

RECOMMENDATION

1. Dispute identification

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| Complaint No. | : | 201604-0006803 |
| Nature of dispute | : | Unsolicited goods |
| Adjudicator | : | N Melville |
| Date | : | 13 May 2016 |

2. Summary of the complaint

The Complainant placed an order with the supplier through its online platform for a total of 17 items totalling an amount of R 23 827.00. The items consisted of household items, one of which was LG 49 Smart UHD LED television set for R 9 900.00. On 31/11/2015, prior to the delivery of the order, the complainant's partner, Mr E. called the supplier's call centre to cancel the television set from the order.

Mr E. was informed that the television set had been successfully cancelled and that the purchase consideration will be refunded to credit card utilized in the original transaction. Complainant thereafter proceeded to confirm with call centre that television set had in fact been removed from the invoice and was assured that same had been cancelled. The supplier delivered the order on 1/12/2015. On the day the delivery was made, the other online orders and contractors were due as the premises to facilitate the move. When the order was delivered, Ms B. signed for acceptance. During the week of the 04/01/ 2016 [34 days after the delivery], Mr E. noticed that the TV set that was supposed to have been cancelled had been delivered and he informed the supplier.

Subsequently, on an unspecified date, the complainant disposed of the LG TV as she regarded the television set as unsolicited goods as per section 21 of the Consumer Protection Act.

In a letter addressed to the supplier by the complainant's attorneys, it was stated that "[S]hould the Commission determine that the goods are in fact not unsolicited goods, our clients' will tender payment of the disputed sum."

By agreement, the matter was instead referred to the CGSO for a ruling.

3. The response of the supplier

1. On the outset I would like to apologize for the confusion that you have experienced in regard to the TV that was inadvertently and incorrectly delivered to your home on the 1st of December 2015 at around 2pm and as communicated to you on the 8th of February 2016 when this error first came to our attention.
2. I refer to the above matter and with reference to your response below dated 11 February 2016, it is not my intention to respond to each and every allegation, and my failure to do so should not be construed as being an acceptance thereof, our rights to respond thereto in due course should the need arise remains reserved.
3. My investigation revealed the following material facts in relation to the matter:
 - a. On or about the 1st of December 2015 at around 2pm you signed the supplier's online delivery manifest specifying that a total of 8 parcels were received by yourself.
 - b. The supplier online delivery manifest refers to a tax invoice #50143120 which reflects the LG 49" Smart UHD LED TV (49UF680t) which was inadvertently and incorrectly delivered to you notwithstanding your cancellation of this item on the days preceding delivery and The supplier having refunded your credit card.
 - c. The Picking list used to pick your items was generated prior to your refund on the TV transmitting and this system glitch resulted in the TV still being picked and delivered to you. We apologise for the inconvenience suffered as a result of our internal technical issue.
4. We note that that your version has changed from previously denying receiving the TV to now invoking your rights under the consumer protection act.
5. We will collect such TV by arrangement and agreement with yourself and at our cost within 7 days from the date of this letter on condition that such goods are still in its original condition and packaging as delivered and received by yourself.

From the correspondence, on 8 February 2016, the supplier informed the consumer that the order was delivered in error. The complainant confirmed it was an error.

4. Issue to be decided

It is necessary to decide whether the TV set became unsolicited as a result of it having been delivered after the complainant had cancelled the order for it and, consequently whether the complainant acquired ownership of it and was entitled to dispose of it.

5. Applicable law

Consumer Protection Act

See Annexure “A”

Case Law

There is, as far as we are aware, no decided case in the Courts or the Tribunal on this subject.

Academic writings

The writings of academics may have a persuasive influence on the courts.¹

According to Stoop and Taylor:²

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.

Naudé and Eiselen³ express a similar view.

Foreign and international law

Section 2(2)(a) permits a person, court or Tribunal or the Commission to consider appropriate foreign and international law when interpreting or applying the CPA.

¹ Peter Havenga, Michele Kyra Havenga *General Principles of Commercial Law* Juta 6th ed at 7

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.

³ Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* 21-6.

In the USA, "unsolicited merchandise" might be defined to include goods, periodicals, or services sent without an order or authorization as a means of offering the goods for sale. **Thus, the terms will not include goods ordered but sent to the wrong person or goods sent after an order was cancelled** (emphasis added), e.g., *B.F. Goodrich Rubber Co. v. Parchelsky Bros.*, 183 N.Y.S. 30 (Sup. Ct. 1920); *GulfC. & S.F.Ry. v. Wortham*, 154 S.W. 1071 (Tex. Civ. App. 1913).⁴

6. Consideration of the facts

Although there are various factual differences in the versions of the two parties, it is common cause that the TV set was delivered after the consumer had cancelled the order for it. The parties further agree that the complainant did not inform the supplier of the mistaken delivery prior to 4 January 2016. These facts are sufficient for the purposes of arriving at a conclusion.

7. Consideration of the law

Section 21 sets out various circumstances which render goods unsolicited. Of relevance here is Section 21(1)(e):

[I]f 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.

This provision is not absolute as it is subject to Section 21(2)(b), which alters the position if either of two situations in which there has been an error exists:

- 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.)

⁴ Unsolicited Merchandise: State and Federal Remedies for a Consumer Problem

Where either of these situations exists, 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.

The situation involved in this case, where the supplier in effect delivered the goods without having been requested to do so by the consumer, but did so in error rather than as a marketing tactic, is not specifically provided for in section 21. The law regarding the interpretation of statutes is by no means clear as to what is to be done where a situation is not expressly provided for. What follows is by no means an exhaustive analysis of this area of law: such an analysis is beyond the scope of the processes of an alternative dispute resolution agent such as CGSO.

One approach, the so called golden rule or literal approach, is if the meaning of the word is clear, it should be put into effect, but if the plain meaning of the word is ambiguous, vague or misleading or if a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity (*Venter v R* 1907 TS 910 at 914).

Another approach, the purposive approach, holds that the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. This incorporates the mischief rule, which entails a consideration of:

- the application of external aids including the common law prior to the enactment of the legislation;
- defects in the law not provided for by the common law;
- what new remedies did the legislature provide; and
- the true reason for the remedies.

There is ample authority for the use of a purposive approach to the interpretation of the Constitution.⁵ The CPA incorporates such an approach by stating in section 2 that the interpretation of the CPA must be effected in a manner that gives effect to the purpose of the CPA. The purposes of the CPA set out in section 3 include:

- To promote fair business practices; and
- To protect consumers from unfair, unreasonable or other improper trade practices and also to protect the consumer from deceptive, misleading or other fraudulent conduct.

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

⁵ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 at para 9.

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. This conclusion would apply equally to errors that do not involve the goods being intended for another person.

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*.⁶

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.

8. Conclusion and recommended resolution

This is by no means a straight forward matter as the CPA does not explicitly provide for a situation where a supplier delivers goods in error other by delivering them to the wrong person.

One must consider the intentions of the legislature, which include protecting consumers from unfair business practices. The “mischief” which section 21 seeks to prevent is the unfair business practice of intentionally delivering goods that were not ordered or are other than were ordered coupled with attempting to collect a payment from a consumer in respect of any charge relating to the goods.⁷ In other words, forcing a consumer to buy goods they did not want or order.

There is no suggestion that that took place here: the supplier reversed the transaction of the consumer’s credit card and seeks the return of the TV set that was delivered in error.

It cannot have been the intention of the legislature that the supplier would lose ownership of the TV set under these circumstances: put differently, it would be absurd if such an interpretation was given to the section. The section that provides for the passing of ownership of unsolicited goods to a consumer, section 21(6)(a), may in itself be unconstitutional.⁸

⁶ *Bosch v Du Plessis* [2009] ZAGPPHC 38 @ para 19.

⁷ S 21(8). See the debate on the UK Unsolicited Goods and Services Bill on: <http://hansard.millbanksystems.com/lords/1971/apr/20/unsolicited-goods-and-services-bill>.

⁸ Naudé and Eiselen op cit footnote 3 at 21-7 fn 5.

It is our conclusion then that a court would probably hold that the TV set was not unsolicited for the purposes of section 21 and certainly that ownership had not passed. The consumer should accordingly make payment of the disputed sum.

As to whether the consumer is liable under section 21(4) for damages for having frustrated or impeded the supplier in its attempt to recover the goods, we do not believe that this warrants further consideration. Whilst it might be argued that the consumer ought to have sought legal advice before disposing of the goods when she was aware that they were subject to dispute, it is evident that the legal position that governs the particular facts of this case lacks in clarity. We accordingly recommend that in the interest of resolving the matter, the supplier seeks no further compensation if the consumer pays the price at the time of the goods.

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).