

**A critical examination of Section 61 of the Consumer Protection Act
68 of 2008 and its implications for those in the Supply Chain**

by

Kaashifa Deen Ally

Submitted in partial fulfillment of the requirements for the degree

Masters in Business Law

in the

School of Law

at the

University of KwaZulu-Natal

Howard College

Supervisor: Professor Tanya Woker

December 2017

TABLE OF CONTENTS

DECLARATION.....	i
ACKNOWLEDGEMENT.....	ii
ABSTRACT.....	iii
CHAPTER 1: INTRODUCTION.....	1
1.1 Background and introduction.....	1
1.2 Statement of purpose.....	3
1.3 Rationale for this research.....	4
1.4 Research questions.....	4
1.5 Methodology.....	5
1.6 Structure of dissertation.....	5
CHAPTER 2: PRODUCT LIABILITY UNDER THE COMMON LAW.....	6
2.1 Introduction.....	6
2.2 Product liability under the common law.....	7
2.2.1 The law of sale.....	7
2.2.2 The law of delict.....	8
2.3 Shortcomings of the common law.....	9
2.4 Conclusion.....	11
CHAPTER 3: PRODUCT LIABILITY IN TERMS OF SECTION 61 OF THE CPA... 13	
3.1 Introduction.....	13
3.2 Definition of strict liability.....	14
3.3 Introduction of strict product liability.....	14
3.4 The CPA.....	16
3.5 Those in the supply chain.....	17
3.5.1 Producer.....	17
3.5.2 Importer.....	19
3.5.3 Distributor.....	20

3.5.4 Retailer.....	21
3.5.5 Concluding remarks regarding suppliers.....	22
3.6 Defences available to suppliers.....	24
3.6.1 Producer.....	25
3.6.2 Importer.....	26
3.6.3 Distributor.....	28
3.6.4 Retailer.....	28
3.7 Criticisms of the section 61(4)(1)(c) defence.....	29
3.8 Conclusion.....	30
CHAPTER 4: PRODUCT LIABILITY INSURANCE.....	32
4.1 Introduction.....	32
4.2 The impact of product liability insurance.....	33
4.3 What is product liability insurance?.....	34
4.4 The importance of product liability insurance.....	36
4.5 Those in the supply chain.....	36
4.6 The premium.....	37
4.7 The policy.....	38
4.7.1 Common clauses in a product liability policy.....	38
4.7.2 Possible exemption clauses.....	39
4.8 Conclusion.....	40
CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS.....	42
5.1 Conclusions.....	42
5.2 Recommendations.....	45
BIBLIOGRAPHY.....	47
ANNEXURE 1: ETHICAL CLEARANCE FORM.....	52

DECLARATION

I, Kaashifa Deen Ally, hereby declare that this dissertation, unless specifically indicated otherwise, is my own work and that all references have been properly made. This dissertation has not been submitted to any other university in full or partial fulfillment of the academic requirements of any other degree or qualifications.

Signed at Durban on the 1st day of December 2017.

Signature: _____

ACKNOWLEDGEMENTS

First and foremost I would like to thank the Almighty for giving me the strength, patience and ability to complete this dissertation, without whom none of this would be possible.

A huge thank you to my mum, dad and sister for your ongoing support, encouragement and proof reading. To Rahsaan Sheik, thank you for your constant motivation and belief in me as well as your tech-savvy assistance.

My supervisor, Professor Tanya Woker, words cannot express my gratitude to you for guiding me throughout this dissertation. Your profound knowledge, understanding, patience and mentorship is remarkable. It is indeed an honour to have completed this dissertation under the supervision of someone of your stature.

I would like to thank the University of KwaZulu-Natal for providing me with a scholarship to pursue my Masters Degree.

Thank you to everyone who had a hand in helping me with this dissertation, I am forever grateful.

ABSTRACT

Product liability in South Africa fell under the common law prior to introduction of the Consumer Protection Act 68 of 2008. Under the common law consumers could claim for any damages that they suffered as a result of purchasing defective goods in terms of the law of sale and the law of delict, however, their remedies were limited. Another problem consumers faced was proving the element of fault which was an essential element in order for a claim under the law of delict to be successful. Consumers could often not prove fault because they had little or no knowledge of the manufacturing process. Commentators, as well as decided cases, called for the introduction of strict product liability. Finally the courts said that if strict product liability were to be introduced it would be the job of the legislature to do so.

The legislature thereafter introduced a form of strict product liability in the form of section 61 of the Consumer Protection Act that altered the common law position. This provision imposed a form of strict liability on all entities in the supply chain: producers, importers, distributors and retailers. Parties in the supply chain can now be held liable irrespective of fault. This drastically increases the potential risk for all entities in the supply chain. Section 61 also widens the scope of people who could be regarded as suppliers so now those who were not viewed as suppliers in terms of the common law can now be regarded as suppliers in terms of section 61. This provision also includes certain defences which the entities can rely on. These issues are considered in this dissertation.

Every entity in the supply chain will have to consider product liability insurance therefore product liability insurance is explained as well as the importance of this insurance and the terms and conditions of a standard type policy.

Lastly, conclusions and recommendations are made to make those in the supply chain aware of their liability as well as the steps they will need to take in order to protect themselves in the event that they face product liability claims.

CHAPTER 1

INTRODUCTION

1.1 Background and introduction

Ever since inception, the Consumer Protection Act 68 of 2008 (herein after referred to as the CPA) has been a topic for debate.¹ It has in many respects substantially altered the common law and attempts to provide greater protection for consumers. The CPA introduced the notion of strict liability for damage caused by defective or dangerous goods. This raises many concerns regarding the consequences for suppliers that imposing strict liability will have.² In addition, section 61 of the CPA has significantly broadened the scope of who in the supply chain can be held responsible in the event of a consumer being harmed by a defective product.

Previously, under the common law, product liability³ was dealt with under the law of delict and the law of sale. Consumers could bring an *aquilian* action in cases of defective goods.⁴ The law of delict is responsible for determining the circumstances in which a person is liable for the damage caused to another. According to the common law, a claim for damages caused by defective goods requires that all the elements of a delict be proved.⁵ The most important requirement for the purposes of this discussion is the requirement that the supplier was at fault, in other words, that the supplier acted intentionally or negligently in supplying the defective product. As will be seen during the course of this mini-dissertation, this requirement is very difficult for consumers to prove.

In addition, in terms of the common law, a consumer could only sue the seller or the manufacturer of the defective product.⁶ As stated above, the CPA introduces strict liability and that liability is imposed on all entities of the supply chain; the producer, importer,

¹ Jacobs W, Stoop P & Van Niekerk R 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' *PER/PELJ* (2010) Volume 13 (3) 302.

² Monty S 'Liability of the Supplier in terms of the Consumer Protection Act' (2010) 5 (3) *Milk & Juice* 35.

³ Refers to a supplier being liable for dangerous or defective products entering the marketplace and causing harm or damage to consumers or their property.

⁴ Gowar C 'Product Liability: A changing playing field?' (2011) 32 (1) *Obiter* 522.

⁵ *Ibid.*

⁶ Basson J 'The South African Law on products liability- Quo Vadis?' (2011) 12 (1) *SAJIE* 89.

distributor and retailer may be held responsible for any damages that have been suffered by consumers. The focus of this dissertation is on the implications which section 61 of the CPA will have on all those involved in the supply chain. I will discuss the scope of liability, any defences which are available to them and what preventative measures they can take to avoid liability or to avoid having to carry the burden of extensive damages alone by taking out specific product liability insurance.

Section 55 of the CPA deals with the right which consumers have to fair value, good quality and safety. Then section 61 deals with those entities who may be held liable for damage caused by defective goods. This section states that the producer, importer, distributor or retailer will be held liable for any harm caused as a result of: supplying unsafe goods, a failure, defect or hazard in the product, or inadequate instructions or warnings to the consumer; irrespective of whether the harm occurred as a result of negligence the producer, importer, distributor or retailer. From this it can be seen that section 61 imposes strict liability on producers, importers, distributors and retailers: consumers no longer have to prove negligence on the part of an entity in the supply chain. All that consumers need to show is that the particular entity that they wish to hold responsible for their damages was part of the supply chain. In order to escape liability, suppliers will need to raise a defence in terms of section 61(4). If they are unable to raise a defence, they will be jointly and severally liable with other entities in the supply chain for damages that consumers have suffered as a result of using a defective product. This then raises the issue of suitable liability insurance.

Section 61(2) also broadens the scope of entities that may be held liable for the purposes of this section. 'Supplier' now includes anyone who applies, supplies, installs or provides access to any goods. Thus a doctor who prescribes medicine, an electrician who installs a stove and a caterer who provides food and beverages can all be regarded as a supplier in terms of this section. Section 61(4) sets out the defences that can be relied upon, however, these defences are not available to those who import or manufacture defective products.

As a result of 'no fault liability', those involved in the supply chain need to take precautionary steps to protect themselves. Product liability insurance has become

increasingly popular and should now be seen as a necessity for any entity that supplies products to consumers.⁷ Product liability insurance protects against claims of personal injury or property damage caused when defective products are supplied.⁸ This is however, an added expense for suppliers which will have a ripple effect throughout the supply chain and could ultimately lead to a rise in the costs of goods and services.⁹

If careful consideration is not given to each product liability claim or if suppliers do not insure against liability it could result in a supplier being put out of business. This will in turn have a negative impact on smaller businesses because they will not have the money to continue trading.¹⁰ These issues illustrate the need for there to be proper understanding of the implications of section 61 for suppliers.

1.2 Statement of purpose

The purpose of this dissertation is to examine the role of those in the supply chain and the defences available to them when they are faced with a product liability claim. This dissertation will also examine the precautionary steps that should be taken by each entity in order to ensure that a product liability claim does not mean that the viability of their business is placed in jeopardy.

In order to determine the role of parties in the supply chain, the defences they may rely on and the precautions they should take, this research will critically examine section 61 of the CPA and display how each entity could be held liable. It will also analyse the defences that are set out in section 61(4) of the CPA and to whom they are available. This research intends to make those in the supply chain aware of necessary steps they

⁷ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 8.

⁸ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities' (2009) 21 *SA Merc LJ* 205.

⁹ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 1.

¹⁰ Katzew J & Mushariwa M (2012) 24 (1) *SA Merc LJ* at 15.

should take to limit their liability and to ensure that they are adequately protected in the event that they face a claim for damages for supplying defective products to consumers.

1.3 Rationale for this research

Every year hundreds of people are injured and many die as a result of having been supplied with defective goods.¹¹ For example, consumers may suffer damages as a result of unsafe motor vehicles, faulty geysers, or consuming tainted food and beverages. A particular problem in South Africa is defective paraffin lamps that are commonly used in informal settlements. During December 2015, in Tembisa, six people were arrested and 44 illegal paraffin lamps were confiscated.¹² The rationale behind the search and seizure operation was to prevent fires that often cause enormous harm because people are sold unsafe and illegal paraffin lamps.¹³ The confiscation of the paraffin lamps was carried out in light of the CPA which calls for fair value, good quality and safe goods for consumers.¹⁴

Despite all the regulation and safety mechanisms that have been put into place, defective goods still make their way into the market place. If suppliers are unable to eliminate defective goods in their entirety then surely they need to be prepared for the harm that may arise. The CPA came into operation in 2011, six years ago, however, many suppliers are still not aware of the scope of their liability and therefore they do not take the necessary steps to protect themselves and their consumers.¹⁵ Hence the relevance of this research.

1.4 Research questions

The questions which this study intends to answer are:

1. What is the common law that applies to the supply of defective products?
2. How has section 61 of the CPA altered the common law?

¹¹ Olofintuade OA *A Critical Examination of the laws that Apply to the Sale of Dangerous and/or Defective Products with Particular Reference to a Consumer's Right to Claim for Consequential Damages* (unpublished LLM Thesis, University of KwaZulu-Natal, 2010) 2.

¹² 'Suppliers of Unsafe Paraffin Stoves Pounded on' *NCC News* March 2016 Issue 2 available at: <http://www.thencc.gov.za/> Accessed on: 1 September 2016.

¹³ *Ibid.*

¹⁴ Section 55 of Act 58 of 2008.

¹⁵ Monty S 'Liability of the Supplier in terms of the Consumer Protection Act' (2010) 5 (3) *Milk & Juice* 37.

3. What implications does section 61 have for those entities involved in the supply chain?
4. What defences are available to those in the supply chain?
5. What alternatives steps can suppliers take in order to ensure that if they are faced with a large product liability claim, they are able to meet it.

An issue which must be borne in mind is that even if the defect is relatively small, it may have the potential to cause enormous damages. Suppliers that face such claims will, without adequate product liability insurance, face insolvency.

1.5 Methodology

This research is solely desktop based. In order to answer the research questions the CPA will be analysed as well as a number of journal articles, website articles, magazine articles, case law and text books.

1.6 Structure of dissertation

Chapter 1 of this dissertation sets out the background information and introduces the topic of product liability. It also states the purpose and rationale for the study illustrating its relevance and importance. The research questions which the study aims to answer are listed in this chapter.

Chapter 2 sets out the common law position regarding product liability in South Africa. It also addresses the forms of redress that are available to consumers under the common law.

A critical examination of section 61 of the CPA is set out in chapter 3. This chapter contains a discussion of the notion of strict liability and identifies each entity of the supply chain, their liability under section 61 and the defences they may rely on.

Chapter 4 deals with product liability insurance, the importance of taking out this insurance and the possible effect having to take out product liability insurance may have on the supply of goods and services.

Conclusions and recommendations for those entities in the supply chain are set out in chapter 5.

CHAPTER 2

PRODUCT LIABILITY UNDER THE COMMON LAW

2.1 Introduction

The creation and manufacturing of products are essential in any society.¹⁶ Unfortunately however, these products sometimes result in injury, disease or death.¹⁷ Therefore, there has been, and will always be, a need to regulate the liability of those who supply defective goods. The world is constantly evolving and developing and therefore the number of defective goods in the marketplace is also increasing. Burchell points out that new dangers are always arising because modern transportation and technology have introduced unprecedented ways of causing harm, injury and death.¹⁸ Defective goods can cause harm of extreme magnitudes and those that cause harm should be held liable for the damage they cause.

An example of a simple product that caused immeasurable harm occurred in the case of Isabella 'Pippie' Kruger who suffered a tragic accident on New Year's Eve in Limpopo.¹⁹ Pippie was burned as a result of defective fire lighter gel which exploded near her. She suffered 3rd degree burns on 80% of her body.²⁰ Pippie is not the only child who has suffered such trauma. Lulu Roussouw, a little girl from Bela Bela experienced a similar explosion as a result of defective lighter gel exploding.²¹ Pippie and Lulu are just two examples of people who have been scarred for life as a result of a defective and/or dangerous product being readily available in the marketplace. Adrienne Barret, the manufacturer of the gel Greenheat, states that 'many gel products in South Africa don't have adequate warnings and instructions for use on the bottle'.²²

¹⁶ Van Eeden E *Consumer Protection Law in South Africa* (2013) 367.

¹⁷ Ibid.

¹⁸ Burchell JM *Principles of Delict* (1993) 246.

¹⁹ Admin 'Her Skin Cooked' *You* 7 April 2016 available at: <http://www.you.co.za/news/her-skin-cooked/> Accessed on: 13 March 2017.

²⁰ Ibid.

²¹ News24 'Second fire gel child victim improves' available at: <http://www.news24.com/SouthAfrica/News/Second-fire-gel-child-victim-improves-20120706-3> Accessed on: 13 March 2017.

²² Admin 'Her Skin Cooked' *You* 7 April 2016 available at: <http://www.you.co.za/news/her-skin-cooked/> Accessed on: 13 March 2017.

If producers are not held liable for design, manufacturing or distribution faults that harm consumers, they have little or no incentive to take every measure in order to ensure that the products that they place into the marketplace are safe.²³ There is a general duty on manufacturers to take 'reasonable steps to ensure that defective products do not reach the market, or if they do, to withdraw them from the market, or to take other steps to ensure that no harm ensues from the presence of the product on the market.'²⁴

Previously the harm caused by defective goods was dealt with under the law of sale and the law of delict.²⁵ Basson describes the term product liability as the 'liability that arises when a product contains a defect which leads to damage such as to property (patrimonial loss), the death of a person, bodily harm, pain and suffering, shock, discomfort, deformity, loss of amenities or shortened life expectation.'²⁶ Product liability was dealt with solely under the common law prior to the introduction of the CPA.

2.2 Product liability under the common law

2.2.1 The law of sale

Seriousness of a defect is key when determining a consumer's remedy for defective goods as frivolous defects are not actionable.²⁷ Before the commencement of the Act, manufacturers liability could be established either under the law of contract or under the law of delict.²⁸ Contractual liability requires a contractual nexus between the supplier of the defective product and the party suffering the harm as a result of the defect. However, in most cases there is rarely a contractual nexus between the producer of the product and the consumer.²⁹

²³ Van Eeden E *Consumer Protection Law in South Africa* (2013) 368.

²⁴ van der Merwe S & de Jager F 'Products liability: A recent unreported case' (1980) *SALJ* 88.

²⁵ Botha MM & Joubert EP 'Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability? - A Comparative Analysis' (2011) 74 (2) *THRHR* 306.

²⁶ Basson J 'The South African Law on 'Products Liability' - Quo Vadis?' (2011) 12(1) *SAJIE* 83.

²⁷ Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act' (2010) 31 2 *Obiter* 228.

²⁸ Jacobs W, Stoop P & van Niekerk, R 'Fundamental Consumer rights under the Consumer Protection Act 68 of 2008: A critical Overview and Analysis' (2010) 13 (3) *PER/PELJ* 382.

²⁹ Jackwell F 'Manufacturers beware' (2007) *Without Prejudice* 31.

The common law remedies under the law of sale are known as the *aedilician* remedies and have evolved from the Aediles' Edict of Roman Law.³⁰ They are the *actio redhibitoria* and *actio quanti minoris*. The former allows a consumer to return the goods in exchange for the purchase price and the latter entitles the consumer to a reduction of the purchase price.³¹

The *actio redhibitoria* is used in situations where the defect is material and as a result the goods cannot be used for their intended purpose, whereas the *actio quanti minoris* is relied upon when the defect is not material.³² Under the *Aedilician* remedies, there is no claim for consequential damages unless there is some other cause of action such as fraud or breach of contract.³³ Consequential damages may only be claimed where the seller is also the manufacturer of the product or the seller 'professes to have attributes of skill and expert knowledge in relation to the kind of goods sold'.³⁴ It can be seen therefore that consequential damages may only be claimed in very limited circumstances.

If there is no contractual relationship between the injured consumer and the entity that the consumer wishes to hold responsible for any damages suffered, then a remedy has to be found in the law of delict.³⁵

2.2.2 The law of delict

Under the common law, product liability was also dealt with under the law of delict and consumers could bring an *aquilian* action in cases of defective goods. The law of delict is responsible for determining the circumstances in which a person is liable for the damage caused to another. According to the common law, a claim for damages caused by defective goods requires all the elements of a delict to be proved.³⁶

³⁰ Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 36.

³¹ *Ibid.*

³² Bradfield G & Lehman K 'Principles of the Law of Sale and Lease' (2013) 82.

³³ Mcquoid-Mason D, Woker T & Greenbaum L *Consumer Law in South Africa* (1997) 78.

³⁴ *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A) 561.

³⁵ Loubser M & Reid E *Product Liability in South Africa* (2012) 38.

³⁶ Gowar C 'Product Liability: A changing playing field?' (2011) 32 (1) *Obiter* 522.

In order to prove *aquilian* liability for harm caused by defective products, there must be proof of wrongfulness and fault, conduct, causation and harm. The consumer needs to show that the producer was at fault. Fault, in cases of defective goods is equivalent to negligence.³⁷

The element of wrongfulness was explained in the case of *Ciba-Geigy v Lushof Farms*³⁸ where the court said: 'a manufacturer who distributes a product commercially which, in the course of its intended use, and as a result of the defect, causes damage to the consumer thereof, acts wrongfully and thus unlawfully according to the legal convictions of the community'.³⁹

The test for negligence was set out in *Kruger v Coetzee*.⁴⁰ Negligence only arises if a *diligens paterfamilias* in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to have guarded against such occurrence; and whether or not the defendant took such steps.

Under the common law the test for negligence with regards to product liability cases is as follows: did the defendant-manufacturer in the process of production take reasonable care to prevent foreseeable harm? This test for negligence focuses on what was reasonably foreseeable and preventable at the time the product was released into the market.⁴¹

2.3 Shortcomings of the common law

Despite the remedies that could be relied upon in the law of sale and the law of delict, there are apparent shortfalls. In conjunction with wrongfulness, a consumer wishing to claim damages arising from harm caused by a defective product also has to prove fault (in the form of negligence) on the part of the manufacturer.⁴² The requirement that a

³⁷ Loubser M & Reid E *Product Liability in South Africa* (2012) 39.

³⁸ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA).

³⁹ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* supra 449.

⁴⁰ *Kruger v Coetzee* 1966 (2) SA 428 (A) 491.

⁴¹ Loubser M & Reid E *Product Liability in South Africa* (2012) 49.

⁴² van der Merwe S & de Jager F 'Products liability: An unreported case' 1980 SALJ 90.

consumer must prove fault is very difficult for a consumer to prove especially when there is an imbalance of information between the parties.⁴³

Consumers are not always aware of the manufacturing process so this onus creates an added expense for the consumer because the skills of an expert might be needed to show that the supplier was at fault.⁴⁴ Not all consumers will be able to bear these costs.

Another costly process would be litigation as consumers are required to approach the civil courts in order to obtain relief.⁴⁵

A further problem is that the consumer does not have insight into production process and often cannot even identify the producer.⁴⁶

Woker states that if there was no breach of warranty, fraud or proof of negligence on the part of the manufacturer then consumers can only rely on limited remedies.⁴⁷ She points out the problems that this can create for consumers by using the example of eating tainted fish from a supermarket. Consumers may be able to claim the purchase price of a tin of fish (in the region of R15) from the supermarket but they would be more concerned with medical bills and loss of income.⁴⁸ These consequential damages cannot be claimed from the supermarket. They could possibly be claimed from the manufacturer of the tin of fish but only if the consumer could prove some form of negligence on the part of the manufacturer. The consumer would also have to identify the manufacturer and this would be even more problematic in instances where the tin of fish was imported.

Relying on contractual liability means that the supplier is only liable to the purchaser for the defective product so if a person receives a gift that is defective for example, they themselves could not sue the supplier.⁴⁹

⁴³ Loubser M & Reid E *Product Liability in South Africa* (2012) 49.

⁴⁴ Gwindima P 'A critical evaluation of the laws that apply to product labelling in South Africa' (unpublished LLM thesis, University of KwaZulu-Natal, 2014) 40.

⁴⁵ Van Heerden C & Barnard J 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2013) 6(3) *JICLT* 137.

⁴⁶ Jacobs W, Stoop P & van Niekerk, R 'Fundamental Consumer rights under the Consumer Protection Act 68 of 2008: A critical Overview and Analysis' (2010) 13 (3) *PER/PELJ* 383.

⁴⁷ Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act' (2010) 31 *Obiter* 229.

⁴⁸ *Ibid.*

⁴⁹ Loubser M & Reid E *Product Liability in South Africa* (2012) 23.

As a result of the gaps in the common law it was clear that South African consumers needed much more comprehensive protection with regards to defective goods. Thus the CPA was put into place so that consumers could easily and effectively obtain relief as a result of harm caused by defective goods. The CPA deals with defective products and liability for these products in some detail in an attempt to bridge the gaps in the common law.

2.4 Conclusion

In *Wagener & Cuttings v Pharmacare Ltd*⁵⁰ the Supreme Court of Appeal (SCA) was called on to impose strict liability on manufacturers when their defective anaesthetic caused some consumers to suffer paralysis. The SCA confirmed that fault is a requirement for delictual liability and stated that if strict product liability were to be imposed this was for the legislature to decide and not the courts.⁵¹

It was clear that the existing consumer protection mechanisms were fragmented and left many gaps in the law.⁵² Woker asserts that up until recently there was no comprehensive law that dealt with consumer issues in South Africa.⁵³ Product liability was confined to the law of sale and the law of delict and provided limited remedies for consumers. The CPA has brought about many changes to the law of product liability in South Africa.⁵⁴ The rationale behind section 61 is to enable the consumer to hold any entity in the supply chain liable for harm caused as a result of the supply of damaged or defective goods.⁵⁵ As a result of section 61 consumers now have more remedies available to them when they suffer harm and this in turn should encourage manufacturers, suppliers and distributors of goods to exercise the utmost care before goods enter the market place.⁵⁶ It is important to note that the common law remedies do not cease to exist and serves as

⁵⁰ *Wagener v Pharmacare Ltd* 2003 2 All SA 167 (SCA).

⁵¹ *Wagener v Pharmacare Ltd* supra 26.

⁵² Jacobs W, Stoop P & van Niekerk R 'Fundamental Consumer rights under the Consumer Protection Act 68 of 2008: A critical Overview and Analysis' (2010) 13 (3) *PER/PELJ* 303.

⁵³ Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act' (2010) 31 *Obiter* 218.

⁵⁴ Gowar C 'Product Liability: A changing playing field?' (2011) 32 (1) *Obiter* 525.

⁵⁵ Gowar C (2011) 32 (1) *Obiter* at 526.

⁵⁶ Jackwell F 'Manufacturers beware' (2007) *Without Prejudice* 32.

an alternative for recovering damages. They are relevant when the injured person cannot satisfy the definitions in the statute but can prove fault on the part of the producer.⁵⁷

⁵⁷ Loubser M & Reid E *Product Liability in South Africa* (2012) 39.

CHAPTER 3

PRODUCT LIABILITY IN TERMS OF SECTION 61 OF THE CPA

3.1 Introduction

The CPA which came into operation in 2011 is seen by many commentators as a revolutionary piece of legislation.⁵⁸ Prior to commencement of this Act the needs of consumers were not adequately catered for which often left consumers unprotected and unsatisfied.⁵⁹ Consumers were victims of many unfair practices and the common law did not provide adequate remedies to address problems consumers faced. In South Africa, poverty, illiteracy and apartheid laws added to the difficulties consumers faced in attempting to achieve redress.⁶⁰ The CPA seeks to ensure that there is a fair, accessible and sustainable market in South Africa and that goods and services are produced which meet their intended purpose.⁶¹ The enactment of the CPA is the legislature's attempt to bring South African law in line with international consumer protection laws.⁶² This Act is wider in scope and application than the common law and has significantly altered the law regarding the sale of defective products in South Africa. In particular section 61 of the CPA sets out those who can be held liable in the supply chain for any damages which a consumer may suffer as a result of being supplied with defective products. The section also sets out any defences that are available to those in the supply chain.⁶³ The Act introduces a form of strict liability and now all entities in the supply chain including the producer, importer, distributor and retailer may be held responsible for any damages that have been suffered.⁶⁴

⁵⁸ Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 35.

⁵⁹ Gangiah P *A critical analysis of Product Liability under the Consumer Protection Act 68 of 2008* (LLM Dissertation University of KwaZulu-Natal 2015) 5.

⁶⁰ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 3.

⁶¹ Davey M 'A summary of the Consumer Protection Act 68 of 2008' (2010) available at: <http://www.meumannwhite.co.za/news-details/25/> Accessed on: 2 May 2017.

⁶² The South African Labour Guide 'Consumer Protection Act' available at: <http://www.labourguide.co.za/consumer-protection/1171-the-consumer-protection-act-introduction> Accessed on: 2 May 2017.

⁶³ Gowar C 'Product Liability: A changing playing field?' (2011) 32 (1) *Obiter* 528.

⁶⁴ *Ibid.*

3.2 Definition of strict liability

Strict liability in terms of defective products is a legal doctrine which holds suppliers of defective products liable for any damage caused by these products irrespective of whether the supplier was negligent in any way.⁶⁵ Essentially, this is liability without fault.

Under the CPA essentially any party in the supply chain may be at risk of incurring liability even when that entity does not deal with the consumer directly.⁶⁶ In terms of the CPA all the consumer has to do is prove a causal link between the unsafe product characteristic, failure, defect or hazard and the harm that was suffered.⁶⁷ The consumer is now entitled to sue any party in the supply chain irrespective of whether that party was negligent.⁶⁸ The Act has however also introduced certain defences that certain parties in the supply chain may rely on. These defences are discussed at the end of the chapter.

3.3 Introduction of strict product liability

Basson explains that the 21st century has introduced increased technological sophistication and that consumers need to be protected against harm that could possibly result from the supply of defective goods.⁶⁹ In a modern society there are many factors which have led to the call for suppliers of defective products to be held to strict liability for the damages which these products cause. Woker lists some of these: unequal bargaining power between consumers and suppliers means that consumers do not have access to all the relevant details in order to enforce their rights. This means that complaints are easily ignored by suppliers. Consumers are often unaware of the effects of the products they buy because the only information they have is information provided by the supplier. An example which clearly illustrates this latter point is the gel product purchased by Pippie's father.⁷⁰ Even if a consumer is well educated they face challenges with regards

⁶⁵ Van Eeden E *Consumer Protection Law in South Africa* (2013) 372.

⁶⁶ Cliffe Dekker Hofmeyr 'Consumer Protection Act' available at: <http://www.cliffedekkerhofmeyr.com/en/sectors/consumer-protection.html> Accessed on: 06 June 2016.

⁶⁷ Mahabeer L 'Strictly Speaking' (2012) available at: <http://www.mondaq.com/southafrica/x/172162/Product+Liability/Strictly+speaking> Accessed on: 2 September 2016.

⁶⁸ Ibid.

⁶⁹ Basson J 'The South African Law on "Products Liability" - Quo Vadis?' (2011) 12(1) *SAJIE* 85.

⁷⁰ Admin (note 19 above).

to goods that come in sealed packages or goods that consist of complicated technology.⁷¹ Another contributory factor is that litigation is very expensive and many consumers do not have the finances to pursue the matter if a supplier denies liability.⁷² Another argument in favour of introducing strict liability is that strict liability can be seen as having a preventative or deterrence function.⁷³ The fact that they may be held liable for any damages suffered by consumers forces those entities in the supply chain to act with much more care.

An important case which called for the introduction of strict liability was *Wagener v Pharmacare Ltd*.⁷⁴ In this case the appellant had undergone shoulder surgery and was given an anaesthetic in the form of a Regibloc Injection. Post-surgery, the appellant was left with damaged tissue and her left arm was paralysed. The appellant claimed that the Regibloc given to her was defective. The appellant argued that proof of fault should not be a requirement when a consumer claims damages because fault is difficult to prove and consumers have little or no knowledge as to the manufacturing process.⁷⁵ Despite these arguments the court held that the appellant's remedy is limited to the *acquilian action* and that if strict liability was to be imposed, it must be the legislature that does it.⁷⁶ This case in particular, as well as South African academics, have called for the legislature to impose strict liability on those who are responsible for putting defective products into the marketplace.⁷⁷ Strict liability was then introduced by the legislature in the form of section 61 of the CPA which must also be read in conjunction with section 55.⁷⁸

⁷¹ Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act (2010) 31 2 *Obiter* 230.

⁷² *Ibid*.

⁷³ Loubser & Midgley *The Law of Delict in South Africa* (2012) 252.

⁷⁴ *Wagener v Pharmacare Ltd* 2003 2 All SA 167 (SCA).

⁷⁵ *Wagener v Pharmacare Ltd* supra 10.

⁷⁶ *Wagener v Pharmacare Ltd* supra 26.

⁷⁷ Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act (2010) 31 no 2 *Obiter* 229.

⁷⁸ The Department of Trade and Industry: Republic of South Africa 'Consumer Protection Act: Your guide to Consumer Rights and how to Protect them' 23.

3.4 The CPA

Section 55 of the CPA states that a consumer has a right to receive goods that are reasonably suited for the purpose for which they are intended, good quality goods which are in working condition and free from defects, goods that are usable and durable for a reasonable period of time and comply with any applicable standards.⁷⁹

Section 61 of the CPA then goes on to explain who is liable for harm caused by defective goods. Section 61(1) of the CPA states that the producer or importer, distributor or retailer of any goods is liable for any harm, caused as a result of supplying any unsafe goods⁸⁰; a product failure, defect or hazard in any goods; or inadequate instructions or warnings regarding any hazard resulting from or associated with the use of any goods.⁸¹ Liability for harm is irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.⁸²

Section 61 is a vital section for any person in the supply chain to be aware of because even if they are not responsible for the manufacturing of the product and could not have been aware of the problems with the product, they may find themselves in a position where they are liable for any damages that a consumer may suffer.⁸³ Therefore, it is imperative for each person in the supply chain to consider adequate insurance which is discussed in the next chapter.

Section 61(2) provides that a supplier of services, who in conjunction with performing the services, applies, supplies, installs or provides access to any goods, is regarded as a supplier of those goods to the consumer for the purposes of Section 61.⁸⁴ The effect of this section is that it also imposes strict product liability on, for example, an electrician

⁷⁹ Section 55 of Act 68 of 2008.

⁸⁰ Section 61(1)(a) of Act 68 of 2008.

⁸¹ Section 61(1)(b) of Act 68 of 2008.

⁸² Section 61(1)(c) of Act 68 of 2008.

⁸³ Slabbert M & Pepper M 'The Consumer Protection Act: No-fault liability of health care providers' (2011) available at: <http://www.samj.org.za/index.php/samj/article/view/5137/3665> Accessed on: 28 August 2017.

⁸⁴ Section 61(2) of Act 68 of 2008.

who installs a defective geyser and surgeon who implants a defective pacemaker or a defective prosthetic.⁸⁵

Section 61(3) of the CPA imposes joint and several liability on all persons who may be liable in terms of Section 61(1).⁸⁶ Consumers may choose to sue the producer, importer, distributor or retailer, or all of them.⁸⁷ This section states that entities could be held jointly and severally liable which means that the plaintiff can sue each party of the supply chain for a *pro rata* share or sue one entity for the whole amount.⁸⁸ Suppliers can protect themselves from others in the supply chain by seeking an indemnity from others in the supply chain.⁸⁹ This means that suppliers indemnify each other if harm is caused to a consumer and either of the parties is at fault.⁹⁰ For example, the installer of a particular manufacturer's geyser may call on that manufacturer to provide him with an indemnity should the geyser turn out to be defective.

3.5 Those in the supply chain

3.5.1 Producer

A producer in terms of the CPA is a person who grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business.⁹¹ A producer creates and manufacturers raw materials which undergo an industrial process.⁹² Producing includes: nurturing, growing, harvesting, mining, generating and refining.⁹³ The definition encompasses the liability of those who have extracted minerals, commodities and the

⁸⁵ Jacobs W, Stoop P & van Niekerk R 'Fundamental Consumer Rights under the *Consumer Protection Act 68 of 2008: A Critical Overview and Analysis*' *PELJ* 2010 (13) 3 384.

⁸⁶ Section 61(3) of Act 68 of 2008.

⁸⁷ Slabbert M & Maister B *et al* 'The application of the Consumer Protection Act in the South African Health Care Context: concerns and recommendations' 173.

⁸⁸ Michalsons 'Product liability for damage caused by goods' available at: <http://www.michalsons.co.za/blog/product-liability-for-damage-caused-by-goods/4584> Accessed on: 2 September 2016.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Section 1 of Act 68 of 2008.

⁹² Loubser M & Reid E *Product Liability in South Africa* (2012) 122.

⁹³ *Ibid.*

donating of blood and processing foodstuffs.⁹⁴ From this definition of a producer it can be seen that producers will now include people who manufacture any product that will be used or consumed by a consumer. Companies that produce foodstuffs and beverages as well as companies that manufacture medication or technological devices are now considered producers in terms of the CPA.

The case of *Wagener v Pharmacare Ltd*⁹⁵ is an example of where the manufacturer/producer was sued. The anaesthetic 'Regibloc' was produced by Pharmacare Ltd and Ms Wagener sought to hold them liable.⁹⁶ She claimed that the anaesthetic was defective and was unsafe for local anaesthetic because of the harm suffered. This was however difficult to prove because Ms Wagener did not have sufficient knowledge and access to the manufacturing process in order to prove that the respondent was in fact negligent. If this case were to be decided today under the new strict liability regime then Ms Wagener would not have to prove negligence and it would be easier for her to hold the producer (Pharmacare Ltd) liable in terms of section 61 of the CPA.

A decision from another jurisdiction that is useful to consider in this situation is the case involving a consumer in America who sued McDonald's in respect of injuries suffered as a result of hot coffee that had spilled at a drive-through in Los Angeles.⁹⁷ It was argued that the lid for the hot coffee was negligently, carelessly and improperly placed on the coffee cup. The result was that the lid came off and the hot coffee spilt onto the consumer.⁹⁸ If this incident had occurred in South Africa, the consumer could possibly have argued that extremely hot coffee constitutes a defect in the product.⁹⁹ Another approach would be to argue that the failure of the employee to properly fix the lid onto the takeaway coffee cup constituted behaviour that is negligent. Therefore the product was unsafe once it was prepared and handed to the consumer.¹⁰⁰ This would demonstrate the extent of liability that is now placed on producers under section 61 of the CPA.

⁹⁴ Loubser M & Reid E *Product Liability in South Africa* (2012) 122.

⁹⁵ 2003 2 All SA 167 (SCA).

⁹⁶ *Wagener v Pharmacare Ltd* supra 3.

⁹⁷ Kirby N 'Dangerous Coffee' Legal Brief (2014) available at: <http://www.werksmans.com/wp-content/uploads/2014/02/040233-WERKSMANS-feb-coffee.pdf> Accessed on: 2 September 2016.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

3.5.2 Importer

An importer with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside the South Africa into South Africa, with the intention of making them available for supply in the ordinary course of business.¹⁰¹

The intention behind the inclusion of 'importer' is to make sure that all goods sold in South Africa are subject to strict product liability.¹⁰² It also attempts to make sure that consumers do not have problems with locating foreign manufacturers. The responsibility will then be on the importer to look to foreign suppliers if they want redress.¹⁰³

A recent survey showed that only about 3% of goods entering Durban harbour, South Africa's main port of entry for imports, are scrutinised by customs. This means that South Africa is extremely vulnerable to the threat of counterfeit products.¹⁰⁴ In 2008, the so-called milk scandal, which involved the sale of counterfeit baby milk powder manufactured in China, is an example of how harmful products are manufactured in one country and then imported into other countries, including South Africa.¹⁰⁵ Milk products imported from China contained 'melamine' which is a type of plastic that is unfit for human consumption. Unfortunately, in many instances the repercussions were fatal and babies in China died.¹⁰⁶

Another example of problematic products is that of weight loss pills that were being advertised as all natural/herbal but were in fact laced with 'sibutramine' which is a chemical that leads to many cardiovascular problems.¹⁰⁷ When this issue emerged, the South African importers and distributors of the harmful product pleaded ignorance and placed the blame on their overseas suppliers.¹⁰⁸ This is precisely the kind of scenario

¹⁰¹ Section 1 of Act 68 of 2008.

¹⁰² Loubser M & Reid E *Product Liability in South Africa* (2012) 125.

¹⁰³ Ibid.

¹⁰⁴ Van Heerden IV 'Fake foods rife in South Africa' available at: <http://www.health24.com/Diet-and-nutrition/Food-safety/Fake-foods-flood-South-Africa-20140909> Accessed on: 05 June 2017.

¹⁰⁵ Olofintuade OA *A critical examination of the laws that apply to the sale of dangerous and/or defective products with particular reference to a consumer's right to claim for consequential damages* (LLM Thesis University of KwaZulu-Natal 2010) 1.

¹⁰⁶ Van Heerden IV 'Fake foods rife in South Africa' available at: <http://www.health24.com/Diet-and-nutrition/Food-safety/Fake-foods-flood-South-Africa-20140909>. Accessed on: 05 June 2017.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

which section 61 aims to curb, in terms of importers escaping liability. Section 61 now allows consumers the opportunity to hold these importers liable for harm caused by defective products irrespective of whether the importer was negligent. This in turn puts pressure on the importers to act with care and make sure that they are dealing with legitimate overseas suppliers and only introducing safe, good quality goods into the South African market place.

3.5.3 Distributor

A distributor in relation to any particular goods, means a person who, in the ordinary course of business-

- a) is supplied with those goods by a producer, importer or other distributor; and
- b) in turn, supplies those goods to either another distributor or to a retailer.¹⁰⁹

An example of a distributor that faced claims under the CPA is Builder's Warehouse. Builders Warehouse is one of South Africa's largest home improvement distributors with many stores around South Africa and neighbouring countries.¹¹⁰ Builder's Warehouse is a well-known home improvement supplier.¹¹¹ In 2015, Builders' Warehouse faced claims of R18 million in the North and South Gauteng High Courts lodged by a Johannesburg commercial pilot and a Pretoria IT technician, because of injuries they suffered when they fell off ladders which were apparently defective.¹¹²

According to reports the consumers relied on section 61 of the CPA.¹¹³ Consumers have the option of suing any party in the supply chain but the supplier of the defective product is most likely to be the first entity that consumers turn to because they are the easiest to find.¹¹⁴ In this scenario, the consumers laid their claims against Builders Warehouse

¹⁰⁹ Section 1 of Act 68 of 2008.

¹¹⁰ 'Builders Warehouse Home Improvement A to Z' available at: <http://www.superbrands.com/za/pdfs/BUILDERSWH.pdf> Accessed on: 23 September 2016.

¹¹¹ Ibid.

¹¹² Schroeder F 'Pair injured in ladder fall sues for R18m' IOL News (7 February 2015) available at: <http://www.iol.co.za/news/crime-courts/pair-injured-in-ladder-fall-sues-for-r18m> Accessed on: 04 May 2016.

¹¹³ Ibid.

¹¹⁴ Financial Mail 'R18m consumer test case against Builders Warehouse' (2015) available at: <http://www.pressreader.com/south-africa/financial-mail/20150515/281483569956030/TextView> Accessed on: 31 August 2017.

because Builders Warehouse had supplied the defective ladders. Section 61 has created this option for consumers to sue the suppliers even if they did not manufacture the defective product. It would then be up to Builders Warehouse to rely on one of the defences in section 61(4) of the CPA that are discussed below.

A distributor is someone who is supplied with goods by a producer or importer and then supplies those goods to another distributor or a retailer, whereas a retailer is someone who supplies the goods to a consumer.¹¹⁵ Another example of a distributor is SA Beauty Distributors. SA Beauty Distributors is a distributor of professional beauty salon and spa products, serving licensed professionals throughout South Africa.¹¹⁶ Ordinary consumers therefore are unable to purchase from SA Beauty Distributors but will be using their products when they acquire the services of one of the salons that are supplied by SA Beauty Distributors or purchase their products from the beauty salon. If the products were defective and cause harm to a consumer, the consumer will be able to sue the distributor (SA Beauty Distributors) and/or the beauty salon from which they purchased or used the product.

3.5.4 Retailer

A retailer with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer.¹¹⁷ Supply includes selling, renting, exchanging, and hiring in the course of business for consideration.¹¹⁸ Retailers now include all entities that supply goods to consumers, so apart from the usual food and clothing retail stores, it now comprises, for example, pharmacies, as well as an alarm company installing an alarm system or an electrician installing a geyser. The definition is so broad that it literally includes anyone who supplies any product or service to a consumer including someone such as a doctor who treats patients.

The CPA has been criticised for redefining the relationship between doctors and patients because it now uses a commerce based approach as opposed to an approach better

¹¹⁵ Section 1 of Act 68 of 2008.

¹¹⁶ SA Beauty Distributors available at: <http://www.sabeautydistributors.co.za/> Accessed on: 04 September 2017.

¹¹⁷ Section 1 of Act 68 of 2008.

¹¹⁸ Ibid.

suites to health care.¹¹⁹ Those in the health care sector argue that the CPA imposes certain requirements or standards on the doctor that are in fact inappropriate.¹²⁰ If a patient is considered a consumer then a doctor will be considered as part of the supply chain as a supplier.¹²¹ However, given the broad definitions set out in the CPA, it must be accepted that a doctor who prescribes medicine to a patient is now part of the supply chain.

3.5.5 Concluding remarks regarding suppliers

One of the first cases that dealt with section 61 is *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited*¹²² which focused particularly on the issue of who is a consumer and a supplier under the Act.¹²³ In this case, the plaintiff had suffered severe electrical burns after he came into contact with a low hanging power line while riding a bicycle.¹²⁴ Eskom is the supplier of electricity in South Africa and so the plaintiff sought relief under section 61 of the CPA.¹²⁵ Eskom argued that the CPA is about consumerism and claimed that if the plaintiff suffered the electrical burns whilst using the electricity, in his home for example, then the CPA would have applied. Eskom argued that the CPA was not intended to be applied to circumstances like these.¹²⁶

Dinnie states that the core of the debate was whether section 61 provides protection and benefits to bystanders.¹²⁷ The court *a quo* held that the defendant's argument that a third party who is not necessarily a consumer cannot claim redress because this would be contrary to the spirit of the CPA.¹²⁸

¹¹⁹ Slabbert M & Maister B et al 'The application of the Consumer Protection Act in the South African health care context: concerns and recommendations' (2011) *CILSA* 202.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited* (26360/14) [2015] ZAGPPHC632 2016 (2) SA 141 GP (1 June 2015).

¹²³ Dinnie D 'Product liability, the Consumer protection Act and insurance' (2105) available at: <http://www.financialinstitutionslegalsnapshot.com/2015/07/product-liability-the-consumer-protection-act-and-insurance/> Accessed on: 2 September 2016.

¹²⁴ *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited* supra 5.

¹²⁵ *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited* supra 9.

¹²⁶ *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited* supra 14.

¹²⁷ Dinnie D 'Product liability, the Consumer protection Act and insurance' (2105) available at: <http://www.financialinstitutionslegalsnapshot.com/2015/07/product-liability-the-consumer-protection-act-and-insurance/> Accessed on: 2 September 2016.

¹²⁸ *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited* supra 17.

The court *a quo*, analysed the wording of section 61 as well as the definitions and held that the plaintiff was entitled to protection under the CPA.¹²⁹ The court found that electricity was in fact 'goods' for the purposes of the CPA, and that the defendant could be regarded as a 'retailer'.¹³⁰ The court held that the plaintiff does not have to be a consumer in a contractual sense in order for the defendant to be liable.

This case was then taken on appeal to the SCA which overturned the decision of the lower court. The central issue in the appeal was whether Eskom could be held strictly liable in terms of section 61 for harm caused by a low hanging power line that was not supplying electricity to anyone.¹³¹ Eskom denied that the harm was caused as a result of the supply of defective or unsafe goods nor could they have been expected to discover the state of the power line. The Court found that there was no material imperfection in the electricity nor was the electricity being used by the respondent when the harm occurred.¹³²

The High Court held that the plaintiff need not be a consumer for Eskom to be liable, however, the SCA held that this finding lost sight of the fact that the relationship should be one of supplier and consumer for Eskom to be strictly liable for harm caused. Ultimately, the Court held, the purpose of the Act is to protect 'consumers'.¹³³ The SCA found that the respondent was not a consumer of electricity because the respondent had not entered into a transaction with Eskom in which Eskom was to supply or produce electricity and the respondent was not using the electricity nor was he a beneficiary of the electricity.¹³⁴

¹²⁹ Dinnie D 'Product liability, the Consumer protection Act and insurance' (2105) available at: <http://www.financialinstitutionslegalsnapshot.com/2015/07/product-liability-the-consumer-protection-act-and-insurance/> Accessed on: 2 September 2016.

¹³⁰ *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited* supra 19.

¹³¹ *Eskom Holdings Limited v Halstead Cleak* (599/2015) [2016] ZASCA 150: 2017 (1) SA 333 SCA (30 September 2016) 1.

¹³² *Eskom Holdings Limited v Halstead Cleak* supra 24.

¹³³ *Eskom Holdings Limited v Halstead Cleak* supra 22.

¹³⁴ *Ibid.*

The SCA held that the facts of this case fell outside the scope of the supplier-consumer relationship because the respondent was not consumer, and therefore not entitled to relief under the Act.¹³⁵ Thus, the appeal was successful.

The decision of the SCA definitely sets the tone of section 61 of the CPA and potentially prevents future claims with similar circumstances under this section. If the interpretation of the court *a quo* were correct then that would lead to high and sometimes unfair onus on those in the supply chain. Examples would include farmers who would be liable for harm suffered by third parties as a result of a fire which started on the farmer's property and spread to surrounding properties. Municipalities would be liable to motor vehicle owners where their vehicles have been damaged by potholes irrespective of how long the potholes have been there or whether any steps have been taken by the municipality to fix them.¹³⁶ The SCA in its decision in the case above, has illustrated who will be regarded as a supplier and consumer and those that fall outside this ambit will not have protection under the CPA.

3.6 Defences available to suppliers

Section 61(4) sets out certain defences that suppliers can rely on when a consumer attempts to hold them liable for damages suffered as a result of using a defective product. These include the following:

- A defendant will not incur liability if; the unsafe product characteristic, failure, defect or hazard is attributable to compliance with public regulation.¹³⁷
- Liability does not arise if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time that the goods were supplied by that person to another person alleged to be liable.¹³⁸

¹³⁵ *Eskom Holdings Limited v Halstead Cleak* supra 25.

¹³⁶ Clyde & Co 'The matter of Halstead-Cleak v Eskom Holdings Limited and some observations for liability insurers' Strict liability under the Consumer Protection Act (2016) available at: <https://www.clydeco.com/insight/article/strict-liability-under-the-consumer-protection-act> Accessed on: 22 May 2017.

¹³⁷ Section 61(4)(a) of Act 68 of 2008.

¹³⁸ Section 61(4)(b)(i) of Act 68 of 2008.

- Liability does not arise if the defect was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person.¹³⁹
- Liability does not attach if it is unreasonable, when one has regard to the person's role in marketing the goods, to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, the liability without fault regime is also excluded.¹⁴⁰
- A defendant will not incur liability if the claim for injury is brought more than three years after the death or injury of a person, earliest time at which the person had knowledge of the material facts about an illness complained or earliest time at which a person with an interest had knowledge of the material facts or the latest date on which a person suffered economic loss.¹⁴¹

Although section 61 (4) lists those defences which are available to parties in the supply chain, some defences are only available to certain suppliers. Therefore it is necessary to consider the position of each supplier and to see which defences are available to them.

3.6.1 Producer

The producer or manufacturer of a product is entitled to rely on the defences under Section 61(4)(a), (b) and (d). In terms of section 61(4)(a), a producer will not be liable if the defective product is in compliance with public regulation. Failure to comply with regulation will constitute an offence.¹⁴²

The producer can raise the defence that the product that he supplied, complied with public regulation. It may be that the public regulation was at fault, but the producer of the product cannot be held liable for the damages that follow the use of the product. The purpose of section 4(b)(i) is to allow the defendant to escape liability if the defect arose after the goods had left his control.¹⁴³ So for example if the case of *Wagener v Pharmacare Ltd*¹⁴⁴

¹³⁹ Section 61(4)(b)(ii) of Act 68 of 2008.

¹⁴⁰ Section 61(4)(c) of Act 68 of 2008.

¹⁴¹ Section 61(4)(d) of Act 68 of 2008.

¹⁴² Loubser M & Reid E *Product Liability in South Africa* (2012) 131.

¹⁴³ Loubser M & Reid E (2012) at 132.

¹⁴⁴ (32/2002, 7001,2000) [2003] 2 All SA 167 (SCA) (28 March 2003).

was being decided now, the respondent company (producer of the defective 'Regibloc') could try and rely on this defence if they can show that the Regibloc was not defective when it left their control. The producer can also rely on section 61(4)(d) if the claim has prescribed.

The following example is provided in order to more fully understand these defences: Coo-ee is a manufacturer of a variety of soft drinks in South Africa. It is therefore a producer in the supply chain. If for example, consumers who had drunk Coo-ee beverages fell ill as a result of a defect in the product then consumers would in terms of section 61 be entitled to sue Coo-ee as the producer. Coo-ee as the manufacturer of the product can rely on section 61(4)(a) which says that a producer, importer, distributor or retailer would not be liable if the defect is as a result of compliance with public regulation. So if the defect occurred as a result of complying with the Foodstuffs, Cosmetics and Disinfectants Act or the Medicines and Related Substances Act 54 of 1972, for example, then Coo-ee could not be held liable. As the producer, Coo-ee could also rely on section 61(4)(b) which states that liability does not arise if the defect did not exist at the time the goods were supplied by that person to another person. So if Coo-ee can show that the defect was not present when it was supplied by them to the consumer then they will not be held liable. Coo-ee as a producer does not have the option of the defence in section 61(4)(c) which says that liability does not arise if it was unreasonable to have expected them to discover the defect, because this defence is only available to distributors and retailers.

3.6.2 Importer

The importer has at its disposal the defences found in Section 61(4)(a), (b) and (d). If the defect is as a result of compliance with public regulation then the importer will not be liable. For example: if the defect of a product was as a result of complying with a provision in the Customs and Excise Act 91 of 1964 then the importer cannot be held liable. The importer will also not be liable if the defect did not exist at the time when the goods were supplied.¹⁴⁵

¹⁴⁵ Section 61(4)(b)(i) of Act 68 of 2008.

Regarding the scandals of the baby milk containing 'melamine' and the weight-loss pills containing 'sibutramine' the importers will be liable because the defence that they could not reasonably have known of the defect is not available to them. The importer, just like the producer is not entitled to rely on the defence in section 61(4)(c).

Another example that demonstrates how these defences operate is that of Muse Beauty, an online shopping site that imports international makeup brands into South Africa. If for example, a consumer suffers harm as a result of using one of the products imported by Muse Beauty then the consumer can sue Muse Beauty as the importer in terms of section 61 of the CPA. Muse Beauty has the option of relying on section 61(4)(a) if the defect arose because the importer complied with the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 . As the importer Muse Beauty can also rely on the defence that the defect did not exist when the product was supplied by them. For example, if their products were purchased from Muse Beauty by a makeup artist and the makeup artist used the makeup after its sell by date had expired and the product had deteriorated and caused harm. The defence set out in section 61(4)(c) that it was not reasonable for the defect to have been discovered is not available to Muse Beauty as an importer.

A recent example which illustrates the situation of where the manufacturer or importer can rely on the defence that the defect did not exist at the time when the product was supplied by them involves an example from Germany where a man injected poison into baby food in order to extort money from supermarkets.¹⁴⁶ If this situation arose in South Africa and consumers sought to hold someone liable for their loss or damage, the manufacturers or importers could rely on section 61(4)(b)(i) which states that they will not be liable if the defect did not exist at the time when the goods were supplied by them.

¹⁴⁶ Llicea M 'Man charged with poisoning baby food in extortion plot' available at: <http://nypost.com/2017/09/30/man-charged-with-poisoning-baby-food-in-extortion-plot/> Accessed on: 30 October 2017.

3.6.3 Distributor

The distributor is entitled to the defences in section 61(4)(a), (b) and (d) as discussed above as well as section 61(4)(c) which states that liability does not arise if it is unreasonable to expect the distributor to have discovered the unsafe product or defect.

In the Builder's Warehouse case, Builder's Warehouse could rely on section 61(4)(b) and (c). Builder's Warehouse could claim that the defect did not exist at the time when they had supplied the ladders. Builder's Warehouse supplies a large quantity of ladders that did not carry the defect so it is possible that the defect did not exist when it left their control.¹⁴⁷ The other option that Builders Warehouse has is that of section 61(4)(c) which states that liability does not arise if it is unreasonable to expect the distributor or retailer to have discovered the defect. It is important that each ladder be of a certain standard, however, the time and cost that would go into testing each individual ladder is may, it is possible to argue, be unreasonable.¹⁴⁸ Therefore, Builders Warehouse could claim that they could not possibly have known about the defective ladders.

3.6.4 Retailer

The retailer has a similar standing to that of the distributor in that they have available to them the defence set out in section 61(4)(c) as well as those in in section 61(4)(a), (b) and (d). A retailer will not be held liable if: the defect was as a result of compliance with public regulation, if the defect did not exist when the retailer supplied the product and if it were unreasonable for the retailer to discover the defect.

In illustrating how the defences can be relied on the example of an alarm company is used. ADT is one of South Africa's largest alarm companies that deals with installing and monitoring alarms. In terms of the CPA, ADT would be considered a retailer because a retailer with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer. If ADT sold and installed an alarm system in a person's home and a person suffered harm as a result of a panic button not working, for example, then the consumer can sue ADT as the retailer. Even though ADT

¹⁴⁷ Gangiah P *A critical analysis of Product Liability under the Consumer Protection Act 68 of 2008* (LLM Dissertation University of KwaZulu-Natal 2015) 38.

¹⁴⁸ Gangiah P (LLM Dissertation University of KwaZulu-Natal 2015) at 39.

does not manufacture the panic buttons it is still liable in terms of section 61 of the CPA because it supplied the defective produce to the consumer. As the retailer ADT can rely on the defence that the defect occurred because of compliance with regulation. They could also rely on the defence that the defect did not exist at the time when it was supplied by them, for example, the consumer had tampered with the panic button or the consumer had failed to recharge the batteries. As the retailer ADT also has the added defence of section 61(4)(c). So ADT could also argue that it was unreasonable to have expected it to have discovered the defect. ADT will also have the option of the defence in section 61(4)(d) if the claim has prescribed.

3.7 Criticisms of the section 61(4)(c) defence

The most important defence from a retailer and distributor perspective is provided for in section 61(4)(c), which states that liability does not arise if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers.¹⁴⁹

This provision is drafted broadly and it offers an escape route for distributors and retailers in situations where they can prove that their conduct was not blameworthy.¹⁵⁰ This defence has been criticised as being over generous and it brings strict liability closer towards *acquilian* liability.¹⁵¹

Some commentators feel that section 61(4)(c) has the ability to leave the consumer in a less favourable position than under the common law when parties are in a contractual relationship, such as a retailer and consumer.¹⁵² Many argue that the liability of distributors and retailers reverts to a fault-based position because reference is made to reasonableness.¹⁵³ 'The introduction of section 61(4)(c) of the CPA may avail the seller or retailer of a defence at the expense of the very consumer that the Act was designed to

¹⁴⁹ Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 36.

¹⁵⁰ Loubser M & Reid E *Product Liability in South Africa* (2012) 133.

¹⁵¹ Loubser M & Reid E (2012) 132.

¹⁵² Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 36.

¹⁵³ Barnard J 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and liability for damages' (2012) *De Jure* 455.

protect.¹⁵⁴ The CPA allows a retailer to rely on section 61(4)(c) to escape liability for consequential damages derived from latent defects.¹⁵⁵ In most instances the entity which the consumer is most likely to turn to when products are defective is the entity from which the goods were purchased.¹⁵⁶ Giving the retailer this defence may very well, from a practical perspective, defeat the purpose of the Act.¹⁵⁷ Consumers will then have to track down the manufacturer or the importer and this may from a practical perspective be difficult to do. This was also one of the criticisms of the common law. A consumer who wanted to claim consequential damages had in most instances to claim them from the manufacturer whom they then had to trace.¹⁵⁸

Distributors and retailers should not be able to rely on the mere absence of negligence to escape liability, they should be judged in accordance with the highest level of good practice in that particular industry.¹⁵⁹ It is yet to be seen how the courts will interpret and apply this provision.

3.8 Conclusion

It is clear that section 61 of the CPA has placed a greater responsibility on all the entities in the supply chain for any damages caused by defective goods supplied by them. An important objective of this section is to ensure that all parties in the supply chain are motivated to exercise care when supplying goods into the marketplace.

Studies have shown that those entities in the supply chain are still unaware of the fundamental consumer rights enshrined in the CPA.¹⁶⁰ In order to carry out the study a questionnaire was used to measure perceived and actual knowledge of the CPA amongst a sample of 97 small independent retailers located in 10 shopping malls in South Africa. The results showed that whilst small independent retailers considered themselves to be well informed, they had very little actual knowledge of the CPA.¹⁶¹ This means that there

¹⁵⁴ Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 36.

¹⁵⁵ Govinden K (2014) at 35.

¹⁵⁶ Govinden K (2014) at 36.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Naude' T & Eiselen S *Commentary on the Consumer Protection Act* (2015) 61-12.

¹⁶⁰ Schalkwyk PJ, Akpojivi U & Bevan-Dye A 'South African Small Independent Retailers' Knowledge of the Consumer Protection Act' *The Retail and Marketing Review: Vol 11 Issue 2* (2015) 19.

¹⁶¹ Ibid.

are parties to the supply chain who are in fact unaware that they could be held liable for damage caused by goods irrespective if they manufactured the goods or not.¹⁶² Ideally the CPA should encourage manufacturers, suppliers and distributors of goods to take a great deal of care before introducing a product into the marketplace.¹⁶³

Even though section 61 provides defences which those in the supply chain may rely upon, the Act has substantially increased the risk of liability for suppliers which they need to be aware of because a large damages claim could have a severe impact on the financial viability of a business. Although section 61(4)(c) has provided retailers and distributors with a substantial defence, consumers would still be able to sue for any damages which they suffered as a result of purchasing a defective product. The onus would then shift to the retailer or distributor to prove that it was unreasonable for them to have discovered that particular defect given their position in the supply chain. They would have to show that they took reasonable steps to ensure that their products complied with section 55 in that they were safe and of good quality. The CPA has definitely increased the responsibility which retailers and distributors have to ensure that their goods comply with the standards set out in the Act. It is not acceptable for suppliers to put goods into the marketplace and then refuse to take responsibility when those goods cause harm. One way in which suppliers can protect themselves against large claims is to ensure that they have adequate product liability insurance which is discussed in the next chapter.

¹⁶² Jackwell F 'Manufacturers beware' (2007) *Without Prejudice* 31.

¹⁶³ Jackwell F (2007) *Without Prejudice* at 32.

CHAPTER 4

PRODUCT LIABILITY INSURANCE

4.1 Introduction

Product liability insurance is a type of insurance that guards against claims of personal injury or property damage that arise as a result of defective or dangerous products sold or supplied through an entity's business.¹⁶⁴ This insurance is designed to help protect a business by ensuring that if a consumer sues for damages as a result of using a defective product, the insured does not have to pay any legal or litigation costs.¹⁶⁵ Product liability insurance also pays out when the consumer is awarded damages.¹⁶⁶ Liability insurance falls under short-term insurance.¹⁶⁷ The Short-term Insurance Act defines a liability policy as a contract in terms of which a person, in return for a premium provides a policy benefit if an event, contemplated in the contract as a risk, occurs.¹⁶⁸

Product liability insurance, otherwise known as 'third party insurance' includes the: insurer (insurance company), the insured (producer, importer, distributor and retailer) and the third party (the consumer) who makes a claim.¹⁶⁹ Liability insurance is a type of indemnity insurance. The insurer undertakes to indemnify the insured against the insured's legal liability in damages toward a third party. The insured is indemnified for either the amount of the legal liability or the sum insured, whichever is less.¹⁷⁰

¹⁶⁴ Aon 'Public Liability Insurance by Aon' available at: <http://business-insurance.aon.com.au/Product-Liability-Insurance> Accessed on: 03 August 2017.

¹⁶⁵ Ibid.

¹⁶⁶ White J 'Product Liability Insurance: Costs, Coverage and More' available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 11 September 2017.

¹⁶⁷ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 204.

¹⁶⁸ Short-term Insurance Act 53 of 1998.

¹⁶⁹ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 5.

¹⁷⁰ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 205.

Product liability insurance offers a variety of risk covers depending on whether the insured is the producer, importer, distributor or retailer. Examples of types of claims are: manufacturing defects, design defects and defective warnings and instructions.¹⁷¹

In recent times there has been major development with regards to product liability insurance which has now been expanded to include all products including those that are imported.¹⁷² The discussion of the impact which the CPA has had on all those in the supply chain in chapter 3 indicates that it is important for all those in the supply chain to take out product liability insurance.

4.2 The impact of product liability insurance

The CPA along with introducing strict product liability has indirectly introduced the need for product liability insurance. It is expected that those in the supply chain will now need to take out additional product liability insurance to guard against liability. An unfortunate consequence is that this need may lead to an increase in the prices of goods and services.¹⁷³ The insured pays a premium which is ultimately passed onto the consumer via an increase in the cost of the goods.¹⁷⁴

The main objective of liability insurance is ensuring that the insured does not incur liability when a consumer suffers harm as a result of a defective product.¹⁷⁵ Insurance companies provide product liability insurance to a plethora of people; franchise owners, engineers, health care professionals and even massage therapists.¹⁷⁶ This is because the CPA in section 61 has widened the net of who can be held liable for defective goods and made it much easier for consumers to claim. The cost of product liability insurance varies depending on how risky a particular product is, firearms, for example, have a higher risk

¹⁷¹ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 10.

¹⁷² Guinsberg ED 'The Insurance of Products Liability as Applied in South Africa' (2017) 4 *Int'l Bus. Law.* 545.

¹⁷³ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 1.

¹⁷⁴ Katzew J & Mushariwa M (2012) 24 *SA Merc LJ* at 11.

¹⁷⁵ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 206.

¹⁷⁶ Aon 'Public Liability Insurance by Aon' available at: <http://business-insurance.aon.com.au/Product-Liability-Insurance> Accessed on: 03 August 2017.

factor than yoga mats.¹⁷⁷ Other factors taken into account when determining a premium for product liability insurance is the quantity of an entity's distribution, the way in which the goods are marketed and any safety measures which a supplier has put in place.¹⁷⁸

Product liability insurance will be essential for all those in the supply chain. Factors that lead to the importance of ensuring that an entity has effective product liability insurance include: an increase in economic activity, an increase in consumer awareness and a 'claims culture'.¹⁷⁹ As consumers become more aware of their rights, this is bound to lead to an increase in the number of claims.

4.3 What is product liability insurance?

Liability insurance is a complex and confusing branch of insurance law because of the many potential legal relationships that may be involved. Parties to the widened web of liability will have to consider product liability insurance which includes multiple people and can be confusing.¹⁸⁰ It will also be important for entities in the supply chain to be aware of the circumstances in which they will be liable to consumers or third parties for the damage they have suffered. The mere fact that the third party has suffered harm will not mean that the supplier is liable for that harm. The insured entity must be liable to the third party for the harm caused and the third party must be able to recover compensation for the damages suffered from the insured entity.¹⁸¹ This was clearly demonstrated in the Eskom case which was discussed in chapter 3. Just because the unfortunate cyclist was injured by electricity from a damaged power line did not mean that Eskom was liable for the damages suffered. Likewise any insurer of Eskom would not have been liable under a product liability insurance policy. There is still, however, a need for insurance because a consumer may attempt to hold the supplier liable for damages which could lead to

¹⁷⁷ White J 'Product Liability Insurance: Costs, Coverage and More' (2017) available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 03 August 2017.

¹⁷⁸ Ibid.

¹⁷⁹ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 227.

¹⁸⁰ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 2.

¹⁸¹ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 207.

litigation. The insurance company will then defend the matter on behalf of the supplier and will cover the litigation costs.

There are three possible times when the insured entity becomes legally liable towards the third party or consumer:

1. when the insured has actually compensated the third party;¹⁸²
2. when the insured's liability against the third party has been established by a court judgment, an arbitral award, or by agreement; or¹⁸³
3. when the third party has a cause of action against the insured or the insured has incurred liability.¹⁸⁴

Product liability insurance covers bodily injury and damage to property. It does not cover: the exclusion of quality control, failure to report any changes in manufacturing or supply, or the inclusion of a forbidden or harmful ingredients or substance.¹⁸⁵ Therefore, a producer, for example, will not be covered if it includes a prohibited ingredient in its product which causes harm, even though it has product liability insurance. Likewise, importers, distributors and retailers will not be covered if they, for example, fail to perform quality control tests or do not report changes in supply, irrespective of whether they have product liability insurance or not.

There are certain factors which insurers will consider before agreeing to provide product liability insurance to a business.¹⁸⁶ These factors include the following:

1. Whether the business is well known and well established. An entity that is already well known and established will be a lower risk than a new business.
2. The type of risk involved.
3. Whether the product is easily disposed of, for example, food items, or is it expected to be used over a number of years, for example machinery.

¹⁸² Jacobs, W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 209.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ White J 'Product Liability Insurance: Costs, Coverage and More' (2017) available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 03 August 2017.

¹⁸⁶ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 220.

4. The territories where the goods will be sold and distributed.

4.4 The importance of product liability insurance

As stated above, the introduction of the CPA has made it important for entities in the supply chain to ensure that they have adequate product liability insurance. Momentum Insurance has provided a number of reasons why this is important.

1. A business owner could be responsible for harm caused by defective goods irrespective of whether that company made the product.¹⁸⁷ This highlights the importance of importers, retailers and distributors taking out product liability insurance because they will still be liable for a defective product irrespective of who manufactured it.
2. Regular liability insurance may not cover product liability insurance. A product liability claim could be an exorbitant amount that has the potential to put an entity out of business therefore separate product liability insurance is necessary in order to ensure that an entity is properly protected.¹⁸⁸
3. Although entities often do not take out insurance because of high premiums the cost of product liability insurance outweighs the cost of losing the business or the damages a business may have to pay.¹⁸⁹

4.5 Those in the supply chain

In order to give context to this chapter, the examples used to demonstrate the responsibility of each in the supply chain provided in chapter 3 are again referred to.

Coo-ee as a manufacturer should take out product liability insurance that will cover them for manufacturing defects, design defects and defective warnings or instructions. So for example: if there was a fault in production, design, or inadequate storage instructions which resulted in a beverage which causes a consumer to become ill, then Coo-ee's insurer will cover the damages and not Coo-ee.

¹⁸⁷ Insurance explained '3 Important Reasons why Product Liability Insurance is a Good Idea for South African Businesses' available at: <http://www.insuranceexplained.co.za/business/product-liability-insurance.html> Accessed on: 03 August 2017.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

Muse Beauty as an importer and retailer should take out product liability insurance that covers them for the incorrect handling or storing of the products. If this causes the product to be defective then Muse Beauty's insurer would have to pay damages to the consumer for the harm caused.

ADT as a supplier will also need to acquire product liability insurance for installation of the alarm systems. If for example: a panic button was defective because of incorrect installation then ADT could be held liable and ADT's insurer would have to pay damages for the harm that was suffered by a consumer.

4.6 The premium

In order to evaluate the premium that an insured entity will have to pay, the insurer will take the following factors into consideration¹⁹⁰

1. the nature of the business;
2. its annual turnover;
3. the number of people the business employs; and
4. its insurance claims history.

Taking out product liability insurance can be expensive, the costs of which will probably be passed on to consumers. Therefore, all entities in the supply chain should try to minimise this cost. The following information is provided in order to assist entities to reduce their costs of insurance.

1. Entities should increase and implement more stringent safety policies in order to lower potential risks.¹⁹¹ All entities in the supply chain should have strict safety measures that should be adhered to. The manufacturer should have safety rules that deal with the production process. Importers and distributors need to have safety measures that deal with handling of products. Retailers should have rules that ensure the safety of storing and displaying goods.

¹⁹⁰ ABI 'Product Liability Insurance' available at: <https://www.abi.org.uk/products-and-issues/products/business-insurance/liability-insurance/product-liability-insurance/> Accessed on: 13 August 2017.

¹⁹¹ White J 'Product Liability Insurance: Costs, Coverage and More' (2017) available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 03 August 2017.

2. Entities should carefully evaluate their risks and only obtain cover for what they need. Unnecessary coverage will unnecessarily increase monthly costs.¹⁹² Each entity in the supply chain will not need the same insurance so each party should take out insurance that is specific to their position in the supply chain that will adequately cover them.
3. Entities should approach various insurance companies and compare prices and policies to ensure that entities are properly covered at the best possible price.¹⁹³

4.7 The policy

4.7.1 Common clauses in a product liability policy

The following clauses may form part of a product liability policy:

1. The operative clause- this clause is designed to provide indemnity in respect of compensation or damages for harm caused by defective goods supplied by the insured.¹⁹⁴
2. Coverage in time- this clause is a limitation on insurance coverage and determines the period of insurance. The insurer will have to pay for claims that fall within this period.¹⁹⁵
3. Accidents occurring within certain geographical limits: Even though the manufacturer and supplier may be in one country, the products can be taken outside the country and the damage or harm can occur anywhere in the world so ideally there should be world-wide coverage.¹⁹⁶
4. Limits of indemnity- this clause includes a stipulated figure for any one accident caused by a defective product or for all compensation payable to a number of claimants arising out of all occurrences.¹⁹⁷

¹⁹² White J 'Product Liability Insurance: Costs, Coverage and More' (2017) available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 03 August 2017.

¹⁹³ Ibid.

¹⁹⁴ Guinsberg ED 'The Insurance of Products Liability as Applied in South Africa' (2017) 4 Int'l Bus. Law 567.

¹⁹⁵ Guinsberg ED (2017) 4 Int'l Bus. Law at 568.

¹⁹⁶ Guinsberg ED (2017) 4 Int'l Bus. Law at 569.

¹⁹⁷ Guinsberg ED (2017) 4 Int'l Bus. Law at 571.

5. Costs of litigation- There may be a clause in the policy which gives the insurer the right at any time to discharge its liability by paying the maximum amount specified by the limits of indemnity.¹⁹⁸

4.7.2 Possible exemption clauses

Some exclusions found in a product liability insurance policy include:

1. Contractual liability: there is usually an exception in the policy that states that the insurance company will not accept liability in situations where the insured entity agrees to accept liability and where that liability would not have arisen without that agreement.¹⁹⁹ For example, where a consumer approaches a supplier claiming that they fell ill after consuming the supplier's product, the retailer cannot simply agree to pay. It must refer the matter to the insurer which will then evaluate whether in fact the consumer has a valid claim.
2. Design of the product: this type of clause states that it is not the intention of the insurer to cover liability that arises from a product if it is supplied in the exact form and condition as intended by the manufacturer.²⁰⁰ An example of this would be a tablet for pain which causes drowsiness. If a consumer takes this tablet and causes a motor vehicle collision and then claims from the supplier's insurer it is likely that this clause will allow them to escape liability because causing drowsiness was a known result of the tablet and intended by the manufacturer.
3. Policies often contain compliance conditions that are procedural in nature. These clauses set out the types of damages that give rise to the claims and those it excludes, it stipulates methods of settling claims as well as precautions that the insured needs to take.²⁰¹

¹⁹⁸ Guinsberg ED 'The Insurance of Products Liability as Applied in South Africa' (2017) 4 Int'l Bus. Law 572.

¹⁹⁹ Guinsberg ED (2017) 4 Int'l Bus. Law at 574.

²⁰⁰ Guinsberg ED (2017) 4 Int'l Bus. Law at 576.

²⁰¹ Guinsberg ED (2017) 4 Int'l Bus. Law at 578.

4.8 Conclusion

Product liability insurance covers the insured for its liability towards a third party arising from the supply of goods that is related to the insured's business.²⁰² The insured undertakes to pay for injury to a person or property. It is a type of insurance which gives suppliers cover for any claims that may arise as a consequence of supplying a defective or dangerous product.²⁰³ The CPA caters for no-fault product liability thus increasing the importance of product liability insurance in South Africa, particularly in the manufacturing and retail sectors.²⁰⁴ It is suggested that anyone who may potentially attract product liability whilst conducting their business consider the different ways of limiting liability and take the necessary measures to protect themselves.²⁰⁵

Even though section 61 of the CPA allows consumers easier access to redress by alleviating them of the burden of proving negligence, the result of this is that all those in the supply chain will now have face an increased risk.²⁰⁶ When product liability insurance was imposed in the United States of America, there was a crisis in the insurance industry and premiums quadrupled. This affected small businesses the most as they were unable to take out adequate cover or they went out of business. If South Africa were to have a mirrored response then this would go against the CPA which also aims to protect the vulnerable.²⁰⁷

Kirby points out that 'with an increased emphasis on potential harm to consumers by goods and services, suppliers around the world must become conscious of their obligations in law in various jurisdictions including South Africa.'²⁰⁸ Insurers are required

²⁰² Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 205.

²⁰³ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 7.

²⁰⁴ Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 226.

²⁰⁵ ENSight 'Supply chain indemnities to mitigate statutory liability under the consumer protection act for damage caused by goods' (2010) available at: <https://www.ensafrica.com/news/supply-chain-indemnities-to-mitigate-statutory-liability-under-the-consumer-pro?Id=408&STitle=corporate%20commercial%20ENSight> Accessed on: 15 August 2017.

²⁰⁶ Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 2.

²⁰⁷ Katzew J & Mushariwa M (2012) 24 *SA Merc LJ* at 6.

²⁰⁸ Kirby N 'Dangerous Coffee' Legal Brief (2014) available at: <http://www.werksmans.com/wp-content/uploads/2014/02/040233-WERKSMANS-feb-coffee.pdf> Accessed on: 2 September 2016

to be alert and keep up with scientific and technological developments, methods of production and selling and the operation of product liability, specifically under the CPA.²⁰⁹

It is also important for all entities to report all claims to the insurance company no matter how small it may seem because failure to do so can result in the insurance company refusing to assist the entity in question if the matter subsequently worsens.²¹⁰

There are, however, some difficulties associated with products liability insurance: claims can be very complicated both legally and scientifically. Obtaining and producing evidence is essential to determine the cause of the problem and this process can be long and expensive.²¹¹ This still outweighs the costs an entity would have to endure if they are faced with a claim for damages. Therefore, it is highly recommended that all entities who may potentially be liable for defective products in their scope of business, take out product liability insurance and carefully consider every avenue of limiting their liability.²¹²

²⁰⁹ Guinsberg ED 'The Insurance of Products Liability as Applied in South Africa' (2017) 4 Int'l Bus. Law 549.

²¹⁰ White J 'Product Liability Insurance: Costs, Coverage and More' (2017) available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 03 August 2017

²¹¹ Guinsberg ED 'The Insurance of Products Liability as Applied in South Africa' (2017) 4 Int'l Bus. Law 552.

²¹² ENSight 'Supply chain indemnities to mitigate statutory liability under the consumer protection act for damage caused by goods' (2010) available at: <https://www.ensafrica.com/news/supply-chain-indemnities-to-mitigate-statutory-liability-under-the-consumer-pro?Id=408&STitle=corporate%20commercial%20ENSight> Accessed on: 15 August 2017.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Prior to the CPA, the liability of entities for the supply of defective products was governed by the law of sale and the law of delict.²¹³ As discussed above, these laws did not provide adequate protections for consumers. Fault was a requirement for a successful product liability claim against a manufacturer and proving fault is very difficult for consumers.²¹⁴ The case of *Wagener & Cuttings v Pharmacare Ltd* led to calls for the legislature to impose strict product liability on those who supply defective products.²¹⁵ Strict product liability has been introduced in the form of section 61 of the CPA, which has serious implications for all entities in the supply chain, not just those who are responsible for manufacturing defective products.²¹⁶ The CPA defines 'supplier' in a way that widens the scope of entities that can be held liable. Now doctors, electricians, plumbers and even beauticians can be considered as suppliers in terms of the CPA and can be held liable for harm caused by defective goods.

Strict product liability can also be seen as a method of prevention or deterrence which compels those in the supply chain to act with greater care.²¹⁷ All those in the supply chain should be aware of the implications of section 61 of the CPA because they can be liable for damages even though they were not involved in the manufacturing process or they are not at fault.²¹⁸

Section 61(4) of the CPA sets out the defences which suppliers can rely on. Producers, importers, retailers and distributors need to familiarise themselves with the defences in section 61(4) of the CPA and know which ones they may rely on, especially in the case

²¹³ Gowar C (note 4 above).

²¹⁴ Loubser M & Reid E (note 43 above).

²¹⁵ (note 50 above)

²¹⁶ Slabbert M & Maister B 'The application of the Consumer Protection Act in the South African Health Care Context: concerns and recommendations' 172.

²¹⁷ Loubser M & Midgley R *The Law of Delict in South Africa* (2012) 252.

²¹⁸ Slabbert M & Pepper M 'The Consumer Protection Act: No-fault liability of health care providers' (2011) available at: <http://www.samj.org.za/index.php/samj/article/view/5137/3665> Accessed on: 28 August 2017.

of producers and importers, as they have limited defences as opposed to distributors and retailers.

Product liability insurance should now be a priority for all entities in the supply chain as explained in chapter 4. Each entity needs to take out product liability insurance so that they do not face a huge claim when a consumer sues for damages suffered as a result of using a defective product.²¹⁹ Adequate product liability insurance ensures that suppliers will not have to pay from their own pockets because the insurer will pay out if the consumer has a successful claim and is awarded damages.²²⁰

The cost of product liability insurance varies depending on the product and its risk factor.²²¹ Even if a product has a low risk factor, for example: pillows, the supplier will still have to pay a premium which is eventually passed onto the consumer in the form of higher priced goods. Therefore, the cost of product liability insurance will rest on the consumer.²²²

Monty suggests ways in which potential liability can be limited by, for example, having supply agreements that contain adequate warranties and undertakings with regard to the goods that are being supplied. She also suggests that indemnities are essential and that retailers and distributors should be indemnified by their manufacturers against any possible harm caused to a consumer as a result of dangerous or defective goods supplied.²²³ If manufacturers are not prepared to provide such indemnities then importers, retailers and distributors should carefully re-think which entities they are obtaining their goods from.

Retailers also need to take preventative measures in respect of certain goods. They need to market and sell hazardous goods in such a manner that consumers are made aware of their potentially hazardous nature.²²⁴ The CPA calls for the packager of hazardous

²¹⁹ Aon 'Public Liability Insurance by Aon' available at: <http://business-insurance.aon.com.au/Product-Liability-Insurance> Accessed on: 03 August 2017.

²²⁰ White J 'Product Liability Insurance: Costs, Coverage and More' available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 11 September 2017.

²²¹ Ibid.

²²² Katzew J & Mushariwa M (note 174 above).

²²³ Monty S 'Liability of the supplier in terms of the Consumer Protection Act'. (2010) 5 (3) *Milk & Juice* 35.

²²⁴ Monty S (2010) 5 (3) *Milk & Juice* at 37.

goods to provide a notice that ensures the consumer is given adequate instructions for the safe handling of the goods.²²⁵ These goods should have warning labels that are easy to read and understand and should also be strategically placed so that it is easily brought to the consumer's attention.²²⁶ Some examples that illustrate this point are the sale of paraffin lamps and firelighter gel discussed in chapters 1 and 2.²²⁷

Each entity of the supply chain needs to ensure that their employees are also aware of the implications of section 61 of the CPA and perhaps undergo training sessions specific to their industry that will assist them to reduce liability, for example: giving a consumer clear and fair instructions on procedure when a complaint is received.²²⁸

Apart from product liability insurance, a producer, importer, distributor and retailer need to protect themselves contractually against each other and this is done via indemnities to product liability claims.²²⁹ Depending on bargaining power, parties can either have a one-way indemnity where one party would indemnify the other from all claims to the extent that the harm is caused by the indemnifying party, or, they can cross-indemnify each other. With cross-indemnification one party indemnifies the consumer or supplier in respective of harm caused where the first party was at fault.²³⁰ It could be beneficial to both parties to enter into an indemnity, this allows parties to introduce an element of fault amongst those in the supply chain.²³¹

²²⁵ Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 36.

²²⁶ Monty S 'Liability of the supplier in terms of the Consumer Protection Act'. (2010) 5 (3) *Milk & Juice* 37.

²²⁷ (Note 12 and 19 above)

²²⁸ Mncwango S 'Just about everyone is liable' (2012) 12(8) *Without Prejudice* 46.

²²⁹ ENSight 'Supply chain indemnities to mitigate statutory liability under the consumer protection act for damage caused by goods' (2010) available at: <https://www.ensafrica.com/news/supply-chain-indemnities-to-mitigate-statutory-liability-under-the-consumer>

pro?Id=408&STitle=corporate%20commercial%20ENSight Accessed on: 15 August 2017.

²³⁰ Ibid.

²³¹ Ibid.

5.2 Recommendations

The following recommendations are proposed:

- As illustrated in Chapter 3, not all suppliers are aware of their position in the supply chain and the extent of the risk they may endure when faced with a product liability claim.²³² Therefore the government should fund campaigns and/or workshops that are aimed at providing suppliers with information on their place in the supply chain, defences which are available to them and the importance of product liability insurance. These campaigns could also be conducted by law students as part of their syllabus. The object of this would be to bring awareness to suppliers of their liability in terms of the new consumer protection regime.
- Once suppliers are aware of the implications of section 61 of the CPA then there should be a social duty on them to inform consumers of their rights under section 61 and also not be dismissive if and when a consumer complains of a defective product.
- The significance of product liability insurance was explained in chapter 4 and taking out this type of insurance should be seen as a requirement by all suppliers.
- Suppliers also need to enter into agreements to indemnify each other as explained earlier in this chapter. So for example: if a consumer suffered harm as a result of a defective Coe-ee beverage and decides to sue Checkers the retailer or Shoreline Beverages the distributor even though the fault may lie with Coe-ee's manufacturing process then Coe-ee will eventually have to pay out to Checkers and/or Shoreline Beverages in terms of the indemnification.

²³² Schalkwyk PJ, Akpojivi U & Bevan-Dye A (note 160 above).

The introduction of strict product liability in the CPA has both advantages and disadvantages.²³³ Even though the new consumer protection dispensation may lead to increased costs for consumers because the cost of insurance will be passed onto the consumers, consumers will now have a better chance of claiming damages than they did under the common law, leaving consumers in a much more favourable position. The introduction of strict product liability via section 61 of the CPA is laudable and cultivates a safer environment for consumers in the marketplace.

²³³ Botha MM & Joubert EP 'Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability?- A Comparative Analysis' (2011) 74 (2) *THRHR* 318.

BIBLIOGRAPHY

Primary Sources:

Statutes

Consumer Protection Act 68 of 2008.

Customs and Excise Act 91 of 1964.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972.

Medicines and Related Substances Act 54 of 1972.

Short-term Insurance Act 53 of 1998.

Cases

Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd 2002 2 SA 447 (SCA).

Eskom Holdings Limited v Halstead Cleak (599/2015) [2016] ZASCA 150: 2017 (1) SA 333 SCA (30 September 2016).

Halstead-Cleak, Derek Anthony v Eskom Holdings Limited (26360/14) [2015] ZAGPPHC632 2016 (2) SA 141 GP (1 June 2015).

Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha and Another 1964 (3) SA 561 (A).

Kruger v Coetzee 1966 (2) SA 428 (A).

Wagener & Cuttings v Pharmicare Ltd (32/2002, 7001,2000) [2003] 2 All SA 167 (SCA) (28 March 2003).

Secondary Sources:

Books

Bradfield G & Lehman K *Principles of the Law of Sale and Lease* (2013) Cape Town: Juta.

Burchell JM *Principles of Delict* (1993) Cape Town: Juta.

Loubser M & Midgley R *The Law of Delict in South Africa* (2012) Oxford University Press: South Africa.

Loubser M & Reid E *Product Liability in South Africa* (2012) Cape Town: Juta.

Mcquoid-Mason D, Woker T & Greenbaum L *Consumer Law in South Africa* (1997) Juta.

Naude' T & Eiselen S *Commentary on the Consumer Protection Act* (2015).

Van Eeden E *Consumer Protection Law in South Africa* (2013) Cape Town: Lexis Nexis.

Journal Articles

Barnard J 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages' (2012) *De Jure* 455.

Basson J 'The South African Law on Products Liability- Quo Vadis?' (2011) 12 (1) *The South African Journal of Industrial Engineering* 83-99.

Botha MM & Joubert EP 'Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability? - A Comparative Analysis' (2011) 74 (2) *THRHR*.

Gowar C 'Product Liability: A changing playing field?' (2011) 32 (1) *Obiter* 521-536.

Govinden K 'One step forward, two steps back' *Without Prejudice* (2014) 35-36.

Guinsberg ED 'The Insurance of Products Liability as Applied in South Africa' (2017) 4 *Int'l Bus. Law*. 545 1976.

Jackwell F 'Manufacturers beware' (2007) *Without Prejudice* 31-32.

Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities' (2009) 21 *SA Merc LJ* 202-227.

Jacobs W, Stoop P & Van NieKerk R 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) Volume 13 (3) *PER/PELJ* 302-406.

Katzew J & Mushariwa M 'Product Liability Insurance in the Wake of the Consumer Protection Act 68 of 2008' (2012) 24 *SA Merc LJ* 1-15.

Monty S 'Liability of the Supplier in terms of the Consumer Protection Act' (2010) 5 *Milk and Juice* 33-37.

Mncwango S 'Just about everyone is liable' (2012) 12(8) *Without Prejudice* 46.

Schalkwyk PJ, Akpojivi U & Bevan-Dye A 'South African Small Independent Retailers' Knowledge of the Consumer Protection Act' *The Retail and Marketing Review: Vol 11 Issue 2* (2015) 19-28.

Slabbert M & Maister B 'The application of the Consumer Protection Act in the South African Health Care Context: concerns and recommendations' (2011) 44 (2) *Comparative and International Law Journal of Southern Africa*.

Van der Merwe S & de Jager F 'Products liability: An unreported case' 1980 *SALJ* 83.

Van Heerden C & Barnard J 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2013) 6(3) *Journal of International Commercial Law and Technology* 429-432.

Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the introduction of the National Credit Act and the Consumer Protection Act (2010) 31 no 2 *Obiter* 217-231.

Thesis

Gangiah P *A critical analysis of Product Liability under the Consumer Protection Act 68 of 2008* (LLM Dissertation University of KwaZulu-Natal 2015).

Gwindima P 'A critical evaluation of the laws that apply to product labelling in South Africa' (unpublished LLM thesis, University of KwaZulu-Natal, 2014).

Olofintuade OA *A Critical Examination of the laws that Apply to the Sale of Dangerous and/or Defective Products with Particular Reference to a Consumer's Right to Claim for Consequential Damages* (LLM Thesis, University of KwaZulu-Natal, 2010).

Internet Articles

ABI 'Product Liability Insurance' available at: <https://www.abi.org.uk/products-and-issues/products/business-insurance/liability-insurance/product-liability-insurance/> Accessed on: 13 August 2017.

Aon 'Public Liability Insurance by Aon' available at: <http://business-insurance.aon.com.au/Product-Liability-Insurance> Accessed on: 03 August 2017.

White J 'Product Liability Insurance: Costs, Coverage and More' Available at: <http://fitsmallbusiness.com/product-liability-insurance/> Accessed on: 11 September 2017.

'Builders Warehouse Home Improvement A to Z' available at: <http://www.superbrands.com/za/pdfs/BUILDERSWH.pdf> Accessed on: 23 September 2016.

Cliffe Dekker Hofmeyr 'Consumer Protection Act' available at: <http://www.cliffedekkerhofmeyr.com/en/sectors/consumer-protection.html> Accessed on: 06 June 2016.

Clyde & Co 'The matter of Halstead-Cleak v Eskom Holdings Limited and some observations for liability insurers' Strict liability under the Consumer Protection Act (2016) available at: <https://www.clydeco.com/insight/article/strict-liability-under-the-consumer-protection-act> Accessed on: 22 May 2017.

Davey M 'A summary of the Consumer Protection Act 68 of 2008' (2010) available at: <http://www.meumannwhite.co.za/news-details/25/> Accessed on: 2 May 2017.

Dinnie D 'Product liability, the Consumer protection Act and insurance' (2105) available at: <http://www.financialinstitutionslegalsnapshot.com/2015/07/product-liability-the-consumer-protection-act-and-insurance/> Accessed on: 2 September 2016.

ENSight 'Supply chain indemnities to mitigate statutory liability under the consumer protection act for damage caused by goods' (2010) available at: <https://www.ensafrica.com/news/supply-chain-indemnities-to-mitigate-statutory-liability-under-the-consumer-pro?id=408&STitle=corporate%20commercial%20ENSight> Accessed on: 15 August 2017.

Financial Mail 'R18m consumer test case against Builders Warehouse' (2015) available at: <http://www.pressreader.com/south-africa/financial-mail/20150515/281483569956030/TextView> Accessed on: 31 August 2017.

Insurance explained '3 Important Reasons why Product Liability Insurance is a Good Idea for South African Businesses' available at: <http://www.insuranceexplained.co.za/business/product-liability-insurance.html> Accessed on: 03 August 2017.

Kirby N 'Dangerous Coffee' Legal Brief (2014) available at: <http://www.werksmans.com/wp-content/uploads/2014/02/040233-WERKSMANS-feb-coffee.pdf> Accessed on: 2 September 2016.

Llcea M 'Man charged with poisoning baby food in extortion plot' available at: <http://nypost.com/2017/09/30/man-charged-with-poisoning-baby-food-in-extortion-plot/> Accessed on: 30 October 2017.

Mahabeer L 'Strictly Speaking' (2012) available at: <http://www.mondaq.com/southafrica/x/172162/Product+Liability/Strictly+speaking> Accessed on: 2 September 2016.

Michalsons 'Product liability for damage caused by goods' available at: <http://www.michalsons.co.za/blog/product-liability-for-damage-caused-by-goods/4584> Accessed on: 2 September 2016.

News24 'Second fire gel child victim improves' available at: <http://www.news24.com/SouthAfrica/News/Second-fire-gel-child-victim-improves-20120706-3> Accessed on: 13 March 2017.

SA Beauty Distributors available at: <http://www.sabeautydistributors.co.za/> Accessed on: 04 September 2017.

Schroeder F 'Pair injured in ladder fall sues for R18m' IOL News (7 February 2015) available at <http://www.iol.co.za/news/crime-courts/pair-injured-in-ladder-fall-sues-for-r18m> accessed on 04 May 2016.

'Suppliers of Unsafe Paraffin Stoves Pounded on' NCC News (2016) Issue 2 7.
Admin 'Her Skin Cooked' available at: <http://www.you.co.za/news/her-skin-cooked/>
Accessed on: 13 March 2017.

Slabbert M & Pepper M 'The Consumer Protection Act: No-fault liability of health care providers' (2011) available at:
<http://www.samj.org.za/index.php/samj/article/view/5137/3665> Accessed on: 28 August 2017.

The South African Labour Guide 'Consumer Protection Act' available at:
<http://www.labourguide.co.za/consumer-protection/1171-the-consumer-protection-act-introduction> Accessed on: 2 May 2017.

The Department of Trade and Industry: Republic of South Africa 'Consumer Protection Act: Your guide to Consumer Rights and how to Protect them' 4-27.

Van Heerden, IV 'Fake foods rife in South Africa' available at:
<http://www.health24.com/Diet-and-nutrition/Food-safety/Fake-foods-flood-South-Africa-20140909>. Accessed on: 05 June 2017.

ANNEXURE 1: ETHICAL CLEARANCE FORM



02 June 2016

Ms Kaashifa Deen Ally (212511273)
School of Law
Howard College Campus

Dear Ms Ally,

Protocol reference number: HSS/0674/016M

Project title: A critical examination of Section 61 of the Consumer Protection Act 68 of 2008 and its implications for those in the Supply Chain

Full Approval – No Risk / Exempt Application

In response to your application received on 01 June 2016, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Professor Tanya Woker
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak / Ms Robynne Louw

Humanities & Social Sciences Research Ethics Committee

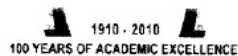
Dr Shenuka Singh (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: ximbap@ukzn.ac.za / snvmanm@ukzn.ac.za / mohuap@ukzn.ac.za

Website: www.ukzn.ac.za



Founding Campuses: ■ Edgewood ■ Howard College ■ Medical School ■ Pietermaritzburg ■ Westville