

# E-tolls 90% compliant with CPA

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The Consumer Protection Act, 68 of 2008 (CPA) is no doubt a very important, and very influential, piece of legislation in South African law and its enactment has given many consumers the confidence to stand up for their rights.



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All companies in the Republic of South Africa are expected to comply with the provisions of the CPA, whether they be public or private and non-compliance would result in hefty consequences.

Therefore, it is understandable that the National Consumer Commission's head of Advocacy, Education and Awareness, Phumeza Mlungu's statement that 'SANRAL's e-tolls terms and conditions are 90% compliant with the Consumer Protection Act' and that 'legislative amendments will be required to bring them in line with the Act' caused a great deal of public uproar. No other companies are granted leniency when it comes to the CPA so why should SANRAL be afforded this luxury?

A system that is lacking 10% compliance with the CPA cannot be deemed to be compliant with its provisions. What is further distressing about the aforementioned statement is that same was made by a head of the National Consumer Commission when, in fact, it is the Commission itself that should issue a compliance notice to SANRAL in an effort to clamp down on non-compliance and protect the rights of consumers. Instead, this less than pro-active attitude portrayed by Mlungu whilst e-tolls were still being enforced creates the impression that the Commission's bark is worse than its bite.

## Sending invoices

SANRAL's practice of sending invoices to motorists only after the seven day grace period has expired is a transgression of the Consumer Protection Act. By this practice, motorists who are not registered and e-tagged are being expected to pay an unknown amount, within seven days, without being furnished with an invoice within this time period.

Should motorists fail to make payment within the stipulated seven days for lack of an invoice, they shall be billed three times the standard rate for late payment. Ironically, regulation 6(5) of the e-road regulations states that 'the Agency must within

32 days after the alternate user has used an e-road but after expiry of the grace period and unless the user has registered, send an invoice to the said user, to the last known address provided in terms of the National Road Traffic Act by such user, reflecting the amount of the toll payable and such invoice shall be paid by the said user on or before the date reflected on the invoice'.

This is improper procedure in terms of section 23 of the CPA and should therefore not be condoned as section 23 (6) of the CPA provides that 'a supplier must not require a consumer to pay a price for any goods or services higher than the displayed price for those goods or services'.

Furthermore, threatening motorists with a criminal offence via sms and email ahead of sending invoices is not proper procedure in terms of section 56 and 57 of the Criminal Procedure Act, 51 of 1977 and further, cannot be reconciled with section 26 of the CPA as section 26(2) specifically states that 'a supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied'.

## **Date and address**

Subsection (3) goes on to state that this written record must include, at the very least, 'the address of the premises at which, or from which, the goods or services were supplied', 'the date on which the transaction occurred' and 'the unit price of any particular goods or services supplied or to be supplied'.

In relation to SANRAL's terms and conditions, the onus is on SANRAL to prove that an unregistered motorist had, in fact, travelled on a specific road at a specific time, however the onus shifts to the motorist in the circumstances where they had registered for an e-tag. Notwithstanding the above, another head of the National Consumer Commission, Ebrahim Mohamed, is of the opinion that the onus should still remain with SANRAL and has reportedly stated that 'the demand for payment, however it is communicated, has to be correct and accurate. It is incumbent on SANRAL to prove to any consumer who raises a query that the road was used on a specific date, by a specific vehicle, and that the charge is based on set tariffs'.

The CPA also specifies that a business enterprise may not charge consumers different rates for exactly the same service. Section 8 of the CPA is aimed at protecting consumers from discriminatory marketing, with subsection (1)(e) confirming that a supplier of goods or services may not unfairly 'charge different prices for any goods or services to any persons or category of persons', yet this exactly what SANRAL is doing based on whether a motorist has registered for an e-tag or not, as well as whether the motorist made payment during the seven day grace period despite not having been equipped with the information required to do so.

## **Ability to pay**

Still furthermore, section 9 of the Act prescribes that the ability of a person to pay the cost, or otherwise meet the obligations of a proposed transaction or agreement should be assessed before entering into the agreement with the consumer and this clearly has not been attended to here, with the cost of e-tolls being imposed on all motorists utilising the tolled roads, irrespective of whether they are in a position to afford making payment in respect of these tolls or not.

The Consumer Protection Act makes provision for circumstances when a conflict exists between any other law and the Consumer Protection Act. In the situation where a conflict does exist, the Consumer Protection Act takes priority. Accordingly, it is the opinion of the authors hereof that the law enforcing e-tolls is really not a valid law at all and therefore, should not be enforced.

In light of the above, the formation of a panel to review the e-tolling process has indeed been welcomed and rightly so. This review process is currently under way and it is hoped that it will involve consultation with national government, municipalities and all sectors of the society.

We have to admit that we will be adopting a 'wait and see' attitude and will not be holding our breath that the entire system

will be scrapped altogether following the panel's findings. The reason being that this decision will ultimately be left up to the national government to make. Thus, although Gauteng Premier David Makhura clearly won over the support of motorists following his announcement that a panel would be set up to review the system, let's hope that something truly positive does come of this. In any event, if the e-toll system is not done away with altogether, it will still have to be amended considerably in order to bring it in line with the CPA.

In the interim, be aware of your rights to question, demand and receive accurate invoices from SANRAL for e-toll charges that are legally compliant with the CPA.

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