

refuse to grant a delictual action if the prejudiced party had adequate contractual remedies at his disposal. In such a case, it has been held that there is no policy imperative for the law to superimpose a further (delictual) remedy and this notwithstanding the fact that the conduct complained of constitutes an independent delict. A delictual action is also unavailable to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so (see *Trustees, Two Oceans Aquarium Trust* and *AB Ventures*; para 1 above). As stated previously (Neethling and Potgieter *Delict* 261 fn 85), it remains difficult to reconcile this approach with the judgment in *Holtzhausen* where the Supreme Court of Appeal emphatically held that an independent delict – that is, where the delict relied on does not consist solely in breach of a term of the contract but complies with the general principles of delictual liability – may indeed found Aquilian liability despite the fact that the plaintiff could have protected himself by contractual means. In our view, where a delictual action has not expressly been excluded in a contract, the law should be loath not to allow the Aquilian action for an independent delict in a contractual setting.

J NEETHLING

University of the Free State

JM POTGIETER

University of South Africa

**ASPECTS OF UNSOLICITED GOODS OR SERVICES IN TERMS OF
THE CONSUMER PROTECTION ACT 68 OF 2008: AN ANALYSIS**

1 Introduction

The Consumer Protection Act 68 of 2008 (CPA) was published in the *Government Gazette* on 29 April 2009 (GG 32186 of 29 April 2009; see also Schedule 2 to the CPA; and Stassen July 2009 *De Rebus* 42–44 for a concise overview of the commencement dates of application of the sections of the CPA). The CPA came into full operation on 1 April 2011 (GN 917 in GG 33851 of 23 September 2010).

The CPA replaced the fragmented and outdated South African framework of consumer law contained in several pieces of legislation (the Business Names Act 27 of 1960; the Price Control Act 25 of 1964; the Sale and Service Matters Act 25 of 1964; the Trade Practices Act 76 of 1976; and the Consumer Affairs (Unfair Business Practices) Act 71 of 1988). The CPA serves as a comprehensive source of consumer law and, together with the National Credit Act 34 of 2005 (NCA), forms a South African framework of consumer law (see also Woker 2010 *Obiter* 217–231 for a discussion of reasons why the Department of Trade and Industry deemed it necessary to introduce consumer protection legislation).

The CPA introduced several concepts and principles which are new to South African law. One such concept is so-called unsolicited goods and services and the prevention thereof as provided for in terms of section 21 of the CPA. Unsolicited goods and services can, in laymen's language, be described as unrequested or unwanted goods or services and, in the narrow sense, as goods or services that are delivered to a consumer without the consumer's knowledge or consent for

which the consumer is expected to pay. A well-known example of this is where a consumer receives books in the post without having ordered them, together with an invoice in respect thereof, indicating that the consumer will be automatically bound by a purchase agreement with the supplier if the books are not returned to the latter.

Technically, the consumer's failure to respond or act (by not returning the books to the supplier), cannot result in the consumer's acceptance of the supplier's offer (Christie and Bradfield *The law of contract in South Africa* (2011) 69). Suppliers have, however, continued to use this method to contract with consumers and legislation was accordingly introduced to curb these practices and to protect consumers (*ibid*).

Section 21 of the CPA addresses this problem. The purpose of this provision is two-fold, namely, to prevent the supplier of unsolicited goods or services to supply such goods or services and to penalise a supplier who does not comply therewith. The provision accordingly protects the consumer who is under the impression that he has an obligation to perform in the event that unsolicited goods or services are delivered to him (see Van Eeden *A guide to the Consumer Protection Act* (2009) 217; Van Eeden *Consumer protection law in South Africa* (2013) 343). This note deals with the circumstances under which goods or services are deemed to be "unsolicited"; the consequences of goods or services being unsolicited; and certain other issues arising from such consequences.

2 Structure, interpretation and purpose of section 21

Before section 21 is analysed, it is necessary to give some background as to its structure, purpose and interpretation.

2.1 Structure

Section 21(1) sets out the circumstances under which goods or services are deemed to be unsolicited. In the event of a misdelivery of goods or services, these circumstances are further qualified by section 21(2). Section 21(3) places a duty on a consumer not to frustrate or impede any reasonable action instituted by the supplier for the recovery of the unsolicited goods within a prescribed period. Section 21(4) sets out the consequences for the consumer's non-compliance with section 21(3). Subsections 21(5)–(9) set out various consequences of the supply of unsolicited goods or services such as possible action by a consumer when he is in possession of, and the proprietary consequences of being in possession of, unsolicited goods (s 21(5)–(6)) and payment in respect of unsolicited goods (s 21(7)–(9)).

2.2 Interpretation and purpose

Section 2 of the CPA deals with its interpretation. The CPA must be interpreted in a manner that gives effect to its purposes as set out in section 3 (s 2(1)). In interpreting section 21, effect must therefore be given to certain purposes set out in section 3 of the CPA, some of which are served by regulating unsolicited goods or services. Section 21, which forms part of the consumer's right to choose (ch 2, part C of the CPA) may, among others, serve the aims of:

- "promoting fair business practices" (s 3(1)(c)) since it addresses the business practice of "inertia selling",

- protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise, improper trade practices since it protects consumers against the improper practice of “inertia selling”; and
- preventing “deceptive, misleading unfair or fraudulent conduct” (s 3(1)(d)) since it prevents the practice of “inertia selling”.

The practice of “inertia selling” exploits the ignorance of the general public concerning contract law, since it often gave the consumer the impression that he had to do something in order to prevent becoming obligated (see Van Eeden *Consumer protection law in South Africa* 343 and Nagel *et al Commercial law* (2011) para 41.54 who state that section 21 is also an attempt at preventing “inertia selling”).

3 What are unsolicited goods and services?

In terms of section 21 of the CPA, only goods or services which are delivered under specific circumstances will be deemed unsolicited.

Although the CPA does not define the term “unsolicited, goods or services”, goods and services are deemed to be unsolicited in the following circumstances (subject to the qualifications set out in section 21(2)):

- if goods or services are delivered to a consumer by or on behalf of a supplier, during the direct marketing thereof, without requiring or arranging payment for such goods or services (s 21(1)(a). Direct marketing is defined in section 1 as “to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of (a) promoting or offering to supply, in the ordinary course of business, any goods or services to a person; or (b) requesting the person to make a donation of any kind for any reason”;
- if the consumer is a party to an agreement in terms of which goods are delivered to the consumer periodically and the supplier delivers goods or services during the course of the agreement that differ materially from that which were agreed on between them. The goods or services that differ materially from that which were agreed on are deemed to be unsolicited, unless the consumer expressly consented to the material change in the goods or services (s 21(1)(b)(i)). In the first part of this section, only “goods” are referred to, whereas “goods and services” are referred to in the latter part. The omission of the words “or services” in the first part is presumably an error (see Van Heerden “Unsolicited goods or services in terms of the Consumer Protection Act 68 of 2008” 2011 *Int J of Private Law* 667 672 where she states that it appears that once a supplier has performed unsolicited services to a consumer, the service may immediately be regarded as unsolicited);
- if the consumer is a party to an agreement in terms of which goods are delivered to the consumer periodically and the supplier continues to deliver any goods to the consumer after the termination of the agreement, other than in terms of a new agreement (s 21(1)(b)(ii); implied consensus can therefore not be implied if a consumer periodically accepts goods after the termination of an agreement, unless the parties expressly enter into a new contract). The word “services” is left out in the first and latter part of this section, which is presumably an error (see reference to Van Heerden above);
- if the supplier delivers goods or performs services at a place, date or time which differs from that which was agreed on between the supplier and the consumer and the latter rejects the delivery of such goods or services

(s 21(1)(c)). In terms of section 19(6)(c) of the CPA, the consumer has a right to reject goods or services which are delivered at a place, date and time which differ from that agreed on, cancel the agreement without penalty and to treat the goods and/or services as unsolicited;

- if the supplier delivers more goods than that which was agreed with the consumer (s 21(1)(d)). The excess goods are deemed unsolicited unless the consumer rejects the delivery of *all* (own emphasis) of the goods in terms of section 19(7)(a). In terms of section 19(7)(a), the consumer has a right to reject all of the delivered goods if a larger quantity than that which was agreed on was delivered. The word “services” is again omitted from this subsection;
- if the supplier delivers goods or services to the consumer which were not expressly or implicitly requested by the consumer (s 21(1)(e)).

As indicated above, goods or services will only be unsolicited if the requirements of section 21(2) are also complied with. This subsection sets out two additional requirements that must be complied with in the event of the so-called misdelivery (or an incorrect delivery) of goods or services by a supplier. These requirements are:

- if the supplier informs the consumer within ten business days from the date of delivery of the goods that the goods were delivered in error, the goods will *only* (own emphasis) be unsolicited if the supplier fails to collect such goods from the consumer within twenty business days from the date on which the consumer was informed of such misdelivery by the supplier (s 21(2)(a)); or
- if goods are delivered to the consumer and (i) the goods have been misdelivered and are clearly addressed to another person; or (ii) it would be apparent, taking into consideration the circumstances of delivery, to the ordinary alert consumer that the goods were intended for someone else (s 21(2)(b)(i)–(ii)), such goods will *only* (own emphasis) be unsolicited if the apparent supplier or deliverer fails to collect such goods from the consumer within twenty business days from the date on which the consumer informed the supplier or deliverer of such misdelivery.

If goods are therefore misdelivered to a consumer by a supplier resulting from a *bona fide* error or mistake, such goods will, in terms of section 21(2), be unsolicited if the supplier or deliverer fails to collect such goods from the consumer within the prescribed number of days from the date on which the consumer or the supplier, as the case may be, was informed of such misdelivery. The obvious question that arises from this is whether a consumer has an obligation to inform the supplier of a misdelivery.

4 Does section 21 impose any obligations on a consumer?

The prerequisites in section 21(2) cater for instances where goods were misdelivered or delivered in error, whereas goods that were delivered purposely to the consumer without being requested are not provided for (see Jacobs, Stoop and Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 *PELJ* 302 328–329; and van Heerden 2011 *Int J of Private Law* 667 673 where the author submits that to expect the legislature to have differentiated between the situations where goods were *bona fide* mistakenly delivered as opposed to the situation where goods are *mala fide* delivered “would have created an evidentiary predicament in the sense that formulating an appropriate onus that had to be discharged by a supplier in

this regard to avoid goods becoming unsolicited might have been extremely onerous and cumbersome”). However, since section 21(2) seems to apply to *bona fide* suppliers only, the legal position in the event of *mala fide* suppliers will also have to be considered (see para 4 2 below).

4 1 *Misdelivery by a bona fide supplier*

It is clear from the above that goods that are delivered due to a *bona fide* error by the supplier can be unsolicited if the supplier or deliverer does not timeously recover or collect the goods from the consumer. As mentioned above, the question that arises is whether a consumer is obliged to notify the supplier or deliverer of such misdelivery in terms of section 21. From the wording of section 21(2)(b) it appears that goods will only be unsolicited if the consumer informs the supplier that the goods were misdelivered: “the goods become unsolicited goods *only if* (own emphasis) the recipient informs the apparent supplier or the deliverer that the goods were misdelivered”. It therefore appears that the supplier must be informed of the misdelivery as a prerequisite for such goods to be treated as unsolicited by the consumer. The CPA does not prescribe the manner in which the consumer must inform the supplier of a misdelivery.

It could be argued that the consumer is not obliged to inform the supplier of the misdelivery and that it is entitled to retain such goods and treat such goods as unsolicited in terms of section 21(5), despite not having notified the supplier of such misdelivery. It is, however, unlikely that this was the intention of the legislator. Should that be the case, a supplier would be penalised even if misdelivery resulted from the negligence of a courier or the postal service. The purpose of section 21 is to bring the delivery of unsolicited goods by suppliers to consumers to an end rather than to punish the negligent acts of deliverers and such interpretation of this provision is unlikely. Nevertheless, this provision does not expressly impose a positive obligation on a consumer to notify a supplier of misdelivery, nor does the provision prescribe a specific time period within which the consumer is required to notify the supplier of such misdelivery. It is submitted that if a consumer remains in possession of misdelivered goods and the consumer fails to inform the supplier of the misdelivery, such goods would not be unsolicited in terms of section 21 and should be dealt with in terms of the common-law rules of undue enrichment as section 21 only applies to circumstances in which the consumer notifies the supplier of the misdelivery.

4 2 *“Intentional” misdelivery by a mala fide supplier*

It is uncertain what the legal position will be if the goods were not misdelivered to the consumer (put differently “intentionally misdelivered”); for example, where the supplier delivers goods or services which were not expressly or implicitly requested by the consumer and/or these goods or services are not delivered due to a *bona fide* error (as provided for in section 21(1)(e)). This will exclude the circumstances in which the goods are addressed to a person other than the consumer and where it would be apparent to the ordinary alert consumer that the goods were intended for another person (see s 21(2)(b)). Would the prerequisites in terms of in section 21(2) still apply?

In terms of section 21(2)(a), if the supplier notifies the consumer that goods were misdelivered within ten business days from the date on which such goods were delivered, the goods will be unsolicited only if the supplier fails to collect the goods from the consumer within twenty business days from the date on

which the consumer was notified of such misdelivery. Therefore, if the consumer is not timeously contacted by the supplier, the consumer will be entitled to retain such goods and treat the goods as unsolicited.

The prerequisite in section 21(2) only applies where goods were misdelivered and will accordingly not apply in circumstances where goods were not clearly misdelivered (or “intentionally misdelivered”). If goods, which were not expressly ordered by a consumer, are delivered to the latter and are clearly intended for the consumer, such goods have clearly not been misdelivered and the consumer will be under no obligation to notify the supplier of the misdelivery (see also Gouws “Unwanted goods” April 2009 *De Rebus* 16). The consumer accordingly becomes the owner of such goods in accordance with section 21(6) of the CPA. An example is where X receives books from Y Bookshop via post and such books are clearly addressed to X without X having ordered them. The books were clearly not misdelivered and unless Y Bookshop notifies X of a possible misdelivery in terms of section 21(2), X will be entitled to retain the books in terms of section 21(1)(e) and 21(5). X is also under no obligation to notify Y Bookshop of the “misdelivery” under these circumstances.

4 3 Duty not to frustrate or impede any reasonable action instituted by the supplier for the recovery of the unsolicited goods

Section 21 imposes an additional obligation on the consumer once he or she has notified the supplier of the misdelivery. In terms of section 21(3)(a), a consumer may not frustrate or impede any reasonable action instituted by the supplier for the recovery of the unsolicited goods within the prescribed period. If the consumer does frustrate or impede the supplier to recover the unsolicited goods, the consumer will be liable to the supplier for any additional costs relating to the recovery of, or damage to such goods as a result thereof (s 21(4)). The consumer is not liable for the costs pertaining to the recovery or further delivery of the goods (s 21(3)(b)). The consumer is also not liable for any damage to the goods during the time that such goods were in the consumer’s possession unless such damage was intentionally caused by the consumer (s 21(3)(c)). The rights which a consumer acquires in respect of unsolicited goods or further consequences of unsolicited goods or services are discussed below.

5 Does section 21 create additional rights for the consumer?

The consumer has the right either to retain unsolicited goods that are in his possession or to return such goods to the supplier at the supplier’s cost and risk (s 21(5)). If the consumer lawfully retains such unsolicited goods, ownership in respect thereof passes to the consumer unconditionally (subject to the right or claim which a third party may have in respect of such goods) (s 21(6)(a)). The supplier or deliverer is liable to the third party in respect of such right or claim relating to the unsolicited goods (s 21(6)(b)). Most importantly, the consumer is under no obligation to pay the supplier for the unsolicited goods or services. The consumer also has no obligation to pay the deliverer of unsolicited goods for the delivery thereof (s 21(7)). Furthermore, a supplier is prohibited from enforcing any right, including for the recovery of, or claiming payment for, any unsolicited goods or services left in possession of the consumer (s 21(8)). It may be argued that this provision also excludes the supplier’s claim for unjust enrichment. If the consumer has made any payment to the supplier or the deliverer in respect of the unsolicited goods, such amounts may be recovered from the supplier or deliverer

with interest accrued thereon (in terms of the Prescribed Rate of Interest Act 55 of 1975), calculated from the date on which it was paid to the supplier (s 21(9)).

Thus, to conclude, if the consumer lawfully retains unsolicited goods, ownership in respect thereof passes to the consumer unconditionally (subject to the right or claim which a third party may have in respect of such goods) (s 21(6)(a)). The supplier or deliverer is liable to the third party in respect of such right or claim relating to the unsolicited goods (a 21(6)(b)). However, the consumer is under no obligation to pay the supplier for the unsolicited goods or services.

6 Should section 21 be challenged?

From the above it is clear that the consumer is entitled to retain unsolicited goods that are in his or her possession if the supplier fails to take steps to recover such goods from the consumer in the prescribed time. The goods are, however, only unsolicited if the consumer informed the supplier of the misdelivery and the supplier failed to collect them. Where no misdelivery had taken place (in other words, deliberate or intentional action), the goods will be unsolicited, irrespective of the fact that the consumer did not notify the supplier of the misdelivery. The consequences of goods being unsolicited are, amongst others, that the consumer may retain them (s 21(5)(a)); ownership thereof passes to the consumer (s 21(6)(a)); and the consumer is under no obligation to pay the supplier for them (s 21(7)).

The Constitution of the Republic of South Africa, however, states in section 25(1) that no person may be deprived of his or her property except in terms of law of general application and that no law may permit the arbitrary deprivation of property. Furthermore, property may only be expropriated in terms of law of general application for a public purpose or in the public interest (s 25(2)).

In *FNB v CSARS (First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002) SA 768 (CC); 2002 7 BCLR 702 (CC)*, the court followed a two-phase approach in applying section 25 of the Constitution, namely, to determine (i) whether the interest which had been affected by the operation of a particular law qualified as property under section 25(1) of the Constitution (para 51); and (ii) whether a deprivation of that property interest had occurred and, if so, whether the deprivation was in conflict with section 25(1), in particular the requirement of non-arbitrariness (para 61).

It must be considered whether the consequences of goods being unsolicited, as set out in section 21 of the CPA, constitute a violation of the rights set out in sections 25(1) and (2) of the Constitution by applying the aforementioned two-phased approach.

This aspect of the arbitrary deprivation of property and the two-phased approach was considered in respect of sections 74 and 89 of the National Credit Act 34 of 2005 (NCA), the consequences of which are similar to those of section 21 of the CPA. Section 74(1) of the NCA states that a credit provider must not make an offer to enter into a credit agreement on the basis that the agreement will automatically come into existence unless the consumer declines the offer. If such an agreement is entered into, the agreement is unlawful (s 89(2)(b) of the NCA). The consequences of an agreement being unlawful are (i) that the agreement is void *ab initio*; (ii) that the credit provider must *refund to the consumer*

any money paid to the credit provider (own emphasis) under the agreement with interest thereon (s 89(5)(a)–(b)); and (iii) the *credit provider's rights in terms of the unlawful agreement are cancelled* (own emphasis), unless the consumer would be unjustly enriched thereby (s 89(5)(c)(i)), in which event the credit provider's rights will be forfeited to the state (s 89(5)(c)(ii)). In both circumstances the credit provider, however, forfeits the amount borrowed to the consumer (see Otto "Die *par delictum*-reël en die National Credit Act" 2009 *TSAR* 417; and Otto "National Credit Act, ongeoorloofde ooreenkomste en meevallertjies vir die fiscus" 2010 *TSAR* 161).

Section 89 of the NCA was applied in *Cherangani Trade and Investments 107 (Pty) Ltd v Mason* unreported case no 6712/2008 and 278/2009 [2009] ZAFSHC 30 of 12 March 2009, where the court declared the agreement between the parties void *ab initio* based on section 89(2)(d) of the NCA because the credit provider was supposed to have been registered as a credit provider at the time that the agreement was concluded but was not (para 27). The court declared that, in terms of section 89(5)(c), the credit provider was not entitled to recover any amounts due to it by the consumer (para 35) and that the credit provider's rights to claim any payment from the consumer were forfeited to the state (para 37).

On 8 April 2011 the Constitutional Court refused *Cherangani Trade and Invest 107 (Pty) Ltd v Mason* 2011 11) BCLR 1123 (CC)), based on the following reasons:

- Certain arguments that were advanced in the Constitutional Court were raised for the first time in that court and it is not desirable for the Constitutional Court to be a court of first and last instance (para 22). These matters included, amongst others, that (i) the court has a discretion rather than an obligation, in terms of section 39(2) of the Constitution, how and whether to enforce section 89(5)(c) of the NCA if it weighed the consumer's right against the credit provider's right set out in section 25(1) of the Constitution (not to be arbitrarily deprived of its property) (para 8); and (ii) the disproportionality of the penalty imposed on the credit provider (being the forfeiture of its purported rights to payment of money or delivery of goods) due to it not being registered as a credit provider (para 15).
- The state should have been joined as a party to the proceedings in view of the fact that the state has a direct and substantial interest in the matter (para 16). This interest arises from the fact that, if a forfeiture penalty is imposed by the court against a service provider, the state would have a right to recover against the service provider.
- The appellant provided no particulars of the extent to which it will be prejudiced by the High Court order or any other basis upon which the High Court, if the case is referred back to it, could find for the appellant (para 23).

Section 89 was again considered in *Opperman v Boonzaaier* unreported case no 24887/2010 of 17 April 2012 (WCC)) per Binns-Ward J, in which the court *a quo* found that section 89(5)(c) permits the arbitrary deprivation of property, contrary to section 25(1) of the Constitution, because it denies an unregistered credit provider any claim against the consumer for the repayment of money borrowed to the consumer without affording a court the discretion to instruct otherwise under certain circumstances (para 72). The High Court interpreted the provision to have only two possible consequences, namely, that the credit provider's rights are cancelled (and the consumer retains the loan amount), unless this will

unjustly enrich the consumer in which case the credit provider's rights must be forfeited to the state (para 26). In both circumstances provided for in section 89(5)(c), the credit provider loses his right to restitution under the credit agreement and is prohibited from claiming for the unjustified enrichment of the consumer (para 70).

In *National Credit Regulator v Opperman* 2013 2 BCLR 170 (CC); 2013 2 SA 1 (CC), the Constitutional Court declared section 89(5)(c) of the NCA to be constitutionally invalid. This was mainly because this provision resulted in an arbitrary deprivation of the credit provider's property in breach of section 25(1) of the Constitution and the deprivation was found not to be reasonable and justifiable under section 36 of the Constitution.

In the majority decision, the Constitutional Court found that section 89(5)(c) is a punitive measure which eliminates the credit provider's right to claim restitution, which deprives the credit provider of his property. The court found that the reason provided for this deprivation, namely, to discourage the provision of credit outside of the framework provided by the NCA, was not sufficient and the means used to achieve the purpose of the provision was disproportionate (para 71).

The Constitutional Court confirmed that section 89(5)(c) results in the arbitrary deprivation of property, contrary to section 25(1) of the Constitution. The court further held that the deprivation was not a reasonable and justifiable limitation of the credit provider's right under section 36 of the Constitution as there are less restrictive means to achieve the purpose of the provision (para 76). The court further held that the failure to allow a court a discretion to distinguish between, for example (i) credit providers who intentionally exploit consumers and those who fail to register because of ignorance and lend money to a friend on an *ad hoc* basis (*ibid*); or (ii) *ad hoc* credit providers and credit providers who provide credit in the ordinary course of their business, as section 40(1)(b) of the NCA only requires a person to register as a credit provider if the total debt owed to that credit provider under all outstanding credit agreements exceeds the threshold prescribed in terms of s 42(1) of the NCA, is disproportional.

It could be argued that section 21(7) (or even s 21(5)–(7)) of the CPA similarly and arbitrarily deprives the supplier of its property in that (i) unsolicited goods may be retained by the consumer (s 21(5)); (ii) ownership in the unsolicited goods “unconditionally” passes to the consumer (s 21(6); ownership passes “unconditionally” in the sense that a third party's rights are not enforceable against the consumer, but rather against the person who supplied or delivered those goods); (iii) the consumer has no obligation to pay the supplier for the unsolicited goods (s 21(7)); and the supplier must not demand or assert any right to payment for such unsolicited goods, or the delivery of any such goods, from the consumer (s 21(8)).

The purpose of section 21 of the CPA is to give effect to the consumer's right to choose by prohibiting and penalising suppliers for delivering unsolicited goods or services to the consumer. From the *Opperman* case above, this reason for the deprivation of the supplier's property may not be a reasonable and justifiable limitation of the supplier's right under section 36 of the Constitution as there are less restrictive means to achieve the purpose of the provision (see also Gouws April 2009 *De Rebus* 16).

If a supplier wishes to institute an unjust enrichment claim against a consumer, due to ownership in the unsolicited goods unconditionally passing to the consumer without payment being due in respect thereof, *Opperman* should be kept in mind. In *Opperman* the court stated that in order for a party to successfully claim on the basis of unjust enrichment, he or she must be free of turpitude and show that he or she has not acted dishonourably (para 16) (in terms of the *par delictum* rule in which it is in the public's interest not to assist those who approach the courts with an "unclean hand" (see also in general Van der Merwe *et al Contract general principles* (2012) 176–182 for a discussion of the *par delictum* rule). In *Opperman*, however, it was generally accepted that Opperman did not act with turpitude as he was unaware that he was required to register as a credit provider. In cases where the supplier acts with turpitude in delivering unsolicited goods or services to the consumer in terms of the CPA, the court has the discretion to reject or grant an unjust enrichment claim. However, as indicated above (para 5), it may be argued that section 21(8) of the CPA excludes the supplier's claim on the basis of unjust enrichment.

7 Conclusion

Section 21 of the CPA addresses the issue of unwanted goods or services. This section combats or prevents typical situations where suppliers deliver goods or perform services without a consumer's request or knowledge. However, although this exclusion seems to be straightforward, its implementation is riddled with technicalities and potential issues, some of which are discussed above. These issues include:

- the prerequisites in section 21(2) cater for instances in which goods were misdelivered or delivered in error, whereas goods that were delivered purposely to the consumer without being requested are not provided for (in this specific subsection);
- section 21(2) does not prescribe the manner in which the consumer must inform the supplier of a misdelivery or a time limit for such notice; and
- section 21(7) of the CPA may constitute a violation of or unreasonably infringe on the supplier's rights set out in sections 25(1) and (2) of the Constitution.

In light of the above, it is uncertain whether section 21 of the CPA is adequate to properly address the problem of unsolicited goods or services.

PHILIP N STOOP

University of South Africa

HEIDI TAYLOR

Bowman Gilfillan Inc