

**AN APPRAISAL OF A CONSUMER'S COOLING-OFF RIGHT
IN TERMS OF SECTION 16 OF THE CONSUMER PROTECTION ACT
68 OF 2008**

OPSOMMING

**Evaluering van die verbruiker se afkoelreg ingevolge artikel 16 van die
Wet op Verbruikersbeskerming 68 van 2008**

Die nota het ten doel om artikel 16 van die Wet op Verbruikersbeskerming 68 van 2008 (WVB) wat die afkoelreg van die verbruiker uiteensit te evalueer in die lig van alle relevante definisies en bepalings binne die Wet. As gevolg van die wye toepassingsgebied van die WVB is daar omstandighede waarin meer as een Wet op 'n verbruikers-ooreenkoms van toepassing kan wees en dus ook meer as een statutêre afkoelreg. In hierdie verband word die toepassing en interaksie tussen artikel 29A van die Wet op Vervreemding van Grond 68 van 1981 en artikel 121 van die *National Credit Act* 34 van 2005 in samehang met artikel 16 van die WVB bespreek. Die nota wys onsekerhede in hierdie verband uit en die bydrae word afgesluit met aanbevelings ten opsigte van die regstel van die geïdentifiseerde onsekerhede.

1 Introduction

The purpose of this note is to illustrate the importance of evaluating a consumer's cooling-off right in terms of section 16 of the Consumer Protection Act 68 of 2008 ("the CPA") in view of the scope of application and wording of the Act itself and in relation to other applicable legislation. In its simplest form, a cooling-off right can be described as a statutory right in terms of which a party may withdraw from an agreement without reason or penalty within a specific time period, provided that it is done in accordance with the statutory formalities laid down by the particular piece of legislation. In the context of consumer protection, the consumer is usually provided with such a cooling-off right where he or she experiences so-called "buyer's remorse" (Otto "Die afkoelreg in die Nasionale Kredietwet en die Wet op Verbruikersbeskerming" 2012 (March) *LitNet Akademies* 23–54). As is shown below, the scope of application of the CPA as well as the particular wording of section 16 read together with other relevant provisions of the CPA affect the implementation of this right. Other legislative cooling-off rights may, in certain circumstances, apply simultaneously together with the provisions of the CPA. The most important of these are section 29A of the Alienation of Land Act 68 of 1981 ("the ALA") and section 121 of the National Credit Act 34 of 2005 ("the NCA"). For purposes of completeness, electronic consumer agreements should be mentioned in passing (although they do not form part of this discussion). Certain provisions of the Electronic Communications and Transactions Act 35 of 2002 ("ECTA") have been repealed by Chapter 8 of the Protection of Personal Information Act 8 of 2013 ("POPI"). The commencement of POPI has been postponed (s 115 POPI). The cooling-off right in terms of section 16 of the CPA will not apply where the cooling-off right in terms of section 44 of ECTA is applicable (s 16(1) CPA). However, other provisions in terms of ECTA and POPI that pertain to direct marketing are relevant to the CPA and are comprehensively discussed by Hamann and Papadopoulos "Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa" 2014 *De Jure* 42–62 and Papadopoulos "Are we about to cure the scourge of spam? A commentary on current and proposed South African legislative intervention" 2012 *THRHR* 223–240.

The various cooling-off rights mentioned above have been discussed elsewhere (Otto 2012 *LitNet Akademies* 23–53; Hamann and Papadopoulos 2014 *De Jure* 42–62; Barnard and Scott "An overview of promotional activities in terms of the Consumer Protection Act in South Africa" 2015 *SA Merc LJ* 441–477; Stoop "Artikel 29A van die Wet op Vervreemding van Grond" 2008 *TSAR* 744–756). However, an appraisal of the interplay and application of the above-mentioned cooling-off rights is necessary in order to give proper context to the application of section 16 of the CPA.

2 A consumer's cooling-off right in terms of section 16 of the CPA

2.1 Content and application of section 16 CPA

A consumer's cooling-off right in terms of section 16 forms part of a consumer's fundamental right of choice (Ch 2 Part C of the CPA). As a general statement regarding the application of the CPA, it could be said that the Act is applicable to suppliers who supply goods and services for consideration in the ordinary course of business to consumers. Section 16 provides the consumer with a cooling-off right that only applies to a transaction that is subject to the CPA and is the result of direct marketing. This section does not apply to a transaction if section 44 of

the ECTA applies (s 16(1)). The cooling-off right in terms of section 16 is in addition to, and not in substitution of, any right to rescind a transaction or agreement that may otherwise exist in law between a supplier and a consumer (s 16(2)). In accordance with section 16, a consumer may rescind a transaction resulting from any direct marketing without reason or penalty by notice to the supplier in writing or another recorded manner and form, within five business days after the later of the date on which the transaction or agreement was concluded or the goods that were the subject of the transaction were delivered to the consumer (s 16(3)). A supplier must return any payment received from the consumer in terms of the transaction within 15 business days after receiving notice of the rescission (if no goods had been delivered to the consumer in terms of the transaction) or receiving from the consumer any goods supplied in terms of the transaction (s 16(4)(a)). A supplier may also not attempt to collect any payment in terms of a transaction where the consumer exercised his cooling-off right, except as permitted in terms of section 20(6) of the Act (s 16(4)(b)).

However, note must be taken of the provisions of section 20(4) of the Act in terms of which a consumer who returns goods in accordance with the cooling-off right in section 16, bears the risk and costs related to such a return. A person who directly markets goods or services and who concludes a transaction or agreement with a consumer must notify the consumer in the prescribed manner and form regarding the cooling-off right in terms of section 16 (s 32(1)).

2 1 1 Direct marketing as a prerequisite for the application of section 16

In terms of the CPA (s 1) “direct marketing” means to approach someone, either in person or by the post or electronic communication, for the direct or indirect purpose of promoting goods and services to that person or to offer to supply such goods or services, in the ordinary course of business or to request the person to make a donation of any nature for any purpose. (“Electronic communication” in terms of s 1 means communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device.) It should be mentioned that direct marketing is also referred to as part of a consumer’s fundamental right to privacy (Ch 2 Part B of the CPA) and also as part of section 21 and unsolicited goods. The focus of this note, however, is on the role that direct marketing plays in terms of section 16 and a consumer’s cooling-off right.

There are differences of opinion as to what types of promotional activities would qualify as direct marketing. Otto, for example, argues that the definition of direct marketing should be interpreted restrictively and although it would be hard to pin-point exact examples in practice, an advertisement in a newspaper, a road sign or even a pamphlet in the post should not be included in the definition of direct marketing (2012 *LitNet Akademies* 26 40). Contrary to Otto, Jacobs, Stoop and van Niekerk are of the opinion that a consumer has a right to block the receipt of flyers or brochures in his letterbox or unsolicited phone calls preemptively and consider these forms of marketing to fall under the definition of direct marketing in terms of the CPA (“Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 *PELJ* 302–508 339). Though Otto is correct in arguing that direct marketing should include some kind of an “approach” aimed at the consumer (2012 *LitNet Akademies* 26), it is submitted that direct marketing should include telephone calls, cell phone messages, electronic mail or a letter directly addressed and sent

to a consumer (Barnard and Scott 2015 *SA Merc LJ* 466–467). It should further include, for example, the handing out of pamphlets at a traffic light or at a shopping mall and would most likely also include practices by suppliers to directly approach consumers within a particular store to draw their attention to specific goods (even if the consumer entered the store or shopping mall of his own accord). Direct marketing as defined in terms of the CPA will include marketing at the doorstep of the consumer's home or even work, but also marketing at the business premises as well as away from the business premises of the supplier. The focus should be on whether or not there was an "approach" by the supplier with the "direct or indirect purpose" to "promote" or "offer to supply" particular goods and services.

For a consumer to be able to exercise his cooling-off right in terms of section 16, a further step is required in that any such direct marketing had to result in the conclusion of a transaction or agreement. The wording used ("transaction or agreement") becomes relevant due to the broad definitions given to these terms in the Act (s 1). Though it is clear that direct marketing will always be a prerequisite for the consumer to be able to exercise his right in terms of section 16, the question posed by Naudé and Eiselen *Commentary on the Consumer Protection Act* (Original Service 2014) 16-6 is how closely the conclusion of the contract must be connected to the direct marketing for the cooling-off right to apply. The writers give a comprehensive argument as to the correct approach (16-6–16-7). It seems that this will remain a factual question if one takes into account the original purpose of providing a consumer with a cooling-off right. The original purpose is to allow a consumer to "step outside" the transaction or agreement (without legal consequences such as committing breach) where the consumer experienced pressure which impeded his decision-making and therefore also experienced remorse for concluding the transaction or agreement in the first place. Naudé and Eiselen 16-8 correctly argue that section 16 does not, in fact, apply to donations as no consideration is received by the supplier when a donation is made by the consumer. (Perhaps the legislature sought to include protection from unscrupulous suppliers who approach consumers by way of direct marketing under the pretence of donations where the true intention is actually the eventual conclusion of a transaction or agreement.) It is clear that direct marketing and the application of section 16 include the supply of both goods and services.

The broad application of direct marketing complicates the correct application thereof in terms of section 16 of the Act. (For a comprehensive discussion on direct marketing and the consumer's right to privacy, see Naudé and Eiselen (2014) 11-12 to 11-15); Barnard and Scott 2015 *SA Merc LJ* 467–468. For a comprehensive discussion regarding unsolicited goods, see Barnard "Ongevraagde goedere ingevolge die Wet op Verbruikersbeskerming in regsvergelykende perspektief" 2015 *TSAR* 268–285).

2 1 2 Limitation of section 16 in terms of section 20 of the CPA

Section 20 of the CPA governs a consumer's right to return goods and confirms the right in terms of section 16 to return goods upon the exercising of a consumer's cooling-off right (s 20(5)). However, section 20(3)–(6) excludes and limits a consumer's cooling-off right where there was an actual delivery of goods.

Perhaps the time periods referred to in sections 16 and 20 should be established first. A consumer may exercise the cooling-off right within five business days from the later date on which goods were delivered or the transaction or

agreement was concluded (s 16(1)(3)). If a supplier delivered goods to a consumer, the latter must return such goods (at his own risk and expense) within 10 business days from delivery of the goods and of course only if the consumer exercised the cooling-off right as prescribed in terms of section 16 (s 20(4)(a)). The supplier then has 15 business days from the date on which the goods were actually received from the consumer to return any payment made by the consumer subject to section 20(6) (s 16(4)). In terms of section 20(6), the number of “business days” must be calculated by excluding the day on which the first such event occurs but by including the day on or by which the second event occurs and also excludes any public holiday, Saturday or Sunday.

It may be asked what the situation would be if the transaction or agreement was concluded 10 business days after the delivery of the goods. In terms of section 16, a consumer may exercise his cooling-off right on the *later* date on which goods were delivered or the transaction or agreement was concluded. However, section 20(4) expressly states that a consumer only has 10 business days from date of *delivery* to return such goods to the supplier. Does this mean that section 20(4) may be disregarded where the conclusion of the transaction or agreement was more than 10 business days after delivery of the goods? Though the latter is most likely a pure academic argument as it is difficult to imagine a practical situation where the transaction or agreement would be concluded after the delivery of the goods, the wording of the particular sections does create ambiguity. Barnard *The influence of the Consumer Protection Act 68 of 2008 on the common law of sale* (LLD thesis UP 2013) 222 suggests that the legislature should have adapted clearer wording as is the case in terms of section 44 of ECTA where a distinction is made between the exercise of the cooling-off right five business days from the actual delivery of goods or five business days from the conclusion of the transaction or agreement for the supply of a service(s).

In terms of section 20(3), a consumer may not return goods or demand a refund at all if the return of the goods is prohibited due to reasons of public health or public regulation; or where goods were disassembled, physically altered, permanently installed or blended with other goods.

A supplier may deduct amounts as described in terms of section 20(6) and the onus to prove the existence of such costs as well as compliance with the above sections is on the supplier. A supplier may not deduct any amount if the goods are unopened and still in the original packaging (s 20(6)(a)). A reasonable amount may be deducted by a supplier but only where the latter will incur repackaging or restoration costs. The reasonable use and opening of the packaging by a consumer will be taken into account in favour of the consumer in the determination of the costs to be deducted from him or her (s 20(6)(b)). A supplier will most likely always prove (or at least attempt to prove) that some repackaging or restoration costs were incurred and may therefore be deducted. This is not entirely unfair towards the consumer if such costs will in fact be incurred.

Section 32(1) makes it clear that a supplier must inform a consumer (in the prescribed manner and form) of the cooling-off right in terms of section 16. However, it is unclear what the “prescribed manner and form” are as this is not mentioned in section 16 or 32. It is submitted that not only should a consumer be informed by a supplier of the cooling-off right at the earliest possible time, but that the complete exclusion of a refund or the allowable deduction that may be made by a supplier in terms of section 20(3) and (6) should be brought to the attention of the consumer as well. Section 16 should be regarded as an implied

term that forms part of the *naturalia* of a consumer transaction or agreement. The only argument that might be made for suppliers giving the consumer notice of the contents of section 20(3) and (6) as well, is to suggest that where direct marketing by the supplier results in the conclusion of a transaction or agreement (which is so stated in terms of s 16(2)), it would prompt the provisions of section 4(4). This would mean that the National Consumer Tribunal (NCT) or a (civil) court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier (suggesting therefore a transaction or agreement resulting from direct marketing), to the benefit of the consumer so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights (including the consumer's cooling-off right) set out in such a document or notice are limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to (i) the content of the document; (ii) the manner and form in which the document was prepared and presented; and (iii) the circumstances of the transaction or agreement (s 4(4)).

2 1 3 Content requirements

As mentioned above, a supplier must inform a consumer (in the prescribed manner and form) of the cooling-off right in terms of section 16. However, there is uncertainty as to meaning of the "prescribed manner and form". Would it be sufficient to verbally explain the contents of such a right? Would it be sufficient to simply refer to section 16 as part of the direct marketing material or should it be included in the eventual consumer transaction or agreement? It has been argued that section 22 of the CPA should be considered. This section provides a consumer with a right to information in plain and understandable language. The section sets out a test for when a notice, document or visual representation will be regarded as being in plain language and also provides for factors to be taken into consideration to assess plain language. Although section 22 and its plain language requirement are not directly mentioned in section 16, it is argued that any notice, document or visual representation informing a consumer of the cooling-off right (or the limitations or exclusion thereof) must be in plain language and comply with the "plain language test" as set out in section 22. (For an in-depth discussion of the content of s 22, see Naudé and Eiselen 22-1-22-11; Gouws "A consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act" 2010 *SA Merc LJ* 79-94; Newman "The influence of plain language and structure on the readability of contracts" 2010 *Obiter* 735-745.)

Section 16 does, however, refer to the manner in which a *consumer* must inform a supplier in exercising the cooling-off right. It should be done "by notice to the supplier in writing or another recorded manner or form" (s 16(3)). Interestingly, the meaning of "in writing" does not form part of the definitions contained in section 1 of the Act but rather is part of the "short title and definitions" contained in regulation 1 to the CPA. "In writing" includes any electronic means recognised by ECTA (regulation 1 to the CPA). "Electronic communication" in terms of section 1 of ECTA means a communication by means of data messages. It is curious why the definition of "electronic communication" as defined in section 1 of the CPA, itself, was not included rather than referring to ECTA. If a broad interpretation is to be given to the term "in writing", adding "or another recorded manner or form" seems superfluous. Annexure C to the regulations of the CPA provides for a guideline document to assist the consumer in wording a notice of rescission in terms of section 16. It should be noted that the wording in

Annexure C seems to favour a narrow interpretation of the term “in writing”, as delivery by hand, fax, email or ordinary mail only is mentioned and it appears as if the signature of the consumer is also a requirement. Though Annexure C refers to the deductions allowed in terms of section 20(6), it does not refer to the exclusions in terms of section 20(3) of the Act. Van Eeden correctly argues that as the regulation in respect of Annexure C currently stands, the Annexure does not clearly inform a consumer of the right to rescind the agreement as set out in section 16 and needs clarification (*Consumer protection law in South Africa* (2013) 139 fn 100).

3 Other legislative cooling-off rights applicable to consumer agreements

3.1 Section 29A of the ALA (immovable property)

In theory, it could be possible that more than one right to rescind a consumer agreement may exist at the same time. This is so because more than one piece of legislation may be applicable to a particular consumer agreement and also due to the wording of section 16(2) which confirms that the consumer’s cooling-off right in terms of the CPA is in *addition* to any other right to rescind that might exist in law. Due to the fact that “goods” also include immovable property (s 1 CPA), the cooling-off right in terms of section 29A of the ALA may apply to a consumer agreement in terms of the CPA. Where both the CPA and ALA apply to a consumer agreement, the consumer (buyer) who bought immovable property will only be able to rescind such an agreement where the property was bought in terms of direct marketing, is worth less than R250 000, the consumer is a natural person and the property was bought for residential purposes (s 16 CPA read together with s 29A ALA). The supplier should have sold the property in the ordinary course of business and not as a “once-off transaction” (s 5 of the CPA). This is where the supplier is, for example, a property developer.

The application of section 29A ALA in conjunction with section 16 CPA may be problematic due to the possibility that in terms of section 16 a consumer may exercise his cooling-off right within five days from either the date of conclusion of the contract or delivery, whichever date is the later. In the case of immovable property, the date of delivery is the date of registration of the property in the name of the buyer by the Registrar of Deeds. Does this mean that a consumer may cancel a consumer sale agreement for immovable property within five business days after registration? Because of the abstract system of transfer in South Africa, ownership of immovable property transfers upon delivery, being the date of registration of such property in the Deeds Office (Nagel *et al Commercial law* (2015) para 14.15). It often happens that many months pass between the date that the deed of sale (transaction or agreement) is concluded (signed) and actual registration. It is inconceivable that any court would allow a consumer to exercise his cooling-off right and rescind the contract within five business days after he (the consumer) became the registered owner of the property. The de-registration process is costly and would be for the account of the consumer in terms of section 20(6). Where bonds are registered in favour of a third party (eg, a financial institution) the situation would be even more problematic. It would also be very cumbersome to expect a seller (supplier) to return payment within 15 business days in the case of immovable property.

It could be argued that the date from which a consumer may exercise the cooling-off right should be the date of conclusion of the contract and not the date of delivery. Applying the former date would be more beneficial to a consumer than

the extensive cost and time issues where the latter date (date of delivery) is applied. This argument is strengthened by section 4(3) and 4(4)(a) of the CPA. It is recommended that section 16 be amended to specifically exclude immovable property from its application. This will avoid many confusing and unclear scenarios that might arise and provide an interpretation of section 16 that is beneficial to the consumer.

3.2 Section 121 of the NCA (consumer credit agreements)

In the case of credit agreements in terms of the NCA, section 121(1) immediately restricts a consumer's cooling-off right. Section 121(1) only applies to an instalment agreement or lease agreement for movable goods entered into at any location other than the registered business premises of the credit provider. A consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer, by delivering a notice in the prescribed manner to the credit provider; and tendering the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement (s 121(2) NCA). Regulation 37 to the NCA provides that the notice by the consumer should be given in writing and delivered by hand, fax, e-mail or registered mail to an address specified in the agreement, alternatively the credit provider's registered address. The credit provider has seven days after delivery of the notice to refund any money the consumer has paid in terms of the lease or instalment agreement, but may also require payment from the consumer for certain reasonable costs (s 121(3)).

The wording of section 5(2)(d) of the CPA seems to indicate that the interplay between the CPA and the NCA is straightforward. However, upon closer inspection and analysis the situation is more complicated (Melville and Palmer "The applicability of the Consumer Protection Act 2008 to credit agreements" 2010 *SA Merc LJ* 272 273). The incorrect interpretation of the interplay between these two pieces of legislation can have disastrous consequences. This was highlighted in *MFC (a division of Nedbank Ltd) v JAJ Botha* (6981/13) [2013] ZAWCHC 107 (15 August 2013). Though the merits of the case were based on provisions other than the cooling-off right(s) of a consumer, the case does illustrate the unfortunate result if legislation is interpreted and applied incorrectly. Otto, Van Heerden and Barnard "Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement" 2014 *SA Merc LJ* 247) extensively discuss the legal position and a repetition thereof is unnecessary (for a comparative analysis, see Stoop "The overlap between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A comparison with Australian law" 2014 *THRHR* 135). For purposes of this note, however, it seems that Otto *et al* 2014 *SA Merc LJ* 277 argue correctly that the protection offered by the CPA operates in *addition* to whatever may be provided for under the NCA and in terms of the credit agreement itself. The two pieces of legislation should be seen as pieces of a larger puzzle in that where the one does not provide sufficient protection to the consumer, the other fills that gap to create holistic protection. This is confirmed by the provisions of section 2(10) of the CPA.

If both the consumer and the credit agreement are contained in the same document, Chapter 5 of the NCA would apply to the transaction. Melville and Palmer 2010 *SA Merc LJ* 276 argue that in these cases the cooling-off right in terms of section 16 of the CPA would not apply to transactions under the NCA, although

this is not expressly stated to be the case in the CPA. The writers make the important remark that the CPA might be applicable if the sale and the granting of credit were dealt with in two separate agreements, as is sometimes the case in practice. The NCA would then apply only to the credit transaction, and the CPA could notionally apply to the sale agreement and the goods and services, resulting in section 16 being applicable to the sale agreement of the goods and services. The writers correctly argue that instead of section 5(2)(d) the legislature should have excluded the application of the NCA in specific instances such as unambiguously excluding section 16 of the CPA where section 44 of the ECTA is applicable (*idem* 278).

Regulation 29(1)(x) and (xi) to the NCA should be noted. It requires credit providers in certain credit agreements to bring the costs deductible (and the manner as to how it will be calculated) by the credit provider in terms of section 121(3) where the consumer exercises his cooling-off right, to the attention of the consumer as part of the pre-contractual notices and statements. This seems more in line with proper information requirements towards the consumer than are currently in place in terms of the CPA. It is submitted that a similar provision should be included to prescribe not only the manner, but also the time period in which a supplier should inform a consumer of the cooling-off right in terms of section 16 of the CPA, as well as the exclusions and possible deductible costs and the way these will be calculated.

4 Conclusion

It is clear that a holistic view is needed when interpreting a consumer's cooling-off right in terms of the CPA. First, section 16 should be interpreted by taking into account all the relevant provisions of the CPA and its regulations (see para 2 above). Secondly, section 16 should be considered within the particular type of consumer agreement that is concluded as more than one statutory cooling-off right may be applicable in the circumstances (see para 3 above). One of the purposes of the CPA (and this should also be the purposes of consumer protection legislation in general) is improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour (s 3(1)(e) CPA). The attempt by the legislature to bring about holistic consumer protection measures should be commended. Melville and Palmer 2010 *SA Merc LJ* 278 state correctly that without clarification, the present uncertainties (as discussed above) will lead to protracted litigation, unnecessary expense and much commercial inconvenience. They are also likely to lead to consumers being deprived of the very protection from which they were intended to benefit (*ibid*).

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