

ADVISORY NOTE 13: UNSOLICITED GOODS¹

This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act (CPA) with regard to unsolicited goods

Introduction

The marketing tactic of sending merchandise as an offer of sale without an order or solicitation and subsequently attempting to collect payment is widely considered to be an abusive practice. In terms of the CPA, a consumer cannot be forced to pay for unsolicited goods and the cost of their delivery, or for unsolicited services, as long as the consumer complies with the requirements of the Act.

Consideration of section 21

Section 21 (Annexure “A”) covers a wide range of situations that are considered to amount to the provision of unsolicited goods or services. These are:

- Goods left with, or any service performed for a consumer by a supplier, during any direct marketing of goods or services, without requiring or arranging payment for them
- Goods or services that are materially different from the goods or services previously supplied to an extent not reasonably contemplated in an agreement for the periodic delivery of goods
- Goods delivered after the termination of an agreement
- Goods delivered or services performed at a location, date or time other than as agreed
- Goods delivered in excess of the quantity that the consumer agreed to buy, unless the consumer rejects the entire delivery
- Any goods delivered to, or any services performed for, a consumer by a supplier without the consumer having expressly or implicitly requested that delivery or performance

Goods are not regarded as being unsolicited goods if the supplier informs the consumer within 10 business days of delivery that the goods were delivered in error; if they are clearly addressed to another person and therefore have obviously been misdelivered; or it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to someone else.

¹ **Warning:** This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors.

The goods will, however, become unsolicited if the supplier fails to recover them within 20 business days of informing or being informed by the recipient that the goods were misdelivered.

The recipient of misdelivered goods must not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within 20 business days. If he or she does so, he or she will be liable for any additional costs of recovery of, or damage to, the goods that results.

That person is not responsible for the cost of recovery of the goods or redelivering them or for any loss or damage to the goods during the time they are in the person's possession or control, unless intentionally caused by him or her. If goods become unsolicited, the recipient can either return them to the apparent supplier or deliverer at the risk and expense of the supplier or deliverer, or the recipient can keep them. If the recipient decides to keep them, the right of ownership passes to the recipient, subject to any right or valid claim that an uninvolved third party may have with respect to those goods.

Although the provision is relatively easy to follow, there are aspects that require further consideration or explanation:

- 1] Is the consumer under an obligation to inform the supplier in the event of an error?
- 2] What is the situation where the error is other than the delivery to the wrong person?
- 3] What remedies does the supplier have if the consumer frustrates or impedes the reasonable attempts by the supplier or deliverer to recover the goods?
- 4] Can an administrative fine be imposed upon a consumer who frustrates or impedes the reasonable attempts by the supplier or deliverer to recover the goods?

These questions are now considered in more detail.

1] Is the consumer under an obligation to inform the supplier in the event of an error?

Section 21(2) does not expressly oblige a mistaken recipient of misdelivered goods to actually inform the supplier of the error. It is, however, clear that such a person is not legally entitled to keep such goods. According to Stoop and Taylor²

From the wording of section 21(2)(b) it appears that goods will only be unsolicited if the consumer informs the supplier that the goods were misdelivered: "the goods become unsolicited goods only if (own emphasis) the recipient informs the apparent supplier or the deliverer that the goods were misdelivered". It therefore appears that the supplier must be informed of the misdelivery as a prerequisite for such goods to be treated as unsolicited by the consumer. The CPA does not prescribe the manner in which the consumer must inform the supplier of a misdelivery.

² Philip N Stoop & Heidi Taylor Aspects of Unsolicited Goods or Services in Terms of the Consumer Protection Act 68 of 2008: An Analysis 2014(77) *THRHR* 296 at 300.

2] What is the situation where the error is other than the delivery to the wrong person?

Section 21(2)(b) mentions only two situations in which there has been an error:

- those goods are clearly addressed to another person, and have obviously been misdelivered; or
- having regard to the circumstances of the delivery, it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to another person.

The element common to both these situations is that of the goods being intended for another person. It is possible to conceive of other errors that do not relate to this element, for instance where a subscription lapses but the delivery department continues to deliver the goods to the consumer owing to an oversight; or where a consumer takes defective goods to the supplier and different departments of the supplier independently refund the consumer with the purchase price of the goods and deliver replacement goods to the consumer's premises.

As Stoop and Taylor (footnote 2 above) correctly point out, the purpose of section 21 is to bring the delivery of unsolicited goods by suppliers to consumers to an end rather than to punish the negligent acts of deliverers. The learned writers submit that if a consumer remains in possession of misdelivered goods and the consumer fails to inform the supplier of the misdelivery, such goods would not be unsolicited in terms of section 21 and should be dealt with in terms of the common-law rules of undue enrichment as section 21 only applies to circumstances in which the consumer notifies the supplier of the misdelivery. It is submitted that this conclusion would apply equally to errors that do not involve the goods being intended for another person.

A court is unlikely to instead interpret the subsection in a manner that gives effect to the overall intention of the section and hold that section 21(2)(b) would apply equally to other similar situations. Equally, the *eiusdem generis* rule of statutory interpretation, whereby a rule is taken to apply to other similar things or situations, would not apply because section 21(2)(b) does not create an open ended list. Rather, *the inclusio unius est exclusio alterius* rule of interpretation would apply: 'Including one excludes another'.

In terms of the common law, the supplier may bring an action to vindicate (recover possession of) the goods. In the alternative, in case the goods have been disposed of, the supplier may claim in terms of the *actio ad exhibendum* (*Bosch v Du Plessis* [2009] ZAGPPHC 38 @ para 19).³

³ *Rossouw NO and Another v Land and Agricultural Development Bank of South Africa* [2013] 4 All SA 318 (SCA) In order to succeed with the *actio ad exhibendum* the respondent had to prove the following requirements, namely that –

- it was the owner of the goods at the time of their disposal;
- the defendant had been in possession of the goods when it disposed of them;
- the defendant acted intentionally in that it had knowledge of the respondent's ownership or its claim to ownership when it parted with possession of the goods; and
- the owner would be entitled to delictual damages as well as the extent thereof.

As to an enrichment claim, the courts have not yet definitively accepted that there is a general enrichment action in South African law.⁴ The general requirements underlying all enrichment actions, however, are that (a) the defendant must be enriched; (b) the plaintiff must be impoverished; (c) the defendant's enrichment must be at the expense of the plaintiff and (d) the enrichment must be without cause (*sine causa*) i.e. unjustified.⁵

In *National Credit Regulator v Opperman* 2013 2 BCLR 170 (CC) the court stated that in order for a party to successfully claim on the basis of unjust enrichment, he or she must be free of turpitude and show that he or she has not acted dishonourably (at para 16). Stoop and Taylor (footnote 2 above at 300) differentiate between *bona fide* and *mala fide* suppliers.

3] What remedies does the supplier have if the consumer frustrates or impedes the reasonable attempts by the supplier or deliverer to recover the goods?

Section 21 (4) provides that a person who frustrates or impedes the supplier is liable to the supplier or deliverer, as the case may be, for any additional costs for recovery of, or damage to, the goods arising as a result of anything done to frustrate or impede the lawful recovery of those goods.

This presupposes that the goods are actually recovered, whether in a damaged state or not. What then is the case where the goods are not recovered for whatever reason? The supplier can sue in terms of the *actio ad exhibendum*, as is explained above.

A consumer who keeps goods that he or she knows belong to someone else could notionally be charged with theft.

As to whether the consumer could have an administrative fine imposed upon them is considered below.

4] Can an administrative fine be imposed upon a consumer who frustrates or impedes the reasonable attempts by the supplier or deliverer to recover the goods?

Under section 112(1), the Tribunal may impose an administrative fine in respect of prohibited or required conduct. Frustrating or impeding the supplier is certainly prohibited so it could be argued that an administrative fine could be imposed, although the rest of section 112 is clearly aimed at suppliers.

⁴ *McCarthy Retail Ltd v Shortdistance Carriers CC* (110/99) [2001] ZASCA 14 @ para 8.

⁵ *McCarthy Retail Ltd* @ para 15.

Annexure “A”

Unsolicited goods or services

21. (1) For the purpose of this Act, goods or services are unsolicited in any of the following circumstances, subject to subsection (2):

(a) If, during any direct marketing of goods or services, a supplier or person acting on behalf of a supplier has left any goods with, or performed any service for, a consumer without requiring or arranging payment for them, those goods or services, as the case may be, are unsolicited;

(b) if a consumer is a party to an agreement contemplating the periodic delivery of goods during the life of the agreement, and—

(i) during the course of that agreement, the supplier introduces goods or services that are materially different from the goods or services previously supplied to an extent not reasonably contemplated in the agreement, the new goods or services are unsolicited, unless the consumer expressly consented to the material change; or

(ii) after the termination of that agreement, the supplier delivers any further goods to the consumer, other than in terms of a different agreement or transaction, those further goods are unsolicited goods;

(c) if a supplier delivers goods or performs services at a location, date or time other than as agreed, and the consumer has rejected that delivery or performance of services, as contemplated in section 19(6), those goods or services are unsolicited;

(d) if a supplier delivers a larger quantity of goods than the consumer agreed to buy, the excess goods are unsolicited unless the consumer has rejected the entire delivery, as contemplated in section 19(7)(a); or

(e) if any goods have been delivered to, or any services performed for, a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that delivery or performance, the goods or services, as the case may be, are unsolicited goods.

(2) Despite subsection (1), if—

(a) within 10 business days after delivery of any goods to a consumer, the supplier informs the consumer that the goods were delivered in error, those goods become unsolicited only if the supplier fails to recover them within 20 business days after so informing the consumer; or

(b) any goods are delivered to a consumer and—

(i) those goods are clearly addressed to another person, and have obviously been misdelivered; or

(ii) having regard to the circumstances of the delivery, it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to another person, the goods become unsolicited goods only if the recipient informs the apparent supplier or the deliverer that the goods were misdelivered, and the goods are not recovered within the following 20 business days.

(3) If a person is in possession of goods contemplated in this section, the person—

(a) must not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within the time allowed in subsection (2);

(b) is not responsible for any cost pertaining to the recovery of the goods or further delivery of them to another person; and

(c) is not liable for any loss or damage to the goods during the time they are in the person's possession or control, other than loss caused by the person's intentional interference with the goods, if any.

(4) A person who fails to comply with subsection (3)(a) is liable to the supplier or deliverer, as the case may be, for any additional costs for recovery of, or damage to, the goods arising as a result of anything done to frustrate or impede the lawful recovery of those goods.

(5) If a person is in possession of any unsolicited goods, the person may—

(a) retain the goods; or

(b) return the goods to the apparent supplier or deliverer at the risk and expense of the supplier or deliverer, as the case may be.

(6) If a person lawfully retains any unsolicited goods—

(a) the property in those goods passes unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods; and

(b) the person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods.

(7) A person has no obligation to pay a supplier for unsolicited goods or services, or a deliverer for the cost of delivery of any unsolicited goods.

(8) A supplier must not demand or assert any right to, or attempt to collect, any payment from a consumer in respect of any charge relating to unsolicited goods left in the possession of a consumer, or the delivery of any such goods, or unsolicited services supplied to or for the benefit of, a consumer, except as contemplated in subsection (4).

(9) If a consumer has made any payment to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the delivery of any such goods, the consumer is entitled to recover that amount, with interest from the date on which it was paid to the supplier, in accordance with the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

Administrative fines

112. (1) The Tribunal may impose an administrative fine in respect of prohibited or required conduct.

(2) An administrative fine imposed in terms of this Act may not exceed the greater of—

(a) 10 per cent of the respondent's annual turnover during the preceding financial year; or

(b) R1 000 000.

(3) When determining an appropriate administrative fine, the Tribunal must consider the following factors:

(a) The nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act.

(4) For the purpose of this section, the annual turnover of a supplier at the time when an administrative fine is assessed, is the total income of that supplier during the immediately preceding year, as determined in the prescribed manner.