

AANTEKENINGE

USING PROTOTYPE THEORY TO DETERMINE THE ORDINARY MEANING OF WORDS

OPSOMMING

Die gebruik van prototipeorie om die gewone betekenis van woorde te bepaal

Die uitleg van woorde tydens hofsake staan dikwels sentraal wanneer woorde se gewone betekenis ter sprake is. 'n Gewilde manier om 'n woord se gewone betekenis te bepaal is om dit in 'n woordeboek op te soek. Hoewel woordeboeke geldige hulpbronne is, is dit wel nodig om alternatiewe hulpbronne te ondersoek. Prototipeorie is 'n bekende taalwetenskaplike benadering waardeur 'n kategorie se beste voorbeeld of tiperendste lid vasgestel word. Betekenis lê op drie vlakke, naamlik die superordinaat, die basiese vlak en die subordinaat. 'n Mens vind prototipes dikwels op die basiese vlak en dit is ook hier waar die gewone betekenis van woorde dikwels verskyn. Dit is daarom behulpsaam om die prototipikaliteit van 'n betwiste woord te bepaal. Deur die betwiste woord se afstand van die prototipe te peil, kan 'n mens aflei in hoeverre 'n woord se gewone betekenis ter sprake is en wat daardie gewone betekenis behels. In hierdie aantekening, stel die outeurs regsgeleerdes aan prototipeorie bekend en lei die onderwerp in met twee metodes waarvolgens prototipes van konkrete kategorieë vasgestel kan word.

1 Introduction

When it comes to the interpretation of statutes, it should be safe to say that the majority of South African jurists know what is meant by “the ordinary meaning of words”. When a contested word is not defined in the relevant statute, it must be given its ordinary meaning: in other words, its plain, everyday and straightforward meaning. What qualifies as “ordinary meaning” is not always clear, as can be seen from the many South African legal scholars and judges who have tried to clarify this phenomenon. Hutton *Language, meaning and the law* (2009) 86 rather short-sightedly argues that linguists have made no contribution in clarifying “ordinary meaning”, which means that jurists cannot turn to linguistics for a better understanding. This is mostly because ordinary meaning is a legal and not a linguistic concept. To claim that a word or phrase might have an ordinary meaning is quite foreign to a linguist and almost on par with believing that a word has a single, straightforward meaning. There is nothing ordinary about meaning. Words are infamously ambiguous and can be very vague at times.

One of the most general ways jurists determine a word's ordinary meaning is by looking it up in a dictionary. Dictionaries are often seen as authoritative when it comes to meaning. If there is one thing jurists should know, it is that ordinary meaning is not equivalent to a dictionary definition. Dictionaries are limited in many ways and should only be seen as a starting point when searching for meaning (Carney and Bergh “'n Taalkundige perspektief op woordeboekgebruik in die hof: Die woordeboek as toevlugsoord” 2014 (11) *LitNet Akademies* 44–46).

Dictionaries do not contain the broader, pragmatic and contextual meaning of words often relevant in court cases.

A case in point would be the word “hijacking”. In *Cargo Africa CC v Gilbeys Distillers and Vintners (Pty) Ltd* 1998 4 SA 355 (N), Thirion J had to determine, among other things, whether a parked and unattended truck carrying liquor was hijacked or stolen. The defendants pleaded that the loss did not result from hijacking, mostly because the goods were not in transit when they were taken. Though the judge made it clear that the contested word’s ordinary meaning had to be scrutinised, he referred to it as an “exotic” word (365), a word that “has not yet become stereotyped” (*ibid*). He came to the conclusion that, even though the majority of dictionaries consulted associated the word with a threat of force and the taking of goods in transit, at least seven of the dictionaries made no references to this (356 364). As a result, the lack of force and its stationary status should be considered as one of the broader meanings of “hijacking”, albeit “not the more usual meaning” (364). Considering “hijacking” to be exotic by implication excludes it from any “ordinary” meaning. And claiming that the word has not been stereotyped is also not true. Hijacking as a phenomenon has increased dramatically since the 1990s, which has led to the lexical item becoming a very common and topical word in South Africa. We dare say that its stereotypical (and therefore, ordinary) meaning contains two criteria, namely, “in transit” and “force”. By saying this, however, we do not claim that “hijacking” does not have any other possible meanings. Yet, the moment you refer to a word’s broader meaning, you effectively move away from its ordinary meaning. When Thirion J argues that “hijacking” does not necessarily connote taking of goods in transit or with force, he no longer deals with its ordinary explanation. A word’s ordinary meaning is much closer to the stereotype.

The instance of “hijacking” is not an isolated occurrence; the interpretation of words is a common phenomenon in South African law (and that of other countries). Words are often part of litigation, as can be seen in the following examples: *Johannesburg Consolidated Investments Co v LK Investments* 1947 2 SA 465 (W) “boarding house”; *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA* 1958 4 SA 572 (A) “coast line”; *S v Mandela* 1972 3 SA 231 (A) “visitor”; *S v Crawford* 1979 2 SA 48 (A) “dealing in”; *Association of Amusement and Novelty Machine Operators v Minister of Justice* 1980 2 SA 636 (A) “pin-table”; *Jowells Transport v South African Road Transportation Services* 1986 2 SA 252 (SWA) “stock meal”; *S v Mafu* 1992 2 SACR 494 (A) “terrorist”; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 2 SACR 445 (CC) “pornography”; *Minister of Safety and Security v Xaba* 2004 1 SACR 149 (D) “search”; and *S v Engelbrecht* 2012 2 SACR 212 (GSJ) “accused”. Sometimes, the scrutiny of the contested word leads to the examination of other words as well, as can be seen in *Cape Town Municipality v Frerich Holdings (Pty) Ltd* 1981 3 SA 1200 (A) where “motor garage”, “service station”, “purpose”, “manner” and “discontinuation” were considered together with the main word “cessation”; in *S v Collop* 1981 1 SA 150 (A) the words “pregnancy”, “embryo” and “vrug” were considered together with the main word “foetus”; and in *S v Twin Springs (Pty) Ltd* 1981 1 SA 562 (N) the words “steengroef”, “stone”, “rock” and “coal” were studied together with the main word “quarry”.

This brings us to the purpose of this note. It is not our goal to criticise jurists like Thirion J in how they deal with ordinary words. Rather, we would like to answer Hutton’s call and propose at least one possible linguistic approach to

determine the ordinary meaning of words. There are a number of ways to determine the ordinary meaning of words, amongst others corpus linguistic and frame semantic approaches – which are not discussed in this note. For the purpose of this note, we would like to introduce legal scholars and practitioners to prototype theory. According to Solan “Judicial decisions and linguistic analysis: Is there a linguist in the court?” 1995 *Washington University LQ* 1079 prototype theory (or more precisely, categorisation) is possibly one of the best cognitive means to interpret meaning in judicial matters:

“Because the prototype approach to word meaning more closely approximates our actual knowledge of words, and because it ordinarily permits acknowledgement of gradations of meaning that we all, including judges, experience, I believe that courts should more consciously examine disputed terms in this way.”

In the following section we explain what prototypes are and how they relate to the ordinary meaning of at least concrete categories. We then illustrate how a prototype, (thus ordinary meaning), may be determined.

2 Prototypes

Prototypes are often viewed in opposition to the classical approach to categorisation. From the latter perspective, Aristotle saw categories as closed groups where items had to fulfil all the necessary criteria for them to be a member. Membership was binary, which meant that an item either belonged to a category or it did not. Categories had fixed borders and all items within a category had equal status. If you consider the category “dog” within the classical understanding, it means that all members of this category had to be similar. For a member to qualify as a dog, it needs to have four legs; it must be covered in fur; it must have a tail; it must be able to bark; and it has to move in packs; and so on. The moment there is a species that does not have fur, for instance, that species is no longer a dog. Membership criteria are clear and definite and the moment an item does not fulfil all of the criteria, it can no longer be part of that category.

Conversely, prototype theory holds that categories are fuzzy at the margins and that items do not have equal status. Membership does not depend on fixed criteria. Dogs differ greatly from one another, but their differences do not make them less dog. A prototype is the best exemplar of a category. It is the most typical item within its group. We can tell a lot about the meaning of a word by studying an item’s relationship with the prototype (see Löbner *Semantik* (2003) 267; Langacker *Foundations of cognitive grammar* Vol 1 (1987) 59–60).

Rosch “Cognitive representation of semantic categories” 1975 *J of Experimental Psychology: General* 104 did a series of experiments in which she expected participants to arrange a series of items within a natural category according to typicality. The category for “Furniture” sees a chair as the best example whereas a telephone is seen as the worst. This experiment revealed that there are grades of membership; when speakers classify items they simultaneously grade (stereotype) them cognitively (Taylor *Linguistic categorisation* (2009) 47). A fridge and a stove might also be examples of furniture, but speakers view a desk, an ottoman and a wardrobe as more representative examples of furniture. Context is a very important aspect of prototypes and a determining factor in categorisation (Rosch “Principles of categorisation” in Margolis and Laurence (eds) *Concepts: Core readings* (2000) 202). A penguin might be seen as one of the worst examples for the category “Bird”, but once you consider a new category, that is “Arctic Birds”, a penguin might be its best example.

When we study the meaning of words, we can identify three taxonomic levels of categorisation, namely, the superordinate level, the basic level and the subordinate level. When most people see a picture of an apple, they do not classify the image as “a kind of fruit”; they would rather call the image in the picture an “apple”. Some people may go one step further and call this image a “Golden Delicious”, though this would be rare. The superordinate level is the broader and vaguer level (“a kind of fruit”), whereas the subordinate level is much more precise (“Golden Delicious”). The basic level is representative of ordinary words; the more typical exemplars of a category (the prototype) are usually found at this level (Mangasser-Wahl *Von der Prototypentheorie zur empirischen Semantik* (2000) 34–35). It is mostly at the basic level that speakers name items and this level is also richer in information than the other two levels (Rosch *et al* “Basic objects in natural categories” 1976 *Cognitive Psychology* 8; Taylor “Prototype theory” (2011) 8 <http://bit.ly/1MHN0XT>, accessed on 3 September 2014). Moreover, the basic level is representative of the whole category: the word “apple” simultaneously represents both “a kind of fruit” and “Golden Delicious” (Löbner 274); especially because items at this level have many attributes in common. Furthermore, basic level categories contain words that are used frequently and which are the first words to be acquired by speakers (in context) (Rosch *et al* (1976) 406 ff; Rosch (2000) 198; Löbner 276; Taylor (2011) 8–9; see also Fillmore “Scenes-and-frames semantics” in Zampolli (ed) *Linguistic structures* (1977) 62). In other words, most children will learn the word “apple” first, followed by the words “kinds of fruit” and “Golden Delicious”.

Rosch *et al* found that adults would name items of subordinate level mostly at the basic level despite knowing what the correct terms are at both superordinate and subordinate levels ((1976) 423 ff; (2000) 196). Referring to an ornate table in your reception area as a “table” rather than a “piece of furniture” or a “piano table” would be an example of this. Where the basic level category could be seen as representative of ordinary meaning, the subordinate level is typical of terminology.

Another characteristic of prototypes is their sensitivity to culture. The way we use/handle certain objects and the way we understand specific concepts are influenced by the cultures we form part of. This is best illustrated by Fillmore’s discussion of the word “bachelor” (“Towards a descriptive framework for spatial deixis” in Jarvella and Klein (eds) *Speech, place and Action. Studies in deixis and related topics* (1982) 34). If a court had to determine the ordinary meaning of this word and they looked it up in a dictionary, they would be confronted with a definition denoting a man who is not and has never been married. But what happens when we apply this word to the Pope? Do two unmarried gay men in a long-term relationship qualify as bachelors? What about an unmarried man who has been in a coma for the past 8 years? The ordinary meaning of “bachelor”, therefore, is bound by cultural convention.

Fillmore’s example brings us to another issue surrounding ordinary meaning and prototypes. Though we believe that prototypicality is applicable to many of the so-called ordinary words dealt with by courts (eg, *Pannar Research Farms (Pty) Ltd v Magome* 2002 5 SA 621 (LCC) “relocate”; *S v Mavungu* 2009 1 SACR 425 (T) “building” and “caravan”; *Blue Circle Cement Ltd v Commissioner for Inland Revenue* 1984 2 SA 764 (A) “plant”; and *Association of Amusement and Novelty Machine Operators v Minister of Justice* 1980 2 SA 636 (A) “pin-table”), not all words are necessarily prototypical. Instead of being the

prototype, some ordinary words represent category members that find themselves at some distance from the prototype. Where a Cape sparrow, a pigeon and a weaver are prototypical birds for Gauteng, the ostrich and penguin are not. If we know that a contested word is actually found at the periphery of a category and therefore not typical, we can infer that the word is not as ordinary as it may have seemed at the start.

In the next section we will illustrate two possible ways of determining the prototype.

3 How to determine a prototype

There are a number of ways to work out what the prototype is (of which some are empirical approaches). Seeing that we intended to introduce prototype theory as a means to understand and determine ordinary meaning (of at least concrete objects), we will keep to the simplest methodology here: sentence substitution and Barsalou's frame in the form of a matrix.

3.1 Sentence substitution

The meaning of words is in many respects tied to their use in sentences (Rosch "Universals and cultural specifics in human categorisation" in Brislin, Bochner and Lonner (eds) *Cross-cultural perspectives on learning* (1975) 190–191; Rosch (2000) 199). A member term (or basic level term) is often substitutable for the superordinate word in sentences. Consider the following sentence: "I can see two birds sitting on the garden fence." The word "birds" is the superordinate word. According to Rosch, we can substitute this term with another member of the category. This means we can use words like "Cape sparrow", "pigeon" and "weaver" and the sentence will still make perfect sense: "I see two sparrows sitting on the garden fence." However, the moment we substitute the superordinate term with a category member that stands at quite a distance from the prototype, the sentence becomes semantically absurd (though, grammatically, there is nothing wrong with it): "I see two penguins sitting on the garden fence." Obviously, a penguin is also a bird, but it has fewer attributes in common with other birds than is the case between a weaver and a sparrow; a penguin is not a prototypical bird and it is very unlikely that it will ever sit on a garden fence in quite the same manner.

We will now turn to three examples taken from court cases where the ordinary meaning of words was considered. The first case is *Waylite Diary CC v First National Bank Ltd* 1995 1 SA 645 (A), in which the court had to decide whether the appointment pages in a field diary were protected by copyright. The court had to decide to what extent these diary pages constituted drawings, a chart or literary work. We will apply our sentence substitution test to "literary work".

The term "literary work" is the superordinate and the following are some members of its category: novels, plays, poetry, research papers, esoteric articles, newspaper reports and appointment pages (in a field diary). If we construct one sentence with the superordinate, we should be able to substitute the superordinate in subsequent sentences with its basic level members without causing absurdity.

- (1) André Brink produced a few literary works during his career.
- (2) André Brink produced a few novels during his career.

The moment we substitute “literary work” with “appointment pages in a field diary” an absurdity enters in:

- (3) *André Brink produced a few appointment pages for a field diary during his career.

“Appointment pages” stand at quite a distance from “novels” and “plays” and it should be safe to say that the pages in a field diary are not prototypical of literary work. The definition of “literary work” in the Copyright Act 98 of 1978 is much more technical and inclusive than the term’s ordinary meaning, something that a presiding officer should keep in mind.

The second case is *Jowells Transport v South African Road Transportation Services* 1986 2 SA 252 (SWA), in which the court had to decide whether a transportation permit allowing a person to transport stock meal also allowed the transportation of mealie meal. The applicant argued that the compound noun “stock meal” could include mealie meal, or meal for human consumption. If this were the case, the superordinate “stock” should include “human” as a member of its category, albeit at the periphery. Let us look at the following sentences.

- (4) I farm with stock instead of crops.
 (5) I am a stock farmer, not a crops farmer.
 (6) I farm with chickens instead of crops.
 (7) I am a chicken farmer, not a crops farmer.
 (8) *I farm with humans instead of crops.
 (9) *I am a human farmer, not a crops farmer.

In sentence (9) the word “human” becomes ambiguous. From the sentences above, we can see that “human” is not one of the prototypes for “stock” and, therefore, not part of the ordinary meaning of “stock meal”. Stock meal is food meant exclusively for livestock/farm animals/game and does not suffice as a broader term that includes mealie meal.

The third case is *S v Abrahams* 2001 2 SACR 266 (C), in which the court had to decide whether armament could include a petrol bomb according to article 32 of the Arms and Ammunition Act 75 of 1969. The word “armament” refers to military equipment. Can a petrol bomb be seen as military equipment? A petrol bomb is a type of ammunition and ammunition forms part of armament. Is a petrol bomb necessarily the type of ammunition that national armed forces will store and use? Does the word “armament” apply only to national armed forces? The sentences reveal something about this mystery. “Armament” is the superordinate and is replaceable with its member terms.

- (10) The soldier had to keep track of the armament used during the practice run.
 (11) The soldier had to keep track of the ammunition during the practice run.
 (12) The soldier had to keep track of the hand grenades during the practice run.
 (13) The soldier had to keep track of the petrol bombs during the practice run.

When we juxtapose the words “soldier” and “petrol bomb” in sentence (13), it admittedly looks strange. However, the moment we add the word “guerrilla” in front of “soldier” the strangeness is altered: “The guerrilla soldier had to keep track of the petrol bombs during the practice run.” The word “petrol bomb” is not the prototype for “military equipment used by national armed forces”, but it can be one of the prototypes for “guerrilla warfare equipment”, especially when one considers phenomena like the Molotov cocktail, its origin and use in recent history.

3.2 Barsalou’s frame matrix

Barsalou makes use of frames to identify prototypes (“Frames, concepts, and conceptual fields” in Lehrer and Kittay (eds) *Frames, fields and contrasts. New essays in semantic and lexical organization* (1992) 47; cf Carney *Twis om woorde: ’n Forensiese ondersoek na semantiese kwessies in hofsake* (2015)). His frames consist amongst other things of attribute-value sets. Barsalou defines attributes as concepts that describe an aspect of at least some category member, whereas values are defined as subordinate concepts that indicate type (30–31). For example, the concept “house” consists of a number of attributes such as rooms, roof, floor, storage space, and so on. An attribute such as “room” may take values like “bedroom”, “bathroom”, “dining room” and “sitting room”. Barsalou furthermore describes prototypes simply as “the set of most frequent values across attributes” (47). In other words, the values that are representative of most of the category members will indicate the prototype. However, before you can determine the prototype, you need to consider the relevant category and identify possible category members, a set of attributes that describe those members as well as their respective values. In order to determine the prototype through attribute-value sets, we suggest using a matrix similar to Table 1 here below.

First of all, one has to indicate the core category, for instance “common Gauteng bird”. We identify the following possible members: sparrow, myna, weaver, pigeon, owl, duck, falcon, eagle, kori bastard and ostrich. Attribute-values sets describing aspects of birds include size (small, medium and large), colour (white and brown), beak (curved and straight) and movement (walks, flies and swims). Category members are represented by a symbol (we use a letter from the alphabet). The symbol is placed next to the value which is most typical and, therefore, representative of the category member. The values with the most symbols next to them show typicality and frequency. It is among these values that co-occurrences are visible. They all point towards the prototype. Please study Table 1 (which is illustrative and not truly representative of Gauteng birds).

Table 1: Prototype for “common Gauteng bird”

Category	COMMON GAUTENG BIRD		
Attribute	Values	Symbol	Category Member
Size	Small	a b c d	(a) sparrow
	Medium	e f g	(b) Indian myna
	Large	h i j	(c) weaver
Colour	White	d f	(d) pigeon
	Brown	a b c e g h i j	(e) owl
Beak	Curved	e g h	(f) duck
	Straight	a b c d f i j	(g) falcon
Movement	Walks	j	(h) eagle
	Flies	a b c d e g h i	(i) kori bustard
	Swims	f	(j) ostrich
Prototype	A prototypical bird in Gauteng is small and brown and has a straight beak. It mostly flies from point A to point B.		

As can be seen in Table 1, there is correlation between “small”, “brown”, “straight” and “fly”. This does not mean that this description of the prototype is true for all birds all of the time. It only shows typicality within the members listed

within this category. The moment you make changes to the category, the attributes and corresponding values will also change. For instance, the moment you have a category like “Western Cape pigeons”, your attributes and values will look different to “common Gauteng bird”. All of these pigeons can presumably fly, they will most likely have the same type of beak and they might have similar builds. But other attributes like “call”, “colour” and “feeding habits” could be relevant.

Barsalou argues that it is reasonable to only compute co-occurring information that is relevant to the background knowledge and goals of the perceiver (49). This can be extended to the relevant needs of a court in determining the ordinary meaning of a word. Prototypes and co-occurring relations provide default information about a category, which allows you to make inferences about categories and its exemplars (*ibid*). If John told André that he saw a bird sitting on a window sill, André should be able to infer certain information about the bird based on the co-occurring attribute-value sets that he already has in his mind. He can make inferences about the size, colour and movement of the bird. For a bird to sit on a window sill, it would most probably be small, it will be able to fly and its colours may range between brown, yellow, red, white and green. It is very unlikely that you will find an emu on your sill.

In order to determine whether Barsalou’s frames (in table format) show any potential to indicate prototypicality and thus also help determine the ordinary meaning of words, we will apply this method to two words taken from South African cases in which the ordinary meaning of the words were under scrutiny.

Let us take “literary work” from *Waylite Diary v First National Bank* to test the matrix. When considering a literary work, the following attributes come to mind: language, content, goal and format (see Table 2). The author of a literary work often uses language in a particular way, either artistically or by following the standardised conventions. Usually, a lot can be said about the language usage of literary texts. Some works can be entirely fictional, whereas others can either be a mixture between fact and fiction or it can be of a more scholarly nature. The purpose of a literary text is amongst others to inform, entertain or to persuade readers of a point of view. Though the format might be of lesser importance it does say something about the nature of literary works. They are mostly published in book format, consisting of many different pages.

Table 2: Prototype for “literary work”

Category	LITERARY WORK		
Attribute	Value	Symbol	Category Member
Language	Standard	e g j	(a) novel (b) poem (c) play (d) travel writing (e) newspaper article (f) academic article (g) theme based study (h) minutes (i) advertisement (j) diary pages
	Creative	a b c d i	
	Business like	f h	
Content	Fictional	a b c	
	Factual	d e f g h i j	
Goal	Entertain	a b c d	
	Inform	e h g j	
	Persuade	f i	
Format	Book/compilation	a b c d f g	
	Page	h j	
	Multimedia	e i	
Prototype	A literary work is mostly a creative and/or factual text with the goal to inform as well as entertain. A literary work is usually published in book format.		

There are a variety of written text types and each has its own function and style. When different exemplars, all representing written texts of some kind, are compared to the values associated with a literary work, it becomes apparent that two facing diary pages do not – ordinarily – qualify as a work of literary importance. Two pages in a diary that reflect the names of days and months and which contain dates can hardly be seen as a text with intelligent language usage. If we look at the frequency across values, then the prototype would rather be a text that makes use of creative language and which is mostly factual (literary work is not only creative writing) and has the purpose to either entertain or inform (and sometimes both). In this case, diary pages do not fall within the prototype. It is actually quite far from the prototype, which means that it cannot be defined within the ordinary meaning of “literary work”.

In *S v Mavungu* 2009 1 SACR 425 (T) the court of appeal had to determine whether housebreaking could take place in a caravan, seeing that it is not a building *per se*. By “building” they mean dwelling, not large structures like skyscrapers or warehouses. Is housebreaking, therefore, restricted to structures such as houses or would it include a caravan? In other words, does the ordinary meaning of “building” include a caravan? See Table 3.

Table 3: Prototype for “building”

Category	BUILDING		
Attribute	Value	Symbol	Category Member
Size	Small	b c d f g	(a) house (b) flat (c) caravan (d) mobile home (e) boat house (f) tent (g) shack (h) palace
	Medium	a e	
	Large	h	
Structure	Permanent	a b c d e h	
	Temporary	f g	
Erf	Private	a h	
	Communal	b c d e f g	
Interior	Fixtures	a b c d e h	
	Empty	f g	
Prototype	A building is mostly a small structure made of permanent building material that stands on communal land. It has fixtures like a stove, bath/shower, toilet and built-in cupboard/closets.		

We dare say that a caravan is included in the ordinary meaning of “building”. Buildings (as in “dwellings”) consist of walls, a roof, at least one door and windows. They contain fixtures like cupboards, a bath/shower, toilet and a stove (at least in Gauteng). Though many houses in South Africa are sole title, a great number of dwellings stand on communal land. South African houses are also small to medium in size, though “small” and “medium” are relative terms. Caravans show signs of prototypicality: they are generally small in size, its structure is permanent (in other words, you do not break it down and reassemble it when necessary as is the case with tents and shacks), they often stand on communal land (especially when someone resides inside) and it contains a number of fixtures which sometimes even includes beds. Therefore, there should be no reason why housebreaking could not apply to a caravan in the event that someone trespasses by breaking into the said caravan.

4 Conclusion

It follows from the work of Rosch and substantial subsequent research that categories are often not comprised of clear-cut members and that categories seldom have concise and clear boundaries, which in turn imply that ordinary meaning is hardly ever clear cut and concise (see also Messerschmidt and Bergh “Met kerse op *met*-konstruksies: ’n Verwysingspuntperspektief” 2011 *Southern African Linguistics and Applied Language Studies* 29). As with category members that do not share full and equal degree of membership, ordinary meaning cannot (and should not) be seen as something that is clearly demarcated. Like most category members, ordinary meaning is fuzzy around the edges. It is therefore a misconception that ordinary words are easy to interpret and elementary in nature. On the contrary, there is nothing elementary or straightforward about meaning.

Dictionaries may be legitimate resources when it comes to a word’s ordinary meaning (though words like “stock meal” and its Afrikaans equivalent “*veemeel*” are not recorded in South African dictionaries), but categorisation is much closer to the way speakers process and organise meaning. In this note we illustrated two, simple ways of identifying ordinary meaning by determining the prototype. The goal of our short introduction to and application of prototype theory is to inspire jurists to further explore this and other approaches to the interpretation of meaning, at both word and sentence levels. We are of the view that legal scholars like Hutton would be less critical of linguists if they actually considered the many linguistic possibilities available to them.

TR CARNEY

University of South Africa

L BERGH

University of the Free State

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

OPSOMMING

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

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

1 Introduction

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

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

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

2.1 Content and application of section 16 CPA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 1 3 Content requirements

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

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

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

3 Other legislative cooling-off rights applicable to consumer agreements

3.1 Section 29A of the ALA (immovable property)

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

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

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

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

3.2 Section 121 of the NCA (consumer credit agreements)

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

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

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

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

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

4 Conclusion

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

J BARNARD
University of Pretoria