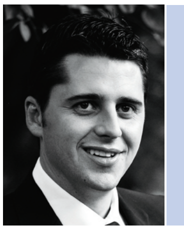
When the service isn't what you paid for

With the Consumer Protection Act (CPA) having come into effect on April 1, what happens if a corporate client pays for a service that is not delivered as promised? Hilka Birns investigates.

This month's panel of expertise

Lucien Pierce, partner at Phukubje Pierce Masithela Attorneys



André Marè, associate at Bowman Gilfellan

Chris Zweigenthal, ceo of the Airlines Association of Southern Africa (AASA)

Alan Reid, business travel consultant

RINA Oosthuizen* is a 21-year-old South African tennis player trying to break into the professional circuit and regularly travels overseas. As she is not yet earning income, her wealthy father gives her money to buy her own Business Class tickets, the latest of which she buys after the effective date of the Consumer Protection Act (CPA). The airline she has chosen is short of aircraft and uses one from another airline on the route on which Oosthuizen travels. The carrier plans to refurbish the aircraft to meet its service standards but in the meantime uses it, knowing that it doesn't offer the service customers have come to expect from it. As a result, headphones provided are not compatible with the aircraft and consequently there is no inflight entertainment on the outbound leg. On the return flight, the same airline uses one of its modern flagship aircraft on the route. This time, however, the entertainment system malfunctions and again, there is no inflight entertainment. The captain apologises over the intercom that the airline was not able to "deliver the service as advertised". Oosthuizen feels aggrieved, as the inflight entertainment system the airline boasts of is an important part of her Business Class experience on long international flights.

**This scenario is based on a real-life case. BTN has changed the name of the client and omitted the name of the airline and route to avoid getting involved in a dispute between the parties involved. It is important to note that comments by panellists were given in the interest of stimulating a debate and should not be construed as acknowledging liability or responsibility for any complaint.*

Each case has its own set of circumstances, which need to be considered in terms of the Act.

In the scenario described, is Oosthuizen protected in terms of the CPA?

Parties agree she is indeed protected in terms of the CPA. Pierce explains: "Oosthuizen fits the definition of a 'consumer', the airline fits the definition of a 'service provider', the service which she purchased from the airline fits the definition of a 'service' and her flight was after April 1, 2011 when the bulk of the CPA became effective."

Does the CPA cover services delivered by both South African and non-South African service providers outside of the country?

Marè says services delivered by South African and non-South African service providers fall under the CPA but enforcing the provisions against a supplier who is based outside of South Africa may prove difficult.

He says the Act applies to every transaction in South Africa and to the promotion of any goods or services or the supplier of any goods or services within the Republic. This is irrespective of whether the supplier has a residence or principal office within or outside South Africa. To "promote" means to advertise, display or to offer to supply any goods or services, he explains.

Does the CPA provide any recourse to Oosthuizen?

Both lawyers agree Oosthuizen is definitely entitled to recourse in terms of the CPA. Pierce says if Oosthuizen "is able to quantify the value of the inflight entertainment she did not receive, she would have good prospects of pursuing the airline for the value of the inflight entertainment. The quickest way to pursue the matter, if it cannot be resolved amicably, would be to lodge a complaint with the National Consumer Commission".

Marè cautions, however, that any refund from the airline would be subject to "reasonability and fairness in the circumstances". "It seems highly unlikely that Oosthuizen would get a significant refund in the travel price due to the failure of the inflight entertainment system, which appears to be an ancillary service to the main agreement. The action may also be different for the outbound and inbound legs of the flight. The aircraft was not refurbished and the airline appeared to have been aware of the fact that it did not meet the required standards. We believe that Oosthuizen would be entitled to at least a reasonable refund for the difference between the service one expects in Business Class and to what she received. Practically speaking, it is likely that the airline would extend a voucher or the like to Oosthuizen to cover a portion of future flights," he adds.

Zweigenthal says one needs to determine what constitutes a satisfactory remedy in terms of Article 54 (2) of the CPA and, if a refund is applicable, what is reasonable in terms of the lack of service.

Had the ticket been bought by a corporate client, how would a situation like this impact on the company's SLA with the airline?

"Much would depend on the terms of the agreements governing the relationship between the corporation and the airline," says Pierce. "If the SLA contains penalty provisions, it is likely that the corporate would be able to invoke those penalty provisions. The impact on the rates and SLA would also depend on the balance of bargaining power between the corporate and the airline."

Zweigenthal and Mare agree, however, it's highly unlikely this scenario would fall into the ambit of the CPA. While the CPA provides that certain juristic persons (corporate entities) may be treated as consumers, it does not apply where the company's asset value or annual turnover equals or exceeds R2m per year.

Meanwhile, providing a corporate perspective, Reid says: "My view would be to lodge a formal complaint with the airline, assess the response and track other complaints over the agreed review period. Anyone who travels often will experience delays, technical hitches, lost luggage, etc. – the system and equipment is man-made and not infallible. An incident rate of more than 0,5% per leg travelled would be cause to raise issues at SLA review time."

If a corporate client pays for a service that is not delivered, can the airline still expect the corporate to stick to targets?

"From a pure contract law perspective, if the SLA between the parties is a fair one, the corporate would probably be entitled to argue that its failure to stick to targets was caused by the airline and therefore it should not be penalised or lose discounts as a result of the airline's breaches of its obligations to consumers. It would therefore be unreasonable for the airline to expect targets to be maintained," argues Pierce.

Marè disagrees: "If the targets are reasonable and fair it is unlikely the corporate client can renege on its obligations in terms of the SLA."

Reid believes it's unrealistic to expect 100% delivery by both parties due to the nature of travel and the variable demands and availability.

As a corporate client, how do you respond in a situation like this? Do you feel it is an issue between the passenger and the airline, or the company and the airline?

Says Reid: "Any failure to deliver on commitments by a supplier should be taken up with the supplier and resolved to mutual satisfaction as far as possible; the advent of the CPA has just added another option, but resorting to the "contract/SLA" each time is going to consume way too much time and resources if handled in a CPA-aligned manner. Exploring options to correct the situation and ameliorating the traveller in a fair and timely manner is the better way."

In terms of the CPA, what are the airline's legal obligations in a case like this?

"The legal obligations of the airline would be to provide the services in accordance with the service levels that would normally be expected for the type of ticket being purchased. In this case, because Oosthuizen had received partial delivery of the services, the airline's legal obligations would be to refund her a portion of the price of the ticket proportionate to the inconvenience she suffered," says Pierce.

Zweigenthal says the CPA's Article 54 (2) states the airline's obligations. "If a supplier fails to perform a service... the consumer may require the supplier to either remedy any defect in the quality of the services performed or goods supplied; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure." ■