

# DISPLAY OF GOODS FOR SALE, ADVERTISEMENTS AND THE CONSUMER PROTECTION ACT\*

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*The article investigates the influence of the Consumer Protection Act 68 of 2008 ('the CPA') on the general rule that the advertising or display of goods for sale at a certain price is an invitation to do business and not an offer to sell. The article critically discusses the common-law position and argues that although a general rule exists in favour of advertisements being regarded as invitations to do business, no such general rule exists in respect of the physical display of goods at a certain price. Furthermore, although it remains a factual question whether an offer exists, the underlying policy considerations must also be taken into account. Thereafter, the article investigates the meaning and influence of the CPA on the common-law position. It is argued that the relevant provisions in the CPA (ss 23, 29 and 30) require that the display of goods at a certain price generally would be viewed as an offer. Furthermore, it is argued that while the CPA has not amended the common-law rule in respect of advertisements, it has improved the consumer's position by prohibiting misleading advertisements and by placing certain obligations on a supplier if it cannot fulfil the promises in its advertisements.*

## I INTRODUCTION

'[L]aws exist not for the scientific satisfaction of the legal mind, but for the convenience of the lay people who sue and are sued.'<sup>1</sup>

These are the words of Sir Frederick Pollock in a letter to Oliver Wendell Holmes in 1877.<sup>2</sup> One wonders how Holmes would have responded if confronted with any of the lengthy and complicated pieces of legislation we have to interpret and apply in South Africa today. One such statute is the Consumer Protection Act 68 of 2008 ('the CPA'), which South African legal academics have been scrutinising for some time. This article is a small contribution to the academic discourse on this topic.

For more than a century, the decision in *Crawley v Rex*<sup>3</sup> has been considered good law in South Africa.<sup>4</sup> It is cited as authority for the general

\* This article is based on a paper I delivered at the 14th International Association of Consumer Law Conference held at Sydney University, Australia, on 1–4 July 2013. I would like to thank Professor Philip Stoop for his valuable comments and Professor Luanda Hawthorne for reading the paper on which this article is based. Finally, I am greatly indebted to one of the anonymous referees for his or her valuable comments on a previous draft of this article. All errors remain my own.

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<sup>1</sup> Mark DeWolfe Howe (ed) *Holmes–Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* 2 ed (1961) 8.

<sup>2</sup> *Ibid.*

<sup>3</sup> 1909 TS 1105.

<sup>4</sup> See for example R H Christie & G B Bradfield *The Law of Contract in South Africa* 6 ed (2011) 43.

rule that the advertising or display of goods for sale at a certain price is an invitation to do business, which is not to be construed as an offer to sell ('the rule').<sup>5</sup> However, the continued, unaltered application of the rule must be reconsidered in the light of ss 23, 29 and 30 of the CPA.<sup>6</sup> Before this can be done, it is necessary to consider the common-law position prior to the enactment of the CPA.

## II THE COMMON-LAW POSITION

An offer is defined as 'a statement of intention in which the offeror sets out to the person to whom the offer is made what performance and what terms he or she is prepared to bind him- or herself to'.<sup>7</sup> This definition contains two requirements. First, the terms of the offer must be certain and definite.<sup>8</sup> In the case of sale, this means that the essentialia must be clearly set out, namely the intention to sell, the goods for sale, and the price.<sup>9</sup> Secondly, an offer must be 'made with the intention that when it is accepted it will bind the offeror'.<sup>10</sup> This relates to the question whether or not the statement or act indicates a clear intention to sell.<sup>11</sup> Whether or not a statement or act will be considered as an offer to sell is a question of fact,<sup>12</sup> and becomes relevant

<sup>5</sup> Robert Sharrock *Business Transactions Law* 8 ed (2011) 54 and 'Contract' in W A Joubert (founding ed) *The Law of South Africa* vol 5(1) 2 ed (replacement volume) (2010) para 375(b); Francois du Bois (gen ed) *Wille's Principles of South African Law* 9 ed (2007) 742. Invitations to do business are also referred to as 'invitations to deal', 'invitations to treat' or 'invitations to bargain'.

<sup>6</sup> Gail Schimmel 'In the beginning' (2009) 9 *Without Prejudice* 7 at 8, in which the author raises the question whether or not s 23 of the CPA has amended the common-law position as outlined in *Crawley v Rex*.

<sup>7</sup> Sharrock in *LAWSA* op cit note 5 para 375. See also *Bourbon-Lefitley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C) at 916; *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic* 2001 (3) SA 1028 (D) at 1030. See further S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract General Principles* 4 ed (2012) 48n11; Christie & Bradfield op cit note 4 at 31; A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 64; J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontrakereg en Handelsreg* 5 ed (1992) 33; D J Joubert *General Principles of the Law of Contract* (1987) 37. A similar definition is found in English law (see for example M P Furmston (ed) *Cheshire, Fifoot and Furmston's Law of Contract* 16 ed (2012) 43).

<sup>8</sup> *Bourbon-Lefitley v WPK (Landbou) Bpk* supra note 7 at 916; *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633D. See also *Wille's Principles* op cit note 5 at 741; Sharrock in *LAWSA* op cit note 5 para 376(a).

<sup>9</sup> Graham Bradfield & Karin Lehmann (eds) *Principles of the Law of Sale & Lease* 3 ed (2013) 24; Van der Merwe et al op cit note 7 at 48–9 and the cases cited in footnote 19.

<sup>10</sup> *Bourbon-Lefitley v WPK (Landbou) Bpk* supra note 7 at 916; *Wasmuth v Jacobs* supra note 8 at 633D. See also Van der Merwe et al op cit note 7 at 48–9 and the cases cited in note 21; Sharrock in *LAWSA* op cit note 5 para 376(b); A A Roberts (ed) *Wessels' Law of Contract in South Africa* vol 1 2 ed (1951) para 86.

<sup>11</sup> Joubert op cit note 7 at 39. The position is similar in English law (see Hugh Beale (ed) *Chitty on Contracts* vol 1 31 ed (2012) para 2–010).

<sup>12</sup> The courts should consider the nature of the statement, the words used and the surrounding circumstances (Christie & Bradfield op cit note 4 at 41).

when a distinction is drawn between an offer and an invitation to do business.<sup>13</sup> Traditionally, this question arises in relation to advertisements and the display of goods for sale at a particular price.<sup>14</sup> These scenarios are discussed below.

(a) *Advertisements of goods for sale at a particular price*

*Crawley v Rex*<sup>15</sup> is regarded as the locus classicus in South African law on this issue. A shopkeeper advertised tobacco at a low price in order to attract customers to the shop.<sup>16</sup> Crawley purchased a pound of the tobacco and, after five minutes, returned for more.<sup>17</sup> The shopkeeper refused to sell him more and asked him to leave the shop, which he refused to do without being allowed to buy more tobacco.<sup>18</sup> Subsequently, he was convicted of remaining on the premises unlawfully after being requested to leave.<sup>19</sup> He appealed the conviction on the basis that he had a right to be in the shop because he had a contract with the shopkeeper, which justified his presence.<sup>20</sup> The court found that there was no contract between Crawley and the shopkeeper because the advertisement of the tobacco at a particular price was not an offer to sell the goods to the public but merely an announcement of the trader's intention to sell at the advertised price.<sup>21</sup> The court in *Crawley v Rex* did not cite any authority for its decision, but it is generally accepted that it followed English law in this respect.<sup>22</sup>

The court argued that it would produce the 'most extraordinary results' if an advertisement were regarded as an offer, because this would mean that the trader would be compelled to sell the specific goods even if they had been sold out.<sup>23</sup> This approach seems to accord with the requirements of an offer. As mentioned before, it has to be determined whether the trader intends to

<sup>13</sup> Joubert op cit note 7 at 39. An invitation to do business is a communication the purpose of which is to invite offers from other persons or to commence negotiations (see Tanya Woker *Advertising Law in South Africa* (1999) 50).

<sup>14</sup> Joubert op cit note 7 at 39–41.

<sup>15</sup> Supra note 3. 'Advertisements' in this context usually include catalogues, brochures, circulars and price lists published or distributed to the public. For a fascinating peek at the circumstances of this case see I Hayman's personal account in 'The facts behind the case' (1949) 66 *SALJ* 166.

<sup>16</sup> The advertisement was in the form of a placard outside the shop, on which the price of the tobacco was indicated (supra note 3 at 1107).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid at 1108.

<sup>22</sup> Ellison Kahn (ed) *Contract and Mercantile Law: A Source Book* vol 1 2 ed (1988) 81 referring to *Timothy v Simpson* (1834) 6 Car & P 499, 172 ER 1337 and *Grainger & Son v Gough* [1896] AC 325. See also Rudolf B Schlesinger (ed) *Formation of Contracts: A Study of the Common Core of Legal Systems* vol 1 (1968) 387. This is still the position in English law (see *Partridge v Crittenden* [1968] 2 All ER 421 at 424).

<sup>23</sup> Supra note 3 at 1108. See also *Grainger & Son v Gough* supra note 22 at 334, where the court followed the same reasoning in respect of a price list.

make an offer and to be bound by its acceptance. The test is therefore whether the statement may be interpreted reasonably as an offer to sell.<sup>24</sup> As such, when determining this, one must consider the practical implications of regarding the advertisement as an offer,<sup>25</sup> and the probability that the trader would not have the intention to make an offer for goods it does not have in stock.<sup>26</sup>

Following the same line of reasoning, Unger argues that a window display is to be construed as an invitation to do business because there may be insufficient goods to sell to all the customers who enter the shop as a result of the display.<sup>27</sup> If one follows this reasoning, it may be argued that advertisements and goods in window displays are generally regarded as invitations to do business due to practical considerations.

It has been argued that the objection against advertisements as offers can be defeated if the advertisement is viewed as an offer, but subject to the term that the trader has to sell only while it has the advertised goods in stock.<sup>28</sup> In addition, the maxim 'first come, first served' may apply to multiple acceptances of the offer.<sup>29</sup> Kahn argues that the trader could limit each customer to a reasonable amount of the goods.<sup>30</sup> Woker argues that a trader can make its intention clear by adding the appropriate qualifications.<sup>31</sup> These arguments are supported by the fact that such qualifications are common practice. However, Joubert criticises these proposals as 'synthetic' and only aimed at achieving a desired result.<sup>32</sup> He argues that they ignore the fact that traders are aware of the rule in *Crawley v Rex* and accept that their statements

<sup>24</sup> Wessels op cit note 10 para 275.

<sup>25</sup> Christie & Bradfield op cit note 4 at 42.

<sup>26</sup> Contra Woker op cit note 13 at 53, who argues that the practical implications of regarding the advertisement as an offer cannot determine the intention of the trader because a trader could decide to make an offer even where it could create practical difficulties.

<sup>27</sup> J Unger 'Self-service shops and the law of contract' (1953) 16 *MLR* 369. See also Kahn op cit note 22 at 82 where he discusses advertisements and window displays under the heading 'Advertisements, catalogues, circulars, placards, price tags and the like'.

<sup>28</sup> Wessels op cit note 10 para 190; Ellison Kahn 'Some mysteries of offer and acceptance' (1955) 72 *SALJ* 246 at 251. See also P H Winfield 'Some aspects of offer and acceptance' (1939) 55 *LQR* 499 at 517; Beale op cit note 11 at 2-017.

<sup>29</sup> Kahn op cit note 22 at 81 referring to Winfield (op cit note 28), E M Hamman 'Enige kritiese opmerkings oor aanbod en aanname' (1940) 4 *THRHR* 130 and Kahn op cit note 28.

<sup>30</sup> Kahn op cit note 22 at 81.

<sup>31</sup> Woker op cit note 13 at 53, listing some examples. A further example is the words 'not for sale to persons under the age of 18' that is included in the advertising of alcohol products. These words are included in terms of the self-regulating Industry Association for Responsible Alcohol Use's ('ARA') Code of Commercial Communication available at [http://www.ara.co.za/uploads/ara\\_code\\_of\\_commercial\\_communication\\_july2012.pdf](http://www.ara.co.za/uploads/ara_code_of_commercial_communication_july2012.pdf), accessed on 19 December 2013.

<sup>32</sup> Joubert op cite note 7 at 40.

will be interpreted in this light.<sup>33</sup> He suggests that this must be taken into account when one determines whether there is an offer or not, and that it would be preferable to change the position by legislation.<sup>34</sup>

The court in *Crawley v Rex* further favoured the traditional observance of contractual autonomy when it stated that a trader is not obliged to sell to any customer.<sup>35</sup> As this argument is also used where the goods are displayed at a particular price, it will be dealt with below.<sup>36</sup>

Despite the rule encapsulated in *Crawley v Rex*, an advertisement may be an offer to sell where there is a clear intention to this effect.<sup>37</sup> In *Fraser v Frank Johnson & Co* the court stated that there would be a clear intention if it is 'in such a simple form that the mere acceptance of it would constitute a contract'.<sup>38</sup> In the absence of a clear intention, an advertisement is regarded as a mere invitation to do business.<sup>39</sup>

(b) *The physical display of goods for sale at a particular price*

The physical display of goods for sale at a particular price refers to the scenario where goods are displayed in such a way that the customer can choose and select the goods himself and then present them for payment.<sup>40</sup> This is usually the situation in supermarkets that are 'large, departmentalised self-service retailers'.<sup>41</sup> As I have discussed previously, whether or not the display of goods for sale would be construed as an offer to sell is a question of fact and depends on whether such a display would meet the requirements of an offer at common law.

However, Wessels makes a compelling argument that the physical display of goods in a shop with a price generally would constitute an offer. He argues that where goods are 'manifestly exposed for sale with prices affixed to them', the only logical and correct interpretation is that the goods are tacitly offered for sale to the first person who is willing to buy them at that price.<sup>42</sup> Thus, if the consumer merely has to pick up the goods and present them for payment

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Supra note 3 at 1108. Presumably, the court was following the reasoning set out in *Timothy v Simpson* supra note 22.

<sup>36</sup> See the discussion in the text to footnote 56.

<sup>37</sup> J T R Gibson *South African Mercantile Law and Company Law* 8 ed (2005) 30. This would depend on the wording of the advertisement (Sharrock in *LAWSA* op cit note 5 para 376(b)). For examples of advertisements that were regarded as offers see *Bloom v The American Swiss Watch Company* 1915 AD 100 and the English case of *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, both of which related to advertisements offering a reward.

<sup>38</sup> (1894) 11 SC 63 at 66 as discussed in Wessels op cit note 10 para 192.

<sup>39</sup> Christie & Bradfield op cit note 4 at 42; Joubert op cit note 7 at 39.

<sup>40</sup> In contrast to window displays discussed in para II(a) above.

<sup>41</sup> Evert van Eeden *Consumer Protection Law in South Africa* (2013) 355, referring to Charles W Lamb, Joseph F Hair & Carl D McDaniel *Marketing* 3 ed (2008) 293 (and see further the 4 ed (2010) 336).

<sup>42</sup> Wessels op cit note 10 para 275.

at the cashier, the only logical inference is that the supplier is making an offer to sell to the first person willing to buy the goods at that price. He accepts that there can be circumstances that indicate ‘that there was no intention to make an unqualified offer and that the act could not reasonably be interpreted as an offer to sell’ and as a result the customer’s acceptance would not constitute a contract.<sup>43</sup> As such, it remains a question of fact and the circumstances of each case would need to be considered. However, Wessels is clearly advancing a general rule that such a display should rather be construed as an offer to sell.

Kahn supports this view for different reasons. He reasons that such a view would protect the legitimate interests of the customer.<sup>44</sup> He argues that prospective customers should not act on what would appear as an offer to any reasonable person ‘only to be met with the reply of the shopkeeper that the particular article is not for sale at that price, or to him, as the case may be’.<sup>45</sup> Therefore, this type of situation is open to abuse by the trader because the customer has no remedy to insist on buying the goods at the marked prices.<sup>46</sup> In addition, Woker argues that a general rule in favour of an offer would incentivise traders to ensure that they display the correct price and protect customers because they would be able to hold a trader to its prices.<sup>47</sup>

Wessels’ view is further supported when considering the situation where a vending machine is used. Here, the offer is made by the trader.<sup>48</sup> This is the only logical inference that may be drawn, because the customer is able to conclude the transaction by inserting the required amount of money into the vending machine without any further act or statement by the trader.<sup>49</sup> Although, it has been argued that a self-service shop can be distinguished from a vending machine because a cashier collects the payment, the court of the King’s Bench in *Chapelton v Barry* found that an offer had been made by the owner of deck-chairs on the beach where customers helped themselves to the chairs and paid later.<sup>50</sup> As such, the same argument could apply where a cashier in a supermarket merely collects the payment when the customer presents his final selection of goods for payment. Furthermore, it would seem that modern supermarkets are closer in character to vending machines than a traditional shop where a shopkeeper manages or administers all sales. This is

<sup>43</sup> Ibid.

<sup>44</sup> Kahn op cit note 28 at 251; Kahn op cit note 22 at 81, supported by Woker op cit note 13 at 54.

<sup>45</sup> Kahn op cit note 28 at 251.

<sup>46</sup> Woker op cit note 13 at 55.

<sup>47</sup> Ibid.

<sup>48</sup> Van der Merwe et al op cit note 26; De Wet & Van Wyk op cit note 7 at 36n115. Reference may be made to the English case of *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169. See further Sir Jack Beatson, Andrew Burrows & John Cartwright *Anson’s Law of Contract* 29 ed (2010) 35.

<sup>49</sup> Schlesinger op cit note 22 at 81.

<sup>50</sup> *Chapelton v Barry Urban District Council* [1940] 1 KB 532 at 535–7. See Unger op cit note 27 at 371 as supported by Kahn op cit note 28 at 253. G Tedeschi ‘Offer of goods and services to the public or invitation to deal’ (1971) 6 *Israel LR* 467 at 470 argues that this part of the decision was obiter.

evidenced by the use of automatic cash points in certain supermarkets, where customers have the option to use such cash points and the customer is able to scan and pay for the goods without any human interaction with a representative from the shop.

By contrast, other commentators advance the argument that, as a general rule, the display of goods for sale at a particular price amounts to an invitation to do business and should not be construed as an offer.<sup>51</sup> The trader is not obliged to sell to a customer at all, or may refuse to sell at the price displayed.<sup>52</sup> In this situation, the customer makes the offer to the trader when he presents the goods for payment.<sup>53</sup> Commentators usually refer to the decision of *Crawley v Rex* and the English case of *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd*<sup>54</sup> in support of their view.

It has already been shown that *Crawley v Rex* dealt with an advertisement in the form of a placard outside the shop and not the actual display of the goods for sale at a particular price. As previously discussed, the practical obstacles that arise when an offer is advertised are not present where goods are physically displayed. With the actual display of goods ‘the offer would cease when the last item of the particular stock was sold’.<sup>55</sup> As such, the general rule in respect of advertisements (as formulated in *Crawley v Rex*) cannot be applied to the display of goods in a shop. However, it was also mentioned that the court in *Crawley v Rex* favoured the traditional observance of contractual autonomy when it stated that a trader is not obliged to sell to any customer.<sup>56</sup> In other words, a trader can choose its customers. Taking this argument to the extreme, Winfield argues that even where something is displayed with a price ticket and the words ‘For sale for £1, cash down, to first customer’ it is still only an invitation to do business and subject to the trader’s approval of the first customer.<sup>57</sup> This is because ‘a shop is a place for bargaining, not for compulsory sales’.<sup>58</sup> Hamman interprets this as

<sup>51</sup> Van Eeden op cit note 41 at 355; Van der Merwe et al op cit note 7 at 50n26; Christie & Bradfield op cit note 4 at 43; Sharrock op cit note 5 at 54; Kerr op cit note 7 at 69–70; Joubert op cit note 7 at 39–40.

<sup>52</sup> Ibid at 40.

<sup>53</sup> Ibid.

<sup>54</sup> [1953] 2 QB 795.

<sup>55</sup> D C W ‘A survey of recent case law’ (1952–1954) 10 *Northern Ireland Legal Quarterly* 117 at 118. See also Unger op cit note 27 at 369.

<sup>56</sup> Cf the discussion in the text at note 36.

<sup>57</sup> Winfield op cit note 28 at 518. See the criticism by Unger op cit note 27 at 370; Kahn op cit note 28 at 252; Kahn op cit note 22 at 81–2. See further Beatson, Burrows & Cartwright op cit note 48 at 35, where they argue that a display clearly stating that the goods will be sold to a person who pays the required price would likely be held to constitute an offer. They refer to the English case of *Warwickshire CC v Johnson* [1993] 1 All ER 299 at 302, where the court held that a notice stating ‘We will beat any TV HiFi and Video price by £20 on the spot’ was an offer.

<sup>58</sup> Winfield op cit note 28 at 518. See further Beatson, Burrows & Cartwright op cit note 48 at 35, where the writers refer to the argument that a ‘shop is a place for bargains, not for compulsory sales’ and state that ‘this is less convincing in the light of

the trader tacitly reserving its right to choose its customers.<sup>59</sup> Winfield argues that if the display is construed as an offer this would mean that the trader might be forced to sell in circumstances where it would prefer not to sell or ought not to sell.<sup>60</sup> The same reasoning can be identified in *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd*, where the court stated that '[i]t is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is prepared to treat but does not amount to an offer to sell'.<sup>61</sup> The court extended this principle to self-service shops.<sup>62</sup> The court held that if the display of the goods amounted to an offer that could be accepted by a customer picking up the article it would be contrary to '[o]rdinary principles of common sense and of commerce'.<sup>63</sup> The court gave the following example:

'On the customer picking up the article the property would forthwith pass to him and he would be able to insist upon the shopkeeper allowing him to take it away, though in some particular cases the shopkeeper might think that very undesirable.'<sup>64</sup>

The court's argument is that if we viewed the display of goods at a particular price as an offer to sell, this would mean that the trader would be obliged to sell to anyone who accepted the offer, including in circumstances in which it would prefer not to sell, or ought not to sell. In other words, the trader would be obliged to sell where the circumstances and facts indicate that the trader does not have the intention to sell.<sup>65</sup> This can be deduced from the wording 'in some particular cases the shopkeeper might think that very undesirable'. But surely, these situations would not meet the test for an offer at common law, because the intention to sell is absent and they would fall under the exception mentioned by Wessels. In fact, *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd* is a good example of a case where the display of the goods would not constitute an offer to sell because the circumstances and facts clearly indicated otherwise. In this case, it was a pharmacist who supervised the transaction and who was authorised to

modern regulation of trading practices, for example the prohibition of sex and racial discrimination and the statutory protection of consumers'.

<sup>59</sup> Hamman op cit note 29 at 140.

<sup>60</sup> Winfield op cit note 28 at 518, referring to the following examples: a trader's 'worst enemy, his greatest trade rival, a reeling drunkard, or a ragged and verminous tramp'.

<sup>61</sup> Supra note 54 at 801. The decision was confirmed on appeal in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 (CA) at 405–6, and confirmed in *Fisher v Bell* [1961] 1 QB 394 at 399. See further J L Montrose 'The contract of sale in self-service shops' (1952–1954) 10 *Northern Ireland Legal Quarterly* 178.

<sup>62</sup> Supra note 54 at 801.

<sup>63</sup> Ibid at 802.

<sup>64</sup> Ibid.

<sup>65</sup> Kahn op cit note 22 at 82, where he states that '[t]he circumstances of the case will indicate how far a public offer is limited in operation'.

prevent the sale of any drug.<sup>66</sup> This was because certain legislative provisions required that the sale of certain drugs and poisons must take place under the supervision of a registered pharmacist.<sup>67</sup> Therefore, the customer would make the offer when he presented his selected goods for payment, and this would then be accepted or rejected by the registered pharmacist. Other examples would include where the safe 'life' of the goods has expired, or the manufacturer has recalled the goods or the goods have been promised to another customer.<sup>68</sup> Kahn and Woker further argue that a special notice in respect of certain limitations applicable to the offer could prevent the trader from being in a position where a customer could insist on buying goods that the trader should not sell to the customer.<sup>69</sup>

Although it remains a factual question whether the trader is making an offer by displaying the goods for sale at a particular price, there are various restrictions where it would not be lawful for the trader to refuse to sell even if it does not have the intention to sell to that particular customer. For example, where refusing to sell would constitute unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000<sup>70</sup> or where it would be contrary to the provisions of the Competition Act 89 of 1998.<sup>71</sup> A little more complicated is the situation where there is a mistake in pricing. It has been argued that it would be harsh to consider a trader bound to the indicated price on goods if there had been a mistake in the pricing.<sup>72</sup> Kahn, on the other hand, argues that it would be worse for the customer and would result in the failure of the customer's legitimate expectations if the trader had a right not to sell the goods to a customer or to

<sup>66</sup> Supra note 54 at 796.

<sup>67</sup> Section 18 of the Pharmacy and Poisons Act, 1933 (at 796 of the court's decision).

<sup>68</sup> Kerr op cit note 7 at 70. The last example is specifically cited in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* supra note 54 at 802. It has been argued that all of these situations may be avoided if the trader removes the goods from display timeously (see P D V Marsh *Comparative Contract Law: England, France Germany* (1994) 43; Unger op cit note 27 at 370).

<sup>69</sup> Kahn op cit note 22 at 84–5; Kahn op cit note 28 at 251; Woker op cit note 13 at 53, suggesting that a trader could include the words 'seller reserves the right of refusal'.

<sup>70</sup> See esp Chap 2 of the Act. It is interesting to note that the English decision of *Timothy v Simpson*, which the court in *Crawley v Rex* supposedly followed when stating that a trader has a right to choose its customer, is a case very much in point (cf notes 22 and 35 above). The plaintiff was a Jew who saw a dress in a dressmaker's shop for a certain price. He sent his clerk to buy the dress but the clerk was informed that the price was higher than that indicated in the window. The plaintiff then entered the shop and insisted on buying the dress for that price. In response, one salesman said 'I suppose we must let him have it,' but another said 'Don't let him have it; he is only a Jew, turn him out' (at 500). The court held that the trader had a right to turn out the plaintiff (ibid).

<sup>71</sup> See especially part B of Chap 2.

<sup>72</sup> Kahn op cit note 28 at 253.

insist on a higher price.<sup>73</sup> In addition, where goods are displayed at a clearly incorrect price, the trader would be protected by the ‘doctrine of “snatching a bargain”’.<sup>74</sup>

The court in *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd* further argued that regarding the display of goods as an offer would also be undesirable for the customer because the customer would be bound to the contract the moment he picked up the goods, and would not have the opportunity to change his mind before presenting the goods for payment.<sup>75</sup> However, this problem can be solved if the offer is accepted only when the customer has made his final selection and presents the goods for payment.<sup>76</sup> This would make more sense because the main purpose of a self-service shop is to provide the customer with an opportunity to examine the various goods before making his final selection.<sup>77</sup>

Although Kahn concedes that a general rule in favour of offers may result in ‘hard cases’, he argues that the opposite would result in ‘greater hardship’ and ‘more failures of legitimate expectations’.<sup>78</sup> Therefore, it is uncertain whether the courts will follow the general rule in *Crawley v Rex* or the reasoning in *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd* where goods are displayed at a particular price in a self-service shop.<sup>79</sup> The following comment on the English law position is particularly insightful and provides an appropriate link with the next part of this article:

‘In the particular case of self-service shops, legal methods of reasoning probably mean that the law is today out of touch with modern social conditions, and also with public attitudes. Most people would probably be surprised to discover that a shopkeeper is not obliged to sell an article at the price indicated if a customer offers to pay for it, and this public attitude is confirmed by the fact that such behaviour by a shopkeeper would today probably constitute an offence under . . . consumer protection legislation.’<sup>80</sup>

Referring to the above quote, McKendrick questions whether the real issue is to determine if a trader made an offer solely with reference to the intention

<sup>73</sup> Ibid.

<sup>74</sup> Woker op cit note 13 at 54, where she argues that the buyer must show a reasonable belief that the displayed price is correct in accordance with the reliance theory of contract (see further *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) 234 (A)).

<sup>75</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* supra note 54 at 802. See also Kahn op cit note 28 at 252.

<sup>76</sup> Ibid; Schlesinger op cit note 22 at 80–1; D C W op cit note 55 at 119.

<sup>77</sup> Kahn op cit note 28 at 252, referring to American case law on this point (this case law was referred to with approval by Woker op cit note 13 at 54).

<sup>78</sup> Kahn op cit note 28 at 253, supported by Woker op cit note 13 at 54–5.

<sup>79</sup> Luanda Hawthorne & Dale Hutchison ‘Offer and acceptance’ in Dale Hutchison & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 52. Contra Sharrock *Business Transactions Law* op cit note 5 at 54, who argues that there is ‘no doubt’ that our courts would apply the reasoning in both these cases where goods are displayed at a particular price.

<sup>80</sup> Stephen Smith *Atiyah’s An Introduction to the Law of Contract* 6 ed (2006) 42.

of that trader.<sup>81</sup> He asks whether the relevant policy considerations should not be considered rather than phrasing the question as one of offer and acceptance alone.<sup>82</sup> As will be seen below, the policy considerations behind the CPA may provide possible answers to this problem.

### III THE CONSUMER PROTECTION ACT<sup>83</sup>

Traditionally, contract law was based on the assumption that the parties had negotiated the terms of the contract and were on an equal footing during the negotiations.<sup>84</sup> In practice, this is often not the case since businesses use standard contracts that benefit them and that are not open to negotiation.<sup>85</sup> Recent developments in consumer law have marked a departure from the traditional reverence reserved for contractual autonomy and moved towards a contractual order striving to protect the interests of consumers.<sup>86</sup> These developments culminated in the enactment of the CPA, which has made substantial amendments to the law applicable to sales governed by the Act.<sup>87</sup>

The CPA promotes and protects specific fundamental consumer rights.<sup>88</sup> Two of these rights must be investigated in order to determine whether the CPA has amended the common law position discussed above. First, the consumer's right to disclosure and information is considered as contained in s 23 of the CPA. Secondly, the consumer's right to fair and responsible marketing in ss 29 and 30 is investigated.

<sup>81</sup> Ewan McKendrick *Contract Law: Text, Cases, and Materials* 4 ed (2010) 68.

<sup>82</sup> *Ibid.*

<sup>83</sup> This section is based on research forming part of my LLM dissertation: Hanri Magdalena du Plessis *The Unilateral Determination of Price in Contracts of Sale governed by the Consumer Protection Act 68 of 2008* (unpublished LLM dissertation, University of Pretoria, 2012) 99–105 and 140–4.

<sup>84</sup> Van Eeden op cit note 41 at 31; Tanya Woker '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) 31 *Obiter* 217 at 227.

<sup>85</sup> Van Eeden op cit note 41 at 13; Woker op cit note 84 at 227; R D Sharrock 'Judicial control of unfair contract terms: The implications of Consumer Protection Act' (2010) 22 *SA Merc LJ* 295 at 296.

<sup>86</sup> Natascha van Vuuren 'Contractual autonomy and consumer rights' (2009) 9 *Without Prejudice* 38.

<sup>87</sup> For more on the scope of application of the CPA see ss 5–6 of the Act. See also Van Eeden op cit note 41 ch 3; W Jacobs, P Stoop & R van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A Critical overview and analysis' (2010) 13 *PELJ* 302 at 309–18; Sharrock op cit note 85 at 299–305.

<sup>88</sup> They are the following: the right to equality in the consumer market (ss 8–10); the right to privacy (ss 11–12); the right to choose (ss 13–21); the right to disclosure and information (ss 22–28); the right to fair and responsible marketing (ss 29–39); the right to fair and honest dealing (ss 40–47); the right to fair, just and reasonable terms and conditions (ss 48–52); and the right to fair value, good quality and safety (ss 53–61). See also Van Eeden op cit note 41 at 51.

(a) *The consumer's right to disclosure and information: s 23 of the CPA*(i) *Mandatory price display*

Section 23(3) of the CPA prohibits a retailer from displaying any goods for sale without displaying a price in relation to those goods.

As a point of departure, it should be determined when goods are displayed for sale. 'Display' in respect of goods is defined as placing, exhibiting or exposing goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect and select those or similar goods for supply to a consumer.<sup>89</sup> It is necessary to consider the meaning of 'placing, exhibiting or exposing' of goods as these terms are not defined in the Act. The term 'place' would probably refer to the physical placement of goods before the public as it can be defined as 'put[ting] in a particular position'.<sup>90</sup> It would seem that 'exhibit' would have a similar meaning because it is defined as 'publicly display[ing] (a work of art or item of interest) in an art gallery or museum or at a trade fair'.<sup>91</sup> Clearly this would include the bulk display of goods in a supermarket where the consumer can inspect and select those goods. It also includes window displays and display areas where only one example of the goods is displayed (for example a bed or sofa) where the consumer cannot select those specific goods but can inspect and select similar goods. Therefore, if the goods are physically displayed in a manner that invites the consumer to inspect and select the specific or similar goods before entering into the transaction, the retailer must display a price. Less clear is the meaning that can be attributed to 'expose', which can be defined as 'mak[ing] (something) visible by uncovering it'<sup>92</sup> or 'uncover[ing] or reveal[ing] it'.<sup>93</sup> It is submitted that 'expose' could possibly include an advertisement for goods because an advertisement could 'expose' or 'reveal' the goods to a consumer as an open invitation to come and inspect and select similar goods for supply to the consumer. It is submitted that whether or not an advertisement would meet this criteria is a factual question. This interpretation would be in line with the purpose of mandatory price display in consumer protection, namely to provide the consumer with the necessary information to choose between different types of product in an informed manner.<sup>94</sup> As will be seen below, mandatory price display requires full disclosure of the price.

Certain types of goods would not be included under s 23(3). The first example are goods offered for sale that qualify as electronic transactions governed by s 43 of the Electronic Communications and Transactions Act 25

<sup>89</sup> Section 1 s v 'display'.

<sup>90</sup> *Oxford English Dictionary* available at [www.oxforddictionaries.com](http://www.oxforddictionaries.com), accessed on 13 December 2013 s v 'place'.

<sup>91</sup> *Ibid* s v 'exhibit'.

<sup>92</sup> *Ibid* s v 'expose'.

<sup>93</sup> *Collins Paperback Dictionary and Thesaurus* 3 ed (2006) s v 'expose'.

<sup>94</sup> Geraint Howells *Consumer Protection Law* 2 ed (2005) 63.

of 2002 ('the ECTA').<sup>95</sup> This is because the ECTA already makes provision for a certain amount of consumer protection.<sup>96</sup> Specifically, s 43 requires certain information to be provided to the consumer on the website where the goods are offered for sale, including the full price of the goods which in turn would include transport costs, taxes and any other fees or costs.<sup>97</sup> Secondly, s 23 also does not apply to a transaction where an estimate is given for repair and maintenance service or where the consumer waives such an estimate in terms of s 15 of the CPA.<sup>98</sup> Again, this is because s 15 already prescribes how the cost of the repair is to be determined in such cases. Thirdly, s 33 governs catalogue marketing, which refers to the situation where goods are sold over the telephone, postal order or fax, and where the consumer does not have the opportunity to inspect the goods before entering into the transaction.<sup>99</sup> Once again, the supplier is required to disclose the full price of the goods (including taxes) in an appropriate manner, taking into account the manner in which the supplier and the consumer communicated in concluding the transaction.<sup>100</sup> Therefore, although s 23(3) seems to be limited to the physical display and certain advertisements of goods, appropriate price disclosure requirements apply to some of the situations not covered by s 23(3).

What then would qualify as the display of a price under s 23(3)? 'Display' in relation to price means to publish anything in a manner that reasonably creates an association between that price and the particular goods.<sup>101</sup> For the purpose of s 23 'price' includes any visual representation that may reasonably indicate an association between the goods and the value of the consideration for which the supplier is willing to sell or supply the goods.<sup>102</sup> Furthermore, the price must refer to the total amount payable by the consumer to the supplier in terms of the transaction (including any amount the supplier is required to impose, charge or collect in terms of any public regulation).<sup>103</sup> Therefore, s 23(3) obliges the retailer to disclose the full price of the goods if it displays the goods for sale. Consequently, the price disclosure requirements in s 23 are similar to the price disclosure requirements in respect of the other situations discussed above.

Section 23(5) provides that a price is adequately displayed if it is expressed in the currency of the Republic. In addition, the price must be affixed to or stamped on the goods, applied to the shelf where the goods are displayed,

<sup>95</sup> Section 23(1)(b).

<sup>96</sup> Section 43 falls under Chap VII of the ECTA, which is entitled 'Consumer protection'. See further Wenette Jacobs 'The Electronic Communications and Transactions Act: Consumer protection and internet contracts' (2004) 16 *SA Merc LJ* 556.

<sup>97</sup> Section 43(1)(i).

<sup>98</sup> Section 23(1)(a).

<sup>99</sup> Section 33(2).

<sup>100</sup> Section 33(3)(c) read with ss 26(3)(e), (g)–(i).

<sup>101</sup> Section 1 s v 'display'.

<sup>102</sup> Section 1 s v 'price'.

<sup>103</sup> *Ibid.* For the purposes of s 23 'price' includes a unit price (s 23(2)).

published in a catalogue or brochure or represented in any way as long as it may reasonably be inferred that the price represented is the price applicable to the goods in question.<sup>104</sup> If the price is displayed in a brochure or catalogue and the brochure or catalogue states that the price is applicable for a certain time only, then the price is considered as the displayed price for that time only.<sup>105</sup> If no time is stated, the price in the brochure or catalogue will be the displayed price for as long as it may reasonably not be regarded as out of date.<sup>106</sup> This means that the display of the price does not necessarily have to be affixed to the goods themselves but can be displayed in any manner prescribed in s 23(5), including an advertisement of the goods.

There are further exceptions to mandatory price display. Section 23(4) provides as follows:

‘A retailer is not required to display a price for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier’s premises to which the public does not ordinarily have access.’

There are conflicting views on the interpretation of this provision. Some legal scholars interpret this provision as providing for two exceptions from mandatory price display.<sup>107</sup> The first is where the goods are displayed predominantly as a form of advertisement, and the second is where the goods or services are displayed in an area within the supplier’s premises to which the public does not ordinarily have access (for example, window displays).<sup>108</sup> This interpretation in respect of the first exception is open to criticism. First, exempting all advertisements from displaying a price would defeat the purpose of mandatory price display (namely to provide the consumer with the necessary information to choose between different types of product in an informed manner). Secondly, it is submitted that the wording of s 23(4) does not provide for such an interpretation. If the provision does in fact refer to two exceptions, the placing of the word ‘or’ must indicate where the first exception ends and the second exception begins. As such, the first exception should rather refer to ‘goods that are displayed predominantly as a form of advertisement of the supplier’,<sup>109</sup> and not of the specific goods or services. This would probably include a display that promotes the brand more than the goods — for example brand advertising of luxury goods. However, brand advertising would probably not meet the requirements of s 23(3) in any event, because it would probably not qualify as ‘the exposing of goods to the public as an open invitation to come and inspect and select similar goods for

<sup>104</sup> Section 23(5).

<sup>105</sup> Section 23(5)(c)(i).

<sup>106</sup> Section 23(5)(c)(ii).

<sup>107</sup> Jacobs, Stoop & Van Niekerk op cit note 87 at 331.

<sup>108</sup> Ibid. See also Van Eeden op cit note 41 at 319n37, where the author also submits that window displays would be exempt from mandatory price display.

<sup>109</sup> Advertisement has been given a very wide meaning in s 1 of the CPA and would include an advertisement with the purpose to bring to attention to all or part of the public the existence or identify of a supplier.

supply to the consumer'. This is because the goods are displayed as an advertisement of the supplier (the brand) and not really intended as an advertisement of the specific goods included in the advertisement itself.

Sharrock offers a better interpretation. He submits that s 23(4) provides for one exception, namely where goods are displayed predominantly as an advertisement of the supplier or its products in an area within the supplier's premises to which the public does not ordinarily have access.<sup>110</sup> As such it would refer primarily to window displays.<sup>111</sup>

(ii) *The consequences of displaying a price*

Whether or not a supplier is required to display a price, the consequences of displaying it are the same.<sup>112</sup> Section 23(6)(a) provides that the supplier may not require a consumer to pay a higher price than the displayed one. There are exceptions to s 23(6): prices determined by public regulation;<sup>113</sup> a price covered completely by a second displayed price;<sup>114</sup> where the displayed price contains an inadvertent and obvious error, provided the error has been corrected and reasonable steps have been taken to inform consumers;<sup>115</sup> and if the displayed price was altered, covered or removed by an unauthorised person.<sup>116</sup> If two or more prices are displayed concurrently in respect of the same goods, the retailer may not require the consumer to pay the higher or highest price.<sup>117</sup> Therefore, the retailer is *bound* to the lowest price displayed. This can be inferred from the words 'the seller is not bound' used in the exceptions contained in s 23(9)–(10).

If the buyer has the right to insist on paying this price, does this mean that the supplier is bound to sell the goods to the consumer at that price if so required by the consumer? In other words, by displaying or advertising the goods at a certain price, is the supplier making an offer to sell? I shall consider first the physical display of goods in a shop, and thereafter the advertisements of goods.

As I have explained in part II above, the common-law position in respect of the display of goods for sale is uncertain and there are arguments supporting and rejecting a general rule that the open display of goods in a shop constitutes an offer.<sup>118</sup> I use a factual scenario to illustrate the possible

<sup>110</sup> Sharrock *op cit* note 5 at 631.

<sup>111</sup> Therefore, I have reconsidered and amended my initial interpretation of s 23(4) as contained in Du Plessis *op cit* note 83 at 101–2.

<sup>112</sup> Section 23(6) refers to 'a price for any goods or services'. However, it should be remembered that s 23 does not apply to electronic transactions governed by s 43 of the ECTA and estimates or the waivers of estimates in respect of repair and maintenance in terms of s 15 of the CPA (s 23(1)). Cf the discussion in the text at note 95 above.

<sup>113</sup> Section 23(7).

<sup>114</sup> Section 23(8).

<sup>115</sup> Section 23(9).

<sup>116</sup> Section 23(10).

<sup>117</sup> Section 23(6)(b).

<sup>118</sup> Cf para II(b) above.

influence of s 23 on the common-law position: A consumer selects a book from the shelf in a shop marked with a price tag of R150.00. When the consumer presents the book for payment the supplier indicates that the selling price is now R300.00. The supplier insists on the payment of R300.00 before transacting with the consumer. We know that s 23(6)(a) provides that the supplier may not require a consumer to pay the higher price of R300.00, rather than the lower displayed price of R150.00. Sharrock argues that this provision does not 'mean that the supplier is contractually bound by a price'.<sup>119</sup> He argues that '[t]he law accepts that a simple display of goods with a price is no more than an invitation to submit offers and, in each case, it is the customer who makes the offer'.<sup>120</sup> Finally, he submits that a supplier who requires the payment of a higher price than that displayed is merely guilty of prohibited conduct in terms of the CPA,<sup>121</sup> which in turn can lead to significant administrative penalties or criminal liability.<sup>122</sup> Sharrock's views are open to the following criticisms: first, the common-law position is not clear on whether the open display of goods is an offer or not. Whether the display would constitute an offer remains a factual question, and it is uncertain whether a general rule exists in favour of an offer or a mere invitation to do business. Secondly, as mentioned above, most modern supermarkets operate more like a vending machine than a traditional shop where the shopkeeper oversees the transactions. Given this context, it can be concluded that the display of the goods is an offer to sell rather than an invitation to do business.<sup>123</sup> Thirdly, if we accept that the consumer is making the offer, the cashier can simply refuse to transact with the consumer at the lower price, provided no other legal limitations on the supplier's contractual autonomy are applicable.<sup>124</sup> Although, the supplier would be guilty of prohibited conduct (which could lead to significant administrative

<sup>119</sup> In *Business Transactions Law* op cit note 5 at 631.

<sup>120</sup> *Ibid* at 632.

<sup>121</sup> *Ibid*.

<sup>122</sup> Sections 71, 99, 100 and 109–112. See further Ina Meiring 'Consequences of non-compliance with the Consumer Protection Act 68 of 2008' (2010) 10 *Without Prejudice* 28. Similarly, in English law a trader may be found guilty of a criminal offence and fined accordingly if he contravenes the provisions of the Price Marking Order 2004 (s 7 read with para 5(1) of schedule 1 of the Prices Act 1974). There is no provision stipulating that the trader is bound to the displayed price, and whether or not the display constitutes an offer is still governed by common law principles. In respect of the English common law position see part II above; Furnston op cit note 7 at 43–7; Beale op cit note 11 paras 2–007 to 2–018. For more on the obligation to display prices in consumer sales in English law see J K Macleod *Consumer Sales Law* 2 ed (2007) 297–8; Lord Mackay of Clashfern (ed) *Halsbury's Laws of England* vol 21 5 ed (2011) paras 533–40.

<sup>123</sup> See discussion at note 48 above.

<sup>124</sup> In addition to the limitations referred to above (see the discussion at note 70 above), s 8(2)(b) of the CPA now also provides that a supplier may not unfairly discriminate against a consumer when deciding to enter into a transaction or to offer to enter into a transaction. This includes direct or indirect unfair discrimination with reference to the grounds of unfair discrimination set out in s 9 of the Constitution of

penalties or criminal liability), the consumer has no right to insist on buying the goods at the lower price. Either the consumer must pay the higher price, or must leave without the goods. In this context, this interpretation ignores the legitimate expectations of the consumer. By contrast, if the display of the goods is generally to be construed as an offer (except where the facts clearly indicate otherwise), the consumer's legitimate expectations would not be ignored. However, this construction could operate quite harshly against the supplier, especially where there is a mistake in pricing.<sup>125</sup> Clearly, we are dealing with a conflict between the interests of the consumer and that of the supplier. In order to establish what interpretation should be preferred, the interpretation provisions of the CPA must be applied. Section 2 of the CPA provides that the CPA should be interpreted to give effect to the purposes detailed in s 3.<sup>126</sup> The main purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa.<sup>127</sup> This must be accomplished by the establishment and maintenance of a fair, accessible, efficient and sustainable consumer market;<sup>128</sup> also, by promoting fair business practices<sup>129</sup> and protecting consumers from unfair trade practices and conduct.<sup>130</sup> Specifically, the CPA aims to protect the rights of vulnerable persons.<sup>131</sup> These would include persons from low-income and remote communities, minors, seniors, illiterate persons or persons with a low literacy level, the visually impaired and persons who have limited language skills in the language in which the advertisement, agreement or other visual representation is presented.<sup>132</sup> Therefore, '[t]he more vulnerable the consumer is, the more protection is required'.<sup>133</sup>

When, in terms of the CPA, a matter is brought before a court, the court has the following obligations. First, the court must develop the common law to improve the realisation and enjoyment of consumer rights generally and, in particular, to improve the position of the vulnerable persons referred to

the Republic of South Africa, 1996 and Chap 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

<sup>125</sup> The mistake in pricing provisions contained in s 23(9) operates more harshly against the supplier than the applicable common-law rules where the supplier would be protected by the 'doctrine of "snatching a bargain"' (see the discussion at note 74 above). In terms of s 23(9), the supplier will remain bound to an inadvertent and obvious error in the price until he has corrected the price and taken reasonable steps to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.

<sup>126</sup> Section 2(1).

<sup>127</sup> Section 3(1).

<sup>128</sup> Section 3(1)(a).

<sup>129</sup> Section 3(1)(c).

<sup>130</sup> Section 3(1)(d).

<sup>131</sup> Section 3(1)(b).

<sup>132</sup> *Ibid.*

<sup>133</sup> Monique L Du Preez 'The Consumer Protection Bill: A few preliminary comments' 2009 *TSAR* 58 at 63.

above.<sup>134</sup> Secondly, the court must promote the spirit and purposes of the CPA.<sup>135</sup> Furthermore, s 4(3) provides that if any provision in the CPA can have more than one meaning, the 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 and, in particular, the position of the vulnerable persons mentioned above.

From the above, it is clear that the CPA requires an interpretation that would rather protect the legitimate interests of the consumer than that of the supplier. Such an interpretation would provide the consumer with a remedy against the supplier itself and he would be able to insist on buying the goods at the displayed price. Woker argues that the development of the common law in this direction would also help ensure that suppliers follow prescribed trade practices and protect the interests of consumers.<sup>136</sup> In addition, there are various ways that a supplier could avoid the possible harsh consequences that could follow such an interpretation, for example by ensuring that goods reflect the correct prices or by including terms to limit the offer where applicable. Section 23 also provides for various instances where the supplier could escape the harsh consequences of s 23(6).<sup>137</sup> Finally, where the facts clearly indicate that the supplier did not intend an offer, the display of goods would not be interpreted as an offer (for example where the safe 'life' of the goods has expired, or the manufacturer has recalled the goods). In light of the relevant provisions and considerations discussed above, the physical display of goods in a shop at a certain price generally should be seen as an offer to sell.

What about the situation where the price of the goods is displayed in an advertisement? Would such an advertisement constitute an offer to sell in terms of s 23(6)? The common-law rule states that generally an advertisement of goods at a certain price is not an offer to sell the goods to the public but indicates an invitation to do business. However, there may be an offer to sell where there is a clear intention to this effect. As such, whether an offer exists or not remains a factual question. Here again, we have a conflict between the interests of the consumer and that of the supplier. However, in addition to the factors listed and considered above, construing the advertisement as an offer to sell would operate very harshly against a supplier because it would be compelled to sell the specific goods even if they had been sold out. Although suggestions have been made that the supplier could mitigate the harsh consequences by including the necessary terms and conditions, it would seem that the legislature has taken cognisance of the practical obstacles to construe an advertisement as an offer and opted to deal with such advertisements separately under s 30. As will be seen below, s 30 does not make the advertisement an offer. However, there are certain consequences that attach to such an advertisement. As such, while it appears that s 23(6) has

<sup>134</sup> Section 4(2)(a).

<sup>135</sup> Section 4(2)(b)(i).

<sup>136</sup> Woker op cit note 13 at 55.

<sup>137</sup> See the exceptions mentioned in the discussion at note 113 to 116 above.

not amended the common-law principles in respect of advertisements, it does not mean that a consumer would not have any remedy under s 23(6) where the advertised price is lower than the actual price indicated on the goods. This can be explained by the following example. A supplier advertises a book at R150.00 and the consumer goes to the shop to buy the book. When the consumer enters the shop, the book in the shop has a price-tag attached indicating a price of R300.00. In terms of s 23(5), both the advertised price and the price-tag on the book would qualify as the displayed price of the goods. Therefore, in terms of s 23(6) the supplier may not require the consumer to pay the higher displayed price of R300.00 but is bound to the lower displayed price of R150.00. As it has been argued that the physical display of the book in the shop can generally be construed as an offer, the consumer would be able to insist on buying the book at the lower advertised price.

*(b) The consumer's right to fair and responsible marketing: ss 29 and 30 of the CPA*

Advertisements of goods at a particular price are dealt with in more detail in the provisions dealing with the consumer's right to fair and responsible marketing. Section 29(b)(iii) provides that a producer, importer, distributor, retailer or service provider must not market any goods in a misleading, fraudulent or deceptive manner including in respect of the price at which the goods may be supplied. In addition, s 30(1) provides that a supplier may not advertise goods as being available at a particular price in a manner that may result in consumers being misled or deceived in respect of the actual availability of those goods at the advertised price. Therefore, both s 29(b)(iii) and s 30(1) are aimed at preventing misleading advertisements in respect of the price or availability of the goods. Again, non-compliance with these provisions would be a prohibited conduct, which could lead to significant administrative penalties or criminal liability.<sup>138</sup>

Section 30(2) goes much further in providing the consumer with a remedy where a supplier advertises goods but they are not available for sale. It provides that if a supplier advertises goods at a specified price and the advertisement sets a limit to the availability of those goods from the supplier at that price, the supplier must make those goods available at that price, to the extent of the limits stated. If the supplier cannot do this, the supplier must offer to supply or procure from another person the same or equivalent goods

<sup>138</sup> In English law, the trader may be found guilty of a criminal offence if he makes any communication to a consumer which contains false information and is untruthful in relation to the price or the manner in which the price is calculated or the availability of the product or if the communication or its overall presentation in any way deceives or is likely to deceive the average consumer in relation thereto, even if the information is factually correct (reg 5(2)(a) read with reg 5(4)(g) and reg 5(5)(a) of the Consumer Protection from Unfair Trading Regulations, 2008 (SI 2008/1277)). See the Office of Fair Trading *Consumer Protection from Unfair Trading: Guidance on the UK Regulations (May 2008)* available at [http://www.ofi.gov.uk/shared\\_ofi/business\\_leaflets/cpregs/of11008.pdf](http://www.ofi.gov.uk/shared_ofi/business_leaflets/cpregs/of11008.pdf), accessed on 18 April 2013.

within a reasonable time, in a reasonable quantity, and at the advertised price.<sup>139</sup>

This means that although the advertisement is generally not regarded as an offer to sell<sup>140</sup> because of the practical problems this would pose, the legislature intended that a supplier be bound to its advertisement as far as possible, and places certain obligations on a supplier if it cannot fulfil its promises in its advertisement. This is in addition to the fact that the supplier could also be guilty of prohibited conduct in terms of the CPA, which could lead to significant administrative penalties or criminal liability.<sup>141</sup> This provision should encourage suppliers to keep a sufficient quantity of the goods advertised and to ensure that they are available.<sup>142</sup> In this way, the CPA provides better protection to a consumer than that which is available at common law.

#### IV CONCLUSION

The meaning of the relevant provisions in the CPA, and their possible effect on the relevant common law principles is a scientific puzzle that this article attempts to solve. Although I make certain proposals as to how these provisions should be interpreted, the meaning of these provisions is unclear and remains open to debate. I hope that my analysis will help to fit together the pieces of the puzzle so that the CPA may provide not only 'scientific satisfaction' to law academics, but also convenience and protection for consumers.

<sup>139</sup> Section 30(3)(a).

<sup>140</sup> Sharrock op cit note 5 at 631–2. The advertisement may be an offer to sell if that is clearly the intention (see para II above).

<sup>141</sup> In English law, the trader may be found guilty of a criminal offence if he makes 'an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered' (reg 3(4)(d) and schedule 1 para 5 of the Consumer Protection from Unfair Trading Regulations, 2008 (SI 2008/1277) referred to in note 138 above. See further the 2009 study by the Office of Fair Trading dealing with the advertising of prices (esp Annex D Legal Framework) available at <http://www.offt.gov.uk/OFTwork/markets-work/advertising-prices/#.UW-2IqI9GE4>, accessed on 18 April 2013.

<sup>142</sup> Jacobs, Stoop & Van Niekerk op cit note 87 at 336.