



## ADVISORY NOTE 1: IMPLIED WARRANTY OF QUALITY

This advisory 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 sections 55 & 56 of the Consumer Protection Act (CPA).<sup>1</sup>

### Contents

ADVISORY NOTE 1: SUPPLY OF GOODS .....	1
Requirements regarding goods.....	2
Implied warranty.....	2
Return period.....	3
Exceptions .....	3
Offered in a specific condition .....	4
Altered contrary to the instructions, or after leaving the control, of the supplier (tampered with by the consumer) .....	4
Underwear is not an exception.....	4
Inspection of returned goods by supplier.....	5
Defects that are insignificant/ not material.....	6
Components.....	7
Durable for a reasonable period of time .....	8
Store refund policy.....	9
Original Packaging.....	9
Till Slip .....	10

---

<sup>1</sup> **Warning:** This information is provided for information purposes. It is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors.

## 1. Definitions

What are Goods?

“goods” includes -

- 1) anything marketed for human consumption;
- 2) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- 3) any literature, music, photograph, motion picture, game, information, data, software, code, or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- 4) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and
- 5) gas, water and electricity;

## 2. Requirements Regarding Goods Supplied

2.1 All goods sold/ supplied must comply with the requirements listed in Section 55, namely:

- (a) They are **reasonably suitable** for the purposes for which they are generally intended;
- (b) They are of **good quality**, in good working order and free of any defects<sup>2</sup>;
- (c) They will be **useable and durable** (will last) for a reasonable period of time<sup>3</sup>;
- (d) They **comply** with the Standards Act/ other **public regulations**; and
- (e) They are **reasonably suitable for the specific purpose** that the consumer has informed the supplier that the consumer wants to use them for.

**Note:** The above requirements do not apply to goods bought on auction.

## 3. Implied Warranty of Quality

3.1 Section 56 of CPA imposes a built-in or automatic six-month warranty (commonly known as a guarantee) that if the goods are not of good quality, defective, not suitable for the purposes for which they are intended or otherwise fail to comply with the requirements listed in Section 55 (above), the consumer is entitled to return them, at the supplier’s risk and expense and without penalty. In these circumstances the consumer is entitled to the remedies below:

- (a) Have the item(s) **REPAIRED**; or
- (b) Have the item(s) **REPLACED**; or
- (c) Get a full **REFUND** of the price paid.

---

<sup>2</sup> 53. (1) (a) “defect” means—

(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

<sup>3</sup> Dealt with below.

### IT IS THE CONSUMER'S RIGHT TO CHOOSE THE REMEDY THEY PREFER

The choice of which of the three "R's" (Repair, Replace or Refund) is the consumer's:

- a) The supplier cannot force a consumer to opt to have the goods repaired if the consumer prefers a refund or replacement unless the defect is insignificant or minor (see below).
- b) The consumer can insist on a cash refund instead of a store credit or voucher, or on a replacement with something similar at no additional cost.
- c) The supplier may not force the consumer to purchase a more expensive model or brand.
- d) The supplier must bear the costs of repairing, collecting and/ or replacing the defective goods and may not charge for usage or wear and tear on the returned product.

#### 4. Return Period

4.1 The consumer must return the goods within six months of them being delivered, except where the goods were not reasonably suitable for the specific purpose that the consumer had informed the supplier of or are otherwise not what the customer ordered. The consumer has 10 days to return the goods in these circumstances. (Section 20(2)(b) and (d)).

4.2 It is uncertain whether the six-month limitation in section 56 has reference to the life span of the implied warranty or execution of the remedies (in which scenario the implied warranty will exist indefinitely and the normal prescription rules regarding the institution of a claim will prevail).<sup>4</sup> Barnard prefers the latter approach as being more acceptable and more in line with the purposes of the CPA.

#### 5. Exceptions

5.1 The above rules regarding remedies for defective goods **do not apply** if:

- (a) The consumer was specifically told that the particular goods were offered in a specific condition (e.g. that they were in some way defective) (section 55 (6))<sup>5</sup>; and the consumer had expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition or
- (b) The goods were altered contrary to the instructions, or after leaving the control, of the supplier (tampered with by the consumer) (section 56 (1)).

5.2 The above two scenarios above are considered more hereunder.

---

<sup>4</sup> J Barnard "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages" 2012 *De Jure* (45) 445 at 467-8.

<sup>5</sup> According to Naudé, it is likely that South African courts will follow a via media interpretation of section 55(6), namely that the supplier may only escape liability if it described the particular less-than-ideal condition of the goods in specific, though generalized detail, without having to list each and every defect for which it seeks to escape liability: Tjatie Naudé "The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008" (2011) 23 *SA Merc LJ* 336 at 342 to 343 (Hereafter "Naudé").

## 6. Goods Offered in a Specific Condition

6.1 It is the responsibility of the supplier to advise the consumer of the condition of the goods prior to the conclusion of the transaction. However, it is not clear whether the supplier must describe each individual defect or whether it is sufficient that the goods be described with sufficient particularity to indicate that the goods may be defective e.g. second hand goods or goods that are sold at a lower price because of their lower quality or defects. (De Stadler in Naudé and Eiselen (eds): *Commentary on the Consumer Protection Act* 55-26 at para 56.)

6.2 The latter approach is supported by the case of *Vousvoukis v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECHC 64 at para 119, in which Pickering J stated:

“In my view, a reasonable person in plaintiff’s shoes, being aware that he was purchasing a second-hand motor vehicle, albeit an expensive one, for a price very considerably less than a new vehicle of that make would have been conscious of the fact that it might experience mechanical problems from time to time which were not to be expected in a brand-new vehicle of that make. Compare: *Addison v Harris* 1945 NPD 444; *Lakier v Hager* 1958(4) SA 108 (T).”

6.3 De Stadler suggests that a warning that the goods may be defective should be accompanied by an instruction to the consumer to inspect the goods carefully before concluding the transaction.

## 7. Goods Altered Contrary To The Instructions, Or After Leaving The Control, Of The Supplier (Tampered With By The Consumer)

7.1 The automatic warranty falls away if the consumer altered the goods contrary to instructions, tampered with the goods or the goods became defective after leaving the control of the supplier.

De Stadler (supra) at 56-3 para 4 says.

"The supplier's liability is only excluded 'to the extent that' the alterations were done. This means that the supplier's liability is only excluded insofar as the breach of the implied warranty is attributable to the alterations. If the breach is still attributable to an unaltered characteristic or a defect unrelated to the alterations a supplier may not escape liability."

### 7.2 Underwear Is Not An Exception

If underwear is defective/ damaged, the consumer is entitled to a replacement or a refund (or even notionally a repair of something like a bustier). The supplier need not take back the original underwear if worn or it can accept it and dispose of it.

7.3 If the underwear does not meet the agreed requirements, the consumer is entitled to return it for a refund (section 20(2)(b), unless for reasons of public health or otherwise, a public regulation prohibits the return of those goods to a supplier once they have been supplied to a consumer (section 20(3)(a). Even if the return of such items is prohibited (we are unaware of any prohibition regarding the return of underwear), this does not mean to say that a consumer is not entitled to a refund if the item did not comply with the consumer’s requirements.

## 8. Change of Mind Returns

8.1 Consumers are usually under the impression that they can return all goods as long as they do it within a specific timeframe and the goods have not been used.

8.2 It does not usually count as a defect that something does not fit, but it could be if the item has an incorrect size indicated on it (i.e. it is smaller or larger than items of that size usually are). It must be borne in mind that suppliers do not normally allow consumers to try on underwear at the store and that underwear is often contained in closed packages, preventing a visual inspection.

8.3 A supplier is, however, entitled to refuse to accept the return of underwear that has been opened and tried on if there is nothing wrong with the underwear and the consumer has changed their mind or merely chosen the wrong size (e.g., as a gift). Change-of-mind returns are subject to store policy, which must be brought to the attention of the customer before the conclusion of the sale. As the ultimate consumer may not be the person who bought the product, it is advisable for suppliers to place warning notices on the underwear items/ have open samples available for visual inspection. A recipient of goods is also a consumer (section 1: Definition (c) of Consumer).

8.4 Where a consumer has not had the opportunity to examine and try on the underwear because of shop policy/ it was sent by mail order, the consumer has the right to a reasonable opportunity to examine it to ensure it complies with the agreement/ order or, in the case a special-order agreement, reasonably conform to the material specifications of the special order (section 19 (5)).

## 9. Inspection Of Returned Goods by the Supplier

9.1 Whether a supplier is entitled to submit returned goods for technical inspection before making a call on whether to refund, replace or repair is not dealt with expressly in the CPA. Suppliers in some instances request such an inspection in order to establish whether the defect was caused by consumer abuse. An inspection might also reveal whether the fault is insignificant and accordingly that the supplier has the right to repair it instead of replacing it, if this cannot be determined readily in the store.

9.2 Conversely, the CPA also does not say that it will be presumed that any defect that manifests within 6 months was present in the goods at the time of sale<sup>6</sup>. According to De Stadler, however, the consumer does not have to prove that the goods were unfit for their purpose when the contract was concluded. In most instances it would be necessary for the entity dealing with the complaint (ombudsman, Commission or Tribunal) to call for the item to be submitted for inspection, in order to make a call.

9.3 The present practice of suppliers of sending goods for inspection seems a reasonable practical solution to the problem, subject to the provisos that:

---

<sup>6</sup> De Stadler in Naudé and Eiselen (eds): Commentary on the Consumer Protection Act 55-6 para 11 n2.

- i. it be resorted to only in appropriate cases, where there is a genuine reason for believing that the supplier may not be liable;
- ii. the inspection is conducted and the item be returned to the consumer speedily (a maximum of 7-10 days if the item needs to be sent away);
- iii. the supplier informs the consumer before doing any repair;
- iv. the letter and spirit of the CPA and good customer relations guide any such dealings.
- v. the inspection and time taken thereon do not have the effect of depriving consumers of their rights under CPA. To do so would contravene the CPA.<sup>7</sup>

## 10. Defects That Are Insignificant/ Not Material

10.1 Not every defect entitles a consumer to return goods for a refund or a replacement: The defect must be a “material imperfection” (see definition in footnote 1 above). Another word for material is significant. The defect may also be an imperfection or a characteristic that renders the goods less useful. This is similar to the common law test.

10.2 In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 (3) SA 670 (AD) Corbett JA (as he then was), dealing with a latent defect, stated as follows at 683H – 684A:

“Broadly speaking in this context, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used.”

10.3 In *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at 322A – B paragraph 25, Cachalia JA stated with reference to Kerr: *The Law of Sale and Lease* 3rd Edition, that “[I]t is now settled that any material imperfection preventing or hindering the ordinary or common use of the res vendita is an aedilician defect.”

10.4 The English headnote of *De Vries v Wholesale Cars en ‘n Ander* 1986 (2) SA 22 (OPA) reads as follows:

“The question which has to be answered in considering the issue whether the latent defect in the merx is serious enough for a successful reliance on the actio redhibitoria, is whether the defect(s) is or are so serious that a purchaser would not have bought had he been aware thereof on conclusion of the contract. In determining the question whether the purchaser would have bought or not, an objective test should be applied. The ipse dixit of the purchaser is not decisive.”

10.5 Combrinck J (as he then was) stated as follows in *Du Plessis v West* [1998] JOL 202 (N) at para 5:

“Where the purchaser chooses to pursue redress by way of the actio redhibitoria (An action for restoration to cancel a sale because of defects in the thing sold). he will, in addition, have

---

<sup>7</sup> Section 51(1)(b)(i) and section 4(5): In any dealings with a consumer in the ordinary course of business, a person must not—

(a) engage in any conduct contrary to, or calculated to frustrate or **defeat the purposes and policy** of, this Act;

(b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive;

to show that, had he known about the defect in the *res vendita* (The thing sold), he would not have entered into the sale and also that he is willing and able to effect restitution of the *res*, or is excused therefrom. Whilst there is a subjective element to the buyer's assertion that he would not have entered into the sale if he had been aware of the defect that must notwithstanding be objectively sustainable. At the end of the day the court must be satisfied on all the evidence that a reasonable man in the buyer's shoes would have held a similar view"

De Stadler in Naudé and Eiselen (eds): Commentary on the Consumer Protection Act 55-6 para 11 says that the South African case law may be of assistance in giving further content to section 55(2)(a). She cites case examples including:

- i. cows that do not give milk;
- ii. a mare that could not race because she was pregnant;
- iii. a welded crankshaft in a car;
- iv. mouldy monkey nuts;
- v. cracked wall in a building; and
- vi. susceptibility of carpet to water stains, impairing its decorative purpose.

## 11. Defective Components

11.1 The definition in section 53(1)(a)(i) of "defect" includes any material imperfection in the manufacture of the components of goods. In practice, it is sometimes necessary to decide whether the failure of a component justifies the replacement of the entire goods. The question has been considered by both the Tribunal and the courts.

11.2 In the Tribunal case of *Hyundai Automotive SA (Pty) Ltd v t/a Kia Motors Roodepoort*,<sup>8</sup> the facts were that the Complainant purchased a motor vehicle from the Applicant but returned it to the Applicant and pointed out a paint bubble on an interior plastic panel of one of the doors. The Applicant immediately replaced the panel with another panel from a demonstration vehicle and at the same time ordered a new replacement panel. When the new panel arrived, the Complainant refused to return the vehicle or collect the number plates and registration documents for the vehicle. The complainant alleged the fuel gauge was not working.

11.3 Without deciding on the issue, the Tribunal expressed the view that although the paint bubble could be seen as a defect from a cosmetic perspective, it would be hard-pressed to find that this rendered the entire vehicle as unsuitable, of bad quality and unusable and therefore not compliant with the requirements set out in Section 55(2)(a) to (c): It would have been reasonable for the Applicant to simply replace the defective part with a new part, which is what it offered to do.<sup>9</sup>

11.4 In the case of *Vousvoux v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECGHC 64, the facts were that the consumer purchased a used motor vehicle from the supplier. When the vehicle's engine was destroyed through no fault of the consumer, the supplier replaced the destroyed engine with a second engine at its own cost. The second engine also experienced mechanical problems. The consumer relied in the alternative on CPA section 55(2)(b) and (c).

---

<sup>8</sup> NCT/4734/2012/60(3)&101(1))

<sup>9</sup> At para 32.

11.5 It emerged that the cause of the vehicle's mechanical problems was in fact damage to the oil pump's drive gear. The court ruled that the claim based on the CPA was out of time and then considered the claim under the *actio redhibitoria*. This too was rejected on the grounds that the damage to the oil pump, once diagnosed, was easily remedied for an amount of approximately R15 000,00, an amount which, whilst seen in isolation, is not inconsiderable, is however, relatively inconsequential when viewed against the purchase price of R470 000.<sup>10</sup>

11.6 The consumer argued that the replacement of the first engine with the second engine did not constitute a repair of the BMW motor vehicle as a whole but that the provision of the second engine was in fact a "new supply" of goods to plaintiff. He submitted that because the defect in the second engine manifested itself within six months of its installation in the BMW, the provisions of s 56(2) were applicable and that plaintiff was accordingly entitled in terms thereof to return the BMW to defendant and to claim a refund of the purchase of the BMW.

11.7 The court did not accept this reasoning because, although the engine in itself was a separate component of the motor vehicle which could be removed, repaired, and replaced, it was nevertheless an integral part thereof without which the motor vehicle was a mere shell and accordingly defective.

11.8 The court quoted Loubser and Reid: 'Liability for Products in the Consumer Protection Bill 2006': A Comparative Critique, *Stellenbosch Law Review* vol 17, 2006, page 412 at 438 – 9:

"[I]t would seem uncontentious that a complex product is defective even where its defectiveness is attributable only to a fault in one of its components: for example a car is defective even when only its brakes fail."

11.9 On this basis the court held that the replacement of the first engine by the second engine of the BMW was clearly a repair to the BMW. The court cited dicta from *De Vries v Wholesale Cars en 'n Ander*:<sup>11</sup>

"So 'n defek sal egter gou en teen geringe koste herstel kan word en sal gevolglik nie kansellasië van 'n ooreenkoms regverdig nie."

(My translation: Such a defect (broken petrol pipe) can be repaired quickly and at low cost and will therefore not warrant cancellation of an agreement.)

## 12. Goods Durable for a Reasonable Period Of Time

12.1 Section 55(2)(c) is further quite radical as the requirement that goods must be useable and durable for a reasonable period of time embodies a new right not recognized under the common law. For the first time in South African law, the consumer has an *ex lege* right to continued good quality.<sup>12</sup> This operates in tandem with the implied warranty of quality in section 56 of the CPA.<sup>13</sup>

---

<sup>10</sup> Ibid at para 120.

<sup>11</sup> 1986 (2) SA 22 (OPA).

<sup>12</sup> CM Van Heerden "The impact of the Consumer Protection Act 68 of 2008 on Product Liability in South Africa" unpublished paper at 14.

<sup>13</sup> Ibid at 15.



12.2 According to Professor Naudé, certain goods can be reasonably expected to be useable and durable for more than 6 months. The anomaly that section 56 provides no remedy for infringement of the consumer's right to useable and durable goods can be resolved by means of section 4(2)(b)(ii)(bb), which gives courts and the tribunal the power to make any innovative order that better protects consumers' rights, not just orders specifically mentioned in the CPA. Naudé argues that courts or the tribunal should have the power to enforce the right that goods remain durable through an innovative order.<sup>14</sup>

12.3 This reasoning was rejected out of hand by Pickering J in *Vousvoulis v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECGHC 64 (19 June 2015) at 110:

'The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in s 56(2). There is no question of s 56(2) being ambiguous in any way. In my view, it is not open to a court, under the guise of making an "innovative order", to extend this period.'

The period for which goods must be durable will differ from product to product.<sup>15</sup>

### 13. Store Refund Policies and Manufacturer Warranties

13.1 The above rules regarding refunds apply irrespective of the store's refund policy or the terms of the manufacturer's guarantee/ warranty.

13.2 In other words, the store's refund policy or the terms of the manufacturer's guarantee/ warranty cannot override the CPA requirements, but they can go further than or offer more rights to the customer than the Act does. For example, a store may accept for a refund goods returned within a specific period and with their original packaging even if there is nothing wrong with them and the customer has merely changed their mind, although the Act only requires a supplier to accept a return if there was something wrong with the goods, as explained above.

13.3 The manufacturer's warranty may extend beyond the 6 months provided by the CPA warranty, but its terms and conditions must be fair (s. 48 CPA) or be brought to the attention of the consumer if they are of an unusual or onerous nature (s. 49 CPA).

### 14. Original Packaging and the Charging of Handling Fees

14.1 Section 56 does not require a consumer to return the goods in their original packaging if the goods are defective. This is in line with the practice in New South Wales, Australia<sup>16</sup>: "You do not have to return products in the original packaging in order to get a refund."

14.2 The supplier may, however, insist upon the return of the goods in the original packaging if the goods are returned because the consumer has merely changed their mind and there is nothing wrong

---

<sup>14</sup> Naudé op cit at 339. Examples of innovative orders can be found in Annexure A hereto.

<sup>15</sup> De Stadler op cit para 25.

<sup>16</sup> See:

[http://www.fairtrading.nsw.gov.au/ftw/Consumers/Consumer\\_guarantees\\_warranties\\_and\\_refunds/Repairs\\_refunds\\_replacements.page?](http://www.fairtrading.nsw.gov.au/ftw/Consumers/Consumer_guarantees_warranties_and_refunds/Repairs_refunds_replacements.page?)

with the goods and the consumer is permitted to return the goods by the store's returns policy. The supplier should, however, at the time of purchase, warn the consumer of the need to keep the packaging.

14.3 Whether or not goods are returned with their packaging is relevant in determining the applicable charge where goods are returned in terms of section 20 because:

- a) A direct marketing agreement was rescinded during the cooling off period.
- b) The consumer did not have an opportunity to examine before delivery, and the consumer has rejected them
- c) The consumer has refused delivery of a mixture of goods
- d) The goods are unsuitable for a particular purpose communicated to the supplier

14.4 20 (6) In determining the right of a supplier to impose a charge contemplated in subsection (5), if any goods returned to the supplier in terms of this section are—

- a) in the original unopened packaging, the supplier may not charge the consumer any amount in respect of the goods;
- b) in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for -
  - (i) use of the goods during the time they were in the consumer's possession, unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or
  - (ii) any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer.

## 15. Till Slips

15.1 While the Consumer Protection Act requires that consumers be provided with a record of the transaction (Section 26), it however makes no specific reference to till slips being required when goods are returned, the high levels of crime in South Africa and the fact that the CPA implied warranty is only for 6 months are reasons justifying the requirement of the production of a till slip when exchanging an item. I am aware that the National Consumer Commission usually requires the production of a till slip, but that it also looks to suppliers to assist by keeping proper records. It is suggested that each case be treated on its merits.

Relevant considerations where till slips are not available are:

- a) Is the item a brand sold by the store?
- b) Is it a brand that is widely available at competitor's outlets?
- c) Does its condition suggest it is a recent purchase and the defect was not caused by the customer?
- d) Is the item of the sort that someone is likely to have shoplifted and damaged in order to get the cash value of? and
- e) Have there been other similar returns?

Please direct any requests for clarification to [info@cgso.org.za](mailto:info@cgso.org.za)

**Consumer Goods and Services Ombudsman**

**Revised March 2021**