

### **The Right to Early Termination of a Fixed-Term Contract**

A fixed-term agreement is an agreement that comes into existence and operates for a defined period. Agreements of this nature will, once concluded, continue to operate for a certain defined period of time, at which point they terminate in their ordinary course. Common examples of these types of agreements, which consumers deal with on a day-to-day basis, are cell phone contracts and gym memberships. For the purposes of this article, we will deal with the example of a cell phone contract, but the principles discussed here generally apply to most types of fixed term contracts.

An express provision found in most cell phone contracts, is to the effect that the contract will operate for a pre-defined fixed term, and only after the expiry of that term will the contract terminate. On the face of it, this condition may seem rigid; however the consumer is afforded certain rights in terms of which he/she may cancel the agreement before its expiry. The right to the early cancellation of a fixed-term agreement is set out and contained in the Consumer Protection Act 68 of 2008 (“CPA”).

Section 14 of the CPA deals with the expiry, renewal and cancellation of fixed-term agreements. Section 14(2)(b)(i)(bb), deals specifically with the consumer’s right to the early cancellation of fixed-term agreements. The section states as follows:

*“14(2) If a consumer agreement is for a fixed term*  
*(b) despite any provision of the consumer agreement to the contrary*  
*(i) the consumer may cancel that agreement*  
*(bb) at any other time, by giving the supplier 20 business days’ notice*  
*in writing or other recorded manner and form, subject to subsection*  
*3(a) and (b).”*

As far as the application of the rights contained in section 14 are concerned, specifically to whom the rights are afforded, section 14(1) states as follows:

*“14(1) This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.”*

Applying the above sections to the example of a cell phone contract, allows a consumer who is a natural person and has concluded a fixed-term cell phone contract, to terminate that agreement before its expiry regardless of any provision in the agreement that purports to prohibit the early termination of the contract.

Noteworthy in regard to section 14 is the restriction placed on its application to transactions between juristic persons. On a strict reading of this section, the right to terminate a fixed-term cell phone contract prematurely is not available to a juristic person (for example a company or close corporation) which has concluded the fixed term agreement in its name with the cell phone provider.

The situation where a juristic person concludes an agreement of this nature is one which arises all too often. It is commonplace for cell phone contracts to be concluded between a juristic person and a cell phone provider, which is then for the benefit of, or the use by, its employees. The juristic person, in concluding the cell phone contract directly with the service provider, becomes the consumer in the relationship. However, the end user (i.e. the natural person/employee for whose benefit and use the cell phone contract has been concluded) is a party in the relationship between the company and the service provider albeit not in the strict, contractual sense.

The question is whether or not the natural person end user in this situation has the right to the early cancellation of the fixed-term cell phone contract, as envisaged by section 14, even though he/she is not actually a party to the agreement between the juristic person and the service provider in the legal sense.

In order to address this question, we need to examine who exactly is regarded as a consumer in terms of the CPA. The definition of a consumer is set out in the definitions section of the CPA. Subsection (c) of the definition of consumer includes the following type of consumer:

*“(c) if the context so requires or permits, a user of those particular goods or a 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.”*

The right to the early cancellation of a fixed-term agreement as envisaged in section 14 accordingly does apply to an end user. In this regard a natural person end user who finds himself/herself in the situation where a juristic person has concluded a cell phone contract on their behalf, or for their benefit or use, is deemed to be a consumer for the purpose of section 14, notwithstanding the restriction placed on the applicability of the section by section 14(1). Such a person would therefore be entitled to the early cancellation of the contract as contemplated in section 14. Given that the end-user is not a contracting party with the service provider, the service provider may request confirmation from the juristic person who is a party to the contract, that it consents to the termination of the agreement.

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