

Advisory Note 5: Delivery of Goods Bought on Credit

This 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 the Consumer Protection Act with regard to whether a supplier may require payment of / start deducting instalments for goods sold on credit before the goods have been delivered.

Applicable law:

- National Credit Act
- Law of Contract
- Consumer Protection Act
- International Law

National Credit Act (NCA)

Does the transaction fall within the scope of the **NCA**?

Section 8 of the NCA defines a *credit transaction* as being a credit agreement:

- A credit transaction is any agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of:
 - the agreement; or
 - the amount that has been deferred.
- A credit transaction includes an instalment agreement.

Goods bought on credit from a supplier will therefore be a credit transaction in terms of the NCA.

Remedies in terms of the NCA:

The Act does provide rules in terms of:

- The listing of Credit Bureaux information.
- The enforcement of the debt.

In terms of Section 72 of the NCA every person has a right to be advised by a credit provider within the prescribed time before any prescribed adverse information concerning the person is reported by it to a Credit Bureaux.

Section 129 of the NCA provides that if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, ADR agent, consumer court or ombud

with jurisdiction, so that the parties can resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

The credit provider may not commence any legal proceedings to enforce the agreement before first providing such notice to the consumer.

Therefore, before listing any adverse information or commencing with legal action a credit provider in terms of the NCA must first give notice to the consumer.

Contract Law

One should first distinguish between situations where the supplier is the credit provider and where the agreements were financed by someone else.

Where the agreement was financed by someone other than the supplier:

In this regard it must be borne in mind that there is more than one agreement applicable:

- 1.) The loan agreement between the consumer and the credit provider, whereby the consumer applied for credit to finance the goods.
- 2.) An agreement between the consumer and the supplier. Whereby the supplier has accepted the consumer's offer to purchase goods.

The consumer therefore entered into a credit agreement with the credit provider, which is a contract separate from the sale agreement between the consumer and the supplier.

A credit provider will therefore be entitled to the instalment due under the credit agreement even if the supplier failed to deliver the goods.

Where the agreement was financed by the supplier:

The terms and conditions of the contract will determine when payment is due under the credit agreement.

One will also have to look at the terms of the contract and if it covers undelivered goods.

In addition to the general terms and conditions of the contract, if a supplier fails or neglects to perform timeously, when performance is due, he is guilty of breach of contract.

Breach of contract is a culpable interference by one contracting party with the rights of the other contracting party.

This breach of contract is called *Mora Debitoris*. *Mora Debitoris* relates to the time of performance alone and not the nature of performance.

Two forms of *Mora Debitoris* can be distinguished: *mora ex re* and *mora ex persona*.

Mora ex re – this occurs if the day of the performance is fixed by the contract and the supplier fails to perform on or before such day. The delay must be due to the fault of the supplier. The supplier will not be liable for breach if the delay was caused by force over which he had no control or by acts of people for whose conduct he cannot be held responsible.

Mora ex persona – this occurs where no day for performance has been fixed. Where no day has been fixed for performance, the supplier must perform within a reasonable period after the conclusion of the agreement. The consumer must then fix a time by making a demand on the supplier to perform at a specified time. When this time arrives and the supplier fails to perform he falls in *mora ex persona*. The time fixed in the demand must however be reasonable.

There are four possible remedies open to a consumer whose supplier is in *mora* namely:

- Performance by the supplier may be enforced.
- Consumer may cancel the contract in certain circumstances.
- Consumer may claim damages with regards to any loss suffered.
- Damages may be claimed together with specific performance or with cancellation.

Therefore a seller who fails to make the thing sold available at the appropriate time is *in mora*. An example of this is the case of *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377 where no date was set for the delivery of 200 000 suitcase corners. The seller sent medium size corners despite knowing that the buyer requiring 10 000 small suitcase corners urgently. Three weeks later, the buyer cancelled contract. The court held that the buyer was entitled to do so.

The Consumer Protection Act (CPA)

The Act does not apply to a transaction that constitutes a credit agreement under the NCA, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of the Act.

In terms of the delivery of the goods are concerned the CPA provides the following:

19(2) unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that-

- (a) the supplier is responsible to deliver the goods or perform the services-
 - (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;

19(6) if the supplier tenders the delivery or performance of any service at a location, or on a date or at a time other than as agreed with the consumer, the consumer may either-

- (a) accept the delivery or performance at the location, date and time;
- (b) require the delivery or performance at the agreed location date and time, if the that date and time have not yet passed; or
- (c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21 of the CPA.

In terms of the CPA the consumer can therefore cancel the agreement if goods are not delivered at the agreed location, date and time, without penalty and can treat goods as unsolicited goods or services.

Section (40) (d) of the CPA also prohibits the use of unconscionable conduct when a supplier demand for, or collection of, payment for goods or services by a consumer.

It would certainly not be reasonable to force a consumer to pay for goods bought under a credit agreement where the supplier has failed to deliver the goods.

International Law

It is permissible under the CPA to look to foreign law for guidance:

When buying goods in the UK the contract is governed by many laws including The Sale of Goods Act 1979.

The Sale of Goods Act 1979 states that goods must be delivered within a reasonable time. If delivery takes too long one can write to the trader giving a reasonable deadline for delivery otherwise you will cancel your order and claim a refund. If a definite date for delivery was given or if one asked for a particular delivery date and this was part of the agreement, then you are entitled to expect that delivery takes place on that date. If the goods are not delivered, you can either claim back costs you incurred or cancel the order and claim a refund.

Conclusion

There are no specific rights afforded in terms of the NCA to consumers who have bought goods on credit and the supplier failed to deliver the goods. If a consumer however stop paying his account due to non-delivery a credit provider must before listing any adverse information with a credit bureaux give the consumer notice of the listing.

The credit provider may also not commence with any legal action until it has given the consumer notice that he is in default and that he may refer a dispute under a credit agreement to a debt counsellor, ADR agent, consumer court or ombud with jurisdiction, so that the parties can resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

If a supplier sold goods on credit but failed to deliver the goods he will be in breach of the contract and the consumer in terms of contract law will have the following remedies:

- Performance by the supplier may be enforced.
- Consumer may cancel the contract in certain circumstances.
- Consumer may claim damages with regards to any loss suffered.
- Damages may be claimed together with specific performance or with cancellation.

In term of the Consumer Protection Act the consumer may cancel the agreement, without any penalty and may treat the goods as unsolicited goods if the goods are not delivered on the agreed location date and time.