

## The Consumer Protection Act

*The Consumer Protection Act 68 of 2008 is set to become an ever more prevalent piece of legislation and therefore both service providers and consumers need to ensure that they are compliant when entering into agreements.*

## Restaurants and the Consumer Protection Act

In terms of the Consumer Protection Act (the “CPA”) restaurants are entitled to ask patrons to make payment into their account of a non-refundable deposit when making a reservation in the event that the patron does not arrive to honour the booking.

This is because the restaurant, as the service provider (as defined in the CPA), stands to lose business in circumstances where it holds a table open for the consumer; turns other potential patrons away; is met with a cancellation by such consumer; and as a result is unable to utilise this table to produce revenue for the restaurant.

The deposit requested serves three purposes, namely:

1. To secure the reservation;
2. It stands as financial security to cover a portion of the restaurant’s loss in the event of a cancellation (without adequate notice) or a no show; and
3. It serves to penalise the patron for their conduct as aforesaid.

Not only does Section 17 of the CPA allow a restaurant to call for a deposit, but the restaurant can charge a cancellation fee when the consumer decides to cancel the booking without adequate notice (as agreed) or if the consumer is a no show.

This does not, however, give the restaurant a license to abuse the patron, as both the deposit and the cancellation fee have to be “reasonable”.

There is quite a bit of conjecture as to what exactly a “reasonable” cancellation fee is. In terms of Section 17(5) of the CPA, a charge is reasonable if it does not exceed a fair amount in relation to the goods and services that were reserved, the length of notice of cancellation provided by the consumer, and the reasonable likelihood that the service provider will find an alternative consumer between the time of being notified as to the cancellation and the time of the cancelled reservation.

## Restaurants are entitled to request a refund for cancelled bookings

In this regard, the cancellation fee would need to be commensurate with the minimum loss suffered by the restaurant, and the restaurant would in the circumstances be required to mitigate such loss by filling/replacing the cancelled booking or no show with another patron (even at a substantially reduced rate). The CPA requires an actual loss of revenue not a theoretical loss of revenue.

It is, therefore, strongly suggested that restaurants draft a clear cancellation policy (dealing with the manner in which the deposit will be utilised / retained in the event of a cancellation) and communicate this to the patron at the time the booking is made and the deposit is paid.

Be wary, however, when a restaurant asks you for a deposit which is likely to exceed the cost of your meal, as this is not a reasonable deposit. Furthermore, ensure that you don't cancel the booking with inadequate notice (given the cancellation policy of the restaurant concerned), as you will likely be required to pay a higher cancellation fee than you would have ordinarily become liable for in circumstances where you furnished adequate notice.

Consider also the restaurant's position: if you were, for example, to make a booking for yourself and 20 of your friends for your birthday, and the restaurant is unable to resell your tables, the restaurant will be left substantially out of pocket and will have suffered an opportunity cost. It will legitimately be entitled to charge a cancellation fee that is reasonable and fair given the loss it has suffered.

As mentioned, and importantly, the CPA requires restaurants to attempt to resell the tables and it is unreasonable and unfair to charge a cancellation fee in the event that the tables were re-sold or were able to be resold.

A factor for restaurant owners to consider is that in terms of Section 51 of the CPA, restaurants are not permitted to ask a customer to provide his or her credit or debit card, bank account, ATM card, or any similar identifying document or device or provide a personal identification code, or number to be used to access the account of a consumer. The deposit must strictly be a cash deposit made, preferably, by Electronic Funds Transfer (EFT).

Furthermore, the restaurant is obliged in terms of Section 65 of the CPA to take reasonable care and exercise diligence in looking after a consumer's deposit. A restaurant will be liable for any loss where they have not taken reasonable care. The restaurant must not treat that deposit as being

the property of the restaurant and in the handling, safeguarding and utilisation of that deposit, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and will be liable to the customer for any loss resulting from a failure to comply with the above.

In conclusion, note also that in terms of Section 47 of the CPA, it is not only incumbent upon the consumer to honour a commitment to the restaurant for the booking, but the restaurant must also honour the reservation taken. In failing to honour the reservation, the restaurant could be liable to compensate the customer for costs directly incidental to its breach, which would be, for example, the costs of travelling to the restaurant.

## Authors

### **Samuel Rosseau**

Senior Associate at Schindlers Attorneys

Phone: +27 (0) 11 448 9654

rosseau@schindlers.co.za

### **Gary Boruchowitz**

Candidate Attorney at Schindlers Attorneys

Phone: +27 (0) 11 448 9701

boruchowitz@schindlers.co.za

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