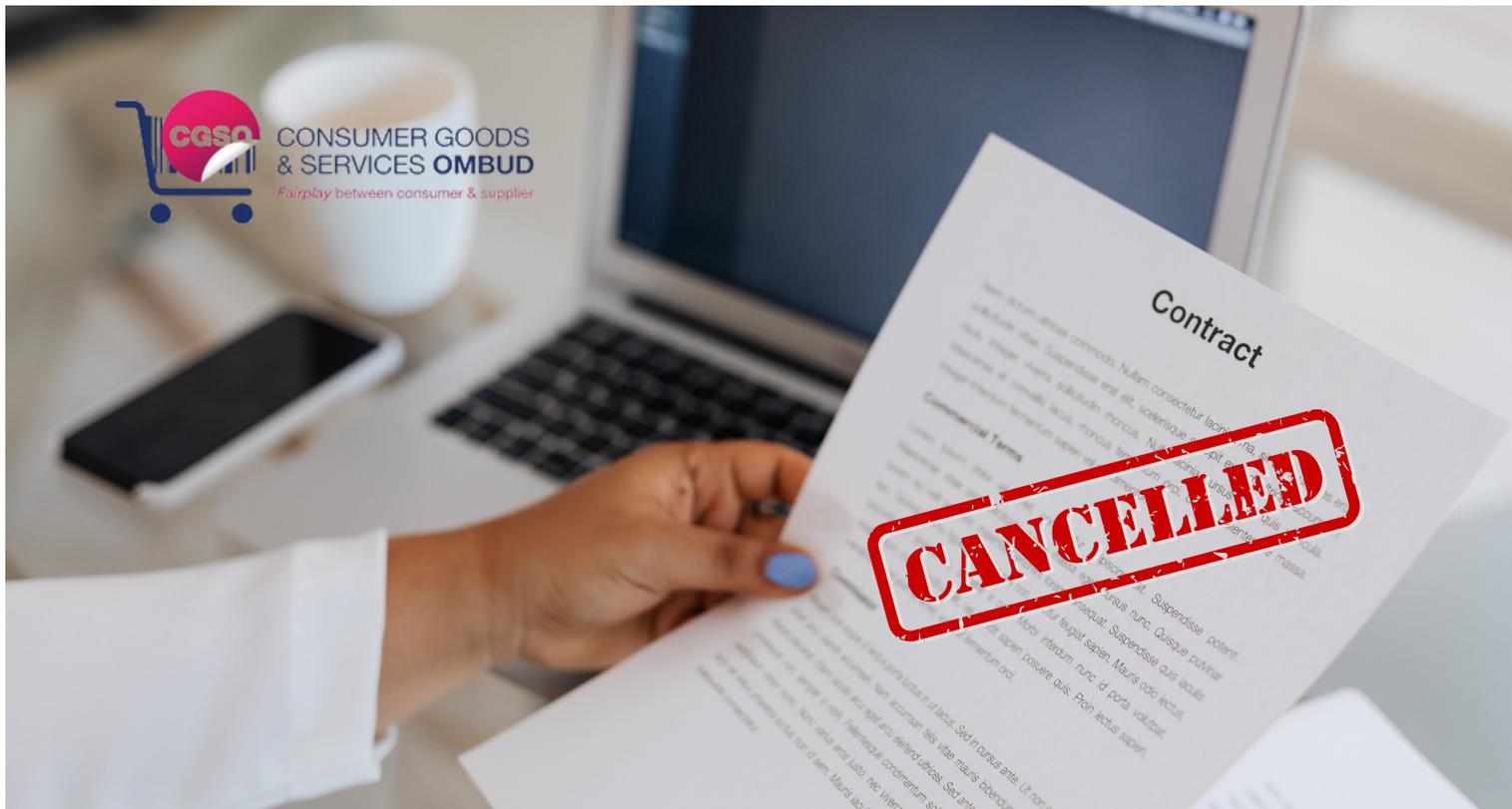


Contracts, COVID, Cancellations and the CPA -Part 1



Just when we thought it was safe to make travel plans, Omicron unleashed a fresh range of bans and restrictions ahead of the festive season, resulting in cancelled flights and postponed holidays at a time when we had barely caught up for the initial burst of complaints sparked by the first three waves.

Based on the **14,438** complaints received between 1 March 2020 and 28/9 Feb2021 (a 52% increase on the previous period), there is widespread confusion about the rights and responsibilities of affected parties in relation to claims for refunds where events or travel plans are cancelled. As covered in the previous article on [force majeure](#), we have established that suppliers may never apply a blanket no-refund policy, regardless of the circumstances.

Section 47 of the CPA and the impossibility to supply

Section 47 usually deals with overbooking and overselling. However, in the context of COVID-19 and related lockdowns, this section also speaks to what should happen if the inability to supply the goods or services arises due to no fault of the supplier.

Section 47(3) provides that:

- (3) If a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must—
- (a) refund to the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and
 - (b) in addition, compensate the consumer for costs directly incidental to the supplier's breach of the contract, except to the extent that subsection (5) provides otherwise.

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The above section entitles the consumer to two types of recourse if the supplier is at fault, namely a full refund with interest plus compensation for direct incidental costs. However, where the supplier is not at fault and has taken reasonable steps to inform consumers about the shortage of stock or capacity, the consumer is only entitled to a refund with interest and not consequential damages as per section 47(5):

47(5) Subsection (3)(b) does not apply if–

- (a) the shortage of stock or capacity is due to circumstances beyond the supplier's control, subject to subsection (6); and
- (b) the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances.

While many suppliers offered clients the option to postpone bookings or reservations to a future date in place of a refund, some consumers queried whether suppliers had the right to do so and if they were compelled to accept such an offer.

Section 47(4) allows the supplier to rely on a legal defence against a claim for a refund if they make an alternative offer to satisfy the promise to deliver, but the consumer must be given the opportunity to consider and choose if they want to accept that offer. Where the consumer is being unreasonable, the supplier has some recourse as per section 47(4) below.

(4) It is a defence to an alleged failure to supply any goods or services, as contemplated in subsection (3), if–

- (a) the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request; and
- (b) the consumer–
 - (i) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
 - (ii) unreasonably refused that offer.

Consumers are therefore obliged to consider alternative offers by suppliers in place of a cancellation refund but are not bound to accept the alternative arrangements.

The bottom line is that regardless of the circumstances – including force majeure or the doctrine of consumers have a right to a full refund if a supplier cannot honour its obligations. Alternatively, the supplier can offer an alternative arrangement (a change of date, or destination, or an alternative product). In all cases, this office has encouraged consumers to accept these alternative offers wherever practically possible.

Sincere thanks to Noluthando Moledi, director at Tumbo Scott Incorporated for clarifying these issues. [Click here](#) to listen to our joint webinar on CPA, Contracts and Force Majeure Events.