutual Insurance Ltd v Biddulph and Another* 1975 1 SA 725 (A) 239.

enactment of the CPA.<sup>226</sup> In discussing the way towards a comprehensive consumer law, it was argued that a “consumer” must be defined as broadly as possible.<sup>227</sup>

Section 1 of the CPA defines a “consumer” to include:

- a* a person to whom services are marketed<sup>228</sup> in the ordinary course of the supplier’s business;<sup>229</sup>
- b* a person who has entered into a transaction<sup>230</sup> with a supplier in the ordinary course of the supplier’s business;<sup>231</sup>
- c* a recipient or beneficiary of services, irrespective of whether the recipient or beneficiary was a party to the transaction for the supply of the services;<sup>232</sup> and
- d* a franchisee in terms of a franchise agreement, as provided for in section 5(6)(b) – (e) of the CPA.

The definition of “person” must be read together with the provisions of section 5(2)(b) of the CPA which provide that the CPA does not apply to any transaction where a consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister<sup>233</sup> as provided for in section 6 of the CPA. Under section 6 of the CPA the Minister must determine a monetary threshold applicable to the size or the annual turnover of a juristic person for purposes of determining the application of the CPA.<sup>234</sup>

The limitation provided for in section 5(2)(b) of the CPA does not apply<sup>235</sup> to:

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<sup>226</sup> DTI “Draft Green Paper on the Consumer Policy Framework” GN 1957, GG 26774 of 9 September 2004 (hereinafter the “Draft Green Paper”) at para 3 4. See also *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 11.

<sup>227</sup> Draft Green Paper at para 3 4.

<sup>228</sup> The definition of “market” includes the promotion and supply of goods and services.

<sup>229</sup> See (a) of the definition of “consumer” in s 1 of the CPA.

<sup>230</sup> Unless the transaction is exempted in terms of s 5(2), or 5(3) and 5(4) of the CPA.

<sup>231</sup> See (b) of the definition of “consumer” in s 1 of the CPA.

<sup>232</sup> See (c) of the definition of “consumer” in s 1 of the CPA.

<sup>233</sup> The Cabinet Minister responsible for consumer matters. See the definition of “minister” in s 1 of the CPA.

<sup>234</sup> Currently, the monetary threshold applicable to the size of the annual turnover of a juristic person is R 2 000 000.

<sup>235</sup> S 5(7) of the CPA.

“transactions for the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;<sup>236</sup> a solicitation of offers to enter into a franchise agreement;<sup>237</sup> an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;<sup>238</sup> a franchise agreement or an agreement supplementary to a franchise agreement<sup>239</sup> and the supply of any goods or services to a franchisee in terms of a franchise agreement.”<sup>240</sup>

A “consumer” as defined<sup>241</sup> includes the seller of residential property.

## **2 2 5 Consideration under the CPA**

The CPA provides for an application of the CPA to the performance of services by or at the direction of a person acting in the ordinary course of business, to or at the direction of a consumer for consideration.<sup>242</sup>

Section 1 of the CPA defines “consideration” broadly to include anything of value given by the consumer and accepted by the supplier in exchange for the performance of services and includes, but is not limited to:

- a* money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;<sup>243</sup>
- b* labour, barter or other goods or services;<sup>244</sup>
- c* loyalty credit or award, coupon or other right to assert a claim;<sup>245</sup> or
- d* any other thing, undertaking, promise, agreement or assurance.<sup>246</sup>

The value can be apparent or intrinsic, transferred directly or indirectly between the

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<sup>236</sup> S 5(6)(a) of the CPA.

<sup>237</sup> S 5(6)(b) of the CPA.

<sup>238</sup> S 5(6)(c) of the CPA.

<sup>239</sup> S 5(6)(d) of the CPA.

<sup>240</sup> S 5(6)(e) of the CPA.

<sup>241</sup> S 1 of the CPA.

<sup>242</sup> See (a)(iii) of the definition of “transaction” in s 1 of the CPA.

<sup>243</sup> See (a) of the definition of “consideration” in s 1 of the CPA.

<sup>244</sup> See (b) of the definition of “consideration” in s 1 of the CPA.

<sup>245</sup> See (c) of the definition of “consideration” in s 1 of the CPA.

<sup>246</sup> See (d) of the definition of “consideration” in s 1 of the CPA.

consumer and the supplier, or with the intervention of third parties.<sup>247</sup> Any consideration as defined<sup>248</sup> in the CPA paid indirectly or through the involvement of a third party will therefore also qualify as consideration in terms of the CPA.

Section 1(a) of the definition<sup>249</sup> of “transaction” comprises three parts. In respect of a person acting in the ordinary course of business, a “transaction” firstly refers to the agreement between the supplier and the consumer for the supply or the potential supply of goods or services in exchange for consideration.<sup>250</sup> Secondly, a “transaction” refers to the supply of any goods by a supplier to or at the direction of a consumer for consideration<sup>251</sup> and thirdly, a “transaction” also refers to the performance of services by or at the direction of a supplier for or at the direction of a consumer, for consideration.

Sections 1(a)(i), 1(a)(ii) and 1(a)(iii) of the definition<sup>252</sup> of a “transaction” are separated by the word *or*.<sup>253</sup> This implies that a “transaction” is *either*<sup>254</sup> an agreement between a supplier acting in the ordinary course of business and a consumer for the supply or potential supply of goods and services for consideration, *or*<sup>255</sup> the supply of any goods by a supplier to or at the direction of a consumer for consideration *or*<sup>256</sup> the performance of services by or at the direction of the supplier for or at the direction of the consumer, for consideration.

An “agreement” is defined<sup>257</sup> as an arrangement or understanding between or among

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<sup>247</sup> See (d) of the definition of “consideration” in s 1 of the CPA.

<sup>248</sup> S 1 of the CPA.

<sup>249</sup> S 1 of the CPA.

<sup>250</sup> See (a)(i) of the definition of “transaction” in s 1 of the CPA.

<sup>251</sup> See (a)(ii) of the definition of “transaction” in s 1 of the CPA.

<sup>252</sup> S 1 of the CPA.

<sup>253</sup> Own emphasis.

<sup>254</sup> Own emphasis.

<sup>255</sup> Own emphasis.

<sup>256</sup> Own emphasis.

<sup>257</sup> S 1 of the CPA.

two or more parties that purports to establish a relationship in law between them.

De Stadler points out<sup>258</sup> that sections 1(a)(ii) and 1(a)(iii) of the definition<sup>259</sup> of “transaction” extend the application of the CPA as provided for under section 1(a)(i) of the CPA to the supply of goods or the performance of services by a supplier acting in the ordinary course of business and a consumer for consideration, where the consumer is not the same person as the consumer with whom the supplier enters into an agreement as provided for in section 1(a)(i) of the definition<sup>260</sup> of “transaction”.<sup>261</sup> The basis of this argument appears<sup>262</sup> to be the use of the term “or” to separate sections 1(a)(i), 1(a)(ii) and 1(a)(iii) of the definition of “transaction”. In support of this argument, De Stadler refers to the definition<sup>263</sup> of “consumer” which includes:

“a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services”.<sup>264</sup>

It is argued that the basis for extending the application of the CPA to the supply of goods or the performance of services by or at the direction of a supplier, acting in the ordinary course of business to a consumer, who is not a party to the agreement as provided for in section 1(a)(i) of the definition<sup>265</sup> of “transaction”, is found in the definition of “consumer” in section 1 of the CPA which includes the user of the goods or the recipient or beneficiary of the services supplied or performed by the supplier in the ordinary course of business and for consideration.

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<sup>258</sup> Naudé & Eiselen Original Service (2014) 5-20.

<sup>259</sup> S 1 of the CPA.

<sup>260</sup> S 1 of the CPA.

<sup>261</sup> Naudé & Eiselen Original Service (2014) 5-20.

<sup>262</sup> De Stadler does not provide a basis for this proposition.

<sup>263</sup> S 1 of the CPA.

<sup>264</sup> See (d) of the definition of “consumer” in s 1 of the CPA.

<sup>265</sup> S 1 of the CPA.



**2 2 5 1      The use of the words “or” to separate sections (a)(i), (a)(ii) and (a)(iii) of the definition of “transaction” in section 1 of the CPA**

The use of the word *or*<sup>266</sup> to separate sections 1(a)(i), 1(a)(ii) and 1(a)(iii) of the definition of “transaction”, indicating an application of the CPA to *either*.<sup>267</sup>

- a*      the agreement between a supplier, acting in the ordinary course of business and a consumer for the supply or potential supply of goods and services for consideration; *or*<sup>268</sup>
- b*      the supply of any goods by a supplier to or at the direction of a consumer for consideration; *or*<sup>269</sup>
- c*      the performance of services by or at the direction of the supplier for or at the direction of the consumer, for consideration,

is problematic in determining an application of the CPA to the supply or performance of services by an estate agent in the sale of residential property, under circumstances where the estate agent is not compensated for the services provided to bring about a sale of seller’s residential property.

Estate agents supply or perform estate agency services in terms of an instruction or authority given by his client<sup>270</sup> and accepted by the estate agent.<sup>271</sup> Regulation 1(h) of the Code of Conduct defines a “mandate” as an instruction given to and accepted by the estate agent, to render an estate agency service. A “client” is defined<sup>272</sup> as a person who has given the estate agent a mandate and may be either the seller or purchaser,<sup>273</sup> or both the seller and the purchaser if the estate agent is acting as a

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<sup>266</sup> Own emphasis.

<sup>267</sup> Own emphasis.

<sup>268</sup> Own emphasis.

<sup>269</sup> Own emphasis.

<sup>270</sup> The “client” is the person who has given the estate agent a mandate (see reg 1(c) of the Code of Conduct).

<sup>271</sup> See the definition of “mandate” in reg 1(h) of the Code of Conduct.

<sup>272</sup> Reg 1(c) of the Code of Conduct.

<sup>273</sup> See reg 3 of the Code of Conduct, the definition of “estate agent” in s 1 of the EAAA and *Low v Shedden* [2001]

broker,<sup>274</sup> provided that the instructions from both the seller and the purchaser are received simultaneously and are not conflicting.<sup>275</sup> Except for a sole mandate<sup>276</sup> and a mandate which includes a power of attorney to the estate agent to conclude transactions on behalf of the seller,<sup>277</sup> the agreement between the estate agent and the seller is not required to be in writing.

The agreement between the seller and the estate agent for the sale of the seller's residential property constitutes a legally binding contract between them,<sup>278</sup> stipulating the terms and conditions agreed between the parties *inter se*.<sup>279</sup> At the very least, the agreement must contain an agreement on the estate agency services to be supplied or performed by the estate agent in respect of a specific immovable property and an agreement by the seller on the payment of commission to the estate agent, the amount payable and the terms and conditions upon which the payment becomes due.<sup>280</sup>

If no specific agreement for the payment of commission is included in the agreement, common law infers that the instruction to sell has been performed:

- a* where the estate agent introduced a financially able and legally willing buyer to the seller;<sup>281</sup>
- b* which resulted in a legally enforceable sales agreement between the seller and the buyer introduced by the estate agent;<sup>282</sup>

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2 All SA 171 (C) 171 172.

<sup>274</sup> *Low v Shedden* [2001] 2 All SA 171 (C) 172, 181. S 27 of the CPA regulates the activities and disclosure obligations of "intermediaries" as defined in s 1 of the CPA. A discussion on the inclusion of estate agents under this section, falls outside the ambit of this research.

<sup>275</sup> See the proviso in reg 1(c) of the Code of Conduct. See also s 30(1)(a) of the EAAA.

<sup>276</sup> Reg 3 3 1 of the Code of Conduct.

<sup>277</sup> S 2(1) of the ALA; *National Board Pretoria Pty Ltd v Estate Swanepoel* 1975 3 SA 27 (A); *Roodia Beleggings (Flora) (Edms) Bpk v Marais* 1979 4 SA 488 (T).

<sup>278</sup> *Nach Investments (Pty) Ltd v Knight Frank (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>279</sup> *Brayshaw v Schoeman & Andere* 1960 1 SA 625 (A); *John H Pritchard & Associates (Pty) Ltd v Thorny Park Estate (Pty) Ltd* 1967 2 SA 511 (D); *Vanarthdoy (Edms) Bpk v Roos* 1979 4 SA 1 (A) 6.

<sup>280</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP); *Nach Investments (Pty) Ltd v Knight Frank (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>281</sup> *Beckwith v Foundation Investment Co* 1961 4 SA 510 (A).

<sup>282</sup> *Brayshaw v Schoeman & Andere* 1960 1 SA 625 (A); *John H Pritchard & Associates v Thorny Park Estates* 1967

c on substantially the terms and conditions required by the seller;<sup>283</sup> and

d the estate agent must have been the effective cause of the sale.<sup>284</sup>

In the course of performing the instruction to bring about a sale of the seller's residential property to a willing and able buyer introduced to the seller by the estate agent, the estate agent markets and introduces the property to prospective buyers, negotiates with the buyers and introduces potential buyers to the seller. Unless the introduction of the prospective buyer results in a sale of the seller's residential property to a buyer introduced to the seller by the estate agent, the estate agent has not performed the instruction and is not entitled to a payment of commission.

It is argued<sup>285</sup> that under these circumstances, the performance of the services by the estate agent does not comply with the definition of a "transaction" in section 1(a)(iii) of the CPA and are consequently not subject to the application of the CPA.

Section 2 of the CPA includes specific instructions on the interpretation of the CPA and provides in section 2(1) of the CPA that the CPA must be interpreted in a manner which gives effect to the purposes of the CPA.<sup>286</sup> Section 2(1) of the CPA must be read together with section 4(2)(b) of the CPA which instructs the court<sup>287</sup> to promote the spirit and purposes of the CPA in any matter brought before the Tribunal<sup>288</sup> or the court<sup>289</sup> and section 4(3) of the CPA, which provides that if any provisions of the CPA, read in context, can be construed to have more than one meaning, the Tribunal or

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2 SA 511 (D); *Naidu v Naidoo* 1967 2 SA 323 (N).

<sup>283</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (in voluntary liquidation)* 1966 1 SA 791 (D).

<sup>284</sup> *Aida Real Estate Ltd v Lipschitz* 1971 3 SA 871 (W) 873; *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1988 3 SA 26 (A) 30; *Aida Real Estate Ltd v Lipschitz* 1971 3 SA 871 (W) 873; *Tyrone Selmon Properties (Pty) Ltd v Phindada Properties 112 (Pty) Ltd* [2006] 1 All SA 545 (C) 546.

<sup>285</sup> [http://www.meumanwhite.co.za/articles/2011\\_08\\_The\\_Consumer\\_Protection\\_Act](http://www.meumanwhite.co.za/articles/2011_08_The_Consumer_Protection_Act) accessed on 15 April 2019.

<sup>286</sup> S 3 of the CPA states the purposes of the CPA.

<sup>287</sup> Excluding a consumer court.

<sup>288</sup> The National Consumer Tribunal established under s 26 of the National Credit Act 35 of 2005 (hereinafter the "Tribunal" or "NCT").

<sup>289</sup> S 4(2)(b)(i) of the CPA.

court<sup>290</sup> must prefer the meaning that best promotes the spirit and purpose of the CPA. Sections 2(1), 4(2)(b) and 4(3) of the CPA confirm the interrelated riders to the general principle to be applied in the interpretation of statutes as identified in *Cool Ideas 1186 CC v Hubbard and Another*<sup>291</sup> namely that:

- a a statutory provision should always be interpreted in a manner which gives effect to the purposes of the Act in question;
- b that the relevant statutory provision must be properly contextualised; and
- c that all statutes must be construed in a manner which is consistent with the Constitution.

It is however argued that the purposive interpretation of the word “or” separating subsections (a)(i), (a)(ii) and (a)(iii) of the definition of “transaction” in section 1 of the CPA, does not allow for a substitution of the word “or” with the word “and” to establish an application of the CPA to the performance of services by an estate agent in the sale of residential property under circumstances where the services performed by the estate agent do not result in the eventual sale of the seller’s residential property and the services are therefore performed without consideration as required under section (a)(iii) of the definition of “transaction” in section 1 of the CPA.

For purposes of providing greater clarity on the application of the CPA in circumstances where services are performed by a supplier acting in the ordinary course of business without consideration and to ensure that the application of the CPA is not unduly limited, thereby limiting the protection of consumers, it is proposed that the words “or” used to separate the provisions of section 1(a)(i), 1(a)(ii) and 1(a)(iii) of the definition of “transaction” be replaced with the words “and”.<sup>292</sup>

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<sup>290</sup> Excluding a consumer court.

<sup>291</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 8 BCLR 869 (CC).

<sup>292</sup> The Department of Trade and Industry (hereinafter the “DTI”) called for tenders for impact assessments of proposed amendments to the CPA in Government Tender Bulletin in GG 3078 of 20 September 2019.

## **2 3    Exclusions and exemptions under section 5 of the CPA**

### **2 3 1   Introduction**

In addition to the general application of the CPA as provided for in section 5(1) of the CPA, the CPA provides for specific transactions and arrangements to be excluded<sup>293</sup> from the scope of the application of the CPA and allows for exemptions to one or more of the provisions of the CPA as provided for in section 5(3) and section 5(4) of the CPA.

### **2 3 2   Exclusions**

The application of the CPA as provided for in section 5(1) of the CPA read together with sections 5(6), 5(7) and 5(8) of the CPA and the definitions<sup>294</sup> of “transaction” and “market”, define the general scope and the application of the CPA. Section 5(2) of the CPA limits the application of the CPA by listing specific transactions which are excluded from the general scope and application of the CPA.

Any transaction:

- a*     in terms whereof goods or services are supplied or promoted to the State;<sup>295</sup>
- b*     with a consumer, if the consumer is a juristic person with an annual turnover or asset value which, at the time of the transaction, equals or exceeds the threshold value determined by the Minister as provided for in section 6 of the CPA;<sup>296</sup>
- c*     that constitutes a credit agreement as provided for in the National Credit Act<sup>297, 298</sup>

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<sup>293</sup> See s 5(2) of the CPA.

<sup>294</sup> S 1 of the CPA.

<sup>295</sup> S 5(2)(a) of the CPA.

<sup>296</sup> S 5(2)(b) of the CPA. The current monetary threshold value is determined at R 2 000 000.

<sup>297</sup> Act 34 of 2005 (hereinafter the “NCA”).

<sup>298</sup> S 5(2)(d) of the CPA. The goods or services which are the subject of the credit agreement in terms of the NCA are not excluded from the application of the CPA.

- d* for any services supplied in terms of an employment contract;<sup>299</sup>
- e* which gives effect to a collective bargaining agreement as provided for in section 23 of the Constitution and the Labour Relations Act<sup>300,301</sup> and
- f* that gives effect to a collective agreement as provided for in section 213 of the LRA<sup>302</sup>

are also excluded from the application of the CPA.<sup>303</sup>

Specifically in relation to services, the promotion of services or the supply of services which could not reasonably be the subject of a transaction as provided for in section 5(1)(a) of the CPA, are also excluded from the application of the CPA.<sup>304</sup>

Any transaction which is exempted as provided for in sections 5(3) and 5(4) of the CPA are also excluded from the application of the CPA.<sup>305</sup>

### **2 3 3 Exempted transactions**

Section 5(3) of the CPA provides for an application by a regulatory authority to the Minister<sup>306</sup> for an industry-wide exemption from one or more of the provisions of the CPA on the basis that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of other national legislation<sup>307</sup> or any treaty, international law, convention or protocol.<sup>308</sup> The Minister<sup>309</sup> may grant the

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<sup>299</sup> S 5(2)(e) of the CPA.

<sup>300</sup> Act 66 of 1995 (hereinafter the “LRA”).

<sup>301</sup> S 5(2)(f) of the CPA.

<sup>302</sup> S 5(2)(g) of the CPA.

<sup>303</sup> S 5(2) of the CPA.

<sup>304</sup> S 5(1)(b)(i) of the CPA.

<sup>305</sup> Section 5(1) of the CPA provides for an application to every transaction occurring within the Republic of South Africa (s 5(1)(a)); to the promotion of any goods or services or to the supplier of any goods or services within the Republic of South Africa (s 5(1)(b)); and to goods and services which are supplied or performed in terms of a transaction as provided for in section 5(1)(a) of the CPA (s 5(1)(c)).

<sup>306</sup> The member of the Cabinet responsible for consumer protection measures. See the definition of “minister” in s 1 of the CPA.

<sup>307</sup> S 5(3)(a) of the CPA.

<sup>308</sup> S 5(3)(b) of the CPA.

<sup>309</sup> The member of the Cabinet responsible for consumer protection measures. See the definition of “minister” in s 1 of the CPA.

exemption<sup>310</sup> after receiving advice from the Commission, to the extent that the regulatory scheme ensures the achievement of the purposes<sup>311</sup> and provisions of the CPA<sup>312</sup> and subject to any limitations or conditions necessary to ensure the achievement of the purposes of the CPA.<sup>313</sup>

The provisions of section 5(3) and 5(4) of the CPA follow the Draft Green Paper where the necessity of developing a “simple, comprehensive and accessible consumer law” that should “serve as a single reference for consumers and business, outline the fundamental rules of conduct and grant consumers basic rights” is acknowledged.<sup>314</sup> The Draft Green Paper however also points out that such a comprehensive consumer law will fall short in catering for all eventualities and all sectors to the extent that some industries and sectors will have specific problems which require additional, industry-specific regulation.<sup>315</sup>

The provisions of sections 5(3) and 5(4) of the CPA must be read together with the provisions of section 2(9) of the CPA which find application in those instances where an industry-wide exemption of one or more of the provisions of the CPA in terms of sections 5(3) is not granted to a regulatory authority, and the provisions of the CPA apply, in addition to the provisions of the regulatory scheme, to the specific industry. Any inconsistency between the application of the provisions of the CPA and any other legislation is dealt with in section 2(9) of the CPA which provides for a concurrent application of the provisions of both the CPA and other legislation to the extent that it

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<sup>310</sup> The Minister must publish the granting of any exemption by notice in the *Gazette*.

<sup>311</sup> See s 3 of the CPA.

<sup>312</sup> S 5(4)(a) of the CPA.

<sup>313</sup> S 5(4)(b) of the CPA. Any goods or services supplied in the Republic of South Africa to any person in terms of an exempted transaction as provided for in s 5(3) and 5(4) of the CPA, are nevertheless subject, together with the importer, producer, distributor and retailer of those goods, to the provisions of s 60 and 61 of the CPA. A comprehensive discussion of the provisions of s 60 and s 61 of the CPA falls outside the scope of this research.

<sup>314</sup> The Draft Green Paper 24.

<sup>315</sup> The Draft Green Paper 24.

is possible to so apply and comply with the one without contravention of the other<sup>316</sup> and to the extent that such an application is not possible, the provisions which extend the greater protection to a consumer must prevail over the alternative provisions.<sup>317</sup>

### **2 3 3 1      The regulation of estate agents under the EAAA and industry-wide exemptions under section 5(3) and 5(4) of the CPA**

Under section 5(3) of the CPA the EAAB may apply to the Minister<sup>318</sup> for an exemption to one or more of the provisions of the CPA on the basis that those specific provisions overlap or are duplicated by the provisions of the EAAA administered by the EAAB. To date, no application under section 5(3) of the CPA has been granted in favour of the EAAB.

In the context of the performance of services for consideration by or at the direction of an estate agent, as a person acting in the ordinary course of business, for or at the direction of the seller of residential property as a consumer under the CPA as provided for under section 1(a)(iii) of the definition of “transaction”, the provisions of the CPA and the EAAA<sup>319</sup> must apply concurrently to the extent that it is possible to apply and comply with the provisions of the CPA and the EAAA without contravention of the other.<sup>320</sup> To the extent that a concurrent application of the provisions of the CPA and the EAAA is not possible, the provisions of either the CPA or the EAAA, which provide the greater protection to the consumer must prevail over the other.<sup>321</sup>

## **2 4      Chapter conclusion**

The CPA was signed into law on 29 April 2009 and has been in force since 2011.

“It was clearly intended to advance an ambitious agenda – in the field of

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<sup>316</sup> S 2(9)(a) of the CPA.

<sup>317</sup> S 2(9)(b) of the CPA.

<sup>318</sup> The member of the Cabinet responsible for consumer protection measures. See the definition of “minister” in s 1 of the CPA.

<sup>319</sup> S 5 of the CPA regulates the application of the CPA.

<sup>320</sup> S 2(9)(a) of the CPA.

<sup>321</sup> S 2(9)(b) of the CPA.



consumer transactions, it brought into operation a new sales and services law regime, and it introduced a consumer contract law that espouses the values of fairness, justice and reasonableness.”<sup>322</sup>

The CPA aims<sup>323</sup> to promote and advance the social and economic welfare of consumers in South Africa by those means listed in section 3(1)(a) to (h) of the CPA. Primarily, the CPA aims to protect consumers.<sup>324</sup>

A “consumer” is defined<sup>325</sup> in relation to services as a person to whom services are supplied or performed<sup>326</sup> in the ordinary course of the supplier’s business<sup>327</sup> and a recipient or beneficiary of services, irrespective of whether that person was a party to the transaction for the supply or performance of the services by the supplier.<sup>328</sup>

In the context of the performance of services, a “consumer” is one of the four<sup>329</sup> key concepts which determine the application<sup>330</sup> of the CPA to the performance of services by or at the direction of a person acting in the ordinary course of business, for or at the direction of a consumer for consideration under section 1(a)(iii) of the definition of “transaction”.

The concepts “performance” of a “services”, “person acting in the ordinary course of business”, “consumer” and “consideration” which determine an application of the CPA, specifically to the performance of services, were discussed in paragraph 2.2 of this research. Paragraph 2.3 of this research summarised sections 5(2), 5(3) and 5(4) of

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<sup>322</sup> Van Eeden & Barnard Preface at vii.

<sup>323</sup> See the Preamble to the CPA. The purposes of the CPA are set out in s 3 of the CPA.

<sup>324</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 16.

<sup>325</sup> S 1 of the CPA.

<sup>326</sup> Subsection (a) of the definition of “consumer” in s 1 of the CPA refers to a person to whom services are marketed in the ordinary course of the supplier’s business. The term “market” is defined to mean to promote or supply services.

<sup>327</sup> See (a) of the definition of “consumer” in s 1 of the CPA.

<sup>328</sup> See (c) of the definition of “consumer” in s 1 of the CPA.

<sup>329</sup> The four key concepts which determine an application of the CPA under (a)(iii) of the definition of “transaction” in s 1 of the CPA are the “performance of “services, by or at the direction of “a person acting in the ordinary course of business” for or at the direction of a “consumer” for “consideration”.

<sup>330</sup> S 5 of the CPA regulates the application of the CPA and must be read together with the defined terms and phrases which make up section 5 of the CPA.

the CPA, which provide for specific exclusions of and exemptions to the application of the CPA.

In this regard, it was pointed out that estate agents, who are regulated by the EAAB in terms of the EAAA, are not exempted from the CPA on the basis that one or more of the provisions of the CPA overlaps or duplicates the EAAA<sup>331</sup> which regulates the activities of estate agents in the public interest.<sup>332</sup> The provisions of the CPA and EAAA must therefore be applied concurrently to the extent that the provisions of the CPA and the EAAA are consistent. Any inconsistencies between the provisions of the CPA and the EAAA must be dealt with as provided in section 2(9)<sup>333</sup> of the CPA.

The EAAA is an industry-specific legislation *inter alia* aimed<sup>334</sup> at regulating the activities of estate agents. To this extent, the EAAB formulated and published regulations<sup>335</sup> in the form of a Code of Conduct, which impose specific duties on an estate agent in his dealings with the public.<sup>336</sup> The EAAA came into operation on 1 August 1977 at a time when the idea of consumer protection started finding traction in the world economy<sup>337</sup> and as such, was not focused on the protection of a consumer's rights in dealing with an estate agent. The EAAA and the Code of Conduct, from a supply perspective, regulate the activities of estate agents in the public interest, but

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<sup>331</sup> Under s 5(3)(a) of the CPA, a regulatory authority may apply to the Minister for an industry-wide exemption from one or more of the provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation.

<sup>332</sup> The purposes of the EAAA are set out in the Preamble to the EAAA and include the control of certain activities of estate agents in the public interest. Other stated objectives are to provide for the establishment of the EAAB and the EAFF and for incidental matters.

<sup>333</sup> S 2(9) of the CPA provides that if there are any inconsistencies between any of the provisions of the CPA and any other Act (other than the Public Finance Management Act or the Public Services Act, which are regulated per provided in s 2(8) of the CPA), the provisions of both the CPA and the other Act must apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravention of the other (s 2(9)(a) of the CPA) and to the extent that it is not possible, the provision which extends the greater protection to a consumer must prevail over the other provisions (S 2(9)(b) of the CPA).

<sup>334</sup> See the Preamble to the EAAA.

<sup>335</sup> S 33 (1)(a) of the EAAA.

<sup>336</sup> S 8(1)(b) of the EAAA empowers the EAAB to frame and publish regulations with the approval of the Minister.

<sup>337</sup> Van Eeden & Barnard 1; Naudé & Eiselen Original Service (2014) 1.

from a demand perspective in terms of consumer protection, do not protect the rights of consumers.

The EAAA and the Code of Conduct define<sup>338</sup> industry-specific terms and phrases which must be used as interpretational tools to analyse the application of the CPA to the performance of services by an estate agent.

From the outset, it was important to clarify the service provided by an estate agent in the sale of residential property in terms of an agreement with the seller to sell his residential property. An estate agent is not, unless specifically authorised in writing by the seller of the residential property,<sup>339</sup> clothed with the authority to sell the seller's residential property.<sup>340</sup> The service expected of an estate agent in performing an instruction to sell the seller's residential property, is to do all that is necessary to bring about a sale of the seller's residential property to a willing and able buyer.<sup>341</sup>

The specific application of the CPA to the performance of those services to bring about a sale of the seller's residential property to a willing and able buyer as provided for under section 1(a)(iii) of the definition of "transaction", was analysed in paragraph 2.2 of this research and is problematic in some instances.

In analysing the performance of services by an estate agent, it was pointed out that although the definition of "estate agency service" in regulation 1(d) of the Code of Conduct read together with section 1(a)(i) – (iv) of the definition of "estate agent" in the EAAA limits the services performed by an estate agent under the EAAA, the definition<sup>342</sup> of "service" in the CPA is sufficiently wide enough to include any service

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<sup>338</sup> S 1 of the EAAA and reg 1 of the Code of Conduct.

<sup>339</sup> Reg 3.5 of the Code of Conduct and s 2(1) of the ALA.

<sup>340</sup> *Bird v Summerville and another* 1961 3 SA 194 (A); *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N); *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Basil Elk Estates (Pty) Ltd v Curzon* 1990 2 SA 1 (TPD); *Wynland Properties CC v Potgieter and Another* [1999] 3 All SA 576 (C); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>341</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>342</sup> S 1 of the CPA.

performed by an estate agent necessary to bring about a sale of the seller's residential property to a willing and able buyer.

In as much as the CPA aims to regulate the consumer market as widely as possible,<sup>343</sup> the application of the CPA to the performance of services under section 1(a)(iii) of the definition of "transaction" is limited to a performance of services by or at the direction of a "person acting in the ordinary course of business". The Supreme Court of Appeal in the matter between *Eskom Holding Ltd v Halstead-Cleak*<sup>344</sup> confirmed that an objective test, having regard to all the circumstances, including the actions of both parties must be employed to determine whether a person acted "in the ordinary course of business"<sup>345</sup> and, although it is accepted<sup>346</sup> that the CPA does not apply to once-off transactions, the court in *AA Mutual Insurance Ltd v Biddulph and Another*<sup>347</sup> held that the phrase "in the ordinary course of business" should be given a wide meaning to include "even a single, isolated activity, enterprise, or pursuit."<sup>348</sup>

In determining whether an estate agent performed the agreed services in the ordinary course of business the provisions of section 26 of the EAAA, which prohibit any person from performing any act as an estate agent unless a valid FFC has been issued to him and every person employed by him, indicate, specifically in relation to the sale of residential property, that any services to bring about a sale of the seller's residential property to a willing and able buyer, performed by an estate agent who is in possession of a valid FFC, must, objectively determined, be regarded as the performance of services "in the ordinary course of the estate agent's business as required under

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<sup>343</sup> Naudé & Eiselen Original Services (2014) 2.

<sup>344</sup> See *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA).

<sup>345</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 21. See also *Van Zyl & Others NNO v Turner & another NNO* 1998 2 SA 236 (C); *Doyle v Killeen and Others* NCT/12984/2014/75(1)(b).

<sup>346</sup> Jacobs, Stoop & Van Niekerk 312; Barnard 2012 *De Jure* 455; Delport 2014 *Obiter* 64.

<sup>347</sup> 1976 1 SA 725 (A).

<sup>348</sup> At 739.

section 1(a)(iii) of the definition of “transaction”, even if such a performance occurs only once-off.<sup>349</sup> A FFC serves as evidence of the estate agent’s registration with the EAAB and compliance with the Training Regulations and confirms that, that person is legally entitled to carry out the services of an estate agent. Objectively determined, a fully certified and industry recognised estate agent, who performs any services to the public, is doing so in the ordinary course of business. Although an estate agent, who performs any services without a valid FFC being issued to him as provided for in section 26 of the EAAA, is not entitled to claim commission from his client in payment for the services performed by him<sup>350</sup> under the EAAA, it is submitted that, for purposes of the application of the CPA to the performance of services under section 1(a)(iii) of the definition of “transaction”, the circumstances of the performance and the actions of both the estate agent, in accepting the instruction to sell the seller’s residential property and the seller, in instructing the estate agent to perform a specific service as an estate agent, objectively determined indicates an intention and understanding by both the estate agent and the seller of the residential property, that the services are performed in the ordinary course of the estate agent’s business.

The third concept which defines the application of the CPA under section 1(a)(iii) of the definition of “transaction”, is the performance of services for or at the direction of a consumer. One of the greatest stumbling blocks of consumer protection legislation before the enactment of the CPA, was the absence of a uniform definition of a consumer.<sup>351</sup> The CPA primarily applies to the marketing of goods and services and to the relationships, agreements and transactions for the supply of goods and

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<sup>349</sup> *AA Mutual Ltd v Biddulph and Another* 1976 1 SA 725 (A).

<sup>350</sup> *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* 2017 4 SA 610 (SCA).

<sup>351</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 11. See also the Draft Green Paper at para 3 4.

services.<sup>352</sup> The definition of a “consumer” in section 1 of the CPA relates to the application of the CPA and defines a consumer, in relation to services, as a person<sup>353</sup> to whom services are marketed<sup>354</sup> and a person who has entered into a transaction with a supplier, in the ordinary course of the supplier’s business, unless the transaction is exempted from the application of the CPA under section 5(2) or 5(3) of the CPA.<sup>355</sup> A “consumer” also includes a user or recipient or beneficiary of services, irrespective of whether that person was a party to the transaction for the supply of the services.<sup>356</sup> In the context of the sale of residential property by an estate agent on instruction received from the seller of the residential property, the estate agent performs services for or at the direction of the seller and the seller is a consumer for purposes of the CPA.

The complex issue of the performance of services by an estate agent for “consideration” is the fourth concept which determines an application of the CPA to the performance of services by a person acting in the ordinary course of business for or at the direction of a consumer for consideration.<sup>357</sup> The term “consideration” is sufficiently widely enough defined in the CPA to include anything of value given to and accepted in exchange for goods or services,<sup>358</sup> irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly or involves only the supplier and the consumer or other parties in addition to the supplier and the consumer,<sup>359</sup> and

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<sup>352</sup> Van Eeden & Barnard 35.

<sup>353</sup> A “person” includes a juristic person whose asset value or annual turnover is less than the threshold value determined by the Minister in terms of s 6 of the CPA. For purposes of the application of the CPA, the application of the CPA is excluded under s 5(2) of the CPA.

<sup>354</sup> See (a) of the definition of “consumer” in s 1 of the CPA.

<sup>355</sup> See (b) of the definition of “consumer” in s 1 of the CPA.

<sup>356</sup> See (c) of the definition of “consumer” in s 1 of the CPA.

<sup>357</sup> See (a)(iii) of the definition of “transaction” in s 1 of the CPA.

<sup>358</sup> Subsection (a) of the definition of “consideration” in s 1 of the CPA provides a general definition and lists specific items which will be regarded as “consideration” in subsections (b) – (d) of the definition of “consideration” in s 1 of the CPA.

<sup>359</sup> S 1 of the CPA.

includes a payment of commission by the seller of the residential property on the sale of the seller's residential property to a willing and able buyer.

In the context of the sale of residential property by an estate agent on instruction from the seller to sell his residential property, the agreement between the seller and the estate agent determines what was agreed between them.<sup>360</sup> At the very least, the seller and the estate agent must agree on the services to be performed by the estate agent in respect of a specific immovable property and on the payment of commission to the estate agent, the amount payable and the terms and conditions upon which the payment becomes due.<sup>361</sup>

The service expected of the estate agent in performing an instruction to sell the seller's residential property, must be understood as an instruction to bring about a sale of the seller's residential property to a willing and able buyer.<sup>362</sup> The estate agent must do all that is reasonably required to sell the seller's residential property to a willing and able buyer.

Unless the agreement between the seller and the estate agent specifically stipulates otherwise, the estate agent is deemed to have performed the instruction to sell the seller's residential property, on introduction of a financially able and legally willing buyer to the seller,<sup>363</sup> which results in a legally enforceable sales agreement between the seller and the buyer so introduced,<sup>364</sup> on substantially the terms and conditions

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<sup>360</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>361</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>362</sup> Unless the agreement between the seller and the estate agent specifically authorises the estate agent in writing to perform a juristic act on behalf of the seller, the estate agent is not clothed with authority to sell the seller's residential property to a willing and able buyer. See *Bird v Summerville and another* 1961 3 SA 194 (A); *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N); *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Basil Elk Estates (Pty) Ltd v Curzon* 1990 2 SA 1 (TPD); *Wynland Properties CC v Potgieter and Another* [1999] 3 All SA 576 (C); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>363</sup> *Beckwith v Foundation Investment Co* 1961 4 SA 510 (A).

<sup>364</sup> *Brayshaw v Schoeman & Andere* 1960 1 SA 625 (A); *John H Pritchard & Associates v Thorny Park Estates* 1967 2 SA 511 (D); *Naidu v Naidoo* 1967 2 SA 323 (N).

required by the seller<sup>365</sup> and the estate agent must have been the effective cause of the sale<sup>366</sup> and, the estate agent is not entitled to claim a commission payment, until such time as the estate agent performed the instruction. Any services performed by the estate agent to bring about a sale of the seller's residential property to a willing and able buyer without these services resulting in a sale of the seller's residential property, are services performed by the estate agent in the ordinary course of business, but not for consideration.

A determination whether the performance of services by the estate agent, acting in the ordinary course of business, for or at the direction of the seller is for consideration, must be made objectively, having regard to the intention of the estate agent,<sup>367</sup> at the time when the estate agent accepted the instruction from the seller to sell his residential property. An estate agent performs the services to bring about a sale of the seller's residential property with the intention to perform the instruction to sell the seller's residential property, thereby entitling him to a payment of commission. Objectively determined, the estate agent performs the services with the intention to bring about a sale of the seller's residential property to a willing and able buyer and to be remunerated for the services performed.

It is questioned<sup>368</sup> whether these unpaid services, performed by the estate agent in bringing about a sale of the seller's residential property, must be excluded from the application of the CPA under section 1(a)(iii) of the definition of "transaction". In this

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<sup>365</sup> *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd (in voluntary liquidation)* 1966 1 SA 791 (D).

<sup>366</sup> *Aida Real Estate Ltd v Lipschitz* 1971 3 871 (W) 873; *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1988 3 SA 26 (A) 30; *Tyrone Selmon Properties (Pty) Ltd v Phindada Properties 112 (Pty) Ltd* [2006] 1 All SA 545 (C) 546.

<sup>367</sup> The performance of the services for consideration must be evaluated from the perspective of the person acting in the ordinary course of business.

<sup>368</sup> [http://www.meumanwhite.co.za/articles/2011\\_08\\_The\\_Consumer\\_Protection\\_Act](http://www.meumanwhite.co.za/articles/2011_08_The_Consumer_Protection_Act) accessed on 15 April 2019.



regard, it was pointed out that a purposive interpretation of the CPA<sup>369</sup> does not allow for the substitution of the words “or” which are used to separate sections 1(a)(i), 1(a)(ii) and 1(a)(iii) of the definition of “transaction” in section 1 of the CPA with the word “and” so as to ensure that the services performed by the estate agent with the intention to bring about a sale of the seller’s residential property and therefore performed with the intention to be compensated, be included in the scope and application of the CPA, irrespective of whether the estate agent is compensated for the services. It was therefore argued that the provisions of section 1(a) of the definition of “transaction” be amended to substitute the word “or” with the word “and” and to ensure that the application of the CPA is not limited to exclude the performance of services by an estate agent, to bring about a sale of the seller’s residential property, in performing the instruction to sell received from the seller, but which remains unpaid.

In the Draft Green Paper it was acknowledged<sup>370</sup> that a comprehensive consumer law envisaged by the CPA will fall short in catering for all eventualities and all sectors to the extent that some industries may require additional, industry-specific regulation. Although the EAAA is industry-specific legislation aimed at regulating the activities of estate agents,<sup>371</sup> it came into operation<sup>372</sup> at a time when the idea of consumer protection started to develop in the world economy<sup>373</sup> and does not, from a consumer protection perspective, aim to protect the estate agent’s client’s<sup>374</sup> consumer rights.

Mention must be made of the PPA which has been signed into law by the President on 2 October 2019 and will, when it comes into operation on a date fixed by the

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<sup>369</sup> S 2(1) of the CPA provides that the CPA must be interpreted in a manner which gives effect to the purposes of the CPA as set out in s 3 of the CPA.

<sup>370</sup> At 24.

<sup>371</sup> See the Preamble to the EAAA.

<sup>372</sup> The EAAA came into operation on 1 August 1977.

<sup>373</sup> Van Eeden & Barnard 1; Naudé & Eiselen Original Service (2014) 1.

<sup>374</sup> Reg 1(c) of the Code of Conduct defines a “client” as the person who has given the estate agent a mandate to perform estate agency services.

President by proclamation in the Gazette, replace the EAAA. The definitions of the industry-specific terms and phrases included in section 1 of the PPA must similarly be used as interpretational tools to determine an application of the CPA to the supply or performance of services by a property practitioner in the sale of residential property. The PPA *inter alia* aims to provide for consumer protection<sup>375</sup> and includes a dedicated chapter<sup>376</sup> in the PPA to give effect to this endeavour. Until such time as an exemption is granted in favour of the Property Practitioners Regulatory Authority<sup>377</sup> as provided for under section 5(3)<sup>378</sup> and section 5(4)<sup>379</sup> of the CPA, the provisions of the CPA and the PPA must, once the PPA becomes operational, be applied concurrently as provided for under section 2(9)<sup>380</sup> of the CPA.

Section 2 of the CPA, which regulates the interpretation of the CPA, provides for a purposive interpretation of the CPA<sup>381</sup> and provides, in section 4(3) of the CPA, that the Tribunal or court must, if any provision of the CPA, read in context, can reasonably be construed to have more than one meaning, prefer the meaning which best promotes the spirit and purposes of the CPA. “From the definitions, The Preamble and

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<sup>375</sup> See the Preamble to the PPA.

<sup>376</sup> Ch 10 of the PPA.

<sup>377</sup> Previously the EAAB. (Hereinafter the “Authority”)

<sup>378</sup> S 5(3) of the CPA provides for a regulatory authority to apply to the Minister for an industrywide exemption from one or more of the provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation or any treaty, international law, convention or protocol.

<sup>379</sup> Under s 5(4) of the CPA, the Minister may, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in s 5(3) of the CPA to the extent that the relevant regulatory scheme ensures the achievement of the purposes and the provisions of the CPA and subject to any limits or conditions necessary to ensure the achievement of the purposes of the CPA.

<sup>380</sup> S 2(9) of the CPA provides that if there are any inconsistencies between any of the provisions of the CPA and any other Act (other than the Public Finance Management Act or the Public Services Act, which are regulated per provided in s 2(8) of the CPA), the provisions of both the CPA and the other Act must apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravention of the other (s 2(9)(a) of the CPA) and to the extent that it is not possible, the provision which extends the greater protection to a consumer must prevail over the other provisions (S 2(9)(b) of the CPA).

<sup>381</sup> S 2(1) of the CPA provides that the CPA must be interpreted in a manner which gives effect to the purposes of the CPA.

the purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers”<sup>382</sup> and the provisions of section 1(a)(iii) of the definition of “transaction” which regulates the performance of services by an estate agent in the sale of residential property on instruction by the seller to sell residential property, must be interpreted in a manner that provides the greater protection to the seller as a consumer under the CPA.

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<sup>382</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 16.

### **Chapter 3: THE DUTIES OF AN ESTATE AGENT IN THE SALE OF RESIDENTIAL PROPERTY UNDER THE EAAA AND THE CODE OF CONDUCT**

#### **3 1 Introduction**

The CPA aims to serve an ambitious agenda of regulating the consumer market as widely as possible,<sup>383</sup> but recognises that a “simple, comprehensive and accessible consumer law” that should “serve as a single reference for consumers and business, outline the fundamental rules of conduct and grant consumers basic rights”, “will not be able to cater for all eventualities and all sectors”.<sup>384</sup> Woker<sup>385</sup> points out that consumer protection measures in South Africa existed prior to the CPA for many years in industry-specific regulation.

It is clear that the CPA aims to include the rights of consumers as provided for in industry-specific regulation within the ambit of the CPA, with section 2(9) of the CPA providing for a concurrent application of the provisions of the CPA and any other Act. Under section 2(9)(a) of the CPA, if there is any inconsistency between any of the provisions of the CPA and any other Act<sup>386</sup> the provisions of both the CPA and the other Act apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second<sup>387</sup> and to the extent that this is not possible, the provision that extends the greater protection to a consumer must prevail over the alternative provision.<sup>388</sup>

The EAAA aims to control certain activities of estate agents in the public interest and

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<sup>383</sup> Naudé & Eiselen Original Service (2014) 2.

<sup>384</sup> Draft Green Paper 24.

<sup>385</sup> Woker 2010 *Obiter* 218.

<sup>386</sup> Excluding the Public Finance Management Act or the Public Service Act which are dealt with under s 2(8) of the CPA.

<sup>387</sup> S 2(9)(a) of the CPA.

<sup>388</sup> S 2(9)(b) of the CPA.

to this extent, the EAAB formulated and published<sup>389</sup> regulations<sup>390</sup> in the format of a Code of Conduct, which imposes duties on estate agents in their dealings with the public.

To date, no application as provided for under section 5(3)<sup>391</sup> and 5(4)<sup>392</sup> of the CPA has been granted in favour of the EAAA and in answering the critical question: what are the duties of an estate agent in the sale of residential property, the duties imposed on an estate agent under the EAAA and the Code of Conduct must therefore be included in a critical analysis of the duties of an estate agent under the CPA.<sup>393</sup>

An investigation and summary of the statutory duties imposed on an estate agent under the EAAA and the Code of Conduct will be discussed in paragraph 3.2 of this research. Many of the duties imposed on an estate agent under the EAAA and the Code of Conduct correspond with specific provisions of the CPA. Although the relevant corresponding provisions of the CPA will be acknowledged in footnotes, a comprehensive analysis of those provisions of the CPA falls outside the scope of this research.

The PPA which was signed into law by the President on 2 October 2019 will, when it comes into operation on a date fixed by the President by proclamation in the Gazette, replace the EAAA. The PPA *inter alia* aims to provide for consumer protection<sup>394</sup> and

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<sup>389</sup> S 8(1)(b) of the EAAA.

<sup>390</sup> S 33 of the EAAA.

<sup>391</sup> S 5(3) of the CPA provides for a regulatory authority to apply to the Minister for an industrywide exemption from one or more of the provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation or any treaty, international law, convention or protocol.

<sup>392</sup> The Minister may, by notice in the *Gazette* after receiving the advice of the Commission, grant an exemption as provided for under s 5(3) of the CPA only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of the CPA at least, as well as the provisions of the CPA, and subject to any limits or conditions necessary to ensure the achievement of the purposes of the CPA.

<sup>393</sup> S 2(9) of the CPA.

<sup>394</sup> See the Preamble to the PPA.

includes a dedicated chapter<sup>395</sup> in the PPA to give effect to this endeavour. A comprehensive discussion of the PPA falls outside the scope of this research, but some observations on the duties imposed on an estate agent under the PPA in the context of consumer protection, will be recorded in the conclusion of this chapter.<sup>396</sup>

## **3 2 The duties of an estate agent in the sale of residential property under the EAAA and the Code of Conduct**

### **3 2 1 Introduction**

Estate agents are regulated by the EAAB in terms of the EAAA which came into operation on 1 August 1977. The EAAA provides for the establishment of the EAAB and an Estate Agents Fidelity Fund,<sup>397</sup> for the control of certain activities of estate agents in the public interest and for incidental matters.<sup>398</sup>

Section 5(3) of the CPA provides for a regulatory authority to apply to the Minister<sup>399</sup> for an exemption to one or more of the provisions of the CPA on the basis that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority.<sup>400</sup> To date, no exemption as provided for in terms of section 5(3) of the CPA has been granted in favour of the EAAB and in the context of the performance of services by or at the direction of an estate agent acting in the ordinary course of business for or at the direction of the seller of residential property, for consideration,<sup>401</sup> the provisions of the EAAA must apply concurrently with the provisions of the CPA as provided for in section 2(9) of the CPA.

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<sup>395</sup> Ch 10 of the PPA.

<sup>396</sup> See para 3 3 of this research.

<sup>397</sup> Hereinafter the "EAFF".

<sup>398</sup> See preamble of the EAAA.

<sup>399</sup> The member of the Cabinet responsible for consumer protection matters. See the definition of "minister" in s 1 of the CPA.

<sup>400</sup> S 5(3)(a) of the CPA.

<sup>401</sup> An application of the CPA under subsection (a)(iii) of the definition of "transaction" in s 1 of the CPA was established in ch 2 of the research.

Section 2(9) of the CPA, provides that if there are any inconsistencies between any provision of the CPA and a provisions of any other Act,<sup>402</sup> the provisions of both Acts apply concurrently to the extent that it is possible to comply and apply with the one without contravention of the other,<sup>403</sup> and to the extent that this is not possible, the provisions which provide the greater protection to the consumer, must apply.<sup>404</sup>

The objectives<sup>405</sup> of the EAAB include the maintenance and promotion of the standards of conduct of estate agents<sup>406</sup> and to regulate the activities of estate agents.<sup>407</sup> To this extent, the EAAB framed and published<sup>408</sup> regulations,<sup>409</sup> with the approval of the Minister,<sup>410</sup> to regulate, control or prohibit any practice followed by an estate agent in dealing with the public<sup>411</sup> and which must be complied with by estate agents.<sup>412</sup> The Regulations, published in the format of a Code of Conduct, sets the standard of professional conduct and ethics expected from an estate agent and impose specific duties on estate agents which are categorised as follows:

- a*            general duty to protect the public's interest;<sup>413</sup>
- b*            mandates; <sup>414</sup>
- c*            duty to disclose;<sup>415</sup>
- d*            duty not to make misrepresentations or false statements or to use

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<sup>402</sup> The Public Finance Management Act and the Public Services Act are excluded from s 2(9) of the CPA and a concurrent application with s 5 of the CPA is regulated under s 2(8) of the CPA.

<sup>403</sup> S 2(9)(a) of the CPA.

<sup>404</sup> S 2(9)(b) of the CPA.

<sup>405</sup> S 7 of the EAAA regulates the objectives of the EAAB.

<sup>406</sup> S 7(1)(a) of the EAAA.

<sup>407</sup> S 7(1)(b) of the EAAA.

<sup>408</sup> The powers of the EAAB are regulated in terms of s 8 of the EAAA.

<sup>409</sup> S 33 of the EAAA.

<sup>410</sup> The Minister of Trade and Industry (see s 1 of the EAAA).

<sup>411</sup> S 33 (1)(a) of the EAAA.

<sup>412</sup> S 8(1)(b) of the EAAA; Reg 2 4 of the Code of Conduct.

<sup>413</sup> Reg 2 of the Code of Conduct.

<sup>414</sup> Reg 3 of the Code of Conduct.

<sup>415</sup> Reg 4 of the Code of Conduct.

- harmful marketing techniques;<sup>416</sup>
- e* offers and contracts;<sup>417</sup>
- f* prohibition against undue influence;<sup>418</sup>
- g* remuneration;<sup>419</sup>
- h* trust monies and interest;<sup>420</sup>
- i* confidentiality;<sup>421</sup> and
- j* vicarious responsibility.<sup>422</sup>

### **3 2 2 The general duty to protect the public's interest**<sup>423</sup>

The objective<sup>424</sup> of the EAAB to regulate the activities of estate agents<sup>425</sup> is defined as “having regard to the public interest”.<sup>426</sup> This objective corresponds with the purpose of the EAAA which includes the aim of controlling certain activities of estate agents in the public interest.<sup>427</sup>

Regulation 2 of the Code of Conduct imposes a general duty on the estate agent to protect the public's interest. In this regard, the estate agent<sup>428</sup> must not in, or pursuant to, his conduct or business:

- a* do, or omit to do anything which is or may be contrary to the integrity of estate agents in general;<sup>429</sup>

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<sup>416</sup> Reg 5 of the Code of Conduct.

<sup>417</sup> Reg 6 of the Code of Conduct.

<sup>418</sup> Reg 7 of the Code of Conduct.

<sup>419</sup> Reg 8 of the Code of Conduct.

<sup>420</sup> Reg 9 of the Code of Conduct.

<sup>421</sup> Reg 10 of the Code of Conduct.

<sup>422</sup> Reg 11 of the Code of Conduct.

<sup>423</sup> Reg 2 of the Code of Conduct. S 54 of the CPA regulates a consumer's right to demand quality services and imposes a corresponding duty on an estate agent to perform quality services. This aspect is analysed in ch 5 of this research.

<sup>424</sup> S 7 of the EAAA.

<sup>425</sup> S 7(1)(b) of the EAAA.

<sup>426</sup> S 7(1) of the EAAA.

<sup>427</sup> See the Preamble to the EAAA.

<sup>428</sup> Reg 2 5 of the Code of Conduct includes an estate agent operating through or using the medium of a company, close corporation or third party as a front or nominee.

<sup>429</sup> Reg 2 1 of the Code of Conduct. The integrity of estate agents is not a concept which is defined in terms of



- b* wilfully or negligently fail to perform any work or duties with reasonable care and skill as is expected of an estate agent;<sup>430</sup>
- c* deny equal services to any person for reasons of race, creed, sex, or country of national origin;<sup>431</sup> or
- d* discriminate against a prospective purchaser on the grounds that that purchaser will not or is not likely going to make use of financial assistance made available by a specific person or financial institution which the estate agent arranges on his behalf.<sup>432</sup>

The estate agent has the duty to protect the interests of his client at all times to the best of his ability, having due regard to the interest of all the parties concerned.<sup>433</sup> This means that an estate agent is prohibited from purchasing, leasing or acquiring any interest in a property in respect of which he has a mandate without the full knowledge and consent of the client,<sup>434</sup> or, sell or let his own property or any property in which he has a direct or indirect interest to any prospective buyer or lessee without disclosing his ownership or interest in that property to the prospective purchaser or lessee.<sup>435</sup>

An estate agent may act on behalf of a seller or a purchaser, or both, as a kind of broker.<sup>436</sup> He may also act as an estate agent for more than one seller or lessor, or more than one purchaser or lessee in respect of the same immovable property. In this

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the EAAA. An argument may be made that the non-performance of agreed estate agency services by the estate agent may be contrary to the integrity of estate agents in general. It must however be noted the EAAA and the Code of Conduct do not specifically impose a duty on the estate agent to perform the agreed estate agency services.

<sup>430</sup> Reg 2 3 of the Code of Conduct.

<sup>431</sup> Reg 2 6 of the Code of Conduct.

<sup>432</sup> Reg 2 7 of the Code of Conduct.

<sup>433</sup> Reg 2 2 of the Code of Conduct; *Van Zyl & Seuns v Nel* 1975 3 SA 986 (N); *Botha v Smith* 1976 4 SA 855 (A).

<sup>434</sup> *Mallinson v Tanner* 1947 4 SA 681 (T) 684; Dendy M "Estate Agents" *LAWSA* 3<sup>rd</sup> Ed. No 18 (2015) LexisNexis (hereinafter "Dendy "Estate Agents" *LAWSA*") 2.

<sup>435</sup> R 4 2 of the Code of Conduct.

<sup>436</sup> *Low v Shedden* [2001] 2 All SA 171 (C) 181.

regard, Regulations 3 7<sup>437</sup> and 4 1 4<sup>438</sup> of the Code of Conduct provide that an estate agent, where he is mandated to act for more than one party in respect of the same immovable property, and his interests in the second mandate would compete with his obligations towards his client, has a duty towards his client to disclose his interest in the second mandate to him in writing, before accepting the second mandate.

If an estate agent accepts the second mandate which conflicts with his original mandate, he similarly has a duty towards the client in respect of the second mandate not to perform or attempt to perform that mandate, and to inform him of the original mandate and the fact that he (the second client) is not the estate agent's client in respect of that immovable property.

### **3 2 3 Duties in respect of mandates**<sup>439</sup>

Regulation 3 of the Code of Conduct, which deals with the estate agent's duties in respect of mandates, provides that no estate agent may perform any estate agency services on behalf of a seller or lessor, or a purchaser or lessee, unless he is given a mandate<sup>440</sup> to do so by that person or his duly authorised agent.<sup>441</sup>

Three primary mandates are identified in the South African context:<sup>442</sup>

- a* an "exclusive and sole mandate" provides for an agreement between the estate agent and his client, in terms whereof the estate agent is allowed an exclusive right, for a determinable period of time, to sell the immovable property of his client;
- b* a "sole mandate" provides a sole right, for a determinable period of time,

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<sup>437</sup> Reg 3 of the Code of Conduct deals with the estate agent's duties in respect of mandates.

<sup>438</sup> Reg 4 of the Code of Conduct relates to the estate agent's duty to disclose.

<sup>439</sup> S 14 of the CPA applies to a fixed-term agreement such as a sole mandate and provides for a consumer's rights in respect of the expiry and renewal of fixed-term contracts. See also Delpont 2014 *Obiter* 70.

<sup>440</sup> Reg 1(h) of the Code of Conduct defines a "mandate" as an instruction or authority given to and accepted by an estate agent to render an estate agency service.

<sup>441</sup> Reg 3 1 and 3 2 of the Code of Conduct.

<sup>442</sup> Other similar mandates include a "dual mandate" and a "tri-mandate".

to an estate agent, to sell the immovable property of his client. A sole mandate is different from an “exclusive and sole mandate” in that a “sole mandate” provides that the client cannot lawfully confer a mandate on another estate agent to sell his same immovable property during the period of the sole mandate. The client may however, lawfully sell his own immovable property directly to a person not introduced by the estate agent;<sup>443</sup> and

- c an “open mandate” which is a mandate given to and accepted by more than one estate agent to sell the same immovable property. Many different estate agents can lawfully have a mandate to sell the same immovable property and no one estate agent can claim the exclusive or sole right to sell the immovable property.

The Code of Conduct imposes additional duties on the estate agent in respect of sole mandates.<sup>444</sup> An estate agent may not accept a sole mandate unless all the terms of the sole mandate or any extension thereof is in writing and signed by the client<sup>445</sup> and the expiry date of the sole mandate or the extension thereof is expressed as a calendar date and is specifically recorded in the document.<sup>446</sup> The sole mandate may not provide for an option to extend the sole mandate for a specific period after the expiry of the sole mandate<sup>447</sup> or include a provision which provides that the estate agent may continue with the agreed estate agency services after expiration of the sole mandate,

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<sup>443</sup> The right of the owner to sell his own immovable property, distinguishes a sole mandate from an exclusive and sole mandate, where the mandate to the estate agent also excludes the right by the owner to sell his own immovable property.

<sup>444</sup> Including a “sole and exclusive mandate”. S 22 of the CPA regulates the consumer’s right to information in plain and understandable language that impose additional duties on an estate agent in preparing and presenting a sole mandate to his client.

<sup>445</sup> Reg 3 3 1 of the Code of Conduct.

<sup>446</sup> Reg 3 3 2 of the Code of Conduct.

<sup>447</sup> Reg 3 4 1 of the Code of Conduct.

unless the client has agreed to these terms in an independently executed document which explains the reasons for and implications of such continuation, prior to the signature of the sole mandate and that independent agreement is signed by both the client and the estate agent.<sup>448</sup> The estate agent is also prohibited from accepting a sole mandate from his client which confers a power of attorney on him to act on behalf of his client, unless the intention and implications of such a power of attorney is fully explained in the sole mandate.<sup>449</sup>

The legal implications of a client, or another estate agent appointed by the client, selling or letting his immovable property without the assistance of the estate agent during the sole mandate, must also be explained to the client in writing.<sup>450</sup> The terms and conditions of the sole mandate must be agreed between the client and the estate agent, including the obligations of the estate agent in respect of the marketing of the property and must not, if the terms and conditions are contained in a standard pre-printed mandate, be smaller in lettering than the remainder of the terms of the mandate.<sup>451</sup>

An estate agent may not wilfully or negligently mislead a seller or lessor with regard to the possible market or rental value of the client's property in order to obtain a mandate from that person<sup>452</sup> and may not accept a mandate which includes or accepts the benefit of any clause in a contract for sale or lease of immovable property negotiated by the estate agent, whereby a sole mandate is directly or indirectly conferred upon him to sell or lease that immovable property for a period of time after the conclusion of the original contract of sale or lease.<sup>453</sup>

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<sup>448</sup> Reg 3 4 2(aa) – (cc) of the Code of Conduct.

<sup>449</sup> Reg 3 5 of the Code of Conduct.

<sup>450</sup> Reg 3 10 1 of the Code of Conduct.

<sup>451</sup> Reg 3 10 2 of the Code of Conduct.

<sup>452</sup> Reg 3 8 of the Code of Conduct.

<sup>453</sup> Reg 3 6 of the Code of Conduct.

The Code of Conduct imposes a duty on the estate agent not to accept a mandate which requires specialised skills or knowledge of an estate agency activity, which falls outside his competence, unless he is assisted by a person who has such specialised skills or knowledge and this fact is disclosed to the client in writing<sup>454</sup> and, he may not claim to have such specialised skills or knowledge if it is not so.<sup>455</sup>

### **3 2 4 Duty to disclose**<sup>456</sup>

If an estate agent conducts his business in terms of a franchise or under a tradename or style other than his own, he has the duty to clearly and unambiguously disclose this in all his correspondence, circulars, advertisements and other written documentation and, in the instance of a franchise, state his name and that of the franchisor<sup>457</sup> and the use of any trade name in respect of his business as an estate agent and may not in any way create confusion on the part of the public in respect of the nature of the business carried on by him.<sup>458</sup>

Regulation 4 1 1 of the Code of Conduct provides that an estate agent must convey all facts concerning a property which he is mandated to “sell” or “lease”, or “purchase” or “hire”, as they are and of which he is aware of or should reasonably in the circumstances be aware of, and which could be material to a prospective purchaser or lessee.<sup>459</sup>

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<sup>454</sup> Reg 3 9 of the Code of Conduct.

<sup>455</sup> Reg 5 3 of the Code of Conduct, which is categorised as a duty not to make misrepresentations or false statements or use harmful marketing techniques.

<sup>456</sup> S 27 of the CPA regulates the duty imposed on an intermediary to disclose information to those persons listed in s 27(1)(a) of the CPA and to keep records of all relationships and transactions contemplated in s 27 of the CPA. An “intermediary” is defined in s 1 of the CPA, but specifically excludes “a person whose activities as an intermediary are regulated in terms of any other national legislation”. Estate agents are regulated in terms of the EAAA and the duty to disclose information provided for in s 27 of the CPA does not apply, in addition to the duties imposed on an estate agent as a supplier, to estate agents.

<sup>457</sup> Reg 4 1 2 and reg 4 1 3 of the Code of Conduct.

<sup>458</sup> Reg 5 6 of the Code of Conduct.

<sup>459</sup> Reg 4 1 1 of the Code of Conduct; *Low v Sheddin* [2001] 2 All SA 171 181.

### **3 2 5 Duty not to make misrepresentations or false statements or to use harmful marketing techniques**<sup>460</sup>

Regulation 5 5 of the Code of Conduct imposes a general duty on an estate agent not to wilfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property in respect of which he has a mandate.<sup>461</sup> In this regard the estate agent may not publish, or cause an advertisement to be published, which creates the impression that the advertisement is published by the seller or lessor, or the prospective purchaser or lessee of immovable property.<sup>462</sup> The estate agent may not advertise or otherwise market a property in respect of which he has a mandate to sell or to let, at a price or rental other than agreed upon with his client<sup>463</sup> or affix a board or notice to immovable property in respect of which he has been given a mandate,<sup>464</sup> indicating that such property is for sale or hire or has been sold or let unless that seller or lessor has given his written consent to do so.<sup>465</sup>

An estate agent may not inform a seller or purchaser or prospective seller or purchaser of immovable property in respect of which he has been given a mandate to sell or purchase, that he has obtained an offer in respect of that property unless that offer is in writing,<sup>466</sup> has been signed by the offeror<sup>467</sup> and is to the knowledge of the estate agent, a *bona fide* offer.<sup>468</sup>

Regulation 5 5 2 imposes a general duty on an estate agent not to use any harmful or misleading marketing techniques or methods to influence any person to confer upon

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<sup>460</sup> Part E of Chapter 2 of the CPA regulates a consumer's right to fair and responsible marketing and impose additional duties on the estate agent.

<sup>461</sup> Reg 5 5 1 of the Code of Conduct.

<sup>462</sup> Reg 5 1 of the Code of Conduct.

<sup>463</sup> Reg 5 4 of the Code of Conduct.

<sup>464</sup> Reg 5 8 2 of the Code of Conduct.

<sup>465</sup> Reg 5 8 1 of the Code of Conduct.

<sup>466</sup> Reg 5 7 1 of the Code of Conduct.

<sup>467</sup> Reg 5 7 2 of the Code of Conduct.

<sup>468</sup> Reg 5 7 3 of the Code of Conduct.

him a mandate to render any estate agency service or to sell, purchase, let or hire immovable property, having regard to the general experience which such a person has concerning property transactions and the circumstances surrounding the transaction or proposed transaction.

The estate agent may not wilfully or negligently prepare, make or assist any person to make a false statement (orally or in writing) or to sign a false statement which he knows is false, or knowingly or recklessly prepare or maintain any false records or books of account.<sup>469</sup>

### **3 2 6 Duties in respect of offers and contracts**

Regulation 6 of the Code of Conduct deals with the estate agent's duties in respect of offers and contracts negotiated by him in terms of his mandate with his client. In this regard, an estate agent must present or cause to present any offer to purchase or sell a property received prior to the conclusion of a contract of sale in respect of that property to his client, unless his client has instructed him not to present the offer.<sup>470</sup>

An estate agent may not present competing offers to purchase the property to the seller in such a manner as to induce the seller to accept a particular offer without considering the advantages or disadvantages of each offer presented.<sup>471</sup> An estate agent may also not amend any provision of a signed offer prior to rejection thereof, or a written mandate or any contract of sale or lease, without the knowledge and express consent of the offeror or the parties to the contract, as the case may be.<sup>472</sup>

A duty is imposed on the estate agent to explain to every prospective party to any written offer or contract negotiated by him in his capacity as an estate agent, prior to signature thereof by the parties, the meaning and consequences of the material terms

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<sup>469</sup> Reg 5 2 of the Code of Conduct.

<sup>470</sup> Reg 6 1 1 of the Code of Conduct.

<sup>471</sup> Reg 6 1 2 of the Code of Conduct.

<sup>472</sup> Reg 6 1 3 of the Code of Conduct.

of that offer or contract and if he is unable to do so, to refer the parties to a person who can do so.<sup>473</sup> An estate agent must notify the offeror forthwith whether the offer submitted by the estate agent has been accepted or not<sup>474</sup> and without undue delay furnish every contracting party with a copy of the agreement with which he is concerned as an estate agent, provided that the foregoing shall also apply in respect of an offer to purchase or lease if the offeror specifically requests a copy thereof.<sup>475</sup>

### **3 2 7 Duty not to use undue influence<sup>476</sup>**

Regulation 7 of the Code of Conduct prohibits an estate agent to use undue influence to solicit, encourage, persuade or influence any party or potential party to a pending transaction to use or not to use the services of a particular attorney or conveyancer or firm of attorneys<sup>477</sup> or, the services or financial assistance offered by any financial institution<sup>478</sup> or any person.<sup>479</sup>

### **3 2 8 Duties in respect of payment**

The Code of Conduct prohibits an estate agent from demanding or including any term in an agreement for any form of payment, or receiving any form of payment or part payment, arising or connected with a completed, pending or proposed contract for sale or lease which is subject to a suspensive condition, until the time that the suspensive condition is fulfilled,<sup>480</sup> or a resolute condition, during the time that the contract may fall away as a result of the operation of the resolute condition.<sup>481</sup>

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<sup>473</sup> Reg 6 2 1 of the Code of Conduct.

<sup>474</sup> Reg 6 2 2 of the Code of Conduct.

<sup>475</sup> Reg 6 2 3 of the Code of Conduct.

<sup>476</sup> S 40 of the CPA regulates a consumer's rights in respect of unsociable conduct and imposes duties on a supplier in respect of using undue influence.

<sup>477</sup> Reg 7 1 of the Code of Conduct.

<sup>478</sup> Reg 7 2 of the Code of Conduct.

<sup>479</sup> Reg 7 3 of the Code of Conduct.

<sup>480</sup> Reg 8 1 1 of the Code of Conduct.

<sup>481</sup> Reg 8 1 2 of the Code of Conduct. This provision does not apply if good cause exists (reg 8 1 2(aa)), the party liable for the payment has expressly, in a separate written document, consented to the payment at any time notwithstanding the fact that the contract is subject to a suspensive or resolute condition (reg 8 1 2(bb)) and that document explains the implications and financial risks to that party of a payment under those circumstances



An estate agent may not inform his client or any other person to a completed or proposed transaction that he is, by law not allowed to charge less than a specific commission or fee, or that such commission or fee is prescribed by law, the EAAB or any institute of estate agents or any other body.<sup>482</sup> The estate agent may not include or accept a benefit of any clause in a mandate or contract, which provides for a payment of any kind to him by his client, arising from or connected with any contract of sale or lease, regardless of the fact whether the purchaser or lessee is able to fulfil his obligations in terms of that contract.<sup>483</sup>

In terms of regulation 8 5 of the Code of Conduct, an estate agent may not include or accept the benefit of any clause in a contract for the sale or rental of immovable property negotiated by him, which entitles him in terms of that contract to deduct any remuneration, commission, benefit or gain from money entrusted to him in terms of that contract, until the agreed remuneration, commission, benefit or gain has actually been paid over by him to the party who is entitled thereto and that person is contractually liable for payment of his remuneration, commission, benefit or gain.<sup>484</sup>

Estate agents may not introduce a prospective purchaser or lessee to any immovable property or to the owner or lessor of immovable property, if he knows or has reason to believe that that person has already been introduced to the property or the owner or lessor, by another estate agent and that there is a likelihood that his client may thus be liable for a payment of more than one commission or fee, if the sale or rental is concluded through his intervention, unless he informed his client of the foregoing and

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(reg 8 1 2(cc)) and that document is signed by both the estate agent and that party (reg 8 1 2(dd)).

<sup>482</sup> Reg 8 2 of the Code of Conduct.

<sup>483</sup> Reg 8 4 of the Code of Conduct. The provisions of this section do not apply if good cause exists (reg 8 1 2(aa)), his client has, prior to him signing the mandate or contract consented, in writing, in a separate document, to such payment (reg 8 1 2(bb)) and that document explains the implications and financial risks to that party of a payment under those circumstances (reg 8 1 2(cc)) and that document is signed by both the estate agent and that party (reg 8 1 2(dd)).

<sup>484</sup> Reg 8 5 of the Code of Conduct.

his client consented, in writing, to him introducing that specific person to the property or to his client again.<sup>485</sup>

### **3 2 9 Duties in respect of confidentiality**<sup>486</sup>

An estate agent may not, without just cause, divulge any confidential information concerning the trade secrets, business affairs or technical methods or processes of his client or any other party to a transaction where he acts as an estate agent, to a third party.<sup>487</sup>

### **3 2 10 Duties in respect of vicarious responsibility**

Regulation 11 of the Code of Conduct establishes a connection between an estate agent who is a sole proprietor of an estate agency business, or a partner in a partnership, or a director of a company, or a member of a close corporation as provided for in section (b) of the definition<sup>488</sup> of “estate agent”, to be held liable for any contravention of any of the provisions of the Code of Conduct by an employee, partner, co-director or co-member, unless the estate agent has, prior to the contravention by that party taken all reasonable steps to prevent the contravention and could not, in the circumstances have prevented the contravention.

### **3 2 11 Duties in respect of trust monies, investments and interest**<sup>489</sup>

The trust account, investment of trust monies and interest earned, are dealt with in both the EAAA and the Code of Conduct. “[T]rust money” is broadly defined<sup>490</sup> to include:

- a any money or other property entrusted to an estate agent in his capacity as an estate agent;

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<sup>485</sup> Reg 8 3 of the Code of Conduct.

<sup>486</sup> See also the ECTA.

<sup>487</sup> Reg 10 of the Code of Conduct.

<sup>488</sup> S 1 of the EAAA.

<sup>489</sup> S 65 of the CPA imposes a duty on a supplier to hold and account for a consumer’s property.

<sup>490</sup> S 1 of the EAAA.

- b* money collected or received by an estate agent and payable in respect of the sale or rental of immovable property;
- c* money collected on behalf of a lessor, payable in terms of a lease agreement;
- d* money collected in terms of any other service as the Minister<sup>491</sup> may from time to time specify;<sup>492</sup> and
- e* any other money collected and received by an estate agent in respect of any immovable property, business undertaking or contract for the building or erection of any improvements on immovable property.

Section 32 of the EAAA regulates the trust account of an estate agent and imposes specific duties on estate agents pertaining to the investment of trust monies by estate agents.

Section 32(1) of the EAAA requires every estate agent to open and keep one or more separate trust accounts with a bank, clearly referenced to section 32(1) of the EAAA, and to deposit all monies held or received into that bank account or account. Details of the account numbers of each separate account and the bank where the accounts are held, must be notified to the EAAB.

An estate agent may invest any money, deposited into his trust account and which is not immediately required for any specific purpose, into a “separate savings or interest-bearing account, opened by him with any bank, building society or any institution or class of institutions designated by notice in the Gazette by the Minister in consultation with the Minister of Finance”.<sup>493</sup> The savings or other interest-bearing accounts must bear reference to section 32(2)(a) of the EAAA<sup>494</sup> and any interest earned on money

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<sup>491</sup> The Minister of Trade and Industry. See the definition of “minister” in s 1 of the EAAA.

<sup>492</sup> Subsection (a) of the definition of “trust money” in s 1 of the EAAA specifically refers to the activities of an estate agent as referred to in (a)(i) - (iv) of the definition of “estate agent” in s 1 of the CPA.

<sup>493</sup> S 32(2)(a) of the EAAA.

<sup>494</sup> S 32(2)(b) of the EAAA.

deposited into the estate agent's section 32(1) trust account, and any interest earned on any section 32(2)(a) investment account must, unless specifically agreed otherwise in a written mandate received from the person whose money is so held by him, be paid over by the estate agent to the EAFF.<sup>495</sup> The estate agent must retain all monies held in a section 32(1) trust account and investments held in a section 32(2)(a) investment account until such time as the estate agent is lawfully entitled to it or instructed to make payment therefrom to any person.<sup>496</sup>

Estate agents are required to keep accounting records of all monies received by them, including all monies deposited into a trust account in terms of section 32(1) of the EAAA, as well as of any monies invested in a savings or any other interest-bearing account referred to in section 32(2)(a) of the EAAA,<sup>497</sup> balance his books and records relating to every section 32(1) trust account and section 32(2)(a) investment account every month and administer the accounts in the prescribed manner.<sup>498</sup> Section 32(3)(b) of the EAAA requires an estate agent to cause every section 32(1) trust account and section 32(2)(a) investment account to be audited within four months after the final date of the financial year of the estate agent. The auditor appointed in terms of section 32(2)(b) of the EAAA must, after completion of the audit, transmit a report of his findings to the EAAB and also provide a copy thereof to the estate agent.<sup>499</sup>

The EAAB<sup>500</sup> may apply to the court for an order prohibiting any estate agent from

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<sup>495</sup> S 32(2)(c) of the EAAA. S 32(2)(d) of the EAAA provides that a prescribed portion of the interest paid by an estate agent to the fidelity fund in terms of s 32(2)(b) of the EAAA, may under prescribed circumstances be refunded to the estate agent.

<sup>496</sup> S 32(2)(e) of the EAAA.

<sup>497</sup> S 32(3)(a) of the EAAA. See also S 29(a)(i) of the EAAA which duplicates the provisions of s 32(3)(a) of the EAAA.

<sup>498</sup> S 32(3)(c) of the EAAA.

<sup>499</sup> S 32(4) of the EAAA. The EAAB may at any time order an estate agent, in writing, to submit the audited financial statements supporting the report by the auditor to the EAAB, within a prescribed period, but not less than 30 days (s 32(5) of the EAAA).

<sup>500</sup> S 32(6) refers to the applicant the EAAB "or any other competent person".

operating his section 32(1) trust account or any section 32(2)(a) investment account and appointing a curator *bonis* to control and administer such trust or investment account/s, with such rights, duties and powers as the court may order.<sup>501</sup>

Section 26 of the EAAA prohibits any person from operating as an estate agent unless a valid FFC has been issued to him and every other person in his employment and to every director of the company, if the estate agent operates as a company.<sup>502</sup> The EAAB may issue a FFC to any person who is not disqualified in terms of the provisions of section 27 of the EAAA.<sup>503</sup> Section 27 of the EAAA specifically deals with disqualifications relating to an FFC and provides in section 27(1)(aA)(i) that no FFC shall be issued to an estate agent who has failed to arrange the auditing of every section 32(1) trust account and section 32(2)(a) investment account in terms of sections 29(1)(b) and 32(3)(b) of the EAAA. In addition, an estate agent who fails to comply with the provisions of sections 29 or 32 of the EAAA, may be guilty of conduct deserving of sanction.<sup>504</sup>

The Code of Conduct also imposes specific duties on an estate agent in dealing with trust monies and interest.<sup>505</sup> An estate agent may not solicit or influence any person who is entitled to trust funds in the estate agent's possession or under his control, to pay any interest earned on money deposited or invested in terms of sections 32(1) or 32(2)(a) of the EAAA, over to the estate agent.<sup>506</sup> The estate agent must disclose to the parties to a contract of sale or an agreement of lease, that unless they agree in writing to whom the interest earned on any money received and deposit by him into

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<sup>501</sup> S 32(6) of the EAAA.

<sup>502</sup> S 26(1)(b) of the EAAA also refers to every member of close corporation, if the estate agency operated as a close corporation.

<sup>503</sup> S 16(3) of the EAAA.

<sup>504</sup> S 30(g) of the EAAA.

<sup>505</sup> Reg 9 of the Code of Conduct.

<sup>506</sup> Reg 9 1 of the Code of Conduct.

his trust account must be paid, the interest shall accrue to the EAFF in terms of section 32(2)(c) of the EAAA.<sup>507</sup>

An estate agent must invest any money received by him in trust, which is not immediately required for any particular purpose,<sup>508</sup> in an interest bearing account at the best interest rate available in the circumstances, at a bank where he normally keeps his trust accounts<sup>509</sup> and must pay the full amount of the interest which accrued on the investment to the party entitled to the interest or to the EAAB (as the case may be), subject to any written agreement between the estate agent and such party.<sup>510</sup>

Regulation 9 4 of the Code of Conduct prohibits an estate agent from including or causing to include a clause in a contract of sale for immovable property negotiated by him, which provides for a payment of any portion of the purchase price paid and entrusted to the estate agent to the seller, prior to the registration of the transfer of the property to the purchaser, unless good cause exists<sup>511</sup> and:

- a the purchaser has agreed in writing prior to the signature of the contract of sale in an independently executed document to such a payment;<sup>512</sup>
- b that document fully explains the implications and the financial risks of such a payment for the purchaser;<sup>513</sup> and
- c that document is signed by the seller and the purchaser and the estate agent.<sup>514</sup>

### **3 3 Chapter conclusion**

The Code of Conduct is not a law and is not enforceable in a court of law.<sup>515</sup> Under

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<sup>507</sup> Reg 9 2 of the Code of Conduct.

<sup>508</sup> S 32(2)(a) of the EAAA.

<sup>509</sup> Reg 9 3 1 of the Code of Conduct.

<sup>510</sup> Reg 9 3 2 of the Code of Conduct.

<sup>511</sup> Reg 9 4(aa) of the Code of Conduct.

<sup>512</sup> Reg 9 4(bb) of the Code of Conduct.

<sup>513</sup> Reg 9 4(cc) of the Code of Conduct.

<sup>514</sup> Reg 9 4(dd) of the Code of Conduct.

<sup>515</sup> Delport 2014 *Obiter* 71 n 32. S 8(1)(b) of the EAAA provides that an estate agent must comply with the provisions of the Code of Conduct and a contravention of any of the regulations of the Code of Conduct may

section 30(1)(e) of the EAAA any estate agent shall be guilty of conduct deserving of sanction if he acts in contravention of or fails to comply with any of the provisions of the Code of Conduct. The EAAB or a committee of inquiry appointed by the EAAB<sup>516</sup> may, if the estate agent is found guilty under section 30(1)(e) of the EAAA, withdraw the FFC of the estate agent<sup>517</sup> and impose a fine of not more than R 25 000 or such higher amount as the Minister<sup>518</sup> may prescribe, payable to the EAAB,<sup>519</sup> or reprimand the estate agent.<sup>520</sup>

In the context of the sale of residential property by an estate agent in terms of an ordinary estate agent's mandate for the sale of the seller's residential property,<sup>521</sup> the Supreme Court of Appeal in the matter between *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>522</sup> held that the agreement between the seller and the estate agent for the sale of the seller's residential property determines what was agreed between them<sup>523</sup> and, in the matter between *Ronstan Investments Ltd v Littlewood*<sup>524</sup> held that unless the duties as provided for in the Code of Conduct are specifically included as express terms to the agreement between the estate agent and his client, the "the appointment of an estate agent to find a purchaser for immovable property in return for commission, without more, places the agent under no

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result in disciplinary proceedings being instituted against the estate agent by the EAAB or a committee of inquiry appointed by the EAAB as provided for in s 30(3) of the EAAA.

<sup>516</sup> S 8B of the EAAA.

<sup>517</sup> S 30(3)(a) of the EAAA and includes for purposes of s 30(3)(a) of the EAAA, if the estate agent is a company, every director of the company (s 30(3)(a)(i)), if the estate agent is a director of a company, the company (s 30(3)(a)(ii)), if the estate agent is in a partnership, every partner in the partnership (s 30(3)(a)(iii)), if the estate agent is a close corporation, every member of the close corporation who is competent and entitled to take part in the running of the business and management and a manager who is an officer of the close corporation (s 30(3)(a)(iv)) and if the estate agent is a member of a close corporation, the close corporation (s 30(3)(a)(v)).

<sup>518</sup> The Minister of Trade and Industry. See the definition of "minister" in s 1 of the EAAA.

<sup>519</sup> S 30(3)(b) of the EAAA.

<sup>520</sup> S 30(3)(c) of the EAAA.

<sup>521</sup> Reg 1(h) of the Code of Conduct defines an instruction or authority to perform estate agency services, given to and accepted by the estate agent, as a "mandate".

<sup>522</sup> [2001] All SA 295 (A).

<sup>523</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>524</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

obligations.<sup>525</sup> Delport<sup>526</sup> points out that “there is no implied term in the ordinary estate agent’s mandate that the estate agent is contractually obliged to act with diligence care,<sup>527</sup> but argues that because there are no closed categories of implied terms in our law, our courts may, in accordance with the requirements of justice, reasonableness, fairness and good faith, develop new categories of implied terms as and when the need arise.<sup>528</sup>

Referring to the estate agent’s duties under the Code of Conduct, Delport<sup>529</sup> further argues that in the absence of an implied term to the ordinary estate agent’s mandate for the sale of the seller’s residential property that imposes duties on the estate agent in the sale of the seller’s residential property, the regulatory nature of the Code of Conduct and the duties imposed on the estate agent therein may support an argument to prove the existence of tacit terms which must be incorporated in the ordinary estate agent’s mandate for the sale of the seller’s residential property and, which gives effect to the duties imposed on the estate agent as provided for in the Code of Conduct.

The test for determining whether a term must be included in the agreement between the parties, generally referred to as the “common bystander test,”<sup>530</sup> provides for the court to assume that if an impartial bystander, who was present when the parties concluded the agreement, had asked the parties what would happen in a specific scenario which they did not foresee or did not provide for in the agreement between

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<sup>525</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA) at para 1; *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>526</sup> Delport H “An estate agent’s duty to list and market a property at market value” 2009 *Obiter* 131 (hereinafter “Delport 2009 *Obiter* (131)”) 139.

<sup>527</sup> Delport 2009 *Obiter* (131) 139. The duty to act with diligence and care is included in reg 2 of the Code of Conduct which regulates the estate agent’s duty of protect the public’s interest.

<sup>528</sup> Delport 2009 *Obiter* (131) 140. See also *A Becker & Co (Pty) Ltd v Becker* 1981 3 SA 406 (A) 419; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 339; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 1 SA 350 (T) 347.

<sup>529</sup> Delport 2009 *Obiter* (131) 140.

<sup>530</sup> *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 532.



them and both parties agree that the answer to the question is obvious, the court must conclude that the parties to the agreement have tacitly agreed to that term.<sup>531</sup>

In terms of the “common bystander test”, and provided that the seller is aware of the duties imposed on the estate agent in the Code of Conduct, the seller may assume and expect an estate agent, who must comply with the provisions of the Code of Conduct,<sup>532</sup> to agree that:

- a* he must act in the best interest of the seller;<sup>533</sup>
- b* with the necessary degree of care and skill as might reasonably be expected of the estate agent;<sup>534</sup>
- c* in a manner which is consistent with the integrity of estate agents in general;<sup>535</sup>
- d* without discrimination;<sup>536</sup> and
- e* avoiding a conflict of interest with the interests of the seller<sup>537</sup>

and the estate agent may agree that he is, as an estate agent, obliged to perform the agreed services in terms of the duties imposed on him under the Code of Conduct.

Under these circumstances and evaluated on a case by case basis, Delport<sup>538</sup> argues that the duties imposed on an estate agent under the Code of Conduct should be incorporated as tacit terms to the ordinary estate agent’s mandate for the sale of the seller’s residential property. Delport<sup>539</sup> cautions that an argument can be made to persuade the court that the common bystander might exclude the duties imposed on

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<sup>531</sup> A comprehensive analysis of the tacit terms to an agreement falls outside the scope of this research. Please see Hutchinson D & Pretorius C (Eds) *The Law of Contract in South Africa* 3<sup>rd</sup> Ed. (2017) Oxford University Press (hereinafter “Hutchinson & Pretorius”).

<sup>532</sup> S 8(1)(b) of the EAAA.

<sup>533</sup> Reg 2 2 of the Code of Conduct.

<sup>534</sup> Reg 2 3 of the Code of Conduct.

<sup>535</sup> Reg 2 1 of the Code of Conduct.

<sup>536</sup> Reg 2 6 and reg 2 7 of the Code of Conduct.

<sup>537</sup> Reg 4 1 4 and reg 4 2 of the Code of Conduct.

<sup>538</sup> Delport 2009 *Obiter* (131) 141.

<sup>539</sup> Delport 2009 *Obiter* (131) 141.

the estate agent under the Code of Conduct, on the assumption that the inconsequential penalties imposed on an estate agent for contravention of the Code of Conduct do not necessarily persuade the estate agent to accept an elevation of these duties to a contractual term under circumstances where the seller is without remedy against the estate agent.<sup>540</sup>

Delport's argument<sup>541</sup> has not been tested nor applied in court. It must therefore be accepted that the statutory duties imposed on an estate agent under the Code of Conduct, which aims to regulate the conduct of estate agents in the public interest,<sup>542</sup> do not, from a consumer protection perspective on the demand side of the performance of services, protect the rights of the seller of residential property.

Section 2(9) of the CPA provides for a concurrent application of the provisions of the CPA and the EAAA. If there are any inconsistencies between any provision of the CPA and a provisions of the EAAA,<sup>543</sup> the provisions of both the CPA and the EAAA apply concurrently to the extent that it is possible to comply and apply with the one without contravention of the other,<sup>544</sup> and to the extent that this is not possible, the provisions which provide the greater protection to the consumer, must apply.<sup>545</sup>

Although the EAAA and the CPA apply concurrently as provided for under section 2(9) of the CPA, the value of the EAAA and the Code of Conduct, from a consumer protection perspective, are limited and the provisions of the CPA, in so far as it extends the greater protection to a consumer, prevails.<sup>546</sup>

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<sup>540</sup> Delport 2009 *Obiter* (131) 140.

<sup>541</sup> Delport 2009 *Obiter* (131) 141.

<sup>542</sup> See the Preamble to the EAAA read together with s 8(1)(b) of the EAAA.

<sup>543</sup> The Public Finance Management Act and the Public Services Act are excluded from s 2(9) of the CPA and a concurrent application with s 5 of the CPA is regulated under s 2(8) of the CPA.

<sup>544</sup> S 2(9)(a) of the CPA.

<sup>545</sup> S 2(9)(b) of the CPA.

<sup>546</sup> S 2(9)(b) of the CPA.

### 3 3 1 The PPA

The PPA, which was signed into law by the President on 2 October 2019, is an industry-specific law *inter alia* aimed at regulating property practitioners.<sup>547</sup> From a consumer protection perspective, the PPA also aims “to provide for consumer protection.”<sup>548</sup>

Under Chapter 10 of the PPA, the PPA imposes statutory duties on the property practitioner in relation to mandatory disclosure forms,<sup>549</sup> the language of agreements and mandatory disclosure forms.<sup>550</sup> Section 68(2) of the PPA, which regulates consumer education and information,<sup>551</sup> provides that a property practitioner “owes a buyer and a seller a duty of care.”

A “consumer” is defined in section 1 of the PPA as a person defined as a consumer in section 1(a) and 1(c) of the CPA and excludes, for purposes of the application of the PPA, a person who has entered into a transaction with a supplier in the ordinary course of business<sup>552</sup> and a franchisee in terms of a franchise agreement.<sup>553</sup> For purposes of the PPA in the context of the sale of residential property by an estate agent in terms of an agreement with the seller to sell his residential property, the PPA and the consumer protection measures introduced under Chapter 10 thereof, only apply to a seller, to whom services are marketed (promoted or supplied)<sup>554</sup> in the ordinary course of the estate agent’s business<sup>555</sup> and a recipient or beneficiary of services, irrespective whether that recipient or beneficiary was a party to the transaction concerning the

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<sup>547</sup> Previously estate agents.

<sup>548</sup> See the long title and Preamble to the PPA.

<sup>549</sup> S 66 of the PPA.

<sup>550</sup> S 67 of the PPA.

<sup>551</sup> S 68 of the PPA.

<sup>552</sup> See (b) of the definition of a “consumer” in s 1 of the CPA.

<sup>553</sup> See (d) of the definition of a “consumer” in s 1 of the CPA.

<sup>554</sup> To “market” means to promote or supply any goods or services (see definition of “market” in s 1 of the CPA).

<sup>555</sup> See (a) of the definition of a “consumer” in the CPA.

supply of those services.

A comprehensive discussion of the PPA falls outside the scope of this research, but it is nevertheless important to highlight that although the aspects related to consumer protection under the PPA is limited to:

- a* mandatory disclosure of specified information and mandatory disclosure forms;<sup>556</sup>
- b* the language of agreements;<sup>557</sup> and
- c* consumer education and information<sup>558</sup>

section 68(2) of the PPA imposes a duty of care on the property practitioner, which may be interpreted as sufficiently wide enough to include a duty on the property practitioner:

- a* to perform the services to bring about a sale of the seller's residential property to a willing and able buyer within a reasonable time or timely;<sup>559</sup>
- b* at the agreed location or locations for the performance of the services;<sup>560</sup>
- c* in a manner and of a quality that persons are generally entitled to expect;<sup>561</sup> and
- d* to return control over the seller's residential property to him in at least as good as a condition as when it was made available to him for purpose of the sale of the seller's residential property.<sup>562</sup>

Section 69<sup>563</sup> of the CPA, which regulates the enforcement of rights by a consumer

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<sup>556</sup> S 66 of the PPA.

<sup>557</sup> S 67 of the PPA.

<sup>558</sup> S 68 of the PPA.

<sup>559</sup> See s 19(2)(a)(i) and s 54(1)(a) of the CPA.

<sup>560</sup> See s 19(2)(a)(ii) of the CPA.

<sup>561</sup> See s 54(1)(b) of the CPA.

<sup>562</sup> See s 54(1)(d) of the CPA.

<sup>563</sup> A comprehensive analysis of s 69 of the CPA falls outside the scope of this research. The observations included are for purposes of formulating a logical conclusion.

under the CPA, provides in section 69(d) thereof that a person contemplated in section 4(1) may seek to enforce any right in terms of the CPA or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by approaching a court with jurisdiction over the matter, “if all other remedies available to that person in terms of national legislation have been exhausted.” This means that the seller of residential property would have to exhaust his remedies under the PPA before he is in a position to enforce his rights as a consumer under the CPA.<sup>564</sup>

If a property practitioner fails to perform the instruction received from the seller to sell his residential property within a reasonable time,<sup>565</sup> or perform the services in a manner and of a quality that persons are generally entitled to expect,<sup>566</sup> the property practitioner, it could be argued, would not be acting with the necessary care as provided for in section 68(2) of the PPA. As a result, the property practitioner will be subject to the penalties provided for under section 62(3) of the PPA, which may include a fine,<sup>567</sup> a portion whereof could be paid to the seller as compensation for any damages suffered as a result of the conduct of the property practitioner.<sup>568</sup>

Under section 69(d) of the CPA, the seller would have to enforce his rights under the PPA first, before he may approach a court with jurisdiction over the matter, to enforce any of his rights under the CPA. As a result, the very purpose of the CPA to protect the rights of consumers may be undermined.

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<sup>564</sup> See the discussion on the interpretation and application of s 69(d) in par 6 3 3 1 1.

<sup>565</sup> S 19(2)(a)(i) and s 54(1)(a) of the CPA.

<sup>566</sup> S 54(1)(b) of the CPA.

<sup>567</sup> S 30(3)(b) of the PPA.

<sup>568</sup> S 30(1) of the PPA.

## **Chapter 4: THE DUTIES OF AN ESTATE AGENT IN THE SALE OF RESIDENTIAL PROPERTY UNDER THE COMMON LAW**

### **4 1 Introduction**

Common law forms an indispensable part of the legal framework that makes up South African consumer protection<sup>569</sup> and plays an important role in the CPA. Woker<sup>570</sup> points out that consumer protection measures in South Africa existed prior to the CPA in the common law. Section 2(10) of the CPA, which deals with matters of interpretation, provides that “no provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.”

It is on this basis that the common law duties imported as *naturalia* of the ordinary estate agent’s mandate for the sale of the seller’s residential property must be included in analysing of the duties of an estate agent under the CPA to answer the critical question: what are the duties of an estate agent in the sale of residential property?

From the outset, it is necessary to clarify the service expected of and supplied or performed by an estate agent in the sale of residential property in terms of an estate agent’s common law mandate for the sale of the seller’s residential property. The terms of the estate agent’s mandate for the sale of the seller’s residential property must always be the point of departure to determine what was agreed between the parties.<sup>571</sup>

The estate agent’s common law mandate for the sale of the seller’s residential property provides for an instruction by the seller to the estate agent to sell his residential property, which instruction the estate agent accepts,<sup>572</sup> together with an undertaking

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<sup>569</sup> Van Eeden & Barnard 59.

<sup>570</sup> Woker 2010 *Obiter* 223.

<sup>571</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>572</sup> Reg 1(h) of the Code of conduct defines a “mandate” as “an instruction or an authority given to, and accepted by, an estate agent to render an estate agency service.”

by the seller to compensate the estate agent, usually in the form of a commission calculated as a percentage of the purchase price of the seller's residential property, for the sale of the seller's residential property to a willing and able buyer.<sup>573</sup> Unless the specific agreement between the seller and the estate agent includes a written<sup>574</sup> power of attorney which specifically authorises the estate agent to sell his residential property, an estate agent is not clothed with authority to perform a juristic act on behalf of the seller and is therefore not authorised to sell the seller's residential property.<sup>575</sup> The services expected of the estate agent in the sale of the seller's residential property are limited to those services necessary to put the seller in a position to sell his residential property to a willing and able buyer.

Nugent AJA in *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>576</sup> explained the estate agent's mandate for the sale of the seller's residential property without a power of attorney which authorises an estate agent to perform a juristic act on behalf of the seller, as follows:

“[w]hen parties agree, as in this case, that the agent will “sell” the property they envisage no more than that the estate agent will bring about a sale between principals”.

#### **4 2    The estate agent's common law mandate for the sale of the seller's residential property**

The express agreement between the estate agent and the seller for the sale of the seller's residential property rarely provides for specific duties imposed on the estate agent in performing estate agency services to bring about a sale of the seller's

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<sup>573</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>574</sup> S 2(1) of the Alienation of Land Act 81 of 1981 (hereinafter the “ALA”); Reg 3 5 of the Code of Conduct.

<sup>575</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>576</sup> [2001] All SA 295 (A) at para 1.

residential property. In the absence of an express agreement between the estate agent and the seller stipulating the duties of the estate agent, common law acknowledges the estate agent's mandate for the sale of the seller's residential property as a *sui generis* category of contract with elements of both agency and mandate, but exceptional in that the agreement, without any express terms which provide otherwise,<sup>577</sup> does not impose any duties on the estate agent and does not afford the seller any rights.<sup>578</sup>

The South African common law is founded in Roman law and Roman-Dutch law, was influenced by English law, customary law and legislation and is a part of the law which continuously develops through judicial precedent.<sup>579</sup> The common law incorporates the law of contract as part of the law of obligations in the private law branch of the common law and includes contracts of agency and contracts for services.<sup>580</sup> An obligation is described as a duty of some kind<sup>581</sup> and contracts are one<sup>582</sup> of the primary sources creating legally enforceable duties between the parties to the contract.

Regulation 1(h) of the Code of Conduct defines the agreement between the estate agent and his client as a "mandate" to mean an instruction or authority given to and accepted by the estate agent to perform estate agency services. In the context of the

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<sup>577</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>578</sup> *Bird v Summerville and another* 1961 3 SA 194 (A) 202; *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986; *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A) 30; *Basil Elk Estates (Pty) Ltd v Curzon* 1990 2 SA 1 (TPD); *Wynland Properties CC v Potgieter and Another* [1999] 3 All SA 576 (C); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A); *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

<sup>579</sup> S 39(2) of the Constitution determines that every court, tribunal or forum must promote the spirit, purposes and objectives of the Bill of Rights when developing the common or customary law.

<sup>580</sup> Other sources of obligations include delict, law of enrichment, *negotiorum gestio*, family relationships, wills and statutes. See Hutchinson & Pretorius 8.

<sup>581</sup> Sharrock 2.

<sup>582</sup> Other sources of obligations include delict, law of enrichment, *negotiorum gestio*, family relationships, wills and statutes. See Hutchinson & Pretorius 8.



sale of residential property, an “estate agency service” is defined<sup>583</sup> to mean “sells ... or publicly exhibits for sale immovable property ... or negotiates in connection therewith or canvasses or undertakes or offers to canvass ... a purchaser therefor.”

The ordinary estate agent’s mandate for the sale of the seller’s residential property is described by the Supreme Court of Appeal in the matter between *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd*<sup>584</sup> as follows:

“[i]t has, of course, often been held that, save for certain exceptions, an agent’s mandate may be summarily revoked by the principal, even if it is expressed to be irrevocable. A mandate in this sense is an authority, derived from an agreement of agency, to perform a juristic act on behalf of the principal. But in law an ordinary estate agent (to whom, for convenience, I shall refer as realtor) is not appointed by virtue of such an agreement. He cannot sell the property on behalf of the owner, nor can he perform any juristic act binding the owner. The latter merely undertakes to compensate him should a certain eventuality occur; usually if he introduces a willing and able purchaser as a result of which the property is sold to the person thus introduced. The contract between the owner and the realtor is therefor also not an agreement of mandate; the realtor is not obliged to perform his mandate. Hence the contract is *sui generis*”.<sup>585</sup>

The Supreme Court of Appeal in the matter between *Ronstan Investments (Pty) Ltd and Another v Littlewood*<sup>586</sup> held that:

“[t]he appointment of an estate agent to find a purchaser for immovable property in return for commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event”.<sup>587</sup>

There is support for the proposition that the ordinary estate agent’s mandate for the sale of the seller’s residential property, although *sui generis*<sup>588</sup> in nature, bears many of the characteristics of agency and mandate and thus imposes similar duties to the

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<sup>583</sup> Reg 1(d) of the Code of Conduct read together with (a)(i) – (iv) of the definition of “estate agent” in s 1 of the EAAA.

<sup>584</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A).

<sup>585</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A) 30.

<sup>586</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

<sup>587</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA) at para 1. See also Delpont 2009 *Obiter* (131) 140.

<sup>588</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A) 30.

duties of an agent and mandatary on the estate agent in the sale of the seller's residential property.<sup>589</sup> Nagel points out that the estate agent has the duty to perform the instruction received from the seller to sell his residential property and "also has the ordinary duties of an agent, namely to act in good faith towards his principal and to give account of all actions performed on behalf of the latter."<sup>590</sup> Sharrock, however, categorises the ordinary estate agent's mandate for the sale of the seller's residential property essentially as a contract of mandate, but exceptional, in that the ordinary estate agent's mandate, under common law, does not impose a duty on the estate agent to perform the instruction.<sup>591</sup>

It is therefore necessary to include a brief summary of the duties imposed on an agent in the context of agency and the duties imposed on a mandatary to a contract of mandate in the discussion of the duties imposed on an estate agent in the sale of residential property.

#### **4 2 1 The concept of agency**

Joubert points out that the expression "agency" is used in such a wide variety of meanings that it cannot be regarded as a concept denoting a specific branch of the law.<sup>592</sup> Nagel describes agency as a contractual situation where an agent acts with authority arising from, *inter alia*, a contract of mandate or employment, and performs a juristic act on behalf of his principal, thereby binding the principal and a third party in a legal relationship.

"Agency can be described as the contractual situation where one person, the agent, acting with authority arising from contracts of mandate, employment, estoppel and ratification or by operation of law, performs a juristic act on behalf of another, the principal, causing the latter directly to acquire all rights and

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<sup>589</sup> *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986; *Botha v Smit* 1976 4 SA 885 (A).

<sup>590</sup> Nagel CJ *et al Commercial Law* 5<sup>th</sup> Ed. (2015) LexisNexis Durban (hereinafter Nagel *et al*) at para 12.11.

<sup>591</sup> Sharrock 346.

<sup>592</sup> Dendy, M "Agency and Representation" in *LAWSA Vol 1* 3<sup>rd</sup> Ed. (2013) (hereinafter "Dendy Agency & Representation LAWSA") at para 125.

obligations flowing from such legal act.”<sup>593</sup>

Three rules of agency are identified as:

- a* being based on a tripartite relationship, implying that there are more than two parties involved in the concept of agency;<sup>594</sup>
- b* that the agent must have the authority of his principal to act on the principal's behalf and must act strictly in accordance with the authority; and
- c* that only the principal and the third party acquire rights and duties in terms of the contract, even though the contract was concluded by the agent and the third party.<sup>595</sup>

The agent acting on behalf of his principal must be authorised to do so by his principal.<sup>596</sup> The source of the authority for the agent to act on behalf of his principal may result *ex lege*.<sup>597</sup> Authority may also be granted to an agent in a unilateral juristic act by the principal in terms whereof he delegates power to his agent to act on his behalf.<sup>598</sup>

More commonly, a contractual agreement between the principal and his agent establishes the authority between the parties.<sup>599</sup> Contracts of employment,<sup>600</sup>

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<sup>593</sup> Nagel *et al* at par 10.03; *United Plant Hire v Hills* 1976 1 SA 717 (A); *Strydom v Protea Eiendomme* 1979 2 SA 206 (T); *Putco Ltd v TV & Radio Guarantee Company (Pty) Ltd* [1985] 2 All SA 533 (A); *Totalisator Board OFS v Livanos* 1987 3 SA 283 (W) 291; *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC).

<sup>594</sup> This distinction is important when discussing the concept of a contract of mandate, as the rule of a tripartite relationship does not exist in the concept of a contract of mandate.

<sup>595</sup> Nagel *et al* at para 10.01.

<sup>596</sup> *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) at para 45.

<sup>597</sup> Nagel *et al* at para 10.25. Parents act on behalf of their minor children as a result of the legal relationship between them, a guardian or trustee is appointed to act on behalf of another under his curatorship, his authority resulting from his appointment and a partner is authorised to act on behalf of the partnership as a result of the partnership agreement. *Eaton & Louw v Arcade Properties* 1961 4 SA 233 (T) 240.

<sup>598</sup> The concept of agency resulting from a unilateral juristic act by the principal, granting authority to the agent, falls outside the scope of this dissertation and is only referred to but will not be discussed.

<sup>599</sup> *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed & Hurwitz Estates v Vorner Investments (Pty) Ltd* 1984 3 SA 155 (A) 166; *The Firs Investment Ltd v Levy Bros Estates* 1984 2 SA 881 (A).

<sup>600</sup> *Ongevalle Kommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A); *Linda Erasmus Properties Enterprise v Mhlongo* NO 2007 ILJ 1100 (LC).

mandate,<sup>601</sup> estoppel<sup>602</sup> and ratification<sup>603</sup> are examples of contracts underlying such authority.<sup>604</sup>

#### **4 2 1 1      The duties of an agent in the concept of agency**

An agent must act within the scope of his authority. Any action outside the scope of his authority does not bind his principal to the third party, unless the principal ratifies the action.<sup>605</sup> The authority may be limited<sup>606</sup> to a single action or many actions relating to a single transaction, or to many similar kinds of actions or to all actions on behalf of the principal.

An authority by the principal to his agent, may be accepted in all instances where an action by the principal can be lawfully performed, unless the performance of such an action is of such a personal nature that personal performance is of material importance to the third party. Certain statutory provisions may also compel personal performance of an action, effectively barring a person to authorise another to act on his behalf.<sup>607</sup>

The tripartite relationship which exists as a result of the legal relationship between the agent and his principal, further imposes duties on the agent *vis-à-vis* the third party.

The agent performs a juristic acts on behalf of his principal, which ultimately binds his principal and the third party in a legal relationship. No legal relationship results

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<sup>601</sup> *Coetzer v Mosenthals Ltd* 1963 4 SA 22 (A); *Strydom v De Lange* 1970 2 SA 6 (T); *The Firs Investment Ltd v Levy Bros Estates* 1984 2 SA 881 (A); *FAWU v Ngcobo* 2013 ILJ 1383 (SCA).

<sup>602</sup> *Northern Metropolitan Local Council v Company Unique Finance* [2012] 3 All SA 498 (SCA); *Africast v Panbourne Properties* [2013] 2 All SA 574 (GS).

<sup>603</sup> *Hamdulay v Smith* 1984 3 SA 308 (C).

<sup>604</sup> A discussion of the contracts underlying the authority falls outside the ambit of this dissertation. For purposes of this research, contracts of employment and mandate as the source for the authority in the concept of agency will be discussed.

<sup>605</sup> *Mijhof v Jackson* 1980 3 SA 13 (C); *SDR Investment Holdings Co v Nedcor Bank Ltd* 2007 4 SA 190 (C); *Company Unique Finance v Johannesburg Northern Metropolitan Local Council* 2011 1 SA 440 (GS); *Joubert Scholtz Inc v Elandsfontein Beverage Marketing* [2012] 3 All SA 24 (SCA). Other exeptions to the principal being bound to the actions of an agent outside the scope of his authority include estoppel and ostensible authority. See *Vodacom v Makate* 2016 4 SA 121(CC).

<sup>606</sup> *Joubert Scholtz Inc v Elandsfontein Beverage Marketing* [2012] 3 All SA 24 (SCA).

<sup>607</sup> See *Joel Melamed & Hurwitz v Cleveland Estates* 1984 3 SA 155 (A); *Ericsen v Germie Motors* 1986 4 SA 67 (A); *Potchefstroom Stadsraad v Kotze* 1960 3 SA 616 (A).

between the agent and the third party from the juristic act authorised by the principal and he is not entitled against, or liable to, the third party as a party to the juristic act.

The agent must act within the limits of his authority. Should the agent exceed the limits of his authority, no legal relationship will result between the principal and the third party and the agent may be liable to the third party for any damages caused as a result of exceeding his authority.<sup>608</sup>

The agent may not fraudulently<sup>609</sup> or negligently<sup>610</sup> misrepresent or create an impression to a third party that he has the necessary authority to act on behalf of his principal or that his authority extends to perform a juristic act on behalf of his principal. Any warranty, express or implied<sup>611</sup> of the existence of an authority or the extent of the authority to the third party, by the agent, may result in a claim for damages against the agent, in the instance where the agent misrepresented to the third party and the third party suffered damages as a result of the misrepresentation.

The authority granted by the principal to his agent is automatically terminated on performance of the juristic acts,<sup>612</sup> or on termination of the specific underlying agreement authorising the juristic act by the agent.<sup>613</sup> In addition, the authority may terminate if any party to the underlying agreement becomes incapacitated or if the principal becomes insolvent. The death of either the principal or his agent will also terminate the agreement between the parties, thereby terminating the authority.<sup>614</sup>

The principal may, with notice, revoke the authority granted to his agent. The agent may also cancel the underlying agreement with the principal, but may be liable for any

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<sup>608</sup> *Blower v Van Noorden* 1909 TS 890.

<sup>609</sup> *Hansa Silver (Pty) Ltd v Obifon (Pty) Ltd* 2015 4 SA 17 (SCA).

<sup>610</sup> *Administrateur Natal v Trust Bank Bpk* 1979 3 SA 824 (A).

<sup>611</sup> *Ericson v Germie Motors (Edms) Bpk* 1986 4 SA 67 (A); *Road Accident Fund v Shabangu* [2004] All SA 356 (SCA).

<sup>612</sup> *Martin v Currie* 1921 TPD 50.

<sup>613</sup> *National Board Pretoria (Pty) Ltd v Estate Swanepoel* 1975 3 SA 27 (A); *AN & G Coal Mining Co v Stuart* 1981 3 SA 521 (W).

<sup>614</sup> *Ward v Barret* 1962 4 SA 737 (N); *Klein NO v SA Transport Services* 1992 3 SA 509 (W).

damages as a result of the cancellation of the agreement.<sup>615</sup>

In the instance where a contract of mandate is the source for the authority to the agent in the concept of agency, the mandatary is authorised to act as an agent for his principal and his obligations as an agent, include an obligation to perform the instruction and to act within the limits of his authority.<sup>616</sup>

The principal have the corresponding obligation to refund or compensate the agent for any expenses or losses<sup>617</sup> and to pay the agreed remuneration.<sup>618</sup>

#### **4 2 2 The concept of mandate**

The contract of mandate, as it is known today, developed from the *mandatum* in the Roman law and was fully established in the Roman-Dutch law, as it is applied today.

The modern contract of mandate is an agreement between one party, the mandator and another, the mandatary, in terms whereof the mandatary undertakes to perform the mandate as a specified task or tasks on behalf of the mandator. The mandate may be performed gratuitously or against an agreement for payment.

Joubert explains the contract of mandate to be a consensual contract between one party, the mandator, and another party, the mandatary, in terms of which the mandatary undertakes to perform a mandate for the mandator.

“There must hence be an identifiable offer, in the form of a request that the mandate in question be performed, and an acceptance of that offer, in the sense of acceding to that request, together with an undertaking to carry out the mandate and to perform the various duties imposed by it. For the rest the agreement must comply with all the requirements for a valid and enforceable contract.”<sup>619</sup>

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<sup>615</sup> *Standard Bank of South Africa Ltd v Ocean Commodities* 1983 (1) SA 276 (A).

<sup>616</sup> *Mouton v Mynwerkersunie* 1977 1 SA 119; *Steyn NO v Ronald Bobroff & Partners* 2013 2 SA 311 (SCA).

<sup>617</sup> *Blumenthal v Bond* 1916 AD 29; *Webb & Pretorius v Gavronsky Bros* 1920 AD 48.

<sup>618</sup> *Nel v Nelspruit Motors (Edms) Bpk* 1961 1 SA 582 (AD); *Wool Growers Auctions Ltd v Elliot Brothers (East London) (Pty) Ltd* (1969) 1 PH A9 (A); *Hills and others v Taxing Master and another* 1975 1 SA 856 (D) 863; *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 2 SA 881 (A) 885; *Van Zyl & Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986; *Jurgens Eiendomsagente v Share* 1990 4 SA 664 (A) 675; *Bird v Summerville and another* 1961 3 SA 194 (A) 202; *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1988 3 SA 26 (A) 30.

<sup>619</sup> Van Zyl & Joubert *LAWSA Mandate & Negotiorum Gestio* at para 2.

The specified task or tasks may be simple, such as the collection of a parcel or the delivery of an item,<sup>620</sup> or of a more complex nature such as the performance of a series of actions, such as the performance of a specific transaction together with all that is required to complete the transaction and any related business as a result thereof. The objective of the task must be capable of being performed and may not be illegal, wrongful or immoral.<sup>621</sup>

The mandatary is not, unless otherwise agreed, acting as an agent for the mandator. He performs a task or instruction in return for payment and in doing so, does not act as a representative of the mandator and does not have the authority to perform juristic acts on behalf of the mandator which results in a legally binding relationship between the mandator and a third party.

The contract of mandate is terminated *inter alia* by performance of the mandate,<sup>622</sup> impossibility of the performance, novation, compromise, waiver, set-off or discharge and prescription or rescission, the death of the mandatary,<sup>623</sup> the death of the mandator,<sup>624</sup> insanity of the mandatary or the mandator, sequestration of the mandatary<sup>625</sup> or the mandator,<sup>626</sup> revocation by the mandator<sup>627</sup> and renunciation by the mandatary.

#### **4 2 2 1      The duties of a mandatary in the contract of mandate**

The mandatary in a contract of mandate, must perform the instruction.<sup>628</sup> In doing so,

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<sup>620</sup> Commonly referred to as “non-juristic acts”.

<sup>621</sup> Grotius *Inleidinge* 3 12 2; Van Keesel *Prael ad Gr* 3 12 2.

<sup>622</sup> *Martin v Currie* 1921 TPD 50.

<sup>623</sup> *Ex parte Kelly* 1943 OPD 76.

<sup>624</sup> *Hunt, Leuchars & Hepburn Ltd: in re Jeansson* 1911 NPd 493; *Ex parte Leinberger* 1945 OPD 275; *Bhanjee v Kara Devraj* 1933 OPD 275.

<sup>625</sup> *Rademan's Trustee v Cogle* 1915 GWL 365; *McEwen v Hansa* 1968 1 SA 465 (AD).

<sup>626</sup> *Netherlands Bank of SA v Yull's Trustee & the United Building Society* 1914 WLD 133; *Macfarlane & Jennings v Ismail, MacFarlane & Jennings v Dadamia* 1941 WLD 148.

<sup>627</sup> *Macfarlane & Jennings v Ismail, MacFarlane & Jennings v Dadamia* 1941 WLD 148; *Ex parte Kelly* 1943 OPD 76.

<sup>628</sup> *Bloom's Woolens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 538; *Ese Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 812; *Mouton v Mynwerkersunie* 1977 1 SA 119 (A); *National Screenprint (Pty) Ltd v The Campbell-Scott*

the concept of a mandate imposes a duty on the mandatary to do so personally,<sup>629</sup> within a reasonable period of time or as specified between the parties<sup>630</sup> and he may not exceed the agreed terms of the mandate.<sup>631</sup> The mandatary must perform the task with the necessary knowledge, care and skill<sup>632</sup> and must act in good faith<sup>633</sup> and must act in the exclusive interest of the mandator, at all times.<sup>634</sup> The mandatary is further prohibited from making any secret profits<sup>635</sup> in performing the instruction, must properly advise the mandator and provide all relevant information to him,<sup>636</sup> may not accept any bribes,<sup>637</sup> may not disclose any information obtained concerning his mandator with others<sup>638</sup> and must account to the mandator.<sup>639</sup>

The mandator has the corresponding duty to refund or compensate the mandatary for any expenses or losses<sup>640</sup> and to pay the agreed remuneration.<sup>641</sup>

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*Company (Pty) Ltd* 1979 4 SA 393 (C) 397; *Steyn NO v Ronald Bobroff & Partners* 2013 2 SA 311 (SCA).

<sup>629</sup> *Nel v SAR&H* 1924 AD 30; *Eldraw Motors v Salzwedel* 1984 2 SA 846 (EC).

<sup>630</sup> *Steenkamp v Du Toit* 1910 TPD 171; *Van Rensburg v Slabbert* 1930 EDL 156.

<sup>631</sup> *Mine Workers' Union v Brodrick* 1948 4 SA 959 (AD).

<sup>632</sup> *Bloom's Woolens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 44; *S v Heller* 1971 2 SA 29 (A) 44; *Mouton v Mynwerkersunie* 1977 1 SA 119 (A); *Slomowitz v Kok* 1983 1 SA 130 (A).

<sup>633</sup> *Incorp Law Society v Meyer* 1981 3 SA 962 (T); *Stainer and others v Palmer Pilgrim* 1982 4 SA 205 (O) 210; *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 2 SA 54 (T) 64.

<sup>634</sup> *Bloom's Woolens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 538; *Leites v Contemporary Refrigeration (Pty) Ltd & Sonpoll Investments (Pty) Ltd* 1968 1 SA 58 (AD); *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and another* 1971 3 SA 866 (W) 867; *S v Heller* 1971 2 SA 29 (A) 44; *SA Fabrics Ltd v Millman* 1972 4 SA 592 (AD); *Ese Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 812; *Rabinowitz and another NNO v Ned-Equity Insurance Co Ltd and another* 1980 1 SA 403 (W) 407; *Joel Melamed v Hurwitz and Cleveland Estates (Pty) Ltd* 1984 3 SA 155 (A) 164; *Tobacco Sales Floor Ltd v Chimwala* 1988 3 SA 427 (ZS) 431; *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 2 SA 54 (T) 64; *Van der Merwe v Nedcor Bank Bpk* 2003 1 SA 169 (SCA); *Laniyan v Negota SSH* [2013] 2 All SA 309 (GS).

<sup>635</sup> *Novick v Comair Holdings* 1979 2 116 (W).

<sup>636</sup> *S v Heller* 1964 1 SA 524 (W); *Fox & Caney (Pvt) Ltd v Dilworth* 1974 2 SA 631 (C) 632; *Stainer and others v Palmer-Pilgrim* 1982 4 SA 205 (O) 210.

<sup>637</sup> *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) 845.

<sup>638</sup> *Novick v Comair Holdings* 1979 2 SA 116 (W); *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 2 SA 54 (T) 64.

<sup>639</sup> *Doyle and another v Fleet Motors PE (Pty) Ltd* 1971 3 SA 760 (A) 762; *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 1 SA 961 (W) 963.

<sup>640</sup> *Webb & Pretorius v Gavronsky Bros* 1920 AD 48.

<sup>641</sup> *Nel v Nelspruit Motors (Edms) Bpk* 1961 1 SA 582 (AD); *Bird v Summerville and another* 1961 3 SA 194 (A) 202; *Wool Growers Auctions Ltd v Elliot Brothers (East London) (Pty) Ltd* (1969) 1 PH A9 (A); *Michael v Vermeulen* 1971 1 SA 442 (T); *Bosch v Flower Box (Pty) Ltd* 1971 4 SA 640 (E); *Grizzell v P & W Erection Co (Pvt) Ltd* 1972 4 SA 449 (R); *Meyer v Bree Holdings (Pty) Ltd* 1972 3 SA 353 (T); *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 1 SA 195 (RA); *Fox & Carney (Pvt) Ltd v Dilworth* 1974 2 SA 631 (R); *Maw v Keith-Reed* 1975 4 SA 603 (C); *Hills and others v Taxing Master and another* 1975 1 SA 856 (D) 863; *KDK Investments (Pty) Ltd v*



### 4 3      The duties of an estate agent in the sale of residential property in terms of an estate agent's common law mandate for the sale of the seller's residential property

The point of departure in determining the duties of an estate agent in the sale of residential property in terms of an estate agent's mandate for the sale of the seller's residential property under common law, is the express terms of the agreement between the estate agent and the seller.<sup>642</sup> Nugent AJA in the matter between *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>643</sup> held with reference to the judgement by Jenkins LJ in *Midgley Estates Ltd v Hand*<sup>644</sup> that:

“[o]ne has to look at the particular contract to see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which commission is expressed to be payable”.<sup>645</sup>

The estate agent's duty to perform the instruction received from the seller to sell his residential property in terms of an estate agent's common law mandate was discussed in the matter between *Gluckman v Landau & Co*<sup>646</sup> where Murray J quoted<sup>647</sup> with approval from the English decision of *Luxor (Eastborne) Ltd v Cooper*.<sup>648</sup> In this matter Lord Russel of Killowen held that:

“[n]o obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent”.<sup>649</sup>

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*Investland City and Industrial (Pty) Ltd* (1975) 2 PH A83 (T); *Van Zyl & Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986; *Laskey v Steadmet (Pty) Ltd* 1976 3 SA 696 (T); *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 2 SA 881 (A) 885; *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1988 3 SA 26 (A) 30; *Jurgens Eiendomsagente v Share* 1990 4 SA 664 (A) 675.

<sup>642</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>643</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>644</sup> *Midgley Estates Ltd v Hand* [1952] 2 QB 432 (CA) 435.

<sup>645</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>646</sup> *Gluckman v Landau & Co* 1944 TPD 261.

<sup>647</sup> *Gluckman v Landau & Co* 1944 TPD 261 267.

<sup>648</sup> *Luxor (Eastborne) Ltd v Cooper* [1941] AC 108 (HL) 124.

<sup>649</sup> *Luxor (Eastborne) Ltd v Cooper* [1941] AC (HL) 124 124.

This view was confirmed by the Appeal Court in the matter of *Bird v Summerville and another*<sup>650</sup> where Hoexter ACJ held that an estate agent is under no obligation to sell the seller's residential property.<sup>651</sup> Miller J in the matter between *John H. Pritchard & Associates v Thorny Park Estates*<sup>652</sup> held that an estate agent is not liable to the seller if he fails to sell the seller's property, even if he was in a position to do so.<sup>653</sup>

In the matter between *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd*<sup>654</sup> the Appeal Court interpreted the estate agent's "Mandate to Sell" by AFC Property Development Co (Pty) Ltd to Eileen Louvet Real Estate (Pty) Ltd. The "Mandate to Sell" read as follows:

"Mandate to Sell

I, the undersigned, David MacGregor Munro duly authorized hereto in terms of a resolution passed by the shareholders of AFC Property Development Co (Pty) Ltd, ... do hereby grant Eileen Louvet Real Estate (Pty) Ltd the sole and exclusive right to sell the above property, .... Upon the sale of each stand and/or unit AFC Property Development Co (Pty) Ltd will be liable for commission in accordance with the tariff of the Institute of Estate Agents (Southern Transvaal branch)."

Van Heerden JA held that:

"[i]t has, of course often been held that, save for certain exceptions, an agent's mandate may summarily be revoked by his principal, even if it is expressed to be irrevocable. A mandate in this sense is an authority, derived from an agreement of agency, to perform a juristic act on behalf of the principal. But in law an ordinary estate agent (to whom, for convenience, I shall refer as a realtor) is not appointed by virtue of such an agreement. He cannot sell property on behalf of the owner, nor can he perform any juristic act binding the owner. The latter merely undertakes to compensate him should a certain eventuality occur; usually if he introduces a willing and able purchaser as a result of which the property is sold to the person thus introduced. The contract between the owner and the realtor is therefor also not an agreement of mandate; the realtor is not obliged to perform his mandate".<sup>655</sup>

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<sup>650</sup> *Bird v Summerville and another* 1961 3 SA 194 (A).

<sup>651</sup> *Bird v Summerville and another* 1961 3 SA 194 (A) 202.

<sup>652</sup> *John H. Pritchard & Associates v Thorny Park Estates* 1967 2 SA 511 (D).

<sup>653</sup> *John H. Pritchard & Associates v Thorny Park Estates* 1967 2 SA 511 (D) 517.

<sup>654</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A).

<sup>655</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A) 30. In *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A), Nugent AJA held that the instruction to an estate agent to sell the seller's residential property, without any other specific terms and conditions, does not imply that the property must be sold to a buyer introduced by the estate agent, but only

In *Low v Shedden*<sup>656</sup> Erasmus AJ explained the duties imposed on an estate agent with reference to the duties imposed on a mandatary, but held that an estate agent is exceptional in that he is under no obligation to perform the instruction received from the seller, rather “he has an opportunity to earn commission”.<sup>657</sup>

Nugent AJA in *Ronstan Investments (Pty) Ltd and Another v Littlewood*<sup>658</sup> held that:

“[t]he appointment of an estate agent to find a purchaser for immovable property in return for commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event”.<sup>659</sup>

In the matter between *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>660</sup> it was argued by the appellant that it was an implied term of the agreement between the appellant and the respondent that the respondent would only be entitled to a payment of commission under specific circumstances. Nugent AJA held that “the law imports no such term into an agreement of this nature” and the express terms of the agreement between the appellant and the respondent must be the point of departure to determine what was agreed between them.<sup>661</sup>

Support is however also found to incorporate implied terms to the estate agent’s common law mandate for the sale of the seller’s residential property which impose duties on the estate agent. Marais J in the matter between *Aida Real Estate v Lipschitz*<sup>662</sup> acknowledged the duty of an estate agent to perform the instruction

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that the estate agent must bring about a sale between the seller and a willing and able buyer and that the estate agent must be the effective cause of the sale (at para 8).

<sup>656</sup> *Low v Shedden* [2001] 2 All SA 171 (C).

<sup>657</sup> *Low v Shedden* [2001] 2 All SA 171 (C) 181.

<sup>658</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

<sup>659</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA) at para 1.

<sup>660</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>661</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>662</sup> *Aida Real Estate v Lipschitz* 1971 3 SA 871 (W).

received from the seller and held that:

“[t]he Law with regard to a matter of this kind is usually stated in the following form: The duty of the estate agent, if he is to earn remuneration by way of commission for selling a property, is to introduce to his principal (the seller) a purchaser who is willing and financially able to buy the property, and he earns his commission if a sale is concluded with that purchaser at the stipulated price or a price ultimately proved to have been acceptable to the seller”.<sup>663</sup>

Van Heerden R in the matter between *Van Zyl en Seuns (Edms) Bpk v Nel*<sup>664</sup> defined the legal relationship between the estate agent and his client as follows:

“’n Opdrag aan ‘n eiendomsagent om ‘n koper te vind het as oogmerk die sluiting van ‘n koopkontrak maar plaas die agent egter onder geen verpligting om self die onderhandelings vir die koop te voer en om te sien na die voltooiing van die koopkontrak of die uitvoering daarvan nie. Wat van hom verwag word is om ‘n persoon te vind wat gewillig en in staat is om te koop...”<sup>665</sup>

#### **4 4 Chapter conclusion**

In the absence of express terms to the agreement between the estate agent and the seller for the sale of the seller’s residential property which stipulate specific duties imposed on the duties of the estate agent in the performance of the instruction to sell the seller’s residential property, common law does not impose any contractual duties on the estate agent in the sale of the seller’s residential property.<sup>666</sup>

There is support for an argument that the estate agent’s common law mandate for the sale of the seller’s residential property bear characteristics of both agency and mandate and therefore impose duties on the estate agent similar to an agent and mandatory.<sup>667</sup> In this regard Delpont argue, with reference to the *Ronstan Investments*

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<sup>663</sup> *Aida Real Estate Ltd v Lipschitz* 1971 3 SA 871 (W) 873. In *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A), Nugent AJA held that the instruction to an estate agent to sell the seller’s residential property, without any other specific terms and conditions, does not imply that the property must be sold to a buyer introduced by the estate agent, but only that the estate agent must bring about a sale between the seller and a willing and able buyer and that the estate agent must be the effective cause of the sale (at para 8).

<sup>664</sup> *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N).

<sup>665</sup> *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986.

<sup>666</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 SCA at para 1.

<sup>667</sup> *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986; *Botha v Smit* 1976 4 SA 885 (A); Nagel *et al* 2015 at para 12.11; Sharrock 346.

(Pty) Ltd v Littlewood<sup>668</sup> judgement, that although there are no implied terms to the estate agent's common law mandate for the sale of the seller's residential property that impose duties on the estate agent to sell the seller's residential property, there are no closed categories of implied terms and "a strong case can be made out for our common law of estate agency to be developed to the extent that an implied term be read into every estate agency mandate that the estate agent must act in the interest of the principal (seller) and perform the mandate with diligence and care."<sup>669</sup>

In *lieu* of a development of the common law to amend the common law rules governing the estate agent's mandate for the sale of the seller's residential property to import terms which impose contractual duties on the estate agent in the sale of residential property, the seller will conversely not have any rights under common law, including the right to cancel the agreement with the estate agent and institute a claim for damages against the estate agent who "incurs no liability towards his principal if he fails to find a purchaser when he could have done so."<sup>670</sup>

#### **4 4 1 Section 173 of the Constitution**

Section 173 of the Constitution provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to develop the common law, taking into account the interests of justice.

In the matter between *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Limited and Another*<sup>671</sup> Van der Westhuizen J held that:

"[b]efore a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of

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<sup>668</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 SCA.

<sup>669</sup> Delport 2009 *Obiter* (131) 139.

<sup>670</sup> *John H. Prichard & Associates v Thorney Park Estates* 1967 2 SA 511 (D) 517.

<sup>671</sup> 2016 1 BCLR 28 (CC).

law".<sup>672</sup>

Referring to the matter between *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*<sup>673</sup> Van der Westhuizen J confirmed that the courts have an obligation to develop the common law in those instances where the common law deviates from the spirit, purposes and objectives of the Bill of Rights.<sup>674</sup>

The Constitutional Court, in the matter between *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Limited and Another*,<sup>675</sup> cautions that although section 173<sup>676</sup> of the Constitution provides for the development of the common law, legislation is more appropriately equipped to bring about fundamental changes to the fabric of the common law.<sup>677</sup>

Van Eeden & Barnard<sup>678</sup> point out that the CPA amends many existing common law rules by introducing additional *naturalia* to specific consumer agreements.<sup>679</sup> Section 19(2)(a)<sup>680</sup> of the CPA provides for such an amendment of the common law by introducing mandatory contractual terms as implied terms to every agreement between the seller and the estate agent for the sale of the seller's residential property. Section 19(2)(a) of the CPA impose a contractual duty on the estate agent to perform the services to bring about a sale of the seller's residential property on an agreed date and time, if any, or within a reasonable time after concluding the agreement with the

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<sup>672</sup> At para 38.

<sup>673</sup> [2001] JOL 8613 (CC).

<sup>674</sup> *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Limited and Another* 2016 1 BCLR 28 (CC) at para 39.

<sup>675</sup> 2016 1 BCLR 28 (CC).

<sup>676</sup> S 173 of the Constitution provides that the Constitutional Court, the Supreme Court of Appeal and the High Court have the inherent power to develop the common law, taking into account the interest of justice.

<sup>677</sup> 2016 1 BCLR 28 (CC) 37.

<sup>678</sup> Van Eeden & Barnard 59 & 314.

<sup>679</sup> A "consumer agreement" is defined in s 1 of the CPA as "an agreement between a supplier and a consumer other than a franchise agreement."

<sup>680</sup> A critical analysis of the application of s 19 of the CPA is included in ch 5 of this research.

seller,<sup>681</sup> and at the agreed locations<sup>682</sup> thereby amending the rules of the estate agent's common law mandate for the sale of the seller's residential property by incorporating mandatory contractual terms as *naturalia* to the estate agent's mandate, which do not impose any contractual duties on the estate agent.<sup>683</sup>

The importance of a development of the common law rules of the estate agent's mandate for the sale of the seller's residential property becomes evident when a dissemination of the remedies available to the seller under the CPA<sup>684</sup> confirms that, under the CPA, the only remedy available to the seller of the residential property, in those instances where the estate agent performs the services to bring about a sale of the seller's residential property to a willing and able buyer in breach of section 19(2)(a) of the CPA, is to require the estate agent to remedy the defect in the performance of the services.<sup>685</sup> The seller must, in the result, rely on his common law rights law rights<sup>686</sup> to cancel the agreement with the supplier. The common law right to cancel the agreement with the estate agent is however, unless the seller and the estate agent expressly agree on the respective contractual rights and duties of the seller and the estate agent, not available to the seller of residential property under the common law rules of the estate agent's mandate for the sale of the seller's residential property.

Unless the common law is developed to amend the common law rules of the estate agent's mandate for the sale of the seller's residential property in order to incorporate as *naturalia* a contractual duties on the estate agent to sell the seller's residential

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<sup>681</sup> S 19(2)(a)(i) of the CPA.

<sup>682</sup> S 19(2)(a)(ii) of the CPA.

<sup>683</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

<sup>684</sup> The remedies available to the seller of the residential property under s 19 and s 54 of the CPA are disseminated in ch 5 of this research.

<sup>685</sup> S 54(2)(a) of the CPA. The remedies available to the seller of residential property under the CPA are discussed in ch 5.

<sup>686</sup> S 2(10) of the CPA provides that no provision of the CPA may be interpreted in a manner which excludes a consumer's rights in terms of the common law.

property as provided for under section 19(2)(a) of the CPA, the seller is effectively deprived of the remedy under both the common law and in terms of the CPA, to cancel the estate agent's mandate under circumstances where the estate agent supplies or performs the services to bring about a sale of the seller's residential property in breach of the contractual terms, implied to the estate agent's common law mandate under section 19(2)(a) of the CPA.

Presently, the seller of residential property, who is dissatisfied with the manner in which the estate agent performs the services to bring about a sale of the his residential property, is unable to effectively exercise his common law right of cancellation in those instances where the estate agent finds himself in breach of the terms of the agreement with the seller, for the sale of the seller's residential property and, is, in addition, precluded from instituting a civil claim for damages against the estate agent.

Therefore, although the consumer's common law rights are preserved under section 2(10) of the CPA, these rights are not, without a development of the common law to incorporate as implied terms contractual duties on the estate agent in the sale of residential property as provided for under section 19(2)(a) of the CPA, available to the seller of residential property.



## **Chapter 5: THE DUTIES OF AN ESTATE AGENT IN THE SALE OF RESIDENTIAL PROPERTY UNDER THE CPA**

### **5 1 Introduction**

The CPA primarily<sup>687</sup> applies<sup>688</sup> to:

- a* the relationships, agreements and transactions between a supplier and consumer;<sup>689</sup>
- b* the marketing of goods or services by a supplier to a consumer;<sup>690</sup>
- c* the supply of goods or the performance of services by the supplier to the consumer;<sup>691</sup> and
- d* the goods and services supplied by the supplier to the consumer.<sup>692</sup>

An application of the CPA in the sale of residential property by an estate agent in terms of an agreement with the seller to sell his residential property as provided for under section 1(a)(iii) of the definition of “transaction”, was established in chapter 2 of this research.

From the outset, it is important to be reminded of the nature of the common law estate agent’s mandate for the sale of the seller’s residential property and the service expected of the estate agent in the sale the seller’s residential property. Under common law, the express terms of the agreement between the seller and the estate agent for the sale of the seller’s residential property, determine what was agreed between them.<sup>693</sup> At the very least, the seller and the estate agent must agree on the services expected of the estate agent in respect of the seller’s residential property and

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<sup>687</sup> Van Eeden & Barnard 35.

<sup>688</sup> S 5 of the CPA regulates the application of the CPA.

<sup>689</sup> S 5(1)(a) of the CPA read together with (a)(i) of the definition of “transaction” in s 1 of the CPA.

<sup>690</sup> S 5(1)(b) of the CPA.

<sup>691</sup> See (a)(ii) and (a)(iii) of the definition of “transaction” in s 1 of the CPA.

<sup>692</sup> S 5(1)(c) and 5(1)(d) of the CPA.

<sup>693</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

payment, usually in the form of a commission payable by the seller to the estate agent on the sale of the seller's residential property to a willing and able buyer.<sup>694</sup>

The service expected of an estate agent in the sale of the seller's residential property in terms of the estate agent's mandate for the sale of the seller's residential property, is described by Nugent AJA in the matter between *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*<sup>695</sup> as follows:

“[w]hen parties agree ... that the agent will “sell” the property they envisage no more than that the agent will bring about a sale between principals”.<sup>696</sup>

The estate agent is expected to take all reasonable steps to bring about a sale of the seller's residential property to a willing and able buyer, including, but not limited to, services such as the continual marketing of the seller's residential property to prospective buyers through advertising, show house days and the introduction of the property to prospective buyers.

The estate agent is also not, unless specifically authorised by the seller in writing,<sup>697</sup> clothed with the authorised to sell the seller's residential property.<sup>698</sup> Regulation 1(d) of the Code of Conduct<sup>699</sup> defines an “estate agency service” with reference to sections 1(a)(i) – (a)(iv) of the definition of “estate agent” in the EAAA. In the context of the sale of residential property by the estate agent on instruction received from the

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<sup>694</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>695</sup> [2001] 3 All SA 25 (A) at para 8. *Brayshaw v Schoeman* 1960 1 SA 625 (A); *John Pritchard & Associates (Pty) Ltd v Thorney Park Estate (Pty) Ltd* 1967 2 SA 511 (D); *Vanarthdoy (Edms) Bpk v Roos* 1979 4 SA 1 (A).

<sup>696</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8. An estate agent is not authorised to perform a juristic act on behalf of the seller and cannot, unless specifically authorised in writing, sell the seller's residential property.

<sup>697</sup> S 2(1) of the ALA; Reg 3 5 of the Code of Conduct.

<sup>698</sup> *Bird v Summerville and another* 1961 3 SA 194 (A) 202; *John H Pritchard & Associates (Pty) Ltd v Thorney Park Estates (Pty) Ltd* 1967 2 SA 511 (D) 517; *Aida Real Estate Ltd v Lipschitz* 1971 3 SA 871 (W) 873; *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N) 986; *Eileen Louvet Real Estate (Pty) Ltd v Property Development Co (Pty) Ltd* 1989 3 SA 26 (A) 30; *Low v Shedden* [2001] 2 All SA 171 (C) 181; *Tyrone Selmon Properties (Pty) Ltd v Phindada Properties 112 (Pty) Ltd* [2006] 1 All SA 545 (C) 553.

<sup>699</sup> Published by the EAAB under s 8(1)(b) of the EAAA.

seller of residential property, an “estate agency service” means to sell immovable property on the instruction or on behalf of another person. It is reiterated that the term “sell” is used in this research, unless indicated otherwise, as an instruction by the seller of the residential property to the estate agent to bring about a sale between the seller of the residential property and a willing and able buyer and the term “sale” indicates a corresponding meaning.

Chapter 2 of the CPA introduced eight<sup>700</sup> fundamental consumer rights and in the context of the supply<sup>701</sup> or performance of services to bring about a sale of the seller’s residential property as provided for in section (a)(iii) of the definition of transaction in section 1 of the CPA. Section 19 of the CPA, included in Part C of Chapter 2 of the CPA, introduced a seller’s fundamental rights with respect to the supply of services and section 54 of the CPA, included in Part H of Chapter 2 of the CPA, introduced a seller’s fundamental right to demand quality services.

Van Eeden & Barnard<sup>702</sup> point out that the CPA changes “many of the rules of the common law (or making some of them mandatory, if in amended form)”. Section 19 and section 54 of the CPA, amend the common law rules governing the specific type of agreement<sup>703</sup> between a seller and an estate agent for the sale of the seller’s

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<sup>700</sup> The right of equality in the consumer market (Part A), the right to privacy (Part B), the right to choose (Part C), the right to disclosure and information (Part D), the right to fair and responsible marketing (Part E), the right to fair and honest dealings (Part F), the right to fair, just and reasonable terms and conditions (Part G), the right to fair value, good quality and safety (Part H) and the right to demand a supplier’s accountability to consumers (Part I).

<sup>701</sup> “[S]upply” when used as a verb, is defined in s 1 of the CPA in relation to services to mean to sell the services, to perform or cause the services to be performed and to grant access to any premises, event, activity or facility in the ordinary course of the supplier’s business, for consideration.

<sup>702</sup> Van Eeden & Barnard 59.

<sup>703</sup> The express terms of the agreement between the seller and the estate agent determine what was agreed between them (see *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1). Under common law, the estate agent’s mandate for the sale of the seller’s residential property provides for an instruction by the seller to the estate agent to sell his residential property, which instruction the estate agent accepts, together with an undertaking by the seller to compensate the estate agent, usually in the form of a commission calculated as a percentage of the purchase price, on the sale of the seller’s residential property to a willing and able buyer (*Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP)).

residential property. Section 19 of the CPA imports mandatory terms to the agreement, thereby introducing *naturalia*, that impose contractual duties on the estate agent, to supply or perform the services to sell the seller's residential property on the agreed date and time, if any, or within a reasonable time after concluding the transaction with the seller<sup>704</sup> and at the agreed location for the performance of the services.<sup>705</sup> Section 54(1) of the CPA introduce statutory duties on the estate agent to supply or perform and complete the services to bring about a sale of the seller's residential property to a willing and able buyer timely and inform the seller timely of any unavoidable delay in the performance of the services,<sup>706</sup> in a manner and quality that persons are generally entitled to expect,<sup>707</sup> and to return control over the seller's residential property to the seller in at least as good a condition as when it was made available to him.<sup>708</sup>

The intervention of the CPA, specifically in the context of the duties imposed on an estate agent in the sale of residential property in terms of an agreement with the seller to sell his residential property, "brought about significant changes to the commercial arena".<sup>709</sup> Under section 4(2)(a) of the CPA the Tribunal or court must, in any matter before them, develop the common law as is necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by those persons contemplated in section 3(1)(b) of the CPA. The provisions of section 4(2)(a) of the CPA must be read together with section 173 of the Constitution which provides that "[t]he Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice" by determining:

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<sup>704</sup> S 19(2)(a) of the CPA.

<sup>705</sup> S 19(2)(a)(ii) of the CPA.

<sup>706</sup> S 54 (1)(a) of the CPA.

<sup>707</sup> S 54(1)(b) of the CPA.

<sup>708</sup> S 54(1)(d) of the CPA.

<sup>709</sup> Barnard 2012 *De Jure* 455.

- a* exactly what the common law position is;
- b* considering the underlying reasons for it;
- c* determining whether the common law rule offends the spirit, purpose and objectives of the Bill of Rights and therefore requires development; and
- d* determine precisely how the common law should be amended.<sup>710</sup>

The application of the provisions of section 19 and section 54 of the CPA in relation to the supply or performance of services as provided for in section 1(a)(iii) of the definition of “transaction”, will be analysed in paragraph 5 2 of this research. The analysis of the provisions of section 19 and section 54 of the CPA<sup>711</sup> will be applied in a critical analysis of the duties imposed on an estate agent under section 19 as well as section 54 of the CPA, specifically in the context of the sale of residential property by an estate agent in terms of an agreement with the seller to sell his residential property with the aim of answering the critical question: what are the duties of an estate agent in the sale of residential property?

In order to arrive at a logical conclusion and recommendation in chapter 6 of this research, the remedies available to the seller under circumstances where the estate agent supplies or performs the services to bring about a sale of the seller’s residential property to a willing and able buyer in breach of the duties imposed on the estate agent under section 19 and section 54 of the CPA, will be disseminated in paragraph 5 3 of this research.

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<sup>710</sup> *Carmichele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC) at para 33.

<sup>711</sup> See para 5 2 of this research.

**5 2            The application of the provisions of section 19 and section 54 of the CPA in the supply or performance of services by an estate agent in the sale of residential property**

**5 2 1   Introduction**

In the context of the supply or performance of services, section 19 of the CPA regulates the consumer's rights in respect of the supply of services<sup>712</sup> by importing mandatory terms to the agreement between the consumer and the supplier that impose contractual duties on the supplier in the supply or performance of the services. Section 54 of the CPA, which regulates a consumer's right to demand quality services,<sup>713</sup> imposes additional statutory duties on the supplier in the supply or performance of the services.

In the context of the supply of services, section 19(2) of the CPA provides that:

- “[u]nless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of ... services that –
- (a) the supplier is responsible to ... perform the services-”
    - (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement; [and]
    - (ii) at the agreed place of ... performance.
  - (b) the agreed place of ... the performance of the services is the supplier's place of business, if the supplier has one, and if not, the supplier's residence”.

Section 54(1) of the CPA regulates the consumer's right to demand quality services and provides that the consumer has the right to:

- “(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of such services;
- (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
- (c) the use, delivery or installation of any goods that are free of defects and of a quality that persons are generally entitled to expect, if any such

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<sup>712</sup> S 19 does not apply to the supply of services to a franchisee in terms of a franchise agreement (s 19(1)(a)) and a transaction, if the performance of that transaction is governed by the provisions of section 46 of the Electronic Communications and Transactions Act 25 of 2002 (hereinafter the ECTA) (s 19(1)(b)).

<sup>713</sup> S 54(2)(b) of the CPA.

- goods are required for the performance of the services;<sup>714</sup> and
- (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for purposes of performing such services<sup>715</sup> having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.”

In analysing the provisions of section 19 and section 54 of the CPA in relation to the supply or performance of services as provided for under section 1(a)(iii) of the definition of “transaction”, the following key aspects, which are in some instances duplicated in section 19 and section 54 of the CPA, are specifically discussed:

- a the concepts of an “agreed date and time”, “reasonable time”<sup>716</sup> or “timely”<sup>717</sup> and the concept of an “unavoidable delay”;<sup>718</sup>
- b the concept of the “manner and quality that persons are generally entitled to expect”;<sup>719</sup>
- c the concept the “return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it

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<sup>714</sup> S 54(1)(c) of the CPA regulates the quality of any goods that are used, delivered or installed as is required for the performance of a service and is not relevant for purposes of this research.

<sup>715</sup> S 54(1)(d) of the CPA. The provisions of s 54(1)(d) must be read together with the provisions of s 65 and s 67 of the CPA included in Part I of Chapter 2 of the CPA which deals with the supplier’s accountability to consumers. S 65(2) of the CPA places a duty on the supplier not to treat any property belonging to the consumer as being the property of the supplier and to exercise a degree of care, diligence and skill in the handling, safeguarding and utilisation of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of the consumer, that can reasonably be expected of a person responsible for managing any property belonging to another. A supplier who has possession of any property belonging to or ordinarily under the control of a consumer, is liable to the owner of the property for any loss resulting from the supplier’s failure to comply with the provisions of s 65(2)(a) or s 65(2)(b) of the CPA. S 67 of the CPA deals with the return of parts and materials and provides that when a supplier is authorised to perform any service to any goods or property belonging to or ordinarily under the control of the consumer, the supplier must retain any of the parts or components of the parts, removed from any goods or property of or under the control of the consumer for any repair or maintenance work, separate from any parts removed from other goods or property and return the parts or components so removed to the consumer in a reasonably clean container.

If a consumer gives possession of or control over property to a supplier for purposes of enabling the latter to perform the agreed services, the consumer is entitled to demand the return of any property or control over any property in at least as good a condition as when it was made available to the supplier.

<sup>716</sup> S 19(2)(a)(i) of the CPA.

<sup>717</sup> S 54(1)(a) of the CPA.

<sup>718</sup> S 54(1)(a) of the CPA.

<sup>719</sup> S 54(1)(b) of the CPA.

available to the supplier for purposes of performing such services”;<sup>720</sup>

- d* the concept of “the agreed place” for the performance of the services;<sup>721</sup>
- e* the concepts of “[u]nless otherwise expressly provided or anticipated in an agreement” and “any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services” and the incorporation of terms which exclude, set aside or override a consumer’s fundamental rights under section 19(2)(a)(i) and section 54(1)(a) of the CPA; and
- f* the concept of the “circumstances of the supply” as provided for in section 54(1)(a) of the CPA.

**5 2 2 The concepts of an “agreed date and time”, “reasonable time” and “timely” under section 19(2)(a)(i) and section 54(1)(a) of the CPA and the concept of an “unavoidable delay” under section 54(1)(a) of the CPA**

Section 19(2)(a)(i) of the CPA provides that a supplier is responsible to perform the services on the agreed date and time. If the consumer and the supplier do not agree on a specific date and time for the supply or performance of the services, it is an implied term of the agreement between the consumer and the supplier that the services must be supplied or performed within a reasonable time after concluding the transaction or agreement with the consumer. The provisions of section 19(2)(a)(i) of the CPA, in so far as it regulates the supply or performance of services within a reasonable time, must be read with the provisions of section 54(1)(a) of the CPA, which provides for a consumer’s fundamental right to demand timely performance or completion of the services and timely notice of any unavoidable delay in the

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<sup>720</sup> S 54(1)(d) of the CPA.

<sup>721</sup> S 19(2)(a)(ii) of the CPA.



performance or completion thereof.

In the matter between *Coertze and Another v Young*<sup>722</sup> the agreement for the supply or performance of services between the consumer and the supplier did not include an agreement for the performance of the services on a specific date and time. The Tribunal held that the supplier's failure to perform the services within a reasonable time constituted a contravention of the provisions of section 19(2)(a)(i) and section 54(1)(a) of the CPA.<sup>723</sup> On this basis, it is argued that the concepts of a performance within a "reasonable time"<sup>724</sup> and a "timely"<sup>725</sup> performance or completion of services, are synonymous for purposes of section 19(2)(a)(i) and section 54(1)(a) of the CPA and, stipulate the criteria for the performance of services in every instance where the agreement between the consumer and the supplier for the supply or performance of services does not specify a date and time for the performance of the services.

The concepts of a "reasonable time"<sup>726</sup> or "timely"<sup>727</sup> are not explained<sup>728</sup> in the CPA<sup>729</sup> and the Tribunal, in the matter between *Coertze and Another v Young*<sup>730</sup> did not elaborate on the criteria applied by the court in determining whether the delay in performing the services was unreasonable.

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<sup>722</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25.

<sup>723</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25 at para 27.

<sup>724</sup> S 19(2)(a)(i) of the CPA.

<sup>725</sup> S 54(1)(a) of the CPA.

<sup>726</sup> S 19(2)(a)(i) of the CPA.

<sup>727</sup> S 54(1)(a) of the CPA.

<sup>728</sup> S 1 of the CPA provides a list of defined terms and phrases and s 53 of the CPA provides for definitions applicable to Part H of the CPA, which includes section 54. The terms "reasonable time" and "timely" are not defined in s 1 or in s 54 of the CPA.

<sup>729</sup> S 19(3) of the CPA provides that the supplier must not require the consumer to accept performance of the services at an unreasonable time. The performance of services "within a reasonable time" as provided for in s 19(2)(a)(i) of the CPA refers to a reasonable period of time. The "unreasonable time" referred to in s 19(3) of the CPA refers to a specific time, i.e. at 24h00 or at 06h00.

<sup>730</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25.

**5 2 2 1      The duties imposed on an estate agent to supply or perform the services on the agreed date and time, or within a reasonable time and to give timely notice of an unavoidable delay in performing or completing the services**

**5 2 2 1 1      Introduction**

Section 19 of the CPA regulates the terms of the estate agent's mandate for the sale of the seller's residential property. Section 19(2)(a) of the CPA provides for mandatory terms to be implied to the estate agent's mandate for the sale of the seller's residential property. Under section 19(2)(a)(i) of the CPA, the services must be performed on an agreed date and time and if the seller and the estate agent do not agree on a specific date and time for the performance of the service, section 19(2)(a)(i) of the CPA provides that estate agent must perform the services within a reasonable time after concluding the agreement or transaction with the seller. Section 54 of the CPA impose duties on the estate agent in the performance of the services. Section 54(1)(a) of the CPA provides for the seller's right to demand timely performance and completion of the services and timely notice of any unavoidable delay in the performance of the services.

**5 2 2 1 2      The sale of the seller's residential property on the agreed date and time under section 19(2)(a)(i) of the CPA**

The service expected of an estate agent in the sale of the seller's residential property is to bring about a sale between principals.<sup>731</sup> The estate agent is expected to take all reasonable steps to bring about a sale of the seller's residential property to a willing and able buyer, which includes services such as the continual marketing of the seller's residential property to prospective buyers through advertising, show house days and

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<sup>731</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

the introduction of the property to prospective buyers, but does not guarantee a successful outcome. It is therefore unlikely that the seller and the estate agent will include a term in the estate agent's mandate for the sale of the seller's residential property that provides for the performance of the services on a certain date and time.<sup>732</sup>

**5 2 2 1 3     The performance and completion of the services within a reasonable time or timely under section 19(2)(a)(i) and section 54(1)(a) of the CPA**

In *lieu* of an agreement between the seller and the estate agent for the sale of the seller's residential property on a specific date and time, section 19(2)(a)(i) of the CPA provides that it is an implied term of the estate agent's mandate for the sale of the seller's residential property, that the services must be performed within a reasonable time after concluding the estate agent's mandate for the sale of the seller's residential property.<sup>733</sup> The provisions of section 19(2)(a)(i) of the CPA, in so far as it regulates the performance of services within a reasonable time after concluding the transaction or agreement for the performance of the services, overlap the provisions of section 54(1)(a) of the CPA which provide for a consumer's right to demand timely performance and completion of services.<sup>734</sup>

The phrases "within a reasonable time" and "timely" is not explained in the CPA, but bear the same meaning for purposes protecting a consumer's rights in relation to the performance of services under section 19 and section 54 of the CPA.<sup>735</sup> In the context

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<sup>732</sup> A sole mandate, which confers on the estate agent the sole right to sell the seller's residential property, must include an expiry date, expressed as a calendar date (see reg 3 3 2 of the Code of Conduct). The expiry date as agreed between the estate agent and the seller is not a date for the performance of the services, but rather a date within which the estate agent has the sole opportunity to sell the seller's residential property.

<sup>733</sup> S 19(2)(a)(i) of the CPA.

<sup>734</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25.

<sup>735</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25 at para 27.

of the sale of residential property the “circumstances of the supply, and any specific criteria or conditions” agreed between the estate agent and the seller before or during the performance of the services must be taken into consideration when determining whether the estate agent performed and completed the services “within a reasonable time” or “timely” and informed the seller “timely” of any unavoidable delay as contemplated in section 19(2)(a)(i) and section 54(1)(a) of the CPA.

The influence of the “circumstances of the supply”<sup>736</sup> on the duties imposed on an estate agent to sell the seller’s residential property within a reasonable time or timely is analysed in paragraph 5 2 7 below.

#### **5 2 2 1 4      The timely notice of an unavoidable delay in the performance and completion of the services under section 54(1)(a) of the CPA**

Under section 54(1)(a) of the CPA, the seller is also entitled to demand the timely notice of any unavoidable delay in the performance of the services to bring about a sale of the seller’s residential property.

An “unavoidable delay” is not defined the CPA.<sup>737</sup> It is argued that an unavoidable delay refers to a delay which is the result of circumstances beyond the estate agent’s control and which makes it impossible for the estate agent to perform the services as agreed within a reasonable time after concluding the agreement with the seller for the sale of the seller’s residential property. In addition, the estate agent could not, by taking reasonable steps, have been avoided by the estate agent.<sup>738</sup>

The estate agent must notify the seller as soon as reasonably possible after he became aware of a delay in the sale of seller’s residential property,<sup>739</sup> to escape liability

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<sup>736</sup> S 54(1) of the CPA.

<sup>737</sup> S 1 of the CPA provides a list of defined terms and phrases and s 53 of the CPA provides for definitions applicable to Part H of the CPA, which includes section 54. The term “unavoidable delay” is not defined in s 1 or in s 54 of the CPA.

<sup>738</sup> De Stadler in Naudé & Eiselen Revision Service 1 (2016) 54-11.

<sup>739</sup> Naudé & Eiselen Revision Service 1 (2016) 54-12.

under section 54 of the CPA.

### **5 2 3 The concept of the “manner and quality that persons are generally entitled to expect” under section 54(1)(b) of the CPA**

Section 54(1)(b) of the CPA provides that a consumer has the right to demand the performance of services “in a manner and quality that persons are generally entitled to expect.”

Section 53 of the CPA provides definitions of terms specifically applicable to Part H<sup>740</sup> of Chapter 2 of the CPA and defines a “defect”, in relation to services to mean “any material imperfection ... in performance of the services that renders the ... results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances.”<sup>741</sup>

A “material imperfection” is not defined in the CPA.<sup>742</sup> The term “material”, when used as an adjective to describe evidence or facts in law, is defined<sup>743</sup> as “significant” or “important”.<sup>744</sup>

The “consumer expectation test” or “legitimate expectation test”<sup>745</sup> which is applied to determine whether the performance of a service is in a manner and quality that persons are generally entitled to expect regards the performance of the services as being materially imperfect,<sup>746</sup> if the defect in the performance of the services is significant and important to the extent that such imperfection renders the result of the service less acceptable than persons generally would be reasonably entitled to expect

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<sup>740</sup> Part H regulates a consumer’s fundamental right to fair value, good quality and safety.

<sup>741</sup> S 53(1)(a)(i) of the CPA.

<sup>742</sup> S 1 of the CPA provides a list of defined terms and phrases and s 53 of the CPA provides for definitions applicable to Part H of the CPA, which includes section 54. The term “material imperfection” is not defined in s 1 or in s 54 of the CPA.

<sup>743</sup> <https://en.oxforddictionaries.com/> accessed on 18 July 2018.

<sup>744</sup> *Oatorian Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A) 785.

<sup>745</sup> Naudé & Eiselen Revision Service 1 (2016) 54-14.

<sup>746</sup> See the definition of “defect” in s 53(1)(a)(i) of the CPA.

in the circumstances.<sup>747</sup> Loubser & Reid<sup>748</sup> point out that the inclusion of the term “acceptable” indicates a “subjective reaction to the ... services” but is further defined by an additional standard to be applied to determine whether the performance of the services is less acceptable than persons generally would be reasonably entitled to expect in the circumstances.<sup>749</sup> Several factors are taken into consideration when assessing the standard of quality of the services including:

- a* the intended standard of the services;
- b* the standard of the specific services under any legislation applicable to the specific services;
- c* any method of performing the service which might prove less harmful or might prevent the harmful effect of the services;
- d* the risk, benefit, utility and cost of the service;
- e* the manner in which the services were marketed to the public;
- f* what can reasonably be expected and accepted to be done with the specific services or the result of the services; and
- g* the time at which the services were performed.<sup>750</sup>

The factors listed by Loubser & Reid<sup>751</sup> are the circumstances of the performance of the services to bring about a sale of the seller’s residential property which must be taken into consideration as provided for in section 54(1) of the CPA,<sup>752</sup> to determine the reasonableness of the standard of quality expected from the estate agent in the performance of the services as well as a determination as to whether or not the

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<sup>747</sup> Naudé & Eiselen Revision Service 1 (2016) 53-2.

<sup>748</sup> Naudé & Eiselen Revision Service 1 (2016) 53-2.

<sup>749</sup> S 54(1)(b) of the CPA.

<sup>750</sup> Naudé & Eiselen Revision Service 1 (2016) 53-6.

<sup>751</sup> Naudé & Eiselen Revision Service 1 (2016) 53-6.

<sup>752</sup> S 54(1) of the CPA provides that the consumer’s rights as provided for in s (a) – (d) must be determined having regard to the circumstances of the supply and any specific criteria agreed between the supplier and the consumer before or during the performance of the services.

services are materially imperfect.

**5 2 4 The concept of the return of any property or the control over any property of the consumer in at least as good a condition as when the consumer made it available to the supplier for purposes of the performance of the services**

Section 54(1)(d) of the CPA provides for a consumer's right to demand the return of or control over any property in at least as good a condition as it was when made available to the supplier for purposes of the performance of the services. In the context of the performance of services by a supplier for or at the direction of a consumer, the consumer's right to demand such return under section 54(1)(d) of the CPA must be considered together with the definitions of "supply" in section 1 of the CPA.

"Supply, when used as a verb – (b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises ... in the ordinary course of business for consideration".

When a consumer relinquishes control over property in order for the services to be performed, section 54(1)(d) of the CPA provides that the supplier must return the property or the control over the property in at least as good as a condition when it was made available by the consumer to the supplier for purposes of supplying or performing the service.

If an estate agent takes control over the seller's residential property for purposes of introducing a potential buyer to the property in the sale of the seller's residential property, it follows, *a fortiori*, that the estate agent must return the control over the property to the seller in as good a condition as when it was made available to him for purposes of performing the instruction to sell the seller's residential property.

**5 2 5 The performance of the services at the agreed location for the performance as provided for under section 19(2)(a)(ii) of the CPA**

Under section 19(2)(a)(ii) of the CPA, a supplier must perform the agreed services at the agreed place for the performance of the services. The agreed place for the performance of the services, is the supplier's place of business, if he has one, and if not, the supplier's residence.<sup>753</sup>

Sales, by nature, involve a continuous process of a collective of efforts, the outcome whereof is uncertain, aimed at achieving a specific result of the transfer of ownership of the seller's residential property to a willing and able buyer, including the marketing of the item or property, the display of the item or property to prospective buyers, negotiations in connection with the item or property and more.

In the context of the sale of residential property, the service expected of the estate agent to bring about a sale between principals, involves taking every reasonable step to bring about a sale of the seller's residential property to a willing and able buyer. The reasonable steps may well include, but are not limited to, the marketing of the seller's property in electronic and other media, the marketing of the property by placing "*For Sale*" boards outside the property, marketing and introducing the property to prospective buyers at open days or show days, marketing and introducing prospective buyers to the property by introducing the property to prospective buyers individually, negotiating with interested buyers in connection with the property – these activities are steps that are not necessarily performed at a single location.

Under section 19(2)(a)(ii) of the CPA, it is an implied term of the estate agent's mandate for the sale of the seller's residential property, that the services must be performed at the agreed place for the performance of the services, and if no specific

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<sup>753</sup> S 19(2)(b) of the CPA.



place for the performance of the services is agreed between the supplier and the consumer, the supplier's place of business is the agreed place for the performance of the service if he has one, or, the supplier's residence.<sup>754</sup>

This, therefore, means that if the seller and the estate agent do not agree on the place for the performance of every reasonable step required to bring about a sale of the seller's residential property to a willing and able buyer, the estate agent is required to perform the services at his place of business or at his residence, as the case may be.<sup>755</sup>

The common law estate agent's mandate for the sale of the seller's residential property provides for an instruction by the seller to the estate agent to sell his residential property, which instruction the estate agent accepts<sup>756</sup> and an undertaking by the seller to compensate the estate agent, usually in the form of a commission calculated as a percentage of the purchase price, on the successful sale of his residential property to a willing and able buyer. Section 19(2)(a)(ii) of the CPA places an unrealistic expectation on the seller and the estate agent to include a specific term in the estate agent's mandate for the sale of the seller's residential property, stipulating the agreed places for the performance of the services by the estate agent, to bring about a sale of the seller's residential property to a willing and able buyer.

Without an agreement between the seller and the estate agent, which provides for the place or places for the performance of the service, the estate agent will act in contravention of the provisions of section 19(2)(a)(ii) and section 19(2)(b) of the CPA, if he performs the services at any other place than at his place of business, or if he does not have a place of business, at his residence.

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<sup>754</sup> S 19(2)(b) of the CPA.

<sup>755</sup> S 19(2)(a)(ii) of the CPA read together with s 19(2)(b) of the CPA.

<sup>756</sup> See the definition of "mandate" in reg 1(h) of the Code of Conduct.

The application of the provisions of section 19(2)(a)(i) of the CPA, specifically in relation to the sale of residential property, is therefore problematic.

**5 2 6 The concepts of “expressly provided for or anticipated in an agreement” and “any specific criteria or conditions agreed between the supplier and the consumer” and the incorporation of terms which exclude, set aside or override a consumer’s fundamental rights under section 19(2)(a)(i) and section 54(1) of the CPA: a consumer’s right to fair, just and reasonable terms and conditions<sup>757</sup>**

Section 19(2) of the CPA and section 54(1) of the CPA protect a consumer’s fundamental consumer rights in relation to the supply or performance of services. The mandatory terms under section 19(2) of the CPA are implied into every agreement between a consumer and a supplier for the supply of services, “unless otherwise expressly provided or anticipated in an agreement”. The standard of quality of the services as provided for under section 54(1) of the CPA must be determined having regard to “... any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.”

Part G of the CPA introduces a consumer’s right to fair, just and reasonable terms and conditions and includes provisions regulating unfair, unreasonable or unjust contract terms,<sup>758</sup> notice required for certain terms and conditions,<sup>759</sup> written consumer contracts,<sup>760</sup> prohibited transactions, agreements, terms and conditions<sup>761</sup> and the powers of the court to ensure fair and just conduct, terms and conditions.<sup>762</sup>

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<sup>757</sup> S 48 – 52 of the CPA. A comprehensive discussion on a consumer’s right to fair, just and reasonable terms and conditions under Part G of the CPA falls outside the scope of this research. The discussion on a consumer’s rights under Part G of the CPA is limited to aspects related to the provisions of s 19 and s 54 of the CPA.

<sup>758</sup> S 48 of the CPA.

<sup>759</sup> S 49 of the CPA.

<sup>760</sup> S 50 of the CPA.

<sup>761</sup> S 51 of the CPA.

<sup>762</sup> S 52 of the CPA.

Naudé<sup>763</sup> points out that legislative control mechanisms regulating contract terms provided for the CPA can be divided into three main categories namely:

- a* rules on the incorporation of terms into a consumer contract;<sup>764</sup>
- b* rules regulating unfair consumer contract terms;<sup>765</sup> and
- c* rules on the interpretation of consumer contract terms.<sup>766</sup>

Section 51(1) of the CPA prohibits any transaction, agreement and terms and conditions to any agreement, including a supplementary agreement,<sup>767</sup> if the general purpose of or effect of such term or condition defeats the purposes and policy of the CPA.<sup>768</sup>

Section 51(1)(b) specifically prohibits a supplier from making a transaction or agreement subject to any terms or conditions which:

- a* directly or indirectly purport to waive or deprive a consumer of a right as provided for in the CPA;<sup>769</sup>
- b* avoids a supplier's obligation in terms of the CPA;<sup>770</sup>
- c* sets aside or overrides the effect of any provisions of the CPA<sup>771</sup> or thereby authorises a supplier to do anything that is unlawful in terms of the CPA;<sup>772</sup> or
- d* authorises a supplier to fail to do anything that is required in terms of the CPA.<sup>773</sup>

Any transaction, agreement, provision, term or condition to the agreement or any

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<sup>763</sup> Naudé T "The Consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *South African Law Journal* 505 – 536 (hereinafter Naudé 2009 *SALJ*) 506.

<sup>764</sup> S 49 and s 50 of the CPA.

<sup>765</sup> S 48, s 50 and s 51 of the CPA.

<sup>766</sup> S 52 of the CPA.

<sup>767</sup> S 51(2)(a) of the CPA.

<sup>768</sup> S 51(1)(a)(i) of the CPA.

<sup>769</sup> S 51(1)(b)(i) of the CPA.

<sup>770</sup> S 51(1)(b)(ii) of the CPA.

<sup>771</sup> S 51(1)(b)(iii) of the CPA.

<sup>772</sup> S 51(1)(b)(iv)(aa) of the CPA.

<sup>773</sup> S 51(1)(b)(iv)(bb) of the CPA.

supplementary agreement between the consumer and the supplier, incorporated in contravention of the provisions of section 51 of the CPA, shall be void.<sup>774</sup>

An agreement which includes a term or condition that excludes the mandatory implied terms regulating the seller's right in respect of the supply of services under section 19(2) of the CPA, or any agreement before or during the performance of services, which includes a term or condition that sets aside or overrides the seller's rights to demand quality services as provided for in section 54(1) of the CPA, may be in contravention of the provisions of section 51 of the CPA, if:

- a* the general purpose or effect of the agreement defeats the purposes and policy of the CPA;<sup>775</sup>
- b* directly or indirectly purports to waive or deprive the seller of his fundamental rights in respect of the supply or performance of services under section 19(2) or section 54(1) of the CPA;<sup>776</sup>
- c* avoid the estate agent's obligations in respect of the supply or performance of services as provided for in section 19(2) or section 54(1) of the CPA;<sup>777</sup>
- d* set aside or override the effect of section 19(2) or section 54(1) of the CPA;<sup>778</sup>
- e* authorise the estate agent to fail to supply or perform the services as is provided for in section 19(2) of the CPA or as provided for section 54(1) of the CPA;<sup>779</sup>  
or
- f* generally authorise the estate agent to fail to do anything that is required from him in terms of the CPA.<sup>780</sup>

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<sup>774</sup> S 51(3) of the CPA.

<sup>775</sup> S 51(1)(a)(i) of the CPA.

<sup>776</sup> S 51(1)(b)(i) of the CPA.

<sup>777</sup> S 51(1)(b)(ii) of the CPA.

<sup>778</sup> S 51(1)(b)(iii) of the CPA.

<sup>779</sup> S 51(1)(b)(iv)(aa) of the CPA.

<sup>780</sup> S 51(1)(b)(iv)(bb) of the CPA.

The provisions of section 51(1)(a) of the CPA must be read together with section 4 of the CPA, which regulates the realisation of consumer rights. Under section 4(5) of the CPA, any person dealing with a consumer in the ordinary course of business must not engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of the CPA.<sup>781</sup>

In the context of the supply or performance of services by an estate agent in the sale of the seller's residential property, the concurrent application of the provisions of section 19(2) and section 54(1) of the CPA, which regulate the seller's rights in respect of the supply of services and the right to demand quality services, and the seller's right to fair, just and reasonable terms and conditions as provided for in Part G of Chapter 2 of the CPA, appear to be conflicting.

Section 19(2)(a)(i) of the CPA provides for the seller's right to the performance of the services on the agreed date and time, if any, or within a reasonable time after concluding the agreement with the seller,<sup>782</sup> and section 19(2)(a)(ii) of the CPA provides for a seller's right to demand performance of the services at the agreed location, but allows for an agreement between the estate agent and the seller that expressly includes a term or terms to the agreement between them,<sup>783</sup> that excludes the seller's right to demand the performance of the services as provided for in section 19(2)(a)(i) and section 19(2)(a)(ii) of the CPA. The seller's right to demand quality services as provided for in section 54(1) of the CPA, is also subject to an agreement between the estate agent and the seller, which regulates the criteria to determine the quality of the performance and may exclude or limit the seller's reasonable expectation

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<sup>781</sup> S 4(5) of the CPA.

<sup>782</sup> S 19(2)(a)(i) of the CPA. If no date and time for the supply or the performance of the services is agreed, the supplier must supply or perform the services within a reasonable time after concluding the transaction or agreement with the consumer.

<sup>783</sup> S 19(2) of the CPA provides that "[u]nless otherwise expressly provided or anticipated in an agreement".

of the quality of the services as a fundamental consumer right under section 54(1) of the CPA.

Section 2 of the CPA, which deals with matters of interpretation, provides in section 2(1) thereof, that the CPA must be interpreted in a manner which gives effect to the purposes<sup>784</sup> of the CPA and provides in section 2(2) of the CPA that appropriate foreign and international law,<sup>785</sup> appropriate international conventions and declarations or protocols relating to consumer protection<sup>786</sup> may be considered in interpreting any of the provisions of the CPA.

Van Eeden & Barnard,<sup>787</sup> referring to the United Kingdom non-ministerial government department *Competition and Markets Authority*,<sup>788</sup> state that the comments of the *CMA Guidance*<sup>789</sup> are instructive to the extent that “[a] term which allows the trader to fail to meet his fundamental requirement of timeliness is liable to be considered unfair”<sup>790</sup> and “[t]his applies not just to terms which simply exclude all liability for delay, but also to standard terms allowing unduly long periods for delivery or completion of work, or excessive margins of delay after an agreed date”.<sup>791</sup>

The CPA aims to promote and advance the social and economic welfare of consumers by those means listed in section 3(1)(a) – (h) and such an interpretation of the provisions of section 19(2), section 54(1) and section 51<sup>792</sup> of the CPA is favoured, particularly having regard to the provisions of section 4(3) of the CPA which provide

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<sup>784</sup> S 3 of the CPA.

<sup>785</sup> S 2(2)(a) of the CPA.

<sup>786</sup> S 19(2)(b) of the CPA.

<sup>787</sup> Van Eeden & Barnard 276 n 363. S 2(2) of the CPA provides for a person, Tribunal or the Commission to consider appropriate foreign law and international law (s 2(2)(a)) and appropriate international conventions, declarations or protocols relating to consumer protection (s 2(2)(b)).

<sup>788</sup> Dated 31 July 2015 (hereinafter the “CMA Guidance”).

<sup>789</sup> CMA Guidance at para 5 9 1 to 5 9 7.

<sup>790</sup> CMA Guidance at para 5 9 1.

<sup>791</sup> CMA Guidance at para 5 9 2.

<sup>792</sup> S 51 of the CPA regulates prohibited transactions, agreements, terms or conditions.

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

Specifically in relation to the supply or performance of services to bring about a sale of the seller's residential property within a reasonable time after concluding the agreement between the estate agent and the seller as provided for in section 19(2)(a)(i) of the CPA and the timely performance or completion of services under section 54(1)(a) of the CPA, regulation 44(3)(p) of the CPA provides that any term in a consumer agreement between the estate agent

“operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession...”,

which allows the estate agent an unreasonably long time to perform, is presumed to be unfair.<sup>793</sup>

The provisions of section 19(2) and section 54(1) of the CPA do not prohibit the estate agent from including a term in the agreement with the seller for the sale of the seller's residential property that effectively allows the estate agent an unreasonably long time to sell the seller's residential property, either by excluding the seller's right to demand performance of the services to bring about a sale of the seller's residential property on within a reasonable time<sup>794</sup> or by including a term which allows an unreasonably long period of time to perform or complete the services to bring about a sale of the seller's

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<sup>793</sup> Naudé & Eiselen Revision Service 1 (2016) 19-5; Van Eeden & Barnard 264 & 276; Naudé T “Enforcement Procedures In Respect Of The Consumer's Right To Fair, Reasonable And Just Contract Terms Under The Consumer Protection Act In Comparative Perspective” 2010 *South African Law Journal* 515 - 547 (hereinafter “Naudé 2010 SALJ”).

<sup>794</sup> S 19(2)(a)(i) of the CPA.

residential property.<sup>795</sup> Any term, condition or provision included in the agreement between the estate agent and the seller is subject to the provisions of section 51 of the CPA and may be void to the extent that it contravenes the provisions of section 51 of the CPA.<sup>796</sup> In addition the seller may challenge the term on the basis of it being a grey-listed term as provided for in terms of regulation 44(3)(p) of the CPA, by providing reasons as to why the period allowed for the performance of the service is unreasonable.<sup>797</sup>

### **5 2 7 The circumstances of the supply or performance of services**

The seller's reasonable expectation of a timely performance or completion of the services to bring about a sale of the seller's residential property and timely notice of any unavoidable delay in the sale of the seller's residential property,<sup>798</sup> the performance of those services in a manner and quality that a seller are generally entitled to expect,<sup>799</sup> and the return of the seller's residential property or the control over the seller's residential property in at least as good a condition as when it was made available to the estate agent for purposes of the sale of the seller's residential property,<sup>800</sup> is subject to the circumstances of the performance of the services.<sup>801</sup>

Economic factors, market conditions, seasonality, the condition of the property, pricing and buyer profile are examples of external factors<sup>802</sup> which may influence the quality of the performance and completion of the services to bring about a sale of the seller's residential property as provided for under section 54(1) of the CPA. The estate agent

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<sup>795</sup> S 54(1)(a) of the CPA.

<sup>796</sup> S 51(3) of the CPA.

<sup>797</sup> Naudé & Eiselen Revision Service 1 (2016) 44-46.

<sup>798</sup> S 54(1)(a) of the CPA.

<sup>799</sup> S 54(1)(b) of the CPA.

<sup>800</sup> S 54(1)(d) of the CPA.

<sup>801</sup> De Stadler in Naudé & Eiselen Original Service (2014) 54-10 at para 25.

<sup>802</sup> <https://www.property24.com/articles/4-external-factors-that-impact-on-property-sales/22998> accessed on 3 May 2019; <https://www.privateproperty.co.za/advice/property/articles/what-are-the-factors-that-affect-property-prices-in-south-africa/6122> accessed on 3 May 2019.



must inform the seller as soon as reasonably possible after he becomes aware of any delay in the sale of his residential property due to the external or any other factors which may influence the sale of his residential property.

The external factors which influence the quality of the sale of the seller's residential property, are circumstances over which the estate agent has no or little control and which influence the performance and completion of the sale of the seller's residential property to the extent that the estate agent cannot guarantee the performance of the service within a reasonable time as provided for in section 19(2)(a)(i) of the CPA or timely as provided for in section 54(1) of the CPA, or at all.

Section 54 of the CPA regulates the consumer's right to demand quality services and states that the test for determining whether the services performed and completed are of the required standard of quality, must be made "having regard to the circumstances of the supply and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

The circumstances of the supply indicate external factors which may influence the reasonable expectation of the consumer to demand timely performance and completion of the services and timely notice of any unavoidable delay in the performance of the services under section 54(1)(a) of the CPA. Factors such as the availability of the supplier to perform the services and the availability of the goods to be used or installed in performing the services are examples of external factors which may influence the timely performance or completion of the services.

The "specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services" are internal factors which influence the reasonable expectation of the consumer to demand the timely performance and completion of the services and timely notice of any unavoidable delay in the

performance of the services under section 54(1)(a) of the CPA. If the consumer and the supplier agree that the performance or completion of the services are urgent, the consumer may reasonably expect the supplier to perform and complete the services in a shorter period of time than what would usually be regarded as a reasonable time. The external and internal factors which influence the consumer's reasonable expectation of the timely performance and completion of the services under section 54(1)(a) of the CPA, must also apply as criteria to determine whether the services performed under section 19(2)(a)(i) of the CPA, are within a reasonable time after concluding the transaction or agreement with the consumer. In the absence of an agreement between the consumer and the supplier for the supply or performance of services on a particular date and time, the circumstances of the performance (external factors) and the specific terms of the agreement between the consumer and the supplier (internal factors) which may influence the reasonable expectation of the consumer, determine whether the services are performed within a reasonable time after concluding the transaction or agreement with the consumer.

The provisions of section 19(2)(a)(i) and section 54(1)(a) of the CPA must be interpreted in a manner that gives effect to the purposes<sup>803</sup> of the CPA.<sup>804</sup> Primarily, the CPA aims to protect consumers<sup>805</sup> and an objective determination of the reasonableness and timeliness of the supply or performance of the services under section 19(2)(a)(i) and section 54(1)(a) of the CPA, must favour the consumer.<sup>806</sup>

The timely performance or completion of every service to bring about a sale of the

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<sup>803</sup> S 3 of the CPA.

<sup>804</sup> S 2(1) of the CPA.

<sup>805</sup> *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 16.

<sup>806</sup> See also s 4(3) of the CPA which provides that "[I]f any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)."

seller's residential property to a willing and able buyer and the timely notice of any unavoidable delay in the sale of the seller's residential property are subject to the conditions agreed between the seller and the estate agent for the sale of the residential property. Factors such as the exclusive instruction to the estate agent based on his expertise in the sale of residential property and an agreement on the urgency of the sale, might indicate an expectation from the seller that may influence the seller's reasonable expectation of a timely performance and completion of the services and timely notice of any unavoidable delay in performing the services.

**5 3     A seller's remedies under section 19(6) and section 54(2) of the CPA in the context of the sale of residential property as a supply or performance of services by an estate agent**

**5 3 1   Introduction**

Specifically in relation to the supply or performance of services as provided for under section 19(2)(a) of the CPA, section 19(6) of the CPA provides that if the supplier tenders performance of any services on a date and time other than as agreed with the consumer, the consumer may choose to accept performance of the services at that time,<sup>807</sup> demand performance of the services at the agreed date and time, provided that the agreed date and time have not passed<sup>808</sup> or cancel the agreement with the supplier without penalty, treating any already performed services as unsolicited services in accordance with section 21 of the CPA.<sup>809</sup>

Section 54(2) of the CPA provides for a consumer's right to require a supplier, who fails to perform or complete the services as provided for in section 54(1) of the CPA, to remedy any defect in the performance of the services<sup>810</sup> or to refund to the consumer

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<sup>807</sup> S 19(6)(a) of the CPA.

<sup>808</sup> S 19(6)(b) of the CPA.

<sup>809</sup> S 19(6)(c) of the CPA.

<sup>810</sup> S 54(2)(a) of the CPA.

a reasonable portion of the price paid for the performance of the services, having regard to the extent of the failure.<sup>811</sup>

In the context of the sale of residential property on instruction received from the seller to sell his residential property, the provisions of section 19(2)(a)(i) of the CPA and section 54(1)(a) of the CPA overlap to the extent that both the provisions of section 19(2)(a)(i) of the CPA and section 54(1)(a) of the CPA regulate the performance and completion of services within a reasonable time. An estate agent who fails to bring about a sale of the seller's residential property within a reasonable time,<sup>812</sup> or timely<sup>813</sup> and fails to inform the seller of any unavoidable delay in the sale the seller's residential property, is in breach of his duties under of section 19(2)(a)(i) and section 54(1)(a) of the CPA.<sup>814</sup>

The remedies available to the seller whose rights in relation to the performance of the services by the estate agent to bring about a sale of his residential property to a willing and able buyer, have been or are being infringed or impaired, are provided for in section 19(6) of the CPA and section 54(2) of the CPA.

**5 3 2 The application of section 19(6)(c) of the CPA in the supply or performance of services within a reasonable time or timely as provided for under section 19(2)(a)(i) and section 54(1)(a) of the CPA**

**5 3 2 1 An unqualified remedy for cancellation of the agreement between the consumer and the supplier for the supply or performance of services**

Under section 19(6)(c) of the CPA, a consumer may cancel the agreement with the

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<sup>811</sup> S 54(2)(b) of the CPA.

<sup>812</sup> S 19(2)(a)(i) of the CPA.

<sup>813</sup> S 54(1)(a) of the CPA.

<sup>814</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25 at para 27.

supplier without penalty,<sup>815</sup> if the supplier tenders the supply or performance of the services on a date and time, or at location other than as agreed with the consumer.

The consumer's right to cancel the agreement with the supplier where the supplier tenders performance of the services on a date and at a time other than what was agreed with the consumer, is a departure from the common law rules which do not provide an automatic right of cancellation to a consumer, where the supplier fails to supply or perform the services on the agreed date and time.

The common law incorporates the law of contract as part of the law of obligations in the private law branch of the common law and includes contracts for services.<sup>816</sup> A contract is an agreement between two or more parties, intended to create legally enforceable obligations between them.<sup>817</sup> Any party who fails to perform his obligations in terms of the agreement between them commits a breach of the terms of the agreement.<sup>818</sup>

In the context of the supply or performance of services in terms of a mandate, where the date and time for the performance of the services are fixed, the mandatary shall be in breach of the terms of the mandate should he fail to perform his obligation timeously on the date and time on which the performance of the services became due. Where the date and time for the performance of the services are not fixed, the mandator must demand performance of the services within a reasonable time and the mandatary will be in breach of the mandate should he fail to perform the services so demanded by the mandator.

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<sup>815</sup> Any services performed by the supplier prior to the cancellation of the services may be treated by the consumer as unsolicited services as provided for under s 21 of the CPA.

<sup>816</sup> Other sources of obligations include delict, law of enrichment, *negotiorum gestio*, family relationships, wills and statutes. See Hutchinson & Pretorius 8.

<sup>817</sup> Hutchinson Pretorius 4.

<sup>818</sup> Reinecke MFB "Die aard en indeling van kontrakbreuk" 2016 *Stell LR* 309 - 322 (hereinafter "Reinecke 2016 *Stell LR*").

The mandator will thereafter only have the right to the immediate cancellation of the mandate if the mandate incorporates a cancellation clause and, if the nature of the mandate and the circumstances underpinning the mandate necessitate the prompt performance of the service or if the mandator has informed the mandatary that the mandate would be terminated if performance of the services is not made by a specific date.<sup>819</sup>

The consumer's right to cancel the agreement with the supplier without penalty under section 19(6)(c) of the CPA, vests when the supplier *tenders*<sup>820</sup> the supply or performance of the services on a date and time other than what was initially agreed between the consumer and the supplier. The term *tenders*<sup>821</sup> indicates that the provisions of section 19(6) may apply in different circumstances:

- a* a supplier may tender performance of the services after the agreed date and time for the supply or performance of the services have passed. In this instance, the supplier is in breach of the terms of the agreement for the supply or performance of the services on an agreed date and time and the tender to perform the services is made after the supplier is already in breach of the terms of the agreement; and
- b* a supplier who anticipates that he may not be able to supply or perform the services on the agreed date and time and tenders performance of the services before the agreed date and time for the performance of the services, on a date and time after the agreed date and time, commits an anticipatory breach of the terms of the agreement.

In terms of section 19(6) of the CPA, the consumer may choose to cancel the

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<sup>819</sup> Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Contract: General Principles* 5<sup>th</sup> Ed. (2016) Juta (hereinafter "Van der Merwe *et al*").

<sup>820</sup> Own emphasis.

<sup>821</sup> Own emphasis.

agreement with the supplier as provided for in section 19(6)(c) of the CPA, without reliance on a *lex commissoria*,<sup>822</sup> or arguing that the nature of the services requires prompt performance thereof or by demanding performance of the services on a particular date and time as provided for under the common law rules governing the law of obligations.

De Stadler argues that the provisions of section 19(6)(c) of the CPA, that provide for an:

“unqualified remedy of cancellation [of the agreement between the consumer and the supplier due to non-performance of services as contemplated in section 19(2)(a)(i) of the CPA] is a departure from the common law, where a consumer would not automatically have the right to cancel an agreement simply because delivery [or performance] was not made by a stipulated or reasonable date and time or location”.<sup>823</sup>

The consumer’s right to the cancellation of the agreement between the consumer and the supplier for the supply or performance of services, in those instances where the supplier does not supply or perform the services as contemplated in section 19(2)(a)(i) of the CPA<sup>824</sup> is in line with the purposes<sup>825</sup> of the CPA and is lauded<sup>826</sup> in that the provisions of section 19(6)(c) of the CPA do away with the burdensome formalities required in terms of the common law for the cancellation of the agreement with a supplier in those instances where the supplier does not supply or perform the services as agreed between them. The result for the supplier, however, is evidently quite severe.

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<sup>822</sup> A cancellation clause in an agreement which allows a contracting party to immediate cancellation of an agreement where another party is in breach of the agreement.

<sup>823</sup> Naudé & Eiselen Revision Service 1 (2016) 19-13.

<sup>824</sup> S 19(6)(c) of the CPA.

<sup>825</sup> S 3(1) of the CPA sets out the purposes of the CPA and provides a general statement of purpose, which is to promote and advance the social and economic welfare of consumers in South Africa by those means listed in sections (a) – (h) of s 3(1) of the CPA. S 3(1)(a) of the CPA provides the establishment of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.

<sup>826</sup> Naudé & Eiselen Revision Service 1 (2016) 19-13.

**5 3 2 2      The interaction between the consumer's right to cancel the agreement under section 19(6)(c) of the CPA and the right to cancellation under the common law**

The interaction between the requirements for the cancellation of a mandate under common law and the consumer's right to cancel the agreement with the supplier without penalty under section 19(6)(c) of the CPA, is problematic on a procedural level.<sup>827</sup> De Stadler points out<sup>828</sup> that a consumer who elects to cancel the agreement with a supplier who is in breach of the terms of the agreement for the supply or performance of services under section 19(2)(a)(i) of the CPA and has exhausted all his remedies in terms of the CPA,<sup>829</sup> may have to, if he is to pursue his remedies in terms of the common law, demand performance of the services from the supplier at a reasonable time, before he can rely on the remedies to which he may be entitled to in terms of the common law, including the right to claim damages.<sup>830</sup>

If a supplier fails to perform the services in terms of the agreement with the consumer as provided for in sections 19(2)(a)(i) of the CPA, the consumer may opt to cancel the agreement with the supplier without penalty as provided for in section 19(6)(c) of the CPA without demanding the supply or performance of the services within a reasonable time. If the consumer thereafter<sup>831</sup> intends to pursue his rights in terms of the common

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<sup>827</sup> Naudé & Eiselen Revision Service 1 (2016) 54-12.

<sup>828</sup> Naudé & Eiselen Revision Service 1 (2016) 54-12.

<sup>829</sup> S 69(d) of the CPA prohibits a consumer from approaching a court with jurisdiction over a matter, unless all remedies available to the consumer in terms of national legislation have been exhausted.

<sup>830</sup> S 2(10) of the CPA protects the consumer's common law right by providing that no provision of the CPA must be interpreted so as to preclude the consumer from exercising any of his rights in terms of the CPA. See also *CJ Digital SMS Marketing CC v National Consumer Commission* (NCT/3584/2011/101(1)) [2012] ZANCT 22 at para 46; *Audi SA (Pty) Ltd v National Consumer Commission* (NCT/4058/2012/101(1)(P)) [2013] ZANCT 4 at para 30 where it was held that the NCT and the NCC do not have the power to order a supplier to pay damages to a consumer. S 115(2)(a) of the CPA provides that a consumer who has suffered loss or damage as a result of the supplier's prohibited conduct or a failure or dereliction of duties in terms of the CPA, institute a claim for the assessment of damages against the supplier in a civil court.

<sup>831</sup> S 69(d) of the CPA provides that a consumer may only approach a court with jurisdiction over the matter if all other remedies provided for in terms national legislation have been exhausted.



law to institute a claim against the supplier for damages or any additional remedies he may be entitled to in terms of the common law as a result of the supplier's failure to perform the services as agreed between them, he may be required to first demand the supply or performance of the services.

**5 3 2 3      The problematic application of the provisions of section 19(6) of the CPA in the supply or performance of services within a reasonable time after concluding the agreement between the consumer and the supplier**

The provisions of section 19(6) of the CPA apply “[i]f a supplier tenders ... performance of any services at a location, on a date or at a time other than as agreed with the consumer.”

Section 19(6) of the CPA specifically refers to the performance of the services on a date and time other than what was agreed with the consumer and it is not clear whether the remedies under section 19(6) of the CPA extend to apply in those instances where the agreement for the supply or performance of the services does not provide for a specific date and a time for the performance of the services,<sup>832</sup> and the services must be performed “within a reasonable time after concluding the transaction or agreement”.<sup>833</sup>

De Stadler argues<sup>834</sup> that the term “agreed” in section 19(6) of the CPA refers to the terms of the agreement between the consumer and the supplier for the performance of the services, that the services must be performed on the agreed date and time or, in absence thereof, “within a reasonable time after concluding the transaction or

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<sup>832</sup> Section 19(2)(a)(i) of the CPA does not provide for the delivery of the goods or the performance of the services at a location other than what was agreed with the consumer. The requirement that the goods must be delivered or the services performed within a reasonable time after concluding the transaction or agreement with the consumer thus only applies to the date and time for the delivery of the goods or the performance of the services.

<sup>833</sup> S 19(2)(a)(i) of the CPA.

<sup>834</sup> Naudé & Eiselen Revision Service 1 (2016) 19-12.

agreement". It is argued that the performance of services "within a reasonable time after concluding the transaction or agreement" applies by default if the consumer and the supplier did not agree on a specific date and time for the performance of the service. It is questioned whether the performance of a service "within a reasonable time after concluding the transaction or agreement" under section 19(2)(a)(i) of the CPA could be regarded as an *agreed*<sup>835</sup> term of the agreement between the consumer and the supplier for the supply or performance of the services.

The Tribunal, in the matter between *Coertze and Another v Young*,<sup>836</sup> considered the remedies available to a consumer where the supplier fails to perform the services within a reasonable time after concluding the agreement with the consumer under section 19(2)(a)(i) of the CPA or timely as provided for in section 54(1)(a) of the CPA. In this matter the respondent, Ms Young, entered into an agreement with Mr Coertze and Ms Burger in terms whereof Ms Young undertook to perform particular services. The agreement, which was concluded between the three of them during May 2011, did not provide for a specific date and time for the performance or completion of the services and the services had to be performed within a reasonable time after concluding the agreement with Mr Coertze and Ms Burger<sup>837</sup> or timely.<sup>838</sup> By August 2011, Ms Young had not performed or completed any of the agreed services and, on application to the Tribunal, it was held that the failure by Ms Young to perform or complete the services were in contravention of the provisions of section 19(2)(a)(i) of the CPA and section 54(1)(a) of the CPA.<sup>839</sup>

The Tribunal held<sup>840</sup> that Mr Coertze and Ms Burger had the right to require Ms Young

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<sup>835</sup> Own emphasis.

<sup>836</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25.

<sup>837</sup> S 19(2)(a)(i) of the CPA.

<sup>838</sup> S 54(1)(a) of the CPA.

<sup>839</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25 at para 27.

<sup>840</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25 at para 33.

to remedy the defect in the quality of the services performed as provided for in section 54(2)(a) of the CPA or, refund to Mr Coertze and Ms Burger a reasonable portion of the price paid for the services, having regard to the extent of the failure as provided for in section 54(2)(b) of the CPA,<sup>841</sup> but did not order the cancellation of the agreement between Mr Coertze, Ms Burger and Mr Young as provided for under section 19(6)(c) of the CPA.

De Stadler<sup>842</sup> further argues that in those instances where the supplier fails to perform the agreed services at all, the consumer's right to require the supplier to refund the full portion of the price paid for the services under section 54(2)(b) of the CPA, effectively equates to the cancellation of the agreement between supplier and the consumer. It must, however, be pointed out that the cancellation of the agreement, as a consequence of the consumer's right to require the supplier to refund the full portion of the purchase price paid in those instances where the supplier failed to perform the services at all as argued by De Stadler,<sup>843</sup> must be understood as a reliance on the consumer's common law rights<sup>844</sup> to cancel the agreement, and not as a right to cancellation under section 19(6)(c) of the CPA.

It is submitted that the provisions of section 19(6)(c) of the CPA require clarification, specifically in the application thereof under circumstances where the agreement between the consumer and the supplier for the supply or performance of services does not provide for a certain date and time for the supply or performance of the services and the services must, therefore, be performed by the supplier within a reasonable time after concluding the agreement with the consumer. Pending clarification of the

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<sup>841</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25 at para 33.

<sup>842</sup> Naudé & Eiselen Revision Service 1 (2016) 54-22.

<sup>843</sup> Naudé & Eiselen Revision Service 1 (2016) 54-22.

<sup>844</sup> S 2(10) of the CPA preserves the consumer's common law rights and provides that no provision of the CPA may be interpreted in a manner which precludes a consumer from exercising any rights afforded to him under the common law.

provisions of section 19(6)(c), it is argued that the provisions of section 19(6)(c) of the CPA, on the current wording thereof, does not support a consumer's right to cancel the agreement with the supplier without penalty, under circumstances where the agreement between the consumer and the supplier for the supply or performance of services does not stipulate a date and time for the performance of the services and the services must therefore be performed within a reasonable time after concluding the agreement with the consumer. Under these circumstances, the consumer must rely on his common law rights<sup>845</sup> to cancel the agreement with the supplier.

In the context of the sale of residential property within a reasonable time after concluding the estate agent's mandate for the sale of the seller's residential property, as provided for in section 19(2)(a)(i) of the CPA, the current position is therefore that the remedies under section 19(6) of the CPA are not available to the seller under circumstances where the estate agent and the seller do not agree on the performance of the services on a certain date and time, and the estate agent fails to sell the seller's residential property within a reasonable time after concluding the estate agent's mandate for the sale of the seller's residential property.<sup>846</sup>

As pointed out above the nature of sales and in particular the sale of residential property, involves an ongoing process of related activities with the aim of bringing about a sale, with an uncertain outcome which is influenced by several factors and cannot be guaranteed. It is, therefore, unlikely that the estate agent and the seller of the residential property will agree on a specific date and time for the sale of the seller's residential property. The seller will have the right to demand the performance of every

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<sup>845</sup> S 2(10) of the CPA provides that no provision of the CPA may be interpreted in a manner which excludes a consumer's rights in terms of the common law.

<sup>846</sup> *Coertze and Another v Young* (NCT/7142/2012/73(3) & 75(1)(b) & (2) CPA) [2013] ZANCT 25); *Jarvis v GM Alberante Motors t/a GM Alberante* (NTC/13959/2014/75(1)(b) [2015] ZANCT 45.

service to bring about a sale of the seller's residential property to a willing and able buyer within a reasonable time or timely, and this means that the seller may not have the option to cancel the agreement with the estate agent for the sale of his residential property under circumstances where the estate agent fails to sell the seller's residential property as provided for in section 19(2)(a)(i) and section 54(1)(a) of the CPA.

### **5 3 3 The application of the provisions of section 54(2) of the CPA in the supply or performance of services**

Section 54 of the CPA regulates a consumer's fundamental right to demand quality services. Under section 54(1) of the CPA, a consumer has the right to:

- a* demand the timely performance or completion of services and timely notice of any unavoidable delay in the performance of the services;<sup>847</sup>
- b* the performance of service in a manner and quality that persons are generally entitled to expect;<sup>848</sup>
- c* the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if the use, delivery or installation of such goods are required for the performance of the services;<sup>849</sup> and
- d* the return of any property or the control over any property in at least as good a condition as when it was made available to a supplier for purposes of performing the agreed services.<sup>850</sup>

If a supplier fails to perform or complete the services as provided for in section 54(1) of the CPA and, subject to any criteria or conditions agreed between the parties and the circumstances of the supply or completion of the services, the consumer may

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<sup>847</sup> S 54(1)(a) of the CPA.

<sup>848</sup> S 54(1)(b) of the CPA.

<sup>849</sup> S 54(1)(c) of the CPA.

<sup>850</sup> S 54(1)(d) of the CPA.

require the supplier to either:

- “(a) remedy any defect in the quality of the services performed or the goods supplied; or
- (b) refund the consumer a reasonable portion of the price paid for the services performed and the goods supplied, having regard to the extent of the failure.”

The remedies available to a consumer in terms of section 54(2) do not include the option to cancel the agreement, and the consumer must rely on his common law remedies to cancel the agreement with the supplier.<sup>851</sup>

**5 3 3 1      The consumer’s right to require the supplier to remedy the defect in the supply or performance of the services under the provisions of section 54(2)(a) of the CPA**

If a supplier fails to perform the services to the standards contemplated in section 54(1) of the CPA, the consumer may require the supplier to remedy any defect in the quality of the services performed or the goods supplied. The provisions of section 54(2)(a) of the CPA must be read together with the provisions of section 53 of the CPA, which provide definitions for specific terms applicable to Part H of Chapter 2 of the CPA, which includes section 54 of the CPA. The term “defect” is defined<sup>852</sup> in relation to services to mean:

“any material imperfection in the ...in performance of the services, that renders the ... results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances”.

The precise meaning of a “material imperfection” is not defined in the CPA.<sup>853</sup> The term “material”, when used as an adjective to describe evidence or facts in law, is

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<sup>851</sup> The option to cancel the agreement under s 19(6)(c) of the CPA is not available to the seller under circumstances where the estate agent agrees to sell the seller’s residential property within a reasonable time or timely. S 2(10) of the CPA provides that no provision of the CPA may be interpreted in a manner which excludes a consumer from accessing any rights afforded in terms of the common law.

<sup>852</sup> S 53(1)(a) of the CPA.

<sup>853</sup> S 1 of the CPA provides a list of defined terms and phrases and s 53 of the CPA provides for definitions applicable to Part H of the CPA, which includes section 54. The term “material imperfection” is not defined in s 1 or in s 54 of the CPA.

defined<sup>854</sup> as “significant” or “important”.<sup>855</sup>

In the context of the consumer’s right to demand performance of a service in a manner and quality that persons are generally entitled to expect, the service can be regarded as being materially imperfect<sup>856</sup> if the defect in the services is significant and important to the extent that such imperfection renders the results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances.

The “consumer expectations test” or “reasonable expectations test”<sup>857</sup> must be applied to determine what would be regarded as reasonably acceptable to a person generally.<sup>858</sup> Factors such as:

- a* the standard intended for the services;
- b* any standards prescribed by legislation;
- c* the prevention of a possible harmful effect of the services;
- d* the risk, benefit, utility and cost of the services;
- e* the manner and purposes for which the services were marketed to the public;  
and
- f* any instructions or warning communicated to a consumer in respect of the intended use of the services, what may reasonably be expected to be done with or in relation to the services and the time when the services were supplied to consumers,

must be employed to determine whether the services are reasonably acceptable and therefore not defective.<sup>859</sup>

The consumer’s right to demand quality services in terms of section 54(1) of the CPA

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<sup>854</sup> <https://en.oxforddictionaries.com/> accessed on 18 September 2019.

<sup>855</sup> *Oatorian Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A) 785.

<sup>856</sup> See the definition of “defect” in s 53(1)(a)(i) of the CPA.

<sup>857</sup> Naudé & Eiselen Revision Service 1 (2016) 53-2.

<sup>858</sup> Naudé & Eiselen Revision Service 1 (2016) 53-2.

<sup>859</sup> Naudé & Eiselen Revision Service 1 (2016) 53-6.

must also be determined “having regard to the circumstances of the supply”<sup>860</sup> and a determination as to whether the services are materially imperfect must be made having regard to the circumstances of the supply. The material imperfection as provided for in section 53(1)(a)(i) of the CPA must render the result of the service less acceptable than persons generally would reasonably be entitled to expect under the circumstances of the supply of that service. The circumstances of the supply of the services will depend on the specific nature of the service.<sup>861</sup>

De Stadler<sup>862</sup> argues that the reference to a material imperfection in the definition<sup>863</sup> of “defect” may limit the consumer’s fundamental right to demand quality services as provided for in section 54 of the CPA, if the introduction of the requirement that the performance of the service must be defective and by implication materially imperfect<sup>864</sup> is required, before a consumer may impose the remedies available to the consumer in terms of section 54(2) of the CPA.

The seller’s right to demand timely performance and completion of services under section 54(1)(a) of the CPA is subject to any criteria and conditions agreed between the seller and the estate agent and, the estate agent’s mandate for the sale of the seller’s residential property must be the point of departure to determine what was agreed between them.<sup>865</sup> The usual instruction to an estate agent to sell the seller’s residential property must be understood as an instruction to bring about a sale between principals<sup>866</sup> and the service expected of the estate agent in performing the instruction received from the seller to sell his residential property is to take all

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<sup>860</sup> S 54(1) of the CPA.

<sup>861</sup> Naudé & Eiselen Original Service (2014) 54-9.

<sup>862</sup> Naudé & Eiselen Revision Service 1 (2016) 54-13.

<sup>863</sup> S 54(1)(a)(i) of the CPA.

<sup>864</sup> See the definition of “defect” in s 53(1)(a)(i) of the CPA.

<sup>865</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>866</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).



reasonable steps to bring about the sale of the seller's residential property to a willing and able buyer. Generally, this means that the estate agent must perform any work or undertaking for the direct or indirect benefit of the seller<sup>867</sup> and specifically in the context of the sale of residential property, the estate agent must market the property for sale, negotiate in connection with the property and canvass or undertake to canvass potential buyers in connection with the property and, take any other reasonable steps to bring about a sale of the seller's residential property to a willing and able buyer.<sup>868</sup>

Section 54(1)(a) of the CPA provides for a consumer's right to demand timely "performance and completion" of the services, and timely notice of any unavoidable delay in the performance the services. The seller's right to demand timely performance and completion of the service to sell from the estate agent under section 54(1)(a) of the CPA, it is argued, must be interpreted, having regard to the continuous nature of the service to sell, as a right to demand timely performance and completion of every reasonable step to bring about a sale of the seller's residential property to a willing and able buyer.

If the estate agent does not take every reasonable step to bring about a sale of the seller's residential property timely, the seller is entitled to require the estate agent to remedy the defect in the performance and completion of the services at that stage and every other stage of the performance of the services as a reasonable step to bring about a sale of the seller's residential property to a willing and able buyer.

### **5 3 3 2      The refund of a reasonable portion of the price paid for the services supplied or performed under section 54(2)(b) of the CPA**

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<sup>867</sup> See the definition of "service" in s 1 of the CPA.

<sup>868</sup> See the definition of "estate agency service" in reg 1(d) of the Code of Conduct read together with s 1(a)(i) of the definition of "estate agent" in the EAAA.

Section 54(2)(b) of the CPA provides for the consumer's fundamental right to require the supplier to refund a reasonable portion of the price paid for the services, having regard to the extent of the failure.<sup>869</sup> The right to require a refund of a portion of the price paid for the service, allows a consumer, where the services supplied or performed are not of the required standard of quality as provided for in section 54(1) of the CPA, to appoint another service provider to complete the services. In those instances where the supplier fails to perform or complete the services, effectively rendering the services useless, the consumer will be entitled to a full refund of the price paid for the services. Although De Stadler<sup>870</sup> argues that the consumer's right to require the supplier to refund the full portion of the price paid for the services under section 54(2)(b) of the CPA under these circumstances effectively equates to the cancellation of the agreement between supplier and the consumer, it is pointed out that the cancellation of the agreement, as a consequence of the consumer's right to require the supplier to refund the full portion of the purchase price paid in those instances where the supplier failed to perform the services at all, must be understood as a reliance on the consumer's common law rights<sup>871</sup> to cancel the agreement, and not as a right to cancellation under section 19(6)(c) of the CPA.

The terms of the estate agent's mandate for the sale of the seller's residential property determine what was agreed between them<sup>872</sup> and the seller and the estate agent must, at the very least, agree on the services to be performed by the estate agent and payment, usually in the form of a commission, calculated as a percentage of the purchase price, on the successful sale of the seller's property to a willing and able

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<sup>869</sup> S 54(2)(b) of the CPA.

<sup>870</sup> Naudé & Eiselen Revision Service 1 (2016) 54-22.

<sup>871</sup> S 2(10) of the CPA preserves the consumer's common law rights and provides that no provision of the CPA may be interpreted in a manner which precludes a consumer from exercising any rights afforded to him under the common law.

<sup>872</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

buyer.<sup>873</sup> The service expected of the estate agent in performing the instruction to sell the seller's residential property, is to take all necessary steps to bring about a sale between principals.<sup>874</sup> The usual agreement between the seller and the estate agent does not provide for a payment apportioned to every single step taken by the estate agent to achieve the successful sale of the seller's residential property, but provides for a payment on concluding the successful sale of the seller's property to a willing and able buyer. Such payment is usually in the form of a commission payable upon registration of transfer of the residential property in the name of the purchaser.

The agreement to pay commission to the estate agent on the successful sale of the seller's property to a willing and able buyer, is consistent with the nature of sales in general, which do not guarantee a successful outcome.

The Tribunal in *Jarvis v GM Alberante Motors t/a GM Alberante*<sup>875</sup> held that although the remedies under section 54(2)(a) of the CPA and section 54(2)(b) of the CPA are available to a consumer where the supplier acted in contravention of the provisions of section 54(1)(a) of the CPA and section 54(1)(b) of the CPA, the consumer was not entitled to the remedy under section 54(2)(b) of the CPA as he did not pay for the services and could therefore not require a refund of a reasonable portion of the price paid for the services.

The argument applies *mutatis mutandis* in the context of the sale of residential property. The common law estate agent's mandate for the sale of the seller's residential property provides for payment to the estate agent, usually in the form of a commission calculated as a percentage of the purchase price, on the successful sale of the seller's residential property to a willing and able buyer.<sup>876</sup> If the estate agent fails

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<sup>873</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP).

<sup>874</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>875</sup> *Jarvis v GM Alberante Motors t/a GM Alberante* (NTC/13959/2014/75(1)(b) [2015] ZANCT 45.

<sup>876</sup> See also reg 8 of the Code of Conduct which *inter alia* prohibits an estate agent from receiving any

to perform the services, or fails to take such reasonable steps as are required to bring about a successful sale of the seller's property to a willing and able buyer within a reasonable time after concluding the agreement with the seller or timely, the remedy under section 54(2)(b), which provides that the consumer may require the supplier to refund a portion of the purchase price to the consumer, may therefore not be available to the seller.

#### **5 4    Chapter conclusion**

The CPA applies<sup>877</sup> to transactions, agreements, and relationships between suppliers and consumers and to the marketing of goods and services by suppliers to consumers.<sup>878</sup> The application of the CPA to the supply or performance of services was analysed in chapter 2 of this research where a specific application of the CPA to the supply or performance of services by an estate agent in terms of an estate agent's mandate for the sale of the seller's residential property under section 1(a)(iii) of the definition of "transaction" was established.

It is important to again be reminded of the nature of the estate agent's common law mandate for the sale of the seller's residential property. The terms of the estate agent's mandate for the sale of the seller's residential property must be the point of departure to determine what was agreed between them.<sup>879</sup> The estate agent's common law mandate for the sale of the seller's residential property provides for an instruction by the seller to the estate agent to sell his residential property, which instruction the estate agent accepts,<sup>880</sup> and an undertaking by the seller to compensate the estate agent, usually in the form of a commission calculated as a percentage of the purchase price,

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remuneration prior to the successful completion of the transaction for the sale of the seller's residential property to a willing and able buyer.

<sup>877</sup> S 5 of the CPA determines the application of the CPA.

<sup>878</sup> Van Eeden & Barnard 35.

<sup>879</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>880</sup> See the definition of "mandate" in reg 1(h) of the Code of Conduct.

on the successful sale of the seller's residential property to a willing and able buyer.<sup>881</sup>

An estate agent is not, unless specifically authorised by the seller in writing,<sup>882</sup> clothed with authority to sell the seller's residential property and the agreement to sell the seller's residential property must be understood to mean "no more than that the agent will bring about a sale between principals."<sup>883</sup>

The research undertaken in chapter 3 and chapter 4 of this research clearly illustrates that prior to the CPA, consumer protection measures included in the EAAA and the common law provided inadequate protection of the rights of a seller of residential property.

Estate agents are regulated by the EAAB in terms of the EAAA, which is *inter alia* purposed to control certain activities of estate agents in the public interest.<sup>884</sup> To this extent, the EAAB framed and published<sup>885</sup> a Code of Conduct which imposes specific duties on an estate agent to control or prohibit any practice followed by an estate agent in dealing with the public and which shall be complied<sup>886</sup> with by estate agents.<sup>887</sup> The Code of Conduct sets the standard of professional conduct and ethics expected of an estate agent and, as a point of departure, the estate agent is expected to protect the public's interests.<sup>888</sup> In the context of the sale of residential property, this means that the estate agent:

a        may not do anything, or omit to do anything which may be contrary to the integrity of estate agents in general;<sup>889</sup>

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<sup>881</sup> *Tekenprakyk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP).

<sup>882</sup> S 2(1) of the ALA; Reg 3.5 of the Code of Conduct.

<sup>883</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>884</sup> See preamble to the EAAA.

<sup>885</sup> The powers of the EAAB is regulated in terms of s 8 of the EAAA.

<sup>886</sup> Reg 2 4 of the Code of Conduct imposes a duty on the estate agent to, at all times, comply with both the EAAA and the Code of Conduct.

<sup>887</sup> S 8(1)(b) of the EAAA.

<sup>888</sup> Reg 2 of the Code of Conduct.

<sup>889</sup> Reg 2 1 of the Code of Conduct.

- b* must protect the interest of the seller, to the best of his ability, having due regard the interest of all other parties concerned;<sup>890</sup>
- c* must not wilfully or negligently fail to perform any duties with such a degree of care and skill which might reasonably be expected from an estate agent;<sup>891</sup> and
- d* may not discriminate against a prospective buyer for reasons of race, creed, sex or country of origin<sup>892</sup> or on the grounds that the prospective buyer will not or is unlikely to make use of additional services made available by a specific person or institution arranged by the estate agent.<sup>893</sup>

In addition thereto, the estate agent must avoid a conflict of interest between the interest of the seller and another person<sup>894</sup> or between the interest of the seller and his own interests.<sup>895</sup>

The Code of Conduct is not a law and is not enforceable in a court of law<sup>896</sup> but regulates the activities of estate agents in the public's interest from the supply side of services by imposing duties on an estate agent in the supply or performance of estate agency services to the seller of residential property.

An argument<sup>897</sup> was presented that the duties imposed on an estate agent in terms of the Code of Conduct should be incorporated as tacit terms to the estate agent's

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<sup>890</sup> Reg 2 2 of the Code of Conduct.

<sup>891</sup> Reg 2 3 of the Code of Conduct.

<sup>892</sup> Reg 2 6 of the Code of Conduct.

<sup>893</sup> Reg 2 7 of the Code of Conduct.

<sup>894</sup> Reg 4 1 4 prohibits an estate agent to perform or attempt to perform an instruction to sell the seller's residential property, if he accepted a current prior mandate which conflicts with the seller's instruction to sell his residential property, unless he disclosed the existence of the prior mandate to the seller and advised him that he is not the estate agent's client in respect of that property.

<sup>895</sup> Reg 4 2 of the Code of Conduct regulates the estate agent's duties in respect of a personal conflict of interest with that of his client and in the context of the seller as the estate agent's client, provides that the estate agent may not purchase or acquire any interest in the seller's residential property which he is instructed to sell, without the full knowledge and consent of his client.

<sup>896</sup> Delport 2014 *Obiter* 71 n 32.

<sup>897</sup> Delport 2009 *Obiter* (131) 140.

mandate for the sale of the seller's residential property, on application of the "common bystander test".<sup>898</sup> The "common bystander test" requires that a court must find that both the seller of the residential property and the estate agent would have agreed that the duties imposed on the estate agent under the Code of Conduct would have been included in the estate agent's mandate for the sale of the seller's residential property, if asked by an impartial bystander who was present when the estate agent and the seller of the residential property concluded the agreement between them. A reasonable expectation by both the seller of the residential property and the estate agent that the estate agent is expected to perform the agreed estate agency services in a manner consistent with the duties imposed on the estate agent in terms of the Code of Conduct, indicates an agreement between the seller and the estate agent that the duties imposed on the estate agent under the Code of Conduct should be imported as tacit terms to the estate agent's mandate for the sale of the seller's residential property. However, the application of the "common bystander test" only applies if the seller was aware of the duties imposed on the estate agent under the Code of Conduct. In addition, because the Code of Conduct is not a law and is thus not enforceable *inter partes*, it was pointed out<sup>899</sup> that an argument may be proffered that the inconsequential penalties provided for in the EAAA may convince the common bystander that the duties imposed on the estate agent under the Code of Conduct should not be imported as tacit terms to the agreement between the estate agent and the seller of the residential property.

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<sup>898</sup> *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 532. The "common bystander test" provides for the court to assume that if an impartial bystander, who was present when the parties concluded their agreement, had asked the parties what would happen in a specific scenario which they did not foresee or did not provide for in the agreement between them. If both parties agree that the answer to the question is obvious, the court must conclude that the parties to the agreement have tacitly agreed to the term.

<sup>899</sup> At para 3.3 of this research.

Common law, which forms an indispensable part of the legal framework that makes up South African consumer protection law,<sup>900</sup> acknowledges the contract of mandate as the transaction type for the supply or performance of estate agency services by the estate agent to the seller of residential property, but points out that the estate agent's common law mandate for the sale of the seller's residential property is exceptional, in that no contractual obligation is imposed on the estate agent to do anything.<sup>901</sup> The express terms of the estate agent's mandate for the sale of the seller's residential property must be the point of departure to determine what exactly was agreed between the estate agent and the seller of the residential property.<sup>902</sup> The estate agent's common law mandate for the sale of the seller's residential property provides for an instruction by the seller of the residential property to the estate agent to sell his residential property, which instruction the estate agent accepts<sup>903</sup> and an undertaking by the seller of the residential property to compensate the estate agent, usually in the form of a commission calculated as a percentage of the purchase price, on the successful sale of the seller's residential property to a willing and able buyer.<sup>904</sup> Without more, the estate agent's common law mandate for the sale of the seller's residential property has been held as being exceptional,<sup>905</sup> in that no terms are implied as *naturalia* to the estate agent's mandate for the sale of the seller's residential property, that impose any duties on the estate agent in the supply or performance of the services to bring about a sale of the seller's residential property to a willing and

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<sup>900</sup> S 2(10) of the CPA protects a consumer's rights in terms of the common law and provides that no provision of the CPA may be interpreted to exclude a consumer from any rights afforded to him in terms of the common law.

<sup>901</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA) at para 1; Sharrock 346.

<sup>902</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>903</sup> See the definition of "mandate" in reg 1(h) of the Code of Conduct.

<sup>904</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP).

<sup>905</sup> Sharrock 346.



able buyer.<sup>906</sup>

Common law does not import terms as *naturalia* to the estate agent's mandate for the sale of the seller's residential property<sup>907</sup> that impose any duties on the estate agent in the sale of residential property. Nugent AJA in the matter between *Ronstan Investments (Pty) Ltd and Another v Littlewood*<sup>908</sup> held that in common law

“[t]he appointment of an estate agent to find a purchaser for immovable property in return for commission, without more, places the agent under no contractual obligations”.<sup>909</sup>

Although Delpont<sup>910</sup> argue for a development of the common law so as to amend the rules governing the estate agent's mandate for the sale of the seller's residential property to import terms to the estate agent's mandate as *naturalia* and which impose a duty on the estate agent to act in the best interest of his client with the necessary diligence and care,<sup>911</sup> this view has not been not adopted by our courts and the common law position remains.

Under common law, therefore, the implied terms to a contract of mandate, which impose duties on a mandatary to perform the instruction<sup>912</sup> personally,<sup>913</sup> within a reasonable period of time or as specified between the parties,<sup>914</sup> without exceeding

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<sup>906</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA); see also *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>907</sup> The express terms of the estate agent's mandate for the sale of the seller's residential property determine what was agreed between them.

<sup>908</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

<sup>909</sup> The problematic aspects of classifying the agreement between the seller and the estate agent were discussed in ch 4 of this research.

<sup>910</sup> Delpont 2009 *Obiter* (131) 140.

<sup>911</sup> See ch 4 of this research.

<sup>912</sup> *Bloom's Woolens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 538; *Ese Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 812; *Mouton v Mynwerkersunie* 1977 1 SA 119 (A); *National Screenprint (Pty) Ltd v The Campbell-Scott Company (Pty) Ltd* 1979 4 SA 393 (C) 397; *Steyn NO v Ronald Bobroff & Partners* 2013 2 SA 311 (SCA).

<sup>913</sup> *Eldraw Motors v Salzwedel* 1984 2 SA 846 (EC).

<sup>914</sup> *Stransky v Jansen & Co* (1888) 6 SC 158; *Johannesburg Consolidated Investments Co Ltd v D Pullinger* (1898) 5 OR 287; *Kennedy v Loynes* (1909) 26 SC 271; *Steenkamp v Du Toit* 1910 TPD 171; *Van Rensburg v Slabbert* 1930 EDL 156.

the agreed terms of the mandate,<sup>915</sup> with the necessary knowledge, care and skill,<sup>916</sup> in good faith<sup>917</sup> and in the exclusive interest of the mandator<sup>918</sup> are therefore not implied to the estate agent's common law mandate for the sale of the seller's residential property.

An estate agent is also not, unless authorised by the seller of the residential property in writing,<sup>919</sup> clothed with authority to perform a juristic act on behalf of the seller of the residential property.<sup>920</sup> The instruction to sell the seller's residential property must be understood to mean "no more than that the agent will bring about a sale between principals"<sup>921</sup> and the acceptance of the instruction by the estate agent does not impose any contractual obligations on the estate agent.<sup>922</sup>

It was therefore concluded in chapter 4 of this research that under common law, the estate agent's mandate for the sale of the seller's residential property therefore does

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<sup>915</sup> *Mine Workers' Union v Brodrick* 1948 4 SA 959 (AD).

<sup>916</sup> *Bloom's Woolens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 44; *S v Heller* 1971 2 SA 29 (A) 44; *Mouton v Mynwerkersunie* 1977 1 SA 119 (A); *Slomowitz v Kok* 1983 1 SA 130 (A); *Durr v ABSA Bank Ltd* 1997 3 SA 448 (SCA); *David Trust v Aegis Insurance Company Ltd* 2000 3 SA 289 (A).

<sup>917</sup> *Incorp Law Society v Meyer* 1981 3 SA 962 (T); *Stainer and others v Palmer Pilgrim* 1982 4 SA 205 (O) 210; *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 2 SA 54 (T) 64.

<sup>918</sup> *Bloom's Woolens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 538; *Leites v Contemporary Refrigeration (Pty) Ltd & Sonpoll Investments (Pty) Ltd* 1968 1 SA 58 (AD); *S v Heller* 1971 2 SA 29 (A) 44; *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and another* 1971 3 SA 866 (W) 867; *SA Fabrics Ltd v Millman* 1972 4 SA 592 (AD); *Ese Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) 812; *Rabinowitz and another NNO v Ned-Equity Insurance Co Ltd and another* 1980 1 SA 403 (W) 407; *Joel Melamed v Hurwitz and Cleveland Estates (Pty) Ltd* 1984 3 SA 155 (A) 164; *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 2 SA 54 (T) 64; *Tobacco Sales Floor Ltd v Chimwala* 1988 3 SA 427 (ZS) 431; *Durity Alpha (Pty) Ltd v Vagg* 1991 2 SA 840 843; *Van der Merwe v Nedcor Bank Bpk* 2003 1 SA 169 (SCA); *Laniyan v Negota SSH* [2013] 2 All SA 309 (GS); The duty to act in the best interest of the mandator includes the duty not to make any secret profits in performing the instruction (see *Robinson v Randfontein Estates GMC* 1921 AD 168; *Peacock v Marley* 1934 AD 5; *Novick v Comair Holdings* 1979 2 116 (W)), must properly advise the mandator (see *Fox & Caney (Pvt) Ltd v Dilworth* 1974 2 SA 631 (C) 632; *Stainer and others v Palmer-Pilgrim* 1982 4 SA 205 (O) 210), may not accept bribes (see *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) 845), may not disclose information regarding the mandator to others (see *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 2 SA 54 (T) 64) and must account to the mandator (see *Doyle and another v Fleet Motors PE (Pty) Ltd* 1971 3 SA 760 (A) 762).

<sup>919</sup> S 2(1) of the ALA. See also reg 3 5 of the Code of Conduct.

<sup>920</sup> *Bird v Summerville and another* 1961 3 SA 194 (A) 202; *John H. Pritchard & Associates v Thorny Park Estates* 1967 2 SA 511 (D); *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26.

<sup>921</sup> *Nach Investments (Pty) Ltd v Knight Frank (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>922</sup> *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

not protect the fundamental consumer rights of the seller of the residential property to demand performance of services to bring about a sale of the seller's residential property within a reasonable time, and with the necessary care and degree of diligence and skill as may reasonably be expected from an estate agent.

"The Consumer Protection Act (CPA) brought about significant changes to the commercial arena"<sup>923</sup> and in the context of the sale of residential property by an estate agent in terms of an agreement with the seller of residential property to sell the seller's residential property, imposes duties on the estate agent in the supply or performance of estate agency services to the seller of residential property in order to protect the fundamental consumer rights of the seller of residential property.

Section 19(2)(a) of the CPA, provides for mandatory implied terms<sup>924</sup> to every agreement for the supply of services, that the services must be performed, on the agreed date and time<sup>925</sup> and at the agreed place for the performance of the services.<sup>926</sup>

If a supplier fails to perform the services on the agreed date and time or at the agreed location and tenders performance of the services at another date and time or at another location, the consumer has the right to choose to accept the delivery of the services at the tendered date and time or at the tendered location,<sup>927</sup> or to demand performance of the services on the agreed date and time and at the agreed location<sup>928</sup> or the consumer may choose to cancel the agreement with the supplier without penalty, treating any performed services as unsolicited services as provided for in

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<sup>923</sup> Barnard 2012 *De Jure* 455.

<sup>924</sup> S 19(2) of the CPA provides that unless expressly provided or agreed otherwise, the terms as provided for in s 19(2)(a) – (c) of the CPA are implied terms to the agreement for the supply of services.

<sup>925</sup> S 19(2)(a)(i) of the CPA. If the parties to the agreement for the supply of the services did not agree on a specific date and time for the performance of the services, s 19(2)(a)(i) of the CPA provides that the performance must be within a reasonable time after the conclusion of the agreement.

<sup>926</sup> S 19(2)(a)(ii) of the CPA.

<sup>927</sup> S 19(6)(a) of the CPA.

<sup>928</sup> S 19(6)(b) of the CPA.

section 21 of the CPA.<sup>929</sup>

Section 19 of the CPA must be read together with section 54 of the CPA, which regulates a consumer's right to demand quality services. Section 54(1) provides for a consumer's right to demand the timely performance and completion of the services and timely notice of any unavoidable delay in the performance of such services,<sup>930</sup> the performance of the services in a manner and of such quality that persons are generally entitled to expect,<sup>931</sup> the use, delivery and installation of goods that are free of defects, the use, delivery or installation of such goods are required for the performance of the services<sup>932</sup> and the return of property or the control of property to the consumer in at least as good a condition as when it was made available to the supplier for purposes of performing the services.<sup>933</sup> If a supplier fails to perform the agreed services as provided in section 54(1) of the CPA, the consumer may require the supplier to remedy the defect in the performance of the services,<sup>934</sup> or to refund to the consumer a reasonable portion of the price paid for the services, having regard to the extent of the failure.<sup>935</sup>

The application of the provisions of sections 19 and 54 of the CPA to the supply or performance of services, is complex and poses many challenges.<sup>936</sup> Although "bad drafting, obvious mistakes, ignorance of the common law and the haphazard importation of concepts developed under foreign law"<sup>937</sup> may be argued to be

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<sup>929</sup> S 19(6)(c) of the CPA.

<sup>930</sup> S 54(1)(a) of the CPA.

<sup>931</sup> S 54(1)(b) of the CPA.

<sup>932</sup> S 54(1)(c) of the CPA.

<sup>933</sup> S 54(1)(d) of the CPA.

<sup>934</sup> S 54(2)(a) of the CPA.

<sup>935</sup> S 54(2)(b) of the CPA.

<sup>936</sup> The complexities and difficulties in the application of the provisions of s 19 and s 54 of the CPA in the supply or performance of services are analysed in para 5.2 of this research.

<sup>937</sup> Delport 2014 *Obiter* 61. See also Naudé 2010 *SALJ* 505; Sharrock "Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act" 2010 *SA Merc LJ* 295 – 325 (hereinafter "Sharrock 2010 *SA Merc LJ*"); Naudé 2010 *SALJ* 515; Du Plessis "Protecting Consumers Against Unconscionable Conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2010 *THRHR* 26 - 42 (hereinafter "Du Plessis 2012 *THRHR*");

contributing factors, the nature of the supply or performance of services, in particular, present challenges, which cannot easily be addressed by statutory regulation.

The CPA applies to the supply or performance of services by an estate agent in terms of an estate agent's mandate for the sale of the seller's residential property.<sup>938</sup> Van Eeden & Barnard point out<sup>939</sup> that the CPA amends many of the common law rules and introduces additional *naturalia* to specific consumer contracts.<sup>940</sup> In the context of the sale of residential property by an estate agent in terms of an estate agent's mandate for the sale of the seller's residential property, the intervention of the CPA and specifically the provisions of section 19 of the CPA, brought about significant changes to the common law rules governing the estate agent's mandate for the sale of the seller's residential property.<sup>941</sup>

Section 19 and section 54 of the CPA introduced statutory duties on the estate agent in the performance of the services to bring about a sale of the seller's residential property to a willing and able buyer and the estate agent must, subject to any criteria agreed with the seller and the circumstances of the supply, perform or complete the services timely and give timely notice of any unavoidable delay in the performance of the services,<sup>942</sup> in a manner and quality that persons are generally entitled to expect,<sup>943</sup> and to return of any property or the control over any property of the consumer in at least as good a condition as it was when it was made available to a supplier for

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Barnard 2012 *De Jure*; Barnard "The Influence of the Consumer Protection Act 68 of 2008 on the Common Law Warranty Against Eviction: A Comparative Overview" 2012 *PELJ* 348 – 639 (hereinafter "Barnard 2012 *PELJ*") 348; Glover "Section 40 of the Consumer Protection Act in Comparative Perspective" 2013 *TSAR* 689 – 697 (hereinafter "Glover 2013 *TSAR*") 689.

<sup>938</sup> S 5 of the CPA regulates the application of the CPA. The application of the CPA in the context of the sale of residential property by the estate agent on instruction from or authorization by the seller, was analysed in ch 2 of this research.

<sup>939</sup> Van Eeden & Barnard 59.

<sup>940</sup> Van Eeden & Barnard 314.

<sup>941</sup> Barnard 2012 *De Jure* 455.

<sup>942</sup> S 54(1)(a) of the CPA.

<sup>943</sup> S 54(1)(b) of the CPA.

purposes of performing the agreed services.<sup>944</sup>

“Effective enforcement mechanisms are the most important part of any consumer protection policy”<sup>945</sup> and the success of the consumer protection measures provided for in the CPA in the context of the sale of residential property, must be measured against the remedies and routes of redress available to the seller in those instances where the seller’s rights, as a consumer, are infringed or impaired by the actions or omissions of the estate agent *qua* supplier, acting contrary to the provisions of the CPA.

The problematic application of the remedies available to a consumer under section 19(6) and section 54(2) of the CPA, was discussed under paragraph 5.3 of this research. In the context of the supply or performance of services by an estate agent in terms of an estate agent’s mandate for the sale of the seller’s residential property, the nature of the services to sell the seller’s residential property complicates an application of the remedies available to the seller of the residential property under section 19(6) and section 54(2) of the CPA.

The supply or performance of an instruction to sell must be understood as an instruction “to bring about a sale between principals”<sup>946</sup> and the estate agent must take all reasonable steps to achieve the sale of the seller’s residential property to a willing and able buyer. The supply or performance of a service to bring about a sale between principals<sup>947</sup> is continuous in nature and does not guarantee a sale of the seller’s residential property to a willing and able buyer on a certain date and on a certain time or at all, and the estate agent cannot reasonably be compelled to perform the service to sell on an agreed date and at an agreed time as provided for under section

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<sup>944</sup> S 54(1)(d) of the CPA.

<sup>945</sup> Draft Green Paper 6.

<sup>946</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>947</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

19(2)(a)(i) of the CPA. The remedies under section 19(6) of the CPA, which include the seller's right to cancel the agreement with the estate agent without penalty<sup>948</sup> is only available to the seller if the estate agent tenders the performance of the services on a date and time "*other than as agreed*"<sup>949</sup> with the consumer and it was pointed out that the seller may therefore, not have the right, under section 19(6)(c) of the CPA, to cancel the agreement with the estate agent without penalty.

The nature of the service to bring about a sale between principals<sup>950</sup> determines that the estate agent must take all reasonable steps to achieve a sale of the seller's residential property to a willing and able buyer as soon as reasonably practicable and the seller has the right to demand performance of every reasonable step in the process to bring about a sale of the seller's residential property within a reasonable time after concluding the transaction or agreement<sup>951</sup> or timely<sup>952</sup> and timely notice of any unavoidable delay in the performance or completion of the services.<sup>953</sup>

Although section 54(2) of the CPA provides for a consumer's right to require the supplier to either remedy the defect in the performance of the services under section 54(2)(a) of the CPA or to demand a refund of a portion of the price paid for the services having regard to the extent of the failure in the performance of the services under section 54(2)(b) of the CPA, the common law estate agent's mandate for the sale of the seller's residential property, which provides for an undertaking by the seller only to compensate the estate agent on the successful sale of the seller's residential property

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<sup>948</sup> S 19(6)(c) of the CPA. The consumer may also choose to either accept performance of the services on the tendered date and time under s 19(6)(a) of the CPA or demand performance of the services on the agreed date and time, if the agreed date and time has not already passed under s 19(6)(b) of the CPA.

<sup>949</sup> Own emphasis.

<sup>950</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 8.

<sup>951</sup> S 19(2)(a)(i) of the CPA.

<sup>952</sup> S 54(1)(a) of the CPA.

<sup>953</sup> S 54(1)(a) of the CPA.

to a willing and able buyer,<sup>954</sup> effectively precludes the seller from exercising his right to claim a refund from the estate agent under section 54(2)(b) of the CPA.

If the estate agent fails to perform the services within a reasonable time after concluding the agreement with the seller<sup>955</sup> or timely, and fails to provide the seller with timely notice of any unavoidable delay in the supply or performance of the services,<sup>956</sup> the seller may request the estate agent to remedy any defect in the performance of the services under section 54(2)(b) of the CPA. The definition of a “defect” under section 53(1)(a)(i) of the CPA, however, limits the application of the remedy available to a seller of residential property under section 54(2)(b) of the CPA, to demand rectification of a materially imperfect performance of a service. The seller’s right to demand quality services under section 54(1) of the CPA is subject to the circumstances of the supply and various external factors, such as economic factors, market conditions, seasonality, the condition of the property, pricing and buyer profile may limit what could otherwise be argued to be materially imperfect performance of a service, thereby limiting the seller of the residential property’s right to require the estate agent to remedy the defect in the performance of the services.

Section 2 of the CPA, which deals with matters of interpretation, provides<sup>957</sup> that the CPA must be interpreted in a manner which gives effect to the purposes of the CPA.<sup>958</sup> The CPA aims to promote and advance the social and economic welfare of the consumers in South Africa<sup>959</sup> by those measures set out in section 3(1)(a) – (h) of the CPA. The provisions of section 2(1) of the CPA must be read together with the provisions of section 4(3) of the CPA which provide that the Tribunal or court must, if

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<sup>954</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP).

<sup>955</sup> S 19(2)(a)(i) of the CPA.

<sup>956</sup> S 54(1)(a) of the CPA.

<sup>957</sup> S 2(1) of the CPA.

<sup>958</sup> S 3 of the CPA sets out the purposes of the CPA.

<sup>959</sup> S 3(1) of the CPA.



any provisions of the CPA, read in context, can reasonably be interpreted to have more than one meaning, prefer the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights generally, and in particular by those persons contemplated in section 3(1)(b)<sup>960</sup> of the CPA.

In the context of the sale of residential property by an estate agent in terms of an estate agent's common law mandate for the sale of the seller's residential property, a dissemination of the remedies available to the seller under sections 19(6) and section 54(2) of the CPA indicate that the CPA does not provide adequate protection of the seller's rights as a consumer under the CPA. The CPA however provides an opportunity for a development of the prevailing common law rules governing the estate agent's mandate for the sale of the seller's residential property, by importing contractual terms to the estate agent's mandate for the sale of the seller's residential property, which impose a duty on the estate agent to perform the services within a reasonable time after concluding the agreement with the seller<sup>961</sup> at the agreed location,<sup>962</sup> thereby promoting and advancing the economic welfare of the seller of residential property in South Africa<sup>963</sup> by protecting the seller from the unfair, unreasonable and unjust trade practices of the common law estate agent's mandate, which does not impose an obligation on the estate agent to do anything.<sup>964</sup>

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<sup>960</sup> S 3(1)(b) of the CPA specifically refers to consumers who are low-income persons or persons comprising low-income communities, consumers who live in remote, isolated or low-density population areas or communities, consumers who are minors, seniors or other similarly vulnerable consumers and consumers 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.

<sup>961</sup> S 19(2)(a)(i) of the CPA.

<sup>962</sup> S 19(2)(b)(ii) of the CPA.

<sup>963</sup> See S 3(1) of the CPA.

<sup>964</sup> See s 3(1)(d) of the CPA.

#### **5 4 1 Section 4(2)(a) of the CPA**<sup>965</sup>

The South African common law developed from Roman law and Roman-Dutch law, was influenced by English law and customary law and is modified by statute and interpreted by judicial precedent<sup>966</sup> in an ongoing process of development of the common law. The CPA adapts and amends the common law<sup>967</sup> and provides in section 4(2)(a) of the CPA that the court must, in any matter brought before the court or the Tribunal, develop the common law “as is necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by those persons contemplated in section 3(1)(b)”<sup>968</sup> of the CPA.

De Stadler<sup>969</sup> points out that although the provisions of section 4(2)(a) of the CPA are mandatory,<sup>970</sup> the application of the provisions of section 4(2)(a) of the CPA is unclear. Van Eeden & Barnard<sup>971</sup> agree that, although the provisions of section 4(2)(a) are mandatory,<sup>972</sup> an opportunity to develop the common law in matters brought before court in terms of the CPA, seems limited, having due regard to the provisions of section 69(d) of the CPA and, should preferably have applied to matters involving the common

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<sup>965</sup> A comprehensive and critical analysis of the provisions of s 4(2) of the CPA falls outside the ambit of this research. Reference to the provisions of s 4(2) of the CPA is made solely in support of the formulation of writer’s argument.

<sup>966</sup> Supreme Court of Appeal of South Africa “SCA History” <http://www.justice.gov.za/sca/historysca.htm> accessed on 31 August 2019.

<sup>967</sup> For example, s 19 of the CPA provides for mandatory terms to be included in every agreement for the delivery of goods and the performance of services. See also Van Eeden & Barnard 59.

<sup>968</sup> S 3(1)(b) of the CPA refers to consumers who are low-income persons or persons comprising low-income communities (s 3(1)(b)(i) of the CPA), persons who live in remote, isolated or low-density population areas or communities (s 3(1)(b)(ii) of the CPA), persons who are minors, seniors or other similarly vulnerable consumers (s 3(1)(b)(iii) of the CPA) or persons whose ability to read and understand any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reasons of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented (s 3(1)(b)(iv) of the CPA).

<sup>969</sup> Naudé & Eiselen Revision Service 1 (2016).

<sup>970</sup> S 4(2)(a) of the CPA provides that the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights in general, and particularly of those persons contemplated in s 3(1)(a) of the CPA.

<sup>971</sup> Van Eeden & Barnard 58.

<sup>972</sup> S 4(2)(a) of the CPA determines that: “In any matter brought before the Tribunal or Court in terms of this Act – (a) the court must develop the common law...”

law rights of the consumer, which are preserved in terms of section 2(10) of the CPA.

#### **5 4 2 Section 69(d) of the CPA**<sup>973</sup>

The application of section 69(d) of the CPA is complex and requires a comprehensive analysis, which is excluded from the scope of this research. For purposes of formulating a logical conclusion, some observations are recorded.

Section 69 of the CPA, which regulates the enforcement of consumer rights, provides in section 69(d) of the CPA, that a consumer<sup>974</sup> may only approach a court with jurisdiction over a matter if all other remedies available to that person in terms of national legislation have been exhausted.

The CPA, as national legislation, provides for the enforcement of consumer rights by referring a matter directly to the Tribunal,<sup>975</sup> the applicable ombud with jurisdiction where a supplier is subject to the jurisdiction of the ombud,<sup>976</sup> or where the supplier is not subject to an ombud with jurisdiction, to a section 82(6) accredited ombud (if the supplier is subject to such an ombud)<sup>977</sup> or by applying to the consumer court of the province with jurisdiction over the matter (if there is such a consumer court),<sup>978</sup> referring the matter to another alternative dispute resolution agent contemplated in section 70 of the CPA,<sup>979</sup> or filing a complaint with the Commission in accordance with section 71 of the CPA<sup>980</sup> and only to a court, if all remedies provided for in terms the

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<sup>973</sup> A comprehensive and critical analysis of the provisions of s 69(d) of the CPA falls outside the ambit of this research. Reference to the provisions of s 69(d) of the CPA is made solely in support of the formulation of writer's argument.

<sup>974</sup> S 69 refers to a person contemplated in s 4(1) of the CPA. S 4(1) of the CPA includes any person acting on his own behalf (s 4(1)(a) of the CPA), a person who is authorised to act on behalf of another person, who cannot act in his own name (s 4(1)(b) of the CPA), a person who acts as a member of or in the interests of a group of affected persons or class of affected persons (s 4(1)(c) of the CPA), a person acting in the public interest, with leave of the NCT or court (s 4(1)(d) of the CPA) and an association, acting in the interests of its members (s 4(1)(e) of the CPA).

<sup>975</sup> S 69(a) of the CPA.

<sup>976</sup> S 69(b) of the CPA.

<sup>977</sup> S 69(c)(i) of the CPA.

<sup>978</sup> S 69(c)(ii) of the CPA.

<sup>979</sup> S 69(c)(iii) of the CPA.

<sup>980</sup> S 69(c)(iv) of the CPA.

legal framework provided for in terms of the CPA and other national legislation have been exhausted.<sup>981</sup>

A consumer may therefore, on a proper interpretation and application of the CPA, only be before the court<sup>982</sup> on appeal or review of a decision of the Tribunal, Ombud, Consumer Court or alternative dispute resolution agent. Appeals, which relate to the substantive correctness of findings of fact or law (in this instance the CPA) and reviews, which relate to procedural fairness, imply that the Court “will be precluded from pronouncing on the common law, other than to do so *obiter*.”<sup>983</sup>

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<sup>981</sup> S 69(d) of the CPA.

<sup>982</sup> See s 69 of the CPA and the discussion on the different options available to consumers in seeking redress in terms of the CPA, below.

<sup>983</sup> Van Eeden & Barnard 511.

## **Chapter 6: CONCLUSION AND RECOMMENDATIONS**

### **6 1 Introduction**

The main aim of this research was to critically analyse the duties imposed on an estate agent in the sale of residential property under the CPA. The statutory duties imposed on an estate agent in the supply or performance of services in the sale of residential property under the EAAA and, the contractual common law duties imposed on an estate agent inherent to the estate agent's common law mandate for the sale of the seller's residential property are included in the ambit of the CPA<sup>984</sup> and were included in the comprehensive analysis of the duties of an estate agent in the sale of residential property under the CPA.<sup>985</sup>

For purposes of this research, it was important to clarify the common law ordinary estate agent's mandate for the sale of the seller's residential property as well as the service supplied or performed by an estate agent in the sale of residential property. In this regard it was pointed out that the express terms of the agreement between the seller and the estate agent for the sale of the seller's residential property determine what was agreed between the parties.<sup>986</sup> The estate agent's common law mandate for the sale of the seller's residential property provides for an instruction given to and accepted by the estate agent to sell the seller's residential property,<sup>987</sup> with an undertaking by the seller to compensate the estate agent, usually in the form of a commission calculated as a percentage of the purchase price of the seller's residential

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<sup>984</sup> S 2(9) of the CPA provides for a concurrent application of the provisions of the CPA and any other Act and section 2(10) of the CPA provides that no provisions of the CPA may be interpreted in a manner which precludes a consumer from exercising any rights afforded to him under common law. See also Woker 2010 *Obiter* 218.

<sup>985</sup> Ch 3 of this research investigated and summarised the statutory duties imposed on an estate agent under the EAAA and the Code of Conduct as well as the PPA. Ch 4 of this research analysed the duties imposed on an estate agent in terms of an estate agent's common law mandate.

<sup>986</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>987</sup> Reg 1(h) of the Code of conduct defines a "mandate" as "an instruction or an authority given to, and accepted by, an estate agent to render an estate agency service."

property, on the sale of the seller's residential property to a willing and able buyer.<sup>988</sup> Unless the agreement between the seller and the estate agent includes a written<sup>989</sup> power of attorney which specifically authorises the estate agent to sell his residential property, an estate agent is not clothed with authority to perform a juristic act on behalf of the seller and is therefore not authorised to sell the seller's residential property.<sup>990</sup> The services expected of the estate agent in the sale of the seller's residential property, are to bring about a sale of the seller's residential property to a willing and able buyer.<sup>991</sup>

It is with this explanation in mind, that the research was undertaken within a systematic framework, as follows:

- a* an introductory chapter, providing a background to the research, stating the research objectives, clarifying the limitations of the scope of the research, explaining the methodology used and including a summary on the general and specific interpretation of the CPA (chapter 1 of this research);
- b* an analysis of the provisions of section 5 of the CPA, read together with the definition of "transaction", which clarifies the circumstances under which the CPA will apply and determines the requirements which must be met to establish an application of the CPA in the sale of residential property by an estate agent (chapter 2 of this research);
- c* an investigation and summary of the statutory duties imposed on the estate agent in the supply or performance of services in the sale of residential property under the EAAA and the Code of Conduct. Aspects of the PPA, which

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<sup>988</sup> *Tekenpraktijk CC v Erf 2720 Tzaneen (Pty) Ltd* 2013 JDR 1667 (GNP); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>989</sup> S 2(1) of the ALA; Reg 3 5 of the Code of Conduct.

<sup>990</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>991</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

was signed into law by the President on 2 October 2019, were included in the summary of the statutory duties imposed on an estate agent in the sale of residential property, in so far as it introduces additional industry-specific regulation of property practitioners (previously estate agents) under the banner of “*Consumer Protection*” (chapter 3 of this research);

- d an analysis of the common law terms imported as *naturalia* to the estate agent’s mandate for the sale the seller’s residential property and the contractual common law duties imposed on an estate agent (chapter 4 of this research);
- e an extensive evaluation and critical analysis of the duties imposed on the estate agent (conversely the rights of a seller) under section 19 of the CPA, which regulates the seller’s rights in respect of the supply of services by importing mandatory terms to the agreement between the seller and the estate agent for the sale of the seller’s residential property<sup>992</sup> and under section 54 of the CPA, which regulates the seller’s right to demand quality services by imposing specific duties on the estate agent in the supply or performance of services to bring about a sale of the seller’s residential property to a willing and able buyer (chapter 5 of this research).<sup>993</sup>

In order to come to a logical conclusion to the critical question: what are the duties of an estate agent in the sale of residential property, and present meaningful recommendations, the remedies available to the seller in those instances where the estate agent performs the agreed services to sell the seller’s residential property in breach of the duties imposed on the estate agent under section 19 and section 54 of the CPA, were disseminated in chapter 5 of this research.<sup>994</sup>

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<sup>992</sup> S 19 of the CPA.

<sup>993</sup> S 54 of the CPA.

<sup>994</sup> It is specifically pointed out that any reference to the seller’s remedies under s 19 and s 54 of the CPA and the PPA is not intended as a critical analysis.

## **6 2    Summary of chapters**

The application of the CPA and the duties of the estate agent (conversely the rights of the seller) in the sale of residential property were discussed in chapters 2, 3, 4 and 5 of this research respectively. The findings of each chapter are summarised hereunder.

### **6 2 1   Chapter 2: The application of the CPA**

The scope and application of the CPA is provided for in section 5 of the CPA read together with the definitions of the terms and phrases which defines the scope of section 5 of the CPA. The CPA applies to the every transaction occurring in the Republic, unless it is exempted in terms of section 5(2) or sections 5(3) and 5(4) of the CPA<sup>995</sup> and, specifically in the context of the supply or performance of services, the circumstances under which the CPA will apply as provided for under section 1(a)(iii) of the definition of “transaction” were analysed in chapter 2 of this research. Section 1(a)(iii) of the definition of “transaction” provides for an application of the CPA to the performance by or at the direction of a person acting in the ordinary course of business, for or at the direction of a consumer, for consideration<sup>996</sup> and identified<sup>997</sup> four key concepts which determines an application of the CPA to the supply or performance of services as:

- a*      the performance of services;
- b*      by or at the direction of a person acting in the ordinary course of business;
- c*      for or at the direction of a consumer;
- d*      for consideration.

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<sup>995</sup> S 5(1)(a) of the CPA.

<sup>996</sup> The CPA also applies to the promotion of services or the supplier of services under s 5(1)(b) of the CPA, to services supplied or performed in terms of a transaction to which the CPA applies, irrespective of whether those services are offered or supplied in conjunction with any other goods or services or separate thereof under s 5(1)(c) of the CPA, and to the agreement between a supplier and consumer for the supply or potential supply of services for consideration under (a)(iii) of the definition of “transaction” in s 1 of the CPA.

<sup>997</sup> At para 2 2 of this research.



It was pointed out<sup>998</sup> that the application of the CPA may be limited by application to the Minister under section 5(3) of the CPA, which provides for a regulatory authority to apply for an industry-wide exemption to one or more of the provisions of the CPA on the basis that those provisions overlap a regulatory scheme administered by the regulatory authority in terms of any other national legislation,<sup>999</sup> and the Minister may grant the application on the terms as provided for under section 5(4)<sup>1000</sup> of the CPA. Estate agents are regulated by the EAAB in terms of the EAAA which came into operation on 1 August 1977. To date, no application under section 5(3) of the CPA has been granted in favour of the EAAB and it was concluded<sup>1001</sup> that the provisions of the EAAA and the CPA must therefore apply concurrently, as provided for in section 2(9)<sup>1002</sup> of the CPA.

Under section 8(1)(b) of the EAAA, the EAAB published regulations<sup>1003</sup> in the format of a Code of Conduct, which must be complied with by all estate agents.<sup>1004</sup> Both the EAAA and the Code of Conduct include a list of defined<sup>1005</sup> terms and phrases and it was confirmed<sup>1006</sup> that these terms and phrases should guide an interpretation of the EAAA and the Code of Conduct and ought to be used as interpretational tools in properly understanding the four key concepts identified in section 1(a)(iii) of the definition of “transaction” in analysing the application of the CPA to the supply or

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<sup>998</sup> At para 2 3 of this research.

<sup>999</sup> S 5(3)(a) of the CPA.

<sup>1000</sup> The Minister may grant the exemption after receiving advice from the Commission and subject to any limitations or conditions necessary to ensure the achievement of the purposes and provisions of the CPA.

<sup>1001</sup> At para 2 3 3 1.

<sup>1002</sup> S 2(9) of the CPA deals with inconsistencies in the application of the CPA and any other Act and provides that the provisions of both the CPA and the other Act/s must be applied and complied with to the extent that it is possible to apply and comply with the one without contravention of the other (s 2(9)(a) of the CPA) and to the extent that it is not possible, the provision that extends the greater protection to a consumer must prevail over the other (S 2(9)(b) of the CPA).

<sup>1003</sup> S 33 of the EAAA.

<sup>1004</sup> S 8(1)(b) of the EAAA.

<sup>1005</sup> See s 1 of the EAAA and reg 1 of the Code of Conduct.

<sup>1006</sup> At para 2 4 of this research.

performance of services by an estate agent in the sale of residential property.

An analysis of the application of the CPA with regard to the performance of services by or at the direction of the estate agent for or at the direction of the seller of the residential property in the sale of residential property, was undertaken in a manner which gives effect to the purposes of the CPA<sup>1007</sup> as provided in section 2(1)<sup>1008</sup> of the CPA and, it was emphasised<sup>1009</sup> that if any of the four concepts, read in context could reasonably be construed to have more than one meaning, the meaning which best promotes the spirit and purposes of the CPA was preferred as provided for in section 4(3)<sup>1010</sup> of the CPA.<sup>1011</sup>

In the context of the sale of residential property by an estate agent in terms of an estate agent's mandate for the sale of the seller's residential property, an application of the CPA was established<sup>1012</sup> to the performance of services by or at the direction of the estate agent for or at the direction of the seller of residential property for consideration as provided for under section 1(a)(iii) of the definition of "transaction" in section 1 of the CPA.

## **6 2 2 Chapter 3: The duties of an estate agent in the sale of residential property under the EAAA and the Code of Conduct**

Estate agents are regulated by the EAAB in terms of the EAAA which came into

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<sup>1007</sup> S 3 of the CPA.

<sup>1008</sup> S 2(1) of the CPA provides that the CPA must be interpreted in a manner that gives effect to the purposes of the CPA as set out in s 3 of the CPA.

<sup>1009</sup> At para 2 2 3 2 and para 2 2 5.

<sup>1010</sup> S 4(3) of the CPA provides that the court or Tribunal must, if any provisions of the CPA, read in context is capable of more than one meaning, prefer the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights generally and in particular of vulnerable persons under s 3(1)(b) of the CPA.

<sup>1011</sup> The requirement of consideration as provided of under (a)(iii) of the definition of "transaction" in s 1 of the CPA posed a particularly difficult challenge, considering that payment, in the form of a commission calculated as a percentage of the purchase price as payment for the sale of the seller's residential property to a willing and able buyer escapes an estate agent who did not succeed in the sale of the seller's residential property despite the supply or performance of services aimed at the sale of the seller's residential property. This aspect was analysed in para 2 2 5.

<sup>1012</sup> At para 2 4.

operation on 1 August 1977. To date, no application in terms of section 5(3)<sup>1013</sup> has been granted in favour of the EAAB and it was concluded in chapter 2 of this research<sup>1014</sup> that the provisions of the EAAA and the CPA must apply concurrently as provided in section 2(9)<sup>1015</sup> of the CPA.

The EAAA *inter alia* aims<sup>1016</sup> to regulate the activities of estate agents in the public interest and to this extent, the EAAB formulated and published<sup>1017</sup> regulations<sup>1018</sup> in the form of a Code of Conduct, which impose duties on estate agents in regulating their conduct in dealing with the public. The Code of Conduct applies to the supply or performance of services by an estate agent in the sale of residential property, and introduced a standard of professional conduct and ethics which is expected from an estate agent in dealing with the public<sup>1019</sup> which must be complied with by all estate agents.<sup>1020</sup>

The duties imposed on an estate agent was summarised in paragraph 3.2 of this research with reference, where applicable, to corresponding sections of the CPA, but it was specifically pointed<sup>1021</sup> out that any such reference to the corresponding sections of the CPA were made briefly, to ensure a comprehensive overview of the duties imposed on an estate agent in the sale of residential property in achieving the

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<sup>1013</sup> S 5(3) of the CPA provides for an application to the Minister by a regulatory authority for an industry-wide exemption to one or more of the provisions of the CPA on the basis that those provisions duplicate or overlap a scheme administered by the regulatory authority in terms of any other national legislation, treaty, international law, convention or protocol.

<sup>1014</sup> At para 2.3.3.1 of this research.

<sup>1015</sup> S 2(9) provides for a concurrent application of the CPA and any other Act (except the Public Finance Management Act or the Public Service Act which are regulated under s 5(8) of the CPA) to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second, and to the extent this is not possible, the provision that extends the greater protection to a consumer prevails over the alternative provision.

<sup>1016</sup> See the Preamble to the EAAA.

<sup>1017</sup> S 8(1)(b) of the EAAA.

<sup>1018</sup> S 33 of the EAAA.

<sup>1019</sup> *Noragent (Edms) Bpk v De Wet* 1985 1 SA 267 (T).

<sup>1020</sup> S 8(1)(b) of the EAAA.

<sup>1021</sup> At para 1.4 of this research.

main aim of this research.

Although the Code of Conduct is not a law and is not enforceable between a client<sup>1022</sup> and an estate agent in a court of law,<sup>1023</sup> an argument<sup>1024</sup> was presented<sup>1025</sup> that the duties imposed on an estate agent in the Code of Conduct, must, on application of the “common bystander test”,<sup>1026</sup> be included as tacit terms to the agreement between the seller and the estate agent, for the sale of the seller’s residential property on instruction from the seller to sell his residential property. It was concluded<sup>1027</sup> that this view has not been adopted by the judiciary and although the Code of Conduct aims to regulate the activities of estate agents in the public interest, from a consumer protection perspective on the demand side, fails to adequately protect the rights of the seller of residential property as a consumer.

Aspects of the PPA, which was signed into law by the President on 2 October 2019, were also referred to<sup>1028</sup> in chapter 3 as the PPA will, once it comes into effect on a date determined by the President by notice in the *Gazette*, replace the EAAA. Chapter 10 of the PPA specifically deals with consumer protection and introduces specific duties on a property practitioner (previously an estate agent) in protecting the rights of a seller as a consumer under the PPA. The reference to the provisions of the PPA which deals with consumer protection was however limited to aspects which supported a process of formulating arguments which are included in the conclusion and

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<sup>1022</sup> A “client” is defined in reg 1(c) of the Code of Conduct as the person who has given the estate agent a mandate, provided that should the estate agent receive conflicting mandates in respect of a particular immovable property, the person whose mandate was first accepted by the estate agent, is regarded as the client.

<sup>1023</sup> Delport 2014 *Obiter* 71 n 32.

<sup>1024</sup> Delport 2009 *Obiter* (131) 140.

<sup>1025</sup> At para 3 3 of this research.

<sup>1026</sup> *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A).

<sup>1027</sup> At para 3 3 of this research.

<sup>1028</sup> Aspects of the PPA were mentioned in para 3 3 1 of this research to ensure a comprehensive overview of the duties imposed on an estate agent in the sale of residential property and in support of some observations which will be made in para 6 3 2 1 of this research relating to the seller’s route of redress as provided for under s 69(d) of the CPA.

recommendations under paragraph 6 3 hereunder.

### **6 2 3 Chapter 4: The duties of an estate agent in the sale of residential property under the common law**

From the outset, it was necessary to clarify<sup>1029</sup> the service expected of an estate agent in the sale of the seller's residential property in terms of an estate agent's common law mandate for the sale of residential property. The terms of every agreement between the seller and the estate agent must be interpreted in accordance with the ordinary principles of the rules of construction of contracts to determine precisely what was agreed between them.<sup>1030</sup> Unless the specific agreement between the seller and the estate agent includes a written<sup>1031</sup> power of attorney which specifically authorises the estate agent to sell his residential property, an estate agent is not clothed with authority to perform a juristic act on behalf of the seller and is therefore not authorised to sell the seller's residential property.<sup>1032</sup> The service expected of the estate agent in the sale of the seller's residential property, are limited to those services necessary to put the seller in a position to sell his residential property to a willing and able buyer.<sup>1033</sup> It was pointed out<sup>1034</sup> that there is support for a proposition that argues for imposing duties similar to the duties of an agent and mandatary on the estate agent in the sale of residential property by virtue of the shared characteristics with the concepts of agency and mandate<sup>1035</sup> and the common law duties of an agent and mandatary was

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<sup>1029</sup> At para 4 1 of this research.

<sup>1030</sup> *Midgley Estates Ltd v Hand* [1952] 2 QB 432 (CA) 435; *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>1031</sup> S 2(1) of the ALA; Reg 3 5 of the Code of Conduct.

<sup>1032</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>1033</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>1034</sup> At para 4 2 of this research.

<sup>1035</sup> *Van Zyl en Seuns (Edms) Bpk v Nel* 1975 3 SA 983 (N); *Botha v Smit* 1976 4 SA 885 (A). See also Nagel *et al* at para 12.11.

therefore summarised<sup>1036</sup> to ensure a comprehensive overview of the duties of an estate agent in the sale of residential property under common law.

An analysis of the duties of an estate agent in the sale of residential property in terms of an estate agent's common law mandate for the sale of the seller's residential property confirmed<sup>1037</sup> that common law acknowledge the estate agent's mandate for the sale of the seller's residential property as a specific type of contract, categorised as similar to contracts of agency and mandate, but exceptional, in that the usual agreement between the seller and the estate agent for the sale of the seller's residential property, without express terms stipulating the duties of the estate agent in performing the instruction to sell the seller's residential property, does not impose any contractual duties on an estate agent in the sale of residential property.

In conclusion, it was confirmed<sup>1038</sup> that the common law position, which does not impose any contractual duties on the estate agent pursuant to the estate agent's mandate for the sale of residential property, remains as a result of the decision of the Supreme Court of Appeal in the matter between *Ronstan Investments (Pty) Ltd v Littlewood*<sup>1039</sup> Referring<sup>1040</sup> to the inherent power of the Constitutional Court, the Supreme Court of Appeal and the High Court to develop the common law as provided for under section 173 of the Constitution, the importance of a development of the common law to import contractual terms to the estate agent's mandate for the sale of residential property which impose duties on the estate agent in the sale of residential property was emphasised,<sup>1041</sup> bearing in mind that, as a result of the common law

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<sup>1036</sup> At para 4 2 of this research.

<sup>1037</sup> At para 4 3 of this research. See also *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA) 556; Sharrock 346.

<sup>1038</sup> At para 4 4 of this research.

<sup>1039</sup> 2001 3 SA 555 (SCA).

<sup>1040</sup> At para 4 4 1 of this research.

<sup>1041</sup> At para 4 4 1 of this research.

rules which do not impose any contractual duties on the estate agent in the sale of the seller's residential property, the common law right to cancel the agreement with the estate agent is not available to the seller of residential property under the common law rules of the estate agent's mandate for the sale of the seller's residential property.

Finally, it was remarked<sup>1042</sup> that presently, the seller of residential property, who is dissatisfied with the manner in which the estate agent performs the services to bring about a sale of the his residential property, is unable to effectively exercise his common law right of cancellation in those instances where the estate agent finds himself in breach of the terms of the agreement with the seller, for the sale of the seller's residential property and, is, in addition, precluded from instituting a civil claim for damages against the estate agent. Therefore, although the consumer's common law rights are preserved under section 2(10) of the CPA, it was concluded<sup>1043</sup> that these rights are not, without a development of the common law, available to the seller of residential property.

#### **6 2 4 Chapter 5: The duties of an estate agent in the sale of residential property under the CPA**

Primarily, the CPA aims<sup>1044</sup> to protect the rights of consumers<sup>1045</sup> and introduces eight fundamental consumer rights<sup>1046</sup> in chapter 2 of the CPA. Specifically in relation to the performance of services, section 19, included in Part C of the CPA provides for a consumer's rights in respect of the supply of services and section 54, included in Part

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<sup>1042</sup> At para 4 4 1 of this research.

<sup>1043</sup> At para 4 4 1 of this research.

<sup>1044</sup> S 3 of the CPA sets out the purposes of the CPA and must be read together with the long title and Preamble to the CPA.

<sup>1045</sup> *Eskom Holding Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA) at para 16.

<sup>1046</sup> The right of equality in the consumer market (Part A), the right to privacy (Part B), the right to choose (Part C), the right to disclosure and information (Part D), the right to fair and responsible marketing (Part E), the right to fair and honest dealings (Part F), the right to fair, just and reasonable terms and conditions (Part G), the right to fair value, good quality and safety (Part H) and the right to demand a supplier's accountability to consumers (Part I).

H of the CPA provides for a consumer's right to demand quality services and the application of the provisions of section 19 and section 54 in the supply or performance of services was critically analysed in paragraph 5 2 of this research with reference to the concepts of "reasonable time" and "timely",<sup>1047</sup> "unavoidable delay",<sup>1048</sup> the "manner and quality that persons are generally entitled to expect"<sup>1049</sup> and the concept of "expressly provided or anticipated in an agreement" and "any specific criteria or conditions agreed between the supplier and the consumer".<sup>1050</sup>

In the context of the sale of residential property by an estate agent in terms of an estate agent's common law mandate for the sale of the seller's residential property, the application of the provisions of section 19 and section 54 of the CPA was critically analysed in paragraph 5 3 of this research and it was concluded<sup>1051</sup> that section 19(2)(a) of the CPA which regulates the rights of the seller of residential property by imposing a duty of the estate agent to perform the services to bring about a sale of the seller's residential property to a willing and able buyer within a reasonable time after concluding the agreement with the seller<sup>1052</sup> and at the agreed location<sup>1053</sup> amends the common law rules governing the estate agency mandate for the sale of the seller's residential property<sup>1054</sup> by introducing as *naturalia* to the estate agent's common law mandate for the sale of the seller's residential property, statutory duties on the estate agent in the supply or performance of the services to bring about a sale of the seller's residential property to a willing and able buyer.<sup>1055</sup>

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<sup>1047</sup> At para 5 2 2 of this research.

<sup>1048</sup> At para 5 2 2 of this research.

<sup>1049</sup> At para 5 2 3 of this research.

<sup>1050</sup> At para 5 2 6 of this research.

<sup>1051</sup> At para 5 4 of this research.

<sup>1052</sup> S 19(2)(a)(i) of the CPA.

<sup>1053</sup> S 19(2)(a)(ii) of the CPA.

<sup>1054</sup> At para 5 4 of this research. S 19(2)(a) of the CPA.

<sup>1055</sup> At para 5 4 of this research.



The remedies available to the seller under section 19(6) of the CPA,<sup>1056</sup> in those instances where the estate agent supplies or performs the services in breach of the contractual duties imposed on the estate agent as provided for in section 19(2)(a) of the CPA, and the remedies available to the seller under section 54(2) of the CPA, in those instances where the estate agent supplies or performs the services to bring about a sale of the seller's residential property to a willing and able buyer in breach of the statutory duties imposed on the estate agent under section 54(1) of the CPA, were disseminated in paragraph 5.3 of this research.<sup>1057</sup> In the context of the sale of residential property by an estate agent in terms of an agreement with the seller to sell his residential property, a critical discussion of the provisions of section 19(6) of the CPA concluded<sup>1058</sup> that the remedies under section 19(6) of the CPA, and specifically the statutory remedy to cancel the agreement with the estate agent under section 19(6)(c) of the CPA in those instances where the estate agent sells the seller's residential property in breach of the contractual duties imposed on the estate agent under section 19(2)(a) of the CPA, are not available to the seller of the residential property on the current wording of section 19(6) which only applies if the estate agent tenders the sale of the seller's residential property on a date and time or location, other than the "*agreed*"<sup>1059</sup> date, time and not within a reasonable time after concluding the agreement for the sale of the seller's residential property with the seller.

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<sup>1056</sup> S 19(6) of the CPA provides for remedies available to the consumer if the supplier tenders performance of the services on a date, time and place other than as agreed with the consumer. The consumer may choose to accept performance of the services on the tendered date, time and place (s 19(6)(a)), or demand performance of the services on the agreed date and time (if the date and time has not yet passed) and at the agreed location (s 19(6)(b)) and may choose to cancel the agreement with the supplier without penalty as provided for in s 19(6)(c) of the CPA.

<sup>1057</sup> See para 5.3 of this research.

<sup>1058</sup> At para 5.3 of this research.

<sup>1059</sup> Own emphasis.

A critical discussion of the provisions of section 54(2) of the CPA concluded<sup>1060</sup> that because the estate agent's unsuccessful supply or performance of any services to bring about a sale of the seller's residential property to a willing and able buyer remains unpaid, the seller's right to demand a refund of the price paid for services rendered under section 54(2)(b) of the CPA is not available to the seller and, the seller may only demand that the estate agent remedy the defect in the quality of the services performed as provided for in section 54(2)(a) of the CPA.

Section 4(2) of the CPA provides for a development of the common law by the court in any matter in terms of the CPA, brought before the Tribunal or the Court, to improve the realisation and enjoyment of consumer rights generally and particularly by those persons contemplated in section 3(1)(b) of the CPA, and although the importance of a development of the common law to incorporate the duties imposed on an estate agent under section 19(2)(a) of the CPA has already been emphasised,<sup>1061</sup> it was concluded,<sup>1062</sup> with reference to the provisions of section 4(2)(a)<sup>1063</sup> and section 69(d)<sup>1064</sup> of the CPA, that the court may be precluded from pronouncing on the common law, "other than to do so *obiter*."<sup>1065</sup> This aspect is elaborated upon in paragraph 6 3 below.

### **6 3     Conclusion and recommendations**

The main purpose of this research was to determine and critically analyse the duties of an estate agent in the sale of residential property under the CPA. From the outset, it was important to clarify<sup>1066</sup> the service expected of an estate agent in the sale of the

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<sup>1060</sup> At para 5 3 of this research.

<sup>1061</sup> At para 5 4 of this research.

<sup>1062</sup> At para 5 4 of this research.

<sup>1063</sup> At para 5 4 1 of this research.

<sup>1064</sup> At para 5 4 2 of this research.

<sup>1065</sup> Van Eeden & Barnard 511. At para 5 4 of this research.

<sup>1066</sup> At para 4 1 of this research.

seller's residential property in terms of an estate agent's common law mandate for the sale of residential property. The express terms of every agreement between the seller and the estate agent must be interpreted in accordance with the ordinary principles of the rules of construction of contracts to determine precisely what was agreed between them.<sup>1067</sup> Unless the specific agreement between the seller and the estate agent includes a written<sup>1068</sup> power of attorney which specifically authorises the estate agent to sell his residential property, an estate agent is not clothed with authority to perform a juristic act on behalf of the seller and is therefore not authorised to sell the seller's residential property.<sup>1069</sup> The services expected of the estate agent in the sale of the seller's residential property, are limited to those services necessary to put the seller in a position to sell his residential property to a willing and able buyer.<sup>1070</sup>

It was with this explanation in mind, that the research was undertaken, to answer the critical question: what are the duties of an estate agent in the sale of residential property?

An application of the CPA to the supply or performance of services to bring about a sale of the seller's residential property to a willing and able buyer was established in chapter 2 of this research. It was pointed out<sup>1071</sup> that one has to look further than the CPA, to include the statutory duties imposed on the estate agent under the EAAA and the Code of Conduct, as well as the common law, as it was clear that the CPA aims to include the rights of the seller as provided for under industry-specific legislation and the common law in the ambit of the CPA.

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<sup>1067</sup> *Midgley Estates Ltd v Hand* [1952] 2 QB 432 (CA) 435; *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>1068</sup> S 2(1) of the ALA Reg 3 5 of the Code of Conduct.

<sup>1069</sup> *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A); *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A).

<sup>1070</sup> *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at para 1.

<sup>1071</sup> At para 1 1 of this research.

Section 2(9) of the CPA provides for a concurrent application of the provisions of the CPA and the EAAA<sup>1072</sup> as provided for under section 2(9)(a) and section 2(9)(b) of the CPA. Chapter 3 of this research, which investigated and summarised the duties of an estate agent in the sale of residential property under the EAAA and the Code of Conduct concluded<sup>1073</sup> that although the Draft Green Paper acknowledge<sup>1074</sup> that the CPA will not be able to cater for all eventualities in all sectors and that some sectors will present industry-specific problems which require additional regulation, the duties imposed on the estate agent under the EAAA, which specifically aims<sup>1075</sup> to regulate the activities of estate agents in the public interest, are included in a Code of Conduct, which is not a law and is not enforceable in a court of law. It was, therefore, concluded<sup>1076</sup> that the EAAA and Code of Conduct do not, from a consumer protection perspective on the demand side, protect the seller's consumer rights in the sale of residential property and *in casu*, the provisions of the CPA extend the greater protection to the seller of the residential property and must therefore prevail.<sup>1077</sup>

Aspects of the PPA, which will replace the EAAA when it takes effect on a date to be proclaimed by the President, in so far as it imposes duties on a property practitioner (previously estate agents) from a consumer protection perspective, were summarised<sup>1078</sup> to ensure a comprehensive overview of the industry-specific statutory duties imposed on an estate agent in the sale of residential property. Some observations on the implications of including statutory regulation of property

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<sup>1072</sup> To date no application under s 5(3) of the CPA has been granted in favour of the EAAB and the provisions of the EAAA must therefore be applied concurrently with the provisions of the CPA as provided for under s 2(9) of the CPA. See para 2 3 3 1 of this research.

<sup>1073</sup> At para 3 3 of this research.

<sup>1074</sup> Draft Green Paper 24.

<sup>1075</sup> See the Preamble to the EAAA.

<sup>1076</sup> At para 3 3 of this research.

<sup>1077</sup> S 2(9)(b) of the CPA.

<sup>1078</sup> At para 3 3 1 of this research.

practitioners from a consumer protection perspective outside the scope of the CPA, will also be included in the conclusion below.

Section 2(10) of the CPA preserves the consumer's common law rights and in chapter 4 of this research, the common law duties imposed on an estate agent (conversely the rights of the seller) in the sale of the seller's residential property were analysed. It was concluded<sup>1079</sup> that without an express agreement between the seller and the estate agent on the respective contractual rights and duties of the seller and the estate agent in the sale of residential property, no contractual duties are imposed on the estate agent under common law. The importance of a development of the common law as provided for under section 173 of the Constitution was highlighted,<sup>1080</sup> and the development of the common law and the provisions of section 173 of the Constitution will again be addressed below.<sup>1081</sup>

Chapter 5 of this research provided a comprehensive and analytical research of the duties imposed on an estate agent in the sale of residential property under section 19 and section 54 of the CPA. Section 19(2)(a) of the CPA introduces mandatory terms to be implied to every agreement between the seller and the estate agent, which impose contractual duties on the estate agent to perform the services to bring about a sale of the seller's residential property on an agreed date and time, if any, or within a reasonable time after concluding the agreement with the seller,<sup>1082</sup> and at the agreed location/s.<sup>1083</sup> Section 54(1) of the CPA introduces statutory duties imposed on the estate agent in the supply or performance of the services to bring about a sale of the seller's residential property to a willing and able buyer. Subject to the circumstances

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<sup>1079</sup> At para 4 4 of this research.

<sup>1080</sup> At para 4 4 1 of this research.

<sup>1081</sup> At para 6 3 1 1 2 of this research.

<sup>1082</sup> S 19(2)(a)(i) of the CPA.

<sup>1083</sup> S 19(2)(a)(ii) of the CPA.

of the sale of the seller's residential property and any criteria agreed between the seller and the estate agent before or during the sale of the seller's residential property, the estate agent must perform and complete the services to bring about a sale of the seller's residential property to a willing and able buyer timely and inform the seller timely of any unavoidable delay in the sale of the seller's residential property,<sup>1084</sup> perform the services in a manner and quality that persons are generally entitled to expect,<sup>1085</sup> and return the control over the seller's residential property to the seller in at least as good a condition as when it was made available to him for purposes of the sale of the seller's residential property.

Although it was argued that the CPA brought about fundamental changes to the relationship between the seller and the estate agent in the sale of residential property,<sup>1086</sup> it was pointed out that the CPA is less substantive in the effective enforcement of the duties imposed on the estate agent in the sale of residential property under the CPA, with the only statutory remedy available to the seller, in those instances where the estate agent supplies or performs the services to bring about a sale of the seller's residential property to a willing and able buyer in breach of the contractual<sup>1087</sup> and statutory<sup>1088</sup> duties imposed on the estate agent under the CPA, to require the estate agent to remedy the defect in the performance of the services under section 54(2)(a) of the CPA.<sup>1089</sup>

In this regard, it was argued<sup>1090</sup> that although the CPA protects a consumer's common

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<sup>1084</sup> S 54(1)(a) of the CPA.

<sup>1085</sup> S 54(1)(b) of the CPA.

<sup>1086</sup> Ch 5 of this research.

<sup>1087</sup> The contractual duties imposed on an estate agent under s 19(2)(a) of the CPA.

<sup>1088</sup> The statutory duties imposed on an estate agent under s 54(1) of the CPA.

<sup>1089</sup> At para 5 3 of this research. A comprehensive analysis of the remedies available to the seller under s 19(6) and s 54(2) of the CPA falls outside the scope of this research, but a comprehensive discussion was included to support the process of formulating a logical conclusion and recommendations.

<sup>1090</sup> At para 5 4 of this research.

law rights under section 2(10) of the CPA<sup>1091</sup> (including the remedies available to a consumer under common law), common law, which forms the basis of the ordinary estate agent's mandate, do not impose any contractual duties on the estate agent in the sale of residential property, and the seller consequently does not have any converse rights, including the common law right to cancel the agreement with the estate agent and institute a claim for damages against the estate agent for damages suffered. This effectively means that although the CPA introduces fundamental consumer rights in favour of the seller of residential property (conversely the duties of the estate agent) in the sale of residential property, the intervention of the CPA in so far as it protects and enforces those rights, did not bring about a significant change in the commercial arena,<sup>1092</sup> and in order to give practical effect of the statutory duties imposed on the estate agent in the sale of residential property under section 19 and section 54 of the CPA, it was reasoned<sup>1093</sup> that a development of the common law is required.

### **6 3 1 Developing the common law**

The provisions of section 19(2)(a) of the CPA amend the common law rules governing the estate agent's mandate for the sale of the seller's residential property by importing mandatory terms to the agreement between the seller and the estate agent for the sale of the seller's residential property, which impose contractual duties on the estate agent in the supply or performance of services to bring about a sale of the seller's residential property to a willing and able buyer.

#### **6 3 1 1 Section 4(2)(a) of the CPA**

Under section 4(2)(a) of the CPA, the court must, in any matter brought before the

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<sup>1091</sup> S 2(10) of the CPA provides that no provision of the CPA may be interpreted so as to preclude a consumer for exercising any rights available to him under common law.

<sup>1092</sup> Barnard 2012 *De Jure* 455.

<sup>1093</sup> At para 5 4 of this research.

Tribunal or court in terms of the CPA, develop the common law as necessary to improve the realisation and enjoyment of consumer rights. From the perspective of the seller of the residential property, an amendment of the common law, to incorporate mandatory terms as *naturalia* to the estate agent's common law mandate for the sale of the seller's residential property which impose contractual duties on the estate agent as provided for under section 19(2)(a) of the CPA, will unlock the seller's common law rights to cancel the agreement with the estate agent and institute a claim for damages suffered, as a result of the estate agent's supply or performance of services to bring about a sale of the seller's residential property to a willing and able buyer, in breach of the contractual duties implied to the common law estate agent's mandate for the sale of the seller's residential property, which are currently not available to the seller under common law.

The seller's reliance on the provisions of section 4(2)(a) of the CPA for a development of the common law to incorporate the mandatory terms as *naturalia* to the estate agent's mandate for the sale of the seller's residential property, faces an obstacle in section 69(d) of the CPA.

### **6 3 1 1 1      Section 69(d) of the CPA**

The application of section 69(d) of the CPA is complex and requires a comprehensive analysis, which is excluded from the scope of this research. For purposes of formulating a logical conclusion, some observations are recorded.

The seller's route of redress in terms of the CPA is regulated under section 69 of the CPA and includes a direct referral of the matter to the Tribunal, if permitted,<sup>1094</sup> to the applicable ombud with jurisdiction over the matter,<sup>1095</sup> to the applicable industry ombud

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<sup>1094</sup> S 69(a) of the CPA.

<sup>1095</sup> S 69(b) of the CPA.



accredited in terms of section 82(6) of the CPA, if the supplier is subject to an industry ombud,<sup>1096</sup> by application to a consumer court of a province with jurisdiction,<sup>1097</sup> by referring the matter to an alternative dispute resolution agent contemplated in section 70 of the CPA,<sup>1098</sup> by filing a complaint with the Commission in accordance with section 71 of the CPA<sup>1099</sup> and by approaching a court with jurisdiction over the matter, if all remedies provided for in terms the legal framework provided for in terms of the CPA and other legislation have been exhausted.<sup>1100</sup>

A consumer may therefore, on a proper interpretation and application of the CPA, only be before the court<sup>1101</sup> on appeal or review of a decision of the Tribunal, Ombud, Consumer Court or alternative dispute resolution agent. Appeals, which relate to the substantive correctness of findings of fact or law (in this instance the CPA) and reviews, which relate to the procedural fairness of the proceedings, imply that the Court “will be precluded from pronouncing on the common law, other than to do so *obiter*.”<sup>1102</sup>

De Stadler<sup>1103</sup> points out that although the provisions of section 4(2)(a) of the CPA are mandatory,<sup>1104</sup> the application of the provisions of section 4(2)(a) of the CPA is unclear. Van Eeden & Barnard<sup>1105</sup> agree that, although the provisions of section 4(2)(a) are mandatory,<sup>1106</sup> an opportunity to develop the common law in matters

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<sup>1096</sup> S 69(c)(i) of the CPA.

<sup>1097</sup> S 69(c)(ii) of the CPA.

<sup>1098</sup> S 69(c)(iii) of the CPA.

<sup>1099</sup> S 69(c)(iv) of the CPA.

<sup>1100</sup> S 69(d) of the CPA.

<sup>1101</sup> See s 69 of the CPA and the discussion on the different options available to consumers in seeking redress in terms of the CPA, below.

<sup>1102</sup> Van Eeden & Barnard 511.

<sup>1103</sup> Naudé & Eiselen Revision Service 1 (2016).

<sup>1104</sup> S 4(2)(a) of the CPA provides that the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights in general, and particularly of those persons contemplated in s 3(1)(a) of the CPA.

<sup>1105</sup> Van Eeden & Barnard 58.

<sup>1106</sup> S 4(2)(a) of the CPA determines that: “In any matter brought before the Tribunal or Court in terms of this Act – (a) the court must develop the common law...”

brought before court in terms of the CPA, seems limited, having due regard to the provisions of section 69(d) of the CPA and, should preferably have applied to matters involving the common law rights of the consumer, which are preserved in terms of section 2(10) of the CPA.

Section 69 of the CPA has been interpreted differently in a number of recent High Court decisions. In the matter between *Joroy 4440 CC v Potgieter and Another NNO*<sup>1107</sup> the court held that the wording of the section 69(d) is clear and unambiguous and held, referring to the Constitutional Court judgement in the matter between *Chirwa v Transnet Ltd and Others*<sup>1108</sup> that, “where a specialised framework has been created for the resolutions of disputes, parties must pursue their claims primarily through such mechanisms.”

In the matter between *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environment Affairs and Tourism, Free State Government and others*<sup>1109</sup> it was held that:

“[t]he Legislature has created a statutory framework in adopting the CPA to deal with the rights and obligations of suppliers and consumers to ensure speedy, inexpensive and fair procedures. A specialised framework has been created for consumers and suppliers to resolve disputes. Parties must pursue their claims primarily through these mechanisms. See *Chirwa v Transnet Ltd and others* 2008 (4) SA 367 (CC)...The Constitutional Court has repeatedly held that where legislation has been enacted to give effect to a constitutional right(s), a litigant should rely on that legislation to give effect to the right(s), or else challenge that legislation as being inconsistent with the Constitution ... The NCA, CPA and the Free State Act were specifically enacted to entrench and govern the realisation of the fundamental consumer rights under the Constitution”.

In the matter between *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Tebogo Leslie Dipico and another*<sup>1110</sup> it was held that the CPA must be interpreted in a manner

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<sup>1107</sup> 2016 3 SA 465 (FB).

<sup>1108</sup> 2008 4 SA 367 (CC).

<sup>1109</sup> [2016] 3 All SA 794 (FB) at para 18.

<sup>1110</sup> 2016 JDR 0690 (NCK).

that gives effect to the purposes set out in section 3 of the CPA and that section 69 of the CPA should, in addition to a purposive interpretation as provided for in section 2(1) of the CPA, be read contextually and in conjunction with section 70 of the CPA which regulates alternative dispute resolutions, and which indicates that the CPA does not seek to introduce the hierarchical system of dispute resolution in section 69, as a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be any of the institutions listed in section 70 of the CPA.

Referring to the matter between *Makhanya v University of Zulu Land*<sup>1111</sup> the court held that:

“[i]n my view, it could never have been the intention of the legislature that consumers subject to the ombud with jurisdiction are denied access to various other dispute resolution mechanisms accorded to other consumers. Such a construction would not be in conformity with the purposes of the CPA which, as already mentioned, is to provide for an accessible, consistent, harmonised, effective and efficient system of redress for consumers. I am of the view that had the legislature intended that a particular category of consumers submit to the jurisdiction of a specific dispute resolution forum only it would have expressly said so,”

and further confirmed that when a claim is enforceable in more than one court with concurrent jurisdiction over the matter, the litigant must choose in which court he is to pursue a matter.

### **6 3 1 1 2      Section 173 of the Constitution**

The provisions of section 4(2)(a) and section 69(d) of the CPA, must be read together with the provisions of section 173 of the Constitution. Under section 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to develop the common law, taking

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<sup>1111</sup> 2010 1 SA 62 (SCA) at para 61.

into account the interests of justice.

In the matter between *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Limited and Another*<sup>1112</sup> Van der Westhuizen J held<sup>1113</sup> that a court must determine exactly what the prevailing common law position is; and the underlying reasons therefore; determine whether that rule or position offends the spirit, purport and object of the Bill of Rights and therefore required a development; consider how the common law should be amended; and must take into account what the wider consequences of an amended of the common law. Referring to the matter between *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,<sup>1114</sup> Van Der Westhuizen J held that the courts have an obligation to develop the common law in those instances where the common law deviates from the spirit, purposes and objectives of the Bill of Rights.<sup>1115</sup>

It is submitted that section 69 of the CPA should be interpreted objectively in the light of the CPA as a whole and by attributing a sensible meaning to the words used therein which does not offend against the purpose of the CPA, but pending clarification of the provisions of section 69(d) of the CPA, Van Eeden and Barnard<sup>1116</sup> point out that any consumer who is contemplating approaching the court to enforce any right as provided for under section 4 of the CPA, should do so within the ambit of section 69 of the CPA.

### **6 3 2 The introduction of industry-specific consumer protection measures under the PPA**

The Draft Green Paper points out that “[a] general consumer law that sets out the basic principles for interaction in the market place will not be able to cater for all

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<sup>1112</sup> 2016 1 BCLR 28 (CC).

<sup>1113</sup> At para 38.

<sup>1114</sup> [2001] JOL 8613 (CC).

<sup>1115</sup> *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Limited and Another* 2016 1 BCLR 28 (CC) at para 39.

<sup>1116</sup> Van Eeden & Barnard 529.

eventualities and all sectors”<sup>1117</sup> and “[s]ome sectors have will have (*sic*) specific problems that require additional regulation”.<sup>1118</sup> It is clear that the estate agency industry presents unique problems which cannot be (and are not) regulated by the CPA which provides “consistent regulation that sets out basic consumer rights.”<sup>1119</sup>

### **6 3 2 1      The PPA**

The PPA, which was signed into law by the President on 2 October 2019, is an industry-specific legislation, *inter alia* aimed<sup>1120</sup> at regulating property practitioners (previously estate agents) and more importantly, from a consumer protection perspective, “to provide for consumer protection.”<sup>1121</sup>

Under Chapter 10 of the PPA, entitled “Consumer Protection”, the PPA introduces duties on the property practitioner in relation to mandatory disclosure forms,<sup>1122</sup> the language of agreements and mandatory disclosure forms<sup>1123</sup> and consumer education and information.<sup>1124</sup> Under the banner of consumer education and information, section 68(2) of the PPA provides that a property practitioner “owes a buyer and a seller a duty of care.”

A “consumer” is defined in section 1 of the PPA as a person as defined in section 1(a) and 1(c) of the CPA and it is important to point out that a “consumer” under the PPA excludes, for purposes of the application of the PPA, a person who has entered into a transaction with a supplier in the ordinary course of business<sup>1125</sup> and a franchisee in terms of a franchise agreement.<sup>1126</sup> Therefore, for purposes of the PPA, in the context

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<sup>1117</sup> Draft Green Paper 24.

<sup>1118</sup> Draft Green Paper 24

<sup>1119</sup> Draft Green Paper 24.

<sup>1120</sup> See the long title and Preamble to the PPA.

<sup>1121</sup> See the long title and Preamble to the PPA.

<sup>1122</sup> S 66 of the PPA.

<sup>1123</sup> S 67 of the PPA.

<sup>1124</sup> S 68 of the PPA.

<sup>1125</sup> Part (b) of the definition of a “consumer” in s 1 of the CPA.

<sup>1126</sup> Part (d) of the definition of a “consumer” in s 1 of the CPA.

of the sale of residential property by an estate agent in terms of an estate agent's mandate for the sale of residential property, the PPA and the consumer protection measures introduced under Chapter 10 thereof, only apply to a seller, to whom services are marketed (promoted or supplied)<sup>1127</sup> in the ordinary course of the estate agent's business<sup>1128</sup> and a recipient or beneficiary of services, irrespective whether that recipient or beneficiary was a party to the transaction concerning the supply of those services. The distinction between a "consumer" for purposes of the CPA<sup>1129</sup> and a "consumer" for purposes of the PPA<sup>1130</sup> is inconsistent with the recommendations made in the Draft Green Paper,<sup>1131</sup> which identified the absence of a uniform definition of "consumer" as one of the greatest stumbling blocks of consumer protection in South Africa and argued that a "consumer" should be defined as broadly as possible.

A comprehensive discussion of the PPA falls outside the ambit of this research, but it is nevertheless also important to highlight the following:

- a although the aspects related to consumer protection under the PPA are limited to mandatory disclosure of specified information and mandatory disclosure forms,<sup>1132</sup> the language of agreements<sup>1133</sup> and consumer education and information,<sup>1134</sup> section 68(2) of the PPA imposes a duty of care on the property practitioner, which may be interpreted as sufficiently wide enough to include a duty on the property practitioner to perform the services to bring about a sale of the seller's residential property to a willing and able buyer within a reasonable time or timely, at the agreed location or locations for the performance of the

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<sup>1127</sup> To "market" means to promote or supply any goods or services (see definition of "market" in s 1 of the CPA).

<sup>1128</sup> Part (a) of the definition of a "consumer" in s 1 of the CPA.

<sup>1129</sup> A "consumer" is defined in s 1 of the CPA.

<sup>1130</sup> A "consumer" is defined in s 1 of the PPA.

<sup>1131</sup> Draft Green Paper at para 3 4.

<sup>1132</sup> S 66 of the PPA.

<sup>1133</sup> S 67 of the PPA.

<sup>1134</sup> S 68 of the PPA.

services, in a manner and of a quality that persons are generally entitled to expect and to return control over the seller's residential property to him in at least as good as a condition as when it was made available to him for purpose of the sale of the seller's residential property;

- b* a transgression of any of the provisions of the PPA is regarded as sanctionable conduct<sup>1135</sup> and if found guilty, the Authority (previously the EAAB) may withdraw the FFC of the property practitioner,<sup>1136</sup> impose a fine, not exceeding the maximum amount determined by the Minister of Justice and Correctional Services for purposes of section 29(1)(a) of the Magistrates' Courts Act<sup>1137</sup>,<sup>1138</sup> or reprimand the property practitioner;<sup>1139</sup>
- c* the Authority may, whenever a fine has been imposed on a property practitioner under section 61(3) of the PPA, order that a portion of the fine be applied towards the payment of compensation to any person who suffered a pecuniary loss as a result of the conduct of that property practitioner;<sup>1140</sup>
- d* section 69 of the CPA, which regulates the enforcement of rights by a consumer under the CPA, provides in section 69(d) thereof that a person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by approaching a court with jurisdiction over the matter, "if all other remedies available to that person in terms of national legislation have been exhausted." This means that the seller of residential property would have to exhaust his remedies under the PPA before he is in a position to enforce his rights as a

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<sup>1135</sup> S 61(1)(k) of the PPA.

<sup>1136</sup> S 61(3)(a) of the PPA.

<sup>1137</sup> Act 32 of 1944 (hereinafter the Magistrates' Courts Act).

<sup>1138</sup> S 61(3)(b) of the PPA.

<sup>1139</sup> S 61(3)(c) of the PPA.

<sup>1140</sup> S 30(1) of the PPA.

consumer under the CPA.<sup>1141</sup>

If a property practitioner fails to perform the instruction received from the seller to sell his residential property within a reasonable time, or perform the services in a manner and of a quality that persons are generally entitled to expect, the property practitioner, it must be argued, would not be acting with the necessary care as provided for in section 68(2) of the PPA and therefore, as a result be subject to the penalties provided for under section 62(3) of the PPA, which may include a fine,<sup>1142</sup> a portion whereof could be paid to the seller as compensation for any damages suffered as a result of the conduct of the property practitioner.<sup>1143</sup> Under section 69(d) of the CPA, the seller would have to enforce his rights under the PPA first before he may approach a court with jurisdiction over the matter, to enforce any of his rights under the CPA.

#### **6 4    Final remarks**

In the matter between *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Limited and Another*<sup>1144</sup> the Constitutional Court cautions that although section 173<sup>1145</sup> of the Constitution provides for the development of the common law, legislation is more appropriately equipped to bring about fundamental changes to the fabric of the common law.<sup>1146</sup> The CPA amends the common law rules and specifically in the context of the sale of residential property by an estate agent in terms of an ordinary estate agent's mandate for the sale of the seller's residential property, section 19(2)(a) of the CPA imposes contractual duties on the estate agent to perform the services to bring about a sale of the seller's residential property to a willing and able

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<sup>1141</sup> See the discussion on the interpretation and application of s 69(d) in par 6 3 3 1 1.

<sup>1142</sup> S 30(3)(b) of the PPA.

<sup>1143</sup> S 30(1) of the PPA.

<sup>1144</sup> 2016 1 BCLR 28 (CC).

<sup>1145</sup> S 173 of the Constitution provides that the Constitutional Court, the Supreme Court of Appeal and the High Court have the inherent power to develop the common law, taking into account the interests of justice.

<sup>1146</sup> 2016 1 BCLR 28 (CC) 37.



buyer within a reasonable time and at the agreed locations.<sup>1147</sup>

Section 4(2)(a) of the CPA provides an opportunity for the seller to approach the court for a development of the common law rules with regard to the estate agent's mandate, to incorporate contractual terms as *naturalia* to the estate agent's mandate, i.e. that the estate agent must supply or perform the services to bring about a sale of the seller's residential property to a willing and able buyer, within a reasonable time, as provided for under section 19(2)(a)(i) of the CPA.

The opportunity provided for under section 4(2)(a) of the CPA applies only to matters brought before the Tribunal or the court in terms of the CPA and, on a proper interpretation of the provisions of section 69 of the CPA, the seller may therefore only be before the court on appeal or review of a decision of the Tribunal, Ombud, Consumer Court or alternative dispute resolution agent, which implies that the court "will be precluded from pronouncing on the common law, other than to do so *obiter*."<sup>1148</sup>

Under section 4(2)(b)(ii)(bb) of the CPA, the court or the Tribunal must make appropriate orders to give effect to the a consumer's right of access to redress, including "any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act."<sup>1149</sup>

Although De Stadler argues that the provisions of section 4(2)(b)(ii)(bb) of the CPA authorise the Tribunal or court to create new remedies in terms of the CPA<sup>1150</sup> and could therefore provide a second bite at the proverbial cherry for the court to develop the common law rules of the estate agent's mandate for the sale of the seller's residential property by issuing an innovative order to develop the common law in line with the advancement, protection, promotion and realisation of the seller's right to the

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<sup>1147</sup> S 19(2)(a)(i) and s 19(2)(a)(ii) of the CPA.

<sup>1148</sup> Van Eeden & Barnard 511.

<sup>1149</sup> S 4(2)(b)(ii)(bb) of the CPA.

<sup>1150</sup> Naudé & Eiselen "Section 4" Revision Service, 2016 at para 12.

supply or performance of services within a reasonable time, as provided for under section 19(2)(a)(i) of the CPA, Van Eeden & Barnard<sup>1151</sup> caution that the provisions of section 4(2)(b)(ii)(bb) of the CPA should not be interpreted as conferring any additional powers on the Tribunal or court that they do not already exercise.

The seller of the residential property who is dissatisfied with the manner in which the estate agent performs the services to bring about a sale of the seller's residential property, is presently unable to effectively exercise his common law right of cancellation in those instances where the estate agent finds himself in breach of the terms of the agreement with the seller for the sale of the seller's residential property and, is precluded from instituting a civil claim for damages.

As a result, the very purpose of the CPA, to protect the rights of the consumer, is undermined and a development of the common law, to introduce *naturalia* to the ordinary estate agent's mandate is a *sine qua non* for protecting the right of the seller of residential property to effectively and efficiently hold an estate agent accountable for the performance of services in breach of the duties imposed on an estate agent in the sale of residential property.

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<sup>1151</sup> Van Eeden & Barnard 512.

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