

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

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1 Introduction

Chapter 2 Part H of the Consumer Protection Act, 68 of 2008 ('the CPA') protects the consumer's 'right to fair value, good quality and safety'.¹ This contribution focuses on two sections in this part of the Act, namely section 55, headed 'Consumer's right to safe, good quality goods' and section 56, headed 'Implied warranty of quality'. In the course of explaining the contents of these sections, problematic aspects will be identified. Some brief comparisons will also be drawn with the EC Consumer Sales Directive² and the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law ('CESL')³ Reference will also be made to proposals made by the Law Commissions of England and Wales and of Scotland on consumer remedies for faulty goods.⁴

1 Scope of application of the CPA in respect of the supply of goods

In brief, the CPA applies to the supply of goods or services to a consumer in the ordinary course of the supplier's business for consideration, where the transaction occurs within the Republic.⁵ As sections 55 and 56 are concerned with the supply of goods, services will not be considered further here. A supplier of goods is someone who 'markets', that is 'promotes or supplies'

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¹ This is the heading of Chapter 2 Part H.

² Directive 99/44/EC on Certain Aspects of the sale of Consumer Goods and Associated Guarantees, OJ (1999) L 171/12. This is a 'minimum harmonization directive', which sets minimum levels of protection for European consumers. Countries may therefore provide for stronger protection in their national legislation.

³ COM (2011) 635 final. It was published in 2011 and is proposed to be an optional instrument which traders can choose to apply to their cross-border contracts with other traders or consumers.

⁴ The Law Commission and The Scottish Law Commission *Consumer Remedies for Faulty Goods* (LAW COM No 317; SCOT LAW COM No 216)(2009).

⁵ See the definition of 'transaction' in s 1.

any goods. This includes selling, renting, exchanging and hiring the goods in the ordinary course of business for consideration.⁶

‘Goods’ are widely defined as including

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) 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;
- (d) 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
- (e) gas, water and electricity.⁷

‘Consideration’ is widely defined as anything of value given and accepted in exchange for goods or services.⁸

It is irrelevant whether the supplier

- (a) resides or has its principal office with or has its principal office within or outside the Republic;
- (b) operates on a for-profit basis or otherwise; or
- (c) is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or
- (d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public’.

‘Ordinary course of business’ is not defined in the CPA. In *Amalgamated Banks of South Africa Bpk v De Goede en ‘n ander*,⁹ the SCA held (in interpreting this phrase in the Matrimonial Property Act, 88 of 1984) that it was irrelevant whether or not the person in question conducted such transactions regularly: the issue was whether the person performed the juristic act in question in the ordinary course of his business.¹⁰ A single, isolated activity (such as the act of standing surety in the *De Goede* case) could in proper circumstances be regarded as being performed in the ordinary course of business. The test for determining whether a contract falls within the ordinary course of a party’s business is whether the conclusion of the contract falls within the scope of that business and whether the transaction is one with commonly-used terms that ordinary businessmen would normally have entered into in the circumstances.¹¹ Case law on income tax accept that if

⁶ See the definition of ‘supply’ in s 1.

⁷ Section 1 sv ‘goods’.

⁸ Section 1 sv ‘consideration’. The definition states in addition that consideration includes:

- (a) money, property, a cheque or other negotiable instrument, a token, a ticket electronic credit, credit, debit or electronic chip or similar object;
- (b) labour, barter or other goods or services;
- (c) loyally credit or award, coupon or other right to assert a claim; or
- (d) any other thing, undertaking, promise, agreement or assurance; irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves other parties in addition to the supplier and consumer.’.

⁹ 1997 (4) SA 66 (SCA) 75–8.

¹⁰ The court had to interpret this phrase as it appears in section 15(6) of the Matrimonial Property Act 88 of 1984.

¹¹ See also *Ensor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) 824–5 (the test is whether the alienation was one which would normally have been transacted by a solvent businessman carrying on a business of that kind and regard is to be had to what is done or would be done in other similar businesses in similar circumstances).

rental income is the ‘product of a bona fide investment with the purpose of earning an income from the investment’, income tax is payable on profit made or any rental loss may be deducted from rental income for the purpose of income tax.¹² Thus an individual who, apart from her own residence, owns only one flat which she rents out is supplying that flat to the tenant in the ordinary course of her business, and the tenant is therefore protected as consumer under the CPA. The lessor has to pay income tax on the rental owed and is therefore running a business of leasing out the flat, even though this may not be her only or main business or occupation.

The wide definition of ‘consumer’ in section 1 encompasses anyone to whom goods or services are marketed or supplied as well as, if the context so requires or permits, a user of those particular goods or a recipient of those services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services. This wide definition in section 1 is effectively narrowed by section 5, which excludes certain entities from the protection of the Act. The State is not protected as consumer.¹³ Neither are juristic persons, whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister by regulation.¹⁴ This threshold has been set at R3 million.¹⁵ Nevertheless, any franchisee, regardless of its asset or turnover value, is protected as a consumer in respect of its relationship with the franchisor.¹⁶ Although the CPA does not apply to a transaction that constitutes a credit agreement under the National Credit Act, 34 of 2005, the goods or services that are the subject of the credit agreement are not excluded from the ambit of the CPA.¹⁷ In other words, the consumer may rely on the provisions on the CPA on the quality of the goods and services supplied under a credit agreement.

The Minister may also grant an industry-wide exemption from all or some of the provisions of the Act on application by a regulatory authority.¹⁸

Sections 55 and 56 do not apply to goods bought at auctions.¹⁹

3 Section 55: the ‘right to safe, good quality goods’.

3.1 Standards that goods must comply with

Section 55(2) sets out the standards or requirements which goods sold must comply with.

¹² Compare, for example, *ITC 561* (13 SATC 313); *ITC 1292* (41 SATC 163); and *ITC 1367* (45 SATC 39); Case No 7980 (unreported, 1984), discussed in RH Zulman, R Stretch & J Silke *Income Tax Practice Manual* (September 2010–SI27) at A:R15.

¹³ Section 5(2)(a).

¹⁴ Section 5(2)(b). But note that section 5(5) provides that sections 60 and 61 (the latter on damages caused by defective goods) apply to all parties in the supply chain, even if the goods are supplied to a person in terms of a transaction that is exempt from the application of the Act.

¹⁵ Government Notice 294 in *Government Gazette* 34181 of 1 April 2011.

¹⁶ Section 1 sv ‘consumer’ read with s 5(6) and (7).

¹⁷ Section 5(2)(d).

¹⁸ Section 5(2)(c) read with s 5(3) and (4).

¹⁹ Section 55(1).

Section 55(2)(a) states that consumers ‘have a right to receive goods that are reasonably suitable for the purposes for which they are generally intended’. The common law of sale also requires that the goods be fit for purpose, failing which the aedilitian remedies would avail the consumer (that is, the *actio quanti minoris* for price reduction and the *actio redhibitoria* for rescission).²⁰ Under the CPA, however, the consumer has the right to *receive* goods that comply with these standards. It follows that the consumer would not have to prove any more that the goods were unfit for purpose at the time of *conclusion* of the contract, as is the case under the common law.²¹

The second paragraph (s 55(2)(b)) states that the goods must be of good quality, in good working order and free of any defects. This requirement incorporates the definition of ‘defect’ in section 53 CPA, which essentially imports a ‘consumer expectations’ test. Section 53 defines defect as

- (i) any material imperfection in the manufacture of the goods or components that renders the goods 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.’

This test is comparable to that in the EC Product Liability Directive²² and the UK Consumer Protection Act, 1987, which transposed this Directive into UK Law.²³ The EC Consumer Sales Directive also requires, in addition to fitness for purpose, that the goods must ‘show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect.’²⁴ As Loubser and Reid have pointed out, the ‘consumer expectations’ test has been extensively criticized in the UK and the USA in the context of product liability and is not particularly helpful.²⁵ It is so vague that it can be used by a court to justify any outcome.²⁶

The next paragraph in section 55 (s 55(2)(c)) is quite radical. It requires that goods must be ‘useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply’. This is a new right not recognized

²⁰ See, for example, the definition of ‘defect’ in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) 670 (A) 684H (‘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’). The *actio redhibitoria*, aimed at restitution, is available in the case of more serious latent defects, and the *actio quanti minoris* in respect of any latent defects. For more details see AJ Kerr ‘Sale’ in WA Joubert (ed) *The Law of South Africa* vol 24 First Reissue paras 44-68.

²¹ See for example *Seboko v Soll* 1949 (3) 337 (T) at 350; *Holmdene Brickworks supra note* at 683C..

²² Article 6 of Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the member States concerning liability for defective products, OJ (1985) L210/29.

²³ Section 3(2).

²⁴ Article 2(2)(d). See also art 24(2)(d) of the Proposal for a Consumer Rights Directive.

²⁵ Max Loubser & Elspeth Reid ‘Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique’ (2006) 17 *Stell LR* 412 424-426; Jane Stapleton ‘Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective’ (2000) 39 *Washburn LJ* 363 376-8; William Lloyd Prosser, W Page Keeton, Dan B Dobbs, Robert E Keeton & David G Owen *Prosser & Keeton: The Law of Torts* 5 ed (1984) 699.

²⁶ Loubser & Reid op cit note at 426-8.

under the common law. As noted above, to claim aedilician relief the buyer has to prove that the defect existed at the time of conclusion of the contract.²⁷ For the first time in South African law, the consumer has an *ex lege* right to continued good quality. This goes beyond the protection afforded in the EC Consumer Sales Directive, which only grants the consumer remedies for any lack of conformity that existed at the time of delivery.²⁸ The Directive does, of course, recognize that the trader may give a commercial guarantee that the goods will function properly for a certain period.²⁹

On the other hand, English case law has recognized since at least 1982 that the implied warranty of fitness for a particular purpose in the Sale of Goods Act, 1979, 'is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery,' this being dependent on the nature of the goods.³⁰ Thereafter, section 14(2B)(e) was inserted into the Sale of Goods Act, 1979, according to which durability is also an aspect of the quality of goods for purposes of the implied warranty as to quality.³¹

Clearly, disputes are likely to occur in South Africa on exactly how long a particular product can be expected to function properly for. As will also be discussed below, section 55(4) provides that to determine whether goods satisfied the requirements of section 55(2) regard must be had to, *inter alia*, the manner in which and the purposes for which the goods were marketed, packaged and displayed, the user of any trade description or mark, any instructions for the use of the goods, the range of things that might reasonably be anticipated to be done with the goods and the time when the goods were produced and supplied. As this is not a closed list of factors, the price and the terms of the contract should also be considered.³²

It is likely that sectoral ombudsmen will refine the durability concept, as courts may only be approached once the consumer has exhausted all other remedies.³³

Such ombudsmen and courts will probably also take into account what guarantees suppliers in the market are typically prepared to give. Suppliers would be well advised to give express guarantees for a stated period. This

²⁷ Note *supra*. Alternatively, the buyer may rely on a *dictum promissumve* made at or before the time of conclusion of the contract (*Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A)).

²⁸ Article 3(1). The CESL gives the buyer remedies only in respect of a lack of conformity which existed at time the risk passes to the consumer (art 105), which generally occurs when the consumer takes physical possession of the goods (art 143).

²⁹ Article 6; art 29 of the proposal for a Consumer Rights Directive.

³⁰ *Lambert v Lewis* [1982] AC 225 at 276.

³¹ Section 14(2B) reads that '[f]or the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods: (a) fitness for all the purposes for which goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety, and (e) durability'.

³² Section 38 of the Quebec Consumer Protection Act provides that 'goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use'. See also JF Luterek 'SAASA Consumer Protection Act, 68 of 2008' *Interact Media Defined* (26 October 2010), available at http://www.interactmedia.co.za/index.php?option=com_content&view=article&id=1012&catid=84&Itemid=89 (visited 9 February 2011) who also gives some examples relating to durability.

³³ Section 69(d) (*sic*). For example, a retail ombudsman will probably be created to deal with complaints about consumer goods.

would make it somewhat less likely that a court would hold that the goods should have been durable for an even longer period.

Finally, section 55(2)(d) provides that goods must comply with any applicable standards set under the Standards Act 29 of 1993, or any other public regulation.

Section 55(3) confirms a right to fitness for a particular purpose made known to the supplier. A similar rule is recognized under the common law of sale.³⁴ The CPA provides that the consumer only has such right if the supplier ordinarily offers to supply such goods, or acts in a manner consistent with being knowledgeable about the use of such goods. In the Consumer Sales Directive and proposed Consumer Rights Directive, the goods also only conform to the contract if they are 'fit for a particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted.'³⁵ The drafters of these Directives therefore shied away from the more supplier-friendly rule in the UN Convention on Contracts for the International Sale of Goods, 1980 ('CISG'), which requires that the goods must be 'fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment'.³⁶

As noted above, section 55(4) indicates what circumstances should be taken into account to determine whether goods comply with the standards set out in subsection 2. For example, the manner of marketing, packaging and display will be taken into account, as well as any trade description or mark, instructions or warnings with respect to the use of the goods.³⁷ The time when the goods were produced or supplied is also relevant according to this subsection.³⁸

According to section 55(5) it is irrelevant in this regard whether a defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods. This is obviously a departure from the common law rules on the aedilician actions, which require that the defect must be latent, that is, not visible upon reasonable inspection.³⁹ The proposed EC Consumer Rights Directive also does not require any non-conformity with the contract to be latent, but at least provides that 'there shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware

³⁴ See, for example, *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) 344 (A) at 357E; *Knight v Trollip* 1948 (3) SA 1009 (D) at 1012–13.

³⁵ Article 2(2)(b) of the Consumer Sales Directive; art 24(2)(b) of the Proposal for a Consumer Rights Directive.

³⁶ Article 35(2)(b).

³⁷ Section 55(4)(a).

³⁸ Section 55(4)(c).

³⁹ See, for example, *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* supra note at 684A–B; *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170 at 179–80.

of, the lack of conformity. . . .⁴⁰ Depending on the circumstances, if the defect was obvious, the seller under this Directive could therefore maintain that the consumer may not complain about the defect in question, as he should have known about it. Under the CPA, the trader may not use this defence. The CPA does not specifically state that the consumer has no remedy if he actually knew about the defect. However, as will be discussed in the next part of this article, section 55(6) brings some relief to suppliers who expressly informed the consumer that goods were offered in a specific condition.

3.2 May the supplier exclude or limit liability for defects?

Section 55(6) allows a supplier to limit liability for certain defects in a prescribed manner. It provides that

- ‘[s]ubsection 2(a) [on suitability for purpose] and subsection 2(b) [on quality] do not apply to a transaction if the consumer –
- (a) has been expressly informed that particular goods were offered in a specific condition; and
 - (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.’

This subsection has caused controversy about whether so-called voetstoets or ‘as is’ clauses will still be allowed. Opposing views have appeared in articles in the popular media and legal journals like *Without Prejudice*.⁴¹

As noted above, the mere fact that the defect was obvious is not enough to safeguard the supplier.⁴² The supplier must have expressly informed the consumer that goods were offered in a specific condition.

Conceivably, this could mean one of three things. Firstly, it could mean that the supplier has to expressly point out every individual defect in question to escape liability for a particular defect. Siphon Tleane of the Department of Trade and Industry was quoted in an article of 16 August 2010 as saying that ‘the concept of voetstoets is not going to be applicable any more’ and that suppliers ‘must have proof that they did explain every defect to the buyer, and it should be signed and contained in the contract’.⁴³ This statement could be interpreted to mean that every defect has to be pointed out before the seller may escape liability, that is, that the consumer would have a remedy in respect of defects not specifically pointed out. However, it is highly unlikely that section 55(6) will be interpreted this strictly. Several industries that sell used or reject goods would be detrimentally affected by such an impractical

⁴⁰ Article 24(3).

⁴¹ See, for example, the references in notes 43, 44, 48 and 51 below.

⁴² Note supra.

⁴³ Michelle Solomon ‘“Voetstoets” will no longer protect sellers’ *Dispatch Online* (16 August 2010), available at <http://www.dispatch.co.za/article.aspx?id=425737> (visited 16 August 2010). A number of articles in the popular media simply state that voetstoets clauses are no longer allowed, without discussing the implications of section 55(6). See, for example, Megan Power ‘The Power Report: “Voetstoets” can lead to grinding halt’ *Times Live* (31 October 2010), available at <http://www.timeslive.co.za/business/money/article734478.ece/The-Power-Report-Voetstoets-can-lead-to-grinding-halt> (visited 2 November 2010).

interpretation.⁴⁴ If the consumer bought from a factory outlet, which displayed a notice that some of the goods on sale are factory rejects, which must be carefully inspected for defects, the consumer should not be allowed to complain if she subsequently discovers a fault in the stitching of a particular garment that was not specifically pointed out to her. Similarly, consider the example of a retailer who informs the consumer that the second-hand car sold is a 1980 model, which is old and rusty, and that the consumer should carefully check the car for defects, and buys it on the risk that it may be defective. The consumer who goes ahead should not be allowed to insist on the remedies of repair, replacement and refund provided for in section 56 on the basis that a particular defect in the car was not pointed out to it. The supplier expressly informs the consumer that goods were offered in a specific, though broadly defined, condition. The supplier describes this condition with adequate precision to put the consumer on guard and warns the consumer to inspect the goods carefully. The supplier cannot be expected to know and point out all defects, including the exact wear and tear on every part.⁴⁵ Section 4(3) requires a purposive interpretation of the Act, and one of the purposes of the Act is to promote a culture of consumer responsibility.⁴⁶ Consumers who shop at factory outlets, for example, can reasonably be expected to take some care when selecting garments

On the other extreme, the view has been expressed that it will still be possible to simply agree that goods are sold ‘voetstoots’ or ‘as is’, as long as this is done expressly and therefore not as part of the ‘small print’.⁴⁷ However, courts are unlikely to follow this view. The terms ‘voetstoots’ or ‘as is’ do not sufficiently describe ‘the specific condition’ of the goods. This should be described in more detail. In any event, the terms ‘voetstoots’ and ‘as is’ could be regarded as technical legal terms, which do not draw the ‘fact, nature *and* effect’ of this type of exemption clause to the attention of the consumer in plain and understandable language, as required by section 49 and section 50 read with section 22. These terms are too cryptic for the consumer to realize their nature and effect.

It is likely that the courts will prefer 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 had to list each and every defect for which

⁴⁴ Claire Morrissey & Azille Coetzee ‘Does this mean voetsek voetstoots’ May 2010 *Without Prejudice* 12.

⁴⁵ Morrissey & Coetzee *op cit* note at 12.

⁴⁶ Section 3(1)(f).

⁴⁷ Morrissey & Coetzee *op cit* note at 12-13. See also Maria Davey ‘Summary of the Consumer Protection Act, 68 of 2010’ *Meumann White News* (31 March 2010), available at <http://www.meumannwhite.co.za/news-details/25/> (visited 2 November 2010); Editor in Residential ‘New act could mean end of voetstoots’ *iolproperty.co.za* (22 February 2010), available at http://www.iolproperty.co.za/roller/news/entry/new_act_could_mean_end (visited 2 November 2010) (‘... when entering into a contract for the purchase of a property with the standard voetstoots clause, the signatory must fully understand the agreement or a court may well set aside such an agreement on the basis that it was unfair or unjust’).

it seeks to escape liability.⁴⁸ Thus, the individual defects need not all be listed before the supplier can escape liability for them, but it must be clear from the description of the goods that the consumer understands and takes the risk that the goods may be defective.⁴⁹ For example, '[t]his is a rusty old 1990 model car, which has been pre-owned by a number of owners, and you should carefully check it for defects. We recommend an independent inspection by an expert like the AA'. The description of the car is detailed enough to put the consumer on guard that it may contain defects. Or '[g]arments may be factory rejects, which should be carefully inspected for defects'. Or '[t]he seller has listed the defects in the house which she knows about in Annexure A. This house is 50 years old and was not built by the seller, and may have or develop latent defects, for which the seller cannot take responsibility. The house is therefore sold "as is". The buyer is advised to ask an independent expert to inspect the house for defects.' If the latter sentence is to be phrased as an acknowledgement that the buyer was advised to obtain an independent inspection, it should comply with the prominence requirements of section 49, which apply to (inter alia) acknowledgments of fact.⁵⁰

Indeed, it is advisable for dealers in immovable property or in second-hand vehicles to recommend that the buyer consult an independent expert to inspect the goods before the buyer buys, and to give a list of such experts on request.⁵¹

It is very likely, however, that a seller would not easily get away with exclusion clauses in the case of new products, except where the buyer knows they may be rejects.

Section 55(6) not only requires the seller to expressly inform the buyer that the goods were sold in a particular condition, but also that the buyer must have expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition. If the buyer in a factory outlet denies having seen the notice that the goods may be rejects, a court will simply have to determine whether she could be believed so that she 'knowingly' bought the goods.

Section 55(6) does not qualify the right to usability and durability guaranteed in section 55(2)(c), nor the right to compliance with any applicable standards contained in the Standards Act or other public regulation. However, section 55(2)(c) on durability has built-in limitations, as it provides that the goods must be durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding

⁴⁸ Cf Charl Theron 'Voetstoos is dead? Long live its younger brother, full disclosure' *Talking Point* (August 2010), available at http://www.walkers.co.za/index.php?option=com_content&task=view&id=137&Itemid=284 (visited 2 November 2010).

⁴⁹ See also Evert van Eeden *A Guide to the Consumer Protection Act* (2009) 225.

⁵⁰ Section 49 essentially requires that the fact, nature and effect of an acknowledgment of fact must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances.

⁵¹ See also Elma Kloppers 'No longer "as is" for "voetstoos" law' *fin24.com* (18 July 2010), available at <http://www.fin24.com/PersonalFinance/Property/No-longer-as-is-for-voetstoos-law-20100718> (visited 16 August 2010), citing Jan Davel of the RealNet Property Group to this effect.

circumstances of their supply. This means that courts will take into account circumstances such as that the goods are second-hand, and also any description of and warning about their condition.

It should also be noted that a claim for damages caused by goods under section 61 is not directly affected by a term complying with section 55(6).⁵² Compliance with section 55(6) merely has the effect that sections 55(2)(a) and (b) do not apply to the transaction, whereas liability under section 61 for damage caused by goods is not dependent upon proof that the requirements in section 55(2) were not met. As will be shown below in the discussion of section 56, such a section 55(6) clause will affect the consumer's remedies of refund, replacement or repair under section 56, for which non-compliance with the section 55(2) requirements and standards are a requirement. A damages claim under section 61 will, however, not be affected because section 61 sets out its own prerequisites for liability under that section. If harm as defined in section 61(5) was caused by the supply of 'unsafe' goods or by a 'hazard' in any goods, there will be a claim for damages regardless of a section 55(6) clause.⁵³ According to section 53, which defines several concepts for the purpose of sections 54 to 61, 'hazard' means [inter alia] a characteristic that . . . presents a significant risk of personal injury to any person, or damage to property, when the goods are utilized.⁵⁴ In turn, 'unsafe' means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.⁵⁵ If the consumer is unable to show the existence of a 'hazard' or 'unsafe characteristic', he or she would have to show the existence of a 'failure' or 'defect' in order to rely on section 61.⁵⁶ As noted above, the definition of 'defect' in section 53 refers to a reasonable expectations test. In this context, one could argue that a warning complying with section 55(6) affects what consumers could reasonably expect, and so a clause complying with section 55(6) may indirectly affect the existence of a claim for damages under section 61 if the consumer is forced to show the existence of a 'defect' and cannot show the existence of a 'hazard' or 'unsafe characteristic'.

Section 55(6) has no direct equivalent in the EC Consumer Sales Directive or the proposal for an EC Consumer Rights Directive. As noted above, the consumer may not complain, however, if she should reasonably have been aware of the lack of conformity. Therefore a supplier could inform the

⁵² In broad terms, section 61 provides that all suppliers in the supply chain, regardless of negligence, are liable for harm caused by unsafe goods, a product failure, defect or hazard or inadequate instructions or warnings provided to the consumer, where such harm consists of death, injury or illness of a nature person, loss or physical damage to any property, as well as economic loss that results from such injury, physical damage etc.

⁵³ The harm in question must be the death of or injury to any natural person, an illness of any natural person, any loss of or physical damage to any property and any economic loss that results from such harm.

⁵⁴ Section 53(1)(c).

⁵⁵ Section 53(1)(d).

⁵⁶ Section 61(1).

consumer that the goods were sold in a particular condition, for example, ‘this car was a write off and is sold for parts only’. In that case, a consumer who despite that warning continues to drive the car, will have no remedy if the car stops driving properly.

4 Section 56: ‘implied warranty of quality’ and remedies of repair, replacement, and refund

4.1 Implied warranty of quality

Section 56(1) provides that every supplier in the supply chain warrant by way of implied term in the agreement of sale that the goods comply with the requirements and standards contemplated in section 55, except to the extent that the goods have been altered contrary to the instructions or after leaving the control of the supplier in question.

That such a warranty of quality is implied into every contract does not, however, mean that full damages are payable simply because the goods do not comply with the section 55 requirements. Admittedly, warranty is a term of art that usually implies that breach thereof entitles the aggrieved party to the normal remedies for breach of contract, including damages.⁵⁷ However, section 61 is clearly intended to regulate liability for damages caused by goods, as it is headed ‘Liability for damage caused by goods’.⁵⁸ Section 61 does not create absolute no-fault liability for retailers and distributors on the simple basis of non-compliance with the requirements of section 55. Retailers and distributors may escape liability for damages under section 61(4)(c) if they can show that it was unreasonable for them to have discovered the defect taking into account their role in marketing the goods. In the light of this defence to a claim for damages for defective goods under section 61, section 56 could not possibly create an alternative, stricter claim for damages against retailers and distributors. For this reason, the words ‘warrant by way of implied term’ is not particularly helpful, and should be deleted.

4.2 Remedies of repair, refund, or replacement

Section 56(2) creates a very radical right for consumers. It provides that within six months after the delivery of any goods to a consumer, the consumer may ask for a repair, refund or replacement if the goods fail to satisfy the requirements contemplated in section 55. For example, if a consumer buys a new car and finds a small defect after four months, the consumer has a choice whether to insist on a new car or a full refund or a repair of the problem. The consumer’s choice is not qualified with reference to the seriousness of the

⁵⁷ Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 3 ed (2007) 295–6 and authorities there cited.

⁵⁸ For a brief summary of section 61, see note supra.

defect. Given that the choice also exists for the whole of six months, this provision is too unbalanced in favour of consumers.

The fact that everyone in the supply chain warrants good quality under section 56(1) seems to imply that the consumer may require a repair, replacement or refund from the producer, importer or distributor as well as the retailer.

It is not clear whether the six-month period is an absolute cut-off point beyond which there will be no remedy of repair, refund or replacement. For example, what happens if the defect probably existed at the time of supply but only manifested after more than six months? Also, consumers now have a right that the goods be useable and durable for a reasonable period of time under section 55(2)(c). What if the goods are of such a type that one can expect them to be useable and durable for a period longer than six months, such as a year, and they break after say eight months? What remedies does the consumer have then if there is no commercial guarantee voluntarily granted by the supplier, which regulates the position?

To hold that the six-month period is an absolute cut-off point in the absence of a longer guarantee would mean that the supposed right to useable and durable goods is not effective at all.

In this regard, it should be remembered that section 4 CPA gives courts and the National Consumer Tribunal ('NCT') the power to

'make appropriate orders to give practical effect to the consumer's right to redress, including, but not limited to – (aa) any order provided for in this Act; and (bb) any innovative order that better advances, protects, promotes and assures the realization by consumers of their rights in terms of this Act.'⁵⁹

In addition, section 4(2)(a) CPA provides that the NCT and courts must 'develop the common law as necessary to improve the realization and enjoyment of consumer rights generally'. A court may therefore possibly decide that, even though the Act is silent about remedies beyond the six-month period, and even though the common law requires that the defect must have existed at conclusion of the contract, it would give a remedy to a consumer where she could reasonably expect the goods to be usable and durable for more than six months and they broke after the first six months. Courts could then develop a new remedy based on the common law aedilician actions to provide for this scenario. For example, they could decide that normally the consumer should be entitled to a repair or price reduction, but that if the defect is serious, a claim for a replacement or refund may be justifiable.

Preferably, however, the legislature should reform this part of the CPA after having properly studied international models and undertaken a regulatory impact study. If the legislature was set on creating a right to useability and durability for a reasonable period of time, it should have thought more carefully about the remedies available.

⁵⁹ Section 4(2)(b).

The six-month period in section 56(2) possibly owes its origin to the EC Consumer Sales Directive. As already noted, in the absence of a commercial guarantee, the current EC Consumer Sales Directive requires the buyer to show that the lack of conformity existed at the time of delivery.⁶⁰ However, the Directive creates a rebuttable presumption that ‘any lack of conformity which becomes apparent within six months of delivery, shall be presumed to have existed at that time, unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity’.⁶¹ The six-month period in the CPA does not serve the same purpose. If the defect arises within six months, it does not merely create a rebuttable presumption about the existence of the defect at the time of supply. Instead, there is a full guarantee for a six-month period.

The EC Consumer Sales Directive was probably also the source of the consumer’s choice between repair or replacement or refund,⁶² although again it is not set out in the same way as in the CPA (as will be shown in the next paragraph). Again, the CPA seems to have borrowed an idea from this Directive, without following it exactly as a model.

The EC Consumer Sales Directive⁶³ firstly sets out four possible remedies – remedying of the non-conformity by repair or replacement, price reduction, and rescission of the contract. Under the Directive, the consumer must first choose between a repair or replacement, unless this is impossible or disproportionate to the trader, for example, too costly when compared with price reduction or refund.⁶⁴ The consumer may require reduction of the price or rescission instead if the consumer is either entitled to neither repair nor replacement, or if the seller has not completed the remedy within a reasonable time, or not without significant inconvenience to the consumer.⁶⁵

Under the EC Proposal for a Directive on Consumer Rights (ultimately not implemented in this form⁶⁶, the consumer would not have the choice between repair and replacement. Instead, the trader may choose to remedy by repair or replacement, free of any cost to the consumer.⁶⁷ But where the trader has proved that a repair or replacement is unlawful, impossible or would cause disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader’s effort is disproportionate if it imposes costs on him, which, in comparison with the price reduction or rescission of the contract are excessive, taking into account the value of the goods if there was

⁶⁰ Article 3(1).

⁶¹ Article 5(3).

⁶² Compare art 26.

⁶³ Article 26(1)

⁶⁴ Article 3(3), which also describes what ‘disproportionate’ means.

⁶⁵ Article 3(5).

⁶⁶ The European Commission published the Proposal for a Directive on Consumer Rights on 8 October 2008 (COM(2008) 614 final). It was proposed to be a maximum harmonisation directive, which would prescribe uniform rules to be implemented throughout Europe as opposed to minimum levels of protection, and which would replace several directives including the Consumer Sales Directive. However, the ultimate Directive on Consumer Rights (2011/83/EU) has a far narrower scope of application and does not replace the Consumer Sales Directive.

⁶⁷ Article 26(2), read with art 27(1).

no lack of conformity and the significance of the lack of conformity. The consumer may only rescind if the non-conformity is not minor.⁶⁸ The consumer may resort to any remedy available where one of the following situations exist: (a) the trader has implicitly or explicitly refused to remedy the lack of conformity; (b) the trader has failed to remedy the lack of conformity within a reasonable time; (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer; or (d) the same defect has reappeared more than once within a short period of time.⁶⁹

A fairer, more balanced international model, which should be considered by the South African legislature, is the one recommended by the UK Law Commissions in 2008.⁷⁰ They recommend that the consumer should have the right to ask for a refund of defective goods within a normal period of 30 days after delivery, as an alternative to repair or replacement. The right to a refund within that 30-day period should also apply to 'minor defects' (because often appearance etc are important to consumers).⁷¹

This normal period could be extended in certain limited circumstances.⁷² These are where it is reasonably foreseeable that a longer period will be needed to inspect the goods and to try them out in practice, or where parties agreed to a longer period than 30 days. But the trader may show that the right to reject should be exercised in less than 30 days where a 30-day period would be incompatible with the nature of the goods, namely where the goods could be expected to perish within 30 days.⁷³ To grant the extreme right of rejection for a period of more than 30 days as a matter of course, as the CPA does, is unfair.

If the defect only becomes apparent after 30 days, the UK Law Commissions would give the consumer a choice between a repair or replacement, but if that is not forthcoming or too 'disproportionate', the consumer should be entitled to ask for a refund in the case of non-minor defects. There are other situations where the consumer may also directly ask for a refund. If the product is dangerous or the supplier acted so unreasonably as to undermine trust in him, the consumer is entitled to an immediate refund.⁷⁴ If the product is essential, the consumer should also be entitled to rescind the contract, unless the retailer has reduced the inconvenience to the consumer by, for example, offering a temporary replacement.⁷⁵ In addition, if one repair or replacement is not effective, the consumer is entitled to a refund or reduction in price.⁷⁶

⁶⁸ Article 26(3).

⁶⁹ Article 26(4).

⁷⁰ A summary of the recommendations is set out at 79–81.

⁷¹ Paragraph 3.110.

⁷² Paragraph 3.65.

⁷³ Paragraph 3.74.

⁷⁴ Paragraph 6.39.

⁷⁵ Paragraph 6.26.

⁷⁶ Paragraph 6.21.

As is the case under the Consumer Sales Directive, the UK Law Commissions recommend that the consumer should be entitled to a reverse burden of proof that faults appearing within six months of delivery were present when the goods were delivered.⁷⁷ This six-month reverse burden of proof should be suspended while repairs are being carried out and should resume when the goods are returned after repair.⁷⁸ A further six-month reverse burden of proof period should start after the goods are redelivered following replacement.⁷⁹

The CESL proposes different rules for contracts where the buyer is a trader and where the buyer is a consumer. The latter is defined as a natural person acting for purposes outside his trade, business, craft or profession.⁸⁰ There are also special rules for contracts for the supply of digital content to consumers. Only the general remedies proposed for consumers who bought non-conforming goods will be briefly mentioned here. It is proposed that the consumer has a right to terminate and thus get a refund at any stage provided that the seller's non-performance of his obligation to deliver conforming goods is fundamental within the meaning of art 87.⁸¹ Thus the non-conformity must be sufficiently serious before the consumer may cancel. The consumer may instead choose between the remedying of a non-conformity or a replacement, 'unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate'.⁸² To determine whether the costs would be disproportionate, regard will be had to 'the value of the goods if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be completed without significant inconvenience to the consumer'.⁸³ If the consumer requested either a repair or replacement, the consumer may only exercise a right to terminate if the seller has not completed the repair or replacement within a reasonable time, not exceeding thirty days.

4.3 Three-month guarantee on repairs

Section 56(3) CPA provides that if a supplier repairs the goods or any component thereof, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods or refund the price paid for the goods.

⁷⁷ Paragraph 3.97.

⁷⁸ Page 67.

⁷⁹ *Ibid.*

⁸⁰ Article 2(f).

⁸¹ Article 114.

⁸² Article 111.

⁸³ Article 111.

4.4 Savings clause for common-law rights

Section 56(4) provides that the implied warranty in section 56(1) and the right to a repair, replacement or refund set out in section 56(2) are in addition to any other warranty implied by law and any express warranty stipulated by a supplier. This bolsters the general savings clause for common law rights in section 2(10), according to which ‘no provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.’

5 Conclusion

As is the case with other parts of the CPA, sections 55 and 56 create difficulties of interpretation, which should be removed by clearer drafting.

These sections of the CPA also provide stronger protection to consumers than the minimum standards required by the EC Consumer Sales Directive, and the rules proposed in the CESL and by the Law Commissions in the United Kingdom, particularly in respect of the right to durability, and the fact that the consumer may choose between different remedies for six months. The latter right is too unbalanced in favour of consumers and will unfairly affect suppliers detrimentally.

No doubt, there will also be calls from courts, business and others that sections 55 and 56 be amended in this regard. Proper comparative research should inform such amendments.
